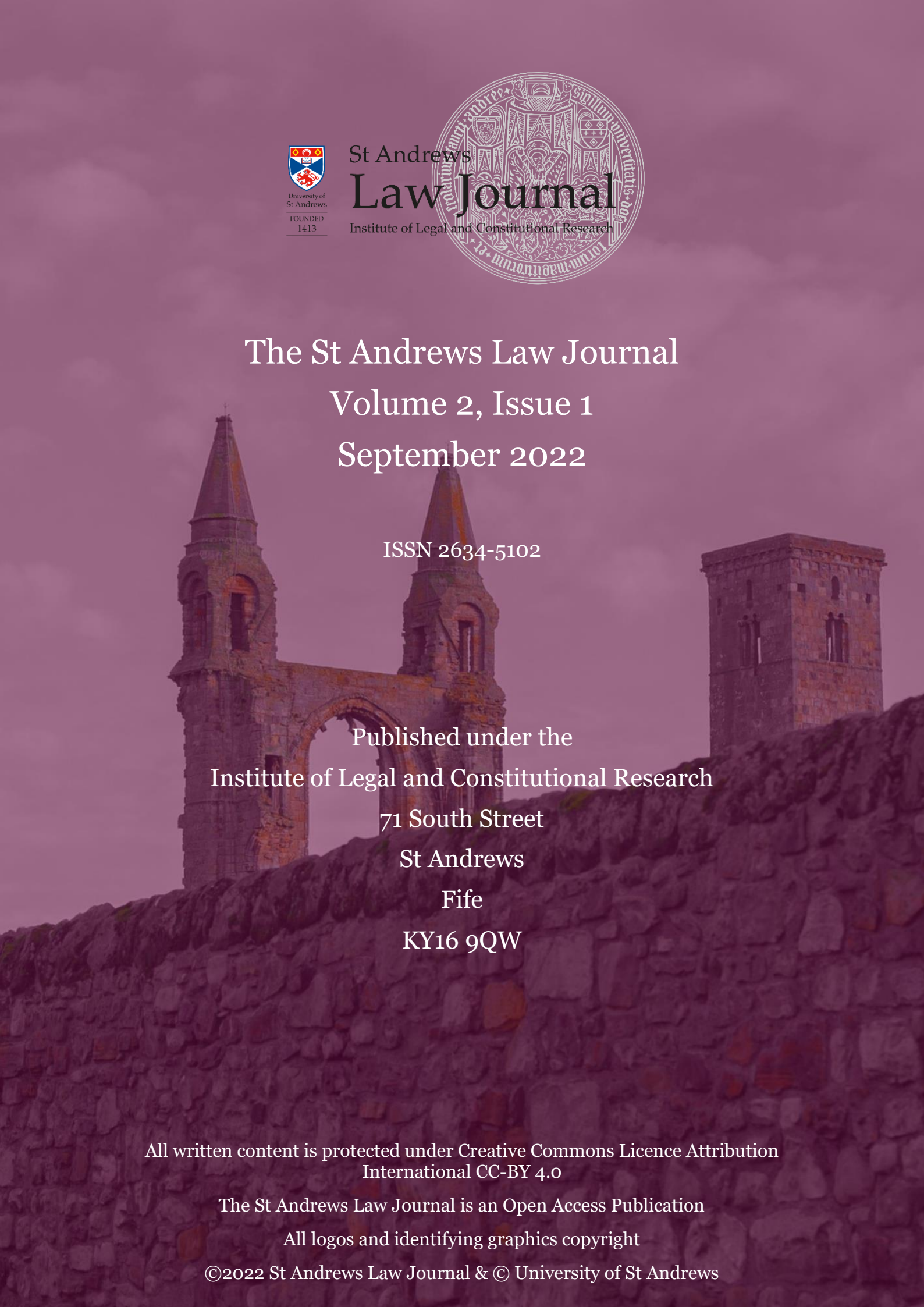

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Contents

OPENING REMARKS BY THE 2021-22 MANAGING EDITORS

The past year has been the second year of the St Andrews Law Journal's operation since its Co-Founders, Oliver Roberts and Bianca Ritter, launched it in late 2020. We were both original members of the Board during its inaugural year, so we have had the pleasure of being involved in the running of the Journal since its very founding. As members of the maiden Board, we were both particularly excited about the publication's potential for the University of St Andrews. For students at the University, law often appears to be a field difficult to penetrate but, with the Journal's founding, the study of the law at a 'non-law' university has become more accessible for those interested in it. Since joining the university, we have witnessed a tangible growth in the legal appetite of the student base, and we are delighted to have been involved in nurturing and strengthening it as part of the Law Journal. The Inaugural Issue represented an explosion of activity in student legal study and, though the size of this Issue is more modest, it is nonetheless representative of the continuation of such activity and the unlikelihood of its dissipating any time soon.

In the Opening Remarks of the last Issue, Oliver and Bianca outlined their vision for the Journal as a publication that provides an "accessible, inclusive and direct platform for legal discussion at the University of St Andrews." In this Issue, we are proud to have carried forward that vision through another academic year. With the earnest and continued support of the Institute of Legal and Constitutional Research, as well as the noble and thorough efforts of the past year's Board members and contributors, the Journal continues to serve as a platform through which students may critically engage with a range of historic and contemporary legal issues. A special thanks must also be given to Oliver Roberts and Nathan Beck-Samuels who, during a transitory phase in the first semester of the past year, helped us both to navigate the challenges involved with moving the Journal's content to the Online Journal Systems (OJS) platform, as well as familiarising us both with the tasks and responsibilities required in the management and successful operation of the Journal, and both have since been generous in offering any further assistance with queries we had in operating the Journal this year. As such, we are also pleased to include the papers submitted during the summer before the 2021-22 academic year, which have yet to be released as part of their own Issue but nonetheless further demonstrate the range of perspectives and issues discussed by the Journal's contributors, for whose work we are both incredibly grateful.

Another aspect of the founding vision for the Law Journal was to offer a platform for a diverse range of students from many different backgrounds, identities and ethnicities. This has indeed been at the core of the Journal's affairs this year, and we have been proud to have been able to devise and release an official Equality, Diversity and Inclusion (EDI) policy for the Journal. Additionally, this Issue includes a paper discussing legal issues associated with the Indigenous nations of Canada. We are pleased in attracting such submissions to the Journal, and we hope that the international and multicultural aspects of legal inquiry in the Journal's outputs only grow further in the coming years. With that being said, this Issue also provides excellent engagement with English law on a range of unique themes from papers on Mercian Law in the early Middle Ages to the history of the law of treasure in England and Scotland. Such thematic scope and variety of topics only serve to further widen the breadth of legal engagement that the Journal helps to provide at St Andrews.

This year has also been a year of reform and reinforcement for the Journal. Aside from the minor name change accompanying the Journal's debut on the OJS platform, we have looked internally at reforming and strengthening the internal affairs of the Journal. In addition to the new EDI policy, we have rewritten the Journal's Constitution to ensure that it has a robust and consistent structure, not to mention the uploading of a new set of Guidelines and Policies for the Journal's contributors. We hope that this more robust framework will

provide the Boards of future years with a supportive documentary structure which may facilitate not only the maintenance, but also further growth and success of the Journal, securing its place within the student legal landscape at the University of St Andrews.

We are eagerly looking forward to the development of the St Andrews Law Journal over the coming year following the appointment of a new Board for the 2022-23 academic year. Freja Stamper and Inci Fassa will be leading the Board, as Journal Manager and Editor-in-Chief respectively. We are confident that they will perform excellently at the Journal's helm, and both have ambitious plans for further increasing the depth and breadth of legal engagement at St Andrews through the Journal. We wish them and the rest of the new Board the very best for the next year!

Finally, we would like to give thanks to the members of Institute of Legal and Constitutional Research, in particular Professors Caroline Humfress and John Hudson, who have provided a wealth of advice and support in the management of the St Andrews Law Journal since its founding in 2020. Their counsel has been invaluable to not only us, but to the entire Editorial Boards of the past two years. The ILCR's continued support of the new 2022-23 Board is already tremendously appreciated, and we are sure that the new Board will benefit greatly from their support over the rest of this academic year.

Yours faithfully,

Jacob Joad
Editor-in-Chief, 2021-22

Karen Katiyo
Journal Manager, 2021-22

LIST OF CONTRIBUTORS

We thank the following individuals for their exceedingly valuable contributions to this Issue of the St Andrews Law Journal. Their commitment to expanding the wealth of legal scholarship at St Andrews is vastly appreciated:

Zeb Micic, Modern History undergraduate, Class of 2024.
Katherine Montana, History graduate, Class of 2021.
Dr Robert S. Shiels, Law graduate, University of Glasgow, Class of 1981; Solicitor-advocate, Crown Office and Procurator Fiscal Service.
Marisa Turner, International Relations Graduate, Class of 2022.
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THE LAW OF TREASURE IN ENGLAND AND SCOTLAND

by Zeb Micic

The law of real property has often been ridiculed: indeed, J. W. Harris considers reasoning in common law and related commentaries appears nowhere as arcane than when they deal with property.[1]

Literature on treasure law is by no means voluminous, yet much valuable material can be found. Sir George Hill's *Treasure Law* (1936) is a semi-antiquarian study of England, Scottish and foreign treasure law and is particularly useful for a comparative element. Equally, A. G. Guest's *The Law of Treasure* (2018) is a prescient practitioner's guide for England and Wales and is a valuable addition to Hill. Scottish law has received analysis recently, principally by D. L. Carey Miller, which are important contributions to the literature.[2]

English Treasure Law

F. W. Maitland once wrote that English real property law as full of rules 'which no one would enact nowadays unless he were in a lunatic asylum'.[3] This is especially true of the pre-1996 system of treasure trove. From very early times treasure trove has been the unquestioned property of the Crown. The first laws on the subject were promulgated during the reign of Edward the Confessor, which provided that treasure found anywhere – except on the premises of a church or cemetery – should be the absolute property of the king. If found on ecclesiastical property, all the gold and half the silver discovered belonged to the king.[4]

Bracton, however, did not limit treasure to gold and silver. He extended it to any other metal. This is what he is believed to have written between 1250-58:

> Treasure, that is, silver or fold or metal of some other kind... Treasure is any ancient store of money or other metal which has been forgotten so that it no longer has an owner; thus it belongs to the finder since it belongs to no one else.[5]

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[1] J. W. Harris, "Reason or Mumbo Jumbo: the Common Law's Approach to Property," *Proceedings of the British Academy*, 117 (2002): 445.
[2] These are principally: D. L. Carey Miller and Alison Sheridan, "Treasure Trove in Scots Law," *Art Antiquity and Law* 1 (1996): 393-406; D. L. Carey Miller, "Treasure Trove in Scots Law," *Fundamina* 8 (2002): 75-90; M. Guthrie, "A Comparative Study of the Scottish Law of Bona Vacantia and the English Law of Treasure," *Art Antiquity and Law* 17 (2012): 307-324.
[3] F. W. Maitland, "The Making of the German Civil Code", in *The Collected Works of Frederic William Maitland* vol 3, ed. H. A. L. Fisher (Cambridge: Cambridge University Press, 1911), 486.
[4] *Leges Edwardi Confessoris*: [14] Thesauri de terra regis sunt, nisi in ecclesia uel in cimiterio inueniantur. [14.1] Et si ibi† inueniatur aurum, regis est; et si argentum, dimidium regis est et dimidium† ecclesie ubi inuentum fuerit, quecumque† sit diues uel pauper.
[5] *Bracton on the Laws and Customs of England*, trans. S. E. Thorne, 2 (Cambridge, Mass: Harvard University Press, 1968), 338.

Sir William Stanford, one of the justices of the Common Pleas, is the next authority. Writing in c. 1548, he simply quotes Bracton verbatim in Latin.[6]

Sir Edward Coke, chief justice of the King's Bench, is, said Lord Denning, 'the greatest authority of all'.[7] After he was dismissed in 1616 he wrote his institutes, bringing Bracton's medieval law up to date to fit the needs of his time of Elizabeth I and James I. His definition of treasure trove formed the basis of all subsequent law upon the subject until the 1996 Act:

> Treasure trove is when any gold or silver, in coin, plate, or bullyon hath been of ancient time hidden, wheresoever it be found, whereof no person can prove any property, it doth belong to the king, or to some lord or other by the kings grant, or prescription.[8]

In *G. E. Overton* the Court spent much time on the words 'when any gold or silver, in coin, plate, or bullyon:' Lord Denning ruled that it should be read as 'gold or silver *in the form of* coin, plate or bullion,' and not, 'gold or silver *contained in* coin, plate or bullion'.[9]

Sir William Blackstone took a different view to Coke. He said:

> Treasure-trove (derived from the French word, trover, to find) called in Latin *thesaurus inventus*, which is where any money, or coin, gold, silver, plate, or bullion, is found hidden in the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the king.[10]

His view that treasure included money of any metal was not a prevailing one. Chitty goes back to Coke:

> 13. Treasure trove, is where ant gold or silver in coin, plate, or bullion is found concealed in a house, or in the earth, or other private place, the owner thereof being unknown, in which case the treasure belongs to the King or his grantee, having the franchise of treasure trove.[11]

Turning, next, to the case law. Before the codification of treasure law, the case law did not settle the law in England: neither *R v. Thomas and Willett* nor *R v. Toole* were binding authorities on the true meaning of treasure trove. Indeed, in 1936 Sir George Hill, director of the British Museum, did not regard the law as settled.[12] Home Office circulars of 1931 and 1936 simply outlined the mechanisms for the administration of the law, i.e. the reporting of finds to police authorities, the British Museum and, ultimately, the Coroner.

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[6] *Attorney General of the Duchy of Lancaster v. G. E. Overton (Farms) Ltd* [1981] EWCA Civ J1118-3, 287.
[7] *Ibid.*
[8] Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: W. Clarke and Sons, 1817), 132.
[9] *Attorney General v G. E. Overton,* 288.
[10] William Blackstone, *Commentaries on the Laws of England*, 17th ed., vol. 1 (London: Collins & Hannay, 1830), 295.
[11] Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown, and the Relative Duties and Rights of the Subject* (London: J. Butterworth and Son, 1820), 152.
[12] G. F. Hill, *Treasure Trove in Law and Practice from the Earliest Time to the Present Day* (Oxford: Clarendon Press, 1936).

The case of *Overton*, referred to above, settled, first, that the law of treasure trove did not apply to any metal other than gold or silver and, secondly, that an object of treasure trove must contain an 'substantial' amount of gold or silver.

The issues with pre-1996 treasure law is particularly well illustrated by the Sutton Hoo discovery in 1938-9. An inquest was held on 15 August 1939, at which Sir George Hill (formerly director of the British Museum and a leading authority on treasure trove) sat with the coroner. The discovery, 'without their equal in interest to anything hitherto found in England of that nature', could not be deemed as treasure and, therefore, claimed for the nation. Firstly, the jury could only be concerned with those objects of gold and silver, thus excluding many items of historical and cultural significance. More importantly, however, the jury had to 'find that the articles were hidden and not concealed', and, therefore, belonged to the Crown. C. W. Phillips, a fellow of Selwyn College, Cambridge, gave extensive evidence on contemporary funeral rites.[13] The verdict was that, as the owner of the articles could not be found, Mrs Edith Pretty, the owner of the land, was the finder and, as the objects did not constitute treasure trove, the owner. The Sutton Hoo objects could have been lost, were it not for Mrs Pretty's generosity in presenting them to the British Museum, and it is remarkable that it took until 1996 for the law to be rendered satisfactory on this point.

There the law lay until the 1996 Act, with which treasure was given a statutory definition as:

- All coins from the same find, providing it was of two or more coins and are at least 300 years old. If the coins contain less than 10 per cent gold or silver, ten are needed for the find to qualify as treasure.
- Two or more pre-historic base metal objects, providing they are associated with each other.
- Any individual item that is over 300 years old and contains 10 per cent gold or silver.
- Objects, substantially made from gold or silver, but less than 300 years old, providing that they had been deliberately hidden with the intention of recovery and the owners or heirs are unknown (i.e. the pre-1996 definition).
- Any other finds found in the same place, or had previously been together, as another object determined as treasure.

Equally important is the fact that the Act allows for the a reward of up to the market value of any treasure surrendered to the Coroner. This was previously a non-statutory, but useful,

[13] R. L. S. Bruce-Mitford, *The Sutton Hoo Ship-Burial*, vol. 1 (London: British Museum Publications, 1975), 721-23.

practice.[14] The amount of the reward and how it is to be divided among the claimants (i.e. the finder, tenants and owner of the land) is determined by the Treasure Valuation Committee, an advisory non-departmental public body of the Department for Culture Media and Sport. Its terms of reference are laid down in the Act's code of practice.[15]

Although not technically treasure law, mention of the Portable Antiquities Scheme would be prescient. This voluntary scheme, managed by the British Museum (in partnership with the National Museum of Wales), records public archaeological finds not determined to be treasure. All recorded finds are recorded in an open-access and free-to-use database. The Scheme was funded by the National Lottery Heritage Fund until 2006, from which year it was funded by the Department of Culture, Media and Sport (DCMS). Management passed to the British Museum in 2007, who fund it through its grant-in-aid from DCMS.[16]

Scottish Law

The Scottish position is somewhat different. Treasure law is a part of the common law of Scotland: the feudal system, of which, classifies prerogative rights vested in the Crown as *regalia majora* or *regalia minora*. The former is held in trust for the people and, therefore, inalienable (it includes rights to the sea and seabed, foreshore and rivers).[17] The *regalia minora* is a miscellaneous group of alienable property rights. The Crown's right to treasure and lost property – *bona vacantia* – are included in this category.[18] It differs from Roman law as there is a rule attributed to Emperor Hadrian which vests treasure in equal shares in the finder and landowner.[19] The Scottish approach to treasure law is relatively simple and the definition of which must include all archaeological objects.

The leading Scottish case is *Lord Advocate v. University of Aberdeen and Budge* (1963) concerning the 'St Ninian's Isle Treasure'.[20] Some twenty-eight items of eighth century treasure was found during an Aberdeen University archaeological dig on St Ninian's Isle. The university took the items to Aberdeen for display in the university museum. The Lord Advocate, responsible for representing the Crown's legal interests in Scotland, brought the case requiring the university to hand the treasure over to the Crown and to accept the usual,

[14] Much correspondence on this subject can be found in files HO 45/10031/A58223 and 23032, the National Archives.
[15] Department of Culture, Media & Sport, *Treasure Act 1996 Code of Practice*, 2nd ed. (n.d.), last accessed December 2021, https://finds.org.uk/documents/treasure_act.pdf.
[16] Portable Antiquities Scheme, "About Us", last accessed December 2021, https://finds.org.uk/about.
[17] W. M. Gordon, *Scottish Land Law* (Edinburgh: W. Green and Son, 1989), para 27.06; Carey Miller and Sheridan, "Treasure Trove in Scots Law," 393-406.
[18] Gordon, *Scottish Land Law,* para 27.06; Miller and Sheridan, "Treasure Trove in Scots Law," 393.
[19] Justinian, *Institutes,* trans. J. B. Moyle (Oxford: Clarendon Press, 1967), 2.1.39.
[20] *Lord Advocate v University of Aberdeen and Budge* [1963] SC 533; see also, D. L. Carey Miller, "St Ninian's Treasure," in *Scots Law Tales,* ed. J. P. Grant & E. E. Sutherland (2010), 111-35.

but non-statutory, monetary reward. The university defended the action, considering Norwegian treasure law – the islands of Orkney and Shetland originally belonged to Norway – rather than Scottish to be applicable. This would have split the abandoned property between the finder (the university), the owner of the ground (Budge) and the Crown. The islands had not, the university argued, been given to Crown by god (as with the rest of Scotland) but acquired differently; therefore, the feudal system of treasure law, as on the mainland, did not apply as the Norwegian law had never been replaced.

The Court of Session predictably ruled that the treasure law of mainland Scotland did indeed apply and the treasure belonged to the Crown. It was deposited in the National Museum of Scotland. This case created the important precedent, in Scotland, that the standard law of *bona vacantia* applied, whatever the original application of law in a particular area was.

The 1996 does not apply in Scotland,[21] where treasure trove comes under Scottish common law. The application of the law, unlike the pre-1996 position in England, is an application of the law concerning *bona vacantia*. Simply, *quod nullius est fit domini regis* ('that which belongs to nobody becomes the king's'). Treasure is one of the *regalia minora* ('minor things of the king') and, therefore, it is the Crown's do as it pleases.

The wider, Scottish, definition of treasure negates the need for a similar body to the Portable Antiquities Scheme in England and Wales, from a purely historical point of view, the lack of a publicly accessible database of finds is to be regretted and is, perhaps, a loss to scholarship.

Reform

Much headway was made by the 1996 act in England and Wales, yet more work is left to be done. Sections 7-9 of the act concern coroners' jurisdiction and makes prospective provision for the appointment of a designated Coroner for Treasure. This seems to the author a much more satisfactory position where a suitably expert and legally-qualified judicial officer will control the national system for treasure, rather than individual area coroners whose expertise and experience of treasure and its related law is variable.

Many of the defects of the 1996 act, in England and Wales, were rectified when the Government recognised 'the growing popularity of metal detecting … has brought to light an increasing number of finds' which do not constitute treasure. This is principally because they made from bronze and not, therefore, precious metal. Under plans published in December

[21] Treasure Act 1996, https://www.legislation.gov.uk/ukpga/1996/24/contents, s 15 (3).

2020, revisions to the definition of treasure are to be made.[22] It would seem sensible if legislation were enacted in Scotland which (a) brought the definition of treasure into statutory form and (b) the extension of an unclear and unsatisfactory definition to be analogous to the reformed English example. In an age of increased devolution and tension between governments of the Union, the law surrounding treasure is an issue of real importance (as far as a cultural legacy is concerned) on which the four nations might come to a unified agreement.

[22] Department of Culture Media & Sport, *Revising the definition of treasure in the Treasure Act 1996*, government response to public consultation, 4 December 2020, https://www.gov.uk/government/consultations/revising-the-definition-of-treasure-in-the-treasure-act-1996-and-revising-the-related-codes-of-practice/outcome/revising-the-definition-of-treasure-in-the-treasure-act-1996-and-revising-the-related-codes-of-practice-government-response-to-public-consultation.

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UNDERSTANDING THE RELATIONSHIP BETWEEN CANADIAN LAW AND SETTLER-COLONIAL LAND ONTOLOGIES FOR CONTEMPORARY DECOLONISATION MOVEMENTS

by Marisa Turner

Introduction

Since the arrival of settler colonialism in Canada, Indigenous nations have struggled to obtain European provincial authorities' recognition of their land rights and sovereignty. However, the *Delgamuukw* case brought before the Canadian Supreme Court in 1997 by the Gitxsan and Wet'suwet'en nations represented a critical turning point for treaty negotiations between the state and First Nations people. For the first time, this decision formally recognised the First Nations' right to land beyond their occupancy and use of that land.[23] The centrality of land in this court case and for contemporary Indigenous sovereignty raises the central question of this paper: How do different attitudes towards land highlight the legacy of colonisation and possibilities of decolonisation?

In this paper, I use a decolonial framework to reveal the power of legality in the settler-colonial states' legitimation of ontological occupation. Using the 1997 Delgamuukw decision and the Coastal GasLink Pipeline as my case studies, I argue that the historical interrelationship between settler-colonial land ontologies and Canadian law during the process of colonisation has influenced the Canadian court system in ways that limit possibilities for decolonisation, and recognition of Indigenous sovereignty.

I structured this paper as follows: First, I provide a brief overview of the interdisciplinary literature that pertains to settler-colonialism, including its associated logics, practices, and legacies. I then explore the differences between Indigenous land ontologies and settler-colonial land ontologies to discuss how they constitute both European and Indigenous legal traditions. Before exploring my case studies, I also examine how these differences in land ontologies were used to delegitimise Indigenous legal traditions and dispossess Canadian First Nations of their land. Afterwards, I explore the legacy of *Delgamuukw* and discuss its pitfalls by analysing the political tensions surrounding the creation of the government-sanctioned Coastal GasLink Pipeline. Lastly, I conclude with some thoughts on the implications of applying an ontological reading to contemporary processes of decolonisation.

[23] John Borrows, "Sovereignty's alchemy: An analysis of *Delgamuukw v. British Columbia*", *Osgoode Hall Law Journal,* 37, no. 3 (1999): 537-596.

Decolonial Literature Review

The politics and study of land ontologies in the context of settler-colonialism have been under-theorised. Engaging the lens of decoloniality, my paper seeks to address this gap. A decolonial approach allows for a critical examination of the "dark side of modernity" by recognising the experiences, histories, and beliefs of colonised peoples.[24] The decolonial method also explores how the production of knowledge has been influenced by colonial logics, ontologies, and power matrices; importantly, this process disrupts persistent settler-colonial logics which continue today.[25]

Within this paper, settler-colonialism will be defined as "a structure of exogenous domination in which Indigenous inhabitants of a territory are displaced by an outside population from an imperialist centre".[26] As this paper argues, colonial displacement extended beyond physical relocation and included the metaphysical world. Although colonialism and settler-colonialism have shared similar rationalities and practices, ultimately, what sets the two apart is the desire of settler-colonialism to establish a post-colonial state.[27] This difference continues to shape the present. With the prevalence of the "myth" of the existence of "post-colonial societies", contemporary Indigenous struggles for sovereignty are threatened through the distortion of the temporal experience of violence and dispossession.[28] Correspondingly, decolonisation can be understood as "the dismantling of the ideological and institutional structures of settler colonialism, which a de-colonial approach helps facilitate.[29] Tuck and Yang's famous statement, that "decolonisation is not a metaphor" is an important reminder, however, that, beyond an intellectual project, decolonisation encourages the "repatriation of Indigenous land and life".[30]

Patrick Wolfe is another key scholar whose insights have impacted the field of decoloniality studies. His concept of 'logics of elimination' traces the consistency between the once overt colonial practices of violence and modern manifestations of injustice.[31] Wolfe argues that the settler-colonial "logic of elimination" which "initially informed frontier killing" has since "transmuted into different modalities, discourses, and institutional formations as it undergirds the historical development and complexification of settler society" [32] Embedded in

[24] Anibal Quijano, "Coloniality and Modernity/Rationality", *Cultural Studies* 21, nos. 2-3, (2007): 172.
[25] *Ibid.*
[26] Paul Berne Burow, Samara Brock, Michael R. Dove, "Unsettling the Land: Indigeneity, Ontology, and Hybridity in Settler Colonialism," *Environment and Society* 9 (2018): 57.
[27] Lorenzo Veracini, '"Settler Colonialism': Career of a Concept," *The Journal of Imperial and Commonwealth History* 41, no. 2 (2013): 313-3.
[28] Veracini, Lorenzo. 2011. "Introducing Settler Colonial Studies," *Settler Colonial Studies* 1, no. 1 (2011): 3.
[29] Burow, Brock, Dove, "Unsettling the Land", 58.
[30] Eve Tuck, and K.Wayne Yang,. "Decolonization Is Not a Metaphor," *Decolonization: Indigeneity, Education and Society* 1, no. 1 (2012): 21.
[31] Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (2006): 402.
[32] *Ibid.*

the "logic of elimination" is the idea of a hierarchy that places settler-colonial society above Indigenous communities, the consequences of which are seen in the historical displacement and genocide of Indigenous people. The imposed superiority of settler-colonial society still exists, however, and operates covertly through apparatuses of the state such as legal institutions which favour Eurocentric legal logics over Indigenous legal traditions and land ontologies. Given the historical continuity of Indigenous dispossession and violence, Wolfe suggests we understand settler-colonialism as "a structure not an event".[33] Understanding settler-colonialism as a structure thus discredits the idea of 'post-colonial' societies and allows us to see modern manifestations of eliminatory rationalities and relations of power that continue to operate at the expense of First Nations people. Namely, as it relates to this paper, the way settler-colonial land ontologies are combined with the force of Canadian law to undermine Indigenous sovereignty.

Land Ontologies and the Role of Law

Tania Li has argued that land is an assemblage which can be understood by its ontologies, which she explains as the "the nature of its thing-ness" and "what it's good for–its values".[34] Although Indigenous ontologies are multiple, just as colonial attitudes are multiple, there are some key differences between colonial and Indigenous relationships with land. There are three main colonial land ontologies which stand out in relation to Indigenous ontologies: land as property, land as empty, and nature as universalistic.[35] These ontologies are wedded together through European capitalist ideology which values land for resource extraction, and commodification.[36] Thus, settler-colonial land ontologies which have viewed land as an object of conquest and possession directly oppose Indigenous land ontologies which seek to develop harmonious relationships with land.

In general, scholars of Indigenous studies have understood Indigenous ontologies of land to revolve around two main concepts: relationality and reciprocity.[37] Relationality is the idea that "all things exist in relatedness".[38] A relational reality binds species and land with each

[33] Wolfe, Patrick.. *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999), 2.
[34] Tania Murray Li, "What Is Land? Assembling a Resource for Global Investment," *Transactions of the Institute of British Geographers* 39, no. 4 (2014): 589.
[35] Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014); Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999).
[36] Burow, Brock, Dove, "Unsettling the Land", 59.
[37] Lauren Tynan, "What Is Relationality? Indigenous Knowledges, Practices and Responsibilities with Kin." *Cultural Geographies* 28, no. 4 (2021): 597–610; Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge and the Teachings of Plants* (Minneapolis, MN: Milkweed Editions, 2013).
[38] Tynan, "What Is Relationality?", 601.

other and is facilitated through spiritual ideas of animacy and life force.[39] These understandings ultimately constitute humans and non-humans "in much more complex ways than in simple biological terms".[40] This reflects Tynan's explanation of how reciprocity follows from relationality since "how the world is known" shapes "how we, as Peoples, Country, entities, stories and more-than-human kin know ourselves and our responsibilities to one another".[41] As such, Indigenous legal traditions express and find legitimacy through Indigenous land ontologies that value relationality and reciprocity.

Robert Cover's theory of law helps explain the co-constitutive nature between ontology and law. He explains that everyone "inhabit[s] a *nomos*- a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void [...] no set of legal institutions or prescriptions exist apart from the narratives that locate it and give it meaning".[42] Resultantly, both Indigenous and settler-colonial communities have created normative legal systems based on their ontological positions and normative worlds. An important difference in their expression, however, is the way that Indigenous legal customs rely on oral tradition expressed through stories, songs, and ceremonies that draw up environmental imagery in comparison to written accounts as used by the European legal tradition.[43] Since Canadian law draws primarily upon European legal tradition, the differences between Indigenous and settler-colonial normative universes act as a barrier for contemporary Indigenous land back claims.

Decolonial scholars have asserted the inextricable relationship between ontological occupation and European colonial expansion. The contemporary consequences of settler-colonial ontological occupation can be described through John Law's (2011) idea of a One-World World (OWW), a concept in which ontological diversity is sacrificed for singularity. In this reality, the settler-colonial world "has arrogated for itself the right to be 'the' world "and subject "all other worlds to its own terms or, worse, to non-existence; this is a World where only a world fits".[44] In the Canadian colonial context, the positioning of settler-colonial ontologies of land as superior to Indigenous ontologies was done in pursuit of a OWW and colonial acquisition. Furthermore, the imposition of Canadian law, which was transplanted through European colonisation, helped cement the foundation of the OWW by legitimising the

[39] Sarah Hunt, "Ontologies of Indigeneity: The Politics of Embodying a Concept," *Cultural Geographies* 21, no. 1 (2014): 27.
[40] Kim TallBear, "Beyond the Life/Not-Life Binary: A Feminist-Indigenous Reading of Cryopreservation, Interspecies Thinking, and the New Materialisms," in *Cryopolitics: Frozen Life in a Melting World,* ed. Joanna Radin and Emma Kowal (Cambridge, MA: MIT Press, 2017), 187.
[41] Tynan, "What is Relationality?", 600.
[42] Robert Cover, "The Supreme Court 1982 term: Foreword: Nomos and narrative," *Harvard Law Review* 97, no. 1 (November 1983): 4.
[43] Law Commission of Canada, *Justice within: Indigenous legal traditions*. Government of Canada, last modified 2006, http://publications.gc.ca/site/eng/9.667883/publication.html?wbdisable=true.
[44] Arturo Andrés Hernández Escobar, "Thinking-feeling with the Earth: Territorial Struggles and the Ontological Dimension of the Epistemologies of the South," *Aibr-revista De Antropologia Iberoamericana* 11 (2016): 15.

destruction of Indigenous land ontologies and corresponding Indigenous legal traditions. For example, the Indian Act of 1876, was a piece of wide-ranging legislation that set in motion violent processes of control and assimilation through the construction of reservations, state residential schools for children, and the criminalisation of traditional sacred land practices.[45] The Act undermined Indigenous sovereignty through forced displacement and European cultural indoctrination as well as through the institutionalisation of a colonial governance and legal infrastructure. These institutions presumed Canadian sovereignty, ignored Indigenous sovereignty, and eroded the practice of their legal traditions.[46]

Delgamuukw v. British Columbia

The issue of unceded land lies at the heart of contemporary Indigenous land struggles and territorial disputes.[47] Most of the territory encompassed by the province of British Columbia was stolen, assumed to be a resource, so it was not signed over to colonial governments by the Indigenous peoples occupying that land.[48] Furthermore, the territories covered by treaties did not represent a relinquishing of Indigenous land rights but rather were reserved to be shared.[49] Since the beginning of British colonisation in the 19th century, the Gitxsan and Wet'suwet'en Nations have resisted land seizure and occupation by the Canadian federal government.[50] *Delgamuukw v. British Columbia* continued that struggle for state recognition of Indigenous land rights.

There are several signature achievements gained by the Gitxsan and Wet'suwet'en nations in *Delgamuukw* – two of which will be discussed and problematised in this section. Overriding the initial court ruling, the Supreme Court of Canada ruled that the provincial government of British Columbia had no right to extinguish Indigenous rights to ancestral territories pursuant to section 35 of the Constitution Act of 1982. This recognised aboriginal title as an "existing aboriginal right". While the case raised and clarified issues relating to Indigenous land title, such as the definition and content of Aboriginal title, it did not outright resolve these issues. While section 35 was discussed by courts to hold "a noble purpose" in pursuing Indigenous justice, the limited legacy of *Delgamuukw*, seen through the Coastal

[45] Law Commission of Canada, *Justice within,* Government of Canada.
[46] Michaela McGuire and Ted Palys. "Toward sovereign indigenous justice: On removing the colonial straight jacket," *Decolonization of Criminology and Justice* 2, no. 1 (2020): 77.
[47] Ashley DeMartini and Rosalind Hampton, "We Cannot Call Back Colonial Stories: Storytelling and Critical Land Literacy," *Canadian Journal of Education / Revue Canadienne de l'éducation* 40, no. 3 (2017): 247.
[48] Augusta Davis, "Unceded Land: The Case for Wet'suwet'en Sovereignty," Cultural Survival, last modified 2020, https://www.culturalsurvival.org/news/unceded-land-case-wetsuweten-sovereignty.
[49] Christopher F. Roth, "Without Treaty, without Conquest: Indigenous Sovereignty in Post-Delgamuukw British Columbia," *Wicazo Sa Review* 17, no. 2 (2002): 143.
[50] *Ibid.*

GasLink Pipeline, undermines the capacity of the Constitution Act to provide meaningful protection to First Nations people.[51]

Another key outcome of this case is the affirmation of oral history as admissible evidence to demonstrate Indigenous land ownership. Despite state-sanctioned practices of forced cultural assimilation, Indigenous oral history, which expresses legal tradition and reinforces human connection to the more-than-human world, persevered.[52] In the initial court ruling, McEachern CJ dismissed oral history as inadmissible evidence for proving Indigenous land ownership stating that "much evidence must be discarded or discounted not because the witnesses are not decent, truthful persons but because their evidence fails to meet certain standards prescribed by law".[53] McEachern CJ's statement is reminiscent of early tensions between settler-colonial and Indigenous ontologies of land that the successful construction of the OWW has distorted. I believe his analysis that the evidence is "exceedingly difficult to understand" best captures the underlying issue.[54] Through the institutionalisation of settler-colonial ontologies of land through law recognising land as property, the state can only recognise evidence of land ownership that conforms to this ontological position; this worldview, however, is fundamentally non-existent within Indigenous ontologies of land that value relationality and reciprocity. Instead, following Indigenous legal traditions, evidence of land occupation is told through stories because their orientation to land defies restrictive settler-colonial ontologies legitimised by a centralised legal system.

Although the Canadian Supreme Court eventually validated oral history as a an admissible form of evidence, the impact of this decision is still limited against the backdrop of larger colonial power dynamics of the state. Moulton supports this claim explaining, "Canada's colonial past and its adherence to a hegemonic and monolithic conception of law are co-constitutive of a process whereby the recognition of Indigenous law will always demand conformity with dominant political and legal discourses".[55] The limitations of the Delgamuukw decision can be explained by the very processes of Indigenous nations engaging with the Canadian legal system. In their attempt to "play by the rules" of Canadian law, Indigenous people's systems of governance and laws are placed as inferior to those of the state, allowing room for the assertion of the Crown's sovereignty. Furthermore, the Supreme Court of Canada ended its decision with the promise of a second trial.[56] After 24 years, this trial has still not yet

[51] Borrows, "Sovereignty's alchemy", 573.
[52] Law Commission of Canada, *Justice within,* Government of Canada.
[53] *Delgamuukw v. British Columbia* [1991] BCJ No 525 (QL), 49.
[54] *Ibid.,* 51.
[55] Matthew Moulton, "Framing aboriginal title as the (mis)recognition of Indigenous law," *University of New Brunswick Law Journal,* 67 (2016): 365.
[56] Roth, "Without Treaty," 160.

proceeded; this has left key issues unresolved and has left the First Nations peoples and their land open to exploitation.

The Coastal GasLink Pipeline

Despite the victory of the Delgamuukw decision, the ongoing issue of the Coastal GasLink Pipeline highlights how tensions between settler-colonial and Indigenous ontologies of land continue to affect Indigenous sovereignty. . Since land rights recognition and the exercise of these rights must occur within the framework of a colonial state, there is room for the state's interests to trump the rights of Indigenous people. Given the fundamental differences between settler-colonial and Indigenous land rights, it is no surprise that Indigenous nations are continually required to defend the land against predatory state interests that seek to exploit the land and its resources, including through the construction of pipelines.

Although the Delgamuukw decision recognised that the provincial government cannot extinguish the land rights of the Wet'suwet'en Nation, the lack of a second trial has resulted in the continued exploitation of land, guided by settler-colonial ontologies. As such, the TC Energy Corporation has received court approval for building the Coastal GasLink pipeline through Wet'suwet'en territory.[57] In the act of resistance, the Nation sought to halt the pipeline's construction and prevent workers from entering the territory through the construction of encampments. However, the Canadian Supreme Court's ruling against the Wet'suwet'en Nation in 2019 to block access to the pipeline embodies the state's disregard for Indigenous law and sovereignty. Additionally, Bill C-15, introduced in 2015, further reflects how the state has routinely disregarded Indigenous laws and sovereignty. Bill C-15 sanctioned the use of force against Indigenous activists who were preventing the pipeline's construction and has reflected how the law has been used to undermine Indigenous self-determination and support settler-colonial land ontologies for the OWW project (Armao 2021).[58]

Conclusion

The limited legacy of the Delgamuukw decision, and the Coastal GasLink speaks to the ways in which settler-colonial land ontologies continue to reflect the settler-colonial "logic of elimination". Ultimately, with limited ability for Canadian courts to bring about the

[57] C. Bellrichard and J. Barrera, "What you need to know about the Coastal GasLink pipeline conflict," CBC News, last modified 2020, https://www.cbc.ca/news/indigenous/wet-suwet-en-coastal-gaslink-pipeline-1.5448363>
[58] Mark Armao, "Canada sides with a pipeline, violating Wet'suwet'en laws — and its own." Grist. last modified 2021. https://grist.org/indigenous/wetsuweten-land-defenders/.

“repatriation of Indigenous land and life,” through state recognition of Indigenous land rights, alternative decolonisation solutions are required to protect Indigenous sovereignty (Tuck and Yang 2020:21). As has been demonstrated, the interests of the state will always come before Indigenous land rights.

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IN SEARCH OF MERCIAN LAW

by Thomas Vare

Introduction

Mercia was an independent polity between the sixth century and the late ninth century, after which it was absorbed into Wessex. Mercia was originally based upon the Trent Valley but during the seventh, eighth and early ninth century it dominated the lands between the Humber and the Thames.[59] There are five extant English law codes from the sixth to the ninth century, none of which are Mercian. Three seventh century Kentish royal law codes survive in a single twelfth century manuscript; the laws of Æthelberht (c. 590-616), the laws of Hlothere (673-685) and Eadric (685-686), and the laws of Wihtred (c. 690-725). Two West-Saxon law codes survive; the laws of Ine, King of Wessex (689-726) was appended to the *domboc* of Alfred the Great (871-899).[60] The early English legal record is, therefore, thin and there are no extant law codes from the major Anglo-Saxon kingdoms of Northumbria, East Anglia, or Mercia.

The lack of an extant Mercian law code is perhaps unsurprising as very little evidence produced within Mercia survives; no Mercian chronicle or annal exists.[61] Indeed, lack of extant legal material does not necessarily mean that Mercia had no law or that no Mercian law code ever existed. The title of this essay alludes to Michael Wood's famous documentary series 'In Search of the Dark Ages' (1979-81) in which Wood narrated and discovered the lives of British historical figures from Boudicca to William the Conqueror.[62] Wood asked the question and then looked for the evidence and this essay takes a similar approach; asking first what Mercian law was and whether a Mercian law code ever existed?

In the sixth and seventh centuries, Mercia almost certainly drew upon a European wide Germanic oral legal tradition. For obvious reasons oral law did not survive unless it became fossilised in a written text, as it did in the law code of Æthelberht. By comparing European law codes, it is possible to adumbrate the form, if not the substance, of Mercia's oral law. As Christianity gradually spread throughout England during the seventh century, literacy increased Anglo-Saxon kingdoms were introduced to Rome's literate heritage. This alongside contact with the written legal culture of Frankia encouraged Kent and Wessex to produce law codes. Mercia, however, was relatively isolated from these developments in the seventh

[59] Nicholas Brooks, "The formation of the Mercian kingdom," in *The Origins of Anglo-Saxon Kingdoms,* ed. Steven Bassett (Leicester: Leicester University Press, 1989), 160.
[60] Lisi Oliver, "The Emergence of Written Laws in Early England," in *The Laws of Alfred,* ed. Stefan Jurasinski, (Cambridge: Cambridge University Press, 2021), 5.
[61] Simon Keynes, "The Kingdom of the Mercians in the Eight Century," in *Æthelbald and Offa*, ed. David Hill and Margaret Worthington (Oxford: BAR Publishing, 2005), 1.
[62] Michael Wood*, In Search of the Dark Ages,* BBC TV Documentary series (London: British Broadcasting Corporation, 1979 –1981).

century; it was the last major kingdom to convert and had weak ties with the Continent and it is unlikely that a written law code was created during this period.

In the late ninth century, Alfred's law code referred to the laws of Offa, King of Mercia (757-796). These laws are no longer extant, nevertheless, Alfred probably referred to a Mercian law code similar to those produced in seventh century Kent. In the eighth century, during the reigns of Æthelbald, King of Mercia (716-757) and Offa, Mercia became the dominant kingdom in southern England.[63] Mercian hegemonic power extended over smaller Anglo-Saxon kingdoms such as, East-Anglia, Sussex, Kent, and Essex. Offa's reign marked the zenith of Mercian learning, political sophistication, and supremacy.[64] His reign was a period of governmental innovation within Mercia; he established the Archbishopric of Lichfield in 787 and was the first English king to mint a large volume of silver pennies bearing his name. Moreover, Offa was also an important figure within Europe; he corresponded with Charlemagne, King of the Franks (768-814), and c. 784 Pope Hadrian I (772-795) believed that Offa was conspiring against the papal throne.[65] Offa's European contacts and the increased sophistication of his court possibly provided the context for the formation of a Mercian law code. It is further possible that Offa's laws drew upon earlier precedents produced under Æthelbald, although the evidence of a thriving literate Mercian court during the early eighth century is not clear. Ultimately, the little evidence we have suggests that the Mercian legal tradition started in the eighth century, somewhat later than in Kent or Wessex.

Oral Law

Mercia in the sixth and early seventh centuries was an oral society and Mercian law likely drew upon a wider Germanic oral tradition. In the ethnographic monograph *De Origine et Situ Germanorum,* Tacitus described Germanic law and the 'fine going to the king or state, part to him who is avenged or his kin'.[66] The *Germania,* written in 98 A.D., was imbued with classical tropes and contained a political and moral agenda for a Roman audience.[67] Thus, the specific content of the laws described in the *Germania* probably did not reflect Germanic law at the time let alone in sixth century Mercia. Nevertheless, Tacitus' continued insistence on Germanic law suggests that there was a strong oral legal tradition in pre-migration Germania. Indeed, early Germanic law codes, created in the centuries after the fall of the Western Roman

[63] Ian Walker, *Mercia and the making of England* (Stroud: Sutton Publishing, 2000), 1-19.
[64] Frank Stenton, *Anglo-Saxon England* (Oxford: Clarendon Press, 1971), 224.
[65] J. Wallace-Hadrill, "Charlemagne and England," in *Early Medieval History*, ed. J. Wallace-Hadrill (Oxford: Basil Blackwell, 1975), 155-180.
[66] Tacitus, "The Origin and Situation of the Germani,", trans. and ed. James Rivers (Oxford: Oxford University Press, 1999), ch. 12.
[67] M. Miller, "Style and Content in Tacitus," in *Tacitus*, ed. Thomas Dorey (London: Routledge, 1969), 106.

Empire in 476, appear to be based upon a common oral tradition.[68] For instance, Æthelberht's law code, the earliest of the English law codes, used the same physiological structure to deal with compensation of physical injuries as the Edictum of Rothari and the *Lex Baiuvariorum*.[69] It is very unlikely that there a direct textual relationship exists between southern Germanic and Kentish texts and this suggests they were drawn from a common oral tradition. Indeed, Æthelberht's laws were possibly based, at least in part, upon a sixth century 'oral text'; it contains evidence of the archaic dative and has simple syntax and vocabulary, and a clear structure.[70] Indeed, all pre-Alfredian Anglo-Saxon law codes, unlike their Continental contemporaries, were written in their native language; this suggests that English law was based upon a native oral tradition rather than replicating Roman law.[71] Overall, therefore, the evidence suggests that the Anglo-Saxons shared in a common Germanic legal tradition that dated back to the pre-migration period. Mercia almost certainly shared in this common tradition, although the specific form and substance of Mercian law has been irrevocably lost.

Mercia's Seventh Century Law Code?

Mercia was the dominant political power in England during the reigns of Wulfhere (658-675) and Æthelred (675-704). Despite this political dominance, no Mercian legal code survives from this period and no contemporary or later author referred to such a text. This does not conclusively prove that no legal code ever existed, nevertheless, it is very unlikely that oral Mercian law was codified in the seventh century. By the end of the seventh century and the beginning of the early eighth century, the promulgation of a law code was considered noteworthy. For instance, in the *Historia ecclesiastica gentis Anglorum* (c. 731) Bede mentioned the 'code of law' produced by Æthelberht and stated that Eorcenberht, King of Kent (640-664), 'prescribed suitably heavy punishments for offenders'.[72] Bede was a Northumbrian monk at Monkwearmouth-Jarrow and his *Historia* represented a Northumbrian view of the seventh century. The Northumbrians and Mercians were consistently at war throughout the seventh century and Bede likely viewed Mercia as an aggressive rival.[73] Indeed, despite Mercia's political dominance in the late seventh and early eighth centuries, Bede did not name

[68] Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century* (Oxford: Blackwell, 1999), 101.
[69] Nicholas Brooks, "The Laws of King Æthelberht of Kent," in *Textus Roffensis: Law, Language and Libraries in Early Medieval England*, ed. Bruce O'Brien, (Turnhout: Brepols, 2015), 117.
[70] Lisi Oliver, "Legal Documentation and the Practice of English law," in *The Cambridge History of Early Medieval English Literature,* ed. Clare Lees (Cambridge: Cambridge University Press, 2013), 499-529.
[71] Oliver, "The Emergence of Written Laws," 13.
[72] Bede, *The Ecclesiastical History of the English People,* trans. and ed. Judith McClure (Oxford: Oxford University Press, 2008), 78, 122.
[73] Patrick Wormald, "Bede, the Bretwaldas and the Origins of the *Gens Anglorum,*" in *Ideal & Reality in Frankish & Anglo-Saxon Society,* ed. Patrick Wormald (Oxford: Wiley-Blackwell, 1983), 110.

a Mercian king in his list of seven kings who ruled 'over all the southern kingdoms'.[74] Nevertheless, the mention of Æthelberht's law code in the *Historia* indicates that by the first half of the eighth century the production of law codes was considered important. The lack of references to a Mercian law code in any contemporary source is noteworthy and heavily suggests that none were produced.

In the seventh century Mercia was relatively isolated from the socio-political influences that led to the codification of oral law in Kent and Wessex. There were three interlinked factors that encouraged the production of written law codes in England during the seventh century; conversion to Christianity, contact with Rome, and Frankish influence. Conversion to Christianity appears to have been a pre-requisite to the production of written law in post-Roman Germanic kingdoms.[75] Christianity was and is a religion of books, in the medieval period the component books of the Bible often circulated independently rather than together, and ecclesiastical institutions, therefore, required a literate class to communicate, understand, and propagate the Bible. The church, therefore, provided a consistent stream of literate clergymen whose skills were used not only theologically but also administratively; early medieval charters were almost exclusively written by clergymen.[76] The church not only trained a consistent supply of literate men but also created a demand for written documents. The church was founded in a literate Roman world, and, despite the collapse of the Western Roman Empire, literacy remained important to the church's administrative ideology. The church, therefore, encouraged secular leaders embrace literacy, indeed, it has been suggested that charters were introduced to England by Theodore of Tarsus, Archbishop of Canterbury (668-690).[77] Furthermore, the Bible provided and provides clear examples of written law in Deuteronomy, Leviticus, and most famously the Decalogue in Exodus 20.[78] Indeed, Christianity was clearly important to the production of the seventh century English legal codes; the first six clauses of Æthelberht's law code deal with the harsh compensations due for crimes against the church, Wihtred's laws primarily dealt with ecclesiastical issues, and Ine 70.1 echoed 1 Kings 4: 22-23.[79] Christianity therefore, encouraged literacy and provided the template for written legal codes in England.

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[74] *Ibid.,* 78.
[75] Patrick Wormald, "Legislation and Germanic Kingship," in *Early Medieval Kingship,* ed. P. H. Sawyer and Ian N. Wood (Leeds: University of Leeds, 1977), 131.
[76] Simon Keynes, "Church Councils, Royal Assemblies, and Anglo-Saxon Royal Diplomas," in *Kingship, legislation and power in Anglo-Saxon England,* ed. Gale Owen-Crocker and Brian W. Schneider (Suffolk: Boydell Press, 2013), p. 83.
[77] Pierre Ghaplais, "The Origin and Authenticity of the Royal Anglo-Saxon Diploma," *Journal of the Society of Archivists,* 3 (1965): 25.
[78] Wormald, "Legislation and Kingship," 132.
[79] R. Lavelle, "Ine 70.1 and Royal Provision in Anglo-Saxon Wessex," in *Kingship, legislation and power in Anglo-Saxon England,* ed. Gale Owen-Crocker and Brian W. Schneider (Suffolk: Boydell Press, 2013), 259-272.

Contact and engagement with Rome encouraged the creation of written law. Rome was the theological, ideological, and literary centre of Western Europe and, despite the fall of the Western Roman Empire, the Petrine church, through the arts of simulation and preservation, maintained the appearance, if not the actuality, of the Imperial heritage. Roman law, both before and after the fifth century, was written and institutionalised. For instance, in the second century A.D the jurist Gaius wrote the *Institutes,* a legal textbook, and later Emperors such as Theodosius II and Justinian I attempted to codify and collate the written tradition.[80] Indeed, Roman law provided an archetype for Germanic legal codes throughout Europe; most clearly evidenced by the use of Latin in all Continental early medieval legal documents.[81] In Britain Roman society and administration fell almost entirely after the Anglo-Saxon invasions and it was Augustinian mission sent by Pope Gregory the Great (590-604) in 597 that reintroduced Rome's legacy to southern England.[82] The link created between Kent and the papacy endured, for instance, the first seven Archbishops of Canterbury were Italian. Further, although no mission was sent directly to Wessex from Rome, the West-Saxons did have a strong relationship with the papacy; both Cædwalla, King of Wessex (685-688), and Ine retired to Rome. Moreover, the prevalence of Celtic place names in western Wessex and the strange inclusion within Ine's code of eight laws concerning Britons may suggest that more Romano-Britons survived within Wessex than other Anglo-Saxon kingdoms.[83] Indeed, Daniel, Bishop of Winchester (c. 705-744), bore a typically British name. It is possible, although in no way provable, that the subjugated British population encouraged or possibly introduced the West-Saxons to Rome's legacy.[84] A close connection to the papacy did not necessarily mean that Rome's legal heritage would be adopted. For instance, Northumbria did not produce a law code despite it having very close theological, ideological, and academic links to Rome in the seventh century. Nevertheless, Rome and the papacy was ideologically committed to the supremacy of the written word and its legal tradition encouraged the production of legal documents and codes. Indeed, although Anglo-Saxon law codes were always written in English, there was still an association between Rome and written law; Bede stated that Æthelberht's laws were promulgated 'after the Roman manner'.[85]

Frankish contacts also encouraged the codification of English oral tradition. After the victory of Clovis, King of the Franks (481-511), at the Battle of Vouillé in 507, Frankia became

[80] Katherine Drew, "Introduction,", in *The Laws of the Salian Franks,* ed. Katherine Drew (Philadelphia: University of Pennsylvania Press, 2012), 18.
[81] Wormald, "Legislation and Kingship", 115.
[82] Guy Halsall, *Worlds of Arthur* (Oxford: Oxford University Press, 2013), 174.
[83] Louis Alexander, "The legal status of the native Britons in late seventh-century Wessex as reflected by the Law Code of Ine," *Haskins Society Journal* 7 (1995): 32.
[84] Martin Grimmer, "Britons in Early Wessex," in *Britons in Anglo-Saxon England,* ed. Nick Higham (Woodbridge: Boydell & Brewer, 2007), 111.
[85] Bede, *Ecclesiastical History,* 78.

the dominant political and military power in Western Christendom.[86] More of Roman civil society survived in Gaul than Britain, indeed, Aquitanians were referred to as Romans throughout the early Middle Ages.[87] The Franks, like their Visigothic adversaries, were, therefore, able to draw more heavily upon the Roman legal tradition; indeed, the Laws of the Salian Franks, produced in the first decade of the sixth century, were compiled by legally trained Roman bureaucrats.[88] Frankish contacts, therefore, indirectly introduced Anglo-Saxon kingdoms to the written Roman tradition. Kent was, and strangely still is, the closest part of England to France and it is unsurprising that the early Kentish kingdom had close cross-channel contacts. Indeed, Ian Wood has suggested that in the sixth and early seventh century Kent may have been under Frankish hegemony.[89] There is not time to discuss presently the merits of this argument, nevertheless, it is evident that there were frequent exchanges between the two kingdoms; Æthelberht of Kent introduced gold coins modelled on Frankish predecessors and married Bertha, daughter of Charibert I, King of the Franks (561-567).[90] There are less obvious political contacts between Wessex and Frankia, however, by the end of the seventh century there was a significant amount of trade between the two kingdoms. For instance, a considerable volume of Rhenish pottery and Frisian ware was found at *Hamwic,* the West-Saxon 'emporia' near Southampton.[91] However, despite the links between Æthelberht's laws and southern Germanic codes, none of the seventh century English law codes were directly modelled on Frankish documents. Nonetheless, Frankish political, economic, and ideological contacts likely encouraged both Kentish and West-Saxon kings to emulate the legal tradition of the dominant polity of Western Europe.

Mercia, however, was late to convert and its contacts with Rome and Frankia were weak during the seventh century. Bede stated that 'the whole Mercian race were idolaters and ignorant of the name of Christ' until Peada, King of Mercia (655), embraced Christianity.[92] Mercia was therefore two or three generations later than other Anglo-Saxon kingdoms to convert; Æthelberht of Kent converted in the first years of the seventh century and Cynegils King of Wessex (c. 611-c.643) converted in 635. Furthermore. just as Mercia was late to convert so it appears the kingdom had less physical and ideological contact with Rome and Frankia. In the sixth and seventh centuries Mercia was militarily involved in conflicts with Northumbria and in the western part of the kingdom. Indeed, Mercia comes from the Old English word *merce,* border, and it is likely that the nascent kingdom was defined by conflict

[86] John Drinkwater, *The Alamanni and Rome 213-496* (Oxford: Oxford University Press, 2007), 354.
[87] Archibald Lewis, *The Development of Southern French and Catalan Society, 718-1050* (Austin: University of Texas Press, 1965), 130.
[88] Drew, *The Laws of the Salian Franks*, 18.
[89] Ian Wood, *The Merovingian Kingdoms 450-751* (London: Routledge, 1994), 66.
[90] Stuart Brookes and Sue Harrington, *The Kingdom and People of Kent, AD 400-1066* (Stroud: The History Press, 2010), 90.
[91] Richard Hodges, *Dark Age Economics: A New Audit* (London: Duckworth, 2007), 104.
[92] Bede, *Ecclesiastical History*, 105.

with the Welsh and the Hwicce, whom Penda, King of Mercia (c. 626-655), conquered in 628.[93] Mercia was, therefore, politically focused upon local quarrels and was neither politically or economically integrated into the Frankish world nor engaged with the ideological ramifications of Rome's Christian heritage. This contrasts with Wessex and Kent during the seventh century, and possibly explains why no Mercian law code was produced despite Mercian political dominance in the latter part of the century.

The Laws of Offa

The prologue to the laws of Alfred the Great mentioned the sources upon which his *domboc* drew:

> But those which I found, which seemed to me most just, either in the time of my kinsman, King Ine, or of Offa, king of the Mercians, or of Ethelbert, who first among the English received baptism, I collected herein, and omitted the others.[94]

This is the only direct reference to Mercian law, and it suggests that at some point in the second half of the eighth century Offa produced a now lost law code. The same influences that Mercia had been isolated from in the seventh century were now active in the eighth; Mercia was firmly Christian, had contacts with Rome, and emulated Frankia. Mercia's political agenda had also changed; throughout the eighth century it focused, with varying degrees of success, on establishing a political hegemony on the south-east over Kent, Sussex, and Essex. This southern focus brought Mercia more firmly into the Frankish and Roman sphere which possibly provided the political framework for the production of a Mercian law code.

Patrick Wormald argued that Alfred's reference to Offa's laws was not to a now lost text but rather to the Legatine Capitulary, written after the visit of papal legates to England in 786.[95] The Capitulary, written in Latin, recorded twenty canons ten of which deal explicitly with ecclesiastical matters and ten which have a more political nature.[96] The Capitulary was promulgated first in Northumbria and then at 'the council of the Mercians, where the glorious King Offa had come together with the senators of the land'.[97] It was also read aloud in English 'both in Latin and in the vernacular', and may have, therefore, had an English gloss.[98] Further, it was known in tenth century Canterbury and Wormald contended that the association with

[93] M. Gelling, *The Early Charters of the Thames Valley* (Leicester: Leicester University Press, 1979), 67.
[94] 'The Laws of Alfred', in *English Historical Documents,* ed. Dorothy Whitelock (London: Eyre Methuen, 1979), 332.
[95] Wormald, *The Making of English Law,* 107.
[96] Bryan Carella, "Alcuin and the Legatine Capitulary of 786," *The Journal of Medieval Latin* 22 (2012): 221-225.
[97] "The Legatine Report," in *English Historical Documents,* ed. Dorothy Whitelock (London: Eyre Methuen, 1979), 839.
[98] *Ibid.,* 840. Wormald, *The Making of English Law,* 107.

Offa and the possible English gloss may have led Alfred's court to mistakenly believing it was Offa's law code. However, Alfred clearly stated that he drew from these sources and he appended Ine's law code to his own laws, yet there are no clear similarities between the Legatine Capitulary and Alfred's *domboc*.[99] Indeed, the Legatine Capitulary appears to have left no trace on Alfredian literature and it does not appear to have been known or used in ninth century Wessex. It is, therefore, better to take Alfred's words at face value; that a now lost text of Offa's laws existed and was known in ninth century Winchester. Indeed, Offa appears to have been well respected within the West-Saxon court; Asser stated, 'he had a great dyke built between Wales and Mercia', and Offa's sword appeared in Æthelstan's will.[100] It is, thus, not unlikely that Alfred would have drawn from Offa's legal text in his own work.

Offa established extensive links with Rome and Frankia in the years after 780 which possibly encouraged the production of a law code. Unlike previous Mercian kings, Offa attempted to conquer and subdue Kent; in 764 he was the first Mercian king to grant land in Kent and by 770 he granted land in the region without reference to a Kentish king.[101] Despite a period of Kentish independence between 776-784, Offa eventually began to dominate Kent; he installed a Mercian Archbishop of Canterbury in 793 and used the Canterbury mint to produce coins bearing his name.[102] Offa's conquest likely introduced Mercia to a more sophisticated literary and political culture as, regardless of Mercia's political domination, Kent remained the ideological and theological centre of southern England.[103] By the end of the seventh century written law was evidently part of Kentish society; the laws of Wihtræd were disorganised and give the impression that written law was responding to individual cases as they appeared.[104] The conquest of Kent, therefore, possibly introduced Mercia into a political culture in which written law was a key component. Moreover, the control of the Archbishopric of Canterbury drew Mercia into the wider ideological sphere of Rome. After 780 Offa was in frequent contact with Rome; a letter from Pope Leo III to Coenwulf, King of Mercia (796-821) mentioned that Offa 'would send every year as many mancuses as the year had days', indeed, a gold mancus bearing Offa's name was found in Rome.[105] Moreover, the aforementioned Legatine Capitulary was the first English papal mission since Gregory the Great sent Augustine in 597. These canon laws were promulgated at Offa's court and may even have influenced or inspired Offa to codify his own laws. There is no direct evidence that Offa directly emulated either Roman or Kentish political models let alone the codification of his legal code,

[99] Oliver, "The Emergence of Written Laws," 5.
[100] Asser, "Life of Alfred," in *Alfred the Great*, ed. Simon Keynes (Harmondsworth: Penguin, 1983), 71.
[101] Eric John, *Reassessing Anglo-Saxon England* (Manchester: Manchester University Press, 1996), 54.
[102] Rory Naismith, "The Coinage of Offa Revisited," *British Numismatic Journal* 80 (2010): 83-94.
[103] Wormald, "Bede, the Bretwaldas and the Origins", 110.
[104] Wormald, *The Making of English Law,* 107.
[105] "Letter of Cenwulf to pope Leo III," in *English Historical Documents,* ed. Dorothy Whitelock (London: Eyre Methuen, 1979), 861. Derek Chick, "The Coinage of Offa in the light of Recent Discoveries," in *Æthelbald and Offa*, ed. David Hill (Oxford: BAR Publishing, 2005), pp. 111-122.

nevertheless, the late eighth century brought Mercia into contact with written legal traditions both on the Continent and in Kent.

Mercia also had increasing links with Frankia during Offa's reign. Two letters from Charlemagne to Offa remain extant in which economic, political, and diplomatic issues were discussed and, although none of Offa's responses survive, it appears there was constant contact between the two courts that far exceeded anything in the seventh century.[106] Furthermore, Offa emulated Charlemagne, for instance, in 787 the Anglo-Saxon Chronicle recorded that 'Ecgfrith [Offa's son] was consecrated king', and this likely paralleled the consecration of Charlemagne's sons Louis and Charles in 781.[107] Likewise in 793 Offa radically reformed Mercian coinage and brought it into line with the weight and style of Charlemagne's coins.[108] During Charlemagne's reign Frankish laws were collated and edited; Einhard stated in the *Vita Karoli* that Charlemagne 'ordered that the laws of all the peoples under his which were not written should be written down'.[109] Indeed, manuscripts of Bavarian, Saxon and Lombardic law codes, all of which claim an antique origin, appear during Charlemagne's reign.[110] It is, therefore, possible that Offa attempted to emulate Frankish legal policy just as he emulated Charlemagne's monetary and theological reforms.

Alfred's words suggest that Offa promulgated a legal code and the conquest of Kent, and the links with Rome and Frankia, lend credence to Alfred's testament. The law code was likely produced in the 780s or 790s when Offa's hegemony stretched over all the southern English and when he was increasingly influential on the European stage. It is possible that Offa was building on earlier written Mercian law codes; Æthelbald of Mercia extended his hegemony over southern England, corresponded with the missionary Boniface, and promulgated canon laws at the Council of Clovesho 747.[111] However, there is no mention of Æthelbald producing a law code and he did not have extensive contact with either Rome or Frankia. The contents of Offa's law code have now been lost, however it was probably written in Old English and dealt with a mixture of ecclesiastical and royal laws. Alfred speaks of it in the same breath as Æthelbald and Ine's law codes and the code must be considered in this legal tradition rather than that of the Legatine Capitulary.

[106] Joanna Story, *Carolingian Connections: Anglo-Saxon England and Carolingian Francia, c. 750-870* (Aldershot: Taylor and Francis, 2003), 195.
[107] "The Anglo-Saxon Chronicle," in *English Historical Documents,* ed. Dorothy Whitelock (London: Eyre Methuen, 1979), 179.
[108] Derek Chick, *The Coinage of Offa and his Contemporaries* (London: Spink, 2010), 123-128.
[109] Einhard, "The Life of Charlemagne", in *Two Lives of Charlemagne,* ed. David Ganz (London: Penguin Classics, 2008), 38.
[110] Matthew Innes, "Charlemagne, Justice and Written law," in *Law, custom and justice in late antiquity and the early Middle Ages,* ed. Alice Rio (London: Centre for Hellenic Studies, 2011), 170.
[111] Sarah Zaluckyj, *Mercia: The Anglo-Saxon Kingdom of Central England* (Almeley: Logaston Press, 2001), 70.

Final Thoughts

Mercian law, as with all Germanic law, originated in a predominantly oral society with roots into the pre-migration age. In the seventh century Mercia was late to convert and, unlike Kent or Wessex, had very little links to the written legal tradition in either Rome or Frankia. Indeed, despite political dominance under Wulfhere, Æthelred, and Æthelbald it is very unlikely that a law code was produced during this period. The prologue to Alfred's *domboc* suggests that Offa produced a written law code, which was possibly the first and only law code produced by a Mercian king. Offa's political power in Kent, and his contact with Frankia and the papacy, likely influenced the promulgation of this now lost code.

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TRADING WITH THE ENEMY IN THE GREAT WAR: THE DIRECTORS OF WILLIAM JACKS AND THE COMPANY IN GLASGOW

by Dr. Robert S. Shiels

A. **INTRODUCTION**

The criminal prosecution in 1914 of two Glasgow businessmen, Messrs Hetherington and Wilson of William Jacks and Company was for a breach of wartime legislation concerning trade with the enemy. A former Director of the company was Andrew Bonar Law MP. It was a case with difficult legal decisions for the public prosecutor, partly because of the new law and also for the serious political interest in the decision to proceed and the trial in the context of febrile politics to settle on a coalition government for the wartime United Kingdom.

The Great War began on 4 August 1914 and the outbreak of hostilities led immediately to legislation for the new conditions including a statutory prohibition on trading with the enemy. The Royal Proclamation had a degree of immediacy but it became clear that additional powers were needed as *lacunae* were soon found in legislation that had been passed.[112] The law and the immediate promptings of good sense and, separately, political acumen probably brought about an almost immediate reduction in exports. That may be a statement of the obvious but an immediate issue was how quickly that cessation could or should be put into effect when goods were in transit. The initial legislative prohibition on trade with the enemy and associated naval blockade were not unprecedented in wartime but these were fast moving events even in that period. There were also legal developments later in the war that led to companies being wound-up.[113]

The lawyers of the period knew that the initial legislation was to be followed by more, and readers of contemporary legal journals were exhorted to get to grips with the basic law in anticipation of what was almost certain to follow, and did follow.[114] From the outbreak of war to 30 April 1915 there were 90 cases of suspected trading with the enemy that had been forwarded to the Director of Public Prosecutions for England and Wales, the Lord Advocate for Scotland and the appropriate authorities for Ireland. Specifically, 15 such cases in Scotland were sent to the Lord Advocate, as national public prosecutor.[115]

[112] Anonymous, "Trading with the Enemy Legislation," *Scottish Law Review* 32 (1916): 105-107.
[113] John McDermott, "Trading with the Enemy: British Business and the Law During the First World War", *Canadian Journal of History* 32, no. 2 (1997: 201-219.
[114] Anonymous, "Trading with the Enemy Legislation," 107.
[115] McDermott, "Trading with the Enemy," 208.

One of the most sensitive of the latter cases was that concerning William Jacks and Company in Glasgow.[116] The seriousness of the possibility of prosecution may be considered from two points. First, a consignment was made of more than 7,000 tons of iron ore by the firm of William Jacks and Company in Glasgow to a German customer. The goods were *en route* at sea at the date at which war was declared. The ship with the iron ore left Canada on 25 July 1914 and it had reached a point just in the English Channel at the date of the declaration of war on 4 August 1914. The goods were delivered to Rotterdam and removed from the ship after the war had been declared. There appears to have been some dispute between the firm of William Jacks and Company in Glasgow and their agents in Rotterdam as to who did what and why it had been done.

Secondly, one of the possible accused, John Richard Kidston Law, generally known as Jack Law, was the brother of Andrew Bonar Law, who was still a Member of Parliament having also in 1911 become Leader in the House of Commons of the Conservative and Unionist Party. At the point that the possibility arose of prosecution by the public prosecutor in Scotland, Bonar Law was Leader of the Opposition in the House of Commons and on 25 May 1915 he became Secretary of State for the Colonies, and less than a decade later he became Prime Minister. Ultimately nothing adverse for Bonar Law came of the whole matter.[117] Yet, the experience "hardly provided the best background for him [Bonar Law] to conduct the delicate negotiations about the form of the [wartime national] coalition".[118]

B. THE COMPANY

Andrew Bonar Law left school to become, through family connections, a clerk at Kidston and Company in Glasgow, a deceptively simple statement of fact that elides an explanation of his birth and upbringing in New Brunswick, Canada, and close family connections with Scotland. As a clerk he received a nominal salary, on the understanding that he would gain a "commercial education" from working there and that would serve him well later as a businessman.[119] In 1885 the Kidston brothers decided to retire, and agreed to merge the firm with the Clydesdale Bank. Such a merger would have left Bonar Law without a job and with poor career-prospects, but the retiring brothers found him a job with William Jacks, an iron merchant who was pursuing a parliamentary career and subsequently became a Liberal

[116] McDermott, "Trading with the Enemy," 209.
[117] R. J. Q. Adams, *Bonar Law* (London: Thistle Publishing, 2013), 190-1.
[118] EHH Green, "Andrew Bonar Law," in *Oxford Dictionary of National Biography,* ed. HCG Matthew and B Harrison (Oxford: Oxford University Press, 2004), 728-738, 733.
[119] Adams, *Bonar Law,* 11.

Member of Parliament. Bonar Law in 1902 became a Director of the Clydesdale Bank.[120] It is known that Bonar Law also had directorships with three other companies, and he inherited substantial sums from relatives.[121]

The Kidston brothers lent Bonar Law money to buy a partnership in Jacks' firm, and with William Jacks himself no longer playing an active part in the company, Bonar Law effectively became the managing partner. He turned the firm into one of the most profitable iron merchants in the market. Bonar Law moved into politics and he was returned for a Glasgow constituency at the general election of 1900. He was 42 years old then and he had some difficulty initially in adapting to the pace of Parliament which was somewhat slower than that of the intensely competitive iron market. However, on his election to Parliament in October 1900 he ended his active work at William Jacks and Company and moved to London.[122]

There were several companies with identical names: Bonar Law seems to have been involved most closely with William Jacks and Company in Glasgow: the firm known as William Jacks and Company in London was an entirely different firm, albeit with identical origins. The Glasgow firm was founded by William Jacks and Bonar Law, while the London firm was founded by William Jacks and Andrew Bonar Law along with J. Gray Buchanan. By 1915, no partner in the firm of William Jacks and Company in Glasgow had any interest direct or indirect in the London firm, and vice versa. On Bonar Law's entry into politics in 1901, he "severed his connection entirely" with both firms, and after the death of William Jacks in 1907 there was no connection even indirectly between the two firms.[123]

C. DECIDING TO PROSECUTE

(1) Preliminary procedure

An important element of criminal procedure in Scotland came to play an unusual part in the decision-making process. Prior to 1898 an accused was not able to give evidence directly in his or her own trial.[124] The change of law did not dispense with the procedure of providing a declaration on arrest. Thus, when brought before a Sheriff for committal proceedings an accused was asked if he or she wished to 'emit a declaration', that is to say give an explanation

[120] Charles W. Munn, *Clydesdale Bank: The First One Hundred and Fifty Years* (London and Glasgow: Collins, 1988), 85.
[121] Adams, *Bonar Law*, 13.
[122] *Ibid.,* 20.
[123] BL/64/D5. There are two letters dated 7 June 1915 and 14 June 1915 in identical terms and both marked 'private and confidential'. The former is apparently typed while the latter seems printed, presumably for wider dissemination within business circles.
[124] The law was changed by Criminal Evidence Act 1898 (c.36).

of events. By 1915 the decision whether to state any defence or other explanation to be relied on later at trial that procedural point was a matter for an accused with advice from a solicitor.[125] The declaration became evidence in the case and high regard was paid to anything said then, as it was evidence given on oath. It seems a reasonable guess now that with such a discretion the general practice of legal advice to a client may have been to say nothing, which advice may or may not have been acted on depending on the circumstances.[126] The declaration of John Law and another director were eight months after the events of interest to the authorities.

In that judicial declaration dated 1 April 1915 John Law said, and in effect he pre-empted any evidence that he might have given at the trial had he been charged, that he was a Director but that he was only to devote such time as he thought necessary to the business. By an earlier contract of partnership dated 1908 it had been settled that he was not bound to devote his whole time to the business. He asserted in his declaration that he knew nothing in August 1914 of the commercial activity by then of interest to the authorities: "Nothing was said to me about it". He had not seen any of the relevant letters.[127] Another Director proceeded similarly with a declaration and offered a different, but nevertheless exonerating, explanation.[128]

The assertions of John Law have to be seen in the context of that part of the Crown case for which two Prints of Correspondence and a Print of Documents were prepared. In the latter was 'Excerpts from the Contract of Co-partners of William Jacks and Company'.[129] One such except was the fifth term of the agreement which provided that: "The parties shall daily consult with one another, so far as practicable, about the conduct of the firm's business".[130] The document was signed by John Law and four others including the two other Directors who did appear in court as accused.

The potential prosecution case was revised by the Law Officers personally: on 5 April 1915, the Lord Advocate wrote to the Solicitor General for Scotland. He sent on a revised draft indictment and advised that on the evidence he had "reluctantly felt obliged to exclude" one of the draft charges.[131] It was also written that: "The declarations mark a new development in the case. I greatly fear we may have to let [John] Law and [the other director] out. Against their

[125] Robert W. Renton and Henry H. Brown, *Criminal Procedure According to the Law of Scotland* (Edinburgh: William Green and Sons, 1909), 37-40.
[126] The competence of making such a declaration was abolished by s.35(6A) which was introduced into the Criminal Procedure (Scotland) Act 1995 by s.78(1) of the Criminal Justice (Scotland) Act 2016.
[127] NRS: AD15/15/20: Box 1.
[128] The explanation was that in the course of his business as a steel merchant for the firm he only dealt with steel and the issue for the authorities to investigate was iron ore.
[129] NRS: AD21/9. The document is dated 27 and 28 January 1914.
[130] NRS: AD21/9, 13-15.
[131] NRS: AD21/9, 13-15.

sworn testimony we have the provision in the deed of co-partnery – with which it seems to me they deal somewhat disingenuously - and the strong probabilities of the situation".[132] It was noted that neither John Law nor the other director said they were physically in the rooms constituting the firm's office at the critical period. The indictment for service, as the concluded extent of the Crown case, omitted the name of John Law.

The Crown papers include a precognition, a statement taken in anticipation of his being called to give evidence, from Alexander Muirie, a clerk at the company, on 19 December 1914. In short, he said that in the three years working there he had seen John Law in the office but that Law had had nothing to do with the business of any part of the firm. He said that: "Mr Law is most irregular in his attendance" and he had "never heard him converse with any of his partners in regard to the business nor have I seen him examine the books. He takes no charge in instructing the staff as to what is to be done […]".[133] He thought that John Law was "a sleeping partner".[134]

(2) Opinion of Counsel

Concurrently with prosecutorial preparation, the concern of some future action by the prosecutor was confirmed in details set out in a *Memorial for Counsel,* a statement of the known facts that would be sent to independent counsel for advice as to how the accused or potential accused might proceed. The *Memorial for Counsel* narrated the fact of an attendance at the offices of the firm by the Procurator Fiscal, the local public prosecutor, personally "accompanied by one of his officers" and a Chartered Accountant.[135] Further, a warrant was presented that was "signed by the Secretary of State for Scotland" authorising on statutory authority the Procurator Fiscal to examine all books and papers to ascertain whether there had been a breach of the law on trading with the enemy.[136] Full co-operation, it was said, was then provided. The Directors wanted to know if an offence had been committed: "it would be a disaster of far-reaching consequences if a prosecution was initiated".[137]

Communications between lawyers and their clients have been confidential since the beginning of time and that was certainly the position in 1915 in Scotland.[138] On that basis, some deference must be paid to the *Memorial for Counsel* with the papers of Bonar Law, although it only states the facts of the circumstances and must surely have been accompanied

[132] NRS: AD21/9, 13-15.
[133] NRS: AD21/9, 13-15.
[134] NRS: AD21/9, 13-15: James Cochran, also a clerk there, gave his precognition (a statement to the public prosecutor of likely evidence) and confirmed the same as Muirie had said.
[135] BL/64/D1, 16. When that event occurred is uncertain as the *Memorial for Counsel* is undated and refers only to the attendance of the Procurator Fiscal and others at "the beginning of last week".
[136] BL/64/D1, 16.
[137] BL/64/D1, 16.
[138] See J. Henderson Begg, *A Treatise of the Law of Scotland relating to Law Agents* (Edinburgh: Bell & Bradfute, 2nd ed., 1883).

with a consultation.[139] The document was nevertheless intended to identify the context of a problem for which independent advice was sought.[140] A copy of the *Memorial for Counsel* was most likely have been sent to Bonar Law to alert him to the facts on which the problem had arisen. It may be that an Opinion from counsel was obtained in answer to the questions asked but, if one was obtained in writing rather than by oral advice at a meeting, then that does not seem to have been received by or kept by Bonar Law with his other papers.[141]

The seventeen-page document constituting the *Memorial for Counsel* appears to have been drafted from a close consideration, probably undertaken at fairly short notice, of the business papers then in the office of William Jacks and Company in Glasgow.[142] The written language of the *Memorial for Counsel* suggests discussions with the accused.[143] These two aspects of the *Memorial for Counsel* suggest strongly that it was the solicitor to the accused Directors or the company who had been instructed to seek definitive advice on their predicament but what was that? It was stated in several ways but ultimately it probably amounted to the same problem. "The question, a very difficult and important one, on which the Memorialists desire the assistance of Counsel, arises in connection with a shipment to Rotterdam".[144] Further, "[…] the question on which the Memorialists desire advice is as to whether the events which now transpired constitute a breach of the Trading with the Enemy Act 1914".[145] Finally, "The question of course is whether the Memorialists have committed a breach of the proclamation of 5th August and 9th September, under which it is prohibited to supply to or obtain goods from the enemy".[146]

The *Memorial for Counsel* does provide some explanation of the events which would have given any counsel some grounds for thought. In describing the "disorganisation" of the journey of the ship, known as the 'Themis' and its cargo, around which the legal problem crystallised, it was said:

"The Memorialists, appreciating the difficulty, decided to do everything in their power to prevent the Themis arriving at Rotterdam, not it must be probably admitted on account of

[139] BL/64/D1.
[140] The recipient of the *Memorial* is not named in the document. The accused Directors at trial were represented by the Dean of the Faculty of Advocate, J.A. Clyde KC. It seems likely that the *Memorial* was sent to him.
[141] The *Memorial* and any Opinion in response would of course set out the limits of the issue and a possible line to be taken in response by the accused which would allow Bonar Law to respond.
[142] BL/64/D1, e.g., 3, "there is voluminous correspondence between [the commercial agent] and the Memorialists which there has not been time to copy"; BL/64/D1, 9, "It would appear from the correspondence"; BL/64/D1, 10, "At this stage the correspondence between [the commercial agent] and the *Memorialists* became somewhat acrid […]"; BL/64/D1, 12, "Various letters and telegrams bearing on negotiations […] follow"; BL/64/D1, 14, "A rather involved interchange of letters and telegrams took place […]".
[143] BL/64/D1, 8: "The Memorialists had not up to this time really come to any definite conclusion as to the destination of the ore […]".
[144] BL/64/D1, 2.
[145] BL/64/D1, 9.
[146] BL/64/D1, 16.

possible infringement of the law relating to trading with the enemy, but because they thought it was extremely doubtful if they would get payment".[147]

The attempts, explained thereafter, to halt the progress of the ship, or to divert it into a British port were, of course set out in the *Memorial for Counsel* and they were indicative of control of the offending ship by William Jacks and Company as agents of the Canadian company. Such action to divert had been successful for another ship, the 'Volga'.[148]

(3) The Decision to Prosecute

The decision, in all these particular circumstances, as to who to prosecute was not an easy one. The Procurator Fiscal at Glasgow investigated the allegations and reported the findings to Crown Office at Edinburgh. The Law Officers for Scotland were located there, as were some permanent officials and support staff. The extensive papers following investigation include draft indictments and letters.[149] In particular, it should be noted, draft indictments for discussion amongst prosecutors were probably not unusual for difficult cases because the prosecution was working to exceptional time restrictions and not all of the evidence to be relied on had appeared at the same time. Moreover, opinions amongst lawyers may have differed as to the strength of whole cases, or that against individuals.

The final, that is to say undoubtedly the crucial, decision as to proceeding with a prosecution seems to have been taken at a meeting on 24 April 1915 following consultation amongst the Lord Advocate (Robert Munro KC MP)[150], the Solicitor General for Scotland (T.B. Morison KC) and the Procurator Fiscal, for Glasgow (James N. Hart).[151] There can be no suggestion that a Liberal Lord Advocate and a Member of Parliament, and the others at the meeting, did not know that a potential accused was a brother of a fellow Scot and Member of Parliament.

Rather oddly, the fact of such a meeting was confirmed almost a decade later in a letter of 15 October 1924 from a Crown Office official in reply to a letter to the Legal Secretary at Dover House, London.[152] Quite why such a question should be asked then is not clear. By 1924 Andrew Bonar Law was dead and a formal inquiry in a letter between officials cannot be seen as a sign of some sort of improper approach. The decision not to prosecute John Law had meant in effect, on the evidence, that Andrew Bonar Law would not be prosecuted either.

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[147] BL/64/D1, 4.
[148] BL/64/D1, 4-5.
[149] NRS: AD15/15/20 (two boxes) and AD 21/9. There is also a full transcript of the four-day trial: AD21/10. The transcript is duplicated at JC36/28.
[150] Robert Munro was MP for Wick Burghs (January 1910 to 1918) and, on the abolition of that constituency, for Roxburgh and Selkirk (1918-1922).
[151] There can be no suggestion that a Liberal Lord Advocate and a Member of Parliament did not know that a potential accused was a brother of a fellow Scot and Member of Parliament.
[152] NRS: AD15/15/20, Box 2.

The Crown papers include a *draft* indictment that names as a possible accused, with others, 'John Richard Kidston Law, merchant'.[153] Also amongst the Crown papers is a Print of Documents for court use as proof of facts.[154] Included in the print is 'Excerpts from Contract of Co-partners of William Jacks and Company dated 27 and 28 January 1914'.[155] Amongst the terms of the contract is: "Fifth: the parties [to the contract] shall daily consult with one another, so far as practicable, about the conduct of the firm's business". The contract is signed by 'John R.K. Law' and also both the future accused, Robert Hetherington and Henry Arnold Wilson.

The Crown papers have the witness statements that form the basis of the decision as to whether, and if so whom, to prosecute. The details in any police witness statements are supplemented by further inquiry by the Procurator Fiscal.[156] On the face of the witness statements and the documents, the case against John Law, *prima facie,* was one of his being a partner with immediate managerial responsibilities in a company that seemed to have been trading with the enemy in wartime. However, a simple explanation of no involvement at all in managerial responsibilities by John Law, with supporting evidence including that from employees of the firm meant there was no chance of proving any charge against him beyond reasonable doubt.[157]

E. THE TRIAL

A telling contemporary comment was that: "the two Glasgow iron merchants drew a goodly company of spectators daily in the High Court, ladies, as is usual at criminal trials of the more genteel order, being well in evidence".[158] The trial that started on Friday 18 June 1915 was before Lord Strathclyde and a Jury. In keeping with the Scottish criminal procedure, the indictment was read to the Jury and there were no opening speeches. The indictment contains the charges against the Directors, Robert Hetherington and Henry Wilson. Reference is made in the charges to schedules attached with evidence set out and reproduced there are the various crucial communications between the company in Glasgow and representations in Rotterdam.[159] The accused were charged in the capacities of "partners of the firm", which

[153] NRS: AD 15/15/20, Box 1.
[154] NRS: AD 21/9.
[155] NRS: AD 21/9, 13-15.
[156] Generally, see MA Crowther, "The Criminal Precognitions and their value for the Historian," *Scottish Archive* 1 (1995): 75-84.
[157] There seem to have been no records of active participation that might have been used to rebut an innocent explanation of inaction.
[158] Anonymous, (1915).
[159] For a formal law report, see *HM Advocate v Hetherington and Wilson* (1914-1915) 52 Scottish Law Reporter 742, with the indictment reproduced at 743-745.

seems not to have had limited liability, and that they were carrying out business as iron ore merchants in Glasgow with an office in Duisburg, Germany.

The trial might be considered, first, from the point of view of the Crown as prosecutor. Lord Advocate had overseen the preparations and he had assessed the impossibility of obtaining a conviction when John Law did so little, and probably nothing, for his share of any profits. The Lord Advocate personally conducted the trial.[160] John Law was available as a Crown witness and he gave evidence on the first day of the trial, on 14 June 1915.[161] He confirmed that he was "a native of Canada".[162] He asserted that he had in practical terms taken no part in the management of the business and, specifically, he had nothing to do with the "cargo in issue".[163] He had had little to do with the firm since 1907, "as agreed in the contract of co-partnery".[164] The other director was a steel merchant and a partner in the business but only in regard to the steel business, iron ore was a different department.[165] Much of the evidence of the transaction in issue seems to have been undisputed, doubtless to the relief of the Crown given the circumstances of war and the difficulties of proof of facts.

The second part of the trial to be considered is that of the defence. The accused Henry Wilson said in evidence on his own behalf that he had tried to stop the ship on 3 August 1914 because of the "serious political condition" on that day.[166] He asserted amongst other things that iron ore was never put on the quay because that was too expensive.[167] The only reason that had been done was because the ship had not been diverted successfully and when it arrived at Rotterdam a firm there had put the cargo on the quay. He immediately repudiated their action.[168] The other accused Robert Henderson gave evidence that the ship and cargo had gone into Rotterdam "against our specific instructions, and having got into Rotterdam it was beyond our control."[169] He added then that the iron ore was out of their control having been consigned to another firm, but he accepted that they had to do everything they could do to keep it back until they could get some promise of payment.[170]

Lord Strathclyde, in his charge to the Jury, reminded them that the ship and ore had left Canada on 25 July 1914 and that it was in the English Channel when war was declared and

[160] The two other prosecutions by then had been conducted by the Solicitor General: *HM Advocate v. Mitchell,* (5 January 1915), and *HM Advocate v. Innes*, (11 January 1915).
[161] Andrew Bonar Law had a copy of the *Memorial for the Opinion of Counsel* and also a detailed daily report from *The Glasgow Herald* of Tuesday 15 June 1915 to consider and he also kept the latter: BL/64/4.
[162] NRS: AD21/10, first day transcript (14 June 1915), 74C-D.
[163] NRS: AD21/10, 75E and p.76C.
[164] NRS: AD21/10, 98C.
[165] NRS: AD21/10, 102C-F.
[166] NRS: AD21/10, third day transcript (16 June 1915), 397F-398C.
[167] NRS: AD21/10, 403D-E.
[168] NRS: AD21/10, 405E.
[169] NRS: AD21/10, 480D.
[170] NRS: AD21/10, 480D.

he commented that, so far as he could say but it was a matter for the jury, "an honest earnest, well-timed effort was made by William Jacks and Company to prevent the ore reaching the Germans."[171] Later: "by the perversity of their Captain their earnest and honest effort was frustrated and as well all know the ore reached Rotterdam."[172] The Jury was out deliberating for just over an hour and returned with guilty verdicts for both accused and recommended "*the utmost possible leniency in favour of the accused*".[173] Each accused was sentenced to six months imprisonment, and each fined £2,000 with a further six months imprisonment if the fine was not paid. It cannot be said with confidence that the suggestion of the Jury was followed by the Court.

F. DISCUSSION

The case of Robert Hetherington and Henry Wilson resulted in a formal law report of the trial because of several points of law that arose. Briefly it may be said that the legal terms were applied with wide definition and strictly.[174] More formally, it was held to be the law that if persons resident and carrying on business in Scotland supply goods to an enemy, they are subject to the jurisdiction of the courts of Scotland, no matter in what country such persons or goods may chance to be when the goods are supplied. Further, it was held that the offence of "supplying" goods to the enemy in contravention of the Proclamation and the Acts of 1914 dealing with trading with the enemy, is not affected by any question as to ownership of the goods supplied; and, accordingly, that the offence may be committed even though the persons supplying the goods is not the owner and has no right of disposal, and even thought the property of the goods has already vested in the enemy at the date when they are supplied. Finally, it was held also that the offence is not affected by the existence of any contractual obligations to make the supply, or by any conditions as to payments or otherwise adjected to the supply, or by the relation to the supplier of any intermediary through whom the supply is made.

At that point, mid-1915, and contemporaneously with the William Jacks and Company case was that known as *The Zamora*.[175] The ship was taking copper and cereal from America to Stockholm and it was intercepted by the Royal Navy. The nominal consignee was a Swedish trading company, but notwithstanding the reputable board of directors, the true purchaser was the Austrian government. The decision of the Prize Court in 1915 was challenged later on

[171] NRS: AD21/10, final day transcript (18 June 1915), 8E-9D.
[172] NRS: AD21/10, 9A-10B.
[173] NRS: AD21/10, 24B-D: emphasis added. That charitable view of the jury is not recorded in the formal law report: see *HM Advocate v Hetherington and Wilson*, 748.
[174] *HM Advocate v. Hetherington and Wilson (1915).*
[175] This case is now said to be chiefly of academic interest: Lentin *The Last Political Law Lord,* 60.

the basis that the ultimate destination of the goods was unknown to the shipowners.[176] The Court held that knowledge of a thing must be imputed to choose who close their mind to it through 'deliberate blindness', which wilful ignorance may be through disinterest to learn or because of a desire not to know.[177] That decision of a court, while not relevant in law to the ship of William Jacks and Company, nevertheless showed the rather strict approach that the authorities in Great Britain took to the commercial trade that seemed to proceed after formal declarations were made.

G. THE POLITICS

The initial firm at the centre of the interest of authorities had been founded by William Jacks himself. He had been born near Duns and he had been a shipyard apprentice in Hartlepool and had later worked in Sunderland. His firm was founded in 1880 and it had businesses in central Scotland and North-East England. Jacks was a Member of Parliament for about four years. He was decidedly a man of his time with a determined interest in all things German, at a time when Germany was the economic powerhouse and proceeding with expansionist policies with a major growth of the German navy and a demand for steel and ships.[178] Jacks later pursued his German literary interests and amongst these, he translated German poetry into English.[179] He wrote a biography Bismarck.[180] Later still, there was his biography of the Kaiser himself.[181] Andrew Bonar Law also had an enthusiasm for German literature and 'the old German spirit' of which it was an expression. In early 1914 he had taken one of his sons to Germany to learn its language and literature.[182] However, there were no tirades of abuse directed at Bonar Law from the *Daily Mail* or the *Daily Express,* and "no one expected that they would".[183]

Andrew Bonar Law was "possessed of reserves of grit and common sense that were at a premium" and that he was "tactically cautious".[184] Yet, at the time of the trial, he was said to be: "certainly angry and hurt by the false accusations against his brother, and the unfounded rumours that somehow he was part of the scandal".[185] In anticipation of some political or public criticism, or both, Bonar Law had prepared a draft of a statement of exculpation,

[176] *The Zamora (No.2)* [1921] 1 AC 802.
[177] *The Zamora (No.2)*, per Lord Sumner at 804.
[178] Katya Hoyer, *Blood and Iron: The Rise and Fall of the German Empire 1871-1918* (Cheltenham: The History Press, 2021), 87-90 and 160-161.
[179] Gotthold Ephraim, *Nathan the Wise: A dramatic poem in five acts* (Glasgow: James Maclehose, 1894).
[180] W. Jacks, *The Life of Prince Bismarck* (Glasgow: James Maclehose, 1899).
[181] Jacks, *The Life of His Majesty William II, German Emperor* (Glasgow: James Maclehose, 1904).
[182] Trevor Wilson, *The Downfall of the Liberal Party 1914-1935* (Ithaca: Cornell University Press, 1966), 57 citing the *Liberal Magazine,* October 1914.
[183] *Ibid.*
[184] Robin Harris, *The Conservatives: A History* (London: Corgi, 2011), 251.
[185] Adams, *Bonar Law*, 191.

making two points.[186] That is to say, first, he denied any control in the company since he had given up his partnership when he became an Under Secretary in 1902. Since that date he had had no control over the firm, he had no knowledge of the way in which the business was conducted and he had had no interest in its profits or losses. Bonar Law, intended to say that after he ceased to be a partner, he withdrew the capital which represented his interest in the firm. However, he said that he was:

> allowed to continue the privilege of using the firm as Bankers; that is, I left with them any funds at a fixed rate of interest which I withdrew at any time either for investment or to meet expenses. During the 13 years the amount has varied, entirely to suit my convenience, between what was for me considerable sums and a few hundred pounds.[187]

Secondly, Bonar Law intended also to say that he was close to his brother John and should the charges against the latter be proved then he, Bonar Law, would resign at once from the position that he then held. As John was not prosecuted, such resignation was not necessary and the statement was never made.

There was a question after the trial when Mr Laurence Ginnell MP on 24 June 1915 asked the Prime Minister whether any Member of His Majesty's Government holds, or held until recently, a financial interest in the firm of Jacks and Company, recently convicted of trading with the enemy?[188] Bonar Law replied, without any attempt to sidestep the issue:

> As this question refers to me, perhaps I may be permitted to answer it myself. I was for many years a member of the firm referred to in the question, and I was still a partner in it when I entered the House of Commons in 1900. For some months afterwards I continued my connection with it, but I came to the conclusion that I had to choose between business and politics, and at the end of the year 1901 I gave up my business, and I gave it up absolutely. Since then—that is for more than thirteen years—I have had no control over the business. I have had no knowledge of the way in which it was conducted, and, although I have from time to time put money on deposit with them at a fixed rate of interest, I have had no share, direct or indirect, in the profits or losses of the firm.[189]

The draft for the statement has written on the back a list of years from 1903 to 1914 and sums of money against each year, all under the heading of “At credit with W J & Co”.[190] The lowest sum, in 1907, is £590 and the highest, in 1912, is £14,352.[191]

These financial arrangements were entirely a personal matter for Bonar Law. It is odd perhaps that a Director of the Clydesdale Bank, which had a London branch, would prefer such a pragmatic arrangement with a former firm such as he made at the time of his political

[186] BL:64/D/3.
[187] BL:64/D/3.
[188] Hansard HC Deb, 24 June 1915, vol.72, cc. 1332.
[189] Hansard HC Deb, 24 June 1915, vol.72, cc. 1332-3.
[190] BLP:64/D/4.
[191] In modern times, these might be seen on a purchasing power calculator as £62,870 and £1,431,000, respectively: https://www.measuringworth.com/calculators/ppoweruk/ [07/05/2021].

appointment.[192] Moreover, the solicitor to the firm of William Jacks and Company of Glasgow seems to have been George H. Robb, solicitor.[193] In central Glasgow, the offices of the firm of William Jacks and Company were at Royal Bank Place, which is entered from Buchanan Street, Glasgow and within a very few minutes' walk of the solicitor's office, both near to the Bothwell Street branch of the Clydesdale Bank.[194]

H. CONCLUDING REMARKS

The whole of the preliminary proceedings and the trial took place during the acutely and politically sensitive period of 1915 when there was the serious problem with munition supplies, 'the shell crisis', and the resignation of Admiral Fisher, the First Sea Lord over priorities for the war. These events added to the strain of wartime politics, not least for Bonar Law who had extreme difficulty in keeping his followers in check.[195] The political struggle to settle on a Coalition Government in 1915, in early stage of a war for which the outcome was by no means certain then, was surely acerbated to some degree for Bonar Law, with the uncertainty about the future of his brother.[196]

It has been said that while Bonar Law was "much troubled by this humiliating affair, there is no evidence to suggest that Bonar Law's behaviour in his negotiations with Asquith in 1915 was affected by it".[197] It may be that both historians of this era of high politics are correct: until the decision was taken on 24 April 1915 to use John Law as a witness, rather than prosecute him, then there must have been a *real prospect* of acute embarrassment for Bonar Law should his brother be indicted for a criminal trial on the sensitive charges of trading with the enemy. By the crucial events of the first fortnight of May 1915, and especially on Monday 17 May when Bonar Law set in motion events that led to the Coalition, John Law would have been advised of his change of status.[198]

There was no evidence in the prosecution papers of any impropriety by Bonar Law around the issue of trading with the enemy. There was, however, an awkward set of circumstances due to the failure of Bonar Law to disassociate himself more explicitly, and publicly, from the firm where he and his relatives had made their living for years. In that

[192] The Clydesdale Bank also had a branch at 30 Lombard Street, London: Munn, *Clydesdale Bank,* 112-113.
[193] Mr Robb has been described as 'general counsel' to the firm: Adams, *Bonar Law*, 405, fn. 95. He was a solicitor in Scotland and a partner in G.H. Robb & Crosbie, solicitors, 30 George Square, Glasgow: *The Scottish Law List and Legal Directory 1915* (Edinburgh, 1915), 294.
[194] Adams, *Bonar Law*, 13; Munn, *Clydesdale Bank*, 332.
[195] David Powell, *British Politics, 1910-35: The Crisis of the Party System* (Abingdon: Routledge, 2004), 64-65.
[196] Martin D. Pugh, "Asquith, Bonar Law and the First Coalition," *The Historical Journal* 17, no. 4 (1974): 813-836.
[197] Adams, *Bonar Law*, 191. Another historian with experience of high office has suggested otherwise: Roy Jenkins, *Asquith* (London and Glasgow: Collins, 1964), 369-370 and cited by Adams, *Bonar Law*, 405 fn.97.
[198] Pugh, *Asquith, Bonar Law and the First Coalition*, 827.

important regard, his "acute political instincts" were in truth have been tested by such failure.[199] John Law appears to have been truly ignorant about the detail of the business of the firm did.

The Lord Advocate had to decide the questions associated with prosecution, as he was entitled to do, and did do, on the evidence. The decision was not difficult as Bonar Law had in law severed his managerial or directorial links with the firm of William Jacks in Glasgow, and by 1914 he had no part as the *controlling mind* of the company. With the result, however, the two accused directors who were held to have traded with the enemy in contravention of very recent legislation, and sent to prison *and* also fined heavily, might well have had a grievance at the outcome.

[199] Mark Coalter, "Andrew Bonar Law: Politics and Leadership, 1911-15," *Conservative History Journal* 1, no. 2 (2003): 22. The sharp issue of attempting to stop existing trade with Germany in the autumn of 1914 was not unique: Lord Haldane had faced the same problem at the Foreign Office: John Campbell and Richard McLauchlan, *Haldane: The Forgotten Statesman* (London: Hurst Publishers, 2020), 59.

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AFTER THE FLIGHT: THE LEGALITY OF THE CONFERENCES AT YORK AND WESTMINSTER

by Katherine Montana

According to Monsieur Courcelles, the French ambassador to Scotland, King James VI remarked that the situation that his mother was in 'was the strangste that ever was hearde of, the like not to be found in any storie of the world'.[200] The year was 1586, and his mother, the former queen of Scotland, had been imprisoned in England for over eighteen years.

In 1567, Mary, Queen of Scots signed her abdication papers in favour of the rule of her son.[201] James, only thirteen months old, officially became the king of Scotland and in return, the twenty-four-year-old former monarch remained captive in Lochleven Castle.[202] Since the gruesome death of her mostly-estranged husband, Henry Darnley, in February of that year, the already-tense situation in her country had devolved into pure chaos.[203]After Mary was kidnapped by the Earl of Bothwell, a noble who was widely suspected to have been a part of the plot that killed her late husband, Mary's future as the queen of Scotland crumbled.[204] She was brought to Lochleven by those who did not favour Bothwell after the disastrous Battle of Carberry Hill, and as Jane E. A. Dawson notes, a group amongst these nobles took control and forced her to abdicate.[205] It was thus a chaotic and troublesome series of events that led to the premature crowning of James VI in 1567, but this conflict did not end there.

Mary escaped from Lochleven in mid-1568 and gathered an army, but a victory seemed lost when she was defeated in a battle against those in favour of the new regime.[206] She fled south in hopes that her cousin, Queen Elizabeth I of England, could give her refuge.[207] A place to stay was given, yes, but the granting of refuge was much more complicated.

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[200] "Courcellis Third Dispatche to Frenche Kinge. 30th November, 1586," in *Extract from the Despatches of M. Courcelles, French Ambassador at the Court of Scotland. M.D.LXXXVI.-M.D.LXXXVII.* ed. Robert Bell (Edinburgh: The Bannatyne Club), 18.
[201] "Procedure: demission of the crown by Mary queen of Scots," in *Records of the Parliaments of Scotland to 1707*, University of St Andrews https://www.rps.ac.uk/mss/1567/7/25/1 [accessed 9 May 2021].
[202] "Procedure: demission of the crown"; "Act for fequefrating the Quenis Maiefties perfon and detening the fame in the hous and place of Lochleven" in *Registrum Honoris de Morton: A Series of Ancient Charters of the Earldom of Morton with Other Original Papers in Two Volumes*, ed. Cosmo Innes, Edinburgh: The Bannatyne Club, 1853), 24-26.
[203] Jane E. A. Dawson, *The Politics of Religion in the Age of Mary, Queen of Scots: The Earl of Argyll and the Struggle for Britain and Ireland* (Cambridge: Cambridge University Press, 2004), 149-150.
[204] Dawson, *The Politics of Religion*, 150-151; Julian Goodare, 'The Ainslie Bond,' in *Kings, Lords and Men in Scotland and Britain, 1300-1625: Essays in Honour of Jenny Wormald,* ed. Steve Boardman (Edinburgh: Edinburgh University Press, 2014), 318-320.
[205] Dawson, *The Politics of Religion*, 151-153.
[206] Ibid., 153-155.
[207] Ibid., 155.

As a result of the chaotic nature of the deposition and sporadic flight to England, Elizabeth allowed for a conference to begin in York. This turned into a series of events which initially, according to K. J. Kesselring, were 'intended to weigh the evidence for Mary's involvement in Darnley's murder, and to determine whether Mary should be returned to Scotland'.[208] However, the unprecedented nature of the conference ensured that its legality was shrouded in doubt. Historians are not the only ones who regard the conference as confusing; contemporaries questioned the legality of it as well.[209] Questions were widespread: did this specific body have the power to conduct a trial or determine whether someone was guilty of committing a crime? Furthermore, was Mary even able to be put on trial since, according to her many supporters, she may still be a rightful monarch? To add even more confusion, was an English body even able to rule on a crime committed in Scotland? Finally, if this was, in fact, a fair trial, what were Mary's rights as a defendant?

This article will analyse Elizabethan legal procedures and question whether typical legal proceedings could even be used in this particular circumstance. I will analyse whether the conferences constituted as a legitimate trial that could, in fact, determine Mary's complicity in the crime she was accused of. Ultimately, I will present an updated conclusion as to whether these proceedings were, in fact, legal and fair according to early modern standards.

According to J.A. Sharpe, homicide cases in Elizabethan England needed to first be called by 'the coroner, who had the duty to convene a jury to view the body of those had died under suspicious circumstances'.[210] According to this model, the conference that began at York was peculiar. Firstly, the only person who technically had the power to give a judgement at the conference was Elizabeth, and she, of course, had not been chosen by the coroner who had officially examined Darnley.[211]

Secondly, and most importantly, this conference was not officially considered a legitimate trial at the time of its calling. As Gordon Donaldson notes, Elizabeth was extremely nervous to give precedent to an official trial that determined the guilt of a monarch.[212] If she did, she feared her enemies could also accuse her of a crime and try to have her deposed as well. Therefore, the English queen made sure that the procedure was officially deemed a conference rather than a trial, ensuring that she would not give hint to any notion that she was laying the groundwork for future trials against contested monarchs.

[208] K. J. Kesselring, "Mary Queen of Scots and the Northern Rebellion of 1569," in *Leadership and Elizabethan Culture*, ed. Peter Iver Kaufman (New York: Palgrave Macmillan, 2013), 53.
[209] Gordon Donaldson, *The First Trial of Mary Queen of Scots* (London: Batsford, 1969), 123-126.
[210] J.A. Sharpe, "Prosecuting Crime in Early Modern England: Discussion paper," *IAHCCJ Bulletin* 18 (1993): 41.
[211] Donaldson, *The First Trial*, 125.
[212] *Ibid*., 125-127.

This can be proven by the fact that according to the session papers composed by the Duke of Norfolk, Elizabeth did in fact desire to 'restore the Queen of Scottes to her Realme and Authoritie'.[213] She wanted no part in declaring Mary guilty and legitimising a forced abdication of a monarch. If she determined Mary's guilt or seemed to publicly approve of the deposition, she would have laid a precedent for her own potential removal. Elizabeth was the daughter of the late King Henry VIII of England, but the fact that she was the product of a Protestant marriage ensured that many viewed her as illegitimate and thus not the rightful monarch of the country.[214] Furthermore, even Henry VIII's legitimacy had been contested during his own reign; his father was considered by many to be a usurper and not the rightful king of England as well.[215] Mary Stewart, in contrast, had, according to her son, 'the best bloode in Europe'.[216] She was a direct descendent of Robert the Bruce and, on top of this strong ancestral link, was also the great-granddaughter of King Henry VII of England. If this 'bloode' could be deposed, what could this mean for Elizabeth: a queen who was considered by half of England to be a pretender?[217]

Therefore, according to early modern English standards, if the conference at York was meant to be determining the guilt of Mary in the murder of her husband, the deposed queen was not given a fair or unbiased trial. However, this was the point. Elizabeth never intended to grant Mary a fair trial according to contemporary standards, for if she had, she would have laid the groundwork for other monarchs such as herself to be put in the same position. In order to more securely retain her own status as the queen of England, Elizabeth ensured that the conference at York was specifically designed to not be viewed as a trial. In doing so, Elizabeth could not be accused of condoning the deposition of or accusations against a fellow queen.

Furthermore, we must question whether an English body had the right to rule on the guilt of someone accused of committing murder in Scotland. According to Alice Taylor, the *Regiam maiestatem and the Auld Lawes and Constitutions of Scotland* was a well-known determiner of certain Scottish laws to many for years before the conferences took place.[218]

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[213] 'The Seffion of the 3d Daye beinge the 6th of Octobre' in *A Collection of State Papers, Relating to Affairs in the Reigns of King VIII. King Edward VI. Queen Mary, and Queen Elizabeth, From the Year 1542 to 1570. Tranfcribed from Original Letters and other Authentick Memorials, Never before Publifh'd, Left by William Cecil Lord Burghley, and Now Remaining at Hatfield House, in the Library of the Right Honourable the prefent Earl of Salisbury,* ed. Samuel Haynes (London: William Bowyer, 1740), 477.
[214] John N. King, "Queen Elizabeth I: Representations of the Virgin Queen," *Renaissance Quarterly* 43, no. 1 (1990): 30.
[215] Katie Stevenson, "Chivalry, British sovereignty and dynastic politics: undercurrents of antagonism in Tudor-Stewart relations, c. 1490-1513," *Historical Research* 86, no. 234 (2013): 601-603.
[216] "Instructions by James VI. To the Master of Gray. [17th December, 1586]" in *King James's Secret: Negotiations between Elizabeth and James VI Relating to the Execution of Mary Queen of Scots, from the Warrender Papers*, ed. Robert S. Rait and Annie I. Cameron (London: Nisbet, 1927), 108.
[217] "Instructions by James VI," 108; Stevenson, "Chivalry, British sovereignty," 601-603.
[218] Alice Taylor, "What does *Regiam maiestatem* Actually Say (and what Does it Mean)?'" in *Common Law, Civil Law, and Colonial Law: Essays in Comparative Legal History from the Twelfth to the Twentieth Centuries,* ed. William Eves, John Hudson, Ingrid Ivarsen and Sarah B. White (Cambridge: Cambridge University Press, 2021), 84-85.

Taylor states that the *Regiam maiestatem* was clear in noting that 'the [Scottish] king in his kingdom had no superior other than God and the Church, and certainly not, by implication, the king of England'.[219] Therefore, according to widespread Scottish viewpoints, it would have been unprecedented and concerning for an English monarch to be determining the guilt of a Scottish one. To add onto this point, the fact that the murder was committed in Scotland rather than England makes a trial in which an English body determining the outcome even more unusual according to the *Regiam maiestatem*.[220] Therefore, this can help us further understand why Elizabeth did not want the conferences to be viewed as a trial: if she announced that it was one, she would have faced intense backlash as a result of ignoring the *Regiam maiestatem*.[221] Even if she had declared Mary innocent at the end of it, many would protest the validity of the determination of an English body ruling on a Scottish case.

Lastly, we must also question what Mary's rights were at these conferences. According to John L. McMullan, defendants in early modern England were obliged to attend their own trial unless they bribed their way out of being accused entirely.[222] Therefore, it may initially seem odd that Mary not only was absent at the later Westminster conference but was in fact specifically ordered by Elizabeth not to attend.[223] However, when we remember the fact that Elizabeth did not want these conferences to be viewed as trials, this absence makes more sense. If Mary had appeared as a defendant, the conference would have seemed even more like an official trial, and Elizabeth could not risk any of her enemies viewing it as such.

Thus, the conferences at York and Westminster were not legal or fair trials according to Elizabethan standards, but this was their intention. There was no precedent for a monarch to hold the trial of a foreign, contested and deposed ruler, and Elizabeth wanted to ensure that she did not start a trend that could potentially threaten her own position as queen of England. By calling no jurors, not breaking the *Regiam maiestatem*, and ensuring that Mary would be absent for their entireties, Elizabeth cleverly made sure that these conferences did not resemble a criminal trial for a monarch.

Therefore, the conferences at York and Westminster did not equate to a legal or fair trial according to the Elizabethan standards, but this was their aim. In order to ensure that her own position as a contested queen could not be threatened, Elizabeth was forced to put herself first. Though Mary's allies continued to fight for her for many years after this series of events was concluded, it was these conferences at York and Westminster that laid the groundwork

[219] Taylor, "What does *Regiam maiestatem* Actually Say," 49, 84-85.
[220] *Ibid.*
[221] *Ibid.*
[222] John L. McMullan, "Crime, Law and Order in Early Modern England," *The British Journal of Criminology* 27, no. 3 (1987): 262.
[223] Donaldson, *The First Trial*, 134-135.

for the fact that she would never live to see Scotland again.[224] Elizabeth's own uncertain future ensured that she could not help Mary have access to a fair trial, for if she conducted one for her, then her own future could be in jeopardy. When Elizabeth refused to rule on Mary's guilt, she condemned her to a life of uncertainty and indecision all whilst being trapped in a limbo of an English prison. When the English queen finally condemned the Scottish one to death, it was arguably not truly out of fear that she was plotting against her, but to be rid of the living reminder of the uncertainty of her own rule. The conferences at York and Westminster predicted the course of Mary's remaining time both in England and on Earth: full of uncertainty and unfairness that ended with her head being placed on a block.

[224] Gordon Donaldson, *All the Queen's Men: Power and Politics in Mary Stewart's Scotland* (London: Batsford, 1983), 114-116.

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