du Plessis, Paul J. "Conceptions of Roman Law in Scots Law: 1900–60." *Roman Law and the Idea of Europe*. By Kaius Tuori and Heta Björklund. London: Bloomsbury Academic, 2019. 221–238. *Bloomsbury Collections*. Web. 26 Apr. 2023. <<http://dx.doi.org/10.5040/9781350058767.0019>>.

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Conceptions of Roman Law in Scots Law: 1900–60

Paul J. du Plessis

Introduction

Although Scotland is geographically situated on the edges of Europe, it has nonetheless come to play an important role in the narrative of a new European *ius commune* during the course of the twentieth century. Perhaps a view from the edge provides greater clarity than being *in medias res*. Few scholars working on the civilian tradition or comparative law more generally in 2018 will be unaware of the peculiar nature of the Scottish legal tradition.¹ As a non-codified ‘mixed jurisdiction’ in which legal principles have been drawn from both the civilian (i.e. Roman law) and common law traditions, Scots law has become a veritable cornerstone in contemporary debates about harmonization of different legal traditions and the utility of ‘mixtures’. Within this debate, the scholarship of Reinhard Zimmermann has played a central role, primarily owing to his support for the idea of a living, non-codified civilian tradition based on the principles derived from Roman law. Zimmermann’s involvement with the Scottish project can be traced back to at least the 1990s and, while it has done much to support the cause of the civilian tradition in Scotland (and is therefore deserving of great praise and admiration), it is by no means the entire story of Roman law in Scotland during the twentieth century. Since the focus of this collection is the first part of the twentieth century, this chapter will attempt to show how earlier scholarship during this period laid the groundwork for the notion of the ‘mixed jurisdiction’. In doing so, I will engage with some of the broader themes raised elsewhere in this volume.

The other main reason for the inclusion of Scotland in a collection of this kind relates to the legal history of Scotland. Although the focus of this volume is the first half of the twentieth century, the nature of contemporary Scots law cannot be understood without some remarks about its legal history. As a separate country from England before the union of crowns in 1603 and the union of parliaments in 1707 by which the United Kingdom was created, Scotland had experienced a reception of Roman law from the late medieval period onwards.² Initially in its *ius commune* form, but later also in its humanist form,³ Roman law had a profound impact on the formation of the municipal law of Scotland during the early modern period, to the extent that the

drafters of the Treaty of Union of 1707 specifically provided legal measures to ensure the recognition and continuation of the civilian tradition post 1707.⁴ While it cannot be denied that the post-1707 settlement led to a substantial influence of English law in some fields (especially commercial law), the civilian tradition in Scots law has survived and continues to be at the very core of the national legal identity that separates Scots law from English law.

Despite these shared origins in Roman law, however, Scots law took a different developmental route from its Continental sister jurisdictions. What separates Scots law from most of these jurisdictions (and indeed also from English law, but for different reasons) is the manner in which Scots law has come to and continues to use Roman law. For, unlike most Continental jurisdictions, Scotland (and indeed the United Kingdom as a whole) did not codify branches of its law during the course of the nineteenth century. Thus, 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), Roman law continues to have 'practical' utility in Scottish courts. It cannot be denied, of course, that Roman law as the object of academic study and the 'practical' uses of it by advocates in Scottish courts are two separate (if not unrelated) things, and yet the application of Roman law as a source of modern law is unique in Europe and is deserving of study. It also bears repeating that precisely because Roman law continues to have a 'practical' application in Scots law, it has not been immune to shifts in legal theory during the course of the twentieth century concerning the nature of law and the nature of sources of law.⁵

This chapter will focus on statements made in a variety of contexts (textbooks, case law etc.) about the place of Roman law in Scots law during the first part of the twentieth century. The aim of such a text-based investigation is to demonstrate perceptions about the place of Roman law in Scots law to assess whether any changes are visible in the period under discussion. While it would of course be possible to write a history of the place of Roman law in Scots law against the backdrop of larger historical events of this period, such as the Industrial Revolution in Britain in the nineteenth century (and its lingering effect also in the first part of the twentieth) as well as the social and economic upheavals brought about by two world wars and the loss of an empire, such an investigation would require different types of evidence. Since law is, however, to some extent a reflection of society, even if not a perfect and clear reflection, these larger historical events will be mentioned in passing and where they have had a demonstrable impact on the main narrative of this chapter.⁶

A tale of reception

The formative period

The extent to which Roman law contributed to the creation of a municipal law of Scotland is a long and complex tale, the start of which can be traced to (at least) the fourteenth century. It is not my intention to provide a comprehensive overview of this

process, since the matter is well documented in a number of recent works, but it bears repeating that there is strong and incontrovertible evidence that Scottish legal culture is historically based on Roman law. In providing a brief overview, I wish to highlight three broad themes.

First, the reception of Roman law in Scotland covers the early modern period and the concomitant rise of the nation state (Birks, Evans-Jones and Stair Society 1995: 185–200). In second place, the reception of Roman law in Scotland occurred against the backdrop of the rise of the European *ius commune* in the later medieval period and continued through the humanist and *Usus Modernus* movements of the early modern period into the natural law movement of the mid-eighteenth and beyond (Robinson, Fergus and Gordon 1994: 230). Thus, in the teaching manuals used in Scotland and abroad as well as in the lecture notes, the main tenets of these movements (and especially the jurists who are representative of these) can be found across different periods. These also influenced the way in which Scottish jurists wrote about Roman law, especially in the so-called institutional writers, a group of prominent jurists covering the seventeenth to the nineteenth centuries whose works have, since the nineteenth century, been used by Scottish courts to discover basic principles of Scots law (Robinson, Fergus and Gordon 1994: 234). Finally, it should be remembered that the reception of Roman law in Scots law was not wholly a juristic reception. In fact, there is good evidence to suggest that the main vehicle of reception, at least in the late medieval and beginning of the early modern period, was through legal practice (Cairns 2000: 86–7).

For the purposes of this chapter, the first phase of reception (i.e. the fourteenth to the nineteenth centuries) will only be dealt with in outline. The initial reception of Roman law occurred via canon law (Robinson, Fergus and Gordon 1994: 229; Cairns 2000: 29–33). During the first part of the period there was no conception of Scots law as a coherent body of municipal law founded on its own principles. Rather, a pan-European *ius commune* also applied to Scotland subject to certain ‘national’ deviations, the *ius proprium*.⁷ This notion of a ‘European common law’ was rooted in and reinforced by the practice of studying law on the Continent. Already by 1496, a statute had dictated that ‘barons and free-holders of substance’ had to provide their sons with at least three years of university training in arts and law.⁸ This generally entailed a period of study abroad, an expensive undertaking. Canon law and church courts continued to have a substantial impact on the reception of Roman law during this period until the Reformation occurred by act of parliament in 1560, after which the study of canon law declined and the jurisdiction of church courts were gradually folded into that of secular courts (Cairns 2000: 76).

The second half of this period of reception, from the beginning of the eighteenth to the end of the nineteenth centuries, opens with the Treaty of Union in 1707 that created the United Kingdom. Two articles of this treaty require specific mention in the context of the development of Scots law and the place of Roman law. The first, Article 18, ensured that, with the exception of revenue and trade law (commercial law), the two systems of private law would continue to exist separately, but subject to the laws promulgated thereafter by the Westminster parliament.⁹ This latter point is especially significant as this period saw the rise of legislation as the prime source of law in the

United Kingdom. The other, Article 19, provided that the Westminster parliament, in its configuration as the House of Lords, would not have jurisdiction to hear cases on appeal from the Court of Session, the highest court in civil matters in Scotland, although this became the norm in the years thereafter (Robinson, Fergus and Gordon 1994: 241).

The reception of Roman law in Scotland in this period was affected by three factors. The first of these was changes to the legal profession manifested in the growing influence of the Faculty of Advocates.¹⁰ The second factor was changes to the court system introduced towards the end of the seventeenth century by act of parliament. The Court of Session was divided into an Outer House and Inner House and changes were made to the procedure used in the court (Robinson, Fergus and Gordon 1994: 238). It was also during this period that the first attempts at reporting and publishing of court decisions were made. It would continue in this form until the first part of the nineteenth century when further changes were introduced, mainly of a jurisdictional nature, to settle the structure of the different levels of court in Scotland (Cairns 2000: 153–5). It is also worth noting that by the first part of the nineteenth century, it had become a legal requirement for students to obtain a degree in law from a Scottish university in order to practice in Scottish courts.

The final factor that may be said to have affected the reception of Roman law during this period is the rise of national legal systems. The Scottish situation here is quite complex, given that Scotland formed part of the United Kingdom, but as already mentioned above, the autonomy of Scots private law as set out in the Treaty of Union allowed for the formation of Scots private law along the lines of a national legal order. It is difficult to map out the complete route whereby Scots law became a national legal order. As an end point, one might cite the year 1750 when the Faculty of Advocates introduced a compulsory examination in Scots law as an entry requirement to the bar (Robinson, Fergus and Gordon 1994: 245). The introduction of this requirement (in addition to the requirement of a pass in Roman law, which had been introduced in the seventeenth century) indicates that the process whereby the national law of Scotland had been created was now complete.

Intellectual movements in legal theory played an important role in the formation of Scots law. The initial interest in legal humanism and the *Usus Modernus* following the restoration of the monarchy eventually commutated into the natural law movement during the course of the eighteenth century (Robinson, Fergus and Gordon 1994: 253–4). Given the importance of natural law for the Enlightenment, a philosophical movement, which dominated Scotland and the world for much of this century, it stands to reason that it had a profound impact on the latter history of Roman law in Scotland.¹¹ It would be foolish to attempt a definition of ‘natural law’ in this context.¹² Suffice it to say that the supporters of this movement placed an emphasis on reason as the basis for all rules of law and that the natural law movement was generally in favour of clear, uncomplicated rules of law that could be collected into a gapless body, hence their impact also on the codification movement in Europe during the course of the nineteenth century. The opponents of this movement, the historical school spearheaded by Savigny, argued against codification and in favour of an organic development of private law rooted in the ‘Geist’ of the people.¹³ Two trends are visible

in the development of Scots law during this period. The first is a decline in the citation of Roman law sources by the Scottish jurists. This is in line with the notion of natural law and the rise of Scots law as a national legal system. In second place, during the course of the nineteenth century, when the notion that law should be an instrument of change in society begins to take hold, Scottish jurists increasingly focus on English law as a source for such ideas. At the same time, and given the importance of precedent in English court decisions, the 'institutional writers' become an important vehicle in Scottish court decisions through which certain basic civilian underpinnings of Scots private law could be conveyed.¹⁴

From the Edwardian period to the 1960s

The period 1890–1914 straddles the end of the Victorian and the entire Edwardian period. Although the Industrial Revolution had made Great Britain wealthy, her economic supremacy had begun to wane (Gilbert and Large 1991: 3–24). Domestically, while relatively peaceful, social change was afoot. The great wealth produced by the Industrial Revolution had not resulted in the improvement of the lives of ordinary workers. Thus, the early part of the twentieth century in Great Britain is marked by the rise of the social function of law. Unions are formed to alleviate the plight of ordinary workers and the progressive extensions of voting rights from the (male) aristocracy to the (male) middle classes and then also to women became a leitmotiv of domestic British politics. Politically, the prevailing policy in Great Britain is one of imperialism.

The First World War had profound socio-economic consequences on Britain and her Empire. Domestically, the First World War led to the demise of the liberals in Great Britain and to the rise of the labour party, briefly in the early 1920s and then for longer periods. Internationally, the First World War has caused rifts between Great Britain and her European neighbours. This, combined with the terms of the Treaty of Versailles, especially in relation to war reparations imposed upon Germany, meant that matters of diplomacy and indeed contact between Great Britain and Germany remained rather strained. This matter remains to be studied more thoroughly in the context of Roman law scholarship, especially since many of the late Victorian professors of Roman law such as James Muirhead and his successor Henry Goudy had studied in Germany. This would no doubt have had an impact on their academic contacts with scholars there.¹⁵

Arguably the biggest consequence of the First World War, however, was economic (Gilbert and Large 1991: 152–3, 157, 174). Without going into specific details, speculation on the American stock exchange led to the economic crash of the 1930s and the subsequent depression. This economic malaise eventually also had an impact on Europe (Gilbert and Large 1991: 202–3). Many banks in Europe and in Great Britain were left exposed leading to a global financial disaster. Much has been written about the extent to which the financial penalties of the Treaty of Versailles, combined with the effects of the economic problems of the 1930s, gave rise to the rise of Nazism in Germany.

The reasons for and the effects of the Second World War are well documented and will not be elaborated upon here. Suffice it is to say that the economic consequences of this conflict were as dire as those of the First World War and it took the second half

of the 1940s and the start of the 1950s to overcome the immediate effects. The 1950s in Great Britain saw the creation of the welfare state in its modern form as well as an attempt, through labour governments, to improve the lives of the average citizen through better housing and employment opportunities. The 1950s also played host to a number of technological advances (e.g. the jet engine), thereby laying the foundations for a move away from traditional industries such as shipbuilding and the like towards innovations in technology. In many ways, Great Britain emerged as a leader in many technologies and this would continue into the early 1960s, culminating in Harold Wilson's famous 'white heat of technological innovation' speech to the labour party conference in 1963. The second factor that had an impact on domestic politics in Great Britain was the slow demise of the British Empire. While Britain's colonies had played a vital role during the Second World War, the end of the conflict and the redrawing of the world map had made it clear that colonialism was a spent force. To that end, for much of the late 1940s and the bulk of the 1950s, ways were explored (not always peacefully) whereby the former colonies could be given self-determination. Although many of these colonies did not achieve independence until the 1960s, following the iconic 'winds of change' speech delivered by Harold MacMillan, the groundwork had already been laid in the 1950s through notion of a British commonwealth (rather than Empire).

The 'idea' of Roman law

Before progressing to specifics, a few observations about conceptions of 'law' in Great Britain during the first part of the twentieth century are required. It is of course incorrect to speak of 'a law of Great Britain' as in reality there has never been a unified law of this kind. Nevertheless, despite the separation between the two bodies of private law (England and Scotland), neither remained unaffected by the prevailing conceptions of law espoused by prominent legal theorists. In terms of legal theory, this period (i.e. 1900–60) is the apex of legal positivism in the United Kingdom,¹⁶ originating in the work of Jeremy Bentham (1728–1832)¹⁷ and developing through a succession of scholars such as John Austin (1790–1859), Hans Kelsen (1881–1973) and, ultimately, H. L. A. Hart (1907–92). It is not my intention to attempt an overview of the complexities of the subtle differences in theory proposed by these scholars. Rather, my argument is merely that these legal philosophers, because of their significant influence on how law should be understood (and indeed the distinction between 'law' and 'other') during the first part of the twentieth century, provide the milieu within which the developments in Scotland should be understood. Whereas the English common law had traditionally been understood in terms closer to that advocated by Savigny and the German historical school,¹⁸ namely as an organic (often unclear) primordial soup from which rulings (never principles) could be drawn through judicial decision, the legal positivists advocated a different approach to law, namely one of simplification and systematization based on the identification of clear rules of law. These rules draw their power from some higher authority (usually the state) and fit together as a harmonious whole in a 'system' (in the scientific sense). In identifying and discussing these rules

of law, these legal theorists maintained, legal scholars should draw a clear distinction between a rule of law and other non-legal considerations such as ethics and morality. The latter, as a rule, have no place in discussions of law.

It is not difficult to fathom why this school of legal philosophy had such a profound effect on legal scholarship in Great Britain during the first half of the twentieth century. Two world wars and the socio-economic problems brought about by these conflicts had swept away the last vestiges of natural law thought. If law were to function as a tool to improve society, it had to be clear and unambiguous, the more scientific the better. Recent research has again reinforced the relationship between post-Second World War labourism and Hart's notions of legal positivism.¹⁹

It is against this backdrop that some remarks about the teaching of law more generally in Edinburgh and of Roman law more specifically are required. My focus on Edinburgh is because of its importance for Scottish law teaching (both historic and contemporary) and also because so much work has been done by Cairns on the teaching of Roman law at this university across centuries.

The nineteenth century is an interesting period in this history of law teaching at Edinburgh. During the first part of this century, the quality of teaching at Scottish law faculties had been called in to question and, since many Scots still studied abroad (especially in Germany during the nineteenth century), it had been suggested that Scottish law teaching should be reformed along German lines to make it more scientific. As Cairns and MacQueen write,

The Scottish universities had been the subject of increasing dissatisfaction from 1820 or so onwards. Within the British context, they were compared unfavourably with Oxford and Cambridge (themselves not immune for criticism at this period), while the tremendous development of the universities of Germany provided a model for the rest of Europe to admire and attempt to emulate. (Cairns and MacQueen 2000: section III.)

This sense of dissatisfaction eventually led to the promulgation of the Universities (Scotland) Act of 1858 which was drafted to reform Scottish universities (Cairns and MacQueen 2000: sections III and IV). Not long thereafter, a new standardized LLB degree was introduced. It was a part-time graduate degree (meaning that students could only be admitted once they had obtained an MA beforehand) and the focus of teaching was on academic subjects (part of the drive towards greater scientification). It is worth pointing out that the foremost scholars of Roman law at the University of Edinburgh during this period were James Muirhead (appointed to the chair of civil law in 1862 and who held it until his death in 1889), succeeded by Henry Goudy (who held the chair from 1889 until he resigned to take up the position of Regius chair of civil law at Oxford in 1894). The first two had studied Roman law in Germany. As Cairns and MacQueen write of James Muirhead,

Muirhead established modern Roman law teaching in Edinburgh, drawing on the best contemporary, essentially German, scholarship, with which he kept up-to-date all his life, and on which he himself wrote ... (Cairns and MacQueen 2000: section IV.)

When Goudy left for Oxford in 1894, James MacKintosh was appointed to the chair. MacKintosh, a practicing advocate who had not studied abroad, occupied the chair for a considerable period of time and resigned the chair only in 1938, shortly before his death. But whereas Muirhead and Goudy had looked towards Germany for their scholarly inspiration, MacKintosh looked locally. No doubt one of the main consequences of the First World War had been to reduce academic ties with Germany.²⁰ MacKintosh is primarily known for the publication of *Roman Law in Modern Practice* (Edinburgh, Green and Son 1934), an archetypal positivist work, which is telling of the intellectual trends in law teaching during this period. This book contains the transcriptions of a series of lectures he delivered in Calcutta as a visiting professor. In the Preface, MacKintosh stated,

I am going to present to you some aspects of Roman Law as applied in the law of Great Britain and adopted to a considerable extent in your Courts, where I am informed the voice of the Digest, or its echoes in the Law Reports, may still at times be heard. ... 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? ... The main purpose of these Lectures is to supply some materials for an answer to this question ... (MacKintosh 1934: 1–2.)

Following this rousing introduction, MacKintosh proceeded to deal with matters such as the importance of legal history, the relationship between Roman and English equity and the transmission of Justinian's project in the medieval period. These were followed by a comprehensive account of various aspects of Roman private law with reference to English and Scottish case law of the period.²¹ Thus, to MacKintosh, Roman law served a thoroughly practical purpose in the context of legal practice in Great Britain.

This model of law teaching continued throughout the first part of the twentieth century. The LLB remained a graduate degree that was in practice only offered on a part-time basis. Most professors at the faculty were also practicing advocates or solicitors and most students were engaged in legal practice as trainees. This practice prevailed until after the Second World War when reform of the LLB was once again on the cards. Although the reform did not become final until 1960, it was widely discussed in academic circles in the post-war years and the end result was a full-time undergraduate degree (i.e. dispensing with the requirement of having an MA before enrolling into the LLB) in which law was taught, according to the prevailing legal positivist fashion, predominantly in terms of rules of law and their system. As Cairns and MacQueen write,

A desire developed for a more academic and sophisticated law degree, with a higher level of teaching than had sometimes prevailed, and a curriculum that gave a more balanced legal education, with greater scope for more advanced, specialised teaching. (Cairns and MacQueen 2000: section V.)

Two figures involved in the teaching of Roman law at Edinburgh are deserving of specific mention (Cairns and MacQueen 2000: section V). The first, Matthew Fisher, the successor to MacKintosh, held the chair from 1938 to 1958 when T. B. Smith was appointed to it. As for scholarly output, it appears to have been negligible, although as a part-time academic and with the disruption of war, this is perhaps understandable. The other, an energetic man whose legacy has divided academic opinion sharply, is T. B. Smith, who became professor of civil law at the University of Edinburgh in 1958. It must not be forgotten that in the interwar period, from roughly the mid-thirties onwards, Roman law as an academic discipline in Great Britain had benefitted from the arrival of Jewish-German émigrés at Oxford and Cambridge such as Fritz Schulz and David Daube who were to have a profound impact on the landscape of Roman law in Britain.²² Not only did their work influence the scholarly landscape of Roman law but in very real terms the pupils of Daube (e.g. Alan Watson) had a profound effect upon Roman law in Britain post 1960. Although in Scotland the impact of Schulz was indirect only via his textbooks (since the chair in Edinburgh was filled throughout the interwar period by MacKintosh and then Fisher), Daube, through his association with the University of Aberdeen, where he was first appointed to the newly created chair of jurisprudence through the intervention of the then dean of the law faculty, T. B. Smith, also had an impact on Scotland.

At this point, a few comments about perceptions of Roman law in Scots law during the first part of the twentieth century are required. As mentioned before, Cairns has shown that there had been a general downplaying of Roman law in the works of the scholars of natural law towards the end of the eighteenth and into the nineteenth centuries. Given the decline of natural law and its commutation into legal positivism through the works of Bentham and his followers, it stands to reason that a new role had to be found for Roman law in Scots law. Four pieces of evidence will be presented in this regard. The first is a statement in the 1927 edition of the standard Scots law textbook, *Gloag and Henderson* (Gloag and Henderson 1927: paragraph 17). Here we are told that Scots law consists of enacted (= statute) law and non-enacted (= common) law. Given the historical development of Scots law as a national legal system, the authors observe that it can be difficult to work out in any given case what the 'common law' of Scotland is. Despite the dominance of English law, however, the authors maintain that the 'common law' of Scotland is 'in large measure derived from the civil law' (Gloag and Henderson 1927: paragraph 17). Shortly thereafter in 1932, an entry in the *Encyclopaedia of the Laws of Scotland*, in a comprehensive and nuanced discussion of Roman law as a source in Scots law, 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 (Murray 1932: 74). After setting out in detail the historical process whereby Scots law came to be influenced through canon law and latterly the institutional writers, the reader is reminded, using a dictum from Lord Dunedin in the case of *Sinclair v Brougham* [1914] AC 398, that Roman law was not authoritative, but merely instructive (Murray 1932: 74). The third piece of evidence comes from 1936 in which Lord MacMillan, in the first publication of the Stair Society, set out the sources of Scots law.²³ This account of the sources of Scots law

clearly shows that Lord MacMillan was a legal positivist as well as a legal nationalist. Evidence of this can be seen, for example, in his distinction drawn from 'native' and 'non-native' sources. Statute law, precedent and institutional writers are listed in this category, while 'non-native' sources include Roman law. Furthermore, in his discussion of the place of Roman law, he is at pains to stress, following the dictum of Lord President Dundas in the *Cantiere San Rocco* case, that Roman law is only useful inasmuch as it sheds light on the development of Scots law and that it should not be used as a cover under which to over-Romanise Scots law (McKechnie, Brown and Stair Society 1936: 175). The final piece of evidence comes from a booklet by Lord Cooper of Culross, *The Scottish Legal Tradition*, first published in 1949. When read in the context of the aftermath of the Second World War and of strength of the legal positivist tradition through the work of Hans Kelsen during this period, this book takes on a new significance.²⁴

After extolling the virtues of Scots law as a system to be studied by others, Lord Cooper went on to say, 'the difficulty is that times are hard and Scotland is small, and this is not the day for small things. ... The fertilising foreign contacts upon which Scots law has thrived for ages can only with difficulty be maintained, and there is a visible risk that the old breadth of vision may be succeeded by insular parochialism and a disposition to rest content without inherited capital of ideas' (Meston, et al. 1991: 87–8). The message is clear. To Cooper, the continued civilian nature of Scots law was in danger. The influence from English law had become overwhelming and something needed to be done in order to prevent the onset of 'parochialism'. It is difficult to identify the reasons behind Cooper's statement in this regard (MacQueen 2005b: 53). No doubt the experience of the Second World War combined with the increasing hegemony of English law over areas of Scots law contributed to this views.²⁵ It would be through Cooper's pupil, T. B. Smith, appointed to the chair of civil law at the University of Edinburgh in 1958, that a vision as to how to save Scots law would be crystallized.²⁶

Smith had a profound impact on the development of Scots law during the course of the 1950s and 1960s (Reid 2005: 4). As mentioned above, it was during this period that the part-time, graduate LLB was increasingly under pressure and would eventually be replaced by the full-time, undergraduate degree. Smith should be seen in the context of the rise of the professional legal academic. After a brief career at the Scottish bar immediately following the Second World War, he was appointed to the first full-time chair of law at Aberdeen in 1949, where he would remain for a number of years and ultimately, in his capacity as dean of the faculty of law, would be instrumental in the appointments of David Daube and his pupil, Peter Stein, there.²⁷

In terms of Smith's views on the civilian tradition in Scots law, these appear to have been influenced by the views of his teacher, Lord Cooper, as well as by Smith's own experiences in the period immediately post-Second World War. He had spent time both in Louisiana and in South Africa during the late 1950s and had come to the conclusion that English common law presented a threat to the continued civilian character of Scots law (Reid 2005: 10). He therefore advocated that the civilian principles should be infused into Scots law once more using not only Roman but also Roman–Dutch law as visible in South Africa.²⁸ The analogy with South Africa, though useful at the

time, would in retrospect become difficult to sustain. As Chanock observed about the creation of South African legal culture in the first part of the twentieth century,

There are two important things about this pedigree [i.e. tracing the history of South African law back through the Dutch Republic to Justinian]. First, and this it has in common with the pedigree of English common law, it is long and *old*. Secondly, it is presented as having its essential roots in Europe, and in two basic European traditions, Roman and German. In this conception the law was both established as a sort of organic heart in the body of the state, and also situated in an external, non-African, European heritage. ... This way of presenting 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. (Chanock 2008: 155.)

The benefit of hindsight is that it sharpens the focus, but at the time Smith saw much in South African legal culture to admire. What Scotland lacked in legal literature, he maintained, could be obtained via the extensive bodies of legal literature in South Africa and to some extent also in Louisiana. Many of his explicitly legal-nationalist views can be seen in his inaugural address in 1958 when he was appointed to the chair of civil law at Edinburgh. This address, the title of which is 'Strange gods', he referred to the creeping influence of English law and how this had negatively impacted upon the civilian doctrinal heritage of Scots law.²⁹ Smith's plan for the future of Scots law did not bear fruit in the short term. He could of course not have known that a merely couple of years later, in 1961, South Africa would withdraw from the British commonwealth and, following the growing body of Apartheid legislation enacted during the 1960s, combined with the international condemnation following the Sharpeville massacre in 1960, would become an international pariah until democracy was restored in 1994. Furthermore, as argued by Reid in his assessment of the legacy of Smith, his nationalist views were not shared by his colleagues and many did not agree with his assessment as to the state of Scots law and the decline of its civilian heritage (Reid 2005: 13–14, 20).

Given the subsequent history of Scots law and the politics of Scottish devolution, it seems somewhat ironic to end this chapter at the advent of 1960. With that said, 1960 is perhaps a good place for a caesura, precisely because of the rather complex events thereafter.³⁰ One thing is clear, though. Even if Smith's flavour of legal nationalism was not popular with many of his contemporaries in the legal teaching profession at the time, it cannot be denied that 1950s Scotland was beginning to experience the first flushes of political nationalism.³¹ Thus, for example, although the Scottish National Party, created in the mid-1930s, initially did not pursue an independent Scotland, by the mid-1950s, the mood music had changed. The reasons for this new impetus are difficult to pin down, but seems likely to have been connected to a general decline of large industry in Scotland during the 1950s and into the 1960s, creating economic challenges (Devine 1999: 568–9), and, to some extent also the decline of the notion of a British Empire and a sense of global purpose in for Great Britain in the world (Devine 1999: 618–19). Of course the relationship between legal nationalism and political nationalism is by no

means straightforward and continues to be a point of contention even in the present. Nonetheless, there are certain indications of a growing sense of national identity connected to the separate nature of Scots law. This can be seen, for example, in the 1953 case *MacCormick v. Lord Advocate* 1953 SC 396 concerning the Royal Prerogatives, which centred on a claim that the newly crowned Queen Elizabeth II had no right to style herself as Elizabeth II in Scotland, since there had never been an Scottish queen by the name of Elizabeth, or, for example, in the circumstances surrounding the theft of the stone of destiny from Westminster Cathedral by a group of Glaswegian Scots in 1950.

Conclusion

The place of Roman law in Scots law during the first half of the twentieth century is a fascinating subject that can only be understood within the context of larger debates about the nature of law and the place of Scotland within the union of Great Britain.³² As this account clearly shows, while the history of Roman law as a practical component of the Scottish legal culture is a long and hallowed one, it is not without controversy. This is most clearly evident in discussions concerning the role of Roman law in the post-natural law period of Scots law covering the first half of the twentieth century. In legally positivist environments, Roman law was relegated to the DNA of Scots law to be viewed through the lens of the institutional writers, not as authoritative in its own right but merely as an addition. Of course, since the end of the 1950s, much has changed in Scotland and with Scots law and the recent attempt by the supporters of Reinhard Zimmermann to 'revive' the civilian tradition in Scotland cannot be ignored. The fundamental tenets of this attempt are that Scotland is the model as it contains a unique blend of civilian and English common law principles. In a post-national state environment such as the European Union, the 'mixture' could be used as a template for modern Continental civilian systems. This vision of the future of Scots law has not found favour universally in academic circles in Scotland.³³ One thing is clear, however. Not only has it left many unconvinced in practical terms, but the nationalist underpinnings of the idea that the civilian tradition should be used as a bulwark against Anglicization is difficult to sustain in 2018. Furthermore, the association between legal nationalism and the narrative of the South African legal culture make for uncomfortable reading. With that said, it is an indisputable historical fact that Roman law has played (and continues to play) a significant role in Scottish legal culture. Perhaps the time has come to celebrate it for what it is and to reflect on its place in the history of the formation of Scots law on its own terms, rather than try to use it for teleological or ideological purposes.

Notes

- 1 See now the excellent survey of Simpson 2017. Although precedent plays an important part in the creation of legal norms in Scotland, it has not always been seen as a welcome source of law; see Whitty 2003. For a discussion of 'legal culture' in relation to the Scottish academic T. B. Smith, discussed below, see Blackie 2005: 86.

- 2 Robinson, Fergus and Gordon 1994: 229. The dating for the first signs of a reception is variously given either as the fourteenth or the fifteenth century; see Cairns 2000: 28. As to whether the Scottish reception was continuous or fitful, see Cairns 2000: 15. Two opposing views, one by Cooper (fitful) the other by Sellar (continuous), may be identified in this debate. For an overview of the Sellar position, see Sellar 2000.
- 3 Cairns 2000: 126. For a recent assessment of this entire movement, see Du Plessis and Cairns 2016.
- 4 Robinson, Fergus and Gordon 1994: 231 for an account of the various 'schools' of Roman law during the early modern period. Stein 1988: 269–353. Also see now Simpson and Wilson 2017: chapters 9, 15, 16.
- 5 Birks 1997. See also Birks, Evans-Jones and Stair Society 1995.
- 6 This view about the relationship between law and society is a paraphrase of the celebrated statement by Crook 1967: 7.
- 7 Cairns 2000: 47. The attraction of Roman law in its *ius commune* form as a source of law was connected to its written nature; see Cairns 2000: 100–1.
- 8 Cited in Robinson, Fergus and Gordon 1994: 230.
- 9 Robinson, Fergus and Gordon 1994: 239. Interestingly, Cairns 2000: 78 mentions that discussions did take place post 1603 about the harmonization of the laws of the two kingdoms, but the project was unpopular and never came to fruition.
- 10 Cairns 2000: 128. See now Cairns and Baston 2015. See also now the collection in Cairns 2014b.
- 11 Cairns 2000: 125. See also now the essays collected in Cairns 2014a.
- 12 See now Finnis 2016.
- 13 Robinson, Fergus and Gordon 1994: 271 for a summary of Savigny's opposition to codification. See now Beiser 2015: especially chapter 5.
- 14 See the Introduction to Reid and Zimmermann 2000 for an account of how legal doctrine develops in a mixed legal system. See also Cairns 2000: 161–77 for an account of the influence of English law in the nineteenth century.
- 15 In the first edition of James Muirhead's *Historical Introduction to the Private Law of Rome* (1886), the author cites many German works, as can be seen from the list of abbreviations in the front of the work. Muirhead had scholarly links to Germany, having studied there. On Muirhead and this point more generally, see Cairns 2013.
- 16 Robinson, Fergus and Gordon 1994: 253–4. For a good survey of the main features of legal positivism, see now Green 2009. See now also Schauer 2011.
- 17 Robinson, Fergus and Gordon 1994: 254. For a good overview of Bentham's philosophy and its impact, see now Crimmins 2017.
- 18 Crimmins 2017: 271. See also van Caenegem 1991: 165–83. See also Kantorowicz 1937. I wish to draw the attention of the reader here specifically to the rather wonderful introduction in Buckland 1925: ix–xxvii, which contains a veritable tour of positivist theories of law prevalent during the time and an assessment as to whether the force of rules of law the Roman context can be explained using these theories.
- 19 Edgeworth 1989. See also now Roberts 2005.
- 20 That German scholars were aware of this can be seen, for example, in the Introduction to Schulz 1936, where the author notes that in translating this book into English, certain issues that would not be of interest to British or American scholars have been removed. A comparison between the German and the English versions of this text should be undertaken to examine the extent of these changes.
- 21 It is worth pointing out that this work by MacKintosh was not dissimilar to that produced by Sherman 1937, after the First World War and which by this time had seen two editions (soon to have a third edition in 1937).

- 22 See Birks 2004 for an assessment of all this.
- 23 See the Introduction to McKechnie, Brown and Stair Society 1936.
- 24 MacQueen 2005a: 396–402 argues that Cooper's views may be traced back to before the Second World War and should be viewed in the context of the rise of comparative law in Britain. On this latter point, see now comprehensively Cairns 2006, especially on the relationship between the rise of comparative law and legal positivism as well as the relationship between comparative law as a scientific discipline and the legal demands of the British Empire. See also Zweigert and Siehr 1971.
- 25 Reid 2005: 9 shows that it was Lord Cooper, the teacher of T. B. Smith that first raised the idea of Scotland as a 'mixed legal system' in an article published in the 1950 *Harvard Law Review*.
- 26 See the chapter by Willock 1976.
- 27 Reid 2005: 7–8; MacQueen 2005b: 55–6 shows that T. B. Smith had never studied Scots law. He had been educated at Oxford where he had been influenced by prominent Roman law, Roman–Dutch law and comparative law scholars such as Francis de Zulueta, Robert Warden Lee and Frederick Henry Lawson.
- 28 Fagan 1996; Van der Merwe 2012. For a defence of the continued relevance of Roman–Dutch law in South Africa, see now Scott 2016.
- 29 Reid 2005: 11–12. A subsequent appraisal of his legacy by Gretton has pointed out that the phrase 'nationalism' is almost always used in a pejorative sense, see Gretton 2005: 32–3. Similarly Visser 2005: 271 do not see him as legal nationalist in the sense.
- 30 For an assessment of the continuing relevance of the civilian tradition in modern Scots law, see the chapters collected in Evans-Jones and Stair Society 1995. See also the collected works of William (Bill) Gordon: Gordon 2013.
- 31 See now the interesting chapter by Kidd and Petrie 2016.
- 32 There are also clear links with the rise of comparative law as an academic discipline in Great Britain during this period. On all this, see Cairns 2006.
- 33 Evans-Jones 1998. See also Du Plessis 2010.

References

- Beiser, F. C. (2015), *The German Historicist Tradition*, Oxford: Oxford University Press.
- Birks, P. (1997), 'More Logic and Less Experience: The Difference between Scots Law and English Law', in D. L. Carey Miller and R. Zimmermann (eds), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*, 167–90, Berlin: Duncker and Humblot.
- Birks, P. (2004), 'Roman Law in Twentieth-Century Britain', in J. Beatson and R. Zimmermann (eds), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain*, 249–68, Oxford: Oxford University Press.
- Birks, P., Evans-Jones, R. and Stair Society (1995), *The Foundation of Legal Rationality in Scotland*, Edinburgh: Stair Society.
- Blackie, J. W. G. (2005), 'T. B. Smith as a Legal Historian', in E. Reid and D. L. Carey Miller (eds), *A Mixed Legal System in Transition: T. B. Smith and the Progress of Scots Law*, 73–99, Edinburgh: Edinburgh University Press.
- Buckland, W. (1925), *A Manual of Roman Private Law*, Cambridge: Cambridge University Press.
- van Caenegem, R. C. (1991), *Legal History a European Perspective*, London: Hambledon Press.

- Cairns, J. W. (2000), 'Historical Introduction', in K. Reid and R. Zimmermann (eds), *A History of Private Law in Scotland*, vol. 1, 14–184, Oxford: Oxford University Press.
- Cairns, J. W. (2006), 'Development of Comparative Law in Great Britain', in M. Reimann and R. Zimmermann (eds), *Oxford Handbook of Comparative Law*, 131–73, Oxford: Oxford University Press.
- Cairns, J. W. (2013), 'English Torts and Roman Delicts: The Correspondence of James Muirhead and Frederick Pollock', *Tulane Law Review*, 87: 867–86.
- Cairns J. W. and Baston, K. G. (2015), 'An Elegant Legal Education: The Studies of Charles Binning, a Scottish Pupil of Cornelis van Eck', *Tijdschrift Voor Rechtsgeschiedenis*, 83 (1–2): 179–201.
- Cairns, J. W. and MacQueen, H. L. (2000), *Learning and the Law: A Short History of Edinburgh Law School*, privately published by the Faculty of Law. [http://www.research.ed.ac.uk/portal/en/publications/learning-and-the-law\(7617657e-1d1e-4961-aa53-bcea1404dab\).html](http://www.research.ed.ac.uk/portal/en/publications/learning-and-the-law(7617657e-1d1e-4961-aa53-bcea1404dab).html).
- Cairns, J. W. (2014a), *Enlightenment, Legal Education, and Critique: Selected Essays on the History of Scots Law*, Edinburgh: Edinburgh University Press.
- Cairns, J. W. (2014b), *Law, Lawyers and Humanism: Selected Essays on the History of Scots Law*, Edinburgh: Edinburgh University Press.
- Chanock, M. (2008), *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice*, Cambridge: Cambridge University Press.
- Crimmins, J. E. (2017), 'Jeremy Bentham', in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition). <https://plato.stanford.edu/archives/spr2017/entries/bentham/> (accessed 23 April 2017).
- Crook, J. A. (1967), *Law and Life of Rome*, Ithaca, NY: Cornell University Press.
- Devine, T. M. (1999), *The Scottish Nation 1700–2000*, London: Penguin Books.
- Du Plessis, P. J. (2010), 'Legal History and Methods', in P. J. Thomas, R. Van den Bergh, G. J. Van Niekerk and L. Wildenboer (eds), *Libellus ad Thomasium: Essays in Roman Law, Roman-Dutch Law and Legal History in Honour of Philip J. Thomas*, 47–55, Pretoria: UNISA Press.
- Du Plessis, P. J. and Cairns, J. W. (2016), *Reassessing Legal Humanism and Its Claims: Petere Fontes?*, Edinburgh: Edinburgh University Press.
- Edgeworth, B. (1989), 'H. L. A. Hart, Legal Positivism and Post-War British Labourism', *University of Western Australia Law Review*, 19: 275–300.
- Evans-Jones, R. (1998), 'Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private law', *Law Quarterly Review*, 114: 228–49.
- Evans-Jones, R. and Stair Society (1995), *The Civil Law Tradition in Scotland*, Edinburgh: Stair Society.
- Fagan, E. (1996), '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*, 33–64, Oxford: Oxford University Press.
- Finnis, J. (2016), 'Natural Law Theories', in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition). <https://plato.stanford.edu/archives/win2016/entries/natural-law-theories/> (accessed 23 April 2017).
- Gilbert, F. and Large, D. C. (1991), *The End of the European Era: 1890 to the Present*, New York: W. W. Norton and Co.
- Gloag, W. M. and Henderson, R. C. (1927), *Introduction to the Law of Scotland*, Edinburgh: W. Green & Son.
- Gordon, W. (2013), *Roman Law, Scots Law and Legal History: Selected Essays*, Cambridge: Cambridge University Press.

- Green, L. (2009), 'Legal Positivism', in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2009 Edition). <https://plato.stanford.edu/archives/fall2009/entries/legal-positivism/> (accessed 23 April 2017).
- Gretton, G. (2005), 'The Rational and the National: Thomas Broun Smith', in E. Reid and D. L. Carey Miller (eds), *A Mixed Legal System in Transition: T. B. Smith and the Progress of Scots Law*, 30–43, Edinburgh: Edinburgh University Press.
- Kantorowicz, H. (1937), *Savigny and the Historical School of Law*, London: Stevens.
- Kidd, C. and Petrie, M. (2016), 'The Independence Referendum in Historical and Political Context', in A. McHarg, T. J. Mullen, A. C. Page and N. Walker (eds), *The Scottish Independence Referendum: Constitutional and Political Implications*, 29–49, Oxford: Oxford University Press.
- MacKintosh, J. (1934), *Roman Law in Modern Practice*, Edinburgh: W. Green & Son.
- MacQueen, H. L. (2005a), 'Legal Nationalism: Lord Cooper, Legal History and Comparative Law', *Edinburgh Law Review*, 9 (3): 395–406.
- MacQueen, H. L. (2005b), 'Two Toms and an Ideology for Scots Law: T. B. Smith and Lord Cooper of Culross', in E. Reid and D. L. Carey Miller (eds), *A Mixed Legal System in Transition: T. B. Smith and the Progress of Scots Law*, 44–72, Edinburgh: Edinburgh University Press.
- McKechnie, H., Brown, J. C. and Stair Society (1936), *An Introductory Survey of the Sources and Literature of Scots Law*, Edinburgh: The Stair Society.
- Meston, M. C., David, W., Sellar, H., Cooper, T. M. and Styles, S. C. (1991), *The Scottish Legal Tradition*, Edinburgh: The Saltire Society.
- Muirhead, J. (1886), *Historical Introduction to the Private Law of Rome*, Edinburgh: Ballantyne, Hanson and Co.
- Murray, A. (1st Viscount Dunedin), ed. (1932), *Encyclopaedia of the Laws of Scotland*, Edinburgh: W. Green & Son.
- Reid, K. (2005), '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*, 1–29, Edinburgh: Edinburgh University Press.
- Reid, K. and Zimmermann, R. (2000), *A History of Private Law in Scotland*, vol. 1, Oxford: Oxford University Press.
- Roberts, T. (2005), 'Legal Positivism and Scottish Common Sense Philosophy', *The Canadian Journal of Law and Jurisprudence*, 18 (2): 277–306.
- Robinson, O. F., Fergus, T. D. and Gordon, W. M. (1994), *European Legal History: Sources and Institutions*, London: Butterworths.
- Schauer, F. (2011), 'Positivism before Hart', *The Canadian Journal of Law and Jurisprudence*, 24 (2): 455–72.
- Schulz, F. (1936), *Principles of Roman Law*, Oxford: Clarendon Press.
- Scott, H. (2016), 'The Death of Doctrine?', in J. Basedow, H. Fleischer and R. Zimmermann (eds), *Legislators, Judges, and Professors*, 223–48, Tübingen: Mohr Siebeck.
- Sellar, W. D. H. (2000), 'Scots Law Mixed from the Very Beginning: A Tale of Two Receptions', *The Edinburgh Law Review*, 4: 3–18.
- Sherman, C. P. (1937), *Roman Law in the Modern World*, New York: Baker, Voorhis & Co.
- Simpson, A. R. C. (2017), 'An Introduction to Scottish Legal Culture', in S. Koch, K. E. Skodvin and J. Øyrehagen Sunde (eds), *Comparing Legal Cultures*, 87–130, Bergen: Fagbokforlaget.
- Simpson, A. R. C. and Wilson, A. L. M. (2017), *Scottish Legal History: Volume 1: 1000–1707*, Edinburgh: Edinburgh University Press.

- Stein, P. (1988), *The Character and Influence of the Roman Civil Law: Historical Essays*, London: Hambledon Press.
- 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.
- Visser, D. 'The Ties That Bind: T.B. Smith as a Comparative Lawyer', in E. Reid and D. L. Carey Miller (eds), *A Mixed Legal System in Transition: T. B. Smith and the Progress of Scots Law*, 272–92, Edinburgh: Edinburgh University Press.
- Whitty, N. R. (2003), 'From Rules to Discretion: Changes in the Fabric of Scots Private Law', *Edinburgh Law Review*, 7 (3): 281–339.
- Willock, I. D. (1976), 'The Scottish Legal Heritage Revisited', in J. P. Grant (ed.), *Independence and Devolution: The Legal Implications for Scotland*, 1–14, Edinburgh: W. Green & Son.
- Zweigert, K. and Siehr, K. (1971), 'Jhering's Influence of the Development of Comparative Legal Method', *The American Journal of Comparative Law*, 19: 215–31.