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Roman law tradition, Scottish civil procedure and adoption of civil law in legal practice

ABSTRACT: The law of Scotland differs from the rest of the UK by its inheritance of Roman law and civil procedure. The Scots law is a non-codified 'mixed jurisdiction' in which legal principles have been drawn from both the civilian (i.e. Roman law) and common law traditions. It also owes heavily to the jurists who developed the causes of action in the civil courts of the country. This still has presence in Scottish procedural law and is practiced in contract, delicts and property law. The *actio iniuriarum* has been a source of the cause of action for civil injury that is still in use today in the courts. In property law there are the *action familiaeer ciscundae* and the *action communi dividundo*, the former lying for the division of property within an inheritance, and the latter being available to co-owners other than heirs. The issue is the scope of procedural remedies in which the courts distinguish between various causes of action and how they can develop a remedy from basic principles of Civil law. In this paper there is an examination of the modern civil procedure in Scots law that rests on the classical theory and the outcome of a mixed jurisdiction in which the Civil law needs to be distinguished from the common law in order to make it sustainable.

KEYWORDS: Ius commune – civil law – actio iniuriarum – *legis Aquiliae* – delict.

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1. *Introduction*

The Roman law in Scottish jurisprudence has been ingrained since the 14 th century and its co terminus with the rise of the nation state. Its evolution has occurred against the backdrop of the rise of the European *ius commune* in the later medieval period [1]. This derived from the Roman concept of a common law and it also applied to Scotland subject to certain 'national' deviations, which was received in the *ius proprium*[2]. 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 substantive law includes the property, contract, and tort concepts and in the civil law tradition is still present because of the procedural remedies available in the courts.

The framework of Scots law has developed through principle derived from legal writings rather than precedence established through the courts[3]. The jurisprudence has had a considerable impact on the formation of the municipal law of Scotland leading up to the Treaty of Union in 1707 whose text provided for legal measures to ensure the recognition and continuation of the Civil law tradition[4]. 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 tradition.

The Roman legal tradition has influenced the jurisprudence of Scots law through canon law and the academic institutions 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

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

[2] J. W. Cairns, and H. L MacQueen, *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].

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

[4]Gordon Robinson, O. F., 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.

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

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theology of the reformed Scottish Church after 1560 which emphasized 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 Scot legal framework. 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]. Furthermore, the Courts Act 1672 transformed the court system that 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 an Outer House and the appellate Inner House and changes were made to the procedure used in the court[9]. The High Court of Justiciary in 1672, became the apex court for the criminal jurisdiction in Scotland[10]. The rise of the national court system affected the reception of Roman law and Scots law became part of the national legal order that is still recognisable and distinguishable today[11].

In the first part of the nineteenth century jurisdictional changes were introduced to settle the hierarchical structure of the different levels of court in Scotland[12]. This has impacted the civil procedure that is distinct from England and there is compelling evidence that Scottish legal culture is historically based on Roman law. 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. This has enabled the Scots law to become sourced on civil procedure drawn from a variety of texts that have led to the harmonization

[6]Aidan O'Neill, Limited Government, Fundamental Rights and the Scottish Constitutional Tradition (2009) *Juridical Review* 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 iureregniapudScotosdialogus (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 Encyclopedia 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] Fergus Robinson, and Gordon Robinson, supra 5, p. 238.

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

[11] Birks, Evans-Jones and Stair Society supra 2, 185–200.

[12] J. W. Cairns and H. L MacQueen supra 3, 153–5.

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of different legal traditions and their application has been subject to conjecture and debate.

The road map of this paper consists of the impact of Roman legal tradition on Scots civil tradition that is practiced in the present day Scottish courts. Part A considers the influence of institutional and jurisdictional factors at the inception of modern Scots law that enforced the Roman tradition; Part B will considers the borrowing of concepts from jurisprudence of other Civil law traditions that also incorporate a mixed jurisdiction; and Part C will examines the various forms of pleadings in the courts in three civil law concepts of contract, tort and property law that are employed in litigation in Scotland and can be traced to Roman law.

2. *Practitioners impact on civil law process*

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 that had control over the procedure of court etiquette called the Faculty of Advocates imbibed the Civil law tradition[13]. The practitioners initiated this process in 1750 with the introduction of a compulsory examination in Scots law as an entry requirement to the bar[14]. This requirement in addition to a mandatory qualification in Roman law, initially introduced in the seventeenth century indicates that the process with a Romantic base was formed. It has been argued that the reception of Roman law in Scots law was through the role of legal practitioners who practiced a hallowed tradition of Civil law[15].

The method of obtaining the legal qualification impacted on the role of the lawyer in the courts. At its inception the LLB was a post graduate vocational degree that was offered on a part-time basis because most professors at the faculty were also practicing advocates and students were engaged as apprenticed trainees. The reform of the system occurred in 1960, when a full time undergraduate degree was offered that eliminated the need for graduation in another subject before enrolment onto the LLB. This offered the legal subjects and was taught in the prevailing legal positivist curriculum that was dominant in legal theory in Scotland[16].

[13] J.W. Cairns, supra 3, 14 at 86–7.

[14]Robinson, Fergus and Gordon, supra 5, 12 at 245.

[15] Cairns, 3,14 at 128.

[16] P. Du Plessis, P. Conceptions of Roman law in Scots law: 1900-1960. In K. Tuori, & H. Björklund (Eds.), *Roman Law and the Idea of Europe (2018)* (1 ed., pp. 221-238).

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The legal practice shaped the adoption of Roman jurisprudence and unlike other Continental jurisdictions it did not lead to the codification process of a national civil law but promoted an independent application of Roman law. This was infused in 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 Scottish techniques in resolving the Roman law concepts and he wrote a treatise the *Roman Law in Modern Practice*[17] a legal positivist framework that conceptualised Roman legal tradition to the legal practice in Scotland.

He stated "*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?*"[18]. 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)*"[19].

MacKintosh elaborated on the convergence of legal history, the relationship between Roman and English common law principles of the law of trust. This he referenced as based on the formative period of the corpus juris of Roman law under Justinian and by declaring the various aspects of Roman private law concerning English and Scottish case law of the period. He emphasised that it had to satisfy the vocational requirement for "*Roman law served a thoroughly practical purpose in the context of legal practice in Great Britain*"[20].

There were indications in the courts that the Roman law was of persuasive effect in decision making process[21]. The basis of the Roman tradition was formulated in academic text books which were to train the aspirants to the legal profession. Craig's Jus Feudale – the work which is widely 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[22]. 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

[17] James MacKintosh, *Roman Law in Modern Practice* Edinburgh, Green and Son 1934, Preface.

[18] Ibid, p 1-2.

[19] Ibid.

[20] Ibid.

[21] In *Sinclair v Brougham* [1914] AC 398 it was held by Lord Dunedin that Roman law was not authoritative, but merely instructive.

[22] Jus feudale tribus libris comprehensum, Book 1, *Stair Society Volume 64,* p 410.

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that the 'common law' of Scotland is 'in large measure derived from the civil law'[23].

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*"[24]. This meant that the civil justice system was encouraged and developed of its own accord and that it was recognised in the procedural law that was adopted to conform with the substantive law principles.

The civil justice system of Scotland and the court structure differs significantly from that in England and Wales both in terms of process and as a regulatory model. The hierarchy of the courts is based on the framework of dual layer of civil courts. The Court of Session in Edinburgh that is equivalent to England's High Court and the sheriff courts which are the equivalent of county courts. The sheriff courts have exclusive jurisdiction in claims up to £100,000 and claims above that amount can be litigated in either the sheriff court or the Court of Session.

The courts have their own rules which vary according to the nature and value of the claim. In the sheriff court the 'small claims' or 'summary cause' rules apply to claims under £5,000 and the 'ordinary cause' rules apply to claims over £5,000. In the Court of Session the default procedure is the 'ordinary action procedure'. There are also specialist procedures for commercial, intellectual property and personal injury cases[25]. The highest court is still the Supreme Court based in England for matters that come under the civil jurisdiction.

3. *Blending Civil law in a mixed system*

The civilian tradition in Scots law developed by the advocates was sustained by borrowing from other jurisdictions which instituted civil procedure into the courts. The civil procedure that has facilitated the reception of Roman law in Scots law also owes itself to the countries that have integrated the civil law into their own system such as South Africa that has a 'mixed system'[26]. The latter

[23] W. M Gloag and RC Henderson ,*Introduction to the Law of Scotland*, Edinburgh: W. Green & Son. 1927: paragraph 17.

[24] A. Murray, (1st Viscount Dunedin), ed., *Encyclopaedia of the Laws of Scotland*, Edinburgh: W. Green & Son, (1932) at 74.

[25] D. Carey Miller, 'Sibling Mixed Systems: Reviewing South African/Scottish Comparative Law', 20 *Edinburgh Law Review* (2016), p. 257.

[26] 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*,

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has a model based on the Roman-Dutch civil law that has inspired the Scottish jurists who consider their jurisdiction as composed of common and civil law[27].

The Civil law principles have been borrowed from the Roman–Dutch law make for a comparison that is instructive because of the development of South African legal culture in the first part of the twentieth century.[28] The South African law is drawn from the Dutch civil law which can be traced to Justinian and it has genesis in two basic legal traditions, Roman and German. In this framework the law was established as a superstructure of the state, and belonged to a European heritage. Chanock argues that "this manner of interpreting the history of the law had two effects. One was instrumental, in that it was resurrected and developed to combat another narrative and pedigree, that of the English common law. A second was that it drew attention away from the local situations in which the law was developed in response to contemporary needs and conflicts"[29].

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"[30].

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.

[27]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.

[28] Lord Cooper, "From David I to Bruce 1124–1329", in Introduction to Scottish Legal History, (Stair Society, vol 20, 1958) at 15.

[29] M. Chanock, *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice*, (2008), 155Cambridge: Cambridge University Press.

[30]See John W. G. Blackie and Niall R. Whitty, Scots Law and the New Ius Commune, in Hector L. MacQueen, Scots Law into the 21st Century: Essays in Honour of W. A. Wilson, (Edinburgh: W. Green, 1996), p.78.

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The perspective of Lord Cooper is 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"[31]. 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'[32]. 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 applicable in a specific case[33]. Law was therefore not created but "discovered", which means that enacted law in Rome began as "recorded customary law"[34]. The term *regula* (rule) was used to define some terms that were considered to be of general application[35]. The rule or *regula* did not establish law but emanated from existing law;[36] and it signified the present legal order[37]. The *regula* could later be consecrated ion as a proper description of the *ius civile* and the judge who pronounced on several disputes in civil law at any given time[38].

This provides an analogy which Professor Gordley's states 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"[39]. The Roman jurists examined cases to clarify the meaning of general concepts… 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)

[31]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.

[32] Justinian's Digest.50.17.

[33] *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.*

[34] *Ibid* at 5-7.

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

[36] D 50 17 1, *Paulus libro sexto decimo ad Plautium.* See *sv "regula"* A Berger *Encyclopedic Dictionary of Roman Law* (Philadelphia, 1991) at 672.

[37] 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.

[38] P Stein, P Stein *Regulae Iuris. From Juristic Rules to Legal Maxims* (Edinburgh, 1966) at 4.

[39] James Gordley, The Jurists: A Critical History, (Oxford: OUP, 2013), p.21.

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like the Roman jurist, the judge is taken to be so distinguished as an authority on the law that their pronouncements may be regarded, on their own merits, as authoritative[40]. Judge or jurist may err, but communis 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 [41], if such excision is indeed at all possible"[42].

The analogy of the two systems in terms of civil procedure is that the Roman jurist in their practice has the objective purpose to always only to define what a rule is and "refine and to clarify, and through this to guide future practice"[43]. The jurists who consider the matter later can overrule the grounds upon which the 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[44].

Lord Gill, former President and Lord Justice General of Scotland has argued that in the development of civil procedure the problem of deficiency is 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"[45]. 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 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"[46].

[40] P Stein, Roman Law, Common Law and Civil Law, [1992] Tulane Law Review 1591.

[41] T. B. Smith, Designation of Delictual Actions: Damn Injuria Damn 1972 SLT (News) 125 and its reprise over a decade later: Damn, Injuria, Again: 1984 SLT (News) 85.

[42]See the discussion in James Edelman, Property Rights to our Bodies and their Products, [2015] University of Western Australia Law Review 47, p. 65.

[43] 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.

[44] Ibid.

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

[46] Ibid.

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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[47]. 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 investment on the part of the party seeking redress[48].

In order for law to develop these litigants need to conduct their case with or without legal representation. The process of mediation and negotiation will not lead to the development of legal doctrine that could only happen in the courts and common law has encouraged the trial process rather than the alternative dispute resolution. The retention of the Civil law process will enable the individual who is involved in a dispute to be certain of the procedure to be adopted by the reliance on casus, ie guidance that will lead to sufficient knowledge of the procedure to be adopted until the conclusion of the dispute.

4. *Inherited Roman concepts in Scot law*

The Civil law concepts that are in practice in the Scottish jurisdiction that can clearly be discerned are contact law; delicts ie civil injuries claims, and property law. There has to be consideration of the Roman law's most significant contributions to civil procedure which is the concept of the *action iuriarum*, that was developed by the institutional writers who defined it as a cause of action. It was considered as an integral part of the law of obligations and received jurists recognition and was interpreted as an obligation to make reparations[49].

a) Contract 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[50]. The parallel source since the nineteenth century is the importation of the English concept of

[47] see Peter Stein, RegulaeIuris: From Juristic Rules to Legal Maxims, (Edinburgh: EUP, 1966).

[48] James Gordley, supra 42at p.22.

[49] Stair, *Institutions*, 1, 9, 4.

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

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misrepresentation[51],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[52].

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[53]. 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[54].

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 (*signum volendi*)[55]. This is one aspect and the other, is based on the principle that the other party can rely on the representor's statement[56]. 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) quality of error (ii) if the error has been induced by misrepresentation and (iii) relevance of error of law. If the error is uninvited, a contract can be reduced 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

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

[52] 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.

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

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

[55] 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.

[56] 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 Maximilianeus Bavaricus Civilis* of 1765 (IV.1.25).

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Bell's classifies as of error *in substantialibus* as regarding 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[57]. 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[58].

If the error has arisen from the innocent misrepresentation of the other party it must be material or, "essential" to the contract[59]. The notion of misrepresentation is borrowed from English law and is different from that of error[60]. 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 as a consequence the English "innocent misrepresentation" and the Scots "essential error" appear to have become interchangeable[61]. 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[62].

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 of the contract ie was *essentialibus*, when as a Civil law construct it can be allowed[63]. It is obvious that if the error relates to the legal consequences of the transaction, the contract is not terminated unless the error

[57] 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 *usus modernus*: compare Zimmermann, *Obligations* 610, and as to classical Roman Law (Ulpian), 593.

[58] Bell, Principles, 4th edn (1839) § 11.

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

[60] *Angus* v *Bryden*, 1992 SLT 884.

[61] E.g. "taking advantage" can also contain aspects of fraud: see *Steuart's Trs* 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.

[62] McBryde, *Contract*, 372.

[63] 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.

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was induced by misrepresentation of the other party[64]. The reluctance to accept error in law as a ground for invalidating the contract can be traced back to Roman law[65].

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 legal academic 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)"[66].

b) Delict (Tort)

It is important to evaluate how the liability in negligence developed from its origins in delect. Scots law has a different approach to imposing liability on someone for an intentional act when they did not specifically intend the harmful result of the act and it imposes liability for harmful consequences when there is *no lawful justification* for doing the intentional act[67]. The wrongfulness is found not in the intention to do an act which injures, but to carry out an injurious act without having lawful authority to do it. This has parallels in the giving damages for assault, in the sense of physical contact without the lawful authority of consent and the same outcome is discernible in the law of obligations, such as

[64] 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.

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

[66] 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/.

[67] This would correspond with Stair's view: "Those who err in the substantials of what is done, contract not" (*Institutions*, 1.10.13).

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unjustified enrichment, where a contract can be annulled if there has been unjust enrichment[68].

In wrongful imprisonment and wrongful prosecution where fault is based on 'malice and want of probable cause' and mere affront is not enough to found liability under the *actio iniuriarum* in Scot law. It must be an affront caused by an intentional act committed without lawful justification, and the burden of proof is on the claimant in the action[69]. This is the fact that justifies recovery for a wider range of issues and negligence or the unintentional causing of injury does not cause liability unless there has been physical injury. The proof of a recognised psychiatric illness can lead to the harm that does lead to liability under the *actio iniuriarum* principle but the harm must have been caused intentionally[70].

The term implied 'wrongfulness' as an outcome of an act based on perceived notions but not injury[71]. It is an insult which is based on an injury to dignity for an infringement of a person's honour, dignity or status[72]. The Scots law has taken a different approach to justify imposing liability on someone for an intentional act when they did not specifically intend the harmful result of the act. The Civil law tradition imposes liability for harmful consequences when there is no lawful justification for doing the intentional act[73].

The delict that caused an affront was the basis of *iniuria* in Roman law and is included in Scots law and needs intent and the defining characteristic of the Scots law of *iniuria* is based on the separation between real injuries which are physical and verbal injuries such as slander which is inherent in Roman law[74].

[68] Reid, *Property*, para 617. Indirectly this touches upon the question whether a derivative acquisition of property is abstract or causal in Scots law: in the former case property can also pass under a void contract if the error does not encompass contemplation of transfer of ownership.

[69] Silence does not suffice except in cases of contracts *uberrimae fidei*, fiduciary relationships etc.

[70] KM Norrie, The actio incorriarumim is Scots law, : Romantic Romanism or Tool for Today ? Stair Memorial Encyclopaedia, vol 15, (1996) para 437.

[71] Bankton, defines it as an 'injury' that as a wrong was independent of any other though it was more usually meant 'wrongfulness' as a judgment rather than injury as a loss. *Institutions*, 1, 10, 21.

[72] The term 'Injury' according to Stair, Bankton, Erskine and other institutional writers on the law of Scotland, who have used the concepts of the civil law, "is an offence maliciously committed to the reproach and grievance of another, whereby his fame, dignity or reputation is hurt": *Newton v Fleming* (1846) 8 D 677 (Lord Murray) , p.694.

[73] See, *Barratt International Resorts Ltd v Barratt Owners Group* 2003 GWD 1-19 (OH). In the context of a requirement for malice in cases of qualified privilege in defamation) 'malice does not in this context infer bad intent, but more lack of good intent': *Defamation and Related Actions in Scots Law* (Butterworths, 1995) at p. 120.

[74] Banction Institutes 1, 10, 22.

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The compensation was not awarded because the claimant had suffered physical injury but because he had suffered emotional disturbance and it was the affront at the insult to his honour that necessitated redress and not the impact on him of the wrongful act. The protected interest was honour or *dignitas* and the loss suffered through its breach was the affront caused[75].

The distinction is between the methods of causing the loss and not in the outcome of wrongfulness. In Scots law it has led to differentiation between the various kinds of verbal injures causing an affront and the legal process in the courts has indicated that the distinction should be abolished[76]. The legal distinction between these categories in Scotland is procedural rather than substantive law and the jurisdiction is within the civil courts[77]. It has been argued that this distinction should be abolished because the jurisdiction is in the civil courts, and it is argued that it is not possible to comprehend if damage was caused by physical acts or words alone that have caused the loss[78].

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 *actiolegis 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[79].

The delictual liability originates in the *ususmodernus* which is in accordance with the legal tradition of the Civil Law systems[80]. This is grounded on the principle of a liability that is premised on the general concept of ('*damnum iniuria*

[75] See John Blackie in *Rights of Personality in Scots Law,* eds N. Whitty and R. Zimmermann (DUP 2009), 104-108 for the emergence of 'assault' as a nominate wrong.

[76] In *Continental Tyre Group Ltd v Robertson* 2011 GWD14-321 (Sheriff Principal Bowen) it was held that it mattered little whether the claim was one for defamation or for verbal injury: but that was in the context of the remedy of interdict, where all that is necessary to show is a legal wrong (as opposed to the particular legal wrong). The opportunity was, thereby, lost to examine the parameters of verbal injury (in that case as an economic, as opposed to personality, loss).

[77] The Commissary Court was abolished in 1830, its jurisdiction being taken over by the Court of Session, as was the Jury Court which had been created in 1815 with jurisdiction to hear 'all actions on account of injury to the person, whether real or verbal, as assault and battery, libel or defamation' (actions listed in the Court of Session Act 1825, s.28).

[78] Kenneth McK. Norrie, The ActioIniuriarum in Scots Law: Romantic Romanism or Tool for Today?,Iniuria and the Common Law, Eric Descheemaeker and Helen Scott (eds) Hart Publishing (2013) pp 49-66.

[79] 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.

[80] Ibid p. 517, 519.

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datum') that compensation for a loss or damage (*damnum*) has to be made if it has been caused by ann(in the sense of a *condicio sine qua*[81].The liability in the Civilian tradition is founded on the general concept ('*damnum iniuria datum*') that compensation for a loss or damage (*damnum*) has to be made if it has been caused (in the sense of a *condicio sine qua* 7 *non*) by an unlawful (*iniuria*) and culpable (*culpa*) act[82].

The aquilian liability rests on *culpa* (fault) and not as an outcome of a Natural Law concept that was based on a principle of strict liability on the basis of *alterum non laedere*[83]. The fault-based aquilian system was the concept which prevailed in the Civil Law countries that owed to thelegal theories of Savigny and the Pandectists in Germany in the 19th century[84]. The 'neighbour principle' of tort liability formulated by the House of Lords in *Donoghue v Stevenson*[85] was it is suggested not in accordance with the Civil law notions in *Lex Aquilia*, because it is not fault-based, but establishes a general rule of an *actual* duty of care owed to a certain group of persons[86], and that leads to a compensation claim if the breach of that duty has caused damage.

The action for negligence requires a proof of damage and in Scot law served to develop different remedies in the law of delicts and it is a form of redress but it has a resonance with Civil law principles. The Scots law on negligence when *Donoghue* was decided was not the aquilian Scots *Civil Law* and the *Common* Law rule emerged as a result of a convergence of Scots and English laws in the 19 th Century[87]. The *Donoghue* ruling does have a Civil law effect because while it is not fault-based, it establishes a general rule of an actual duty of care owed to a certain group of persons[88]. It will succeed if the breach of that duty has

[81]The compensation was then also split into two categories of calculation, *damnum emergens* and *lucrumcessans* which survive in present codifications today, e.g. in Austria §§ 1293, 1323, 1331, 1332 ABGB.

[82]See D 50 17 1, *Paulus libro sexto decimo ad Plautium:* "Regula est, quae rem quae est breviter enarrat" ("A rule is something which briefly describes how a thing is"). All texts from the Corpus iuris civilis are taken from *The Digest of Justinian* (Mommsen, Krueger & Watson edition). *Cf* Stein supra 41 at 72-73.

[83]R. Zimmermann, The Law of Obligations, p. 1033; N. Jansen, 'Duties and rights in negligence: A comparative and historical perspective on the European law of extracontractual liability', 3 Oxford Journal of Legal Studies (2004), p. 443, 452, 456.

[84] Ibid.

[85] [1932] UKHL 100.

[86] see discussion of the 'idealist' perspective in N. J. McBride, 'Duties of Care – Do they really exist?', 3 Oxford Journal of Legal Studies (2004), p. 417, 418.

[87]R. Evans-Jones, 'Roman Law in Scotland and England and the development of one law for Britain'115 *Law Quarterly Review* (1999), p. 624.

[88] MacQueen, Hector and Sellar, W. David H. (2000), in K. Reid and R. Zimmermann (eds.),

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caused damage and the common law duty of care principle establishes that the breach of duty is an unlawful, but not necessarily also culpable act leading to injury. The issue of culpa which is the narrow definition of negligence under the aquilian system establishes liability for negligent acts because they are also culpable acts based on fault.

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[89]. Lord Macmillan's reference to the institutional writer Erskine (1773)[90] stated a 'neighbour' in the context of a generic delictual liability rule that was considered to be the landmark of Lord Atkin's definition of the neighbour principle[91]. There are substantive areas of law of delict as in Scot law which are comparable in scope or content[92]. The principle of liability established under *Donoghue v. Stevenson*, establishes the general duty of care rule in the form of the 'neighbour principle'[93] and it is contended that the Scots law has been influenced by English law and vice versa[94].

c) Property

While the Scots law of obligations and delicts has been influenced by English law the Scots property law is essentially based on Civil law. The fundamental concepts, such as real rights in land defined by *traditio*, *possessio*, *accessio*, originate from Roman law[95]. In particular, it embodies the idea of a single and indivisible *dominium* as ownership and absolute entitlement, instead of the English concept of *title* with (theoretically) relative entitlements, whereby the highest in competing titles in the bundle of rights in land prevails, and whereby the entitlement is defended by torts (especially trespass and conversion)[96].

A History of Private Law in Scotland, vol. 2, p. 544, 546.

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

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

[91]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.

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

[93][1932] AC 562, 1932 SC (HL) 31.

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

[95] E. Reid, in J. C. Rivera (ed.), The Scope and Structure of Civil Codes, p. 357. 52.

[96] F. H. Lawson, B. Rudden, The Law of Property (3rd edition, Oxford University Press, 2002), p. 68; M. Bridge, Personal Property Law (4th edition, Oxford University Press, 2015), p. 80, 86.

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The Civil Law method for the protection of property is the *rei vindicatio* (action of delivery), but Scots law has not adopted the concept of *rei vindicatio*[97]. The most important feature of Scots property law is the absence of a division between legal and equitable ownership that is characteristic of English property law[98]. The English trust is founded on this legal concept of simultaneous different qualities of ownership[99] but the Scots law does not have an equivalent to the English trust. The rudimentary '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[100].

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 entitlements[101]. The ownership can only be conveyed on the basis of 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 in itself sufficient to transfer ownership, irrespective of the validity of any underlying contract, the system is abstract, which is the present Scottish system[102].

While the system of transfer of ownership is abstract determines legal solutions particularly in relation to double sales of property,[103] and to the invalidation of contracts. The example is a mistake by error where, first, it has to be determined whether the error renders a contract void or merely voidable, and, if the latter applies, as to effect of a reduction of the contract. It does not render

[97] 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.

[98] M. Bridge, Personal Property Law, 4 th edition (Oxford University Press, 2000), p. 6-10.

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

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

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

[102] 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 Obligationenrecht als 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.

[103] Reid, *Property*, para. 609; Carey Miller, "Systems of Property".

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the contract void retrospectively, *ab initio* (or "*ex tunc*"), in the sense that it is deemed never to have been concluded. The contract for sale of land may be terminated from the error on record but remain valid in respect of the time period before ("*ex nunc*"). The latter approach will not render the conveyance void because the concept of error will not vitiate the contractual consent[104].

Where the basis of transfer is abstract, error can only prevent the transfer of ownership if the error concerns the intention to transfer ownership, for the validity of the underlying legal relationship is not material to the conveyance[105]. This is of central importance for the legal position of third parties to whom the transferee may have transferred the property in the interim and with it the ownership of title. In Scots law the redress is effected in such cases by way of unjustified enrichment, and that might effect a decision in favour of the pursuer to avoid undue expansion in the law of unjustified enrichment[106].

The Scots law has retained two fundamental principles of Civil law which are the transferor can reclaim property transferred under the reduced contract (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 cause (iusta causa traditionis)[107].

[104] See, with regard to land, S Wortley, "Double sales and the offside trap: some thoughts on the rule penalising private knowledge of a prior right" 2002 JR 291, 312.

[105] Reid, *Property*, para 609, 617. See the discussion of error in this context already in Savigny, *System des heutigen römischen Rechts*, note 123 above, vol 3, 360 and note (e).

[106] G. L G. L. Gretton and A. J. Steven, Property, Trusts and Succession, (2 nd edition, Bloomsbury Professional, 2013), p. 37, discuss this issue. 92 Especially T. B. Smith, A Short Commentary on the Law of Scotland, p. 539. G. L. Gretton and A. J. Steven, Property, Trusts and Succession, p. 38, consider the abstract conveyance applicable to moveable property. K. Reid, The Law of Property in Scotland, para. 609, p. 487, also shows a clear preference to the abstract conveyance. 93 K. Reid, The Law of Property in Scotland, para. 608, p. 486; W. M. Gordon, 'The importance of the justa causa of traditio', in P. Birks (ed.), New Perspectives in the Roman Law of Property: Essays for Barry Nicholas (Clarendon Press, 1989), p. 123. 94 Now Sale of Goods Act 1979, c. 54. 95.

[107]Gretton and A. J. Steven, Property, Trusts and Succession (2 nd edition, Bloomsbury Professional, 2013), p. 37, discuss this issue. 92 Especially T. B. Smith, A Short Commentary on the Law of Scotland, p. 539.

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5. *Conclusion*

The Roman legal tradition in Scots procedural law has survived the test of time and it is enshrined its civil law where the influence of institutional and jurisdictional factors have 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, the Advocates who have helped to cultivate the interest by the *actio iniuriarum* that has led to the remedies to be made available in the civil jurisdiction. Many of the civil actions have been retained dspite 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 from another fused system such as South African system has adopted Roman Dutch civil law and which has integrated common law with the civil law. The fundamental tenets of Roman law have been adapted with an identical process of incorporation of Civil law principles. This has manifested itself in the law of obligations; contract and tort or delicts as it is called and the property law principles of ownership, division and inheritance.

The conscious adoption of Roman law principles stems from the reasoning of jurists who have enacted law from the principles and then formed the rules. This has given it the flexibility of being practical as it can be reformed at any given state of the development of socio legal norms. *regula* was used to define some terms that were considered to be of general application. In Scots law this has been facilitated by the enduing principle of the *ius civile* without developing any civil code such as other European countries.

The consensus in Scotland system seems to be to continue with the Civil law tradition and jurists including its preeminent law officers have recommended its adoption by distinguishing the sources of Scots law. The Scots civil procedure is based on the Roman legal tradition and the civil courts structure have been able to realise its coherence and sophisticated methodology. It is that needs to be encouraged as Scotland restores its historical connection with the Roman law.