Comparative Law Review

2024 – Vol. 15 n. 2

ISSN:2038 - 8993

COMPARATIVE LAW REVIEW
The Comparative Law Review is a biannual journal published by the
I. A. C. L. under the auspices and the hosting of the University of Perugia Department of Law.

Office address and contact details:
Department of Law - University of Perugia
Via Pascoli, 33 - 06123 Perugia (PG) - Telephone 075.5852437
Email: complawreview@gmail.com

Comparative Law Review is registered at the Courthouse of Monza (Italy) - Nr. 1988 - May, 10th 2010.

COMPARATIVE LAW REVIEW

VOL. 15/2 - 2024

Contract Law for Interesting Times

***

ROMAN LAW TRADITION, SCOTTISH CIVIL PROCEDURE AND ADOPTION OF A MIXED SYSTEM OF JURISPRUDENCE

*Zia Akhtar**

TABLE OF CONTENTS:

The law of Scotland differs from the rest of the UK by its inheritance of Roman law and its composition of both common law and civil law. The fusion in a non-codified 'mixed jurisdiction' stems from legal principles that have been drawn from both the civilian (i.e. Roman law) and English common law traditions. It owes its Civil law origins to the jurists who developed the causes of action in the civil courts and are the institutional writers in the Scottish legal tradition. This was a gradual process that oversaw the Roman-Scots law of the early formative period that later came under the influence of English law after the Act of Union in 1707. The consequence was a legal system which drew from both the great European traditions whilst containing distinctive elements of its own. In this paper there is an examination of the historical development of Scots law, and the concepts drawn from English common law that became necessary when the House of Lords became the final court of appeal. The cause of action in common law were integrated into the civil procedure while retaining the action in delict that was related to claims for civil injuries. There is a comparative approach with the principles drawn from the South African law that has also the elements of both common law and Roman Dutch law in its framework. The argument is that in contemporary proceedings the mixed system of substantive law is beneficial because it is based on practiced tradition and a diverse system has the ability to survive with procedural changes to the modern sources of law.

Keywords: Ius commune – institutional writers – civil law – common law – Roman Dutch law – delict .

INTRODUCTION

The framework of Scots law has developed through principle derived from legal writings rather than precedence established through the courts.[1]The jurisprudence of institutional writers has had a considerable impact on the formation of the municipal law of Scotland leading up to the Treaty of Union in 1707whose text provided for legal measures to ensure the recognition and continuation of the Civil law tradition. [2] While the post-1707 settlement led to a substantial influence of English law in the realm of commercial law, the classical tradition in Scots law has survived with the historical legal identity that separates Scots law from English common law. The substantive law includes the property, contract, and tort concepts and in the civil law tradition the delict has had considerable impact where fault as basis for liability is concerned and is still present in the procedural remedies available in the courts. The issue is the historical process for the adoption of two

* LLB (Lon), LLM (Lon) Gray's Inn, Coventry University.

1 See Kenneth McK Norrie, The *Actio Iniuriarum* in Scots Law: Romantic Romanism or Tool for Today?, in Eric Descheemaeker and Helen Scott, Iniuria and the Common Law, (Hart, 2013), p.49.

2 O.F Robinson, TD Fergus, and W. M Gordon, *European Legal History: Sources and Institutions*, London: Butterworths. 1994: 231;P .Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, London: Hambledon Press, (1988), 269–353.

legal concepts that has survived and is part of the substantive and procedural aspects of law.

The Roman law has been ingrained in Scots law since the 14 th century and its co terminus with the rise of the European *ius commune* in the later medieval period [3] This derived from the Roman concept of a common law and also applied to Scotland subject to certain 'national' deviations, which was received in the *iusproprium*.[4] This notion of a 'European common law' was ingrained and reinforced by the practice of law that has endured in the post-1707 settlement when there has been a substantial influence of English law but the classical tradition in Scots law has survived. The civil law tradition in its substantive law includes the delict and causes of action that govern the property, contract, and tort concepts that are still present because of the procedural remedies available in the courts.

The civil law tradition has influenced the jurisprudence of Scots law through canon law and the academic writings which are the main sources of its development. This emanated in the intellectual history of Scotland which was based on the Scottish Republican constitutional tradition that can be traced to the Declaration of Arbroath of 1320.[5] This was inherent in the political theology of the reformed Scottish Church after 1560 which emphasised the limitations of the secular power before the ecclesiastical institution. [6]

The early jurists of Scottish private law developed a framework that served to establish the Scots legal framework. The institutional writers contributed a major part in this development. George Buchanon, a renaissance scholar, established the principle of a separate legal tradition of Scotland with increased scope for judicial review.[7]This impacted on the hierarchy of the courts and the practice of law by recognising both ecclesiastical, and civil law.[8]The Courts Act 1672 transformed the court system and also effected civil procedure and led to the establishment of the Court of Session that is the equivalent of the High Court in Scotland. This had a layer of the Outer House and the appellate Inner House in the civil law cases that were heard on appeal.[9]The High Court of Justiciary in 1672, became the apex court for the criminal jurisdiction in Scotland. [10]The rise of the

[3] Evans-Jones Birks, *The Foundation of Legal Rationality in Scotland*, Edinburgh: Stair Society.1995: 185–200.

[4]J. W. Cairns, and H. LMacQueen, *Learning and the Law: A Short History of Edinburgh Law School*, privately published by the Faculty of Law. (2000), p 47. http://www.research.ed.ac.uk/portal/en/publications/learning-and-the-law(7617657e-1d1e-4961-aa53-bceea1404dab).html.

[5]Declaration of Arbroath.National Records of Scotland. https://www.nrscotland.gov.uk/Declaration

[6]Aidan O'Neill, Limited Government, Fundamental Rights and the Scottish Constitutional Tradition *Juridical Review,* (2009) 85-128.

[7]Roger Mason, and Martin Smith, A Dialogue on the law of kingship among the Scots – a critical edition and translation of George Buchanan's *De jure regnia pud Scotos*. Or, A dialogue, concerning the due privilege of government, in the kingdom of Scotland, betwixt George Buchanan and Thomas Maitland, by the said George Buchanan, (Ashgate: Aldershot, 2004) at pp 33, 55, 133, 143

[8] In the 1660s, Viscount Stair brought together the elements of customary, feudal and Roman law into one system in his leading work The Institutions of the Law in Scotland (1681). John Erskine wrote. An Institute of the Law of Scotland (1773) and his Principles of the Law of Scotland (1759) and Sir George Mackenzie, The Laws and Customs of Scotland in Matters Criminal (1678) *See also Encyclopaedia of the Reformed Faith, ed. D.K. McKim (*Louisville, Kentucky and Edinburgh, 1992)For further reading see ID, Willock, 'The Scottish Legal Heritage Revisited' in J Grant (ed), Independence and Devolution: The Legal Implications for Scotland (Edinburgh, W Green, 1976); pp 3-6.

[9]Robinson, Gordon and Fergus, supra 3, p 238.

[10] David Stevenson, *Revolution and Counter Revolution in Scotland, 1644-51* (Edinburgh, 2nd edn, 2003), 104

national court system affected the reception of Roman law, and it became part of the national legal order that is still recognisable and distinguishable today. [11]

The Union Treaty of 1707 was instrumental in bringing about the changes in the legal system which ingrained the English common law into the legal framework of Scots law. This was facilitated by the appeals in civil law cases in whose appellate structure led to the House of Lords as the final court of apex jurisdiction. The Treaty also enabled the harmonisation of English and Scots law in the commercial transactions and in insurance and transportation that became part of a fully-fledged British empire.

In the first part of the nineteenth century jurisdictional changes were introduced to settle the substantial rules such as in tort liability that was an English concept that was conveyed to Scotland by the decisions that extended duty of care to no fault liability. There were concepts that were adopted from English law in accidental injury, contract liability and property and succession.[12] This is inclusive of a non-codified 'mixed jurisdiction' in which legal principles have been drawn from both the civilian (i.e. Roman law) and common law tradition. The Scots is a mixed system of jurisprudence in common with the South African, Louisiana and Quebec and the most pertinent example is the South African system whose incorporation of the Dutch Roman law alongside the common law can be compared to the Scottish legal framework. This enabled the civil procedure to be drawn from a variety of texts that have led to different legal traditions and their application can be a basis for comparative study.

The road map of this paper consists of as follows: Part A considers the influence of institutional and jurisdictional factors at the inception of Scots law that enforced the civil law tradition that is part of its legal system; .Part B considers the borrowing of concepts from English common law and the creation of mixed system of jurisprudence; Part C compares South Africa and its adoption of Dutch Roman law along with English which was premised on colonial conquests and the changes in the demography of the Cape; and Part D examines the impact of the mixed jurisprudence and the cause of actions based on contract and property law that often bring the civil law concepts into conflict with the substantive rules. The crucial question is whether the presence of a mixed system has transformed the Scots legal framework into a mature, coherent system of legal rules that are capable of developing in a manner that preserves and also resolves the contradictions of a mixed system of law.

I. ORIGINAL SOURCES OF JURISDICTION IN SCOTS LAW

After Scottish independence in 1328 under the Treaty of Northampton, there was an academic project that enabled the first Scottish University, St Andrews to be founded in 1413, and many students went abroad on scholarships to study mostly in France.[13]The

[11] Birks, Evans-Jones and Stair Society supra 4, 185–200.

[12] J. W. Cairns and H. LMacQueensupra 5, 153–5

majority of these students specialised in canon law and while being in foreign institutions they acquired a considerable knowledge of Roman law and its substantive framework [14] The Scots students continued to study abroad, mainly in Cologne, Louvain[15] and Northern Italy [16]during the fifteenth century, France and during the sixteenth century and, after the Reformation,[17] in the Netherlands[18] and in the German universities during the eighteenth and nineteenth centuries.[19] Between 1600 and 1800 about 1600 Scots matriculated from the Law Faculty at Leiden alone.[20] Upon their return to Scotland, these trained lawyers were accustomed to the Roman law concepts of *ius commune* and sources of laws with which they had become familiar during their European vocational studies. The contemporary archives in Scottish cathedral libraries are evidence of the availability of much Roman law literature along with canon law that attests to the influence of Roman law.[21]

The reception of Roman law in Scotland in its formative period was affected by the vocational factors that impacted on civil procedure in the courts. The formation of the advocates into an association or Faculty of Advocates that had control over the conduct of the court also reflected the pleaders in the Civil law tradition.[22] The Catalogue of the Library of the Faculty of Advocates published in 1693 also has resources that served as texts used by the Bartolists and French customary lawyers, the decisions of the French parlements, the authored works of Charles Dumoulin and Guy Pape; and includes treatises

[13]Robinson, Gordon and Fergus at supra 2 at 8 at 65 -67. They give an instance of William Spynie (1406) studied Arts and Canon law in Paris, and Roman law in Avignon. Later he was involved in the case of *Bishop of Aberdeen v Crab* recorded in the register of the diocese of Aberdeen. In this case a charter granted to Crab and his wife by a former bishop was challenged by the grantee who succeeded him in his court as feudal superior. A cleric, William de Spynie, in turn challenged the jurisdiction of the latter bishop on the ground that he was a judge in his own cause: see Gordon, et al at 7-8. See also D.E.R. Watt, A Biographical Dictionary of Scots Graduates to 1410 (1977). , Clarendon Press, 1977.at 1410

[14] Bishop Wardlaw who had studied Roman and Canon law at Orleans and Avignon, founded the University of St Andrews in 1413. The university's bull of foundation provided for the teaching of both Civil and Canon law but seems that only Canon law was taught. Bishop Turnbull, who had studied at Louvain and Pavia, founded the University of Glasgow in 1451. The University of Aberdeen was founded in 1495 by Bishop Elphinstone who had studied Arts at Glasgow, Canon law in Paris and Civil law at Orleans. He prescribed the Orleans course in Civil law for Aberdeen. There were many trained lawyers in Scotland, although not as many graduated from local universities. The papal bull made provision for the teaching of both Civil law and Canon law, and also improved remuneration for professors and also granted dispensation (special permission given by the Church) to clerics to study civil law.See Gordon, supra 2 at 8-9; Cairns supra 13 at 69.

[15] See J. H Baxter, Scottish students at Louvain University, Scottish Historical Review Vol 25 no 100 (1928) 327-334.

[16]See RJ Mitchell, Scottish Law Students in Italy in the Later Middle Ages (1937)49J.R. 19-24.

[17]On the Reformation, see Cairns (n 66) 76-77. The Reformers wished to promote the academic study of Roman law as evidenced by The First Book of Discipline of 1561 providing for instruction in Roman and municipal law. See Cameron the First Book of Discipline with Introduction and Commentary (1972) 140-1 – 140-3.

[18]See J.W. Cairns "Importing our lawyers from Holland: Netherlands influences on Scots law and lawyers in the eighteenth century' 1999 (20-22) J of Legal History 49-52

[19]See A. Rodger "Scottish advocates in the nineteenth century: The German connection" 1994 (110) LQR 563.

[20]See Gordon supra 2 at 9-10.

[21]Ibid at 37

[22] J.W. Cairns, supra 3, 14 at 86–7

by Dutch jurists such as Leeuwen, Matthaeus, Voet, Grotius, Huber, Noodt, Vinnius, etc. [23]

The practitioners initiated this process in 1750 with the introduction of a compulsory examination in Scots law as an entry requirement to the faculty.[24] This requirement in addition to a mandatory qualification in Roman law, initially introduced in the seventeenth century indicates that Civil law had been assimilated into the Scots legal framework. It has been argued that the reception of Roman law in Scots law has to be evaluated alongside the " sources of early Scottish law, the Norman influence, feudal tenures and royal justice". was through the role of legal practitioners who practiced a hallowed tradition of Civil law. [25] Prior to the establishment of the Court of Session in 1532 Scotland there was an academic shortfall and there was a pathway towards studying the Roman-law concepts and principles and civil code. [26]

The creation of the Court of Session in 1532 permitted Scotland its first centralised, authoritative secular court, with the Lord President and seven of the fifteen "senators" originally appointed being churchmen.[27] It provided the forum for the "professional advocates" almost all of whom had studied Roman law and the *ius commune*. The advocates applied Roman law in their pleadings and the majority of judges were capable of adjudicating and as a result the court adopted Romano-canonical procedure and introduced a considerable number of Roman rules and concepts. The Reformation ended the authority of canon law when Papal authority was rejected in 1560 and when canon law was already accepted as part of Scottish law, the courts continued to apply it if it was not in conflict with reformed doctrine. [28]

An integral part of legal tradition developed by the Scottish institutional writers was the collection of important judicial decisions the so-called 'practicks'. Apart from decisions 'practicks' there were also digest 'practicks' which resembled handbooks containing references to decisions and other authorities.[29] Apart from being used as precedents, these collections acknowledge the importance of Roman law[30]that was being consulted and applied whenever there was no existing Scots legal authority to apply as precedent in a new set of circumstances. [31] The lack of literary sources to reference Scots law based on Roman principles can be determined by the publication of first substantial thesis on Scots law, the Ius Feudale by Sir Thomas Craig, that was written in Latin in 1606, but only printed in 1655. [32]

[23]Watson, in Stair Society Vol 1, An Introductory Survey of the Sources and Literature of Scots Law, (1936) 177.
[24]Robinson, Fergus and Gordon, supra-2, 12 at 245.
[25] Cairns, supra 3,14 at 128
[26]Kenneth Reid and Reinhard Zimmermann, Reid & Zimmermann (eds) A History of Private Law in Scotland Vol 1 (2000) Oxford University Press pp 15-27
[27]See Gordon supra 2 at 13.
[28]Ibid.
[29]Ibid. at 14; See Robinson supra 2 at 233-234.
[30]See Avon Clyde (ed) for Sir Thomas Hope's Major Practicks (publ by the Stair Society – Hope's Major Practicks 1608-1633) Vols 1 & 2 (Publications of the Stair Society, 3 and 4, Edinburgh, 1937 and 1938).
[31] See the remarks made by John Lesley, Lord of Session in 1564 in De originemoribuset rebus gestisScotorum (Rome, 1576) 71.
[32] The Jus feudale/ by Sir Thomas Craig of Riccarton: with an appendix containing the Books of the feus, a translation by James Avon Clyde, Edinburgh : W. Hodge; 1934

Craig defined the feudal law with as much relevance in Europe as in Scotland and this was significant because firstly, because to some extent its structure followed the institutional scheme of personality, choses and pleadings that were being used by the Roman jurists Gaius and Justinian. Secondly, Craig established the status of Roman law as one of the sources of Scots law and considered Roman law to rank below Scottish legislation, judicial decisions and feudal law. However, he accepted that there was the possibility of citing the reference to Roman law since much of Scots law was unwritten and unsubstantial. Thirdly, he used Roman law and its jurists to fill the lacunas in Scots law on general points such as the "question whether the right over a feudal vassal a type of ownership (dominium) is or merely a usufruct (liferent). This developed into the conjecture based on natural law from the seventeenth century, when this was seen as an alternative source of general authority and Roman rules were accepted or rejected according to whether they were seen as "natural" or not. [33]

James Dalrymple, the Viscount Stair, published his Magnus Opus the Institutions of the Law of Scotland in 1657 that provided the "foundation for the Scots law". [34] He cited Roman law throughout, firstly as a source of abstracts concepts, secondly, as persuasive authority and thirdly, as highly persuasive because of its inherent equity and inspiration from reason and natural law. Although Stair was critical of the structuring of legal treatises on the model of the Institutes of Gaius and Justinian, he used the Roman structure to a certain extent to sustain the principles of Roman jurisprudence as integral to Scots law.[35]

The next stage of incorporation of Roman law was based on the Sir George Mackenzie's Institutions of the Law of Scotland published in 1684 with eight editions between then and 1758, and in 1754, replaced by Erskine's Principles) followed the Roman institutional order more abundantly. The adoption of the structure was according to Scottish needs, for example in considering the division between immovable (heritable) and movable property, which is foreign to Roman law. Mackenzie also considered Scots statutes, court decisions and customs above Roman law, and although he abhorred the adoption of complete sets of rules where it was not strictly necessary, he permitted much of Roman law had already been incorporated into the framework of Scots law.[36]

Lord Bankton (Andrew McDouall),in his An Institute of the Laws of Scotland in Civil Rights divided his text book into three volumes that were published between 1751 and 1753. They followed the order of Stair's Institutions but modified it to conform more approximately to the order of Justinian's Institutes. He frequently cited Roman texts but did not source Roman law but used if for the purpose of analysis and obiter dicta discussion during the summation of cases. [37]

The practitioners and the theorists shaped the adoption of Roman jurisprudence and unlike in other Continental jurisdictions this did not lead to the codification of a national civil. Instead, it was an independent application of Roman law and in the 19 th Century

[33]Gordon supra 2 at 16-18; Cairns supra 3 at 98-100.

[34] Sir James Dalyrymple, 1st Viscount Stair, University of Glasgow story https://www.universitystory.gla.ac.uk/biography/?id=WH0009&type=P

[35]Gordon Ibid at 18-19 .

[36]Ibid at 19-20.

[37]Ibid at 22-23.

was invoked at the law school in Edinburgh in 1860s when James MacKintosh was appointed to the chair of Civil law. He was a practicing advocate who adapted Roman law concepts to Scottish jurisprudence when he wrote a treatise *Roman Law in Modern Practice* [38] a positivist framework that conceptualised Roman legal tradition to the legal practice in Scotland.

He stated in his archives "*I note among the legal luminaries on the Bench some divergence of opinion, or at any rate some difference of emphasis, with regard to the value and authority of the Roman Law for present-day purposes. … The real question is what weight do the Civil Law and its commentators carry in the actual adjudication of disputed issues?*".[39]The legislature also did not codify the procedural law and "*unlike most of these jurisdictions, where the 'practical' use of Roman law as a source of law ceased upon codification, to be replaced by a civil code of some description consisting of general rules of law (often very heavily based on nineteenth-century Pandectist conceptions of Roman law)*".[40]

MacKintosh espoused the legal history, the relationship between Roman and Scots laws which he referenced as based on the formative period of the corpus juris formulated under Justinian's rule by declaring the various aspects of Roman private law. He emphasised that it had to satisfy the requirement in civil procedure for "*Roman law served a thoroughly practical purpose in the context of legal practice in Great Britain*".[41]

There were indications in the courts that the Roman law was of persuasive effect in decision making process.[42]The basis of the Roman tradition was formulated in academic textbooks which were to train the aspirants to the legal profession. Craig's *Jus Feudale.* [43] This work is regarded as the first organised textbook on Scots law states that, where "no answer to a legal problem can be found by reference to native Scots sources, recourse may be had to both Canon law and Roman law".[44]

The first training manual to teach civil procedure was the standard Scots law textbook, *Gloag and Henderson* which states that Scots law consists of enacted (= statute) law and non-enacted (= common) law. The authors reject the concept of the 'common law' of Scotland and they proffer that the 'common law' of Scotland is 'in large measure derived from the civil law'.[45]This was confirmed by the publication of the procedural handbook in 1932 in the form of the *Encyclopaedia of the Laws of Scotland*, which explained that "*Roman law acted as a buffer to the development of the English common law during the formative period of Scots law, thereby restricting the extent of its influence upon Scots law*".[46] This meant that the civil justice system was encouraged and developed of its own accord and that it was

[38]James MacKintosh, *Roman Law in Modern Practice* Edinburgh, Green and Son 1934, Preface.
[39] Ibid, p 1-2
[40] Ibid
[41] Ibid
[42] In *Sinclair v Brougham* [1914] AC 398 it was held by Lord Dunedin that Roman law was not authoritative, but merely instructive.
[43]The Jus feudale / by Sir Thomas Craig of Riccarton; with an appendix containing the Books of the feus, a translation by James Avon Clyde. Edinburgh: W. Hodge; 1934
[44]The Jus feudale Book 1, *Stair Society Volume 64,* p 410
[45] W. MGloag and RC Henderson, *Introduction to the Law of Scotland*, Edinburgh: W. Green & Son. 1927: paragraph 17
[46] A. Murray, (1st Viscount Dunedin), ed., *Encyclopaedia of the Laws of Scotland*, Edinburgh: W. Green & Son, (1932) at 74.

received in the procedural law that was adopted to conform with the substantive law principles.

II. ABSORPTION OF COMMON LAW IN THE SCOTTISH LEGAL SYSTEM

In comparison with Roman law the adoption of English law emanated prior to the Union of Scotland and England in 1707, by which Scotland voluntarily joined England in the new Kingdom of Great Britain and transferred sovereignty to the British Parliament. The influence of the *ius commune* and especially of Roman-Dutch law persisted well into the eighteenth century, but the influence of civilian law eventually declined, and Scots law became increasingly subjected to anglicisation. The reception of parts of Roman (civilian) law by the Scottish courts (especially the Court of Session), which wove it into the fabric of Scots law through which it acquired binding authority by the system of precedent.[47]

The Scots law was severed from its main source of development and was inevitably influenced by new developments in English law. Secondly, although the independent Scots court structure was preserved in the Acts of Union of 1707, the House of Lords became the highest court of appeal from the Court of Session in Scotland too. This was the platform for English-law to influence the Scots law in the spheres of private law and public law, except that in criminal law the House of Lords had no jurisdiction.

The history of the right of appeal to the House of Lords gave the English judges the opportunity of influencing Scots law. In *Greenshields v Magistrates of Edinburgh*[48] the appellant Greenshields was a Scottish episcopalian minister who appealed in 1710 after he was imprisoned by the Edinburgh magistrates for using the English Book of Common Prayer to conduct a service for a private episcopalian congregation. The Lords' decision confirmed that no law in Scotland proscribed the Prayer Book liturgy and provided a degree of legal recognition to the episcopalians who used it. [49] This provided the opportunity for an appeal under the Court of Session Act 1808 which introduced a limit to interlocutory appeals that has endured. The right exists if the Court of Session is not unanimous; otherwise only that court can give permission to appeal.[50]

The Scots law borrowed from the English law reports published by Blackstone with decisions of English courts on legal points undecided in Scots law.[51] This led to the

[47]T B Smith states in 18th and 19th centuries a policy of anglicising Scots law was pursued in a deliberate and indeed offensive manner' (T B Smith, The Hamlyn Lectures, *British Justice: The Scottish Contribution*, London, Stevens, 1961, p 85).

[48](1709) 1 Rob 12.

[49] Ben Rogers, The House of Lords and Religious Toleration in Scotland: James Greenshields's Appeal, 1709–11, Studies in Church History, Edited by Rosamond McKitterick,Charlotte Methuen, Andrew Spicer , Volume 56: THE CHURCH AND THE LAW , June 2020 , pp. 320 – 337
DOI: https://doi.org/10.1017/stc.2019.18

[50]Under the Courts Reform (Scotland) Act (CRA) 2014 the civil cases from Scotland need permission from judges before they reach the UK Supreme Court, which means that a party that wants to overturn a decision of the Inner House of the Court of Session must now seek the Court's permission before trying to bring a further appeal to the Supreme Court. If the Inner House refuses permission, a party can then ask the Supreme Court directly for permission to appeal.

[51]Blackstone: Introduction to the Laws of England, Section 4 Of the Countries Subject to the Laws of England. He states in his commentary that prior to the Union Treaty there was "diversity of practice between two large and uncommunicating jurisdictions". Sir William Blackstone, *Commentaries on the Laws of England in Four Books. Notes selected from the editions of Archibold, Christian, Coleridge, Chitty, Stewart, Kerr, and others, Barron*

infusion of English concepts into Scots law primarily by means of legislation and court decisions, and it became less necessary to refer to Roman law or the *ius commune* for guidance. There were also socio-economic factors that led to the absorption of English law and following on the unprecedented growth in trade and industry in England after the Industrial Revolution of the 1850s, the acknowledgment of the superiority of English mercantile law and the trade advantages inherent in commercial transactions with English merchants led to a wholesale reception of English commercial law into Scots law.[52]

In the 18th and 19 centuries the Scottish appeals to the House of Lords continued even though, although Scot lawyers such as Lord Mansfield became eminent practitioners in England, it was only after the creation of the first life peers, the Lords of Appeal in Ordinary, in 1876 that it became the practice to have at least one Scottish Law Lord. This Supreme Court largely composed of an English judiciary gave judgments that in considering the large volume of Scottish appeals overruled many of the decisions of the Scottish courts.

In *Bartonshill Coal Co v Reid*[53], a miner was killed by the negligent operation of the machinery for elevating him onto the surface. The Inner House of Sessions held the employer liable, ruling that the miner and the machine operator were not *collaborateurs,* –in effect stating that the coal extraction and lifting it to the surface were different operations. The House of Lords held that the miner and the operator were both engaged in extracting coal from the pit under the doctrine of common employment. Lord Cranwith stated "that there is no decision in the Scotch Courts which is not capable of being reconciled with the authorities upon this subject in our Courts; although there are occasional dicta of the Judges, which strongly tend to raise a distinction between them. I am satisfied, that the principle, upon which the English Courts have proceeded, is the correct one, and ought to be applied to this case" [54]The implication was that if such be the law of England, on what ground then it was also the law of Scotland.

The English cab rank rule that is applicable to barristers in England was assimilated by the advocates in Scotland. [55]The substantive and procedural aspects have also been assimilated by the Scots law from the English jurisprudence. This has been observed in the areas of tort, property and contract law and this process has been because of case law and the precedence established by the courts.

In a Scottish case of occupiers liability of *Dumbreck v Addie*[56], the Inner House of Sessions found that the occupier was at fault when the child trespasser was injured when machinery was started without warning in an unfenced field which the defenders knew was frequented by children. In the House of Lords the Scottish law lords both Lord Dunedin

Field's Analysis, and Additional Notes, and a Life of the Author by George Sharswood. In Two Volumes. (Philadelphia: J.B. Lippincott Co., 1893). Vol. 1 - Books I & II.

[52] The Treaty of Union decreed that laws concerning trade, customs and excises were to be harmonised. Section XVIII states "That the Laws concerning Regulation of Trade, Customs and such Excises to which Scotland is by virtue of this Treaty to be lyable be the same in Scotland from and after the Union as in England –"

[53] (1858) 3 Macq 266, 285.

[54] Par. 799.

[55]In Batchelor v. Pattison & Mackersy (1876) 3 R. 914, 918. Lord Ingliss, Lord President of the Court of Session held that the cab rank rule applied in Scotland.

[56] SC HL 51, [1929]

and Lord Shaw of Dunfermline accepted the principles of English property law by ruling with the majority by enforcing the duty of care owed by occupiers to invitees, licensees and trespassers, in providing a remedy to a child trespasser who had been injured.

The common law's influence was further extended by the House of Lords case of *Donoghue v Stevenson* [57] of the allegedly decomposing snail in a bottle of ginger beer bought by A but consumed by B was heard by the Court of Session. The Scots law of delict was applied based on the Roman law concept of *culpa* or fault which meant that if somebody was at fault and harmed someone by his carelessness, 17th century Scots law that they were liable under fault liability even though he had no contract with that person. The Scots law of delict is a law of tort, and not a law of a number of torts and there is an overarching principle of extra-contractual liability and reparation. This overarching principle is based on the Roman law *action legis aquiliae*, as developed further by the *ius commune* principle and Scots lawyers interpret the precedence of Scots law in delict (as in contract), not incrementally on a case-by-case basis, but against an intellectual framework of Civil law.[58] This was contrary to the 19th century English notions of privity of contract, whereby a third party was not allowed to benefit from a breach of a contract between others. Their Lordships held that there could be liability if the facts were proved. Lord Atkin stated the 'neighbour' principle that has affirmed the duty of care principle in tort and applies in English law.[59]This case has established the formulation of a general principle of liability for negligence by borrowing from the Scottish legal tradition based on Civil law.[60]This was primaced on Lord Macmillan's reference to the institutional writer Erskine [61] who stated a 'neighbour' in the context of a generic delictual liability rule that was considered to be the subject of Lord Atkin's definition of the neighbour principle.[62]The principle of liability established under *Donoghue v. Stevenson*, establishes the general duty of care rule in the form of the 'neighbour principle'.[63]and it is contended that the Scots law has been influenced by English law and vice versa. [64]

There are substantive areas of law of English property law in Scot law which are comparable in scope or content. [65]This has been described as a "construct of civilian principles tempered by common law pragmatism".[66] The "*original modes of acquisition of*

[57] 1932 SC (HL) 31, [1932] AC 562

[58] H. MacQueen and W. D. Sellar, 'Negligence', in K. Reid and R. Zimmermann (eds.), A History of Private Law in Scotland, vol. 2 (Oxford University Press, 2000), p. 517-547, at p. 521-524.

[59] "In Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care". Lord Aitken at 57.

[60]R. Evans-Jones, 'Roman Law in Scotland and England and the development of one law for Britain', 115 *Law Quarterly Review* (1999), p. 628.

[61]J. Erskine, *An Institute of the Law of Scotland* (Bell, 1773), Book III, 1, 13, p. 415

[62]see D. Visser and N. Whitty, 'The Structure of the Law of Delict', in K. Reid and R. Zimmermann (eds.), *A History of Private Law in Scotland*, vol. 2 (Oxford University Press, 2000) p. 422, 438. See also W. J. Stewart, *Delict* (4th edition, Thomson/Green, 2004), p. 9

[63][1932] AC 562, 1932 SC (HL) 31

[64]R. Leslie, 'Scotland (Report 2)', in V. V. Palmer (ed.), *Mixed Jurisdictions Worldwide* (Cambridge University Press, 2001), p. 240

[65]E. Reid, in J. C. Rivera (ed.), *The Scope and Structure of Civil Codes*, p. 362.

[66]Robinson *et al supra* p 232.

property and the modes of transfer of movable property are almost wholly civilian as is the law relating to servitudes and real security, diligence (execution of judgments) and bankruptcy".[67]This includes the concept of the rule that postage of an agreement in the mail box is acceptance of contract based on offer and acceptance. The Scots law framework has not adopted the civil law method for the protection of property the *rei vindication* (action of delivery). [68]

The adoption of property law principles has also developed through the courts that have borrowed from English law. In *Camerons v Youngs*[69], Lord Robertson introduced into Scots law the English precedent in *Cavalier v Pope* [1906] AC 428 by its reasoning that a landlord was not liable to anyone other than the tenant for injurious defects in the property. His lordship stated, "These *principles have no application at all to persons who are within the house, for they have and can have no right to be there except by the licence of the owner, given by the owner on certain terms to the person with whom he chooses to contract*". [70]

In Scots law two fundamental principles of property law have been retained from civil law which are the transferor can reclaim property title if the contract is void (for example by *rei vindicatio, condictio sine causa* or a similar remedy). This is because the transferee never acquired ownership, due to the deemed absence of *iusta causa traditionis* as the result of the diminution in the contract for the sale of the real estate because of the defect of title. The consensual conveyance is considered a sale of land in a non-inherited conveyance, because the consent is incorporated in and creates a valid contract, that is also termed the just. (*iusta causa traditionis*).[71]

This is despite adherence to the maxim *inaedificatum solo cedit*, which is form of ownership exemplified by the Tenements (Scotland) Act of 2004 that allows ownership in apartment buildings.[72]There is a strong civilian influence in the field of intestate succession (parents and siblings share in the estate) but the law has followed the English tradition of testate succession in certain respects. It has retained the institution of a legitimate portion and imported the device of a trust but adapted it to a civilian mode.[73]The Scots law has not adopted the English system of legal and equitable ownership but divided the trustee's estate into ordinary and trust patrimony, which placed the trustee in a fiduciary relationship with the beneficiary and gave the beneficiary a fortified personal right to enforce his or her interests.[74]

The Scot property law prescribes a single and indivisible *dominium* as ownership and absolute entitlement, instead of the English concept of *title* with (theoretically) relative

[67]Reid supra 65 at 252

[68] K. Reid, The Law of Property in Scotland (Butterworth, 1996), para. 158, p. 129-130; J. Stair, The Institutions of the Law of Scotland, David M. Walker (ed.), (The University Presses of Edinburgh and Glasgow, 1981) (1st ed. 1681), IV, 3, 45, p. 830.

[69][1908] UKHL 410 45 SLR 410

[70] Ibid

[71] A. J. Gretton and. J. Steven, Property, Trusts and Succession (2 nd edition, Bloomsbury Professional, 2013), p. 37, Also see T. B. Smith, A Short Commentary on the Law of Scotland, p. 539.

[72]Ibid at 255.

[73]at 270.

[74]M. Bridge, Personal Property Law, 4 th edition (Oxford University Press, 2000), p. 6-10. The main legislative acts came in the form of 4 Trust Acts in 1861, 1863, 1867 and 1891, which were consolidated in the Trusts (Scotland) Act 1921 (the "1921 Act"). This 1921 Act remains the substantive legislative framework for trusts in Scotland and gives the power to trustees to vary the trusts as part of their administrative duties.

entitlements.[75] The ownership can only be conveyed based on an underlying reason recognised by the law (*iusta causa traditionis*), most commonly a contract capable of transferring ownership (e.g. a sale, but not a loan for use, *commodatum*). Where the conveyance is sufficient to transfer ownership, irrespective of the validity of any underlying contract, the system is abstract, which is transposed by civil law in the present Scottish system.[76]

The English trust is founded on this legal concept of simultaneous different qualities of ownership[77]but the Scots law has not assimilated an equivalent to the English trust. The 'trust' in Scots law is a type of an extended *fiducia* based on contract, in that the trust property may be conceptualised as being held as a special patrimony (a discrete estate) separate from the general patrimony of the trustee, so that the creditors of an insolvent trustee are also bound by the entitlement of the beneficiary to that special patrimony.[78]

The Scots law has abolished the feudal system by the enactment of the Abolition of Feudal Tenure (Scotland) Act 2000 after 800 years of its existence. [79]

The separate streams of jurisprudence that the Scots law inherited from both the English law and the Roman law means that it did not codify its laws. The mixed system is based on judge made law and legislation and there is no parallel with a Napoleonic Code or those codes adopted by the European states. Instead, TB Smith states that the "*possibility of fixing the orientation of Scottish law by codification really, passed when during the 19th century the new legal situation common to both Scotland and England resulted in the development of a substantial amount of what was in effect British law. In this development Scottish and English solutions affected each other reciprocally, and separate general codification of laws for one country only ceased to be a practical proposition*". [80]

The existence of a British law that encompasses Scotland owes itself to not the institutional writers but to the judges and law lords of the Supreme Court. It is the development of precedence that has allowed the existence of the precedence that has blended Scots law with the English law. It is noticeable that the tort law is mostly judge made but the contract law is based on the treaty principles of the Union Treaty whose object was harmonisation of the commercial laws. The property law has also been developed through the mechanism of feudal land tenures and is separate from England and the legislature has abolished feudalism leading to a more autonomous substantive law of Scotland.

---

[75] F. H. Lawson, B. Rudden, The Law of Property (3rd edition, Oxford University Press, 2002), p. 68;

[76]This theory of abstract delivery goes back to F C v Savigny, *System des heutigen römischen Rechts* (1840-49) vol 3, 312-313, (indirectly also) vol 4, 244-246, and can especially be found in Savigny, *Das Obligationen rechtals Theil des heutigen Römischen Rechts*, vol 2 (1853) 254-261, in particular at 257 and note (m): see now § 929 BGB. See also Reid, *Property*, para 608; D L Carey Miller, "Systems of property: Grotius and Stair", in D L Carey Miller and D W Meyers (eds), *Comparative and Historical Essays in Scots Law. A Tribute to Professor Sir Thomas Smith QC* (1992) 13, 28.

[77] F. H. Lawson and B. Rudden, The Law of Property, p 86, 94.

[78] G. Gretton, 'Trusts without Equity', 49 International and Comparative Law Quarterly (2000), p. 599, 606, 609-610, 614

[79] Section 2 states "*An estate of dominium utile of land shall, on the appointed day, cease to exist as a feudal estate but shall forthwith become the ownership of the land and, in so far as is consistent with the provisions of this Act, the land shall be subject to the same subordinate real rights and other encumbrances as was the estate of dominium utile".*

[80]T. B. Smith, English Influences on the Law of Scotland, The American Journal of Comparative Law Vol. 3, No. 4 (Autumn, 1954), pp. 522-542 at 521

III. COMPARATIVE LAW DEVELOPMENT OF SOUTH AFRICAN LAW. BLENDING CIVIL LAW IN A 'MIXED' SYSTEM

The civil procedure that has facilitated the reception of Roman law in Scotland has a parallel with the countries that have integrated the civil law concepts into their own framework such as South Africa that also has a 'mixed system'.[81] The latter has a model based on the Roman-Dutch civil law that has inspired the Scottish jurists who consider their jurisdiction to be composed of English common law and civil law.[82]The origins of the mixed legal system in South Africa originates in the Dutch East India Company which established a refreshment station at the Cape in 1652 under the Dutch Governor Jan van Riebeeck to provision goods for transportation to Netherlands,[83] Although sparsely populated by indigenous tribes, the Cape was considered a *res nullius* that became the property of the Dutch East India Company by occupation, and the law of Holland was declared to be the law applicable there.[84]

The Cape was occupied by Britain, firstly in 1795 until 1803 in the course of the Napoleonic wars and again for a second time from 1806 until 1900, after it reverted briefly to the Dutch authorities. Under the Articles of Capitulation, the Dutch colonists were allowed to retain their existing laws and privileges. Article 7 of the Articles of Capitulation of 1795 allowed the colonists to "*retain all the privileges which they now enjoy". This article also re-established the former Raad van Justitie "to administer justice … in the same manner as has been customary until now*" and according to existing "laws, statutes and ordinances". The Cape was formally ceded to the British government by the Convention of London in 1814 as part of a treaty concluded with the Netherlands. Article 8 of the Capitulation provides that "*the Burghers and Inhabitants shall preserve all their Rights and Privileges which they have enjoyed hitherto*"; and then, in the later Article 8 of the Articles of Capitulation of 1806, this clause was made applicable to all inhabitants of the Cape Colony.

In 1809 the Netherlands had adopted a variation of the French Code Civil and it was not possible for the administration in Cape to promulgate because the region was under the

---

[81] E. Fagan, 'Roman-Dutch Law in Its South African Historical Context' in R. Zimmermann and D. Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa*, Oxford: Oxford University Press.(1996), 33–64, Van der Merwe, V. (2012), 'The Origin and Characteristics of the Mixed Legal Systems of South Africa and Scotland and Their Importance in Globalisation', *Fundamina: A Journal of Legal History*, 18 (1): 91–114; For a treatise on the continued relevance of Roman–Dutch law in South Africa, see H. Scott, 'The Death of Doctrine?', in J. Basedow, H. Fleischer and R. Zimmermann (eds), *Legislators, Judges, and Professors*, (2016), 223–248, Tübingen: Mohr Siebeck

[82]K. Reid, 'While One Hundred Remain: T. B. Smith and the Progress of Scots Law', in E. Reid and D. L. Carey Miller (eds), *A Mixed Legal System in Transition: T. B. Smith and the Progress of Scots Law*, (2005), 1–29, at 10; Lord Cooper, "From David I to Bruce 1124–1329", in Introduction to Scottish Legal History, (Stair Society, vol 20, 1958) at 15.

[83] P Van der Merwe, et al, Palmer (ed) Mixed Jurisdictions Worldwide. The Third Legal Family (2012) Cambridge University Pres, p 3-4

[84]A letter from the Directorate of the Dutch East India Company (VOC) to the Council of India in 1621, couched in vague terms, stated that the law to be applied in the countries governed by the Council of India (also the Cape as *buitencomptoir*or foreign dependency) was the law of the State of Holland. There is also an instruction of 1657 by Van Riebeeck (Colonial Archives, The Hague, 3969, Vol 1657: Political Resolution of February 21, 1657), to the so-called *freeburghers*, to live according to the laws of the Netherlands and India. See, further, Van der Merwe *et al* (n 3) 95-96; Hahlo& Kahn *The Union of South Africa The Development of its Laws and Constitution* (1960) 12; Fagan "Roman-Dutch law in its South African historical context" in Zimmermann &Visser (eds) *Southern Cross. Civil Law and Common Law in South Africa* (1996) 39.

legal jurisdiction of the British colonial overlords.[85] This led to a large-scale legislative importation into the Cape of English commercial law relating to shipping, insurance, company law, insolvency, intellectual property and negotiable instruments.[86] This led to the adoption of the mercantile law that was based on English statutes after the Colebrooke-Bigge Commission Report stated that the Roman- Dutch law was not comprehensive enough to provide the means for recovery in commercial transactions.[87]
The English system of legal reporting was also introduced which consecrated the doctrine of stare decisis. The documentation accepted by the court had to be drafted according to the English specimen and the testamentary documents such as wills and probate had to be on the English model of disposition of property.[88] It has been argued that the British authorities accepted at this time that the Roman-Dutch law was adequate in providing for the Dutch population to not abandon it and permit its application in those areas of jurisdiction where it did not conflict with English legal principles. [89]The effect was that the "English authorities settled for a more moderate programme of gradual adjustment and piecemeal reform of the Cape system of administration of justice, which soon acquired a typically British flavour". [90]The extension of the mixed system of jurisprudence of South Africa owes itself to the departure in1837 of fifteen thousand Dutch colonists called "Voortrekkers", who were not amenable to being governed by English law.[91] The migrants left the Cape geographical entity and established the Republics of the Orange Free State and of the Transvaal in 1854 and 1852 respectively. These new Republics stipulated in their Constitutions that Roman-Dutch law would be the governing norm in these territories. [92] The Constitution of the Republic of Transvaal adopted the Trader's Handbook, an elementary work by the Roman-Dutch jurist Van der Linden, as the inspiration of its law. In its application it adopted the English procedural rules of a jury in its courts system. [93] The independent Republics made a leap of faith by duplicating the English influenced commercial and public- law that was being implemented in the Cape and commissioned their judges to sit on the bench. [94]These judges referenced the English, Scottish and, especially, Cape cases (as well as citing civilian sources other than the authorities of seventeenth-century Holland).
The jurisdictions of Transvaal, Orange Free State and the Republic of Natal, incorporated a "mixed jurisdictions" and this fused system remained after Natal was annexed to the

[85] See, in general, Du Bois "Introduction" in Van der Merwe & JE du Plessis (eds) *Introduction to the Law of South Africa* (2004) 9-10
[86]Hahlo & Kahn, *The Union of South Africa The Development of its Laws and Constitution* (1960)18-20.
[87] "Law is singularly deficient, but the Judges are enjoined to follow the principles and practice of those States which are most distinguished by their Commercial enterprise and experience." See the Report of the Colebrooke-Bigge Commission See Report of 6 Sep 1826, *pr* in Theal (ed) *Records of the Cape Colony* Vol 28 (1905) at 1-111 at 14
[88]See, in general, Du Bois "Introduction" in Van der Merwe & JE du Plessis supra 86 at 11-12, 14-15
[89] Ibid at 10-11.
[90] Du Bois "Introduction" in Van der Merwe & JE du Plessis supra 86 at 94.
[91] Van der Merwe, See Palmer (ed) Mixed Jurisdictions Worldwide. The Third Legal Family supra 84, at 3-7.
[92] *Ibid* 105-106.
[93] *Ibid* 97, 117
[94] Corrie van der Merwe, The Origin and Characteristics of the Mixed Legal Systems of South Africa and Scotland and their importance in Globalisation**,** *Fundamina* 18 (1) 2012 pp 91 -114

Cape in 1843, and it became a separate English colony in 1856; the Orange Free State and the Transvaal both came under English control as Crown Colonies in 1902 (after the Second Anglo-Boer War).The Roman Dutch framework was abrogated and the old legislative and executive structures were replaced by new constitutions that assigned them as Royal colonies which were incorporated by the seal of a governor representing the Crown, and nominated Executive and Legislative Councils.[95] The machinery of justice was in accordance with English structures and this was represented by the magistrates courts which replaced the *landdrosts*' courts and the justice of the peace was established for criminal cases. The mixed law legal apparatus was maintained by the English law-inspired statutes being complimented by ordinances that preserved the status of Roman-Dutch law.[96]

After 1910 when South Africa achieved its independence as a Dominion, and it became an independent nation within the British Commonwealth in terms of the Statute of Westminster in 1931. It abolished appeals to the English House of Lords in 1955 and became a Republic in 1961. In its contemporary articulation in the South African law has become distinctly mixed through the blending of Roman-Dutch law and English law by the courts and the legislature.[97] This was because the rise of Afrikaner nationalism which facilitated "between 1960 and 1980, to a resuscitation of Roman law back to its inception in the jus commune". Its existence in the present framework is in the field of private law with the province of the public-law to fall under the influence of English law.[98]

Lord Cooper, senior judge and former Lord Advocate of Scotland contends that the adoption of the Roman Dutch law in South African legal culture was beneficial and that Scot legal system "*might turn directly to the primary sources of the Civil law as a matter of everyday practice, though certainly they should be encouraged to engage with any academic literature which concerns the applicability of Civilian jurisprudence in the 21st century*". It has been argued that in terms of practice in the courts "*when looking to non-Scots precedent, the jurisprudence of a more developed system with its similar history and non-codified law has the potential to be particularly useful… the most potentially useful does not logically exclude the useful or even the fairly useful'. The proposal that Scots practitioners look to South Africa for guidance is set forth as a starting point, not as the most desirable end*".

Lord Cooper states that "*the Scottish lawyer has been first and foremost a comparative lawyer since the thirteenth century, and when he ceases to be a comparative lawyer Scots Law will die*".[99]The impact on Scottish jurisprudence flows from the concept of Regulae – general rules that emanate from cases that 'the law may not be derived from a rule, but a rule must arise from the law as it is'.[100] The *regulae iuris* from Stein 's perspective is formulation of Roman law that it is not a fixed body of rules, but rather "rules" that were "recognised or found" to be

[95] Hahlo & Kahn supra 87 at 22-23.
[96] Van der Merwe *et al, supra 84 at* 99-100; Carpenter *Introduction to South African Constitutional Law* (1987) 59-73.
[97] Van der Merwe at 101-102, Also see See Du Bois supra 86 at 12-13.
[98] Du Bois ibid at 14-15
[99]Lord Cooper, Selected Papers 1922-54, (Oliver and Boyd, 1957), p.133 Also see H. MacQueen, 'Legal Nationalism: Lord Cooper, Legal History and Comparative Law', Edinburgh Law Review, vol. 9, no. 3, (2005) pp. 395-406. https://doi.org/10.3366/elr.2005.9.3.395.
[100] Justinian's Digesr.50.17

applicable in a specific case.[101] Law was therefore not created but "discovered", which means that enacted law in Rome began as "recorded customary law". [102] The term *regula* (rule) was used to define some terms that were considered to be of general application.[103] The rule or *regula* did not establish law but emanated from existing law;[104] and it signified the present legal order.[105] The *regula* could later be consecrated ion as a proper description of the *iuscivile* and the judge who pronounced on several disputes in civil law at any given time.[106]

IV. BENEFITS OF A MIXED SYSTEM OF LAWS

There is an analogy between the two streams of jurisprudence of the civil law and English common law because the objective purpose is to define what a rule is and "refine and to clarify, and through this to guide future practice".[107] The source or the judgments in the common law and civil law are arrived at differently because considerations of the judgments in the common law courts and jurists in the civil courts are conceptually separate. The judges in the common law courts and the jurists in civil law jurists who are formulating a cause of action reach their perspectives from different vantage points.

The civil law jurists can overrule the grounds upon which the legal proposition was based and move forward from those who had "guided practice in the wrong direction". In the Common law courts "*the aim of the judge is to resolve the dispute between the two litigants before them within the bounds of the law, yet as the old adage goes 'hard cases make bad law'. Compounding this, of course, is the fact that the judgment of a Common law court cannot be overturned until a real case*", which implies that a new precedence is established. [108]

Lord Gill, former President and Lord Justice General of Scotland has argued that in the development of civil procedure there was a problem of deficiency, but it was not as great in the civil law as in the Common law. The assumed superiority of civil law jurisprudence to Common law principles "*does not lie in the substantive rules of the former, but rather in the fact that those substantive rules were separated from procedural forms at a relatively early stage in the development of Roman jurisprudence*".[109]The Roman reliance on casus means that there could be a transfer "*from casus to regulae and for the development of basic, yet sophisticated, legal concepts such*

---

[101]P Stein *Regulae Iuris.From Juristic Rules to Legal Maxims* (Edinburgh, 1966) at 4. Also see Rena van den Bergh, A rule must arise from the law as it is - and it is not cast in stone, Fundamina, vol.20 n.2 Pretoria 2014.

[102]*Ibid* at 5-7.

[103]See D 50 17 1, *Paulus librosextodecimo ad Plautium:* "Regula est, quae rem quae estbreviterenarrat" ("A rule is something which briefly describes how a thing is"). All texts from the Corpus iuriscivilis are taken from *The Digest of Justinian* (Mommsen, Krueger & Watson edition). Stein supra 36 at 72-73

[104] D 50 17 1, *Paulus librosextodecimoadPlautium.* See *sv "regula"* A Berger *Encyclopaedic Dictionary of Roman Law* (Philadelphia, 1991) at 672.

[105]Ibid at 672. Legal maxims coined in early law were at times criticised by the classical jurists because they were no longer applicable to the economic relations and daily lives of later times.

[106]P Stein, P Stein *RegulaeIuris. From Juristic Rules to Legal Maxims* (Edinburgh, 1966) at 4.

[107] Jonathan Brown, The Scottish Legal System – What Next? Scots Law as a Civilian System: A Response. University of Strathclyde research paper. https://pure.strath.ac.uk/ws/portalfiles/portal/90156116/Brown_SLG_2019_Scots_law_as_a_civilian_system.pdf

[108] Ibid

[109] Lord Gill Baron David Hume's Lectures 1786-1822, Vol I (edited by G. Campbell H. Patton) (Edinburgh: Stair Society, 1939), p.13

as possession, fault and consent to similarly emerge at an early stage, which in turn allowed for coherent, rigorous and logical analysis of those concepts".[110]

The difference is that despite the apparent proximity between an English judge and the civil law jurist, the Scots law has benefited from less reliance on the precedence of the courts over the duration for its consolidation because the Roman jurists had derived the principle by reasoning much earlier in their formulations.[111] This form of reasoning provides a nexus between the Scots law to the civil law and this connection can be of benefit to Scots law and is a direct source of law for the jurisprudence that is based on the Scots law. The basis of this reasoning is that civil procedure in Scotland is reliant on principles that are readily available than those that develop through the process of litigation which is a personal initiative of the party seeking redress. [112]

Professor Gordley argues by which the Roman jurists "*determine the legal problems that can be compared with the process by which the judiciary in Common law states decide cases.*[113]"The common law judges examined cases to clarify the meaning of general concepts and the "*English judges used cases to determine the boundaries of the writs recognised by the Common law courts since (in the Civil and Common traditions respectively)"*and in Roman jurisprudence*, "the judge is taken to be so distinguished as an authority in the law that their pronouncements may be regarded, on their own merits, as authoritative.*[114] *Judge or jurist may err, but commun is error facitius (common error makes the law) and even a blatant mistake made by one of eminent distinction can take a long time to eradicate,* [115] *if such excision is indeed at all possible*".[116]

In the law of contract, Scotland has eschewed the English-law principles of consideration and privity of contract and maintained consensus qualified by the doctrine of *bona fides* as the cornerstone of the law of contract. The harmonisation process as envisaged by the Treaty of Union has incorporated the commercial law and law relating to companies, insolvency, bills of exchange, copyright, patents and designs has been transplanted from English law mostly by means of legislation. [117]

The Scot contract law is a fused mix of both civil and English common law and this can be viewed by the concept of the law of error that has civil law origins.[118] The parallel source since the nineteenth century is the importation of the English concept of misrepresentation,[119]a part of the law of tort (although it appears in the context of the formation of contracts), while the 'classical' Scots law of error is conceptually a part of contract, because its idea is being a remedy that deals with a defect in consensus in the contract formation process. In consideration of the fact that this idea of 'error' is an

[110] Ibid
[111]see Peter Stein, Regulae Iuris: From Juristic Rules to Legal Maxims, (Edinburgh: EUP, 1966)
[112]James Gordley, supra 42at p.22
[113] James Gordley, The Jurists: A Critical History, (Oxford: OUP, 2013), p.21.
[114] P Stein, Roman Law, Common Law and Civil Law, [1992] Tulane Law Review 1591.
[115] T. B. Smith, Designation of Delictual Actions: Damn Injuria Damn 1972 SLT (News) 125. There was a sequel a decade later: Damn, Injuria, again: 1984 SLT (News) 85
[116]See the discussion in James Edelman, Property Rights to our Bodies and their Products, [2015] University of Western Australia Law Review 47, p.65.
[117]the Copyright Act of 1709 (8 Anne c 19); the Partnership Act, 1890; the Bills of Exchange Act, 1892; the Sale of Goods Act, 1893; the Marine Insurance Act, 1906; and lately the Companies (Floating Charges) (Scotland) Act, 1961.
[118]K Zweigert and H Kötz, *An Introduction to Comparative Law*, 3rd edn (tr T Weir) (1998) 204.
[119]H Lévy-Ullmann, "The law of Scotland" (1925) 37 JR 370 at 390

incorrect and remediable solution the Scots contract law is Civilian based, and it concentrates on the erring party, while in the common law of the English tradition the remedy of misrepresentation the liability falls on the party at fault.[120]

The Scottish courts consider error cases in litigation as raising an action in misrepresentation or, depending on the facts and their interpretation. The errors are dealt with as breach of contract events, without elaborating on the definition of error in their deliberations.[121] This approach is derived from the English law, in contrast to the civil law systems which distinguish more obviously between defects in formation and defects in performance of the contract, and remedies exist for breach.[122]The law of error in Scots law has the objective of resolving the conflict arising from the infringement of the intention (*volition*) of a party to a contract and their declaration or expression (*signumvolendi*).[123] This is one aspect and the other, is based on the principle that the other party can rely on the representor's statement.[124] The party may not always be bound by a contract if they contracted under error because that would invalidate the contract. This can be considered objectively and while error can be defined as a misconception, or a wrong or incorrect assumption about a matter of fact or of law.

The Scot contract law is a fused mix of civil and English law for instance the concept of the law of error that has civil law origins.[125]The parallel source since the nineteenth century is the importation of the English concept of misrepresentation,[126]a part of the law of tort (although it appears in the context of the formation of contracts), while the 'classical' Scots law of error is conceptually a part of contract, because its idea is being a remedy that deals with a defect in consensus in the contract formation process. In consideration of the fact that this idea of 'error' is an incorrect and remediable solution the Scots contract law is civilian based, and it concentrates on the erring party, while in the common law of the English tradition the remedy of misrepresentation the liability falls on the party at fault.[127]

The civilian concept of error and the English liability for misrepresentation cannot be bridged and the Scottish courts in cases consider error cases in litigation as misrepresentation cases or depending on the facts and their interpretation. The errors are dealt with as breach of contract events, without elaborating on the definition of error in their deliberations.[128] This approach is derived from the English law, in contrast to the civil law systems which distinguish more obviously between defects in formation and defects in performance of the contract, and remedies exist for breach.[129]

---

[120] A.Rahmatian, The political purpose of the 'mixed legal system' conception in the law of Scotland. Maastricht Journal of European and Comparative Law, 24(6), (2017) pp. 843-863.

[121] E Örücü, "Comparative law as a tool of construction in Scottish courts" 2000 JR 27, 33, 36.

[122] See P Legrand, "Against a European Civil Code" (1997) 60 MLR 44, 53

[123] This analysis of error in contract theory of Scots law is the legacy of the jurists of Natural Law, see R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 587, 613.

[124] This "reliance theory" is the product of eighteenth-century *ius commune* jurists in central Europe (as opposed to the "will theory" of Grotius and Pufendorf), and could already be found in the Bavarian *Codex MaximilianeusBavaricusCivilis* of 1765 (IV.1.25),

[125] K Zweigert and H Kötz, *An Introduction to Comparative Law*, 3rd edn (tr T Weir) (1998), 204.

[126] H Lévy-Ullmann, "The law of Scotland" (1925) 37 JR 370 at 390.

[127] A.Rahmatian, The political purpose of the 'mixed legal system' conception in the law of Scotland. Maastricht Journal of European and Comparative Law, 24(6), (2017) pp. 843-863.

[128] E Örücü, "Comparative law as a tool of construction in Scottish courts" 2000 JR 27, 33, 36.

[129] See P Legrand, "Against a European Civil Code" (1997) 60 MLR 44, 53

The law of error in Scots law has the objective of resolving the conflict arising from the infringement of the intention (*volition*) of a party to a contract and their declaration or expression (*signumvolendi*).[130] This is one aspect and the other, is based on the principle that the other party can rely on the representor's statement.[131] The party may not always be bound by a contract if they contracted under error because that would invalidate the contract. This can be considered objectively and while error can be defined as a misconception, or a wrong or incorrect assumption about a matter of fact or of law.

The errors in Scot law can be distinguished according to the (i) extent of the error (ii) if the mistake has been induced by misrepresentation and (iii) relevance of it on record. If the error is uninvited, a contract can be voided only if the error is *in substantialibus*, that is traced to the fundamental nature of the contract. It is difficult to define the exact meaning and ambit of the "substantials": which Bell's classifies as of error *in substantialibus* which relates to the subject-matter of the contract, the contracting person (if personal identity is essential), the price, the quality of the thing engaged for, and the nature of the contract.[132] This list reflects the basic types of error in Roman law, but it is not exhaustive, nor does it refer to any potential differences between unilateral and common error that led to the formation of the contract. [133]

If the error has arisen from the innocent misrepresentation of the other party it must be material or, "essential" to the contract.[134] The notion of misrepresentation is borrowed from English law and is different from that of error.[135]It relates to the "material" or "essential" error that can be defined as an error that does not need to go to the root of the contract but must be sufficiently important to have induced a reasonable person to enter into the contract. Thus, the misrepresentation must have caused the error and therefore the English "innocent misrepresentation" and the Scots "essential error" appear to have become interchangeable.[136] The "Essential error" (*error in substantialibus*) under classical Scots law and is an "essential error" under modern Scots law and can be distinguished from innocent misrepresentation in the formation of an agreement.[137]

The relevance of the error in law is relevant and decisions of the courts have shown that to exclude the errors from validating a contact the error must not lead to the subject matter

---

130 This analysis of error in contract theory of Scots law is the legacy of the jurists of Natural Law, see R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 587, 613.

131 This "reliance theory" is the product of eighteenth-century *ius commune* jurists in central Europe (as opposed to the "will theory" of Grotius and Pufendorf), and could already be found in the Bavarian *Codex MaximilianeusBavaricusCivilis* of 1765 (IV.1.25),

132 The distinction between uninduced and induced error reflects the present situation of Scots law under the influence of the English law of misrepresentation. Before, there was no difference between uninduced and induced (essential) error. Misrepresentation became relevant only if it was fraudulent, see McBryde, *Contract*, 365. This reflected the position of the *ususmodernus*: compare Zimmermann, *Obligations* 610, and as to classical Roman Law (Ulpian), 593

133 Bell, Principles, 4th edn (1839) § 11.

134 See already in *Sword* v *Sinclair* 1771 Mor 14241, although it is doubtful whether this case was indeed one of unilateral error: W WMcBryde, "A note on Sword v Sinclair and the law of error" 1997 JR 281.

135*Angus* v *Bryden*, 1992 SLT 884

136 E.g. "taking advantage" can also contain aspects of fraud: see *Steuart's Trustees* v *Hart* (1875) 3 R 192. Also, securing a good bargain means contracting at the expense of the other side, which the law does not normally prevent.

137McBryde, *Contract*, 372.

of the contract ie was *essentialibus*, when as a Civil law construct it can be allowed.[138] It is obvious that if the error relates to the legal consequences of the transaction, the contract is not terminated unless the error was induced by misrepresentation of the other party.[139]The reluctance to accept error in law as a ground for invalidating the contract can be traced back to Roman law.[140]The Scottish law of error is an example of the fusion or "commixition" of the Roman law and the Common Laws, as it does not separate the legal division that is necessary in civil procedure in this area of law. The law of error and misrepresentation are an example of fusion that does not lead to remedies in the mixed legal systems to be readily distinguished.

Andreas Rahmatian argues that the solution would be procedurally flexible and "*it can be tailored in a broader way (property law with the laws of contract and delict), or more narrowly (within contract, for example the law of error), or may even be postulated as having an inverse effect (Scots law influencing English law, and not even a 'classical' Civilian concept that is normally supposed to characterise Scots law, but a Scots Common Law idea of some kind, such as in the tort/delict of negligence)*".[141]

The retention of the civil law in the Scots legal system will enable the individual who is involved in a dispute to be reliant on casus, ie guidance that will lead the judge to have sufficient knowledge of the procedure to be adopted in the dispute. There has to be more informed training of English judges in Scots law who are likely to review appeals in the UK Supreme Court. This is because of the increasing role of the apex court after the Scotland Act 1998 which has allowed appeals to reach the Courts that are on devolution issues. Those appeals which concern the Human Rights Act 1998 are also heard in the Supreme Court in criminal matters and the judges need to have the expertise in the Scots law even when applying universal principles of law.

CONCLUSION

The Roman legal tradition has survived the test of time, and it is enshrined its civil law where the influence of institutional and jurisdictional factors has influenced its development. This has caused it to be ingrained through a historical process that has led to the convergence of interest in its promotion by practitioners, who have helped to cultivate the interest by the *action iniuriarum* that has led to the remedies to be made available. Many of the civil actions have been retained despite the influence of common law that has led to Scotland being a fused or mixed system jurisdiction.

While Scots law is a mixed system of substantive law the borrowing from the jurisprudence of English common law has parallels with the South African system that has adopted Roman Dutch civil law which integrates common law with the civil law. The adoption of rulings from the superior courts most notably the House of Lords had the effect that the

---

[138] Compare J Thomson, "Error revised" 1992 SLT (News) 215. The other reason is arguably the somewhat confused state of the present Scots law of error.

[139] J C Smith, "Contracts – mistake, frustration and implied terms" (1994) 111 LQR 400, 408 *et passim*; C J Slade, "The myth of mistake in the English law of contract" (1954) 70 LQR 385.

[140] This complicated subject goes beyond the scope of this article. For Swiss law, e.g., see A Koller in T Guhl, *Das schweizerischeObligationenrecht*, 9th edn (2000) 140 *et seq*.

[141] Andreas Rahmatian, Codification of Private law in Scotland: Observations of a Civil lawyer. Oxford University Comparative Law Forum. (20070 https://ouclf.law.ox.ac.uk/codification-of-private-law-in-scotland-observations-by-a-civil-lawyer/

principles have become part of the Scots legal system. The identical process of incorporation of these principles with the civil law concept of delict has manifested itself has fused itself with the law of obligations ie contract, tort and property law principles.
The consensus in Scotland system seems to be to continue with the same mixed framework have recommended its retention by distinguishing the sources of Scots law. The Scots substantive law is based on the mixed tradition and the civil courts structure has been able to absorb its coherence and sophisticated methodology and incorporate into its substantive and procedural framework. This distinguishes the separate streams of the common law and civil law inheritance and their identity in the historical evolution of Scots law.