

**THE 15<sup>th</sup> ANNUAL 21<sup>st</sup> CENTURY BAR CONFERENCE 2015**  
**MACKENZIE BUILDING – FRIDAY 4 DECEMBER 2015**

**Keynote Address**

**by**

**The Rt Hon Lord Carloway, the Lord Justice Clerk<sup>1</sup>**

**Introduction**

Court reform is never complete. Our courts must be ready to adapt and respond to progressions and innovations in society. They should do so with a modern outlook but at the same time reflecting upon historical experience. The preoccupations of our ancestors are comparable, perhaps surprisingly so, to those of today.

The 19<sup>th</sup> Century was an era of reform, both in Scotland and in England. Court reform (particularly that of the Court of Session) was high on the political agenda. The context is worthy of brief reminder: following the death of the Prime Minister, Pitt the Younger, in January 1806 and with the country still at war with France, a national unity government – The Ministry of All the Talents – was formed. It was headed by the Tory-turned-Whig Lord Grenville who became Prime Minister on 11 February. The Ministry was to be short-lived. It broke up in 1807, having

---

<sup>1</sup> I am grateful to my Law Clerk, Lisa Kinroy, for her historical research and the preparation of the initial draft of this paper.

failed to accomplish its stated goals of ending the war with France and Catholic emancipation, although it did achieve the abolition of the slave trade.

The Ministry is interesting because of its efforts to reform the Court of Session. In the spring of 1906, the Ministry tabled a Bill in the House of Lords with its proposed reforms. It was the first time a Westminster government had sought to alter a Scottish institution protected by Article 19 of the 1707 Act of Union<sup>2</sup>. It provoked intense debates about Scottish sovereignty, which resonate in today's climate.

Underlying the government's proposals were concerns regarding judicial self-interest; the insistence on "the haill fifteen" sitting on all cases; the reliance upon written pleadings; the appellate structure and impenetrable rules of procedure<sup>3</sup>. The reforms envisaged a Court of Session more constitutional, perhaps more "English"<sup>4</sup>. However, the proposals were met with hostility from the Scottish judiciary and the Faculty of Advocates<sup>5</sup>. During a Faculty debate, David Hume, Advocate commented: "we are preparing our necks and those of our posterity, for the yoke of servitude to the law of England"<sup>6</sup>.

---

<sup>2</sup> "That the Court of Session or College of Justice do after the Union and notwithstanding thereof remain in all time coming..."; Kathryn Chittick, *Walter Scott and the Reform of the Scottish Judicature 1806-1810*, J. Leg. Hist. 2015, 36(3), 236 – 259 at p.236.

<sup>3</sup> Chittick, p.238.

<sup>4</sup> *Ibid*, p. 239.

<sup>5</sup> *Ibid*, pp.240 and 242.

<sup>6</sup> Cited by Chittick at p.244: *Substance of the Speeches Delivered by Some Members of the Faculty of Advocates, at the Meeting on the 28<sup>th</sup> February, adjourned to the 2<sup>nd</sup> of March, and at the Meeting held on the 9<sup>th</sup> of March, 1807, for Considering the Bill Entitled 'An Act for better regulating the Courts of Justice in*

Meanwhile, Jeremy Bentham had become preoccupied with the reform movement. Bentham knew nothing of Scots law<sup>7</sup> but his stance on the reforms is nonetheless interesting. He wrote to Lord Grenville on the subject throughout 1806 and 1807<sup>8</sup>.

Bentham's vision was based upon a conception of judicial procedure serving the interests of the people; his so-called "natural" system of procedure. Bentham's system would give effect to the substantive law, preventing errors and the failure of justice – as its direct ends; and by preventing delay, vexation and expense – its collateral ends<sup>9</sup>. The prevailing system, which had been the creation of judges rather than the legislature, did not serve the interests of the people, but rather the judges and lawyers as a class. Judges and counsel were both paid by fees and it was in their interest to make their profession as profitable, and as easy, as possible<sup>10</sup>. Bentham attacked the practice whereby the evidence would be heard by one judge sitting alone in the Outer House, but the case determined by other judges sitting in the Inner House<sup>11</sup> and "the immoderate extent given ... to the geographical field of jurisdiction of the metropolitan courts"<sup>12</sup>. Bentham promoted an increase in the

---

*Scotland, and the Administration of Justice therein, and establishing Trial by Jury in certain Civil Cases'*, Edinburgh and London, 1807, (28 Feb. 1807), 25.

<sup>7</sup> Chittick, p.241.

<sup>8</sup> A J MacLean, *Jeremy Bentham and the Scottish Legal System* [1979] JR 21 at p.23. Bentham's letters to Lord Granville were published in 1808 under the title "*Scotch Reform*".

<sup>9</sup> MacLean, p.31.

<sup>10</sup> MacLean, p.30.

<sup>11</sup> MacLean, p.31.

<sup>12</sup> Cited by MacLean at p.31: John Bowring, *The Works of Jeremy Bentham* (1843), Vol. V, p.9.

jurisdiction of the sheriff courts so that litigants, to pursue their court actions, need travel “not from the Orkneys to Edinburgh, but from the Orkneys to Kirkwall”<sup>13</sup>.

So far as the structure of the Court of Session was concerned, Bentham posited “the necessity for distributing the equilibrium, and fixing it on two different levels, dividing it between an upper and an under school”<sup>14</sup>. Many of Bentham’s ideas found some expression in the Court of Session Acts of 1808, 1810 and 1825<sup>15</sup>.

The reforms of the early 19<sup>th</sup> Century took place in a different era, at a time when “there really was something to complain about”<sup>16</sup>. However, the concerns underlying the reforms find parallels in those of today. Whereas Bentham’s concern was to achieve a procedure which primarily served the needs of the people, the essential concern of The Scottish Civil Courts Review – the Gill report – is to promote and support justice, more particularly access to justice, through the quality and efficiency of our courts.

## **Information technology**

A particularly modern preoccupation is that the justice system should keep abreast of (or, perhaps more accurately, catch up with) the digital revolution. In a

---

<sup>13</sup> Cited by MacLean at p.28: Bowring, Vol. V, p. 27.

<sup>14</sup> Cited by MacLean at p.40: Bowring, Vol. V, p.21.

<sup>15</sup> A J MacLean, p.42.

<sup>16</sup> Lord Hope of Craighead KT, *In law, is procedure really that important?* 17 March 2010.

speech at the launch of the Digital Strategy for Justice in Scotland in August 2014, Lady Dorrian cited Ofcom research which found that we are now in an era in which we spend more time using technology devices than sleeping<sup>17</sup>. Lady Dorrian observed:

“If people and businesses communicate instantly by email, Skype or Facebook, they will expect public services to do likewise. They will increasingly fail to understand, or have sympathy with, any system that still relies on extensive documentation, sent by post, and by the requirement to appear in person for the handling of routine matters”.

The Gill report has a chapter devoted to the use of IT in the civil courts. It cites the Government’s policy commitment to increase the use of IT in the public sector<sup>18</sup>. I too have previously called for “clear sky thinking” on the use of IT in Scottish courts in the interests of justice, given the advances in the last twenty years or so<sup>19</sup>. Whatever Bentham would have made of today’s technologies, the principles espoused in the Gill review would have been of very real interest to him.

---

<sup>17</sup> Lady Dorrian, *Digital Justice Strategy: A view from the courts*, 20 August 2014; see Ofcom: The Communications Market 2014; see, also, <http://www.bbc.co.uk/news/technology-28677674> 7 August 2014.

<sup>18</sup> Gill report, Ch. 6, para. 71.

<sup>19</sup> Lord Justice Clerk, Lord Carloway, *Scots Criminal Evidence and Procedure – Meeting the Challenges and Expectations of Modern Society and Legal Thinking*, Edinburgh, 9 May 2013.

*The electronic process*

The Gill report noted that a paperless litigation system had been all but achieved in many jurisdictions<sup>20</sup>. Such systems typically pose the following advantages: the facility to file or lodge documents electronically; the supersession of paper processes with electronic document management systems, which could be integrated with the court's case management system and also linked to the judge's diary; electronic case files incorporating commercial software, such as legal databases and other research tools; routine correspondence with the court by email; the conduct of hearings on procedural matters by telephone or video conferencing; the taking of evidence by video link; the displaying on screens of documents or other materials; the digital recording of oral evidence and real time transcription; and the electronic issuing of court orders<sup>21</sup>. The Gill report also drew upon the experiences of the County Court Bulk Centre (CCBC) based in Northampton. The CCBC is a central, computer-supported office processing high volume, low value debt litigations. Prior to this innovation, one member of staff in a local county court could be fully occupied in dealing with 3,000 claims per year. At the CCBC, the figure is 25,000. Significant savings had been achieved as a result<sup>22</sup>.

---

<sup>20</sup> Gill report, Ch. 6, para.3. See, also, para. 9. In Singapore, electronic filing is universally available and mandatory; in Israel and the US federal courts a non-mandatory system operates.

<sup>21</sup> See, Gill Report, Ch.6, paras. 10 -12.

<sup>22</sup> See <http://www.hmcourtsservice.gov.uk/cms/bulkcentre.htm>.

The Gill report considered increased use of email communications with the court and, in suitable cases, procedural hearings conducted by telephone or video conferencing. Drawing upon the experiences of other jurisdictions, the report identified a number of significant advantages, including: reduced waiting and travelling time, overcoming “the tyranny of distance”<sup>23</sup>; stricter adherence to time estimates and hearing start times; involvement of principal solicitors with full instructions and authority to engage constructively with the case; reduction in expenses; and the increased accessibility of the civil justice system, particularly for individuals and smaller corporate litigants<sup>24</sup>.

The report noted that case management conferences by telephone had become the norm in England following the Woolf reforms<sup>25</sup> and similar successes had been recorded in Canada and in Australia<sup>26</sup>. In Scotland, there had been widespread take up, in commercial causes at Glasgow Sheriff Court, of case management conferences by telephone<sup>27</sup>, and a similar practice operated in the Employment Tribunals<sup>28</sup>. The Inner House commented upon the use of telephone conference calls for the conduct of case management conferences in *Jackson v Hughes Dowdall*<sup>29</sup> and *ASC Anglo*

---

<sup>23</sup> A Wallace, “*New Technologies and the Civil Litigation Process: Report from Australia*”, (2007), The International Association of Procedural Law XIII World Congress 2007.

<sup>24</sup> Gill report, Ch. 6, paras. 16 – 30.

<sup>25</sup> *Ibid*, para.16.

<sup>26</sup> *Ibid*, paras.23 – 29.

<sup>27</sup> Sheriff Court Rules, Ch. 40.12[1].

<sup>28</sup> Gill report, paras 21-22. Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004.

<sup>29</sup> 2008 SC 637.

*Concrete Limited v Geminax Limited*<sup>30</sup>. Although the court in *Jackson* did not hear detailed submissions, it expressed reservations as to the compliancy of the use of emails and conference calls with the principle that justice should take place in public and with Article 6(1) of the European Convention on Human Rights<sup>31</sup>.

In *ASC Anglo*, a case management conference had been arranged, to proceed by way of telephone conference. The pursuer thereafter intimated and enrolled a motion for summary decree which was granted by the sheriff on the telephone. This time, the Inner House was more concerned with practice, citing the difficulties in referring to authorities and authorities:

“...we express concern that the sheriff should have thought it appropriate to deal with an opposed motion for final decree in the private and, in practical terms, highly unsatisfactory, circumstances of a telephone conference call<sup>32</sup>.

The desirability of conducting procedural hearings by conference call will depend upon the facts and circumstances of each case. So far as the requirements of Article 6(1) are concerned, the European Court has identified two principal goals: the protection of litigants from the secret administration of justice; and the maintenance

---

<sup>30</sup> [2008] CSIH 55; 2009 SLT 75.

<sup>31</sup> “It is a general principle, of constitutional importance, that the administration of justice should take place in open court. ... Similar observations have been made by the European Court of Human Rights in relation to article 6 ... Exceptions to the general principle, created by judicial practice, require to be considered with care, bearing in mind that convenience is not the only (or the most important) consideration”. [2008] CSIH 55; 2009 SLT 75 at para. [5].

<sup>32</sup> *Ibid*, at para [17] *per* Lord Eassie.



of public confidence in the judicial system<sup>33</sup>. In *Dory v Sweden*<sup>34</sup>, the European Court developed these principles:

“... the entitlement to a ‘public hearing’ in Article 6(1) necessarily implies the right to an “oral hearing”. However, the obligation under Article 6(1) to hold a public hearing is not an absolute one. Thus, a hearing may be dispensed with if a party unequivocally waives his or her right thereto and there are no questions of public interest making a hearing necessary. A waiver can be done explicitly or tacitly, in the latter case for example by refraining from submitting or maintaining a request for a hearing. ... Furthermore, a hearing may not be necessary due to exceptional circumstances of the case, for example, where it raises no question of fact or law which cannot adequately be resolved on the basis of the case file and the parties’ written observations”<sup>35</sup>.

In *Miller v Sweden*<sup>36</sup>, the Court observed whether to dispense with an oral hearing:

“...essentially comes down to the nature of the issues to be decided by the competent national court... It does not mean that refusing to hold an oral hearing may be justified only in rare cases. ... it is understandable that ... the national authorities should have regard to the demands of efficiency and economy”<sup>37</sup>.

A distinction must be drawn between these cases, where the hearing involves a decision on the merits, and procedural hearings, such as case management hearings.

The European jurisprudence is that the right to a public hearing does not apply to

---

<sup>33</sup> R Reed and J Murdoch (2008), *A Guide to Human Rights Law in Scotland*, 2<sup>nd</sup> ed, p.509. See, also, *Axen v Germany* (1983) A 72, at para 25: “By rendering the administration of justice visible, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society”.

<sup>34</sup> Application no. 28394/95.

<sup>35</sup> Gill report, para 37.

<sup>36</sup> [2005] ECHR 55853/00.

<sup>37</sup> *Ibid*, para29.

procedural hearings, as these do not involve the determination of civil rights or obligations<sup>38</sup>.

In Article 6 terms, there is no difficulty in principle with procedural hearings being conducted by means of telephone or videoconferencing, provided certain safeguards are in place. In deciding whether it would be compatible with Article 6 for a case management hearing to take place in private, the Gill report recommended that the court should have regard to the questions to be decided; whether the parties have consented or have by implication waived their rights to a public hearing; and whether the questions to be decided involve the public interest or are of such importance that the public would have an interest in having the hearing take place in open court<sup>39</sup>. Arrangements could even be made for the public to have access to telephone conference calls<sup>40</sup>.

An electronic filing system is in development by the Scottish Court and Tribunal Service. It is envisaged that this system will permit electronic filing of court documents and forms; an electronic process integrated with the court's case management system and judges' diaries; correspondence with the court by email and procedural hearings being conducted by telephone or video conferencing. In time, it is anticipated that the system will be expanded to facilitate the taking and

---

<sup>38</sup> See, for example, *X,Y and Z v Switzerland* (Application Number 6916/75, decisions of 12 March and 8 October 1976) and *H v United Kingdom* (Application Number 11559/85, 2 December 1985).

<sup>39</sup> Gill report, Ch.6, para. 63.

<sup>40</sup> *Ibid.*

hearing of evidence by video link. An initial template has been developed and that is presently being tested internally by SCTS staff.

### *Modes of Proof*

Our system of proof is founded upon the primacy of oral testimony, that is, an account given upon oath from the witnesses in court. “The reason is, that an examination and cross-examination in open Court, under the solemn sanction of an oath, are the best means of securing truth and detecting falsehood”<sup>41</sup>. Certainly, the perceived significance of a witness answering for his or her testimony at the great Day of Judgment, as the original form of oath prescribed, remains considerable<sup>42</sup>.

However, this mode of inquiry is inherited from the Victorian age, when there was a need for litigants, their representatives and witnesses to appear before the courts at the cited time and place. Those considerations are losing relevance today, when information can be assembled and presented in recorded form using modern technology. Yet, the principles of evidence remain substantially similar to those set out in 1887 by the editor of Dickson<sup>43</sup>. Many forms of admissible evidence today – video recordings, for example – would have been beyond the realms of contemplation in 1887. Leaving questions of competency to the side for the moment,

---

<sup>41</sup> Dickson, *Evidence*, para. 1716.

<sup>42</sup> See Green’s Encyclopaedia, *Oath of Witnesses*, (3<sup>rd</sup> ed.).

<sup>43</sup> *Evidence* (3<sup>rd</sup> Grierson ed) (1887).

in our age of technology we must grasp the possibility that, in the future, evidence might be presented to the court in a quite different, more modern manner.

Today, what a person says can be recorded electronically and accurately at any time in audio and video format. Events can be caught, contemporaneously, on CCTV or on portable devices. In the ascertainment of fact, which is more likely to be true: a record of an event as caught on camera and a video recorded statement made by a witness in the hours immediately following an event; or the oral testimony of a witness at a proof months or perhaps years later? Why should it not be competent, employing a procedure akin to a commission on evidence<sup>44</sup>, for all evidence to be taken, in advance, in the form of a video recording of the witness's account or of the relevant event or thing? Our system of evidence has long recognised the competency of taking the evidence of a witness, which is in danger of being lost, to lie *in retentis* or the evidence of a witness who will be unavailable for the proof diet<sup>45</sup>. Provided that there is judicial oversight of the procedure and the witness can be, if necessary, cross-examined, the evidence should in principle be admissible<sup>46</sup>.

The task of evaluating credibility and reliability would remain with the judge. If the final hearing proceeds, the video recordings can be submitted to the judge who will have examined all of the evidence in advance. Excepting cases with special features, the diet would be restricted to oral submissions. The judge, having had the

---

<sup>44</sup> Rule of Court 35.11.

<sup>45</sup> Dickson, para.1718 and Rule of Court 35.11(1)(b).

<sup>46</sup> *Watson v Glass* 1837 15 S. 754.

opportunity to digest the evidence in advance would be in a better, more informed position to engage with parties' submissions. The diet itself would be much shorter, reducing expense and waiting times for substantive hearings in other cases, thereby increasing the accessibility of the civil courts. This process would offer the additional benefit that witnesses could provide their testimony at a time and place convenient to themselves, as well as their representatives, and the court. Alternatively, once the evidence had been heard, parties would have an opportunity to consider the advantages or otherwise of proceeding any further. In this way, the reform might serve a dual function as a dispute resolution procedure whereby, once the evidence has been heard, parties could evaluate the merits of their respective cases without incurring the risk and expense of proceeding with the conventional final diet.

Article 6 confers, in civil cases, the right to a fair trial. There is no breach of that essential guarantee inherent in these proposals. There would be sufficient safeguards. Even in criminal matters, the European Court has held that Article 6(3)(d), which contains the accused's right to examine or have examined witnesses against him, is not absolute. It does not entail a right to cross-examine every, or indeed, any witness in the conventional domestic manner in open court.<sup>47</sup> There must, of course, be an opportunity to pose questions to a witness, but that is the extent of the Convention entitlement. The proposed new procedure would

---

<sup>47</sup> *Saïdi v France* (1994) 17 EHRR 251; *Kostovski v Netherlands* (1989) EHRR 434.

continue to guarantee an opportunity to ask questions of a witness. It is simply that the evidence can be adduced at an earlier stage in the proceedings, harnessing the benefit of modern technology.

This is the era of electronic recording and broadcast. As technology progresses, more and more of the incidents giving rise to court proceedings will be captured in some form of digitally recorded format. What the witnesses say at the time will be recorded in sound and vision. If no contemporaneous statement is available, the evidence of a witness to fact should be recorded as soon as possible after the event. The witness can be the subject of cross-examination, with the resultant video being uploaded to the online process as the witness's sworn testimony. The courts must move with the times and embrace a system which is consistent with modern advances. The days of the lengthy proof with oral testimony will soon be over. Such diets are time consuming, expensive and unnecessary. They do not operate in the matter best suited to the ascertainment of truth. They are not consistent with modern ideas of justice.

### **Appropriate level**

Significant structural changes to our civil court system are underway. The essential consideration is to promote and support justice, more particularly access to justice, through the quality and efficiency of our courts. The objective is

“rationalisation”; improved organisation, not only of the court structure, but also in the allocation of cases to be heard. Cases must be given, but only given, the appropriate level of scrutiny. They must be determined in accordance with our principles of law and justice but, in the promotion of justice for all, they must also be determined expeditiously and affordably.

Others will speak in more detail to the substance of the reforms. Suffice it to say, the devolution of a large chunk of civil first instance business from the Court of Session to the Sheriff Courts by virtue of the increased privative limit is perhaps the headline reform. It will promote “local justice” except where the new Sheriff Personal Injuries court picks up the slack.

A further consequence will be that the Court of Session will be appropriately placed to function, as it should, as the Supreme Civil Court in Scotland. An increasing volume of public, and public interest litigation, important and developing areas of jurisprudence, is anticipated, especially as more reserved matters are devolved to Holyrood. It is important that the Court of Session is in a position to deal with the new business promptly and effectively.

Although it is beyond the scope of this address, the affordability of litigation is crucial consideration underlying the reforms. Increased efficiency and cost-effectiveness will be achieved from the allocation and hearing of cases before courts commensurate with their nature and subject-matter.

## Leave provisions

The right of appeal to the Sheriff Principal against all final judgments and those involving for example interim interdicts and decrees, and that traditional staple, the refusal of a reponing note, is preserved<sup>48</sup>. Otherwise, leave from the sheriff is required to take matters further<sup>49</sup>. Whether an appeal will be heard before one or three Appeal Sheriffs is for determination by the Sheriff Appeal Court<sup>50</sup>. The Sheriff Appeal Court may be leap frogged only upon certification by that Court that the appeal raises a complex or novel point of law<sup>51</sup>.

Appeals against a decision constituting a “final judgment” to the Court of Session from the Sheriff Appeal Court may be taken upon leave granted by the Sheriff Appeal Court, which failing the Court of Session, but only if the appeal raises an important point of principle or practice or there is some other compelling reason for the Court of Session to hear the appeal<sup>52</sup>. Thus, appeals from decisions of fact or discretionary determinations taken in the sheriff court are now unlikely to reach the Inner House. Those that do must have a wider procedural or practical significance. This test is likely to cause a significant drop in the number of unmeritorious appeals

---

<sup>48</sup> Court Reform (Scotland) Act 2014, s 110(1).

<sup>49</sup> *Ibid*, s 110(2).

<sup>50</sup> *Ibid*, s 47(2).

<sup>51</sup> *Ibid*, s 112(2).

<sup>52</sup> *Ibid*, s 113 and s 136(1).



reaching the Divisions, often presented without the benefit of professional legal advice.

The automatic right of appeal from the Court of Session to the United Kingdom Supreme Court will cease to exist. The substitution of the new sections 40 and 40A of the Court of Session Act 1988<sup>53</sup> will bring Scotland into line with the other UK legal systems. Leave to appeal must be sought from the Inner House, generally within 28 days. Permission will be granted only if “the appeal raises an arguable point of law of general importance which ought to be considered by the Supreme Court”<sup>54</sup>. Such a test is already familiar from recent cases, notably Lord Reed’s *dictum* in *Uprichard v Scottish Ministers*<sup>55</sup>. The timing of applications continues to be relevant.<sup>56</sup>

## Conclusion

This is neither the first, nor will it be the last last, exercise in the reform of our courts. The reforms have been promoted out of concerns to secure access to justice, through increased efficiency, reduced expense and the hearing of cases by courts commensurate to their subject matter. These are not new concerns; Bentham and his contemporaries were grappling with them more than 200 years ago. The historical

---

<sup>53</sup> *Ibid*, s 117.

<sup>54</sup> Court of Session Act 1988, s 40A(3) (substituted by 2014 Act, s 117).

<sup>55</sup> 2013 SC (UKSC) 219, Postscript of Lord Reed at para. [58].

<sup>56</sup> 1988 Act, s 40A(3); cf *Massie v McCaig* [2013] CSIH 37.

comparative serves to emphasise the need for the justice system to renew, adapt and respond to developments and innovations in broader society. Today, this is achieved through effective and meaningful use of IT, by rationalising court business and ensuring that cases are dealt with at the appropriate level. These reforms are ones of which Bentham would have been very proud.

**LORD CARLOWAY**  
Lord Justice Clerk  
4 December 2015