Scottish Influence on the English Bar*

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Perhaps I should say at the outset what was my reason for wishing to talk to you on such a theme as Scottish influence on the English bar. Our great profession is a very human profession, for the law deals not with abstractions but with human beings. All of us know that we share a common tradition of law and liberty running back to the Magna Carta and beyond; what we sometimes forget is that the reason why that tradition is a living thing is that it was built up and handed on by individual men imbued with its spirit and devoted to its survival. Our law is what it is because of the lawyers who have made it, we can best understand it by understanding them.

When your president did me the honour of asking me to speak here tonight I thought I should like to talk to you about advocacy, that many-sided art which has done so much to shape our law. But, of course, the many styles of advocacy are no more than reflections of the minds and characters of the men who developed them; and so I decided that I would take for the subject of my address the character of great advocates and the influence they have had on our profession in England. If you ask why I have chosen Scotsmen, I can only say that it is to them that I myself have looked for inspiration ever since I was a boy in Scotland and because, as one considers the story of English advocacy, it is interesting that one should find Scotsmen in positions of commanding, often of pioneering, importance.

The first Scot to make his name at the English bar was William Murray, who became Lord Mansfield, Chief Justice of England, and one of the greatest judges ever to have sat in Westminster Hall. He was educated in England, at Westminster School in London and Christ Church at Oxford, so that Dr. Johnson, who hated Scot-

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land and admired Mansfield, was driven to say that much might be made of a Scotchman if he be caught young. But he was born at Scone on the site of the ancient abbey where the Kings of Scotland had been crowned, son of the fifth Viscount Stormont in the peerage of Scotland, and one of his brothers followed the Old Pretender into exile and became Earl of Dunbar at his court.

Mansfield as a young man was not content to be just a lawyer; as Dr. Johnson put it, "he drank champagne with the wits". When still at school he met and captivated Alexander Pope, who introduced him to literary society and became a close friend. The story goes that he was out spending the evening with Pope when Sarah, Duchess of Marlborough, called at his chambers about some legal matter and had to wait in vain till after midnight. His clerk told Mansfield next morning that he did not know who she was for she would not tell him her name, but that she swore so dreadfully that she must be a lady of quality. His contemporaries all acclaim the eloquent beauty of his voice, and Boswell writes of the "air and manner which none who ever saw and heard him can forget". Lord Mansfield was not tall, but all his portraits show him well-built and dignified, with the air of a man whose mind is employed in the place and the occupation which he best understands and to which he feels a calling. "He had", said Burke, "some superiors in force, some equals in persuasion; but in insinuation he was without a rival. He excelled in the statement of a case. This, of itself, was worth the argument of any other man."

Inevitably his practice grew and when he was thirty-seven, with one of the largest practices at the bar, he became Solicitor General and entered the House of Commons. This post he held for nearly twelve years, and such was the quality of his fellow ministers that, although not in the Cabinet, he was throughout that time the effective Leader of the House of Commons. Always listened to with favour, he was the only man in Parliament able to withstand the torrential eloquence of the elder Pitt, and on the death of Pelham he could have been Prime Minister. But Mansfield always knew what he wanted, and it was not political success; he even refused to become Lord Chancellor. Eventually, when he was fifty-one and Attorney General, the Chief Justice of the Queen's Bench died and Mansfield claimed the vacant office and a peerage. Everything possible was done to keep him in the government which he had done so much to support, but Mansfield was firm and on the 8th of November, 1756, he was sworn in before Lord Chancellor Hardwicke. The next day the government resigned.

As a judge Lord Mansfield enjoyed a complete ascendancy, and although he sat for over thirty years there were in all that time less than twenty cases in which one of his colleagues dissented from his judgment and only six in which he was reversed on appeal. He cannot have been an easy judge to appear before, for though always courteous and helpful to inexperienced members of the bar, he had a habit of dealing with longwinded arguments by taking out a newspaper and reading it. And he so overrode his colleagues that one was driven to exclaim: "I have not been consulted and I *will* be heard". "Forty years afterwards", said Bentham, "the feminine scream issuing out of a manly frame still tingles in my ears". Another historic occasion when Mansfield was startled out of his calm was when he corrected counsel for saying that he appeared for the curators, with a short "a". "Curātors", said Mansfield severely, "that Latin 'a' is always long". "My Lord", said counsel, "I should have remembered that in addressing one of the greatest orātors and senātors of the age".

For all his faults, however, his judgments time and again laid the foundations of the modern law. He was not a man of original genius: perhaps he would have been a less great judge if he had. But he saw with unequalled clarity the pattern of his own century and the needs of the next. The law of England when he came to the bench was an archaic survival in the age of rationalism. The whole tenor of Lord Mansfield's mind was modern, and it is perhaps fitting that his greatest achievement was to set the commercial law on firm foundations. Before his day decisions in commercial cases had been come to more or less at random, without any consideration of principle and often without any reason being given by the judge. Mansfield found the pattern behind the cases and laid down principles which business men could understand, principles which still govern the law of insurance and charterparties, of bills of exchange and promissory notes. At Guildhall he attached to himself a select body of special jurors who were regularly empanelled in commercial cases and taught him the customs and usages of trade. With their help he did much to turn the law from something bordering on chaos to a system that fitted the needs of modern commerce. The same spirit governed his actions in all branches of the law. He reformed the procedure of his court, and strove to modernize the law of property. Sometimes his decisions went too far for his immediate successors and the old rules were restored. But in nearly every case his decisions on points of principle have been upheld by posterity. As one of his biographers says, "Where he succeeded

he laid the foundation of all subsequent development. Where he failed he mistook not the resilience of his principles but the aptitude of his generation." Like so many great men of the 18th century he found in common sense a pervading inspiration. The reason why he is remembered by lawyers is that he made that same common sense the inspiration of the common law.

Soon after Lord Mansfield became Chief Justice of England there came to London another Scot, Alexander Wedderburn, who was to climb to the top of his profession and eventually reach the Woolsack. His family had for generations practised the law in Scotland and he began his career at the Scottish bar; but in those days the scope of a barrister in Scotland was limited, and Wedderburn's ambition was not. He soon built up a considerable practice in Edinburgh, and became eminent as a debater in the kirk assembly. But his mind was always set on Westminster Hall and he became a member of the Inner Temple while he was still a student in Scotland. The risks of practising in London were very great. When Wedderburn was a young man, no one educated in Scotland had ever achieved success at the English bar. The Scots were not popular in England and a Scottish accent was considered laughable. It is not surprising that Wedderburn hesitated for some years before making his decision, and found it necessary to take elocution lessons when once he had.

The decision, when it came, was dramatic. The leader of the Scots bar was a man named Lockhart, who had a reputation for being rude and supercilious, and Wedderburn agreed with three other young barristers that whoever of them should next be against Lockhart in a case should publicly insult him. The lot fell upon Wedderburn when Lockhart in the course of his speech called him "a presumptuous boy". When the presumptuous boy came to reply he delivered such a furious personal attack that Lord President Craigie, afterwards asked why he had not stopped it at once, replied, "Because Wedderburn made all the flesh creep on my bones". Eventually he recovered himself and told Wedderburn that his language was "unbecoming an advocate and unbecoming a gentleman". Wedderburn in a fury replied that "His Lordship had said as a judge what he could not justify as a gentleman". The court's reply was that Wedderburn must retract his words and apologize, or he would be deprived of his status as an advocate. Very coolly, having completely subdued all signs of emotion, Wedderburn stripped off his gown and, holding it up, said, "My Lords, I neither retract nor apologize, but I will save you the trouble of deprivation;

there is my gown and I will never wear it more". He then laid his gown upon the bar, made a low bow to the judges, and left the court. The same night he set off for London.

It was the one dramatic gesture of his life. Once in England the cautious side of Wedderburn's nature took command; his practice grew gradually, and after his entry into Parliament grew more quickly. Subtle, elegant and reasonable, a master of irony and bitter sarcasm, he was an orator of great power and persuasiveness and a highly successful law officer, but he never won a reputation as a man of principle. "The Ulysses of debate" he was called, and "the wary Wedderburn"; Junius, with the sharpest tongue of all. said that there was something about him that even treachery could not trust. His ability, however, was never doubted. It carried him from success to success—Attorney General, Chief Justice of the Court of Common Pleas, First Commissioner of the Great Seal, Lord Chancellor with the title of Lord Loughborough, and finally retirement as the Earl of Rosslyn.

Brought up in the law of Scotland, his understanding of the English law was never deep and in the forty years he sat in Parliament he introduced no important legal reform. But he achieved what he wanted—for many years he was conspicuous in public life and he reached the heights of his profession. His banquets were princely, he had an immense retinue of servants, and he never went out without two splendid carriages drawn by the most beautiful horses—one for himself and one for his attendants. His judgments were luminous and elegant, his behaviour courteous and impartial, his features well-chiselled and dignified with a piercing eye and noble manners. He was the beau ideal of an eighteenth century chancellor, a reminder to the youth of Scotland that the highest objects of ambition were open to them.

Lord Mansfield was a great advocate, but for complete fulfilment he looked to the bench. Thomas Erskine, though he reached the Woolsack, was never more happy or more successful than as an advocate at the bar. Even after he had become Lord Chancellor, he would often go to Westminster Hall to talk with his old friends and regret that he had ever deserted advocacy. Lord Campbell, another Scottish Lord Chancellor, wrote the lives of his predecessors in a book so cruelly critical that it was said that he had added a new terror to death. Yet Erskine he called "the greatest forensic master that Britain ever produced". "He possessed", said Campbell, "an opulence of imagination, a fertility of fancy, a power of commanding at an instant all the resources of

his mind and a dexterity in applying them, which the whole united Bar of England could not equal".

In July 1778 Erskine was called at Lincoln's Inn and with his first case made his name. A Captain Baillie had been appointed Lieutenant-Governor of Greenwich Hospital and had exposed various abuses in the management of the hospital which were due to the conduct of the First Lord of the Admiralty, the Earl of Sandwich. Some of the First Lord's agents, who had also been attacked, took proceedings against Baillie in the King's Bench as a step towards having him convicted of criminal libel. When the trial came on, Baillie was represented by five counsel, of whom Erskine was the junior. His leaders' arguments consumed the first day of the trial and the court adjourned. The next morning the Solicitor General, thinking that all Baillie's counsel had been heard, was getting up to reply when Erskine rose from the back row and addressed the court in a speech which was never forgotten by those who heard it. It was not long before he mentioned the name of the First Lord, and Lord Mansfield, who was presiding, interrupted to remind him that Lord Sandwich was not before the court. Erskine continued in a passage which is typical of his oratory: "I know that he is not formally before the Court; but for that very reason I will bring him before the Court. He has placed these men in the front of the battle, in hopes to escape under their shelter; but I will not join in battle with them; their vices, though screwed up to the highest pitch of human depravity, are not of dignity enough to vindicate the combat with me. I will drag *him* to light who is the dark mover behind the scene of iniquity." When he was asked how he had the courage to stand up to Lord Mansfield, he answered that he imagined his little children plucking his robe and that he heard them saying, "Now, father, is the time to get us bread". He also used to say in expansive moments that he went home that night with sixty-five retaining fees in his pocket.

As an advocate it is hard to exaggerate his merits. Clear in discernment, almost infallible in judgment, he had the great quality of being able to take a line without hesitation on which the whole fate of the case might turn. In examination in chief he was able, apparently without effort, to make the witness recall lucidly all the facts favourable to his case; in cross-examination he never asked too much. His eloquence did not depend on carefully balanced antithesis or richness of language; his first quality as an advocate was devotion to his client and his oratory had the greatest of all merits, it was generally successful. Even in his most impas-

sioned moments he kept the closest watch on the jury, and there are many passages in his speeches to show that he is addressing himself to their mood and feelings as reflected in their faces.

He had a humanity and light-heartedness which made other speakers seem dull; and it is perhaps a reflection of this side of his character that he had taught his dog Toss to sit at consultations with his paws on the table, wearing the bands of a barrister and gazing into a book. His faults, indeed, were the complement of his virtues and it is not surprising that his greatest fault was a child-like and excessive vanity which made him constantly talk of his successes and exaggerate his achievements. Councillor Ego he was called, and a few words from his maiden speech in the House of Lords are enough to show the reason: "I have been seven and twenty years engaged in the duties of a laborious profession, and, while I have been so employed, I have had the opportunity of a more extensive experience in the Courts than any other individual of this generation. . . . My experience is not only equal to that of any individual judge, but of all the judges collectively."

Henry Crabb Robinson was not always the most inspiring of narrators. In fact it is credibly reported that as he was seen approaching his club someone said, "If you have anything to say now is your last chance, for here's Crabb Robinson coming". Yet his recollection of the impression that Erskine made upon him when as a boy he heard him plead in a case about a will has stood the test of time. "I have a recollection of many of the circumstances after more than fifty-four years; but of nothing do I retain so perfect a recollection as of the figure and voice of Erskine. . . . But the sentence that weighed on my spirits was a pathetic exclamation 'If, gentlemen, you should by your verdict annihilate an instrument so solemnly framed, I should retire a troubled man from this court', and as he uttered the word 'court' he beat his breast and I had a difficulty in not crying out. When in bed the following night I woke several times in a state of excitement approaching fever; the words 'troubled man from this court' rang in my ears." When even the names of most fashionable advocates are writ in water, it is some criterion of greatness that the memory of a speech in a probate action could last for over half a century.

In politics he was never at his best, perhaps because he never met with the applause he felt he deserved. Pitt, so the story goes, came to listen to his maiden speech in the House of Commons and sat with pen and paper in hand to note the arguments of his formidable adversary. He wrote a word or two, but with every sentence

his attention relaxed and at length, while every eye in the house was fixed on him, ran the pen through the paper and with a contemptuous smile threw them both on the floor.

Erskine is said never to have recovered from this expression of disdain. His true political importance was in the courts. With the spread of the ideas of the French Revolution societies had sprung up for the promotion of parliamentary reform and their members were often wild and inflammatory in their speeches. The government, remembering the excesses in France, decided to put the societies down and the conflict was fought out largely in the courts, with Erskine appearing for the reformers. The success of his appeals to the law exalted the law in the minds of the English people and helped to keep civil peace secure. "His sword and buckler", wrote a future Liberal Prime Minister, "protected justice and freedom. Defended by him, the Government found in the meanest individual whom they attacked the tongue of Cicero and the soul of Hampden, an invincible orator and an undaunted patriot."

The tradition of Scottish advocacy founded by Mansfield and Erskine has been worthily upheld down to the present time, and it is, I think, fitting that I should say a word about a 20th century Lord Chancellor from Scotland, Lord Haldane. Unlike his predecessors, his work was not confined to England, but came from every part of the Commonwealth, and his practice in the Privy Council was of enormous variety. In one fortnight towards the end of his time at the bar he began with a case of Buddhist law from Burma, and went on to argue successively appeals concerned with the Maori law of New Zealand, the French law of Quebec, the Roman-Dutch system of South Africa, the Mohammedan law and then the Hindu law from India, the custom of Normandy in a Jersey appeal, and Scottish law in a case from the North. His experience gave him an abiding faith in the influence for good of the younger nations of the Commonwealth on Britain, and he saw in our legal system one of the most vital of the links which bind us together.

His practice in the Privy Council started after he had been at the bar for about three years, when the head of his chambers, Horace Davey, was briefed by a famous firm of solicitors on behalf of the government of Quebec, which had sent its Solicitor General over to get leave to appeal to the Privy Council against a judgment in the Canadian courts. The day before the hearing Davey found that he had to continue a part-heard appeal in the House of Lords, and Haldane was summoned to a consultation at

the Privy Council at ten o'clock the next morning. He sat up the greater part of the night reading the case, which involved a complicated question of constitutional law, and went to the consultation, where Davey announced that he must leave at once for the House of Lords. The Solicitor General for Quebec was precluded by his orders from opening the case, since if the application to appeal were refused the responsibility would be such that the government of Quebec might fall. Davey then introduced Haldane, seized his hat, and left in a hurry. It was then only five minutes before the case would be called, and Haldane put on his wig and gown. Leave to appeal was granted, but the solicitors went away without a word of thanks. However, a few days later, they climbed the stairs to his garret in Lincoln's Inn with a brief in an important case for the province of Ontario.

Haldane had none of the gifts which make a great cross-examiner and spoke with disdain of "small and uninteresting questions of mere fact". He was a philosopher whose interest was in first principles, and he believed that not only in philosophy but in science and the law it was true that no systematic knowledge was sufficient unless it led up and pointed to first principles. This frame of mind, coupled with an accurate memory which let slip little of what he had read, was of the greatest value to a man whose practice was before the House of Lords and the Privy Council, where the judges are concerned with first principles and expect help from the advocates who appear before them He learnt to know their idiosyncrasies and could follow the workings of their individual minds. He gives an example in his autobiography: "If, for example, Lord Watson, who was by no means a silent judge but who was a man of immense power, started off by being against me, I would turn round to some colleague of his on whose opinion I knew he did not set much weight, and who would be sure merely to echo what Lord Watson had said. By devoting myself to the judge who had merely repeated Lord Watson's point I well knew that I should speedily detach Lord Watson from it and bring him out of his entrenchments." It was a style of advocacy very different from Erskine's, but it was effective.

He always remained a philosopher, convinced that the authority and power of the law should be reinforced by the development of ethical habits within a community. In 1913 when he was Lord Chancellor he was invited to address a great meeting of the American Bar Association, which was held in Montreal to mark the common basis of American and English law, and in his address pleaded

for an idea which is today familiar but then attracted widespread attention, the development of a community of nations, a community imbued with a sense of what is fitting, as distinguished from mere law or pure ethics, and therefore able to provide a firm basis for international law and reverence for international obligations. As Lord Chancellor, too, he was much concerned with the development of the Judicial Committee of the Privy Council and set before himself as a conscious aim the creation of one unified Supreme Court of Appeal for the Commonwealth. Events have moved in a way which he could not have foreseen and his noble conception has vanished for ever. But it shows his abiding concern for the efficiency of a court which spoke the final word throughout the Commonwealth, a devotion shown also by the fact that until his final illness overtook him he made it a point to sit in every Dominion appeal raising a constitutional point. Seldom has the great cause of commonwealth found a more eloquent pleader.

Such then is the proud tradition of Scottish advocacy, reaching back to Lord Mansfield and forward to the present day. It is a many-sided tradition, for it has been formed by many men, but looking back over the last two centuries one can, I think, distinguish three strong strands of English advocacy which owe a special debt to Scotland. There have been the militant advocates, Russell and Carson and F. E. Smith, whose lambent genius still brings dead pages to impassioned life. Their forerunner, indeed their master, was Thomas Erskine. There have been the strain whose roots were firmly in the great non-conformist tradition in our land, though they might be devoted servants of the Established Church, men whose moral earnestness and weighty phrase have often hushed a crowded court. Such a man was Lord Haldane, who looked always to first principles, whose deep conviction it was that the more experience is spiritual the more it is real. And there has been, and always will be, a third school, whose pellucid exposition of intricate legal problems has been an intellectual pleasure, not only to the tribunal which they addressed, but to all who heard. That stamp of mind changes little from Sir John Holt in the seventeenth century to Lord Atkin in the twentieth. And that type of advocacy found one of its greatest exponents in Lord Mansfield, whose statement of a case was worth the argument of any other man.

One thing they had in common. They knew and taught that it is on honesty in advice and candour in presentation alone that the confidence of the bench and the public in the advocate depends. Not only that, it is the only path to justice, and the pursuit of justice was something that they put above even the pursuit of truth.

It was as ministers of justice that they saw themselves, unrestricted by formal rules but buoyed up and inspired by a great tradition. And it is as ministers of justice that I would commend them to you, knowing that upon Canada as upon England their spirit and their inspiration have left a strong mark and benefit.

The Bounds of Judicial Law-Making

In the United States, controversy as to the bounds of judicial law-making has persistently divided judicial, professional and public opinion. Many political leaders and large segments of our people, though opposite schools at different times, urge a 'judicial activism' to take the initiative in bringing about changes in fundamental law. On the other hand, Presidents Jefferson, Jackson and Lincoln each in his time complained that the Supreme Court was invading the legislative field More recently, President Roosevelt stated his grievance to be that 'The Court has been acting not as a judicial body, but as a policy-making body'

No one has proposed and, of course, no one can devise a formula that will insure judicious use of judicial power. Considering that the judicial office is the least representative in our system, that the litigation process is narrowed by serious limitations, and that judicial power normally is exerted with retroactive effect, I should not suppose it open to doubt that overstepping or irresponsible use of judicial power is as much an evil as lawlessness in either of the other branches of government.

However, since all interpretation is a making of decisional law, the question which underlies this old controversy is by what sign shall we know the limits of the power which is given to the courts as distinguished from political power not entrusted to them. Chief Justice Marshall for the Court penned this definition '. . . Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature, or, in other words, to the will of the law.'

But does this do much to tell the profession what concrete factors actually will shape the judgment on any reasonably debatable issue? At its least, and probably at its most, it is a pledge that decisions will be reached so far as humanly possible by application of existing and ascertainable legal criteria and standards. . . . Confusion at the bar and disagreement on the bench usually begin in lack of an accepted system of weights and measures to mete out constitutional justice. Unfortunately, the conclusion of judges having the highest sense of professional responsibility is that the present state of our constitutional development provides no definitive principles of decision. (Hon. Robert H. Jackson, The Role of the Judiciary in Maintaining Our Freedoms, an address delivered at the annual meeting of the American Bar Association at Boston, August 24th, 1953)