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## **Scots and English Law: The Case of Contract**

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**Abstract**

The J. A. C. Thomas Lecture delivered at University College London on 15 March 2001. A discussion of the relationship of Scots law with English law with specific reference to the example of contract law, arguing that it well illustrates the way in which a mixed legal system can develop, both avoiding the destruction of its Civilian characteristics and absorbing Common Law ones on a basis of critical and rational choice between alternatives. The paper concludes by looking at two recent examples of the process in connection with the law of specific implement and also spousal guarantees of husband's business debts.

**Keywords:**

Scots law. English law. Mixed legal systems. Legal history. Comparative law. Contract law.

“Scots and English law: the case of contract”, (2001) 54 *Current Legal Problems* 205-229.

## Scots and English Law: The Case of Contract

*Hector L. MacQueen\**

I know of Tony Thomas only through his published works – notably his *Textbook of Roman Law* and the contract casebook which he edited along with J C Smith – and through the glowing tributes paid to him by other scholars in their writings<sup>1</sup> and in conversations with me over the years. What I did not fully realise until a few years ago was how much time he had spent – ten years in all - at the Law School at Glasgow University, the last seven of them as Douglas Professor of Civil Law. In his history of the Glasgow Law School, David Walker pays an unusually warm tribute to him and his work: ‘Tony was a kenspeckle figure with horn-rimmed glasses and a bow tie. He was learned, had high standards and a real love of Roman law.’<sup>2</sup> Professor Thomas’ teaching and scholarship at Glasgow had a profound influence on at least three other Scots who have subsequently made – and continue to make - outstanding contributions to the field of Roman and Civil Law, namely Alan Watson, Alan Rodger and Bill Gordon. I spoke with Alan Rodger about Tony Thomas just a week ago, and was amused when virtually the first thing Alan mentioned was the bow tie – obviously something which made a great impression in the Scotland of the 1950s and 1960s. It is therefore a particular pleasure and a privilege to follow in the footsteps of many others who have come down from Scotland to offer a lecture in honour of the memory of Tony Thomas.<sup>3</sup> I hope that my subject, the relationship between the Scots and the English laws of contract, will not seem too far removed from at least one of his interests.

The lecture topic springs from personal experiences over the last few years, and I would like to begin by listing these and explaining the chains of thought to which they gave rise. First in time, and probably foremost, was a commission to write, with Professor Joe Thomson of Glasgow, a student text on *Contract Law in Scotland*.<sup>4</sup> Our strong feeling was that this book was, amongst other things, an opportunity to make the Scots law of contract more accessible to those approaching it from a background in other legal systems. Equally we wanted to expose students to something of the benefits of comparative study of contract law in other jurisdictions. Where should English law be fitted into this approach? It was evident that English law and English cases should not be referred to merely for comparative purposes, since their use in the development of Scots law went significantly further than that; on the other hand, we wanted to

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\* Professor of Private Law, University of Edinburgh. This is a lightly revised version of the J. A. C. Thomas Lecture delivered at University College London on 15 March 2001. Several Edinburgh colleagues, all named elsewhere in the footnotes, commented helpfully on the first draft, as did Reinhard Zimmermann. Error liability is however mine alone.

<sup>1</sup> Notably by my then Edinburgh colleague Peter Birks, delivering the very first Thomas Lecture: ‘English and Roman learning in *Moses v Macferlan*’ (1984) 37 *CLP* 1 at 1-2. See also P. G. Stein and A. D. E. Lewis (eds.), *Studies in Justinian’s Institutes in Memory of J. A. C. Thomas* (London, 1983), and the commemorative note therein, contributed by J. C. Smith.

<sup>2</sup> D. M. Walker, *A History of the School of Law: the University of Glasgow* (Glasgow, 1990), p. 73. ‘Kenspeckle’ = ‘easily recognizable, conspicuous, familiar; a mark by which a person or thing may be known or recognized’ (M. Robinson (ed.), *Concise Scots Dictionary* (Edinburgh, 1985), sv).

<sup>3</sup> Apart from Birks’ lecture cited in n. 1, see A. Rodger, ‘Mrs Donoghue and Alfenus Varus’, (1988) 41 *CLP* 1; D Johnston, ‘Appointments and disappointments: *White v Jones* in Rome and today’ (2000) 53 *CLP* 283.

<sup>4</sup> (Edinburgh, 2000).

emphasise the Scottish material on the subject, since that is what non-Scots would look for from Scottish authors.

The second experience began when in 1995 I joined the Commission for European Contract Law headed by Professor Ole Lando of Copenhagen, replacing the late Bill Wilson.<sup>5</sup> The Commission is an attempt to create a contract law suitable for use in the European Union. It is made up of a representative group of lawyers from every jurisdiction in the Union, including England and Scotland. The aim is to produce a body of contract principles which will facilitate cross-border trade in Europe, provide an infrastructure upon which specific harmonisation projects in the field may be built, and give a model for the development of contract law and teaching in the Member States. Publication began in 1995 and should be complete in the next year or so.

The volumes containing the Principles include not only the texts but also an expository commentary and notes comparing the Commission's rules with the national laws of the Member States. The process of revising the national notes, prepared by my predecessor for the first volume of the Principles, revealed to me a picture of the Scots law of contract essentially aligning it with the Common Law traditions of England and Ireland. The notes in general seemed to have a division between the Continental codified systems and the case law ones of the British isles; in the latter, English law naturally loomed largest, and the comment which then followed would often be along the lines, 'Scots and Irish law are the same/similar'. Of course, my comment here is a generalisation and by no means always did it hold good; but the experience led me to wonder whether there was indeed anything truly distinctive in the Scots law of contract. It also puzzled me that the Principles were intended, amongst their many other aims, to act as a bridge between the Continental and the Common Law traditions, and that Scots law, as the only European system mixing these two traditions, did not receive more attention in this regard. Was it because it did not deserve to do so, or because it was not such a mixture as I had always been told?

That question has inspired a good deal of my work on contract law since 1995, not least in the preparation of further national notes for subsequent volumes of the Principles, and I will elaborate upon some of my conclusions later on in this lecture. But before I go on to that, let me add in another couple of experiences that caused me to reflect upon the relationship of Scots and English contract law. One was that of being Scottish editor for the new edition of *Atiyah's Sale of Goods*, under the guiding hand of John Adams.<sup>6</sup> There is a good deal of general contract law in that book, and rather unexpectedly I found myself having to write paragraphs at the beginning or end of some quite lengthy exposition, saying in effect that none of the following, or of the above, as the case might be, was applicable to Scotland: for example, on conditions and warranties, mistake, privity, unfair terms, remedies, and rescission for misrepresentation. In the midst of this, I was also asked to 'put a kilt' on the treatment of contract law in a handbook for surveyors which had already been produced in England and which was now to be put on the market in Scotland. The deadline was very tight but the sum of money on offer even more tempting, until I looked at the text to be Scotticised and realised that the task was one which would demand a little more than deletion of references to consideration and replacement of 'plaintiff' (or 'claimant') with 'pursuer'. The work has since been carried out by other hands; but the experience certainly

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<sup>5</sup> See O. Lando and H. Beale (eds.), *Principles of European Contract Law Parts I and II* (The Hague, 2000, henceforth *PECL*). Part I was published in 1995 at Dordrecht.

<sup>6</sup> P. S. Atiyah, J. N. Adams and H. L. MacQueen, *Sale of Goods*, 10th edn (London, 2000).

reinforced a growing sense that Scots and English contract law were indeed still distinct bodies of doctrine.

Let me say at once that I do not approach this subject in any narrowly nationalistic spirit, or with any sense that it would be a Bad Thing if Scots contract law was merely a mirror image of its English counterpart. There are two questions for me: one, how Scots law may and should develop in the future; and the other, what, if any, contribution can the Scottish experience make to the future of contract law generally. This is especially so in Europe in the light of the Lando Principles, its forerunners, such as the Vienna Convention on the International Sale of Goods and the Unidroit Principles of International Commercial Contracts, and its rivals, such as those produced by the Gandolfi group in Italy.<sup>7</sup> But the question is also relevant in a world thoroughly used by now to the idea of a global economy, which is being reinforced and deepened by trans-national e-business and contracting on the Internet.

With regard to this point, it is worth reminding ourselves yet again of an old idea of comparative law with respect to ‘mixed’ legal systems, amongst which Scots law falls to be classified. In 1924 Henri Lévy Ullmann observed that ‘Scots law gives us a picture of what will be some day the law of the civilised nations, namely a combination between the Anglo-Saxon and the Continental system’.<sup>8</sup> These words were echoed more recently by Konrad Zweigert and Hein Kötz, who wrote (in the translation of Tony Weir): ‘... it is clear that Scots law deserves particular attention from comparative lawyers as a special instance of the symbiosis of the English and Continental legal traditions; this may be of some assistance to those who embark on the great project of the future, namely to procure a gradual approximation of Civil Law and Common Law.’<sup>9</sup> Such thinking has been extended to mixed legal systems more generally: ‘mixed systems can be regarded as points of reconciliation and as models of the symbiosis of legal systems. They may even be depicted as the ‘ideal systems’ of the future.’<sup>10</sup> As noted by Jacques du Plessis, from Stellenbosch University in another mixed legal system, South Africa, ‘it can be argued that mixed systems have the potential of being legal ‘battlefields’ where rules from different systems have to fight for their survival so that only the fittest or best rules survive’.<sup>11</sup>

But, as Esin Örüçü has observed, ‘they [mixed systems] have not yet become the ideal systems of the future as was hoped, however’,<sup>12</sup> and Scots law and the other mixed legal systems have not in fact received much attention outside Scotland and the other

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<sup>7</sup> The work of this group, headed by Professor Giuseppe Gandolfi (Pavia), has now been published: *Code Européen des Contrats, Avant-projet, coordinateur Giuseppe Gandolfi*, vol. I, (Milan, 2000). It is based upon the Italian Civil Code and the Contract Code for Scotland and England drafted by Harvey McGregor QC for the two Law Commissions in the late 1960s, for which see H. McGregor, *Contract Code drawn up on behalf of the English Law Commission* (Milan, 1993).

<sup>8</sup> H. Lévy-Ullmann (trans F. P. Walton), ‘The law of Scotland’, (1925) 37 JR, at 390.

<sup>9</sup> K. Zweigert and H. Kötz, *Introduction to Comparative Law*, trans T. Weir, 3rd edn (Oxford, 1998), 204.

The statement also appeared in the first and second editions.

<sup>10</sup> E. Örüçü, E. Attwooll and S. Coyle (eds.), *Studies in Legal Systems: Mixed and Mixing* (The Hague, London and Boston, 1996), 350 (Örüçü). For another recent analysis of mixed systems, see W. Tetley, ‘Mixed jurisdictions: Common Law vs Civil Law (codified and uncoded)’, (1999) 4(ns) *Uniform Law Review* 591. A perceptive older study is J. McKnight, ‘Some historical observations on mixed systems of law’, 1977 JR 177.

<sup>11</sup> J. du Plessis, ‘The promises and pitfalls of mixed legal systems: the South African and Scottish experiences’, (1998) 3 *Stellenbosch LR*, at 343.

<sup>12</sup> Örüçü, (above n.10), 351.

mixed systems themselves.<sup>13</sup> The reasons why this might be so have been well expressed by Du Plessis:

[T]he mere fact that a system has the promise of being able to select from a broader variety of rules obviously does not imply that the best rule necessarily is going to be selected. The pitfall is that it could be the worst rule for that matter, in which case one would not have a particularly exciting ‘mixed’ legal system, but a rather, as some would say, depressing ‘mixed up’ legal system. ... Ultimately, there is nothing inherently admirable or exciting about a rule derived from a mixed legal system. It entirely depends on what is mixed.<sup>14</sup>

On the other hand, Jan Smits has written, in a lecture of 19 May 2000 inaugurating his tenure of the chair of European Private Law at Maastricht in the Netherlands:

It is my profound belief that the experience mixed legal systems already have with the mixing of the civil law and the common law can be of great significance for the venture of establishing a European Private Law. Many times, the *Rechtshonoratien* of these systems were able to pick from both the civil law and the common law what they considered to be the best solution for a specific problem.<sup>15</sup>

In his lecture, Smits illustrates this thesis by drawing critically upon the experiences of Scotland, South Africa, Quebec and Louisiana in considering the ‘duty to rescue’ and the rewarding of the Good Samaritan as part of the new *ius commune*. More recently, with Michael Milo of Utrecht, Smits has edited a collection on ‘Trusts in Mixed Legal Systems: A Challenge to Comparative Law’, the aim of which is to explore how the trust may be accommodated in Civil Law systems. For this purpose, say Milo and Smits, ‘mixed legal systems turn out to be a *Fundgrube* [treasure trove]’.<sup>16</sup> It seems to me that it is only by specific and detailed analyses of this kind that we can find out whether or not mixed systems do embody the best—or at least good or defensible—choices between the contrasting rules of the Common and the Civil Law, and thus have a role to play in the convergence of legal systems in Europe.

In recent times, however, some Scots lawyers have seemed to lack faith in the merits of being a mixed system and to see only a future of assimilation within the Common Law unless appropriately Civilian remedial action is taken. The famous words of the late Pierre Trudeau, comparing Canada’s relationship with the USA to sleeping with an elephant,<sup>17</sup> may be applied to the connection between Scots and English law. T B Smith was the first major proponent of this concern, and his views

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<sup>13</sup> But see H. David, *Introduction à l'étude du droit écossais* (Paris, 1972) and H. Weber, *Einführung in das schottische Recht* (Darmstadt, 1978). Other non-Scots to write extensively about Scots law include Klaus Luig (Cologne) and Peter Birks (Oxford). Christian von Bar’s *The Common European Law of Torts*, 2 vols, (Oxford, 1998-2000) makes frequent reference to Scots law. Reinhard Zimmermann (Regensburg) and a number of South African scholars have recently taken a comparative interest in Scots law: see K. G. C. Reid and R. Zimmermann (eds.), *History of Private Law in Scotland* (Oxford, 2000).

<sup>14</sup> Du Plessis, (above, n.11), at 343.

<sup>15</sup> J. M. Smits, *The Good Samaritan in European Private Law: on the perils of principles without a programme and a programme for the future* (Deventer, 2000), at 35. See also *ibid*, 49; *idem*, ‘European private law as a mixed legal system’, (1998) 5 *Maastricht Journal* 328, and *Europees privaatrecht in wording* (Antwerp, 1999).

<sup>16</sup> M. Milo and J. Smits, (2000) 8(3) *European Review of Private Law* 421 at 426. The other contributors to the collection are K. G. C. Reid and G. L. Gretton (Scotland), M. J. de Waal (South Africa) and C. H. van Rhee and H. L. E. Verhagen (Netherlands).

<sup>17</sup> E. Knowles (ed), *Oxford Dictionary of Quotations* 5th edn., (Oxford, 1999), 783-4.

emerge pretty clearly in the marvellous titles of some of his great articles: e.g. ‘The Common Law Cuckoo: Problems of ‘Mixed’ Legal Systems with special reference to restrictive interpretations in the Scots law of obligations’; ‘Strange Gods: the crisis of Scots law as a civilian system’; and so on.<sup>18</sup> Lately, the most articulate public proponent of this view has been my good friend Robin Evans-Jones of Aberdeen, who argues that the mixed character of Scots law has been the product largely of weak law encountering and being overwhelmed by stronger law in a series of receptions – first, the medieval customary structure by the Civil Law, second, the Civil Law by the Common Law – and that its borrowing from one system or another has been determined by this relative strength (essentially a cultural matter) rather than by a rational and critical process of choice of the best rule amongst competing alternatives. He speaks of ‘the myth of the genius of Scots private law’, and illustrates his thesis from developments in the Scots law of unjustified enrichment (the role of error as a ground of recovery following the case of *Morgan Guaranty*<sup>19</sup> in 1995) and property (the case of *Sharp v Thomson*<sup>20</sup> in 1997, in which the House of Lords set on one side the principles of property law in order to produce what was seen as a just result in a competition between a purchaser and the holder of a floating charge arising on the seller’s insolvency, the floating charge being a concept introduced in Scotland by legislation in 1961).<sup>21</sup>

There are many points in this argument upon which one might wish to dwell. For example, there could be elaboration of Tony Weir’s recent observation, backed up by a wealth of detail in many fields of law, emphasising ‘how very different, after nearly three centuries of political unification in an unquestionably single market, the laws of Scotland and England continue to be’.<sup>22</sup> Again, one might speak of the genius of Scots law, not as a matter of claiming for it a higher or superior quality, but rather by way of identifying its ‘spirit’ or ‘characteristic disposition’, as my *Shorter Oxford English Dictionary* defines the word’s primary meaning, and seeing that as indeed lying in a process of eclectic borrowing and adaptation of material derived from various traditions maintained over many centuries and still going on.<sup>23</sup> Further, one might note that the two areas of

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<sup>18</sup> The articles mentioned can be most conveniently consulted in his *Studies Critical and Comparative* (Edinburgh, 1962). Cuckoos seem self-explanatory, but a godless age may need to be reminded of Genesis, 34, 2 (Authorised Version): ‘Put away the strange gods that are among you, and be clean, and change your garments.’ Smith also wrote of the law of Scotland ‘awhoring after some very strange gods’ (*Studies*, 72; also his *Short Commentary on the Law of Scotland* (Edinburgh, 1962), 616); this conflates the Genesis reference just given with Exodus 34, 15-16.

<sup>19</sup> *Morgan Guaranty v Lothian Regional Council* 1995 SC 151.

<sup>20</sup> 1997 SC (HL) 66.

<sup>21</sup> See R. Evans-Jones, ‘Receptions of law, mixed legal systems and the myth of the genius of Scots private law’, (1998) 114 *LQR* 228. For other sceptical views of the ‘genius’ and commitment to coherence and principle of Scots law, see, *inter alia*, A. Rodger, ‘Thinking about Scots law’, (1996) 1 *Edin LR* 3; L. Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law 1747 to the Present* (Cambridge, 1997); J. M. Thomson, ‘Legal change and Scots private law’, in J. Cairns and O. Robinson (eds.), *Critical Studies in Ancient Law. Comparative Law and Legal History: Essays in Honour of Alan Watson* (Oxford, 2001), 379-91.

Thomson discusses the case of *Morgan Guaranty* at 387-9, noting correctly that English developments were a necessary part of the background to the case, and also that the court disguised the appearance of change in the law by talking of a return to the older, Civilian principles of the law. But this latter point sits uneasily with his general view that the development of private law is not guided by concepts of principle or doctrinal purity. Finally, it should also be noted that Evans-Jones has argued that the search for ‘British’ law in the House of Lords has sometimes meant the deployment of Scots rather than English law: ‘Roman law in Scotland and England and the development of one law for Britain’, (1999) 115 *LQR* 605.

<sup>22</sup> T. Weir, ‘Divergent legal systems in a single Member State’, (1998) 6 *Zeitschrift für Europäisches Privatrecht* 564 at 565.

<sup>23</sup> Further on this, see Thomson (n. 21 above), although the material discussed further below in the present paper will show that I do not agree with his observation (at 379) that ‘even recent changes in Scots private

law which Evans-Jones discusses, enrichment and property, are perhaps those parts of private law in which Common Law influences are in general least apparent, with developments since *Morgan* and *Sharp* rather suggesting a refusal to allow further room for expansion for any Common Law disposition which they may contain. Thus in enrichment law the courts have affirmed in some important decisions that the basic, essentially Civilian, principle is that enrichments not supported by any legal ground must be reversed;<sup>24</sup> while, with one notable exception in Aberdeen sheriff court now subject to appeal,<sup>25</sup> *Sharp v Thomson* is fast becoming rather like *Junior Books v Veitchi*, a very distinguished case with no followers.<sup>26</sup> It is also under review by the Scottish Law Commission.<sup>27</sup>

But here I want to consider rather the issue of whether or not a mixed system can engage upon a rational and critical process of choice between competing alternatives, or whether the process of mixing inevitably involves the dilution of one element in the mix by the other. I think contract law offers the ideal field of study here by comparison with the other parts of Scots private law. As I have already mentioned, enrichment and property are notably Civilian in character, while delict (tort), or at any rate its central topic of negligence, is now pretty thoroughly indistinguishable from its English counterpart (although that also owes something to the ‘Civilianisation’ of English law in this area<sup>28</sup>). Contract, on the other hand, is much more mixed, and the mixing is still going on; so it is here that we can study the process and its outcomes most closely. To this end we can now use two major tools: first, we can compare the outcomes of Scots law with the Lando Principles, which do indeed represent a critical and rational choice across many traditions of the ‘best rule’ in contract; and second we can draw upon the outcomes of the historical research which has just been published in two volumes under the rather mundane title, *History of Private Law in Scotland*,<sup>29</sup> but which to those who were the contributors will always be known as *Northern Cross*,<sup>30</sup> in tongue-in-cheek homage to

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law were neither a rational development from pre-existing legal doctrine nor a response to general socio-economic evolution’.

<sup>24</sup> See in particular *Shilliday v Smith* 1998 SC 725; *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90 per Lord Hope of Craighead at 98; commented upon by P. Hood, ‘Unjustified enrichment in Scots law: a further step towards rationalisation’, (1998) 114 *LQR* 559; M. A. Hogg, ‘Contract, agency and recompense: four recent enrichment cases’, (1998) 2 *Edin LR* 357; P. Hellwege, ‘Rationalising the Scottish law of unjustified enrichment’, (2000) 11 *Stellenbosch LR* 50; and W. D. H. Sellar, ‘*Shilliday v Smith*: unjust enrichment through the looking glass?’, (2001) 5 *Edin LR* 80. See also the speech of Lord Hope of Craighead in *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349. In the light of the decisions mentioned, the Scottish Law Commission has taken the view that no statutory intervention is necessary and the development of the law can be left to the courts: Report on Unjustified Enrichment, Error of Law and Public Authority Receipts and Disbursements (Scot. Law Com. No 169: 1999).

<sup>25</sup> *Burnett’s Trustee v Grainger* 2000 SLT (Sh Ct) 116; commented upon by R. Rennie, ‘To *Sharp v Thomson* – an heir’, 2000 *SLT (News)* 239; S. C. Styles, ‘Sharp pains for Scots property law’, 2000 *SLT (News)* 305; G. L. Gretton, ‘Equitable ownership in Scots law?’, (2001) 5 *Edin LR* 73.

<sup>26</sup> See e.g. *Lady Fforde v McKinnon* 1998 SLT 902 at 909 per LJC Cullen; *Fleming’s Tr v Fleming* 2000 SC 206 at 215 per Lord Caplan; Gretton, ‘Equitable ownership’, at 77-8.

<sup>27</sup> See Scottish Law Commission Thirty-Fifth Annual Report 2000 (Scot. Law Com. No. 182: 2001), paras. 2.37, 2.48, 3.33-35. The Commission is acting upon a reference from the Scottish Ministers.

<sup>28</sup> See generally D. Ibbetson, ‘The law of business Rome’: foundations of the Anglo-American tort of negligence’, (1999) 52 *CLP* 74; and the same author’s *A Historical Introduction to the Law of Obligations* (Oxford, 1999), ch. 9.

<sup>29</sup> See above, n. 13.

<sup>30</sup> My own preferred title for the work, *Fiery Cross*, recalling the traditional symbol with which the Highland clans were called out to war, was rejected by the politically correct as a result of its alternative associations with the Ku Klux Klan in the southern USA. Other rejected titles included *Northern Lights* (a problem over associations with the sentimental song ‘Northern Lights of Old Aberdeen’), *Aurora Borealis*, *Northern Star*, and *St Andrews Cross*.

the work on South African law which inspired the Scottish effort, *Southern Cross*.<sup>31</sup> This enables us to see in much greater detail than hitherto the stages in the mixing process across a wide range of contract law.

I have already published a comparison of some features of Scots contract law and the Lando Principles.<sup>32</sup> What I tried to show in that paper was that in many instances where the Lando Principles had opted for either a Common Law or a Civilian approach, the end result was broadly similar to that achieved in Scots – and indeed South African – law.<sup>33</sup> Thus, on the Civilian side, neither the Lando Principles nor Scots law favoured consideration or any other equivalent badge of enforceability marking out contracts from other agreements. As a result, gratuitous unilateral promises were enforceable, and firm offers irrevocable in both systems. Scots law and the Lando Principles both recognise third party rights in contract,<sup>34</sup> while contracting parties have a right, subject to defined exceptions, to demand actual performance from the other side. The converse of this in both systems is that if one party is not performing in accordance with the contract, the other has the right to withhold its side of the bargain until the non-performance is rectified. Overall, what was emphasised here was the legal effect to be given to parties' intentions and the right to performance as agreed or promised.

Turning to the Common Law side of the Lando Principles and the Scots law of contract, I drew attention to other rules on breach, in particular the unified concept of breach as non-performance of all kinds, the acceptance of the concept of repudiation, and the availability of 'self-help' remedies of termination, available without prior judicial authorisation. I noted also the recognition of the undisclosed principal in agency cases. Here the striking point was the emphasis on commercial utility and rules which would allow rapid decision-making in the market place without the time-consuming need to resort to the courts for a determination of the position. A further example which I did not discuss in any detail was the reception into Scots law in the nineteenth century of a concept of undue influence, paralleled in the Lando Principles by a concept of excessive benefit or unfair advantage, which becomes a ground of avoidance for a party who was dependent on or had a relationship of trust with the other party and this other party, who knew or ought to have known of this, took advantage in a grossly unfair way or took an excessive benefit.<sup>35</sup>

The copious minutes of the Lando Commission will tell future legal historians something of the reasons for the choices and decisions just outlined in the two previous paragraphs. What if any light does historical investigation throw upon the way the Scots law of contract reached its current position? *Northern Cross* does not tell us all the answers, although it is frequently very suggestive as to the direction which further research might take. A very broad picture would be that the foundational influence upon the Scottish law of contract was the medieval canon law – hence perhaps the emphasis upon performance as the moral right and duty flowing from promises and agreements – and that this was closely woven together with the Civil Law and Civilian, in

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<sup>31</sup> R. Zimmermann and D. P. Visser (eds.), *Southern Cross: Civil Law and Common Law in South Africa* (Kenwyn, 1996).

<sup>32</sup> *Scots Law and the Road to the New Ius Commune* (Ius Commune Lectures in European Private Law No 1, Universities of Maastricht, Utrecht, Leuven and Amsterdam, February 2000).

<sup>33</sup> Further on Scots and South African law, see R. Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (Oxford, 2001), 126-58; *idem*, 'Common law und ius commune: Unkodifizierte Mischrechtsordnungen im Vergleich', *Festschrift Hamburg Max-Planck Institute*, forthcoming.

<sup>34</sup> As of course English law now does also, following the Contracts (Rights of Third Parties) Act 1999.

<sup>35</sup> *PECL*, art. 4:109.

particular Natural Law, scholarship. It was against this backcloth that in the seventeenth century Lord President Stair wrote his seminal *Institutions of the Law of Scotland*, laying out a basic scheme of the law of obligations which still lies at the heart of the way most Scots lawyers think about the subject. The influence of English law begins to become apparent in legal writing around the beginning of the nineteenth century, driven chiefly by developments in commercial law, and reaches its apogee towards the end of the century. The apparent decline in references to Civilian sources, however, masks the continuity of doctrines which were now principally vouched by Scottish cases and writings – the Roman-Scotch law, as Cairns and Zimmermann have dubbed it<sup>36</sup> – and the same has often become true of doctrines originally borrowed from England – perhaps Anglo-Scotch law? Moreover, the transplants, whether from Civilian or Common Law sources, have often taken on ‘the protective colouring of a thoroughly native species’<sup>37</sup> as the result of adaptation to the perceived requirements of justice in individual cases or straightforward misunderstanding of the original doctrine. The whole has been welded into shape from time to time by the writers of texts, whose visions have sometimes competed with each other and been more or less successful in the courts and with practitioners. The second half of the twentieth century saw a great growth in the quality and quantity of such writing, and development was further driven by the activities of the Scottish Law Commission, to be measured not just by the legislation resulting from its reports, but also by their use by lawyers as sources in their own right.

Moving from the general to the specific, there are a number of areas in which there is no sign at all of a shift from a basically Civilian to a Common Law position. The most fundamental non-shift is the absence of any reception of either consideration or privity, where the basic principles set out in Stair’s *Institutions* remained at the root of the law. This becomes more interesting in the light of what happened in nineteenth-century South Africa, where the Roman-Dutch law flirted for a long time with a requirement of consideration before it was finally rejected in 1919.<sup>38</sup> The issue arose in South Africa because Roman-Dutch law had used the Civilian doctrine of *causa* as the means of distinguishing enforceable from unenforceable agreements, and some lawyers argued that this was simply consideration under another name. In Scotland, however, as Gerhard Lubbe and David Sellar point out in *Northern Cross*,<sup>39</sup> Stair, influenced by the canon law, the Spanish scholastics and Grotius, rejected the view ‘that promises, or naked pactions, where there is no equivalent cause onerous intervening, do morally produce no obligation or action, though in congruity and decency it be fit to perform’.<sup>40</sup> For Stair, ‘every paction produceth action’<sup>41</sup> – a tongue-twister translation of the canonist maxim, *pacta servanda sunt* – and the limit upon enforceability was to be found in the parties’ ‘purpose to oblige’,<sup>42</sup> i.e. what today we call, rather unhappily, intention to

<sup>36</sup> See J. W. Cairns, ‘The Civil Law tradition in Scottish legal thought’, in D. L. Carey Miller and R. Zimmermann (eds.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (Berlin, 1997), 211 n.127; R. Zimmermann and J. A. Dieckmann, ‘Das schottische Privatrecht im Spiegel seiner Literatur’, (1995) 3 *Zeitschrift für Europäisches Privatrecht* 899, at 899 and 909; Cairns, ‘Historical introduction’, in Reid and Zimmermann (eds.) (above, n.13), 163-8 (see also the editors’ preface at 6); Zimmermann, (above n.33), 1, 152.

<sup>37</sup> G. W. S. Barrow, *The Kingdom of the Scots* (London, 1973), 122.

<sup>38</sup> *Conradie v Roussow* 1919 AD 279. For the twists and turns of the story see D. Hutchison, ‘Contract formation’, in Zimmermann and Visser (above, n.26), 166-73.

<sup>39</sup> In respectively, ‘Formation of contract’, in Reid and Zimmermann (eds.) (above, n. 13), vol. 2, 1 ff., at 11-18, and ‘Promise’, *ibid*, 252 ff. See also Zimmermann (above, n.33), 155-8.

<sup>40</sup> I, 10, 10.

<sup>41</sup> I, 10, 7.

<sup>42</sup> I, 10, 13.

create legal relations, or in some cases, including gratuitous promises, in requirements of form. Stair's view, it may be noted, was no mere blind acceptance of those of others: he reached a conclusion upon a controverted point and argued out what he thought was the position of Scots law on the issue.

My own *Northern Cross* study of third party rights in contract likewise does not suggest any serious attempt in the centuries after Stair to move away from his doctrine of *jus quaesitum tertio* in favour of privity, even after the latter doctrine had begun to crystallise in English law in the middle of the nineteenth century.<sup>43</sup> Once again, Stair reached his position through an argument or debate about the natural law, in particular rejecting the views of Grotius, and holding that the views of the Spanish scholastic Molina corresponded better with the Scottish authorities on the subject. The difficulties which Scots law subsequently had with the *jus quaesitum tertio* arose from reconciling Stair's doctrine with another line of authority which he had treated narrowly elsewhere in the *Institutions* but which was much more broadly developed by later writers and in case law. These difficulties were ultimately, if awkwardly, reconciled in 1898 by a text writer, Condie Sandeman, whose analysis was more or less gratefully adopted by Lord Dunedin when they were at last focused in an actual case, *Carmichael v Carmichael's Executrix*,<sup>44</sup> in the House of Lords in 1920. The technical result was apparently to hamstring the scope of the *jus quaesitum tertio*, but this did not occur out of any desire to introduce a doctrine of privity from English law. True, Condie Sandeman approached *jus quaesitum tertio* as 'a deviation from the rule of contract law, that no third party can sue upon a contract', not exactly the spirit of Stair; but he was clear that 'the law of Scotland ... is well settled ... [and is] that every stipulation in a mutual agreement is binding upon the person obliged, whether it is conceded in favour of the other contractor or of a third party'. He comforted himself for this deviation through the wholly unhistorical proposition that 'our *tertius* with his *jus quaesitum* and the English cestui que trust show strong affinity'.<sup>45</sup> As for Lord Dunedin, he made his dislike of privity (and consideration) characteristically plain in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*<sup>46</sup> in 1915:<sup>47</sup>

My Lords, I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce.

And although in *Carmichael* he was driven to surround the *jus quaesitum tertio* with some very technical and difficult rules which have caused problems ever since, it has perhaps not been sufficiently emphasised how liberal and flexible was his application of those technicalities in the case, so that the actual result was in favour of the third party right.

What these examples would suggest to me is that, in at least these two instances, the Civilian base of Scots contract law has proved entirely durable despite centuries of exposure to the dark forces of the Common Law. The difficulties encountered en route

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<sup>43</sup> For what follows, see 'Third party rights in contract: *jus quaesitum tertio*', in Reid and Zimmermann (eds.) (above, n. 13), vol. 2, 220 ff.

<sup>44</sup> 1920 SC (HL) 195.

<sup>45</sup> For the quotations from Sandeman, see MacQueen (above, n. 43), 236-7.

<sup>46</sup> [1915] AC 847.

<sup>47</sup> At 855.

have been largely of our own making, and have had little to do with any desire to be assimilated with English law. The rational strength of the basic Scottish position, founded on giving effect to the intention of the parties, has enabled it to withstand any earth tremors there may have been: the institutional writers, Erskine and Bell, speaking of valuable or adequate consideration in their definitions of contract,<sup>48</sup> for example, or Lord Kames' view that there was no general principle of *jus quaesitum tertio*, only a limited number of exceptional cases in which the third party acquired a right.<sup>49</sup>

If we now switch to those areas in which the Common Law position was received into, or at any rate was influential in the development of Scots law, perhaps the most striking instance is the growth of the self-help remedy of termination for breach of contract. Under the Lando Principles, we may note, 'a party may terminate the contract if the other party's non-performance is fundamental', whereas 'a general right of cancellation was never recognized in Roman law'.<sup>50</sup> David Johnston's study in *Northern Cross* demonstrates the Civilian base of the treatment of the subject in Stair and the other institutional writers of the seventeenth and eighteenth centuries.<sup>51</sup> The analysis treated delay (*mora*) as the most important form of breach, with other forms of non-performance being treated generally, with the typical remedies being orders for performance, save where that was impossible, or damages and interest. The doctrine of mutuality, almost certainly derived from the Civilian *exceptio non adimpleti contractus*, enabled one confronted with non-performance on the other side, to decline to perform its own part of the contract. By 1800, however, presumably under English influence, breach was dealt with in a more general way, and the question of whether a party might cease performance altogether, with permanent effect, began to arise. The rules on sale allowed a buyer to reject defective goods (the Civilian *actio redhibitoria*), but otherwise the right to terminate appeared to depend upon there being an appropriate clause in the contract (a *lex commissoria*), the classic example being an irritancy clause in a lease. But a declarator had to be obtained in such cases.

What came to be seen as the key case laying down the law that a party could terminate without declarator following the other party's *material* breach was *Turnbull v McLean & Co*<sup>52</sup> in 1874, although there had been forerunners pointing in this direction since the 1850s. English influence was certainly strong in this case:<sup>53</sup> a number of English cases were cited in argument and Lord Justice-Clerk Moncreiff said that 'from any study that I have been able to give to the English cases I do not think they indicate any material difference in principle from our own rules on this subject'.<sup>54</sup> But the actual decision built from the long-established principle of mutuality – a party in breach cannot

<sup>48</sup> Erskine, *Inst.*, III, 1, 16 ('A contract is a voluntary agreement of two or more persons by which something is to be given or performed upon one part for a valuable consideration, either present or future, on the other part'); Bell, *Prin.*, § 66 ('It is a rule, that every obligation is *presumed* to be for an adequate consideration').

<sup>49</sup> See MacQueen (above, n. 43), 228-30.

<sup>50</sup> *PECL*, art. 9:301(1); Zimmermann (above, n. 33), 141.

<sup>51</sup> D. Johnston, 'Breach of contract', in Reid and Zimmermann (eds.) (above, n. 13), vol. 2, 175 ff. See also H. L. MacQueen, 'Remedies for breach of contract: the future development of Scots law in its European and international context', (1997) 1 *Edin LR* 200 at 202-12; W. W. McBryde, 'The Scots law of breach of contract: a mixed system in operation', (2001) 5 *Edin LR*, forthcoming.

<sup>52</sup> (1874) 1 R 730 at 738, per LJC Moncreiff ('where one party has refused or failed to perform his part of the contract in any material respect the other is entitled either to insist for implement, claiming damages for the breach, or to rescind the contract altogether, except so far as it has been performed.')

<sup>53</sup> Zimmermann (above n.33), 142-3, raises the possibility that the English development was influenced by the *ius commune* and the concept of conditions.

<sup>54</sup> *Ibid.*, at 738.

compel the other to perform – and practical considerations arising from the fact that the contract in question was an instalment one: for how long was a party confronted with non-performance to be treated as still bound to perform its own side of the bargain?

It is therefore not clear to me how far the court in *Turnbull* was conscious of innovation and a move in a more English direction. The doctrine of materiality as enunciated in *Turnbull* developed in several subsequent cases before appearing to take on a slightly different form, first in the special statutory provisions on the buyer's right of rejection in Scotland in the Sale of Goods Act 1893,<sup>55</sup> laying down that the buyer could only reject upon breach of a material *term* (i.e. pointing much more strongly towards a condition/warranty dichotomy), and then in the judgment of Lord President Dunedin in *Wade v Waldon*<sup>56</sup> in 1909, saying that termination could only follow upon breach of a term that was material in the sense that it went to the root of the contract. Any tendency which the 1893 Act and *Wade* showed towards doctrine akin to conditions and warranties was, however, held in check, and in its current form, as revised in 1994,<sup>57</sup> the right to reject under the Sale of Goods Act is founded upon the seller's material breach rather than upon breach of a material term. This followed work by the Scottish Law Commission,<sup>58</sup> which more recently also surveyed remedies for breach more generally, and on consultation found no strong support for any change in the law on material breach and termination, which appears to work in practice and to be reasonably well understood.<sup>59</sup> So what we see here is an area of contract law in which a Civilian model was modified in favour of a Common Law one; but the English law was not received in detail and instead there emerged, by way of the interplay between the courts and the text writers, a good example of Anglo-Scotch law, systematic and workable in its own right, and very similar to the Lando Principles in its basic formulation.

A more overt anglicisation and rejection of Civilian principle was the reception of the postal acceptance rule. The first major case was *Dunlop v Higgins* in 1847-48,<sup>60</sup> where the Court of Session and the House of Lords both chose to follow the famous case of *Adams v Lindsell*.<sup>61</sup> *Dunlop* was a case of late delivery of the acceptance, and in some ways the key question was not so much when the contract was concluded as for how long the offer should be held open for acceptance. But *Thomson v James*,<sup>62</sup> decided by the Court of Session in 1855, was a case where the offeror posted a withdrawal on the same day that the acceptance was likewise committed to the post. The question as to whether or not there was a contract therefore depended fundamentally upon the effect of postal communications between distant parties. Counsel for the offeror based their arguments upon classical or 'strict' Civilian principles of *consensus*, saying that at no time were the parties ever actually agreed, while the offeree's case rested upon principles of equity and justice as represented by the case of *Adams*: he was entitled to act, or rely, upon the offer which he did not know to have been retracted. By a majority, the court held for the offeree and adopted the postal acceptance rule, on the bases that Civilian writers and Stair had not contemplated the problems of contracting at a distance and an

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<sup>55</sup> See s. 11(2) of the 1893 Act.

<sup>56</sup> 1909 SC 571.

<sup>57</sup> By the Sale and Supply of Goods Act 1994.

<sup>58</sup> Report on Sale and Supply of Goods (Scot Law Com No 104, 1987).

<sup>59</sup> Report on Remedies for Breach of Contract (Scot Law Com No 174, 1999), paras.7.5-24.

<sup>60</sup> (1847) 9 D 1407; (1848) 6 Bell's App 195 (HL).

<sup>61</sup> (1818) 1 B & Ald 681.

<sup>62</sup> (1855) 18 D 1. Note also the brief report at 17 D 1146, narrating that the 'extreme length and importance of this case' have led to the full report being held over to the next volume, since judicial revision of the text has not been completed.

acceptor could do no more than commit his communication to the post. The case was clearly seen by contemporaries as a major issue of principle, and both arguments and judicial opinions are exceptionally lengthy by the standards of the time. It cannot be seen as a meek capitulation of the Civil to the Common Law; rather, it represents a carefully considered solution to a relatively new and fundamental problem arising from changing commercial conditions.<sup>63</sup> Inasmuch as it protects the offeree from the uncommunicated revocation of the offer, it reaches exactly the same solution as the Lando Principles (and indeed the Vienna Convention and the Unidroit Principles);<sup>64</sup> and it is noteworthy that Lord President McNeill let fall one of many Scottish dicta against the proposition that the acceptance lost in the post concludes a contract.<sup>65</sup>

My last example of the nineteenth-century reception of English law is the arrival of undue influence in *Gray v Binny*<sup>66</sup> in 1879. A soldier son succeeded in having the court strike down his agreement to disentail his inheritance in favour of his mother and, ultimately, of the solicitor who was advising them both but was also the mother's creditor. The mother and the solicitor argued that Scots law did not recognise undue influence unless it was also within the well-established (and Civilian) category of fraud; while the son, whose claim that he acted out of love for and dependence upon his mother as well as his own ignorance, never averred fraud by her or the solicitor. An abundance of English and some Scottish cases were cited in the debate. Lord Shand was the most explicit of the judges on the need to develop some doctrine to deal with such cases that fell short of fraud; the law would be lamentably defective if it provided no remedy in this kind of case. While the principles involved had received more consideration in England, they were 'based on reason and justice, and indeed it has been said on public policy, and are of universal application'.<sup>67</sup> Again, therefore, the position was fully argued, and a decision consciously made, based upon a perceived gap in the law and an inability to deal with a genuine problem in any other way. And it is notable that in the subsequent development of undue influence in Scotland, many features of the equitable English doctrine – for example, presumptions of undue influence – were not taken up.<sup>68</sup>

So much for the nineteenth-century reception of English contract law in Scotland. I think that I have said enough to indicate my view that, whether brought about by the House of Lords or, more typically, by the Scottish courts and writers themselves, it was not always uncritical or total, and that the doctrines which emerged, whatever one might think of them, were by and large native reworkings of the original source material, often linked to a Scottish principle and generally aimed at simplicity and practicality; but nonetheless capable of such systematic exposition as would allow their future operation to be as predictable and regular as any other legal system.

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<sup>63</sup> On the development of postal services in Scotland, see A. R. B. Haldane, *Three Centuries of Scottish Posts* (Edinburgh, 1971).

<sup>64</sup> PECL, art. 2:202(1). See also Vienna Convention on the International Sale of Goods, art. 16, and UNIDROIT, *Principles of International Commercial Contracts* (Rome, 1994), art. 2.4. See also the South African case adopting the postal rule, *Cape Explosives Works Ltd v South African Oil and Fat Industries Ltd* 1921 CPD 244.

<sup>65</sup> (1855) 18 D at 12. See further W. W. McBryde, *The Law of Contract in Scotland* (Edinburgh, 1987), 84.

<sup>66</sup> (1879) 7 R 332. Compare the development of undue influence in South Africa, for which see Zimmermann (above n. 33), 136-8.

<sup>67</sup> At 349.

<sup>68</sup> On the modern law of undue influence in Scotland, see McBryde, (above, n. 62), 244-9.

What is the position now as the twentieth century becomes the twenty-first? So far as the courts and text writers are concerned, I can perhaps best illustrate the continuing eclecticism – or genius - of our law with two bodies of case law which are currently attracting a great deal of attention.

The first concerns the remedy of specific implement (equivalent to specific performance in English law). The law of specific implement, although resting upon a Civilian base, has long been subject to Common Law influence, in that since the late nineteenth century it has been subject to the equitable discretion of the court and the rules of English law as to when specific performance will be refused have been received as guidelines as to when the Scottish courts' discretion should be exercised to refuse the remedy. The key difference between Scots and English law remains, however, that specific implement is a right, albeit qualified, whereas specific performance is available only if that is a more appropriate remedy than damages.<sup>69</sup> That there is more in this distinction than may appear at first blush has emerged in recent cases on both sides of the border about so-called 'keep open' clauses in commercial leases, obliging the tenant to carry on in a particular business at the leased premises. In England, the House of Lords has pronounced that such clauses are generally not specifically enforceable.<sup>70</sup> Before this decision, however, an Extra Division of the Court of Session had granted a landlord specific implement against a tenant which wanted to abandon the lease.<sup>71</sup> The contrasting results led to debate as to the position in Scotland, which has been resolved, for the time being at least, in favour of the landlord in the specific case, and in favour of a relatively strong right to specific enforcement. In *Highland and Universal Properties Ltd v Safeway Properties Ltd*<sup>72</sup> the First Division drew a contrast between the Scottish and English concepts of specific enforcement as the main reason for not applying the views of the House of Lords. The two main opinions, those of Lord President Rodger and Lord Kingarth, did not rest simply on the grounds of conceptual difference, but addressed head-on some of the arguments against specific enforcement in the English case. Thus Lord President Rodger observed: 'I merely record that experience of decrees of this kind in Scotland in recent years does not suggest that defenders have in practice had difficulty in obtempering them. Nor have these decrees led in Scotland to the kind of heavy and expensive litigation which the House of Lords feared would follow in England.'<sup>73</sup> Lord Kingarth did not think that 'the history in Scotland' had 'given rise to any obvious difficulties in enforcement or supervision'.<sup>74</sup> Meanwhile, the general rules of specific implement had been under review by the Scottish Law Commission, which reported at Christmas 1999: 'Our preliminary view was that the existing law was satisfactory. Consultees agreed. We think that no reforming legislation is necessary.'<sup>75</sup>

In the *Safeways* case Lord Kingarth commented, without apparent concern, that 'there may be differences, as between Scotland and England, in relation to the enforcement of provisions in commercial contracts which depend upon different but

<sup>69</sup> See A. D. Smith, 'Specific implement', in Reid and Zimmermann (eds.) (above, n. 13), vol. 2, 195 ff.

<sup>70</sup> *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.

<sup>71</sup> *Retail Parks Investments Ltd v Royal Bank of Scotland (No 2)* 1996 SC 227. See for comment on this and the *Co-operative Insurance* case H. L. MacQueen and L. J. Macgregor, 'Specific implement, interdict and contractual performance', (1999) 3 *Edin LR* 239.

<sup>72</sup> 2000 SC 297; commented upon by A. D. Smith, 'Keep on keeping open', (2000) 4 *Edin LR* 336. There will be no further proceedings in the case, as the parties settled after Safeways found new tenants to occupy the space in its place: see 'Superstore packs its bags at last', *Edinburgh Evening News*, 7 November 2000.

<sup>73</sup> 2000 SC at 302H.

<sup>74</sup> 2000 SC at 313D-E.

<sup>75</sup> Scot. Law Com. No. 174, para 7.28.

well established principles'.<sup>76</sup> This may appear to contrast with the second case with which I seek to illustrate the relationship between Scots and English contract law, *Smith v Bank of Scotland*.<sup>77</sup> In this case the House of Lords over-ruled the Court of Session and applied its earlier decision in the English appeal, *Barclays Bank v O'Brien*.<sup>78</sup> A desire that the law in matters affecting banks and guarantees given them by the spouses of debtor-customers should be the same in Scotland as in England clearly underlay the decision. Lord Jauncey, who 'applying the principles of Scots law alone ... would have been disposed to dismiss this appeal', in the end concurred: 'I appreciate the practical advantages of applying the same law to identical transactions in both jurisdictions'.<sup>79</sup> Lord Clyde argued that before *O'Brien* the Scots law on guarantees had developed on broadly the same lines as the English law, and that the policy considerations were identical in both jurisdictions. He concluded:<sup>80</sup>

I am not persuaded that there are any social or economic considerations which would justify a difference in the law between the two jurisdictions in the particular point here under consideration. Indeed when similar transactions with similar institutions or indeed branches of the same institutions may be taking place in both countries there is a clear practical advantage in the preservation of corresponding legal provisions. Furthermore, the development which is here proposed is one which is of clear advantage and usefulness to those who may be prompted to join with a spouse or other close companion in the granting of a security over their home or other property with grave disadvantage to themselves, which they may not even fully appreciate, and with a particular benefit to the business interests of the companion.

Here, then, we have a clear judicial alignment of Scots with English law. But it is only fair to note that the move is supported by policy considerations that were evidently argued and reflected upon before the decision was reached. It is not a case of a weak law lying down before a strong. Further, the nineteenth-century cases which founded the pre-*O'Brien* position in Scotland – *Hamilton v Watson*,<sup>81</sup> *Young v Clydesdale Bank*<sup>82</sup> and *Royal Bank of Scotland v Greenshields*<sup>83</sup> – had themselves been criticised.<sup>84</sup> Moreover, the

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<sup>76</sup> 2000 SC at 314B.

<sup>77</sup> 1997 SC (HL) 111. There are numerous, mostly critical, commentaries on the case: see e.g. two articles by G. L. Gretton, both entitled 'Sexually transmitted debt': 1997 *SLT (News)* 195; 1999 *Tydskrif vir die Suid-Afrikaanse Reg* 419; also J. M. Thomson, 'Misplaced concern?', (1997) 65 *SLG* 124; L. J. Macgregor, 'The House of Lords 'applies' *O'Brien* north of the border', (1998) 2 *Edin LR* 90. See also A. D. M. Forte (ed), *Good Faith in Contract and Property* (Oxford, 1999), in particular the editor's own contribution (more favourable to the case). For the so-far cautious approach of the Scottish courts to the new law, see *Braithwaite v Bank of Scotland* 1999 SLT 25; *Forsyth v Royal Bank of Scotland plc* 2000 SLT 1295; *Wright v Cotias Investments Inc* 2001 SLT 353; and *Ahmed v Clydesdale Bank plc* 2001 SLT 423.

<sup>78</sup> [1994] 1 AC 180.

<sup>79</sup> 1997 SC (HL) at 115F-G.

<sup>80</sup> 1997 SC (HL) at 120E-G.

<sup>81</sup> (1842) 5 D 280; aff'd (1845) 4 Bell's App 67 (HL).

<sup>82</sup> (1889) 17 R 231.

<sup>83</sup> 1914 SC 259.

<sup>84</sup> See J. J. Gow, *The Mercantile and Industrial Law of Scotland* (Edinburgh, 1964), 310-12. Further, so far as concerned private individuals' guarantees, the old law was inconsistent with what had become accepted by the banks themselves as good practice: see Forte (above, n.74), at 91 n.64. The inconsistency of the former law with the Roman *senatus consultum Velleianum* and the *authentica si qua mulier* (for which see R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (pbk. edn., Oxford, 1996), 145-52) was never a ground for its criticism in Scotland, however.

development in *O'Brien* can be paralleled in Germany,<sup>85</sup> and would be supported by the Lando Principles.<sup>86</sup>

Perhaps most importantly, Lord Clyde went out of his way to find a distinct doctrinal basis for *O'Brien* in Scotland, constructive notice being a concept of limited scope in Scots law. He found it in 'the broad principle in the field of contract law of fair dealing in good faith'.<sup>87</sup> Consciously or not, he thus brought into the arena a principle that on the whole English law has denied, while it flourishes in Continental systems. In Scotland, while the principle had never been subject to the vigorous judicial and academic put-downs which it has long had in England, it had scarcely been a very conspicuous part of contract law before 1997. Debate has since begun upon the wider implications of Lord Clyde's dictum for the law of contract, with predictably inconclusive results to date,<sup>88</sup> but should the time come for the courts to consider whether the principle is any more than latent within existing rules, or can be used more creatively in the development of the law, the decision between these possibilities ought at least to be an informed and justifiable one.

In devolved Scotland, the fate of private law is now no longer a matter predominantly for the courts and text writers. It was a legitimate Scottish complaint before 1999 that legislation on private law matters would only get through Parliament provided that there was no worthwhile debate about it, and that even then matters moved slowly at best. While viewed over the long run the Scottish Law Commission had a good record of having its reports implemented legislatively, there were often long intervals between report and royal assent. At the very least the Scottish Parliament provides the means for more rapid implementation. While private law is unlikely to be a major priority for MSPs, a start has been made and there are a number of Law Commission reports awaiting attention. So far as contract law is concerned, there are proposals relating to the formation and interpretation of contracts, the admissibility of extrinsic evidence in connection with interpretation, the subjection of penal clauses to a judicial control for manifest excessiveness, and the reform of certain aspects of remedies for breach of contract, in particular the rule in *White & Carter (Councils) v McGregor*.<sup>89</sup> In all these reports there has been extensive discussion of comparative law, including the Lando Principles, and the recommendations point more firmly in the directions of the Continental and the Lando solutions than those of the Common Law. If the Scottish Parliament acts upon these reports, the Civilian dimension of Scots contract law will be strengthened, and that on the basis of rational argument about what is the best solution in each of the areas discussed.

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<sup>85</sup> BverfGE 89, 214-236 (= *NJW*, 47 (1994) 36-39). See further M. Habersack and R. Zimmermann, 'Legal change in a codified system: recent developments in German suretyship law', (1999) 3 *Edin LR* 272. Note also the Dutch, Italian and Belgian commentaries on the case in (1996) 4(3) *European Review of Private Law* 263-285.

<sup>86</sup> See *PECL*, art. 4:111 and Comment, Illustration 2.

<sup>87</sup> 1997 SC (HL) at 121B-C.

<sup>88</sup> See the collection edited by Forte (above, n. 74). My contribution (at 5 ff.) argues that a principle of good faith explains and rationalises the seemingly disparate cases upon pre-contractual liability. Good faith is of course a key element of the Lando Principles: see *PECL*, art. 1:201. The Scottish Law Commission found little support for good faith as an explicit control mechanism upon the remedy of retention (suspension of performance): Scot. Law Com. No 174, para 7.18.

<sup>89</sup> See Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods (Scot. Law Com. No. 144, 1993); Report on Interpretation in Private Law (Scot. Law Com. No. 160, 1997); Report on Penalty Clauses (Scot. Law Com. No 171, 1999); Report on Remedies for Breach of Contract (Scot. Law Com. No. 174, 1999).

I conclude, therefore, that the Scots law of contract exemplifies what can be achieved in a mixed system of law, that this achievement is not accidental but is rather the product of a long-sustained and continuing inter-action between the courts, the text-writers and, increasingly, the legislators and those who prepare what they enact.<sup>90</sup> I am confident that Scots law has something distinctive to contribute to debates about contract law in its European and global future, and indeed to similar debates about other parts of private law, some of which I have mentioned in the course of this lecture. It is certainly too optimistic to say, with Lévy-Ullmann, that Scots law gives us a picture of what will some day be the law of the civilised nations; but I am not ashamed to claim that it merits more comparative study.

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<sup>90</sup> It also raises questions, in my opinion, against the arguments put forward by, e.g. Legrand and Teubner, about the incompatibility of the Common Law and the Civilian *mentalités*, but another occasion will be required to address these issues.