

An Academic Portrait of J.M. Thomson: Teacher, Scholar and Connoisseur

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SCOTT CRICHTON STYLES

Introduction

Joseph 'Joe' McGeachy Thomson was one of the leading legal scholars of his generation and among his many other roles and talents Joe Thomson was a proud and passionate editor for eight years of this journal, the *Juridical Review*, the second oldest law journal in the British Isles,¹ and so it is only appropriate that his passing be commemorated by a pen portrait within these pages.

The Young Man

The son of James Thomson, a fish curer,² and Catherine (née McGeachy), Joseph McGeachy Thomson was born 6 May 1948 and raised in Campbeltown, Argyllshire, on Kintyre peninsula at the head of Campbeltown Loch, a location immortalised in the eponymous folk song.³ After secondary education in the former independent Keil School in Dumbarton,⁴ Thomson pursued law at the University of Edinburgh from 1966-70 from where he graduated with a First Class Honours LLB at a time when a First was much more difficult to obtain than it is today.⁵ He was also awarded the Lord President Cooper Memorial Prize Scholarship which is awarded to an honours student of outstanding distinction on completion of his or her law degree. This "unvarnished first"⁶ was the only degree Thomson would ever hold. At Old College he was taught criminal law by the great

¹ The *Juridical Review* was founded in 1889 a few years after the foundation of The *Law Quarterly Review* in 1884. It is likely that the LQR was the model for the *Juridical Review* as it and its editor, Sir Frederick Pollock, are mentioned in the Prefatory Note to the *Juridical Review*'s inaugural issue: (1889) 1 JR 2.

² A fact revealed in a piece arguing against the introduction of good faith as a general principle in Scots law, because among other things, it may be inimical to the ability to make money: "...I like to make a profit. In this respect, I resemble my late father who was a fish curer. He used to buy herring at two (old) pence) a basket, smoke and sell them as kippers at two (old) pence) a pair!" in "Good Faith in Contracting: A Sceptical View" in Edited by ADM Forte (editor) *Good Faith in Contract and Property Law* at p. 63.

³ The chorus of which song contains sentiments with which the adult Joe would heartily concur; "Oh! Campbeltown Loch, Ah wish ye were whisky! Campbelltown Loch, Och Aye! Campbeltown Loch, I wish ye were whisky! Ah wid drink ye dry."

⁴ The school closed down in 2000 due to falling pupils numbers, see http://www.heraldsotland.com/news/12198244.School_apos_s_out_for_Keil_pupils/

⁵ In the 2016-17 academic year 26% of graduates who completed their first undergraduate degree achieved a first class degree, <https://www.hesa.ac.uk/news/11-01-2018/sfr247-higher-education-student-statistics>. In 1970 the figure was nearer 4% and in many subjects, including law, there might be no first class degrees awarded in a given year.

⁶ This was the colloquial term in former days given to those graduates who did not choose to 'gild the lily' of their First-class degree with a subsequent higher degree. The Edinburgh LLB was the only degree Thomson ever held.

Gerald Gordon⁷ and private law by the equally great W.A. “Bill” Wilson (1928-1994).⁸ However, strangely, Thomson was never taught by the professor who was arguably the most distinguished scholar working in Old College in the late 1960’s when he was an undergraduate, Professor Sir Thomas ‘T.B’. Smith (1915 – 1988)⁹ and that is perhaps one reason he never embraced the neo-civilianist approach of Smith.¹⁰ But if Smith had no influence on the young Thomson, then Wilson had an enormous one. Wilson was both an academic mentor and good friend to Thomson. It was Wilson who inspired Thomson’s love of the law, and much of his approach to the law can be traced back to the influence of Bill (see further below under “The Scholar”). The two men although in some ways very different, Bill was rather shy and diffident in company whilst Joe was very outgoing and delighted in being the centre of attention, shared much in common notably a love of the law, a wide circle of friends, a love of the arts and an enjoyment of fine wines and good whisky.¹¹ When Wilson died after a short illness in 1994 at the premature age of 65 Thomson felt the pain of the loss of his mentor and friend even more than most.

The Teacher

⁷ Sir Gerald Gordon (born 1929) CBE, QC HonFRSE, Head of Department of Criminal law and Criminology from 1965 to 1972, Professor of Scots law from 1972 to 1976, Sheriff from 1976 to 1999 and a Temporary Judge at the High Court until June 2004 and author of *The Criminal Law of Scotland* the first significant work on the subject since Baron Hume.

⁸ MA, LLB. After graduating from Glasgow University Wilson practised as a solicitor for nine years and was appointed lecturer in law at the University of Edinburgh from 1960. . From 1972-93 he was the Lord President Reid Professor of Law. His books included *Trusts, Trustees and Executors* (1975, with A. G. M. Duncan) and *Debt* (1982; 2nd edn 1991) and he was joint editor of three editions of the standard one-volume work on Scots law, *Gloag and Henderson's Introduction to the Law of Scotland* (1980, 1987, and 1994). He also wrote numerous learned articles on a wide variety of subjects.

⁹ Sir Thomas Broun Smith, QC, FBA, FRSE DCL LLD (3 December 1915 – 15 October 1988). Professor of Scots Law at the University of Aberdeen 1949-1958, Professor of Civil Law at the University of Edinburgh 1959-1968, and Professor of Scots Law 1968-72. Full time Scottish Law Commissioner 1972-1980. His published books include *Doctrines of Judicial Precedent in Scots Law* (1952), *Scotland: The Development of its Laws and Constitution* (1955), *British Justice: The Scottish Contribution* (1961), *A Short Commentary on the Law of Scotland* (1962), *Property Problems in Sale* (1978) and *Basic Rights and their Enforcement* (1979). He also published numerous, often provocative, articles lamenting the drift of Scots law from its allegedly civilian roots, of which the best known is perhaps his inaugural lecture at Edinburgh University “Strange Gods: The Crisis of Smith’s” early essays were collected in *Studies Critical and Comparative* (1962). An interesting survey of Smith’s scholarship can be found in *A Mixed Legal System in Transition: T. B. Smith and the Progress of Scots Law* (Edinburgh Studies in Law) Hardcover (2005) Elspeth Reid & David L.Carey Miller (Editors)

¹⁰ “Although Sir Thomas Smith was professor of Civil Law and Scots Law when the author (JT) was an undergraduate at Edinburgh University, it was not my good fortune to be one of his pupils.” “An Island legacy: the delict of conspiracy” in *Comparative and Historical Essays in Scots Law: A tribute to Professor Sir Thomas Smith QC* (1992) Carey-Miller & Meyers (eds) at p 137. In a book review of *A Mixed Legal System in Transition: T B Smith and The Progress Of Scots Law* (2005) Elspeth Reid & David Carey Miller (eds) in *JLSS* 15 May 2006 Thomson paid a generous tribute to Smith: “Until his death in 1988, Professor Sir Thomas Broun Smith bestrode the Scottish legal academy like a colossus. Undoubtedly the most famous Scots legal academic of his generation, his scholarship was known and respected throughout the world. This was a position of which “TB” was not only aware but greatly enjoyed. Indeed, much of the acclaim arose not only from his intellectual prowess but also from his hugely charismatic personality.” These last comments could equally well have been applied to Thomson himself.

¹¹ MacQueen’s remark in his “memoir of Professor William Adam Wilson” in *Scots Law into the 21st Century: Essays in Honour of W.A.Wilson*, H.L.MacQueen (ed) that: “A key part of Wilson legend was a liking for alcoholic refreshment..” could have equally been said to apply to the Thomson legend and the two men often enjoyed their ‘refreshment’ together in the most convivial way.

Immediately after graduating from Edinburgh in 1970 Thomson took up a lectureship at the University of Birmingham from 1970-74.¹² He then spent 10 years at King's College London where, as well as developing his academic career, he took full advantage of the many metropolitan opportunities to enjoy opera, ballet¹³ and the great art galleries. Thomson returned to Scotland in 1984 when he was appointed Professor of Law at Strathclyde University in Glasgow and Hector MacQueen¹⁴ recalls that this return to Caledonia caused great excitement in Old College among those who already knew him, such as Robert Black¹⁵ and John Blackie.¹⁶ As head of the Strathclyde Law School Thomson encouraged both scholarship and camaraderie. He was a good friend and mentor to many young lecturers, whom he often entertained with typical generosity in one of his favourite Glasgow restaurants, the Rogano or the Glasgow Arts Club. He went out of his way to relieve colleagues of administration and teaching where he could in order to allow them to develop their own careers and was always willing to provide helpful criticism of any research which colleagues wished to show him.¹⁷ Thomson also encouraged awareness of the role of computing in the law at a time when that was a rare specialism. Naturally convivial himself, Thomson was aware of the importance of such intangible things as *esprit des corps* and under his leadership Strathclyde Law School, then the youngest of the five Scottish law schools, flourished, growing in both size and reputation. It was an exceptionally friendly place to work, with many of the staff meeting every Friday to socialise together after hours. Work hard, play hard might have been the School motto at that time.

In 1990 Thomson remained in the City of Glasgow but changed law schools, leaving the modernist minimalism of Strathclyde University for the gothic baronial splendours of Glasgow University on his appointment to the Regius Chair of Law, arguably one of the most prestigious chairs in Scots academic law. Thomson's predecessor in the Regius Chair was David. M. Walker (1920-2014).¹⁸ The two men were both distinguished legal scholars and teachers but there were significant differences between them in their style. Walker wrote numerous lengthy books,¹⁹ Thomson preferred the short article. Walker's lectures were clarity personified, if perhaps somewhat dry, while Thomson's

¹² That Thomson was able to obtain an academic post will surprise many in 2018 but in the 1970's and even into 1990's a doctorate was relatively unusual among staff in the arts and the social sciences and especially in law.

¹³ At a reception in the 1990's at Glasgow University Thomson remarked to the present author that he had recently returned from Venice, where, among many other things, he had "Visited the grave of Diaghilev, San Michele cemetery, Venice. To pay homage at the shrine as it were."

¹⁴ Professor of Private Law, University of Edinburgh, speaking at Thomson's memorial Service.

¹⁵ QC, FRSA, FRSE, Professor Emeritus of Scots Law, University of Edinburgh

¹⁶ Emeritus Professor of Law, University of Strathclyde

¹⁷ I am indebted to Professor Kenny Millar, University of Strathclyde, for this information.

¹⁸ Professor David Maxwell Walker (1920-2014) CBE, QC, MA, PhD, LLD, Hon. LLD, FBA, FRSE, FRSA, FSA Scot., Professor of Jurisprudence 1954-58 and was Regius Professor of Law, 1958 to 1999, University of Glasgow.

¹⁹ The number of books which Walker wrote is truly impressive: *Law of Damages in Scotland*, 1955, *The Scottish Legal System*, 1959, 8th edn 2001, *Law of Delict in Scotland*, 1966, 2nd edn 1981, *Scottish Courts and Tribunals*, 1969, 5th edn 1985, *Principles of Scottish Private Law* (2 vols), 1970, 4th edn (4 vols), 1988-89, *Law of Prescription and Limitation in Scotland*, 1973, 6th edn 2002, *Law of Civil Remedies in Scotland*, 1974, *Law of Contracts in Scotland*, 1979, 3rd edn 1995, *Oxford Companion to Law*, 1980, (ed) *Stair's Institutions* (6th edn), 1981, (ed) *Stair Tercentenary Studies*, 1981, *The Scottish Jurists*, 1985 and *The Legal History of Scotland*, 7 vols, 1988-2004. In 1960 Walker wrote an article, "Legal scholarship in Scotland" 1960 SLT (News) 10 justifiably lamenting the lack of modern Scots law texts which concluded "...It is clear that unless a great deal of work is done in the next decade on the production of modern Scottish books, students and practitioners of Scots law will be working with hopelessly antiquated and inadequate tools and will inevitably be swamped by English law." , Walker seems to have decided to try and meet this gap in the market of Scots legal literature almost single handed!

teaching style was discursive and individualistic, albeit just as clear.²⁰ At Glasgow University, Thomson, as at Strathclyde, did his best to recruit new staff and to promote both scholarship and conviviality among his colleagues, and visits with colleagues to the Ubiquitous Chip Restaurant in Ashton Lane were a frequent occurrence. One high point of Thomson's time at Glasgow occurred when he was elected as the President of the Society of Public Teachers of Law²¹ and, in that capacity, brought the Society's annual conference to Glasgow.. The conference, a great success in both academic and social terms, is fondly remembered by those who attended it.

In today's academy, published research in the quest for a higher score in the research league tables has become the main goal of many academic staff, but Thomson followed the example of his mentor Wilson, and his predecessor Walker, in enjoying and valuing undergraduate teaching just as much as research, and it was an area in which he excelled. Thomson was an outstanding teacher whose lectures were both inspiring and insightful. At Glasgow University in the 1990's Thomson's first year lectures in Obligations Course were always packed, despite their anti-social (for students) 9am time slot. No other lecturer at Glasgow in those days could draw a crowd the way Thomson could. He had a unique ability to engage students and bring the law to life. He was a brilliant storyteller. His lectures were not just lectures, they were performances. He would introduce cases with stories. One former Glasgow student, Lesley-Anne Barnes Macfarlane²² recalls him beginning a lecture with the following: "Today, ladies and gentlemen, we will ponder several great issues in the law of delict - the two professors and the banana skin and the bull in the china shop".²³ He is remembered for his wit, his sense of fun, his theatricality and most of all his redoubtable intellect. Lorna Richardson, another Glasgow Undergraduate of that time, remembers Thomson explaining the grounds for reduction of a contract. Thomson used as an example the bridegroom who had a change of heart after entering into the "contract of marriage". With appropriate melodrama, he portrayed the nervous groom, who began with one pint to steady the nerves, a few pints with the best man and so on until eventually he had to be held up at the altar and coached to say his vows by the bride's angry father. It was both funny and memorable. As Richardson recalled, "We all realised that trying to argue that a contract was void due to intoxication was likely to be a hard sell – a useful life lesson! Students didn't just respect him, we had a real affection for Joe. He was one of a kind."²⁴ Thomson's methods were undoubtedly entertaining, but they were much more than that. As Laura Macgregor²⁵ points out: "Joe was very funny, making the most of the facts of the cases to make everyone laugh... And there was method in this approach, the students both recalled and understood the cases which they had had expounded to them in so memorable a fashion. In terms of the modern educational jargon, which Joe so despised, it was a very successful "teaching and learning strategy".

²⁰ Although a very able lecturer Walker was a notoriously demanding examiner. The failure rate of exams marked by Walker in the 1980's could easily reach over 75% until the external examiner exercised some much need moderation in all senses of that word and restored the pass rate to more usual levels.

²¹ Now the Society of Legal Scholars.

²² LLB (Hons, First Class), University of Glasgow; LLM, University of Strathclyde; PhD, Edinburgh Napier University. Lecturer in Child and Family Law & Law of Evidence, The Business School, Edinburgh Napier University.

²³ The present author is unable to identify the case involving the professors and the banana skin but presumes that the bull in the china shop (actually a dairy) case is a reference to *Cameron v Hamilton's Auction Marts Ltd* 1955 SLT (Sh Ct) 74.

²⁴ In the obituary of Thomson published in The Times, May 21 2018, one former student is quoted as saying: "Cigarettes and gin and Lord Denning. What more could a young law student want for?"

²⁵ LLB, LLM, DiplP. A colleague of Joe's at the University of Glasgow in the 1990s and now Professor of Commercial Contract Law, University of Edinburgh.

Although Thomson continued to hold the Regius Chair of law until 2005 his active contribution to law teaching at Glasgow University ceased in 2000 when he was appointed as a Scottish Law Commissioner. Although he did not miss the increasingly bureaucratic nature of much of modern university life he did miss the pleasure of lecturing with its opportunity to teach and inspire new generations of law students. After his death some of his former students remarked “We are a' Joe Thomson's bairns!!” It is a compliment which Professor Thomson would have appreciated.

The Law Commissioner 2000-2009

In 2000 Thomson was appointed as a Scottish Law Commissioner and, in 2005, his term was renewed for a further four years. In many ways the post was well suited to his talents and Thomson relished the opportunities it provided both to research the law and to publish reports seeking to improve it. The Commission offered him an opportunity to implement the rational reform which he believed law at its best could embody, shaping the law to meet the needs of contemporary society

For better or worse, social policy in the nineteenth and twentieth centuries has been implemented by legislation...Legislation is also the means by which the recommendations of the Scottish Law Commission for the Reform of Scots law are implemented. In reforming the law, the Commission, while carefully considering the solutions of other jurisdictions, endeavours to find the best rule for the perceived social and economic problems the law is attempting to solve. The existing Scots or civilian principle will be jettisoned if that is necessary to provide a better solution.”²⁶

At the Scottish Law Commission Thomson was lead Commissioner for a series of reports and papers on such diverse issues as damages for psychiatric injury, succession (partially implemented by the Succession (Scotland) Act 2016) , damages for wrongful death (implemented by the Damages (Scotland) Act 2011) , succession, trusts, and two projects involving the English Law Commission, unfair terms in contracts (implemented by the Consumer Rights Act 2015) and insurance law. Insurance reform was a long and massive project involving several law commissioners from both jurisdictions and was eventually implemented in a trilogy of statutes: The Third Parties (Rights against Insurers) Act 2010, The Consumer Insurance (Disclosure and Representations) Act 2012 and The Insurance Act 2015.

The Scholar

Thomson was heavily influenced in his intellectual approach to law by his teacher and long-term friend Bill Wilson, and this can be seen in three ways in particular. Firstly, a rejection of the neo-civilianism of the Cooper-Smith ideology²⁷ which sought to emphasise that Scots law was a mixed legal system and one which in the area of private law should seek to return to its allegedly Roman roots in order to renew itself.²⁸ By contrast the Wilsonian approach sought to ground Scots law

²⁶ “When Homer Nodded,” in: H. MacQueen(ed) *Scots Law into the 21st Century: Essays in Honour of WA Wilson*, (1996), p.21.

²⁷ This rather pejorative description of those who supported the importance of Scots law as part of national identity and of the importance of Roman law within Scots law, was coined by I.D.Willock in his article “The Scottish Legal Heritage Revisited”, in J P Grant (ed), *Independence and Devolution. The Legal Implications for Scotland* (1976) 1.

²⁸ This view was expressed especially strongly by Smith in . “Strange Gods: the crisis of Scots law as a civilian system” 1959 JR 119 at 140, reprinted in his collection of essays, T B Smith, *Studies Critical and Comparative* (1962) at 72ff. Scots Law as a Civilian System” first published in 1959 JR 119 (and reprinted in Smith, *Studies*

firmly in the present needs of society not on the archaic solutions of Roman law. Thomson likewise had no interest in any Roman roots, real or imaged, and for him Scots law was a geographical, not a doctrinal, institution: "There is a Scottish legal system which consists of those legal principles and rules which are valid and enforceable *in a geographical area of the United Kingdom called Scotland.*"²⁹ (italics added by present author). Secondly, Wilson was firmly committed to the application of logical analysis of the law³⁰ and to a belief in the importance of rationality and internal coherence in the law, which resulted in what might justly be described an applied philosophical analysis of the law. Thirdly, these two interests came together in a stress on the utility and importance of statutes and in their proper interpretation.³¹ In all of these matters, Thomson followed Wilson. Indeed, so strongly did Thomson cleave to the principles inculcated in him by Wilson that the pupil retained his hostility to neo-civilianism even when the master himself had softened his attitude to that approach. In one of his final articles, "The Importance of Analysis",³² Wilson had lamented the decline of Roman Law in Scotland but Thomson decried this 'recantation' in his contribution to Wilson's posthumous *festschrift*, *Scots Law into the 21st Century: Essays in Honour of WA Wilson*,³³ "When Homer Nodded?", describing it as "... quite remarkable given that Wilson had spent much of his academic life denying, - and at times, deriding - the relevance of civilian principles for contemporary Scots law."³⁴ Thomson however maintained the pure non civilian Wilsonian approach to law. For Thomson, to look in the past for solutions as Smith did, was a mistake: "Modern Scots law cannot be systematically expounded as a set of interlocking, internally consistent principles."³⁵ Those who attempted to do so, could never succeed: "From this viewpoint D.M. Walker's *Principles of Scottish Private Law* (4th ed 1988), must be regarded as a failure, albeit magisterial."³⁶ For Thomson the role of Roman law was only as an interesting model of a "relatively simple legal system which can be seen in the round" not as a source of substantial legal principles to guide the modern development of the law.³⁷

Another significant intellectual influence on Thomson was that of his near contemporary, the jurist Neil MacCormick. Thomson's belief in the Wilsonian approach was further strengthened by his reading of MacCormick's³⁸ important book, *Legal Reasoning and Legal Theory*, of which Thomson said:

Critical and Comparative) with its memorable opening line "Scotland has too often gone awwhoring after strange gods, and ... the time is ripe to return to the juristic altars of our fathers." See list of Smith publications in footnote 8 above.

²⁹ *Scots Private Law*, 2006 at para. 1-01.

³⁰ See Wilson 'The Importance of Analysis' in *Comparative and Historical Essays in Scots Law: A tribute to Professor Sir Thomas Smith QC* (1992) Carey-Miller & Meyers (eds). See also H.L.MacQueen 'The Contribution of W.A.Wilson to Scots Law' in *Scots Law into the 21st Century: Essays in Honour of W.A. Wilson*, H.L.MacQueen (ed) .

³¹For a concise overview of Wilson's views in this area see Gerry Maher, 'Statutory Interpretation: The Wilsonian Analysis' in *Scots Law into the 21st Century: Essays in Honour of W.A. Wilson*, H.L.MacQueen (ed) .

³² W.A.Wilson "The Importance of Analysis" in Carey-Miller & Meyers (eds) *Comparative and Historical Essays in Scots Law: A tribute to Professor Sir Thomas Smith QC* (1992) at p 162

³³ Hector MacQueen (editor) (1996)

³⁴ "When Homer Nodded," in H. MacQueen(ed) *Scots Law into the 21st Century: Essays in Honour of WA Wilson*, (1996), p.19

³⁵ Op.cit p.26.

³⁶ Op.cit. p.26 footnote 37.

³⁷ Op.cit. p.27

³⁸ Sir Donald Neil MacCormick QC FBA FRSE (27 May 1941 – 5 April 2009) was a Scottish legal philosopher and SNP politician. He was Regius Professor of Public Law and the Law of Nature and Nations at the University of Edinburgh from 1972 until 2008. His many books include *Legal Reasoning and Legal Theory* (1978), *Legal Right*

The book had a profound influence on my teaching and research in that subject. I found MacCormick's approach to statutory interpretation refreshing. Instead of assuming that statutory language was *prima facie* incomprehensible, MacCormick demonstrated that, read carefully and on the assumption of Parliamentary rationality, most statutory provisions were readily comprehensible, and if an ambiguity arose this should be resolved in such a way as to further the purpose of the legislation always provided the final interpretation remained a possible meaning of the statutory language. Thus equipped, I have guided generations of students through the hundreds of statutory provisions which make up family law and labour law. Rarely has MacCormick's – basically literal – approach failed to provide the right answer. For it is an error to assume that a literal construction of statutory language will inevitably produce a narrow result: often the contrary is the case. In my experience there is little need to embrace purposive or teleological interpretation.³⁹

In broader terms of principle and his approach to the law, Thomson was an unrepentant doctrinal conservative. In terms of Adams & Brownsword's typology of judicial thinking, Thomson was a formalist as opposed to a realist in his approach to texts with a market-individualist ideology.⁴⁰ Thomson believed in freedom of contract before fairness⁴¹, in the literal interpretation of statutes and contract and in the strict separation of powers.⁴² As he said:

A vitally important point is that in a system of private law, the rights recognised by the law should not be able to be trumped by an appeal to some form of utilitarianism or public policy considerations...that there can be harsh results does not allow us to abandon rule-bound decision making.⁴³

Given these views it is rather surprising that Thomson was also a great admirer of the judgments of Lord Denning MR⁴⁴ given his lordship's sometimes cavalier approach to precedent and statute,⁴⁵ but

and Social Democracy: Essays in Legal and Political Philosophy (1984), *Rhetoric and The Rule of Law* (2005), *Institutions of Law* (2007) and *Practical Reason in Law and Morality* (2008).

³⁹ Thomson in a 2009 Book Review of Neil MacCormick, *Rhetoric And The Rule Of Law: A Theory Of Legal Reasoning*. *Edinburgh Law Review* (2005), Volume 13 Issue 2, Page 343-345,

⁴⁰See J.N.Adams & R. Brownsword, *Understanding Contract Law* (5th edn 2007), especially chapter 3.

⁴¹ See the views expressed in "Good Faith in Contracting: A Sceptical View" in ADM Forte (editor) *Good Faith in Contract and Property Law* at p. 63.

⁴² "As a private lawyer I agree that judges should have a limited role in the development of the law. Thus my distaste for purposive or teleological statutory construction. Alas this has become even more fashionable given that the court has now the freedom to give a word or phrase a meaning which is not even a possible meaning of the language whenever it considers that the ordinary meaning might be a breach of the European Convention on Human Rights." Thomson 2009 Book Review of Neil MacCormick, *Rhetoric And The Rule Of Law: A Theory Of Legal Reasoning*. (supra note 23)

⁴³ *Scots Private Law*, 2006, para. 1-05

⁴⁴ (1899 – 1999). A judge for 38 years, he was Master of the Rolls between 1962-1982.

⁴⁵ "He was more concerned with the intention of a statute than with its precise terminology. He was not overly respectful of precedent. He was prepared to entertain unorthodox arguments if they appeared to lead to what he saw as justice." Address at the Service of Thanksgiving for the Rt Hon Lord Denning, OM by Lord Bingham republished in Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (2000).

perhaps it was Denning's gifts as a judicial story teller⁴⁶ that caused Thomson to overlook his purposive and dynamic use of sources.⁴⁷

Perhaps the most well worked out expression of Thomson's approach to the law can be found in his textbook *Scots Private Law*, 2006 and in his 2003 article "Principle or Policy? The Judicial Development of the Law of Delict."⁴⁸ In the 2003 essay Thomson shows both his doctrinal conservatism and his belief that the law should be rational and predictable,⁴⁹ but also laments that the courts have moved away from that principled approach towards "a jurisprudence not of rules but of reasons."⁵⁰ Thomson concedes that policy issues are legitimate when courts are "mapping the boundaries of liability"⁵¹ but once the boundaries have been determined the courts should return to applying principles for the sake of predictability and rational coherence. After considering developments in the field of delict/tort for liability for pure economic loss and psychiatric injury he states:

By their very nature, these rules are important devices which courts can use to limit potential delictual liability. But they are legal concepts and should be applied in a principled manner. In a system of private law, both parties have rights and duties. While corrective justice demands that I make reparation for losses which I have wrongfully caused to another, I am not obliged to make reparation for losses which were not wrongfully caused by me. Both pursuer and defender are entitled to rely on rules of law to determine the existence and extent of such delictual liability. Put another way, while policy considerations are relevant in setting the pale of delictual/tortious liability, once inside the pale, liability should be determined by legal principles and rules: resort to bald policy considerations should not be made to avoid a 'wrong' answer which would otherwise arise from the application of the rules or principles in the particular circumstances of a case.⁵²

Thomson goes on to lament the supplanting of what he sees as the clear rule of liability, set down in *Muir v Glasgow Corporation*,⁵³ by cases such as *McFarlane v Tayside Health Board*⁵⁴ and even more does he criticise the weakening of the principle of causation which he argues is an "...important limiting device which traditionally has operated within the pale of the rules and principles of the law of tort/delict is the concept of causation." This clarity he saw as undermined first in *McGhee v*

⁴⁶ To cite but two examples of his many memorable openings to a judgment: "It happened on April 19 1964. It was bluebell time in Kent Mr and Mrs Hinz had been married some ten years, and they had four children, all aged 9 and under. The youngest was one. Mrs Hinz was a remarkable woman..." , *Hinz v Berry* (1970). "In summertime, village cricket is a delight to everyone" was the opening line in *Miller v Jackson* (1977).

⁴⁷ It is hard, for example, to believe that Thomson approved of the resolutely non literal and very subjective attempt by Denning to find for the plaintiff in *Gibson v. Manchester City Council* [1978] I W.L.R. 520; [1979] I W.L.R. 294., by holding that a binding contract had been formed despite documentary evidence to the contrary; a decision which was firmly quashed by the House of Lords on Appeal. For an interesting survey of Denning's impact on English law see Jeffrey L. Jowell & Patrick McAuslan *Lord Denning, the judge and the law* (1984)

⁴⁸ 2003 *Current Legal Problems*, Vol.56(1), pp.123 – 151.

⁴⁹ "The importance of legal rules based on legal principles is that they should enable lawyers to predict with certainty the legal significance of particular conduct and the outcome of any litigation arising from it." *Ibid* at 124.

⁵⁰ *Ibid* at 125. The words are a quotation from F Schauer, 'The Jurisprudence of Reasons' (1987) 85 *Michigan Law Review* 847.

⁵¹ *Ibid* at 136.

⁵² *Ibid* at 137

⁵³ 1943 SC (HL) 3

⁵⁴ 1998 SC 389.

*National Coal Board*⁵⁵ and then in *Fairchild v Glenhaven Funeral Services*.⁵⁶ He considered the latter a triumph of policy over principle.

It was not just in delict that Thomson disliked policy prevailing over legal rules and he had a robust distrust of judicial discretion:

In the present writer's view any further increase in judicial discretionary powers should be resisted.... A legal right recognised by a system of private law should not be able to be trumped because a judge considered that its exercise would be unfair or unjust or socio-economically unfortunate or inconsistent with the government's or the Executive's policy in the circumstances of a particular case. Put shortly, any increase in judicial discretion can only undermine private legal rights and their correlative duties, i.e. the concept of private law itself!⁵⁷

Thomson had little time for the view that the actual rules of Scots law are in some way an essential part of the Scottish national identity, as espoused by T.B.Smith and by his predecessor but one in the Glasgow Regius chair, A.D.Gibb⁵⁸, however he did think that the existence of a separate Scottish court system was very important:

In short, it is my contention that while the substantive content of Scots law is unimportant in this context, the Scottish national identity would be severely undermined if Scotland was to lose its separate legal system.⁵⁹

Speaking of Wilson in "*When Homer Nodded?*" Thomson said:

Because of the complexity of the law in modern societies – often as a result of attempting to implement social and economic policies through legislation...traditional forms of legal exegesis break down. In the present writer's view, it was Bill Wilson's greatest academic achievement to realise that this was so; hence when we look at his oeuvre, these interests may appear almost random and unconnected: indeed he might be considered at times, a miniaturist. That of course is precisely to miss the point. Modern Scots law cannot be systematically expounded as a set of interlocking, internally coherent principles.⁶⁰

These remarks about Wilson could be applied *a fortiori* to Thomson himself. Unlike Wilson, he wrote no big definitive works as Wilson had done in his two SULI volumes *Trusts, Trustees and Executors* (1975, with A. G. M. Duncan) and *Debt* (1982; 2nd edn 1991) but like Wilson he was an excellent 'miniaturist' writing numerous insightful articles. Thomson's legal interests were wide and eclectic ranging from trusts⁶¹ to transsexualism,⁶² from questions of identity in bequests⁶³ to questions of

⁵⁵ 1973 SC (HL) 37.

⁵⁶ [2002] UKHL 22, [2003] 1 AC 32, [2002] 3 WLR 89, [2002] 3 All ER 305.

⁵⁷ *Scots Private Law*, 2006, para 1-07.

⁵⁸ A.D.Gibb (1888 – 1974) was a founding member of the SNP and held the Regius Chair from 1934–1958. His works include *Scottish Empire* (1937), *A Preface to Scots Law*, (1944) and *Law from over the border; a short account of a strange jurisdiction* (1950). For a rather hostile critique of Gibb's views see Lindsay Famer "Under the Shadow over Parliament House: The Strange Case of Legal Nationalism". In Farmer, Lindsay; Veitch, Scott. *The State of Scots Law* (2001). pp. 151–164.

⁵⁹ "Scots Law, National Identity And The European Union" *Scottish Affairs*, Feb 2015, vo. 10 (First Series), No. 1 pp. 25-34 at p.31

⁶⁰ "When Homer Nodded?" in *Scots Law into the 21st Century: Essays in Honour of WA Wilson Hector MacQueen* (editor) (1996).

⁶¹ "Unravelling Trust Law: Remedies for Breach of Trust" 2003 JR 129

⁶² "Transsexualism: a legal perspective." *J Med Ethics*. 1980 Jun; 6(2): 92–97.

identity in legal nationalism.⁶⁴ All of these diverse issues he approached with his belief in the strict interpretation of statutes and seeking the clear meaning of case law in order to maintain the internal coherence of given areas of the law.

One form of scholarship to which Thomson, an exceptional teacher,⁶⁵ contributed enormously was the student textbook. *Family Law in Scotland* ran to seven editions⁶⁶ and his book *Delictual Liability* to five; he also co-authored with Hector MacQueen *Contract Law in Scotland*, which ran to four editions. The sole commercial failure of Thomson's text book oeuvre was *Scots Private Law*, perhaps not for any want of quality of the writing but for his rather bold, even eccentric, decision to exclude all case law references; a decision which greatly diminishes the utility of the text to students and practitioners. In all four textbooks, Thomson's clarity of mind and belief in the rationality and internal coherence of the⁶⁷ law shines through. The modern academy, with its focus on research rankings,⁶⁸ tends to rather undervalue student textbooks but, together with teaching itself, they are incredibly influential, forming the minds of the future generations of lawyers. A good example of the influence that a textbook can have, even on a learned Lord of Session, can be found in *Willson v Willson*;⁶⁹ a case on financial provision on divorce where, after considering various authorities, the Lord Ordinary, Lord Drummond Young, stated:

Finally, I should note that the legal principles relevant to the present case are admirably summarised by Professor J M Thomson in his textbook, *Family Law in Scotland* (5th ed) at paras 7.6–7.7, 7.13 and 7.17.” [2008] CSOH 161, 2009 Fam. L.R. 18 at para. 7.

In similar vein in a case on the liability for injury caused by a bull, *Foskett v McClymont (No 9)*, Lord Osborne commented:

I consider that the approach which I think it right to take to these provisions is one which is supported by some of the material which was put before me. In *Delictual Liability*, J M Thomson, at pp 148 – 150, it is made quite clear that the author considered that it would be open to the court to assess the characteristics of animals including cows and bulls in relation to the criterion set forth in sec 1(1)(b) of the Act. In addition, for what significance it may have, a similar view appears to be expressed in para 47 of the Scottish Law Commission Report No 97 of 1985. For all of these reasons, I consider that the first criticism mounted by the defenders against the pursuer's case in *condescendence V* is unsound.⁷⁰

Other examples of Thomson's influence on the judiciary can be found in the Supreme Court decision of *Cramaso LLP v Viscount Reidhaven's Trustees* where his views in “Misrepresentation” 2001 SLT 279⁷¹ found favour. Thomson also annotated Law Reform (Miscellaneous Provisions) (Scotland) Act

⁶³ “A Question of identity – the Problem of Bequests to Non-existent Institutions in Scots Law” 1973 JR 281

⁶⁴ “Scots Law, National Identity And The European Union” Scottish Affairs, Feb 2015, vo. 10 (First Series), No. 1 pp. 25-34 at p.31

⁶⁵ As discussed above under “The Teacher”.

⁶⁶ The first edition sold over 4,000 copies which is a record for a Scots law textbook 9 (source Margaret Cherry

⁶⁷ In chapter 6 on causation of his *Delictual Liability* Thomson uses a simplified account of the approach in H. L. A. Hart and A. M. Honore's, *Causation and the Law* 2nd edn (Oxford, 1985) which is a perfect example of the “applied jurisprudence” or conceptual analysis which both Thomson and his mentor Wilson used in dealing with black letter law.

⁶⁸ Whether in RAE or REF.

⁶⁹ [2008] CSOH 161; 2009 Fam. L.R. 18

⁷⁰ 1998 S.C. 96 at 103

⁷¹ Thomson, JM, “ Misrepresentation” 2001 SLT 279

1985 and his comments on section.22 were cited by Lord Hope of Craighead in the Judicial Committee of the Privy Council case of *Kearney v HM Advocate (No 1)*.⁷²

One very demanding and important role which Thomson undertook was to be the Scottish member of the Law panel for 1996 Research Assessment Exercise. It was a role for which his wide range of legal interests made him perfectly suited. Thomson also nourished scholarship in others as deputy editor of the *Stair Memorial Encyclopaedia* from 1984-1996 and, later, as director of the Scottish Universities' Law Institute from 2000-2009. It is the fate of editors that their important role is almost invisible to posterity but any authors who provided manuscripts for Thomson can attest to the care with which he undertook the task of ensuring that publications were of the highest quality. Thomson's standard for good research was simple but demanding: "things that were clever yet readily understood because they were well-written."⁷³ Thomson's last academic role was as editor of the *Juridical Review* from 2009 until 2017.

In 1996 he was elected a Fellow of the Royal Society of Edinburgh, the highest academic accolade that Scotland can bestow. Strangely, none of the three Scottish universities with which Thomson was closely associated, Edinburgh, Strathclyde and Glasgow ever thought it appropriate to confer upon Thomson an honorary degree.

The Man

As well as being an outstanding academic, Joe Thomson was also an exceptional man. Always impeccably dressed and usually with a twinkle in his eye, Joe had "*joie de vivre tres plus*" which infused in equal measure his personal and professional lives. His commitment to excellence in scholarship, was complemented by his appreciation of excellence in other other fields. He was a connoisseur of fine food and wines and of art literature, opera, ballet and music. Terrance's *maxim humani nihil a me alienum*⁷⁴ perfectly summed up Joe's approach to life. Exceptionally kind, generous and affable, Joe certainly knew how to throw a party, to bring together all sorts of people from first year students to senior members of the judiciary and to make them all feel equally welcome. Not the least of his many gifts was his gift for friendship. Conversation was an art for him and it would range over the arts, the law and the latest gossip.

Relatively late in life, at the age of 51, Joe found the love of his life in Annie Cowell when an old friendship blossomed into something much deeper. Joe and Anne swiftly decided to seal their love by embracing the legal institution about which Joe had written so much as an academic expert, viz marriage. Appropriately, in February 1999 the nuptials were held, in the Chapel of the University of Glasgow. The ceremony was as flamboyant⁷⁵ and joyful as can be imagined and it was a wedding which caught the imagination of the whole of the Glasgow University Law School community.⁷⁶ Joe's place at the centre of so many different social circles was perhaps most clearly evidenced on that

⁷² [2006] UKPC D1, 2006 S.C. (P.C.) 1, see comments by Lord Hope on the use of retired judges at para 26]

⁷³ Quoted in Scots Law News blog "Research in law: Professor Thomson and Lord Rodger speak" Posted on June 15, 2010 by H. Macqueen. Available at <https://www.sln.law.ed.ac.uk/2010/06/15/research-in-law-professor-thomson-and-lord-rodger-speak/>

⁷⁴ "Nothing human is be alien to me."

⁷⁵ The many academics present were asked to wear their academic robes which made the congregation even more colourful than is usual at a wedding.

⁷⁶ Spontaneously, the night before the wedding a group of academics, support staff and students got together to decorate the Law School in honour of the wedding. This group of happy academic decorators spent hours cutting pink hearts and bunting from paper which were then stuck in all the many windows of the Stair Building.

memorable day with the wedding guests ranging from lords of session⁷⁷ to singers and from professors⁷⁸ to poets⁷⁹.

After leaving the Scottish Law Commission, Joe retired to his home town of Campletown where he and Annie enjoyed married life⁸⁰ and entertained their many friends in some style whilst Joe continued to pursue his scholarly interests, such as updating his textbooks and editing this journal. He also enjoyed many trips at home and abroad which combined his love of the fine arts and fine living, a pleasure now further enhanced by being able to share these interests with Annie.⁸¹ He was appointed an Honorary Sheriff in Campbeltown, a distinction which gave him great pleasure. After several happy years of active retirement Joe fell ill and after short illness he died on 12 May 2018, in the town of his birth, Campbeltown. The funeral was held in the Lorne and Lowland Parish, Campbeltown on Thursday, 17th May. On 13 October 2018 a memorial service in his honour was held in the Canongate Kirk on Edinburgh's Royal Mile. The auld kirk was filled to capacity with Joe's many friends, acquaintances, colleagues and former students and warm tributes were paid by his fellow professors Hector MacQueen and Laura MacGregor, the journalist Bernard Ponsonby and the poet Liz Lohead who poignantly read out the very poem that she had written for and declaimed at Joe and Annie's wedding in 1991, *Epithalamium*⁸² and that seems an apposite place to conclude this pen portrait:

For marriage, love and love alone's the argument.

Sweet ceremony, then hand in hand we go

Taking to our changed, still dangerous days, our complement.

We think we know ourselves, but all we know

Is: love surprises us. It's like when sunlight flings

A sudden shaft that lights up glamorous the rain

Across a Glasgow street – or when Botanic Spring's

First crisp, dry breath turns February air champagne.

Delight's infectious – your friends

Put on, with glad rag finery today, your joy,

Renew in themselves the right true ends

They won't let old griefs, old lives, destroy.

⁷⁷ The organist was Lord Gill

⁷⁸ Professor Kenny Miller was the best man and Professors Fraser Davidson and Robert Rennie were ushers.

⁷⁹ Scots makar, poet and dramatist Liz Lohead read out a poem.

⁸⁰ In the Preface to the fourth edition of his *Family law in Scotland*, published in 2002, Joe touchingly wrote: "Finally, I would like to thank my wife, Annie. Not only did she treat the author's tantrums with compassion (which they did not deserve) but, more importantly, she has convinced me what a wonderful institution marriage can still be. It is appropriate that this edition is dedicated to her."

⁸¹ At his memorial service in her tribute Liz Lochhead commented that when travelling abroad Joe always insisted that they go to see at least one artistic masterpiece per day. The masterpieces chosen for viewing by Joe were invariably conveniently located near an excellent restaurant.

⁸² At the memorial service Liz explained that she had chosen the rather obscure title knowing of Joe's love of long and obscure words, "epithalamium" being the ancient Greek and Roman term for a song or poem celebrating a marriage.

When at our lover's feet our opened selves we've laid

We find ourselves, and all the world, remade.

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