

This is an electronic reprint from *Roman Law Resources* (www.IusCivile.com). Copyright © 1995 The Stair Society. All rights reserved. This piece originally appeared as W. Gordon, 'Roman Law in Scotland', in R. Evans-Jones, *The Civil Law Tradition in Scotland* [The Stair Society, supplementary series, vol. 2] (Edinburgh, 1995) (ISBN 1-872517-08-0), pp 13-40, and is reprinted here with the kind permission of the Stair Society. Authors should cite to the original work: the original pagination is noted below by use of angle brackets (< >). All enquiries concerning the use or reproduction of this material should be addressed to the Stair Society.

## Roman Law in Scotland

William M. Gordon, *University of Glasgow*

- I. Introduction
  - II. The Period up to the Sixteenth Century
  - III. Sixteenth and Seventeenth Centuries
  - IV. The Eighteenth and Nineteenth Centuries
  - V. The Present Day
- Addendum

### I. Introduction

Scots law in the course of its history has had much closer contact with the European civilian tradition than has the English Common law but there have also been significant influences from the Common law. This essay explores the civilian influence but in the course of doing so it must also look at the effect which contact with the Common law has had, especially since 1707. As background to discussion of Roman influence on Scots law some brief account of the demarcation of the boundaries of what was the kingdom and is now the

jurisdiction within which Scots law operates is desirable.<sup>1</sup>

The modern border between Scotland and England runs along a line from the river Solway on the west to the river Tweed on the east, excluding Berwick-upon-Tweed at the mouth of the Tweed which became an English possession finally in 1482. Modern Scotland includes, besides the mainland, the Western Isles and the northern islands of Orkney and Shetland. However, Scotland became a single kingdom only in the early eleventh century and the somewhat artificial boundary between Scotland and England<sup>2</sup> was drawn in the twelfth century, settling the disputed claims of the kings of Scotland to territory in northern England.

Little is known with certainty of the laws applied among the various peoples who were brought under a single rule in the eleventh century—the Picts, the Scots, the Britons and the Angles. The same may be said of the Scandinavian settlements in the north and south-west but Scandinavian influence clearly predominated in the northern and western <14> islands which were brought within the Scottish kingdom at later dates—the thirteenth century in the case of the Western Isles and the fifteenth century in the case of Orkney and Shetland.<sup>3</sup> It would be reasonable to assume a diversity of law, customary or other, among them and there is some firm evidence of that diversity, and indeed of some continuity of diverse custom and law, in references to special customs of Galloway in the south-west,<sup>4</sup> to Celtic law in

<sup>1</sup> On the history of Scotland reference may be made e.g. to M. Lynch, *Scotland: A New History*, (2nd ed., London etc., 1992), the most modern single volume history, and for fuller treatments to the multi-volume *Edinburgh History of Scotland*, gen. ed. G. Donaldson. 4 vols. (Edinburgh, 1965-75) and *The New History of Scotland*, gen. ed. J. Wormald. 8 vols. (London, 1981-84, now being reissued by the Edinburgh University Press, with some volumes in revised editions). D. M. Walker offers a synthesis with particular emphasis on the law in *A Legal History of Scotland*, of which vols. 1 (The Beginnings to A.D. 1286), 2 (The Later Middle Ages), and 3 (The Sixteenth Century) (Edinburgh, 1988, 1990 and 1995) have appeared to date. [*Editor's note*—see Addendum.]

<sup>2</sup> See the comment in H. Summerson, "The Early Development of the Laws of the Anglo-Scottish Marches, 1249-1449" in *Legal History in the Making*, edd. W. M. Gordon and T. D. Fergus (London and Rio Grande, 1991), 29-42 at 33. <14>

<sup>3</sup> The Western Isles were brought in by treaty with Norway in 1266. Orkney and Shetland were pledged for the dowry of Margaret, daughter of Christian 1 of Denmark, who married James III of Scotland in 1468. They were forfeited to the Scottish crown in 1472 for non-payment of the dowry and redemption was never conceded.

<sup>4</sup> See H. L. MacQueen, "The Laws of Galloway: a Preliminary Study" in *Galloway: Land and Lordship*, edd. R. D. Oram and G. P. Stell (Edinburgh, 1991), 131-43.

the Highlands and Western Isles<sup>5</sup> and to Scandinavian law in Orkney and Shetland.<sup>6</sup> But the scanty early sources of Scots law assume in general a common law for Scotland. They may give a misleading picture and the possibility that they do so must be kept in mind. Nevertheless the question what Roman influence there has been in Scots law has to be addressed in the light of what sources there are and these allow us to speak of "Scots law" even although there may be a suspicion that to do so imposes a uniformity which did not in fact exist and perhaps indeed reflects a later imposition of uniformity, of which imposition there is certainly vived from an some trace.<sup>7</sup>

Although the Romans penetrated into Scotland and for a period occupied the southern part of modern Scotland between Hadrian's Wall, running from the Solway to the Tyne, and the Antonine Wall, running from the Clyde to the Forth, there is no clear evidence that that occupation continued into the third century. It cannot, therefore, be stated with certainty that even southern Scotland was still part of the Roman empire when in A.D. 212 the Edict of Caracalla extended Roman citizenship to almost all inhabitants of the empire.<sup>8</sup> The Roman occupation of Scotland, such as it was, was limited and the Roman forces were withdrawn from the whole of Britain in the early fifth century. In these circumstances it seems unlikely that Roman occupation left any traces in the law even of southern Scotland. It has been stated confidently that <15> it did not.<sup>9</sup> It is also very doubtful whether there was any influence, or any substantial influence, through contact with Rome by the peoples who came together to form the Scottish nation, even if in the present state of research it may be unwise to deny that possibility categorically.<sup>10</sup> Influence through the Roman church would come into the reckoning.

But whatever early traces may be found by further research it is safe to say that in so far as Scotland has and has had a share in the civilian tradition it has

<sup>5</sup> W. D. H. Sellar, "Celtic Law and Scots Law: Survival and Integration (The O'Donnell Lecture 1985)", (1989) 29 *Scottish Studies* 1-27.

<sup>6</sup> W. J. Dobie, "Udal law" in *An Introductory Survey of the Sources and Literature of Scots Law*, (Publications of the Stair Society, 1, Edinburgh, 1936), 445-60.

<sup>7</sup> See e.g. Statutes of Iona (Icolmkill) in 1609, recorded in the register of the Privy Council in 1610- *R.P.C.*, 1st ser., ix (Edinburgh, 1889), 26-30.

<sup>8</sup> On the Roman occupation of Scotland see e.g. P. Salway, *Roman Britain*, (Oxford, 1981); G. S. Maxwell, *The Romans in Scotland*, (Edinburgh, 1989). <15>

<sup>9</sup> J. Dove Wilson, "The Sources of the Law of Scotland", (1892) 4 *J.R.* 1-13 at 4; Walker, *Legal History*, *cit. sup.*, n.1, vol. 1, 5.

<sup>10</sup> See T. G. Watkin, "Saints, Seaways and Dispute Settlements" in *Legal History in the Making*, *cit. sup.*, n.2, 1-9, esp. at 4-9.

acquired that share essentially from later influence, initially through Canon law and then directly through contact with the Roman law taught in the universities. The Roman law which has helped to shape the development of modern Scots law is mainly, if not exclusively, Roman law as revived and understood by the Glossators and thereafter as understood by the successive schools of Roman lawyers who applied themselves to study and application of the texts which survived from antiquity. In Scotland, as elsewhere in Europe, the Roman law which influenced the native rules was not a fixed body of doctrine. What was known of Roman law and how what was known was understood and applied varied over the centuries. The authority given to it or the inspiration derived from it also varied at different periods. This is not always as clearly understood as it might be as "Roman law" tends to be equated simply with the rules embodied in the *Corpus Juris Civilis* and to be thought of as ascertainable by consultation of the sources of the ancient Roman law or modern manuals thereof. These rarely consider the post-Justinianic developments of Roman doctrines. The richness and complexity of the Roman heritage is thereby and therefore underestimated.

## II. The Period up to the Sixteenth Century

There are not many traces of Roman law in the early material on Scots law. What traces there are seem to derive from the use of Canon law rather than from use of Roman law direct. This is true both of the occasional references in early collections of legal materials such as the Laws of the Four Burghs and the *Liber de iudicibus*<sup>11</sup> and the more extensive passages relating to Roman law in the treatise known as *Regiam <16> Majestatem*.<sup>12</sup> The latter have been shown by Stein to come from Goffredus de Trano's *Summa in titulos*

<sup>11</sup> Laws of the Four Burghs, c. 101 (*A.P.S.*, i,41; red pagination, 353) - *cum necessitas non habet legem* from the *Decretum*; *Liber de iudicibus*, cc. 36-44 with extracts from Ivo of Chartres, including *Inst.*, 2.1.12-16 on acquisition of wild animals. See Stein, *Ius Romanum Medii Aevi*, Pars V, 13b (Milan, 1968) reprinted as "Roman Law in Medieval Scotland" in *The Character and Influence of the Roman Civil Law. Historical Essays* (London and Ronceverte, 1988), 269-317 at 275ff. <16>

<sup>12</sup> *A.P.S.*, i, 597 ff. (red pagination); also edited and translated with an introduction and notes by Lord Cooper, using a text based on Skene's edition, in *Regiam Majestatem and Quoniam Attachiamta*, (Publications of the Stair Society, )1, Edinburgh, 1947). The relevant passages are 1.29-2.7 and 2.10-12 (*A.P.S.*, i, 605-8) and in Cooper's edition 1.28-2.10 and 2.13-15. See Stein, *Historical Essays*, *cit. sup.*, n.11, 280ff.

*decretalium*, which was written between 1241 and 1246.<sup>13</sup> Such records of litigation and other documents as survive from the thirteenth century and contain references to Roman law show the same connection, although it has to be said that this may reflect their provenance which is commonly the records of the Church. Where the Church was involved, skilled lawyers were available, although they would have been trained abroad, because there was no Scottish university until the foundation of St. Andrews in 1413. These lawyers used their learning in court actions and arbitrations and the procedure of the church courts was the Romano-canonical procedure found in church courts generally, at least from the twelfth century. Thus in 1233 judges-delegate hearing a dispute between Paisley Abbey and one Gilbert of Renfrew decided the case on the advice of men skilled both in Canon and Civil law<sup>14</sup> and in 1288 there is recorded the cautionary tale of Adam Urry a cleric of the diocese of Glasgow who had learned the Civil law. He, it is said, cared more for the court of riches than the cure of souls but repented on his deathbed and damned thoroughly the lawyers' court.<sup>15</sup> The tale implies that Roman law, or at least the skills learned from the study of Roman law, were useful in the secular courts as well as the church courts. A spectacular example of reference to Roman law in a thirteenth century legal dispute is the reference to Paris lawyers for advice in the Great Cause of Scotland, the dispute over the succession to the Scottish crown after the death of the Maid of Norway in 1290, which was settled by Edward I of England, although it does not appear that Roman law was actually applied.<sup>16</sup>

Documents drawn by notaries, who are found in Scotland from the thirteenth century, also show both a connection with the church and a knowledge of Canon and Roman law. About half the notaries identified <17> are Papal notaries, the others being imperial notaries.<sup>17</sup> As part of their training

<sup>13</sup> P. G. Stein, (1969) 48 *Scot. Hist. Rev.* 107-23.

<sup>14</sup> *Register of Paisley Abbey* (Publications of the Maitland Club, 17, Edinburgh, 1832 and of the New Club, I, Paisley, 1877), 159; also in *A.P.S.*, i, 97.

<sup>15</sup> *Chronicon de Lanercost* (Publications of the Bannatyne Club, 65 and the Maitland Club, 46, Edinburgh, 1839), 124 under the year 1288; Stein, *Historical Essays*, *cit. sup.*, n.11, 293-94.

<sup>16</sup> E. L. G. Stones and G. G. Simpson, *Edward I and the Throne of Scotland: an Edition of the Record Sources for the Great Cause* (Oxford, 1977-78); Stein, *Historical Essays*, 294ff. <17>

<sup>17</sup> J. Durkan, "The Early Scottish Notary" in *The Renaissance and Reformation in Scotland. Essays in Honour of Gordon Donaldson*, edd. I. B. Cowan and D. Shaw (Edinburgh, 1983), 22-40.

they picked up some knowledge of Roman law and early Scottish documents, like documents from elsewhere in Europe in this period prepared by notaries, show the practice of renouncing rights, privileges and defences which might be available under Roman law.<sup>18</sup> Whether there was any real risk that Roman law might be appealed to is unclear but notarial documents prepared by a papal notary could be used as a basis of a claim to jurisdiction by the church courts and so the renunciations were not necessarily a mere show of learning. From this evidence it is clear that by the end of the thirteenth century Roman law was being used, sometimes perhaps directly but more often indirectly as a source of ideas. In the church courts it was used as subsidiary authority where it did not conflict with Canon law.

The evidence of use of Roman law continues throughout the fourteenth century and there is greater evidence of its use in the secular courts as well as in the church courts in addition to the evidence of its use derived, for example, from documents. To some extent the increase in the evidence available may simply result from the survival of a greater quantity of material. There is no magic in 1301 as the start of a new era but it is a fact that more evidence survives as we come closer to the present day. One example is the increase in the number of notaries who can be identified in the fourteenth century, thirty-five as against five so far for the earlier period.<sup>19</sup> No doubt more notaries can be identified simply because we have more notarised documents. On the other hand there is some evidence that there actually were more notaries acting because a diocesan system of admission of papal notaries is found operated by the bishops, acting under delegated powers. This indicates that there was a greater need for control of admission arising from greater numbers seeking admission. As well as a greater quantity of evidence there is an indication that Roman law was being used in a sophisticated way implying a sure grasp of it rather than its use as a show of learning. This indication comes from two

<sup>18</sup> *Liber Sancte Marie de Melros*. 2 vols. (Publications of the Bannatyne Club, 56, Edinburgh, 1837), vol. I, 288, No.327, a composition between the Knights of St. John of Torphichen and Reginald Cheyne and his wife Eustachia, to be dated after 1272/3 - D. B. Smith, "A Note on Roman Law in Scotland", (1921) 18 *Scot. Hist. Rev.* 66-68. The composition contains renunciations of *restitutio in integrum* and the *condictiones ex lege, sine causa* and *ex iniusta causa* and, on the part of Eustachia, of the benefit of the S. C. *Vellaeorum* and the *lex Julia de fundo dotali*. See also *Liber Sancte Marie de Calchou*. 2 vols. (Publications of the Bannatyne Club, 82, Edinburgh, 1846), vol. I, 181, No.223, dated 1287, an agreement between Kelso Abbey and the Knights Templar, and Stein, *Historical Essays*, *cit. sup.*, n.11, 293-94.

<sup>19</sup> Durkan, *loc. cit.*, n.17. <18>

cases, <18> *Abbey of Lindores v. Earl of Douglas* recorded in the cartulary of the abbey<sup>20</sup> and *Bishop of Aberdeen v. Crab* recorded in the register of the diocese of Aberdeen.<sup>21</sup>

In the former case the abbey had been summoned to appear before the court of the earl to do homage for lands which he claimed that the abbey held from him. The abbey appeared but disclaimed him as superior and took the case to the king's court on the basis that the land was held of the king and not of the earl having been excepted from the grant on which the earl relied. Both Roman law and Canon law were cited in the elaborate arguments presented for the abbey, with Azo and Pierre de Belleperche among the civilian authorities quoted. In the latter case a charter granted to Crab and his wife by a former bishop was challenged by the bishop in a court held by him as feudal superior of the disputed lands requiring his vassals to show that they had good title.<sup>22</sup> The decision of the bishop that the charter had not been validly granted was challenged in the court of the sheriff on the basis that the bishop had been judge in his own cause. Again an elaborate argument relying on both Roman and Canon law was presented and although it may be that the arguments in both cases were prepared by the same man, William de Spynie, a clerical lawyer who died as bishop of Moray in 1406,<sup>23</sup> the fact that such arguments could be presented in secular courts suggests that expertise in Roman law was not confined to clerics and the church courts. Other evidence that the king had access to lawyers knowledgeable in Roman law is found in an account of a dispute between David II and the earl of Ross whom the king confounded by citing civilian authorities.<sup>24</sup>

In the fourteenth century we also have more definite evidence of how a knowledge of Roman law was obtained in that the careers of Scots who went to continental universities to study can be traced.<sup>25</sup> William de Spynie was one of them, having studied arts and Canon law in Paris and Roman law

<sup>20</sup> *Cartulary of the Abbey of Lindores* (Publications of the Scot. Hist. Soc., 1st ser., 42, Edinburgh, 1903), No. CXLIX (200-12) and Appendix V (314-25).

<sup>21</sup> *Registrum Episcopatus Aberdonensis* 2 vols. (Publications of the Maitland Club, 63 and the Spalding Club, 13 and 14, Edinburgh, 1845), vol. I, 143-55. See on both cases Stein, *Historical Essays*, *cit. sup.* n.11, 299-305.

<sup>22</sup> R. M. Graham, "Showing the Holding", 1957 *J.R.* 251-69.

<sup>23</sup> Stein, *Historical Essays*, 305.

<sup>24</sup> Lord Saltoun, *The Frasers of Philorth* 2 vols. (Edinburgh, 1879), vol. 2, Appendix, charter no.12; Stein, *Historical Essays*, 298.

<sup>25</sup> D. E. R. Watt, *A Biographical Dictionary of Scots Graduates to 1410* (Oxford, 1977).

elsewhere, perhaps in Avignon.<sup>26</sup> Those who studied law predominantly studied Canon law<sup>27</sup> and in so doing would acquire some knowledge of Roman law but some made more advanced study of Roman law. The most favoured universities were Orleans, <19> where there was a Scottish nation from the early fourteenth century,<sup>28</sup> Paris and Avignon. The preference for French universities is easily explained by the close ties between Scotland and France through the "Auld Alliance". The Scots also supported the Avignon papacy during the Great Schism. If the *Regiam Majestatem* is correctly dated to the early fourteenth century we have evidence of some use of Roman law in a treatise on Scots law, albeit through Canon law, and it is clear that there is still a close connection between Roman and Canon law in the fourteenth century. What is difficult to assess, given the fragmentary nature of our evidence, is the extent to which Roman law competed with native authority in the secular courts.

When we enter the fifteenth century we are better supplied with legal source materials and have a still wider range of evidence of the use of Roman law, including knowledge of the content of cathedral libraries. One of the important indications of the value of Roman and Canon law in legal practice is the foundation of universities which had as one of their specific aims the provision of legal education. The earliest was St Andrews founded in 1413 by the efforts of Bishop Wardlaw who had studied Roman and Canon law at Orleans and Avignon. The bull of foundation provided for the teaching of both Civil and Canon law but only the teaching of Canon law seems to have begun.<sup>29</sup> In 1432 the university petitioned Pope Eugenius IV for a dispensation for beneficed clergymen to study both laws to help the provision of legal expertise in the secular courts, alleging that few took up the study of Civil law.<sup>30</sup> The university of Glasgow was founded some forty years later in 1451

<sup>26</sup> *Ibid.*, s.v. Spyny, William de, 503-6.

<sup>27</sup> Stein, *Historical Essays*, *cit. sup.*, n.11, 327, referring to information given to him by D. E. R. Watt. <19>

<sup>28</sup> J. Kirkpatrick, "The Scottish Nation in the University of Orléans 1336-1538", in *Second Miscellany of the Scottish History Society* (Publications of the Scottish History Society, 1st ser., 44, Edinburgh, 1904), 47-102; T. B. Smith, "The Influence of the 'Auld Alliance' with France on the Law of Scotland" in *Studies Critical and Comparative* (Edinburgh, 1962), 28-45.

<sup>29</sup> *Acta Facultatis Artium* 1413-1588, ed. A. I. Dunlop (Publications of the Scottish History Society, 3rd ser., 54-55, Edinburgh, 1964), cli ff.

<sup>30</sup> *Ibid.*, cliii; *The Saint Andrews Formulare*, 1514-1546, edd. G. Donaldson and C. Macrae. 2 vols. (Publications of the Stair Society, 7 and 9, Edinburgh, 1942 and 1944), vol. 2,



through the efforts of Bishop Turnbull who had studied at Louvain and Pavia. There is some evidence of the teaching of both Civil and Canon law in the 1450s although it is not clear how long it continued.<sup>31</sup> However long it did continue the foundation is significant as is the third foundation of the fifteenth century, the university of Aberdeen. <20> The man responsible for the creation of a university in Aberdeen is Bishop Elphinstone who studied arts in Glasgow and began teaching Canon law there and who then studied Canon law in Paris and Civil law at Orleans. He became bishop of Aberdeen in 1483 and chancellor of Scotland in 1488 and obtained the bull of foundation of a university in Old Aberdeen in 1495. The bull again made provision for the teaching both of Canon and Civil law but it made more adequate arrangements for payment of the professors than was made in the earlier foundations and it contained from the start a dispensation for clerics to study Civil law. The university did not in fact operate until the beginning of the sixteenth century but the foundation recognised that a need for it already existed in the fifteenth.<sup>32</sup>

Important as the foundation of the three oldest Scottish universities is as an indication of the relevance of Roman and Canon law to practice in the Scottish courts, it is not clear that they contributed many law graduates or trained lawyers for those courts. It appears that study abroad was still found attractive whether for its own sake or because the Church was an international institution and those whose first choice was Canon law might have better hope of advancement if they had attended continental universities many of which were longer established and better endowed.<sup>33</sup> Many Scots students went to Cologne and, after its foundation in 1425, to Louvain.<sup>34</sup> Some went to Italy<sup>35</sup>

310, No.525 gives a style for a licentiate in Civil law, dating from the early sixteenth century.

<sup>31</sup> *Munimenta Universitatis Glasguensis*. 4 vols. (Publications of the Maitland Club, 72, Glasgow, 1854), vol. 2, 67. There was no provision for the teaching of law in the *Nova Erectio* of 1577 when new provision was made for teaching after a period of decline - J. Durkan and J. Kirk, *The University of Glasgow 1451-1577* (Glasgow, 1977), 328 and 331. <20>

<sup>32</sup> L. J. Macfarlane, *William Elphinstone and the Kingdom of Scotland 1431-1514: The Struggle for Order* (Aberdeen, 1985), esp. ch. 1 on Elphinstone's education and ch. 7 on the foundation of the university. Lectures delivered by William Hay in 1533 have survived and were published by the Stair Society - *William Hay's Lectures on Marriage*, ed. J. C. Barry (Publications of the Stair Society, 24, Edinburgh, 1967).

<sup>33</sup> A. I. Dunlop, *Scots Abroad in the Fifteenth Century*, Historical Association Pamphlet No.124 (London, 1942), 13-19.

<sup>34</sup> J. H. Baxter, "Scottish Students at Louvain University", (1928) 25 *Scot. Hist. Rev.* 327-34.

<sup>35</sup> R. J. Mitchell, "Scottish Law Students in Italy in the Later Middle Ages", (1937)

but France was less popular in the fifteenth century because Paris was occupied by the English and the French took a different view of papal politics. Orleans still had its attraction and Bishop Elphinstone, who had studied there, prescribed the Orleans course in Civil law for Aberdeen.<sup>36</sup> What is clear is that there was legally trained manpower in Scotland even if the training was not done as often in Scottish universities as had been hoped. The contents of cathedral libraries are evidence of the availability of Canon and Roman law literature.<sup>37</sup> <21>

Lawyers in the fifteenth century continued to serve the Church in its courts and administration and the Church regularly supplied literate members of the secular administration but there is fuller evidence of the effects of Roman law on the secular law also. In addition, in conveyancing practice there is evidence of the existence of skilled lawyers not operating entirely in the sphere of the Church, although it is true that the Church was a great landholder and may well have helped to supply the expertise which is evidenced. For example, there is a great increase in the number of notaries known in the period 1400-1600 - at the very least 1500 altogether.<sup>38</sup> The Act 1424 c.45 (*A.P.S.* ii, 8, c.24), the earliest Scottish statute on legal aid for the poor, requires judges to find "lele and wyse" advocates to plead the causes of those unable to pay the normal fees and implies the existence of lawyers in the secular courts as well as in the church courts. The Education Act of 1496, the Act 1494 c.53 in Glendook's quarto edition, (*A.P.S.* ii, 238, c.3), the inspiration for the passing of which is attributed to William Elphinstone, the founder of Aberdeen University, requires substantial freeholders to send their sons to the grammar schools to learn Latin perfectly and then to send them for three years to the

49*J.R.*. 19-24.

<sup>36</sup> Macfarlane, *William Elphinstone, op. cit.*, n.32, 345.

<sup>37</sup> A list of books in Aberdeen in 1436 in the *Registrum Eptiscopatus Aberdonensis, op. cit.*, n.21, vol. 2, 127 at 129-32 names fifty-eight books on Canon law and at 132 nine on Civil law with seven not found and at 133-34 missing volumes of Canon and Civil law, three of the Canon law and one of the Civil law books being noted as found; a list of those in Glasgow made in 1432, *Registrum Episcopatus Glasguensis* 2 vols. (Publications of the <21> Bannatyne Club, 75 and the Maitland Club, 61, Edinburgh, 1843), vol. 2, 335 at 335 names three Civil law books and three Canon law ones and at 338 a further five Civil law (all the *Corpus Iuris*) and seven Canon law.

<sup>38</sup> This figure, based on his unpublished researches, was given to me by Professor R. Lya11 of Glasgow University. I am grateful for his permission to quote it; see also J. J. Robertson, "The Development of the Law" in *Scottish Socity in the Fifteenth Century*, ed. J. M. Brown (London, 1977), 136-52.

schools of arts and law. The stated purpose is that they may have knowledge and understanding of the laws and so be better prepared to do justice in the courts which they hold. The consequence hoped for is that this will relieve the central courts from concerning themselves with "ilk small Iniure". This indicates that the Roman and Canon law which would be learned in the universities was seen as being of value in the secular courts also.

From the fifteenth century come the first surviving originals of the records of the Scottish parliament and the King's council. The extant series of parliamentary records dates from 1466 and the extant council records from 1478.<sup>39</sup> From these, and from such evidence as we have of <22> the activity of parliament and council from sources other than the official records before these dates, we have some indication of what at least seems to be evidence of the use of Roman law in contexts not involving the Church. Examples of statutes are the Tutors Act of 1474 (the Act 1474 c.51; *A.P.S.* ii, 106- 7, c.6) providing that the tutor to a pupil child shall be the nearest agnate (relative through a male) aged twenty-five and possibly the Prescription Act of the same year (the Act 1474 c.54; *A.P.S.* ii, 107, c.9) introducing a forty year prescription. There is express reference to the Civil and Canon law as authorising the revocation of acts done to their prejudice by those "constitute in youth and tender age" in the Act of 1493 setting aside acts done to the prejudice of the Crown during the minority of James IV (*A.P.S.* ii, 236, c.22); there are less clear allusions to these laws in the similar laws passed by James III's parliament in 1464 in relation to acts done during the minority of James II (*A.P.S.* ii, 84). The Liferent Caution Act of 1491 (the Act 1491 c.25; *A.P.S.* ii, 224-25, c.6) providing for security against waste or destruction of lands held in ward or under a liferent right seems to be inspired by the *cautio usufructuaria* of Roman law.

In the conduct of judicial business in council and parliament the procedure used appears to be derived from the Romano-canonical procedure of the

<sup>39</sup> Lord Thankerton, "The Statutory Law", in *Sources and Literature, cit. sup.*, n.6, 1-15 at 5; *The Parliaments of Scotland. Burgh and Shire Commissioners*, ed. M. D. Young. 2 vols. (Edinburgh, 1992 and 1993), Introduction; R. K. Hannay, "Early Records of Council and Session, 1466-1659" in *Sources and Literature*, 16-24; the parliamentary record as then known is published in *A.P.S.*; the records of Council have been published up to 1503 in *The Acts of the Lords of Council in Civil Causes*, edd. T. Thomson and others (Edinburgh, 1839 and 1918- ) [*A.D.C.*, i to iii], now 3 vols., the last in 1993 with an introduction by A. L. Murray, clarifying the original arrangement of the records before T. Thomson's editorial interventions. There is a rather less satisfactory version of the Council record from 1501-1503 in the Publications of the Stair Society, 8, (Edinburgh, 1943). <22>

church courts.<sup>40</sup> Certainly it closely resembles that procedure, with the defender required to appear by a summons stating the basis of the claim made by the pursuer against him, the defender appearing either personally or by a procurator, allegations and reasons being propounded by the parties to the court and the decision taking the form of a decret issued by the court which had heard the case. Roman ideas appear in the record, sometimes in Scots dress, as on 13 March 1482/83 where an obligation is challenged as having been made "be force and dreid", ie. *vi ac metu*.<sup>41</sup> The records do not disclose, and given their nature and purpose, could not be expected to disclose, a high proportion of decisions based on legal as opposed to factual issues or to reveal much direct evidence of the use of Roman law where a legal issue did arise. They do provide clear evidence of a sophisticated treatment of the issues to be dealt with. Careful provision is made for the trial of any issues of fact and for discussion of points of law by men who were certainly aware of the possibility of the use of Roman law.<sup>42</sup> In short, it is clear that by the end of the fifteenth century at least, and probably long before, Scots law was a legal system mature enough to be able to take advantage of the <23> learned laws for its development, at least in respect of cases dealt with in the courts of highest instance. It was also a system operated by men who were willing and able to take advantage of these laws.

### III. The Sixteenth and Seventeenth Centuries

The evidence from the sixteenth century then confirms the picture emerging from what we know of earlier development. Roman law and Canon law are established as subordinate persuasive authorities in the secular courts and Canon law is being applied in the Church courts as authority binding on these courts. The binding authority of Canon law ended with the Reformation when Papal authority was rejected in 1560<sup>43</sup> but where Canon law was already

<sup>40</sup> *A.D.C.*, *passim*. H. L. MacQueen, "Pleadable Brieves, Pleading and the Development of Scots Law", (1986) 4 *Law and Hist. Rev.* 403-22 is more cautious and suggests (at 420-22) that the direct influence may have come from England.

<sup>41</sup> *A.D.C.*, ii, CX, 13 March 1482/3.

<sup>42</sup> See W. M. Gordon, "The Acts of the Scottish Lords of Council in the Late Fifteenth and Early Sixteenth Centuries - Records and Reports" in *Proceedings of the 11th British Legal History Conference*, July 1993, forthcoming. <23>

<sup>43</sup> *A.P.S.*, ii, 534-35, c.2; confirmed after the deposition of Mary in 1567 by the Act 1567

accepted as part of Scots law it continued to be applied in courts dealing with matters, such as status, which had been regulated by Canon law before the Reformation, in so far as Canon law did not conflict with Reformed doctrine. Canon law could also be referred to on questions not already settled but technically it was now only of persuasive authority.<sup>44</sup>

The creation of the College of Justice in 1532 by legislation confirmed in 1541<sup>45</sup> both settled the jurisdiction exercised by the king's council as a central court and indirectly led to its extension.<sup>46</sup> Exercise of its jurisdiction increasingly influenced the direction taken by the law where direction was given to it by decisions of the courts rather than by legislative act. The judges in the College of Justice, the Senators of the College, or Lords of Council and Session as they were known, formed what was called the Session and may somewhat anachronistically be called the Court of Session.<sup>47</sup> They commonly had resort to Roman law to assist them in the decision of the legal questions which came before them. This is sometimes presented as a new development or the impression is given that there was a major change in 1532 (or 1541) but, although it must be accepted that the foundation of the <24> College was significant, neither the reorganisation nor the use of Roman law represented a complete innovation. The use of Roman law in particular, as has been seen, was the continuation of an older tradition.

In the sixteenth century the records of the Council become differentiated. The series of acts of council continues until 1559; in the records the name was changed from *Acta Dominorum Concilii* to *Acta Dominorum Concilii et Sessionis* as from 1532 by the nineteenth century Keeper of the Records, Thomas Thomson, but there is no contemporary warrant for the change.<sup>48</sup> A

c.2 (*A.P.S.*, iii, 14, c.3 and *A.P.S.*, iii, 36).

<sup>44</sup> See Craig, 1,2,24; Stair, 1,1,14 and 16.

<sup>45</sup> The Act 1537 cc.36-41 (in Glendook's quarto edition) (*A.P.S.*, ii, 335-36, cc.1-2); the Act 1540 c.93 (*A.P.S.*, ii, 371, c.10).

<sup>46</sup> A. L. Murray, "Sinclair's Practicks" in *Law Making and Law Makers in British History. Papers presented to the Edinburgh Legal History Conference, 1977*, ed. A. Harding (Royal Historical Society Studies in History Series, 22, London, 1980), 90-104 at 98-100; H. L. MacQueen, "Jurisdiction in Heritage and the Lords of Council and Session after 1532" in *Miscellany II*, ed. D. Sellar (publications of the Stair Society, 35, Edinburgh, 1984), 61-85; *Common Law and Feudal Society in Medieval Scotland* (Edinburgh, 1993), ch. 8.

<sup>47</sup> H. L. MacQueen, "Stair's Later Reputation as a Jurist: the Contribution of William Forbes" in *Miscellany III*, ed. W. M. Gordon (Publications of the Stair Society, 39, Edinburgh, 1992), 173-94 at 186 n.26. The term "Court of Session" comes into common use only in the eighteenth century.<24>

<sup>48</sup> A. L. Murray, *A.D.C.* iii, Introduction.

new series of Acts and Decrees starts from 1542 and records the decrees of the Court of Session; the Books of Sederunt recording the sederunts of the court, acts of sederunt regulating procedure, and the admission of judges to the bench and advocates to practice before the court, start from 1553; a register of deeds for preservation and execution - a deed could and can be recorded to maintain an official record of its terms and to obtain warrant to enforce an obligation contained in it - starts from 1554 and is referred to as the Books of Council and Session. A new register of the activities of the Council as the royal privy council dealing with public affairs, including the supervision of the administration of justice in other courts, begins from 1545.<sup>49</sup>

Publication of these records, other than the records of the privy council dealing with public affairs, which are printed up to 1691, is not far advanced. Nor is exploration of the records to help elucidate the development of the law, except on particular points,<sup>50</sup> but cases dealing with what were regarded, or appear to have been regarded, as questions of importance were recorded in collections described as "practicks". Some of these contain decisions only and are hence referred to as "decision practicks"; others are more of the nature of handbooks containing references to decisions and other authorities and are referred to as "digest practicks".<sup>51</sup> It is not altogether clear whether the collections of decisions which have survived were made for the private purposes of the collector or to help inform the court of the course of past decisions. If they circulated they circulated in manuscript and although the extant collections give an almost continuous record of decisions from 1540 onwards, which is available in the surviving manuscripts, few have been printed.<sup>52</sup> None of the decision <25> practicks are among these although work is being done on them.<sup>53</sup> Like the original records the practicks would repay

<sup>49</sup> R. K. Hannay, "Early Records of Council and Session, 1466-1659" in *Sources and Literature, cit. sup.*, n.6, 16-23.

<sup>50</sup> E.g. H. L. MacQueen, "Jurisdiction in Heritage", *cit. sup.*, n.46.

<sup>51</sup> H. McKechnie, "Practicks" in *Sources and Literature, dt. sup.*, n.6, 25-41.

<sup>52</sup> Two collections of digest practicks have been published or, in the case of Balfour, republished by the Stair Society - Hope's *Major Practicks* 1608-1633, ed. J. Avon Clyde. 2 vols. (Publications of the Stair Society, 3 and 4, Edinburgh, 1937 and 1938); *The Practicks of Sir James Balfour of Pittendreich*, ed. P. G. B. McNeill. 2 vols. (Publications of the Stair Society, 21 and 22, Edinburgh, 1962 and 1963). The text of Balfour's *Practicks* is reproduced from the edition published in 1754. <25>

<sup>53</sup> A. L. Murray has published a study of the earliest decision practicks, Sinclair's *Practicks*, in the article cited in n.46 above. An edition of Maitland's *Practicks* is being prepared by R. Sutherland.

more detailed examination than they have been given hitherto but the studies which have been made of them,<sup>54</sup> and even unsystematic examination of those which have been printed,<sup>55</sup> provides increasing evidence of familiarity with and application of Roman law or of ideas derived from Roman law. The evidence of the records thus supports the remark of John Lesley (1527-96), a Lord of Session from 1564, that Roman law was turned to whenever there was a difficult case on which there was no native authority.<sup>56</sup> <26>

By the beginning of the seventeenth century we have the start of what can properly be described as a literature of Scots law and this also testifies to

<sup>54</sup> See, e.g., A. L. Murray, in the study of Sinclair's *Practicks* cited above, at pp. 103-4:

Some written pleadings of 1503 refer to the *Institutes* and *Codex* and to the commentaries of Nicholas de Tudeschis, John de Ferrariis and Johannes Andreae. From Sinclair's *Practicks* it appears that citation of such authorities must have been the common currency of those who pleaded before the lords of council.

Sinclair's citations of legal authorities, which were in the usual highly abbreviated form, have suffered more than the rest of his text from careless and uninformed copyists. However, it is possible to identify numerous references to Civil and Canon law texts. He also cites from a range of jurists, Panormitanus, Bartolus, Jason de Mayno, Johannes Andreae and even the relatively obscure Johannes Monachus.

Some of the cases cited to illustrate these points are printed in Morison's *Dictionary*, e.g. *Keir v. Marjoribanks* (1546) Mor. 5036; *Kirkcaldy v. Pitcaim* (1542) Mor. 9367. In a case in 1548 it is argued that "an omitted case remains at the disposal of the common law" meaning by "common law" the Civil and Canon law, the *ius commune* - Murray, *op. cit.*, at 101-2.

<sup>55</sup> See e.g. in Balfour's *Practicks*, vol. 1, 198 the case of *Balfour v. Pitcairne* decided in 1540 where it was held that goods deposited which had been stolen along with the depositor's own property need not be restored to the depositor "*quia neque dolum neque lata culpa commisit et depositarius solum tenetur de dolo et lata culpa*" (because he committed neither fraud nor serious fault and the depositor is liable for fraud and serious fault); Hope's *Major Practicks*, 11.9.2 : "the wed [i.e. the pledge] being stolln or reft or lost be any violent chance without the keeper's negligence, *cui resisti non potuit*, the creditor is not obliged to the restitution thereof, and yet hes good action for his debt".

<sup>56</sup> *De origine moribus et rebus gestis Scotorum* (Rome, 1576) at 71 and (Rome, 1578) at 76: "*nos ita lege municipali teneri ut si causa multis controversiis implicata quod saepe fit incidat quae legibus nostratibus non possit dirimi statim quicquid ad hanc controversiam decidendam necessariam censetur ex civilibus Romanorum legibus promatur*". Cf. also the Scots version by Dalrymple in the Publications of the Scottish Text Society, 1 (Edinburgh, 1888) at 120, quoted by Stein, *I.R.M.A.E.* V, 13b, 49 [= *Historical Essays*, *cit. sup.*, n.11, 315] in the Latin and in "The Influence of Roman Law on the Law of Scotland", 1963 *J.R.* 205-45 at 216 [= *Historical Essays*, 319-59 at 330] in the Scots. <26>

familiarity with and use of Roman law. The first substantial treatise on Scots law is Craig's *Jus feudale* which was finished around 1606,<sup>57</sup> although first printed in 1655. As the title indicates, Craig's main concern is the feudal law and hence he deals primarily with land law. But, in the first place, his work shows some evidence of the influence of Roman law in its structure (and, of course, the *Books of the Feus* were part of the medieval *Corpus Iuris Civilis* and were still included in editions in Craig's day). In the second place, Craig explicitly discusses the place of Roman law among the sources of Scots law and its authority in Scotland and, in the third place, there is ample evidence throughout the *Jus feudale* of the use of Roman law and of writers on Roman law, past and contemporary, to assist with the treatment of Scots law, especially on general points.

So far as structure is concerned Craig begins with titles on the origin of law and appears to have had at least some regard to the institutional scheme of persons, things and actions, although the *Books of the Feus* probably also exercised some influence on his presentation. In his discussions of the use of Roman law in Scotland Craig, in the second and eighth chapters of his first book, refers to the wide use made of Roman law in western Europe and says that where no answer to a legal problem is to be found in Scottish legislation or judicial decisions or the feudal law recourse is had to Roman law (and to Canon law, which is preferred in case of conflict with Roman law).<sup>58</sup>

<sup>57</sup> J. W. Cairns, T. D. Fergus and H. L. MacQueen, "Legal Humanism in Renaissance Scotland", (1990) 11 *Jour. Leg. Hist.* 40-69 at 49 (also in *Humanism in Renaissance Scotland*, ed. J. MacQueen (Edinburgh, 1990)); J. W. Cairns, "The *breve testatum* and Craig's *Jus feudale*", (1988) 56 *T.v.R* 311-32 at 317.

<sup>58</sup> Craig, 1,8,17:

*Si neque ex actis Parliamentorum, neque consuetudine judiciali, neque jure Feudali, quid sit faciendum in quavis quaestione occurrat, ad jus Civile recurrendum est. Nam jus Civile hominum societatem respicit, & quomodo in repub. seu communi societate civium ex aequo & bono res adminstretur, docet: cujus juris maximus usus & omnibus seculis & apud omnes gentes fuit. Et licet singulae gentes formulas suas judiciorum usurparint, tamen hoc jus Civile omnibus negotiis & circa res omnes ita diffunditur; ut nulla fere quaestio, nulla facti species occurrat, in qua ejus singularis usus non sit manifestus. Et in foro nostro si quid arduum, si quid difficile interveniat, ex jure Civili ejus solutio petenda est: si tamen in aliquibus per jus Canonicum sive Pontificium sit innovatum (& sunt qui ea omnia colligerunt in quibus jus Canonicum a Civili dissentit), in eis jus Pontificium a nostris praefertur; praecipue ubi Ecclesiae administratio, vel scandalum (ut Canonistae loquuntur) ubi animae periculum versatur*



Examples which <27> show Craig's familiarity with Roman law, which he had perhaps learned in Paris, and his knowledge of current views on questions of Roman and feudal law are to be found in his discussion of what objects can be granted in feu,<sup>59</sup> of the effect of the wrong designation of the granter of a feu charter<sup>60</sup> and of the question whether the right of a feudal vassal is a kind of *dominium* or merely a usufruct, as held by Cujas.<sup>61</sup> Craig, therefore, is using Roman law in much the same way as the judges were using it in the sixteenth century.

What we find in Craig is, if anything, even more clear in the later institutional writers until Bell and Hume who were writing at the end of the eighteenth century and the beginning of the nineteenth when the influence of the English Common law becomes more evident. For the institutional writers Roman law is a guide and an inspiration but it is not necessarily to be followed at all or in detail. It is also to be noted that from the seventeenth century onwards Roman law in Scotland, as elsewhere, had to compete with rational natural law as a model and Roman rules might be referred to and relied on not simply because they were Roman but because they were seen as "natural". Conversely Roman rules might be rejected as not being in conformity with natural law even if there was no conflicting native authority to rely on where

and cf. 1,2,14 where he specifies the areas in which Roman law is particularly used as: <27>

*in rerum praecipue mobilium administratione, licet judiciorum proprias & peculiares formas unaquaeque gens usurpaverit. Et nos etiam nostris formis actionum non omnino a jure Civili abhorrentibus utimur; tamen in pactis, transactionibus, restitutionibus in integrum, arbitriis, sive (ut hodie loquimur) arbitramentis, servitutibus, contractibus tam bonae fidei quam stricti juris, tam non nominatis, quam nominatis, evictionibus, pignoribus, tutelis, legatis, actionibus, exceptionibus, obligationibus, denique in delictis puniendis, jus Civile sequendum omnino proponimus: et ut vere dicam, in rebus omnibus nostris, & circa omnes res, hoc jus Civile ita diffunditur, ut nulla fere quaestio, nulli facti species occurrat, in quo ejus vis & usus singularis non appareat manifeste: in foro sive judiciis, quoties quid arduum occurrit, ejus solutio inde est petenda.*

Craig's *Jus feudale* was translated, along with the *Libri feudorum* in Cujas's recension, by J. Avon Clyde and published in two volumes, (Edinburgh, 1934). The translation is a free one and needs to be compared with the Latin.

<sup>59</sup> 1,15.

<sup>60</sup> 2,3,14.

<sup>61</sup> 1,9,10ff.; see also Cairns, *et al.*, n.57 above, at 48-49 and Cairns, "Craig, Cujas and the Definition of *feudum*: is a Feu a Usufruct?" in *New Perspectives in the Roman Law of Property*, ed. P. B. H. Birks (Oxford, 1989),75-84. <28>

previously, in such circumstances, it would have been normal and natural in another sense to turn to Roman law for guidance. In other words natural law provided an alternative source of general authority at a time when, not only in Scotland, but throughout Europe writers were seeking to present accounts of their own systems breaking away from the *ius commune* and were encouraged to give greater emphasis to native sources by the approach of the Humanists in the sixteenth century to Roman law.<sup>62</sup> The Humanists saw Roman law itself as a historical system which was not necessarily applicable in the different circumstances of their own times.<sup>63</sup>

In Stair, the earliest of the Scottish institutional writers to give a conspectus of the whole of the private law, both the use of Roman law as a source of ideas and as persuasive authority and the competition between Roman and natural law can be seen. Indeed, close reading of Stair's text shows that even where he might appear at first sight to be relying on Roman law he is in fact testing it against natural law.<sup>64</sup> He is critical of the arrangement of treatises on Civil, in the sense of Roman, law<sup>65</sup> and even of the clearer institutional order of persons, things and actions,<sup>66</sup> although he makes a concession towards that order in his second edition of 1693 by arranging his work in four books, with the last devoted to actions.<sup>67</sup> Stair is also quite clear that Roman law is not used as binding authority in Scotland<sup>68</sup> although he

<sup>62</sup> See O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History. Sources and Institutions* (2nd ed., London etc., 1994), para. 14.2.2; K. Luig, "The Institutes of National Law in the Seventeenth and Eighteenth Centuries", 1972 *J.R.* 193-226 (a revised version of "*Institutionen - lehrbücher des nationalen Rechts im 17. und 18. Jahrhundert*", (1970) 3 *Ius Commune* 64-97); J. W. Cairns, "Institutional Writings in Scotland Reconsidered", (1983) 4 *Jour. Legal Hist.* 76-117 [= *New Perspectives in Scottish Legal History*, edd. A. Kiralfy and H. L. MacQueen (London, 1984), 76-117].

<sup>63</sup> Robinson, Fergus and Gordon, *European Legal History, cit.*, paras. 10.2 to 10.5.

<sup>64</sup> See his treatment of *negotiorum gestio* in Stair, 1,8,3ff.

<sup>65</sup> Stair, 1,1,17: "There is little to be found among the commentaries and treatises upon the civil law, arguing from any known principles of right: but all their debate is a congestion of the contexts of the law: which exceedingly nauseates delicate ingines [minds]".

<sup>66</sup> Stair, 1,1,23: "...these are only the extrinsic object and matter, about which law and right are versant. But the proper object is the right itself, whether it concerns persons, things or actions". His order is to treat of the constitution and nature of rights, their conveyance or translation *inter vivos* or *mortis causa* and the remedies for their enforcement.

<sup>67</sup> Stair, 1,1,23: "...these are only the extrinsic object and matter, about which law and right are versant. But the proper object is the right itself, whether it concerns persons, things or actions". His order is to treat of the constitution and nature of rights, their conveyance or translation *inter vivos* or *mortis causa* and the remedies for their enforcement.

<sup>68</sup> Stair, 1,1,16: "Our customs, as they have arisen mainly from equity, so they are also

himself makes <29> considerable use of it in the first and second books (following the order of the second edition), which deal with obligations and property, and in the third book when he is dealing with succession. He makes particularly generous use of it when he is dealing with general questions and with testamentary succession. References are more sporadic in the treatment of the law of actions in the fourth book because Stair is there dealing with Scottish practice but even in this book it is clear that the Roman law was at least at the back of his mind.<sup>69</sup> It is not true to say, as is sometimes done, that he filled gaps in Scots law by incorporating Roman law<sup>70</sup> but he did use it to suggest questions and possible solutions to problems on which there was no native authority, as on the law of risk in sale.<sup>71</sup>

Mackenzie's *Institutions* were first published in 1684 and passed through eight editions by 1758. After that they were supplanted as a student textbook by Erskine's *Principles* which were first published in 1754. They follow the Roman institutional order more closely than Stair's *Institutions* although Mackenzie does adapt that order to Scottish needs, for example, in dealing with the division between heritable and moveable property which is foreign to Roman law. It is suggested by Erskine<sup>72</sup> that Mackenzie regarded Roman law

from the Civil, Canon and feudal laws, from which the terms, tenors and forms of them are much borrowed; and therefore these (especially the civil law) have great weight with us, namely, in cases where a custom is not yet formed. But none of these have with us the authority of law: and therefore are only received according to their equity and expediency, *secundum bonum et aequum*"; cf. also Stair, 1,1,12: "...the Civil law of the Roman commonwealth or empire, as the most excellent...the affinity that the law of Scotland hath with it...and its own worth...though it be not <29> acknowledged as a law binding for its authority, yet being, as a rule, followed for its equity, it shall not be amiss here to say something of it". In this latter passage "as a rule" does not mean "generally" as it would in modern English but "as a guide" or the like, see A. Watson, "The Rise of Modern Scots Law" in *La formazione storica del diritto moderno in Europa. Atti del III congresso internazionale della società Italiana di storia del diritto*. 3 vols. (Florence, 1977), vol. 3, 1167- 76 at 1176.

<sup>69</sup> W. M. Gordon, "Roman Law as a Source" in *Stair Tercentenary Studies*, ed. D. M. Walker (Publications of the Stair Society, 33, Edinburgh, 1981), 107-12.

<sup>70</sup> W. M. Gordon, "Stair's Use of Roman Law" in *Law-making and Law-makers in British History, cit. sup.*, n.46, 120-26 and "Roman Law as a Source", *cit.*, at 111.

<sup>71</sup> Stair, 1,14,7. His treatment of this topic, as of *arra*, may have been inspired by Vinnius's *Partitiones*. He also used Gudelinus, *De iure novlssimo* and Vinnius's commentary on the *Institutes of Justinian* - see W. M. Gordon, "Stair, Grotius and the Sources of Stair's *Institutions*" in *Satura Roberto Feenstra sexagesimum quintum annum aetatis complenti ab alumnis collegis amicis oblata*, edd. J. A. Ankum, J. E. Spruit and F. B. J. Wubbe (Fribourg, 1985) 571-83.

<sup>72</sup> Erskine, *Inst.*, 1,1,41.

as part of the written law of Scotland but this seems to be inaccurate. Of Roman law generally he says, "...as this Civil law is much respected generally, so it has great influence in Scotland except where our own express Laws or Customs have receded from it"<sup>73</sup> but Erskine may be referring to Mackenzie's <30> (too general) remark that "...by the common Law in our Acts of Parliament is meant the *Civil Law*".<sup>74</sup>

Mackenzie's *Institutions* give a much more succinct account of the law than Stair's, which explains their adoption as an elementary student textbook, and he is much more sparing in his references, except to statutes. However, it is clear in reading through his book that he writes as one familiar with Roman law and he does make some express comparisons with or comments on the relevance of Roman law, for example, in dealing with persons under age and with obligations.<sup>75</sup> Scots law comes first but he finds Roman law helpful in exposition of Scots law by suggesting a structure and questions to be addressed whether or not Roman law has already been incorporated into the fabric of Scots law.

In the seventeenth century the decision practicks, which give details of cases alone, and the digest practicks, which give details of or references to cases and other legal authorities found to be useful in practice, begin to be superseded by the closer ancestors of law reports. These reports are more like modern law reports than the practicks but they do not yet give the opinion of the court or the opinions of individual judges. Decisions of the Court of Session were decisions of the court and individual opinions were not delivered as nowadays although the views of individual judges who contributed to the decision may be indicated in the course of reporting the contentions of parties. Although Roman law was still not regarded as having binding authority<sup>76</sup> there are cases in which it appears in fact to have settled an issue.<sup>77</sup> Even where it

<sup>73</sup> Mackenzie, 1,1,7. <30>

<sup>74</sup> *Ibid.*, citing James IV, c.51 (1493 c.51, *A.P.S.*, ii, 236, c.22); James V, c.80 (1540 c.80, *A.P.S.*, ii, 360, c.15); Queen Mary, c.22 (1551 c.22, *A.P.S.*, ii, 487, c.17); James VI, Parl. I, c.31 (1567 c.31, *A.P.S.*, ii, 548, c.2). The reference may be to the Civil law in these instances but there are others in which the reference is to the common law of Scotland as opposed to local laws, e.g. *A.P.S.*, ii, 252, c.24 (1503) and iii, 41, c.48 (1567) and ii, 360, c.15 (1540) - "be disposition of the common law baith *canone ciuile* and statutes of the realm" - is somewhat ambiguous.

<sup>75</sup> Mackenzie, 1,7, 2 and 23; 3,1.

<sup>76</sup> E.g. *Pinkill v. Lord Balcarras* (1649) 1 B.S. 441.

<sup>77</sup> E.g. *Ballenden v. Macmath* (1628) 1 B.S. 155; numerous other examples are given in D. Baird Smith, "Roman law" in *Sources and Literature, cit. sup.*, n.6, 171-82 at 174 n.2.

was not decisive or not expected to be decisive it was nevertheless cited to the courts and this was at least partly because Scottish advocates who pleaded in the higher courts had normally received their academic training in Roman law, usually at a continental university and commonly, at this time, in the Netherlands. They were also required to display some competence in Roman law as one of the formal requirements of admission to the bar in the ordinary way.<sup>78</sup> An examination in Scots law was introduced for such "ordinary" applicants for admission only in 1750<sup>79</sup> and, significantly, the number of advocates who went abroad for their academic education declined quite sharply thereafter.<sup>80</sup> This decline can also to be explained by the revival of law teaching in the Scottish universities, and especially in Edinburgh and Glasgow, in the eighteenth century but the relation with the new style of examination does seem significant. The extent to which Roman law was cited and found helpful no doubt depended on the knowledge of it held by both advocates and judges<sup>81</sup> and it is reasonable to assume that this varied but, as the Court of Session was a collegiate court, it is unlikely that there were many occasions on which no expertise on Roman law was available on the bench.

#### IV. The Eighteenth and Nineteenth Centuries

Erskine in his *Principles* which appeared in 1754 and in his *Institute*, which was published posthumously in 1773, follows the scheme adopted by Mackenzie in his presentation of the law. He continues the pattern of exposition of Scots law with the assistance of Roman law but he cites Roman

<sup>78</sup> See *The Minute Book of the Faculty of Advocates. Vol. I; 1661-1712*, ed. J. M. Pinkerton (Publications of the Stair Society, 29, Edinburgh, 1976), Introduction, ix-x; J. W. Cairns, "John Spotswood, Professor of Law: a Preliminary Sketch" in *Miscellany III, cit. sup.*, n.47, 131-59 at 132-33. <31>

<sup>79</sup> See *The Minute Book of the Faculty of Advocates. Vol. 2, 1713-1750*, ed. J. M. Pinkerton (publications of the Stair Society, 32, Edinburgh, 1980), 241.

<sup>80</sup> N. Phillipson, *The Scottish Whigs and the Reform of the Court of Session, 1785-1830* (Publications of the Stair Society, 37, Edinburgh, 1990), Appendix A, giving figures for Leiden, Utrecht and Groningen which show a drop in the 1740s and a very sharp drop from the 1760s.

<sup>81</sup> Reference may be made in this connection to J. W. Cairns, "The Formation of the Scottish Legal Mind in the Eighteenth Century: Themes of Humanism and Enlightenment in the Admission of Advocates" in *The Legal Mind. Essays for Tony Honore*, edd. N. McCormick and P.B.H. Birks (Oxford, 1986), 253- 77.

law in his *Institute* much more frequently than did Mackenzie in his much slighter work. Like Mackenzie, he mentions cases in which statutes have justified the exercise of powers by reference to Roman law<sup>82</sup> and he notes that it was felt necessary to pass a statute abrogating doctrines of Roman and Canon law repugnant to Protestant doctrine after the Reformation<sup>83</sup> but he draws from these evidences of use of or reference to Roman law the conclusion that, while Roman law is very useful in determining controversies where there is no fixed rule of Scots law, there is no case for applying any rules special to that system.<sup>84</sup> In his treatment of individual topics he is <32> in some respects closer to Roman law than Stair in that he cites Roman texts explicitly and more freely but he does not follow Roman law exactly even when he draws heavily on it, as in his discussion of possession in his second book. For example, he says that the liferenter (who is more or less equivalent to the Roman usufructuary) and the tenant both have possession in Scots law which they did not have in Roman law (albeit the usufructuary had possessory remedies by extension of the possessory interdicts). He leaves it unclear whether the borrower has possession or not in Scots law although he follows Roman law in denying possession to the depositary.<sup>85</sup>

Andrew McDouall, Lord Bankton, in his *Institute*, which was published in three volumes between 1751 and 1753 and is now being republished by the Stair Society,<sup>86</sup> explicitly follows the order of Stair's *Institutions*. However, he

<sup>82</sup> Erskine, *Inst.*, 1,1,41.

<sup>83</sup> *Ibid.*, referring to the Act 1567 c.31 (*A.P.S.*, ii, 548, c.2).

<sup>84</sup> *Ibid.*:

These observations prove at least that great weight is to be laid on the Roman law in all cases not fixed by statute or custom, and in which the genius of our law will suffer us to apply it; and as we have few statutes in the matter of contracts, transactions, restitutions, servitudes, tutories and obligations, the knowledge of it must be singularly useful in determining controversies arising from those heads of the <32> law. Yet where any rule of the Roman law appears to have been founded on a subtilty peculiar to their system, it were absurd to pay the smallest regard to it.

In his list of areas in which there were few statutes he might have included moveable property. In dealing with that in *Inst.*, 2,1 and with possession at *Inst.*, 2,1,20ff., he refers to many Roman law texts and virtually bases his account on Roman law in the absence of much Scottish material on which to draw.

<sup>85</sup> Erskine, *Inst.*, 2,1,20 and 22 respectively.

<sup>86</sup> Volumes I and II have appeared as volumes 41 (Edinburgh, 1993) and 42 (Edinburgh, 1994), respectively, and volume III will appear as volume 43 in 1995.

modifies it in certain respects to make it conform even more closely to the order of Justinian's *Institutes* than Stair himself had done in his second edition. For example, he adds titles on the state and distinction of persons and on the division and quality of things,<sup>87</sup> although the latter comes in the first rather than in the second book and so corresponds rather to the placing of the title on the division and quality of things in the *Digest* (D.1.8). His general attitude is similar to that of Erskine<sup>88</sup> and throughout his work he refers frequently to <33> Roman texts.<sup>89</sup> As in Stair the references do not necessarily mean that he thinks that Roman law does or should apply. Roman law is there rather as a framework of discussion, whether or not it is applicable. For example, he is ambiguous on the acceptance of the *actio de effusis vel deiectis* in Scots law.<sup>90</sup>

In the eighteenth century as in the seventeenth there are many cases in which Roman law was cited to or by the courts and we are still better informed of decisions as a result of improvement in the reporting of the activity of the courts. However, the original records have still to be fully explored for the light which they may cast on the use of Roman law in cases which were not reported or which were reported but in which the report is not full enough to

<sup>87</sup> Bankton, 1,2 and 3; cf. D.1.8.

<sup>88</sup> Bankton, 1,1,42:

From many of our statutes it appears, that our legislators had great regard to the Civil and Canon laws, which therein are termed *the Common law* [he cites the Acts 1493 c.51 (*A.P.S.*, ii, 236, c.22), 1540 c.69 (*A.P.S.*, ii, 356, c.1) and c.80 (*A.P.S.*, ii, 360, c.15), and 1551 c.22 (*A.P.S.*, ii, 487, c.17)] as being common to most nations; this indeed shews, that our lawgivers followed these laws as an example, in framing those statutes for their reasonableness and expediency; and therefore, it may from thence be concluded, that our judges ought to direct themselves by the civil and canon laws, as a rule, where our own statutes and customs fail, or where the question, tho' concerning a feudal subject, is not decided by our feudal customs.

In such case the civil law most commonly takes place, unless we have entirely rejected it in matters of that kind. Thus, for example, it were absurd to argue from the civil law, in favour of adoption of slavery, and other matters, which are entirely abolished by universal custom of nations.

<33>

<sup>89</sup> See, e.g., the distinction of public and private law in Bankton, 1,1,54 and the rules of interpretation and the effect of statutes in Bankton, 1,1,61-70.

<sup>90</sup> Bankton, 1,4,31; see *Gray v. Dunlop*, 1954 S.L.T. (Sh. Ct.) 75 where it was held that it was not received into Scots law.

disclose all the authorities which were relied on.<sup>91</sup> Roman law might still be decisive although not applied as binding authority<sup>92</sup> but equally a Roman rule might be rejected if it was seen as unsuitable for application in Scotland.<sup>93</sup> However, by the end of the eighteenth century we have to reckon with three limiting factors affecting recourse to Roman law - first, the increasing availability of English authority on points undecided in Scotland; secondly, the perception (which might or might not be accurate) that at least in some areas such as mercantile law English law ought to be applied as persuasive authority because of the greater experience of English lawyers in dealing with new problems in the relevant area; and, thirdly, the increasing settlement of Scots law by decision or legislation, making it less necessary to refer to Roman law for guidance. So far as the last point is concerned, even where Roman law had had a hand in settling the Scots law in the first place the Scottish authorities might be referred to in preference to the relevant Roman ones if a new point developing the basic rules should arise.

Reference to English authority does not begin with Bell but probably the most familiar evidence of the existence of and preference for English authority is found in Bell's reliance on English cases in his *Commentaries*, which appeared first as a treatise on bankruptcy law in 1800 but ended as *Commentaries on the Law of Scotland and on the <34> Principles of Mercantile jurisprudence*.<sup>94</sup> Bell alleges in his preface (at viii ff.) that the progress of Scots mercantile law was hindered by the concentration of lawyers on questions of land law arising out of the forfeitures imposed on those who were convicted criminally for their support of the Jacobite risings in 1715 and 1745 and that it might have seemed better simply to adopt English mercantile law "which had already made great progress towards perfection". He himself regarded such a course as premature and he claimed that he had extracted the principles of the law merchant from the English and foreign authorities and not simply followed English cases some of which, he says (at xiii-xiv):

<sup>91</sup> See the Scottish Law Commission, *Recovery of Benefits*, vol. 2, (Background Research Papers), 19 ff., an extract from the pleadings in *Stirling v. Earl of Lauderdale* (1733) Mor. 2930, contained in SRO 228/5/2/92.

<sup>92</sup> E.g. *Sword v. Sinclair* (1771) Mor. 14241 - in sale risk passes, in principle, when the contract is concluded.

<sup>93</sup> *Allan v. Cleghorn's Creditors* (1713) Mor. 11835 - a widow had no tacit hypothec for her marriage contract provisions on analogy of the tacit hypothec to secure her dowry given to a wife by Roman law. <34>

<sup>94</sup> See Introduction by R. Black to the reprint (Edinburgh, 1990), 1 -2.



...contain so strong an infusion of common law [i.e. English Common law, not the *ius commune*] intimately blended in the judgment, that without a careful comparison of them with the great principles of jurisprudence delivered in the Roman law, and recognised in the Scottish authorities, or commented on by foreign writers of credit, there was much hazard of impairing what it was my design to clear, and of substituting, in the place of mere obscurity, corrupted doctrine and mistaken principles.

Bell hoped to bring the two systems closer together and to bring Scots law to the attention of English lawyers some of whom he had "...been mortified to find ignorant on this subject, and in no degree aware of the admirable principles and comprehensive views by which the law of Scotland is distinguished".<sup>95</sup> What is not clear is that others used English authorities with the same discrimination or that he was successful in persuading English lawyers who were not already so persuaded of the virtue of paying attention to the distinctive virtues of Scots law. Despite his close attention to English authorities Bell does still refer to Roman law both in his *Commentaries* and in his *Principles* but he does not discuss Roman law as a source in the body of either work and his view of Roman law as well as his actual use of it has to be deduced from the references made to it rather than from a programmatic statement. This task is made less easy than it might have been by the absence of any entry relating to Roman law as such in the index to either work.

Hume, Bell's predecessor in the chair of Scots law in the university of Edinburgh, does discuss the use of Roman law as a source of Scots law. In his *Lectures*, published by the Stair Society long after his death,<sup>96</sup> he refers to the usefulness of the study of Roman law as part of legal education but he also stresses (in the first volume, at 1-4) the need to know Scots law and while acknowledging the contribution of Roman law to the development of Scots law he rejects the idea that Roman law <35> is authoritative.<sup>97</sup> In his *Commentaries on the Law of Scotland respecting Crimes*, the first version of which appeared in 1797, he also rejects the authority of Roman law but, in addition, he states that, because of the wide differences between Rome and

<sup>95</sup> Preface, xiv.

<sup>96</sup> Hume, *Lectures*.

<sup>97</sup> *Ibid.*, vol. 1, 13: "...the obeisance we pay to the Civil [law] is now, and always has been, a voluntary obeisance, and matter of courtesy - such as depends, in the main, on its agreement with equity and reason, its analogy to the rest of our practice, and its suitableness to our state of things and kinds of business". Cf. also Appendix A to that volume, giving additional material derived from student notes, at 357.

Scotland in circumstances relevant to the application of criminal law,<sup>98</sup> he has not looked very frequently or extensively into Roman law except where Roman law has actually been taken into account in Scottish practice<sup>99</sup> and he has paid even less attention to modern commentators on it. He acknowledges that their observations are "just and rational" but says that they are generally "...nothing more than any man of plain sense, with a little attention to the subject, will readily, and to as good purpose, make out for himself".<sup>100</sup> On the other hand he has found that if authorities are needed the works of English lawyers are to be preferred because English practice offers a closer analogy and English writers are as good in explaining and illustrating doctrines as the writers of other countries.<sup>101</sup> Hume does look primarily to Scottish practice as illustrated not only from reported cases but from the records of the criminal courts but his preference for English persuasive authority over the persuasive authority of Roman law is significant.

In matters of private law and public law (other than criminal law, in respect of which the House of Lords had no jurisdiction), some influence from English law was almost inevitable by reason of the exercise by the House of Lords of the appellate jurisdiction which it was not explicitly granted in the Treaty and Acts of Union of 1707 but which it assumed or accepted soon after as a matter of practice.<sup>102</sup> The House of Lords had a majority of English peers and there was no requirement that a member familiar with Scots law should sit on Scottish appeals. This meant that it was unlikely that Scots law would be dealt with in Scottish appeals by judges with an intimate knowledge of that

<sup>98</sup> *Ibid.*, vol. 1, 15 and 16: "Because in any country, the frame and character of this part of its laws, has always a much closer dependence on the peculiar circumstances of the people, than the detail of its customs and regulations in most of the ordinary affairs of civil life...", adding that the law of crimes "...has a near relation to the distinctions of rank among the people, the functions of their Magistrates, their institutions and national objects, their manners and habits, their religion, their state of Government, and their position with respect to others" and in all these respects there is a difference between Rome and Scotland.

<sup>99</sup> *Ibid.*, vol. 1, 17: "For these reasons, though I have not neglected the authorities of the Roman system, in cases where I find that they have actually been regarded in our practice; yet I have not engaged in frequent or very extensive inquiries with respect to them".

<sup>100</sup> *Ibid.*, vol. 1, 17.

<sup>101</sup> *Ibid.* <36>

<sup>102</sup> See A. J. MacLean, "The 1707 Union: Scots Law and the House of Lords", (1984) 4 *Jour. Leg. Hist.* 50- 75 (= *New Perspectives in Scottish Legal History*, edd. A. Kiralfy and H. L. MacQueen (London, 1984), 50- 75) and most recently R. S. Tompson, "James Greenshields and the House of Lords: a Reappraisal" in *Legal History in the Making, cit. sup.*, n.2, 109-24. There was no appeal on criminal matters - see MacLean at 60 n.48 and Tompson, 119-20.

system. Although litigants were willing enough to take advantage of the right of appeal it is not surprising to find that little attention was paid to decisions of the House of Lords as precedents in the Court of Session in the eighteenth century.<sup>103</sup> Nevertheless the existence of the House of Lords as the ultimate appeal court was an obvious encouragement to the greater use of English law, the effects of which become apparent later. There was also a considerable body of opinion favourable to the adoption of English ideas and English law as models;<sup>104</sup> criticism of the anglicisation of Scots law and of the baneful influence of English law exercised through the House of Lords has not been the only view of the relationship between Scots and English law taken over the years. At the beginning of the nineteenth century the House of Lords was more concerned to stem the tide of litigious Scotsmen exercising their rights to approach it in the hope of obtaining a favourable decision (and meanwhile postponing execution of an adverse decree in the Court of Session) than seeking opportunity to accept cases and thereby increase its influence on the development of Scots law.<sup>105</sup>

Roman law clearly was important in the creation of Scots law but as Scots law became established with an increasing quantity of source material in the form of legislation and court decisions and with its own legal literature, both in the form of the institutional writings already referred to<sup>106</sup> and in the form of other treatises on particular topics, there was less need to look to Roman law for solutions to legal problems. Again, doctrines, principles or rules derived in whole or in part from Roman law when once incorporated into Scots law could and did take on a life of their own in which the Roman element might no longer play an essential role. For example, the so-called *conditio si institutus sine liberis decesserit*, which is read into testamentary provisions with the effect of allowing the children of a beneficiary instituted to take the provision in preference to a substitute named even if there is no express destination to the children of the institute, has its roots in Roman law. There it could be implied for the benefit of descendants of the testator. Once adopted into Scots law it was extended to the children of collateral institutes as well as to the children of descendants if it appeared that a family provision

<sup>103</sup> Tompson, *op. cit.*, at 116-17. Erskine, *Inst.*, 1,1,47 is clear that individual decisions of the House of Lords are not binding precedents.

<sup>104</sup> See N. T. Phillipson, *The Scottish Whigs, cit. sup.*, n.80, 90ff. and 177 -79.

<sup>105</sup> See Tompson, *op. cit.*, n.102, at 120ff.

<sup>106</sup> See sections III and IV above. <37>

was intended.<sup>107</sup> However, as the law developed it gradually lost contact with the Roman basis of the principle as the courts were able to refer to earlier cases rather than to the Roman texts for authority on its application and in a case in 1891<sup>108</sup> the Roman contribution was dismissed in argument as "three obscure passages in the *Corpus Iuris*". In *Farquharson v. Kelly*<sup>109</sup> the court did not apply the *conditio* in the case of an illegitimate child although some support for its application could have been found in Roman texts applying it to natural children. These Roman texts do not appear to have been cited to the court.

From the nineteenth century onwards there is also evidence that to some extent Roman law was less used because it was less well understood or where understood it was seen as a historical system rather than a living source of ideas which could still be applied even in changed circumstances. Roman law did keep a place in legal education but its relative share of attention tended to diminish as other subjects claimed a place in the teaching of law in the Scottish universities. The examination in Roman law required of intrants to the Faculty of Advocates seems to have become less rigorous in that the theses prepared were not necessarily the unaided work of the intrant and this particular part of the admission requirement was dropped in 1966.<sup>110</sup>

Evidence on the question of the competence of judges and advocates in Roman law in the nineteenth century is somewhat impressionistic but there are undoubtedly negative impressions in some cases, as in *Gowans v. Christie*<sup>111</sup> where what appear to be several citations of writers on Roman law turn out to be essentially a citation of Voet, with writers quoted by him, and where, moreover, full advantage of the arguments which might have been derived from Roman law, had it been used as well as it might have been, was not taken.<sup>112</sup> That Voet was relied on in that case is indicative of a view that the

<sup>107</sup> *Walker v. Walker* (1744) Mor. 10328; see W. M. Gordon, "Roman and Scots Law - the *conditiones si sine liberis decesserit*", 1969 *J.R.* 108-27 at 115ff.

<sup>108</sup> *Hall v. Hall* (1891) 18 R. 690 at 691.

<sup>109</sup> (1900) 2 F. 863; the actual decision, which is hardly surprising at its date, is now superseded by legislation equalising the rights of legitimate and illegitimate children for almost all purposes - the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (c.70) and the Law Reform (Parent and Child) (Scotland) Act 1986 (c.9).

<sup>110</sup> D. A. O. Edward, "Faculty of Advocates. Regulations as to Intrants", 1968 *S.L.T.* (News) 181-3 at 181.

<sup>111</sup> (1871) 9 M. 485 and (1873) 11 M. (H.L.) 1.

<sup>112</sup> See W. M. Gordon, "Roman Law in a Nineteenth Century Scottish case: *Gowans v. Christie*" in *Sodalitas. Scritti in onore di Antonio Guarino*, ed. V. Giuffrè. 10 vols. (Naples,

Roman law to be looked at was the law as understood at a time when Roman law was having considerable influence on the development of Scots law. The opinion that it is Roman law as understood at the time of the institutional writers which alone is relevant when Roman law is looked at in modern times was explicitly stated by Lord President Clyde in the more recent case of *McDonald v. Provan (of Scotland St.) Ltd.*<sup>113</sup> But in fact there has been no clear policy with regard to the citation of Roman law as persuasive authority in cases from the nineteenth and twentieth centuries. Sometimes only texts are cited;<sup>114</sup> sometimes there is a range of writers from medieval times onwards;<sup>115</sup> sometimes modern textbooks are cited, using "modern" here to mean contemporary, at least in terms of use, with the case in which the citation appears;<sup>116</sup> sometimes writers contemporary with the Scottish institutional writers of the seventeenth and eighteenth centuries, as in the cases mentioned above and sometimes a range of writers both modern and contemporary with the institutional writers.<sup>117</sup> There seems to have been no clear consciousness that Roman law as applied in Roman times is one thing and Roman law as an influence on the development of western European legal thought is another; that the Roman law applied in Rome and the Roman empire itself has a history of over a thousand years and Roman law scholarship has approached that history in various ways; that there have been various approaches to Roman law since Justinian; and that inspiration can be derived from a range of material all of which can claim some relevance to the question how a particular question should be decided. Sometimes it may be suspected that judges have been happy to find reasons not to go into Roman law and explore the range of material available.<sup>118</sup>

1984-85), vol. 7, 3371-87. <38>

<sup>113</sup> 1960 S.L.T. 231.

<sup>114</sup> See e.g. *Douglas' Executors* (1869) 7 M. 504; *Magistrates of Kilmarnock v. Mather* (1869) 7 M. 548.

<sup>115</sup> See e.g. *Thompson v. Whitehead* (1862) 24 D. 331.

<sup>116</sup> See e.g. *Waygood & Co. v. Bennie* (1885) 12 R. 651; *Glasgow Corporation v. Lord Advocate* 1959 S.C. 203.

<sup>117</sup> See e.g. *Sloans Dairies Ltd. v. Glasgow Corporation* 1977 S.C. 223, where the modern authors Moyle and de Zulueta were cited along with Voet and Pothier.

<sup>118</sup> See *Sloans Dairies, cit., per* L. J.-C. Wheatley at 235: "I have been able to [reach my conclusion] without a detailed examination of the writings of the civilians and the commentators thereon and the works of the institutional writers and textbooks which were so extensively canvassed before us".

The argument that Roman law is no longer of the same service as in earlier periods of Scots law has also been used to reduce the scope for reliance on Roman law. It has been said that Roman law is not as well adapted to an industrial as to an agricultural society<sup>119</sup> and it can be argued that English law has become more appropriate as a source of inspiration. English law is also the system with which most of the judges in the House of Lords are familiar and it is to the House of Lords that civil appeals may ultimately be brought (where no reference to the European Court of Justice is involved); those judges are likely to be more receptive to arguments presented in terms with which they are familiar. The relevance of this last consideration was apparent in *Gowans v. Christie*<sup>120</sup> where the judges in the House of Lords were clearly uneasy with the civilian concepts and terminology used in argument, although it must be said that this sort of reaction has become uncommon nowadays.<sup>121</sup> It has also been argued that it is now too late to import wholly new ideas from Roman law, as in *Drummond's Judicial Factor v. HM. Advocate*,<sup>122</sup> where the use of the survivorship presumptions of Roman law in a case in which two persons who had left reciprocal wills had been killed simultaneously was rejected, leaving the law to be settled considerably later by legislation.<sup>123</sup> All this has led to a decline in the continuing influence of Roman law, without necessarily diminishing the actual importance of keeping contact with the civilian elements of the law.

## V. The Present Day

Roman law is still referred to in twentieth century cases but it has not been decisive in any of those in which it has been cited. It has been used rather to support a decision in areas in which Roman law has already been used in the past, as for example in *Sloans Dairies*.<sup>124</sup> Examination in the Roman law of property and obligations is still required of those entering the Faculty of Advocates; it is not, however, required of those solicitors who are permitted to

<sup>119</sup> P. G. Stein, "The Influence of Roman Law", *cit. sup.*, n.56, 243 (= *Historical Essays*, *cit. sup.*, n.11, 357). <39>

<sup>120</sup> *Cit. sup.*, n.111.

<sup>121</sup> Cf. *Will's Trs. v. Cairngorm Canoeing and Sailing School Ltd* 1976 S.C.(H.L.) 30.

<sup>122</sup> 1944 S.C. 298.

<sup>123</sup> Succession (Scotland) Act 1964 (c.41), s.31.

<sup>124</sup> *Cit. sup.*, n.117. <40>

plead in the Court of Session and the High Court of Justiciary under the provisions for extending rights of audience contained in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 s.24. Only Aberdeen of the Scottish universities which teach law has kept a compulsory course in Civil law for all students and that course was shortened in 1990-91. As an option Roman law is under pressure from other options in the law curriculum perceived by some students and their advisers as more relevant to practice and, in particular, to practice as solicitors. The Scottish Law Commission tends to look to modern systems and especially to Common law jurisdictions for comparative material when considering reform. The common ground which Roman law and, more particularly, the Civil law could offer to European lawyers is not at present appreciated as much as the common ground of the latest directive or regulation from the European Union<sup>125</sup> but it has also to be said that Roman law is not universally appreciated as a foundation of legal studies even in civilian jurisdictions. There remains the hope that a more enlightened view will ultimately prevail.

#### Addendum

*To footnote 1:* A further two volumes of Professor Walker's *History* covering the seventeenth and eighteenth centuries appeared in 1996 and 1998 respectively. For his tendency to underestimate civil law influence in Scots law see W.M. Gordon, 'The Civil Law in Scotland' (2001) 5 Edinburgh L.R. 1-15, at pp. 1-2.

<sup>125</sup> See, however, D. A. O. Edward, "Scots law and Six Heresies", (1994) 39 *J.L.S.S.* 159-62 at 161 for a warning against exaggeration of the importance of the common civilian heritage as a bridge between Scots law and European law.