Foreword

In June 2009 scholars, practitioners and judges joined in a Festakt to mark Sir Gerald Gordon's eightieth birthday. Now, in a happy double celebration, we have the Festschrift containing papers which are all, in one way or another, the fruits of that occasion. No Scots lawyer has more deserved a double celebration.

It is actually very hard now to recall just what an innovation Gordon's *Criminal Law* represented. The great fat book dropped like a bomb into a legal world where nothing had apparently changed for decades and where, if the judges and most of the practitioners were to have their way, nothing was ever going to change. Macdonald's *Criminal Law* had last been revised in 1949, the Criminal Appeal Court hardly sat and, even if it did produce a judgment of importance, there was a good chance that it would not be reported.

But the bomb did not produce its explosion immediately. Two other events were required. One, the introduction of criminal legal aid, had already occurred, but its effects were only just beginning to be felt. The other, the retirement of Lord Clyde as Lord Justice General and his replacement with Lord Emslie, still lay some five years in the future. So the judges' initial reaction to the book was typified by Lord Avonside's famous choleric refusal even to consider a passage from it when he was sitting in the Privy Council. Whether because of that or not, he was never invited back.

Lord Emslie's appointment marked a turning point. He became Lord Justice General in the Spring of 1972 and when I first saw the criminal appeal court later that year, many solicitors and counsel were still dropping in to watch the amazing new sight of the court actually sitting for a whole day – or even for days at a time. And, even more importantly, Lord Emslie was happy to consider new arguments advanced by counsel. Slowly but surely, also, he began to produce a stream of authoritative judgments addressing those arguments. The scene was set for *Criminal Law* to produce its effect.

The effect was not quite immediate. Even Lord Emslie sometimes seemed to yearn for the older, simpler, days when Macdonald contained everything that you needed to know. In those simpler days, on common law offences at least, Scottish judges never needed to look beyond the confines of Scotland. Indeed it was positively bad form to do so. I remember the scene – worthy of a Bateman cartoon – when a very junior counsel tried to cite *Russell on Crimes* to an appeal court containing Lord Wheatley and Lord Kissen. But the material was in Gordon and so, despite opposition, counsel tended to persist. Moreover, the advent of photocopiers meant that counsel could use cases from overseas jurisdictions. As an advocate depute, I found that citing, say, an Australian case was a useful ploy for introducing a supposedly alien concept, which, even in the 1980s and 1990s, might have been resisted if its English origins had been too openly proclaimed. Gradually, the appeal court became used to a somewhat richer diet – and to looking at the passages in Gordon where the new material was discussed. Even if the court may not always have referred to the book, it was having its effect.

And then came the *Scottish Criminal Case Reports (SCCR)*, which ensured that any cases of importance were promptly reported. The competition also stimulated the editors of *Scots Law Times* and *Session Cases* into action. But *SCCR* had the unique selling point of Gerald's commentaries. When a case was cited and submissions were being made about its effects, very wisely, counsel rarely referred to any criticisms in the commentary. But the commentary was the elephant in the room. It was the one thing that everyone was actually thinking about, but no-one was mentioning. "Perhaps not *everyone* agrees with the reasoning" – was the most that Lord Emslie would say, while looking off into the far distance. What mattered was that the comments did have an effect and, by the time that Lord Hope became Lord Justice General, counsel would routinely and quite openly make arguments based on them. The appeal court judges would also look, rather nervously, at each new part of *SCCR* to see whether their written work had got a respectable mark from Gerald.

Many – perhaps most – of the cases in the criminal appeal court concern procedural points or points of evidence. On these, too, Gerald was providing authoritative guidance not only in his commentaries, but in his work on Renton and Brown. And, when human rights, devolution issues and the like arrived in 1999, he was ready and eager to grapple with those too.

The essays in this volume show not only how very much Scottish criminal law has changed, but also how very much it is changing. The world of devolution is one where the Scottish Law Commission and Scottish Parliament

have now made their first major inroad into the common law with the Sexual Offences (Scotland) Act 2009. Whether it is a change for the better remains to be seen, but there can be no doubt that it marks a major change. The old common law was pragmatic. The drafting of the 2009 Act reflects a completely different, more academic and more theoretical, approach. In that sense, it is the product of the revolution which Gerald triggered.

It is fitting therefore that the essays bring theoretical and practical insights from scholars working all over the world. It is fitting also that they contain criticisms of the work of the judges both in Scotland and elsewhere. In a way, it is fitting, too, that some of the essays are directed at points which, even by now, have been modified by new cases. Our criminal law is a mixture of the theoretical and the practical, of the old and the new. No-one knows that better than Gerald Gordon. No one could more richly deserve this collection of stimulating essays reflecting his interests. While enjoying this volume, we look forward to the Festschrift to mark his ninetieth birthday.

Lord Rodger of Earlsferry

Sir Gerald Gordon