Chapter 4

FACT-FINDING:
A BRITISH PERSPECTIVE

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I. INTRODUCTION

The approach to fact-finding is perhaps the most significant point of difference between the 'common law', or Anglo-American, tradition and the 'civil law' tradition of mainland Europe. Various attempts have been made to encapsulate the nature of the difference, such as 'the common law system is accusatorial (or adversarial) while the civil law system is inquisitorial' or 'the common lawyer is concerned with fact while the civil lawyer is concerned with truth'. Such simple generalisations, although they contain a germ of truth, are ultimately more misleading than helpful.

The reason why they are misleading is that they presuppose the existence of two parallel procedural systems which can be directly compared point by point. In fact the systems are not parallel. The so-called 'inquisitorial' approach in France applies only to criminal procedure: there are substantial differences between France and Germany; and there is a world of difference between both of them and Scandinavia. Equally, there are quite significant differences between Scotland and England, between England and Ireland and between all of them and the United States. Detailed comparison is difficult precisely because there are so many differences within the two families.

A lawyer in the European Commission once remarked to me that Europe is a legal zoo. There are almost as many different forms of procedure as there are countries. Truly scientific comparison would be possible only if we could compare how different systems would deal with the same set of facts. That is unattainable but, at the very least, detailed comparative research would need time to watch courts at work in different countries; sufficient knowledge of languages to understand what is going on; access to the papers; and the opportunity to discuss with the judges and advocates the choices they made and the decisions they took in dealing with each case. Even then, one's assessment of the ways in which different systems would deal with the same problem of fact would remain largely impressionistic. We are as much in the realm of feeling or smell as in that of rigorous academic comparison.
Codes and treatises on the law of evidence are, at best, unreliable guides. Superficially, the rules of two systems may appear very similar. For example, some aspects of the Dutch procedures described in Dr Punt's paper bear a striking resemblance to recent proposals for new procedures in the Scottish courts. Yet we can be certain that if the Scottish proposals were to be implemented, the Scottish courts would still work very differently from the Dutch courts.

Lawyers from different traditions start from different assumptions about the way in which the law ought to work, and they carry these assumptions through into the way in which they make it work. The greatest problem for the comparatist is to articulate what lawyers of different traditions do not think to explain because they take it for granted. He must especially avoid making value judgments about the respective merits of different systems before establishing the facts about how they work.

Although for all these reasons, broad generalisations about the differences between the common law and civil law systems are to be avoided, it remains true that the approach to fact-finding is a fundamental point of difference between those two families. The aim of this paper is to explore how and why this is so.

My qualifications for presenting such a paper are only two. The first is that I am by training and experience a Scots lawyer and lawyers from small jurisdictions are from necessity comparative lawyers since they must always be ready to take account of the law and practice of their larger and more self-sufficient neighbours. The second is that, in the field of European Community law, I have worked for some years past with lawyers from other jurisdictions, bred in different legal traditions. Inevitably, our approaches to cases have differed from time to time. Sometimes we have discussed the differences and tried to define the reason for them. More often the nature of the difference has become clear from the use of a word, a phrase or a technique that is unfamiliar. Community lawyers become comparatists by osmosis. In this paper I shall draw on these two facets of my experience.

Until the early years of the last century Scotland belonged, for civil procedure, to the same legal family as France - so much so that familiarity with the terminology of old Scots procedure made it unexpectedly easy for me to come to terms with procedural arguments in Luxembourg. Early in the nineteenth century Scotland adopted, for civil proceedings, the system of trial by jury devised in England and exported from England, first to Ireland and then to the American colonies. Scotland already had trial by jury for serious crimes, although with significant differences from the English system - notably the

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2. See also the author's 'Different Assumptions - Different Methods' (the SSC Biennial Lecture for 1990) published by the Society of Solicitors in the Supreme Courts of Scotland. The present paper owes much to comments of friends and colleagues on that Lecture, as also to the fertile minds of the author's Legal Secretaries in Luxembourg, Jacqueline Minor, Elizabeth Willocks and Michael Wilderspin.
absence of any opening speeches. In Scotland the jury was, and still is, plunged straight into the evidence.

The adoption of jury trial for civil proceedings brought Scotland, procedurally at least, fully into the family circle of the Anglo-American common law. But the heritage of our procedural past lies hidden in the old books and in some aspects of our terminology and practice. Coming back from Luxembourg to look again at the old Scottish books, I have found that a phrase, a proposition or a paragraph has helped to focus a point of which I have been conscious but did not know how to formulate. I hope that the results of my rummaging in these old treasure chests may prove enlightening, or at least interesting.

II. THE SPECIAL CHARACTERISTICS
OF THE COMMON LAW SYSTEM

The Anglo-American procedural system has certain special characteristics which are common to all countries of the common law family and which set them apart from all others. These special characteristics determine, not just the way our courts work, but the whole mind-set of lawyers bred in our system. What is more, they give rise to deeply-held beliefs amongst laymen as well as lawyers about what is meant by the guarantee of 'due process'. The special characteristics of the common law procedural system have their origin in the belief - still very much alive in the United States - that trial by jury is the proper method of judging criminal guilt and civil liability. This is why criminal procedure and civil procedure are basically the same in the common law countries. In both cases the legal process is assumed to centre on a single, once-for-all, continuous event, called a trial, at which evidence is led by two equally-matched adversaries, who examine and cross-examine the witnesses and then make oral submissions to the judge on the facts as proved and the law to be applied. (It is significant that there is no adequate translation in other languages of the English terms italicised in the preceding sentence.)

Everything that goes before the trial is preparatory or incidental to it. Any subsequent appeal is concerned with what happened at the trial or the conclusion to be drawn from it. Although civil jury trial has largely been abandoned in most common law countries other than the United States, the same pattern of procedure is followed before the judge of first instance who is treated as a surrogate jury.

Historically, belief in trial by jury was more than a purely pragmatic belief in it as the best way of determining questions of fact. In the eighteenth century the right to jury trial was seen as a fundamental 'natural' right of the citizen and an essential protection against abuse of executive and judicial power. Thus, the Sixth Amendment to the United States Constitution guarantees the right to trial by jury in all criminal prosecutions, while the Seventh Amendment provides that:

in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be
otherwise reexamined in any court of the United States than according to the rules of the common law.

Note the emphasis, not only upon the right to jury trial, but also upon the unassailability of the jury's verdict on questions of fact.

In 1789, the year of the French Revolution and the year when Madison introduced the Bill of Rights to the U.S. Congress, a Scottish judge, Lord Swinton, published a paper on the reform of the Scottish courts including a proposal for 'the revival of jury trial in certain civil actions'. He sought to demonstrate:

the excellence of jury-trial over every other kind, and particularly over that kind where the trial of the fact, as well as of the law, is left to established judges, even the most learned and impartial .... It appears that the excellence of this mode has been recognised in three of the most illustrious and renowned states which have graced the history of the world, Athens, Rome, and Great Britain - Great Britain, including Scotland as well as England, for both these kingdoms have immemorially enjoyed the privilege of jury-trial: although, about 250 years ago, James V of Scotland, introduced into the Scots civil courts the French method of taking evidence by inquest, and reducing it to writing. ... Perhaps it is reserved for the present happy reign of George III to complete the system of liberty, by restoring to Scotland her ancient privilege of jury-trial in civil causes.3

Again we have the theme that jury trial is a guarantee of liberty and that, as a matter of principle, questions of fact should not be judged by judges.

Civil jury trial was eventually introduced into Scotland in 1815.4 It has had a chequered history and has never been without its critics. Nor did jury procedure wholly displace the former system, of which traces remain, particularly in the terminology of procedure. But the later history of civil jury trial is not important. The significant point is that, because Scotland adopted the Anglo-American pattern of procedure for civil cases, we can make direct comparisons between the procedures described in the older books and the procedure we have today.

III. THE PATTERN OF COMMON LAW PROCEDURE

The first characteristic of trial by jury is that all the material for judgment must be presented orally to all the jurors at the same time. Second, a jury of 12 people cannot be brought together on different occasions to suit the convenience of the parties, their lawyers and the witnesses. The oral presentation must therefore be continuous. Third, the jury cannot be brought back later to

3. Swinton, Considerations concerning a Proposal for Dividing the Court of Session into Classes or Chambers, 1789, 70-71 (with more modern punctuation).
4. In order to establish the civil jury system, a Scots member of the English bar, William Adam, was brought in as Lord Chief Commissioner of the Jury Court. Adam, a close friend of Walter Scott, was the son of one of the brothers Adam, the architects. He had had a varied career at the English Bar and the House of Commons, had wounded Charles James Fox in a duel and had taken part in the impeachment of Warren Hastings.
reconsider their verdict if it is found to rest on false assumptions of fact or a wrong application of the law. The factual material presented to the jury must therefore be as complete as possible, and it must be ‘filtered’ to ensure that the jury is not misled by irrelevant material or influenced by material which, for reasons such as privilege or confidentiality, ought not to be used. Fourth, since the jury’s function is solely to determine the facts, application of the law to those facts (the function of the judge) cannot take place until the jury has completed its work. The procedure must therefore be exhaustive so far as the facts are concerned.

These inherent characteristics of the jury system explain why common lawyers are so fact-oriented. Already at the end of the seventeenth century Lord Stair, the father of modern Scots law, remarked that:

The English do commonly join the point of fact and [law],5 and so allow witnesses for either party on any point they think fit, and then judge what point of [law] there ariseth from the fact proven by either party.6

Things have not changed. As Lord Denning put it in 1974:

As a rule you cannot tell whether it is necessary to decide a point until all the facts are ascertained. So in general it is best to decide the facts first.7

The procedure leading up to trial is primarily directed towards the facts. The written pleadings must deal with legal points to the extent that they define the orders sought and, at least in general terms, the legal grounds for seeking them. But it is not necessary to argue the law at the stage of pleading, since that will come later when the facts are determined. On the other hand, the pleadings must define the issues of fact with some particularity, and it must be possible to force the opposing party to come clean and be specific about the facts alleged. In England, for example, this can be done through a ‘request for further and better particulars’ and/or by requiring the opposing party to answer ‘interrogatories’ on oath.

Having defined the factual issues, the material to be presented to the jury or judge must be identified and got ready. Documents must be collected and lodged in court. Witnesses must be found and statements taken from them - an absolutely essential task of the British solicitor but one that would be regarded as professionally improper, if not illegal, by lawyers in most civil law jurisdictions.

Common law countries differ in the extent to which they require opposing parties to assist each other in their search for material. In Scotland, on the whole, the parties are left to their own devices, subject to the power of the court to require them to produce to their opponent documents in their possession that are clearly relevant to the case. In England, the obligation of ‘discovery’

5. Stair uses the word ‘right’ (= ius, droit, recht, etc.).
requires each party to supply his opponent with a list of documents in his
possession which are material to the dispute. If he refuses to supply a list or to
allow the documents to be inspected, the court may order him to do so. A party
may also apply for an Anton Piller order, which will allow him to enter the
opposing party's premises and take possession of documents in order to prevent
their destruction or disappearance.

In the United States, in response to Roscoe Pound’s attack on ‘the sporting
type of justice’, the processes of discovery and interrogatories have been
carried to such lengths that cases are almost tried twice - first inter partes and
then in court.

Corresponding procedures exist to ensure that material wrongfully obtained
cannot be used and to protect the confidentiality of, for example, communications
between lawyer and client. Such procedures highlight the significance of the
distinction between evidence and proof in the common law system - a distinction
which it is almost impossible to explain in French because the word preuve
covers both (or neither). The evidence is the material on the basis of which a
jury would be entitled to hold a fact proved, but the evidence must, in Scottish
terms, be relevant (properly related to the facts in issue) and competent (lawful
evidence).

The role of the judge in these preliminary procedures is essentially reactive.
He takes no part in the preparation for the trial, unless the parties seek his
assistance. Pre-trial case management, already performed by the Master in
English High Court proceedings, is now increasingly resorted to in the United
States, but the judge is not there performing any investigative function.

At the trial the evidence is presented to the court by the opposing parties,
primarily through the process of oral examination and cross-examination of
witnesses. Where there is a jury, the judge’s role is, once again, essentially
reactive - dealing with objections to questions or the production of documents
- until the parties have completed their final speeches, at which stage the judge
'sums up' and directs the jury on points of law. Even where there is no jury:

the judge’s part ... is to hearken to the evidence, only himself asking questions of
witnesses when it is necessary to clear up any point that has been overlooked or left
obscure; to see that the advocates behave themselves seemly and keep to the rules
laid down by law to exclude irrelevancies and discourage repetition; to make sure
by wise intervention that he follows the points that the advocates are making and can
assess their worth; and at the end to make up his mind where the truth lies. If he
goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate;
and the change does not become him well.

At the stage of appeal, there is very little chance of being allowed to introduce
fresh evidence, and the verdict of a jury is sometimes treated with almost

9. See Wigmore, ‘Roscoe Pound’s St Paul Address of 1906: the Spark that kindled the White
mystical reverence. Much the same attitude is taken to the findings of a trial judge sitting alone, great importance being attached to:

the manner, appearance, and mode of giving evidence, all the outward and visible signs by which men habitually detect falsehood or receive an assurance of truth.\textsuperscript{11}

The proper approach for an appellate court has been defined in this way:

(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge’s conclusion.

(2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

(3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakeably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.\textsuperscript{12}

The expression ‘misdirection of himself by the judge’ brings out very clearly the idea that the trial judge sitting alone is a surrogate jury who has to be ‘directed’ as to the law and whose ‘findings of fact’ are entitled to almost the same degree of respect as the verdict of a jury.

In a word, the essential characteristic of the common law procedural system is that it is a ‘lay’ system. The legal knowledge and training of the judge takes second place to the presumed common sense and worldly wisdom of the layman (even if combined in the same person). The structure of the system and the assumptions on which it is based make it highly fact-oriented, and the distinction between ‘fact’ and ‘law’ is fundamental to it.

IV. THE ‘CIVIL LAW’ APPROACH

The preoccupation of common lawyers with fact-finding as an essential and discrete stage in the administration of justice leads them to make three important but fallacious assumptions about the procedural systems of mainland European. The first is that since fact-finding is central to the common law system, other systems must have directly comparable fact-finding procedures - not necessarily the same procedures but comparable procedures. The second is that since the common law systems adopt the same approach to fact-finding in civil and in criminal procedure, other systems must do so too. The third is that since all systems within the common law family (English, Irish, American, etc.) work in

\textsuperscript{11} Lord Loreburn, L.C., in Kilpatrick v. Dunlop (1911), reported in a footnote to Murray v. Fraser, 1916 S.C. 623 at p.631. I am grateful to Professor W.A. Wilson for this hidden reference.

essentially the same way, there is the same homogeneity amongst the systems of the civil law family.

Each of these assumptions is fallacious. There is no single system common to the countries of the civil law family which can be directly compared with the common law system just described. There is, however, a general approach which can be set against it by way of comparison. By way of introduction, we can go back to a passage in Stair’s *Institutions* already quoted.\(^\text{13}\)

The theory of civil litigation in Scotland, following the principle of the civil law, was that the parties entered into a judicial contract to abide by the decision of the court. Stair explains that this contract was constituted by the act of litiscontestion. This was a judicial act by which the judge allowed the parties to prove the points proof of which, or failure to prove which, would, unless some new point emerged, result in decree in favour of one or other of them. The judicial order allowing proof presupposed that the judge had determined, first, what points were relevant and, second, how they might be proved - in particular, whether by writ or by oral testimony.

According to Stair, ‘the whole office of judges is in determining the justice and truth of pleas’, a plea being a point of fact and the point of law arising from that fact - ‘ex facto enim jus oritur’. He distinguishes the Scottish approach from the English:

The English do commonly join the point of fact and [law], and so allow witnesses for either party upon any point they think fit, and then judge what point of [law] there ariseth from the fact proven by either party. Our ancient custom did not allow this way in any case, being tenacious in this axiom, *fristra probatur quod probatum non relevat*, and with very good reason, that people should not be put to the trouble and expense to adduce witnesses, before it were determined what points would be effectual if they were testified; besides that oaths should not be taken in vain.\(^\text{14}\)

In spite of the archaic language and the Scottish technicalities, there comes across, above all, from Stair’s exposition the insistence that, precisely because facts give rise to legal rights, questions of fact and law go together and both are the province of the judge. The parties have contracted to abide by the decision of the judge, and it is for him to decide what is relevant, what needs to be proved, and how it may be proved.

The concept of relevancy was related to the practice of constructing written pleadings in the form of an Aristotelian syllogism. Bankton, another of the Scottish institutional writers, explains:

In most actions the Libel or Declaration sets forth the pursuer’s claim, premising the law (called by some the Proposition), and subjoining the fact (termed the Subsumption) and the Conclusion is for a decree against the defender for the claim libelled.\(^\text{15}\)

\(^{13}\) *Institutions*, IV.x1.8.

\(^{14}\) Ibid., IV.xxxix.3-4.

Ultimately, when in ‘judging the justice and truth of pleas’, the judge had to determine whether the allegations of fact and the propositions of law (the media concludendi) justified the form of order sought (the Conclusions). Where the facts alleged, even if proved, could not support the claim, then the case could be decided as a matter of law, and proof of fact was not merely unnecessary but positively undesirable.

Even where the judge considered proof of fact to be necessary and desirable, proof by oral testimony of witnesses was neither the primary nor the only method. As Erskine, Professor of Scots Law at Edinburgh in the mid-eighteenth century explained:

In those ages when the art of writing was in a great measure confined to the clergy, and when a universal simplicity of manners prevailed, proof by witnesses was admitted in almost every case .... but after writing became a more general accomplishment, the lubricity and uncertain faith of testimonies made it necessary to bring the doctrine of parole evidence within narrower limits.16

The proper order in which the different methods of proof still received in our law ought to be undertaken by parties is, first, by the writing of the person against whom the proof is brought; for while there is any room for this manner of evidence, the putting of unnecessary oaths to the litigants or witnesses ought to be avoided.17

Here we can note two points. The first is that oral testimony is inherently unreliable, writing being a more reliable basis for judgment. Distrust of witness evidence as a route to the truth was reflected in a series of rules disqualifying witnesses on grounds including consanguinity, common interest, age and even sex.18 Where witness evidence was used, the witnesses were heard, not by the Court (which always sat in banc) but by one of the judges sitting alone (in the ‘Outer House’) or by a specially appointed Commissioner, usually a member of the bar, who ‘reported’ the evidence - usually in the form of a written transcript.

The second point to note is the concern, not simply to avoid the unnecessary taking of evidence, but to avoid the unnecessary taking of oaths. This was not just a hangover from the middle ages or the religious wars of the seventeenth century, but a serious moral objection. In 1788, at the trial of Deacon Brodie for robbing the General Excise Office in Edinburgh, Lord Justice-Clerk Braxfield warned a witness that:

if you say anything to the prejudice of these men that is not true or if you conceal any part of the truth, with a view to favour them, you will thereby be guilty of the crime of perjury, for which you will be liable to be tried by this Court, and severely punished, and you will commit a heinous offence in the sight of the Almighty God, and thereby endanger your immortal soul.19

17. Ibid, IV.ii.3.
18. Stair, IV.xliii.7-11; Erskine, IV.ii.22-27.
19. Roughead (ed.), The Trial of Deacon Brodie (Notable Scottish Trials series) 132. See also the warning given to the same witnesses by Lord Hailes at 135.
The corollary of belief in the moral significance of oaths was the acceptance, as next best to 'proof by writ', of 'proof by oath' of the opposing party - a concept quite different from that of proof by witnesses since the parties could not testify in their own favour. Where a party relied on proof by oath of his opponent, he was bound by it, but the theory was that, if a party conceded an essential point against himself on oath, it could surely be taken to be established. Correspondingly, a party would not be likely to endanger his immortal soul by a false oath in his own favour. (Proof by writ or oath survives in Scots law, though its origins are imperfectly understood.)

The difference of approach between England and Scotland in the matter of oath-taking is brought out in the lectures, delivered in 1821-22, of David Hume, Baron of Exchequer and Professor of Scots Law at Edinburgh. In the course of discussing disqualification of witnesses, he breaks off:

And here, before proceeding, I may take notice that a principle enters into our practice, of which in the law of some other Countries, little or no consideration seems to be had. I mean a regard to the conscience of witnesses, lest they injure themselves, and offend their maker, by the sin of perjury. In England, they seem to think, that this is the concern of the witness alone, - and that if disposed to perjure himself, he shall freely be allowed to do so, and to run his risk of detection and punishment if he go wrong. With us, on the contrary, the law is disposed to be watchful for the welfare of the individual in this particular, - and looks on the example of perjury as a serious matter, and is anxious therefore to hinder the guilt from being incurred, if by any reasonable means this may be accomplished. To detect or to punish the perjury, - this our practice regards as but a secondary consideration. It strives to preserve the conscience of the lieges clear, and to prevent the influence and contagion of so hurtful an example. These considerations, as peculiar to our practice - not recognised in the law of England - have not perhaps, always, had sufficient attention paid to them in Scotch cases in the House of Lords.20

If the point seemed to be unimportant in the House of Lords in the early nineteenth century, it is not unimportant in continental Europe today. Under the Rules of Procedure of the European Court of Justice and of the Court of First Instance, a witness or expert need not be sworn but, if he is, he takes the oath after having given his evidence or presented his report.21 The reason for this practice, contrary to that of most Member States, is that it gives witnesses the opportunity to correct their evidence before taking the oath and thus to avoid committing perjury.

Other aspects of the old Scottish procedure can be found today in the European Court. The writ initiating a direct action must state the conclusions, the moyens (media concludendi) and the offres de preuve (the offers of proof)22 (I use the terminology of the French text because the points are hidden in the English text.) The judgment of the Court sustains or rejects the moyens invoked

21. Rules of Procedure of the Court of Justice of the European Communities, Arts. 47(5) and 49(6).
22. Ibid., art. 38(1).
and must, in principle, deal with each of them. This means that, in deliberation between the judges, the discussion tends to be focused on pre-defined issues of law, rather than upon the facts in general and the conclusions to be drawn from them.

The Court may dismiss an action on grounds of inadmissibility even before the writ has been served on the opposing party.\footnote{23} It is for the Court to prescribe the measures of inquiry that it considers appropriate in an order setting out the issues of fact to be determined. These may include the personal appearance of the parties (for questioning by the Court); a request for information or production of documents; oral testimony (of witnesses other than the parties); experts’ reports; or an inspection of the place or thing in question. The conduct of the inquiry may be delegated to the Judge-Rapporteur who will, as in old Scottish practice, report the result to the Court.\footnote{24}

Note that oral testimony of witnesses is only one, and then not the first, method of proving fact. Having spent two years in the Court of First Instance, one of whose purposes is closer examination of the facts, I have never seen a witness examined and only twice seen the examination of an expert.

To a marked degree, the culture of the civil law tradition was, and remains, averse to proof by witnesses on theoretical, practical and, to some extent still, moral grounds. Erskine referred in the passage cited above to the ‘lubricity and uncertain faith of testimonies’, and I have heard much the same point of view expressed by colleagues in Luxembourg.

Proof by writ, oath or witnesses was distinguished by the Scottish institutional writers from other, ‘extraordinary’ methods of proof. They included proof by inference, notoriety (judicial knowledge), confession, concession and presumption.\footnote{25}

Two of the extraordinary methods of proof - notoriety and presumption - deserve special mention. There is no need to prove what the judge already knows, provided it is generally known though not necessarily to everyone. A fact may be presumed by reason of its inherent probability (presumptio judicis), because the law presumes it unless the contrary is proved (presumptio juris), or because the law requires it to be presumed and disallows any attempt to prove the contrary (presumptio juris et de jure). Again, there are general presumptions - for example, in favour of personal liberty and freedom from obligation - and special presumptions - for example, the presumption in favour of marriage between those who live together and are known as man and wife (one of the Scots forms of ‘irregular marriage’) and the presumption in favour of legitimacy: pater est quem nuptiae demonstrant.

The common lawyer would find it very surprising that these should be regarded as ‘methods of proof’. In the common law world they are points of law to be invoked in order to complement, supplement or qualify the proved facts. Herein lies the essential difference between the two approaches.

\footnote{23} Ibid. art. 92.
\footnote{24} Ibid. art. 45.
\footnote{25} Stair, IV.xlv; Erskine IV.ii.33 ff.
What we find in the Scottish institutional writings of the seventeenth and eighteenth century, and I have found confirmed in Luxembourg, is the underlying idea that the *facta probanda* - the facts so far as relevant to the case - can be approached as necessary, stage by stage, in different ways, some of which are mutually exclusive while others can be applied cumulatively. The approach is well illustrated in a European staff case, *Duraffour v. Council*, in 1971.  

The widow of a Community official claimed the benefits payable under the Staff Regulations in the case of an official's death as the result of a non-occupational accident. The question was whether the official's death was due to accident or suicide. Both in their written pleadings and at the oral hearing the parties referred to and discussed the legal and factual significance of various items of ‘evidence’ (in the common law sense). But there had, up to that point, been no separate procedure of ‘taking evidence’, the factual submissions of the parties being interwoven with their legal submissions. In the light of those submissions, the Court decided that it was necessary formally to take evidence and ordered the claimant, within one month, ‘to give particulars of the facts which she offers to prove and indicate for each one the method of proof on which she intends to rely’. The defendant institution was thereafter to have the right ‘to produce the elements of proof in support of its own contentions, the right of both parties to produce evidence in rebuttal being reserved’.  

There was no suggestion that it was too late to be raising questions of evidence after the written and oral pleadings were complete. It simply became clear that formal evidence was required and the Court called on the parties to provide it. But the ‘right’ of the parties to bring evidence was, as it always is in the European Court, limited to the right to *offer* evidence subject to the Court’s assessment of its relevance. 

The technique of the civil law systems is thus archetypally ‘judicial’ in that it involves a professional lawyer applying the rules, the methods and the outlook of the law as a science to a problem submitted by the parties to the judge, as a *lawyer*, for solution. This, of course, is quite unlike the technique of jury trial which relies on the capacity of the common man to ‘detect falsehood or receive an assurance of truth’ and treats the process of fact-finding as a necessary and logical precursor of applying the law. It is pointless to look in the civil procedure of France, Germany or Italy for anything corresponding to a ‘trial’ in the common law sense, since there is no place and no need for such an event. Correspondingly, an appeal court is free, and sometimes bound, to re-examine the facts since no particular sanctity attaches to the findings of the judge of first instance. The fact/law dichotomy becomes technically important only in the context of ‘cassation’ as distinct from appeal.

27. The text has been slightly adapted to reflect the original French (there being no official English translation in 1971).
V. CONCLUSION

The essential difference between the common law and civil law approaches to fact-finding seems to lie in a difference of perception. The common law tradition perceives fact-finding as a 'lay' activity separate from, and generally anterior to, the 'judicial' activity of interpreting and applying the law. The other tradition sees fact-finding as an integral part of the process by which a dispute between laymen is submitted for determination by a trained professional judge, the 'judge' in this context being, ultimately, the professional judiciary at first instance and appeal as a single collegiate body.

There is evidence that the two traditions are moving more closely together, particularly through their interaction in the context of the European Community. The new procedures for judicial review in Britain are not much different in essentials from the procedures of the Court of Justice in Luxembourg. International arbitrations, with arbiters drawn from different traditions, frequently adopt a 'mixed' procedure. But differences of culture and outlook remain important. In particular, the expectation of some form of 'trial' is so embedded in the common law approach to due process that it is looked for even where it does not necessarily belong - for example, in public inquiries and in EEC competition procedure.

Having had experience of operating on both sides of the divide, I firmly believe that the process of examination and cross-examination, developed in the common law system of trial, is unrivalled as a means of getting at the truth where important facts are deliberately concealed or distorted. Those who have been trained in the common law system develop a nose for the evasion and the half-truth. If a judge has had no experience as an advocate with an interest to pursue a point on behalf of his client, he may break off his investigation at the very moment when, by pressing a bit further, he might have uncovered the truth.

On the other hand, as a way of getting at objective truth, the common law system suffers from the drawback of being party-driven:

Judges like to think that the object of a litigation is to discover the truth. We try to do so and fortunately we often do discover it. But the decision of a [trial judge] is in the last analysis only an adjudication by a trained mind on the material which the parties can or choose to put before him. We have all been familiar at the bar with cases where vital evidence in unprocurable and also with cases where the truth may lie with witnesses whom neither side is prepared to lead.28

Perhaps the common law system also places undue emphasis on the relative credibility of witnesses as a means of resolving disputes. In so doing, it can become unacceptably adversarial, deterring honest people from exposing themselves to the witness box.

There is also, as the House of Lords warned in 1959,\textsuperscript{29} a danger for the future of the common law if its procedural links with the jury system are forgotten. The vitality of the system depends on precedent but the system is at risk of dying under the weight of precedent. The jury system limits the availability of precedents, particularly factual precedents, since jury cases are normally unreportable except on appeal. By contrast, the decision on the facts of a judge of first instance is reportable and therefore citable. So the health of the common law system may indeed depend on continuing to treat the judge of first instance as a surrogate jury and maintaining fairly rigidly the distinction between question of fact and questions of law.

However, to repeat a point made at the beginning, it is important not to be led into confusing comparison of methods with a value-judgment of the respective merits of those methods. As a first step, the methods themselves need to be better understood, especially by lawyers taking advantage of greater freedom to practise across frontiers. Comparative lawyers must articulate what other lawyers take for granted.

\textsuperscript{29} See the speeches of Lord Somervell of Harrow and Lord Denning in \textit{Qualcast (Wolverhampton) Ltd. v. Haynes}, [1959] AC 743.