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The Judicial Role of the House of Lords before 1870

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Thomas, Duke of Gloucester, and Thomas Arundel, bishop of Ely, remonstrated with Richard II over the King's refusal to attend the parliament called in 1386:

we have a laudable and approved custom, which none can deny, that our king has the power to call together once every year, to his parliament, the lords and great men of the realm, with the commons, as to the highest court in all the land, in which without doubt or quibble all equity ought to shine like the morning sun in his ascent, and to which both rich and poor can resort, for the refreshment and tranquillity of peace, and the redress of injuries, as to an unfailing refuge...¹

A significant part of Parliament's role, from the reign of Edward I, lay in providing remedies for petitioners either reluctant to pursue their causes in other courts or, to a lesser extent, wishing to appeal from a lower court. With the development of the two Houses of Parliament in the fourteenth century, petitions could be and were sent to either House. The Lords claimed, by the early fifteenth century, that judgment belonged to them alone: petitions considered by the Commons were sent to the Lords for confirmation, but petitions dealt with by the Lords were not referred to the Commons.² There was a sharp decline in the judicial work of Parliament in the sixteenth century; only five cases are recorded in the Lords Journals between 1514 and 1589. This decline has been attributed to greater activity by the common law courts and to the development of new prerogative courts; another reason, acknowledged in the preamble to the Error from Queen's Bench Act 1584, was the infrequent meeting of Parliament: 'Forasmuch as erroneous Judgements given in the Courte called the King's

¹ *Knighton's Chronicle 1337–1396*, GH Martin (ed and trans) (Oxford: OUP, 1995) 357.

² G Dodd, *Justice and Grace: Private Petitioning and the English Parliament in the Late Middle Ages* (Oxford: OUP, 2007); see 165–6 for the 'prominence of the Lords in the petitionary process'.

Bench are only to be reformed by the High Courte of Parliament, which Court of Parliament is not in these Dayes so often holden as in auncient Time.³

When Henry Elsyng codified the rules of procedure in the House of Lords during the 1620s, he commented that ‘The execucion of all our Lawes hath ben longe since distributed by the Parlement unto the inferiour Courtes, in such sorte as the Subiecte is directed where to complayne, and the Justices howe to redresse wronges and punish offences . . . Yett complaynts have ever ben receaved in Parlement, asswell of pryvatt wronges, as of publique offences. And, accordinge to the quallitye of the person, and nature of the offence, they have been retheyned, or referred to the Common Lawe.’⁴ Elsyng noted that judicature still belonged to Parliament in the following instances: (1) judgments against delinquents, as well for capital crimes, as misdemeanours; (2) in reversing erroneous judgments in Parliament, or the Court of King’s Bench; (3) in deciding of suits long depending in other courts, either for difficulty or delay; (4) in hearing and determining the complaints of particular persons on petition; (5) in setting at liberty any of their own Members or servants imprisoned; and in staying the proceedings at the common law against them during the privilege of Parliament; and (6) in certifying the elections and returns of Knights and Citizens for Parliament. Elsyng completed his chapter on the judicature of the House of Lords in August 1627.⁵

The previous six years had seen a remarkable revival of the judicial work of the House of Lords, which began in March 1621 when James I referred the petition of Edward Ewer, a hardened litigant, who asked that his cause in the King’s Bench be sent to the House of Lords for review. A few days later, the House of Commons pressed the Lords to proceed against Sir Giles Mompesson for his misdeeds as a patentee; Edward Coke referred in warm terms to the judicial role of the Lords: ‘there is a necessity in this else justice will fall to the ground and the subject in some cases cannot be relieved’. In agreeing to act against Mompesson, the House of Lords revived impeachment.⁶

Greater prosperity, more complex economic organisations and an increased population brought a considerable growth in litigation in the later sixteenth and early seventeenth centuries. Suitors were also more likely to bring their complaints to London rather than apply to a local court. There were serious delays in the administration of justice by the law courts. Other litigants were ready to follow Ewer’s example; in the five parliaments held between 1621 and 1629, the House accepted 207 cases which included cases of first instance, cases which had been considered by other courts but were not appeals, and appeals. The House was

³ CH McIlwain, *The High Court of Parliament and its Supremacy* (New Haven: Yale University Press, 1910) 121–37.

⁴ ER Foster (ed), *Judicature in Parlement by Henry Elsyng* (London: Hambledon Press, 1991) 7.

⁵ *ibid.*, xii, 10–11.

⁶ W Notestein et al (eds), *Commons Debates 1621* (New Haven: Yale University Press, 1935) vol 2, 195; parliament retains the power of impeachment, but it was last exercised when Lord Melville was impeached in 1804.

prompt to develop new procedures for handling the growing number of petitions. A standing Committee for Petitions, established in 1621, grew in size and importance throughout the 1620s. Legal assistants, summoned by writs of assistance, supported the work of the Committee. Initially, a petition was read before the whole House before it was referred to a Committee. In the Parliament of 1624 it was ordered that petitions should be sent directly to the Committee, which would present its conclusions to the House. Eventually, the Committee was allowed to decide on petitions, but with a weekly report to the House. A new and necessary precedent was created and generally accepted in 1624 when the House considered appeals from the Court of Chancery.⁷

During the long interlude of Charles I's personal rule in the 1630s, the actions of royal officials weakened popular confidence in the rule of law. When Parliament met again in 1640, the House of Lords faced a torrent of litigation, which increased following the abolition of the prerogative courts and the collapse of the Privy Council in 1641 when their unfinished litigation came to the Lords. In the first half of the 1640s, the House laboured to restore the legal order. Later, the radical passions of the time overwhelmed a House devoted to a conservative interpretation of the law. On 6 February 1648/9, the House of Lords, being 'useless and dangerous', was abolished.⁸ During the debates on the case of James Nayler in December 1656, the House of Commons claimed to hold the authority of the House of Lords to sentence Nayler. The severe punishment imposed on Nayler highlighted the lack of a check on the power of the Commons and led to a debate on the concept of the 'Other House' and its judicial powers. The resolution passed by the Commons on 17 March 1657 limited these powers in civil causes to writs of error from the lower courts; to cases sent to Parliament because of difficulty; to petitions against proceedings in the courts of equity; and, to the privileges of their own House. Criminal cases could only be considered after an impeachment by the Commons. The inconclusive debates in the Protectorate Parliaments on the judicial power of the Other House did show the need for a second chamber.⁹

The restored House of Lords met in April 1660 and embarked, within five days, on its judicial work. Inevitably, the House had to deal with complaints arising from the turbulent years of the Civil War and the Interregnum; with caution and compromise, realistic solutions to these difficult problems were

⁷ The standard work on the judicial work of the House of Lords in the seventeenth century is JS Hart, *Justice upon Petition: The House of Lords and the Reformation of Justice 1621–1675* (London: HarperCollins Academic, 1991); see ch 1 for the revival of the House as a court. For the role of legal assistants, see ER Foster, *The House of Lords 1603–1649: Structure, Procedure, and the Nature of its Business* (Chapel Hill: University of North Carolina Press, 1983) 74–6; see also A Horstman, 'A New Curia Regis: The Judicature of the House of Lords in the 1620s' (1982) 25 *Historical Journal* 411–22.

⁸ Hart, *ibid.*, chs 2–5 contain a detailed survey of the House's use of its judicial powers in the 1640s.

⁹ P Little and DL Smith, *Parliament and Politics during the Cromwellian Protectorate* (Cambridge: CUP, 2007) 178–95; JT Rutt, *Diary of Thomas Burton Esq* (London: H Colburn, 1828) vol 1, 387–8 for the Commons' resolution.

pursued. The Act for Confirmation of Judicial Proceedings 1660 forestalled appeals based on the status of the Interregnum judges. The usual private grievances were also received but, for lack of time, many were re-scheduled for the next parliament.

The House proceeded with its judicial work, as usual, for the first six years of the parliament called on 8 May 1661. A major dispute with the House of Commons arose over the case of *Thomas Skinner v East India Company*. Skinner established a trading station in the East Indies before Cromwell granted a monopoly of the East Indies trade to the East Indies Company in 1657. After the Company confiscated his property, Skinner returned to England in 1661 and sought compensation for his considerable losses. A number of attempts by the Privy Council to mediate between Skinner and the Company failed before Charles II agreed to send the matter to the House of Lords on 19 January 1667. In the Company's answer of 28 January to Skinner's claims, a strong objection was made to the fact that 'the petition is in the nature of an original complaint' and not a petition to consider a decision by a lower court. The House held that they could proceed on the matter and found, a year later, for Skinner; in answer, the Company petitioned the Commons for relief from the 'unusual' and 'extraordinary' proceedings of the Lords. The House of Commons, which included men who were members of the Company, resolved that the Lords had acted arbitrarily and initiated a dispute between the two Houses that lasted throughout 1668 and 1669. At the opening of a new session in February 1670, the King asked both Houses to bring the dispute to an end. When the Commons revived the quarrel, the King ordered that all references to the dispute in the journals of both Houses be deleted and the dispute brought to an end. Both the Commons and the Company argued that the Lords did not have the right to hear first instance cases where other avenues of redress had not been pursued. This argument deterred future litigants and the House of Lords, in practice, limited its jurisdiction to appeal cases, except for impeachments and peerage claims.

Within five years another crisis had arisen between the two Houses, this time over the case of *Shirley v Fagg*, where the defendant, Sir John Fagg, was a member of the Commons, and this led that House to claim that Fagg had parliamentary privilege. Opposition peers seeking a dissolution encouraged this dispute and the Commons enlarged the quarrel when it emerged that two other Members of their House, Thomas Dalmahoy and Arthur Onslow, were also defendants in appeals before the Lords. Two of the cases were appeals from the Court of Chancery and the third was an appeal from the equity side of the Court of Exchequer. The House of Commons now added to their dispute by challenging the power of the Lords to accept appeals from the courts of equity. The King was forced to prorogue Parliament twice; the dispute was not revived when Parliament met again in 1677 and the House of Lords retained its right to an appellate jurisdiction in equity. The altercations over the judicial powers of the House of Lords were fomented by members of both Houses with other priorities: the argument over *Skinner's Case* was used as a means of preventing a new Bill limiting

toleration to dissenters reaching the House of Lords; the dispute over privileges which arose from *Shirley v Fagg* and the other cases was used to scupper the Test Bill and to attack the Lord Treasurer, Lord Danby. The House of Lords defended its judicial powers fiercely; when the House of Commons imprisoned persons involved in the case against Dalmahoy, the Lords rebuked the other House sharply:

Their Lordships do judge this Order for Imprisonment to be illegal and arbitrary, and the Execution thereof a great Indignity to the King's Majesty in this His highest Court of Judicature in the Kingdom, the Lords in Parliament; where His Majesty is Highest in His Royal Estate, and where the last Resort of judging upon Writs of Error and Appeals in Equity, in all Causes, and over all Persons, is undoubtedly fixed and permanently lodged.

The House of Commons was reminded that it held no judicial authority: 'the Lower House of Parliament, who are no Court, nor have Authority to administer an oath, or give any Judgment'.¹⁰

By the end of the reign of Charles II, the judicial role of the House of Lords had been established for some 60 years. Around 40 per cent of the peers who attended the restored House of Lords had attended the House before the Civil Wars and their familiarity with the House's practice in receiving and considering appeals enabled the restored House to resume judicial work with relative ease. On the whole, the peers dealt fairly and expertly with the cases presented to them. The main disadvantage lay in the intermittent nature of Parliament and the fact that cases lapsed at a prorogation; the House sought to solve the latter problem by allowing, on 29 March 1673, writs of error and appeals to continue into the next session. The difficulties arising from the intermittent nature of Parliament were solved after the Glorious Revolution when Parliament met annually and, as a result, the Lords could decide a greater proportion of the cases before them.¹¹

When the British Parliament met for the first time on 23 October 1707, the question of appeals from Scotland to the House of Lords was unclear. Article 19 of the Articles of Union stated that:

No causes in Scotland be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas or any other court in Westminster Hall, and that the said courts or any other of the like nature after the Union shall have no power to cognosce, review or alter the acts or sentences of the judicatures within Scotland or stop execution of the same.

The subject of an appellate jurisdiction had been raised during the discussions over the Union and it is probable that the omission of the role of the House of Lords from the Articles was deliberate. On the English side, the recent dispute in 1704–5 between the Lords and the Commons over *Ashby v White* had raised questions again in the Commons over the extent of the jurisdiction of the Lords,

¹⁰ Lords Journals vol 12, 718.

¹¹ Hart (n 7) ch 6 has the best account of *Skinner's Case* and of *Shirley v Fagg*. See A Swatland, *The House of Lords in the Reign of Charles II* (Cambridge: CUP, 1996) ch 5 for the regular judicial work of the House.

and this was probably a factor in omitting a reference to appeals in the Articles. Scottish opinion was divided: some thought that distance would deter appeals to the Lords while others believed that such appeals would assist in reducing ministerial influence over the Court of Session. The commissioners negotiating the Union probably held that a direct reference to appeals in the Articles of Union would be controversial in Scotland. However, soon after the Union, Parliament passed the Exchequer Court (Scotland) Act 1707, which allowed appeals from that court to the House of Lords in common law and equity cases. The House of Lords received the first appeal from a decision of the Court of Session, *Rosebery v Inglis*, on 16 February 1708. Parliament was dissolved before Inglis could return his answer to the House and there were no further proceedings on this appeal. Lord Rosebery had been a Scottish Union Commissioner while five of the Scottish Union Commissioners and five of the English Union Commissioners sat on the petition committee, which reported on the appeal. The House claimed jurisdiction over Scottish criminal cases when it reversed the decision of the High Court of Justiciary in the case of *Magistrates of Elgin v Ministers of Elgin* (1713). The right of the House to accept such appeals was contentious and it was effectively ended in 1781 by the decision of Lord Mansfield who argued, in the case of *Bywater v Lord Advocate*, that there had been no appeal from the High Court to the Scottish Parliament and there could, therefore, be no appeal from the High Court to the House of Lords.

In its first order relating to Scottish appeals on 19 April 1709, the House ordered that, once notice had been served on a respondent in an appeal from a court in Scotland, the sentence or decree appealed against ought not to be carried into effect. This was an incentive for Scottish litigants to postpone judgment by appealing to the Lords; the number of Scottish appeals easily outnumbered English appeals throughout the eighteenth century. Action to reduce the number of such appeals was taken in 1808 when 139 Scottish cases were waiting for a hearing in the House. With the agreement of the Scottish judges, the Court of Session Act 1808 prohibited appeals in interlocutory matters without the leave of the Court of Session or if there was disagreement among the judges. Scottish judges were also allowed, under the Administration of Justice (Scotland) Act 1808, the power to decide whether a case being appealed merited a stay of execution. These measures had little effect in reducing the number of Scottish appeals.¹²

When Maurice Annesley appealed on 7 May 1717 to the House of Lords against the decision of the Irish House of Lords in the case of *Annesley v Sherlock*, he prompted the House of Lords to resume a long-standing dispute over jurisdiction with the House in Dublin. Following the judgment of the Irish House of Lords in *The Bishop of Derry v The Irish Society* in 1698, the Society had appealed

¹² DM Walker, *A Legal History of Scotland, vol 5, The Eighteenth Century* (Edinburgh: T & T Clark, 1998) 445–55; AJ MacLean, ‘The 1707 Union: Scots Law and the House of Lords’ (1983) 4(3) *Journal of Legal History* 50; AJ MacLean, ‘The House of Lords and Appeals from the Court of Justiciary, 1707–1887’ (1985) 30 *Juridical Review* ns 192.

to the English House of Lords which ruled that an appeal from the Irish Court of Chancery to the Irish House of Lords was *coram non iudice*, and that such appeals had to be sent to the English House of Lords. In the following year, the English House overruled the decision of the Irish House in another Irish Chancery appeal, *Ward and ors v The Earl of Meath*. On this occasion, the Irish House voted to defend its jurisdiction and a difficult conflict was only avoided through the mediation of the Lord-Lieutenant in Dublin. *Annesley v Sherlock* reopened a dispute that had not been resolved. Despite the success of the Lord-Lieutenant in reaching an amicable settlement between the two parties in the case, the two Houses were not prepared to put their disagreement to one side and the matter now turned on the question of which House held the final jurisdiction over appeals in Ireland. In the course of the quarrel, the Irish House of Lords placed three of the judges of the Irish Court of Exchequer under arrest for heeding the decisions of the British House of Lords. In answer, the British House of Lords passed resolutions on 28 January 1719 in support of the Exchequer judges for their action 'in Obedience to the Orders of this House' and instructed the judges to prepare a Bill to secure 'the Dependency of Ireland'. The Declaratory Act of 1719 reaffirmed the appellate jurisdiction of the British House of Lords in appeals from the Irish courts. Forty years later, when the British government was weakened by the war in America and the Irish Parliament became aware of its increased power relative to London, the Declaratory Act was repealed by the Repeal of the Act for Securing Dependence of Ireland Act 1782. The position was restored to that in effect before the Declaratory Act and the British Parliament, prompted by Irish pressure, passed the Irish Appeals Act 1783 which, with great care, declared that all actions and suits in Ireland should be 'decided in His Majesty's Courts therein finally, and without appeal from thence'. Further offence was avoided by the omission of a reference to either House of Lords. Almost twenty years later, appeals from Irish courts returned to Westminster following the Act of Union in 1801.¹³

Lay peers continued to sit on appeals during the eighteenth century. In notable cases, for example the *Douglas Cause* of 1769, a large number of lay peers attended and voted on the appeal. There were occasional attempts to interfere with the course of justice, as in the case of *Bishop of London v Ffytche* (1783) when the judges advising the House recommended judgment for Ffytche by seven to one, but the spiritual peers carried the day for the Bishop of London when the House, after a long debate, voted on the appeal. Frequently, the Lord Chancellor was the only lawyer sitting on appeal, but with a number of lay peers. Gradually, it was recognised that the House needed a number of Members qualified to act as

¹³ I Victory, 'The Making of the Declaratory Act 1720' in G O'Brien (ed), *Parliament, Politics and People: Essays in Eighteenth Century Irish History* (Dublin: Irish Academic Press, 1989) 9–29; DW Hayton, 'The Stanhope/Sunderland Ministry and the Repudiation of Irish Parliamentary Independence' (1998) 113 *English Historical Review* 610; A Lyall, 'The Irish House of Lords as a Judicial Body, 1783–1800' (1993–5) 28–30 *Irish Jurist* 314.

judges; rumours of a new peerage in January 1785 led *The Times* to comment: 'the business of appeals in the House of Lords [is] making an encrease of Law Lords a matter of necessity'.¹⁴

Except for one year, Lord Eldon held the post of Lord Chancellor from 1801 to 1827; he was a man of great legal learning but his procrastination over judgments was the despair of his fellow lawyers. At a time when the political world was divided over the question of political reform, it was inevitable that the reformers would press for changes in the administration of justice by the House of Lords. Eldon succumbed to pressure from the House of Commons for reform when he moved, on 5 March 1811, for the appointment of a select committee to consider the best mode of expediting the hearing of cases in appeal and writs of error. At that time the arrears of appeals and writs of error amounted to 270 cases. The report of the select committee, published on 20 May, recommended that the House should sit three days a week at 10am in order to reduce the arrears and that an extra judge should be appointed in Chancery to reduce the burden on the Lord Chancellor. The House agreed to meet three days a week between 10am and 3.45pm to hear appeals and an extra judge was appointed to Chancery. The House also appointed an Appeals Committee, which met, and still meets, to consider preliminary procedural matters and petitions for leave to appeal.

These reforms proved inadequate and another select committee reported that 225 appeals and 24 writs of error, which included 155 Scottish cases, were awaiting a hearing on 14 March 1823.¹⁵ Judges in the Court of Session did not elaborate on their judgments and this prompted dissatisfied litigants to appeal to the House of Lords. The Court of Session (Scotland) Act 1825 restricted appeals in cases beginning before magistrates or sheriffs in Scotland to questions of law. The House of Lords also agreed to meet five days a week, between 10am and 4pm, to hear appeals, and measures were introduced to compel lay peers to make up a quorum, with the unfortunate result that the lay peers sitting on an appeal often changed from day to day. These arrangements reduced the arrears of appeals by 1827. Under the reforming government of Lord Grey, the new Lord Chancellor was Brougham, a man of great energy and a strong will, who abolished, between 1830 and 1834, the arrears of appeals. Anxious to extend his legal reforms to the work of the House of Lords, Brougham introduced in 1834 a Bill to separate the judicial and parliamentary duties of the Lord Chancellor, but he was persuaded to abandon his Bill on the grounds that his successful dispatch of the arrears made it unnecessary. Shortly afterwards, he was replaced as Lord Chancellor.

¹⁴ *The Times*, 6 January 1785, col 3b. AS Turberville, *The House of Lords in the Age of Reform 1784–1837* (London: Faber and Faber, 1958) 185–219 contains some relevant material on this period; the judicial work of the House between 1690 and 1870 requires more detailed study.

¹⁵ *Accounts relating to the number of appeals and writs of error heard or decided, 1813–23*. HC paper 447, sess 1823.

By the late 1830s the membership of the House included seven peers with judicial experience, and they were sufficient for a quorum to hear appeals. In the appeal of Daniel O'Connell from a decision of the Irish Queen's Bench in 1844, five of these Law Lords sat, with the assistance of 12 judges from the common law courts. This appeal was controversial on political grounds and lay peers wished to support the minority of lords who had found against O'Connell. Peel, the Prime Minister, sent his colleague, Lord Wharncliffe, to persuade the House that lay peers should not attempt to override the judgment of the Law Lords. The lay peers accepted Wharncliffe's plea and followed the Earl of Verulam's example in leaving the chamber.¹⁶

During the committee stage of a Chancery Reform Bill in 1855, Sir Richard Bethell, the Solicitor General, repeated current complaints about the appellate jurisdiction: the House of Lords was not performing its judicial work satisfactorily; peers hearing an appeal felt free to attend or not as they pleased, or to remain for the whole of the argument; with the exception of the Lord Chancellor, the rest of the court were 'mere volunteers'; and the House should include a judge experienced in the law of Scotland; the House was 'inferior to the lowest tribunal in what ought to be the accompaniments of a Court of Justice'.¹⁷ In answer to the vocal criticism of reformers, the Government announced that Sir James Parke, lately a judge in the Court of Exchequer, was to be made a life peer as Baron Wensleydale. Members of the Lords opposed, successfully, the creation of a life peer, which they feared would foreshadow a reform of their House with the creation of more life peers. At the same time, the House of Lords accepted that the exercise of the judicial functions was inadequate and that a more reliable core of professional judges was required to consider appeals. Chance largely dictated the presence of sufficient members qualified to sit judicially. Following the rejection of life peerages, the House appointed a select committee to consider the appellate jurisdiction. The outcome of its reflections was the Appellate Jurisdiction (House of Lords) Bill 1856 which allowed the appointment of two salaried judicial officers in the House and four life peers and for the House to sit judicially during prorogation. After a swift passage through the Lords, the Bill failed in the Commons because the measure was insufficient for the reformers and excessive for the conservative.

After 1856, rapid changes of government ensured that there were sufficient Law Lords to cope with appeals. The House's ability to deal with Scottish appeals, which had been a grievance of long standing, was improved in 1867 when Duncan McNeill, a Scottish judge, became Lord Colonsay. Reformers had not

¹⁶ There was an emphasis in the speeches of the Lord Chancellor and others on the importance of the legal opinions presented to the House: see the detailed account of *O'Connell v R* in *The Times*, 5 September 1844, 5–7. Lay members had last voted on an appeal, without a 'law lord' present, on 17 June 1834; Lord Denman expressed his concurrence with the dissenting judgment in the controversial *Bradlaugh v Clarke* (1883), but he was ignored: *The Times*, 10 April 1883, col 4e.

¹⁷ Parl Debs (series 3) vol 139, cols 2119–20.

abandoned their campaign for a thorough review of the entire court system; in 1867, the year of the Second Reform Act, pressure in the House of Commons led to a Royal Commission on the Judicature. The Appellate Jurisdiction Bill 1870 included the Commission's proposal that the House of Lords should appoint a Judicial Committee, consisting of members and others, to hear appeals; the Bill failed and reform was again postponed.¹⁸

¹⁸ The standard account of developments from 1800–70 is R Stevens, *Law and Politics: The House of Lords as a Judicial Body 1800–1976* (London: Weidenfeld and Nicholson, 1979) 3–47; O Anderson, 'The Wensleydale Peerage Case and the Position of the House of Lords in the Mid-nineteenth Century' (1967) 82 *English Historical Review* 486; for Scotland, see DM Walker, *A Legal History of Scotland, vol 6, The Nineteenth Century* (Edinburgh: LexisNexis Butterworths, 2001) 306–10.