Roman Law in Britain

Robin Evans-Jones, *University of Aberdeen*

This is the text of the paper which I delivered before Georg Wolf and a few stragglers from one of the dinners on the weekend which he organised to celebrate his retirement. The paper commenced at half past one in the morning. A few hours later Georg said that he understood the significance of the case *Cantiere San Rocco* but not that of *Donoghue v. Stevenson*. Since

Donoghue is far more important it is clearly incumbent upon me to try to put my earlier failing right. I do so in appreciation of the inspirational role which Georg Wolf played in my own education in Roman law. In his teaching a prime concern was the identification of the levels of thought deriving from the influence of different hands on the classical texts preserved in the Digest. In this paper we see, firstly, how classical Roman law can become highly suffused through exposure to a more unusual influence: English law. We also see how it has nevertheless proved, on occasion, to be inspirational for English law and why the fact of that influence has sometimes had to be suppressed. The bridge between Roman law and English law is provided by Scotland.

I. Introduction

At a certain stage of their histories Scottish and English private law were very different in character. Scots law was strongly influenced by the Civilian tradition through the same process of legal development common to much of continental Europe called "the reception of Roman law". This was a movement which, it is generally thought, had little influence on English law[1]. The Common law and the Civil law traditions, as represented by English and Scots private law, operated in close geographical proximity before 1707 and there was <84> certainly a degree of interchange between the two cultures during this period[2]. The Treaty of Union of 1707 brought the Common law and Civil law into a more complex proximity within the single union state of the United Kingdom of Great Britain comprising, most prominently, the different nations of England and Scotland. *Ex facie* the distinctive nature of Scots private law was protected by the recognition of Scotland as a separate legal jurisdiction from England by the Union[3]. However, in a recent study I showed how, especially since the beginning of the nineteenth century, English law has been "received" into Scotland as part of a gradual development

[1] For a recent assessment see *W M. Gordon*, 'A Comparison of the Influence of Roman Law in England and Scotland' in: The Civilian Tradition and Scots Law, edd. D. Carey Miller/R. Zimmermann (Berlin 1997) 135. On the general question of the extent to which English law has been influenced by "Roman law", cf., most recently *R. Zimmermann*, 'Savigny's Legacy: Legal History, Comparative Law and the Emergence of a European Legal Science', 112 (1996) L.Q.R. 576 at 587 ff. <84>

[2] See *W.D.H. Sellar*, 'The Resilience of the Scottish Common Law' in: The Civilian Tradition and Scots Law, edd. D. Carey Miller/R. Zimmermann (Berlin 1997) 225 at p.149.

[3] Cap. 7, article 19.

towards the achievement of one law, or at least similar legal results, in English and Scottish private law[4]. The existence of two distinct jurisdictions within what had developed into the politically centralised single nation state of Britain understandably led to pressure to assimilate English and Scots law[5]. The co-existence of two distinct legal traditions in England and Scotland must also have appeared odd in the light of the growing perception amongst many sections of society that Britain was a cultural unity bound together by a common language and traditions[6].

The great difference in the stature of England and Scotland within the Union made it inevitable that development towards legal unity was achieved, in the main, by the assimilation of Scots law with English law. A result was that Scots private law gradually lost many of its "Civilian" characteristics. Paradoxically a model for the convergence of Scots and English law was in all likelihood provided by the Civilian tradition. Legal unity was required of the new European nation states that were being forged during the nineteenth century. Codification, which was the principal means by which this unity was brought about, provided a clear example of how different legal traditions could be synthesised for the purposes of new political groupings. <85>

The development of Scots law towards English law can be typified as one of "drift" because it has come about gradually through "reception". "Reception" is not in essence a deliberative process. Its distinctive feature is that it happens because powerful members of society, normally lawyers, for a range of reasons, either partly or wholly, form a preference for a legal tradition which is not their own. In this study I will show that, notwithstanding the general direction of development of Scots law towards English law, there has been a number of occasions this century when English law has actively founded upon Scots law to enable it to take important steps forward. The examples which I examine concern areas where Scots law was once based, or

[4] 'Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law', 114 (1998) L.Q.R. 228. The fact that there was a drift of Scots law towards English law is now becoming more widely accepted; see, most recently, *H. MacQueen /W.D.H. Sellar*, 'History of Negligence in Scots Law', Northern Cross (OUP), edd. K.G.C. Reid/R. Zimmermann (forthcoming) who pose the following important question: "How does one explain the apparent shift in orientation of Scots law in the course of the nineteenth and twentieth centuries from the Civil to the Common law?"

[5] See *R. Evans-Jones*, *op. cit*. n. 4.

[6] As regards this perception amongst Scots lawyers, see *Alan Rodger*, 'Thinking about Scots Law', (1996) 1 Edinburgh Law Rev. 3. See also *idem*, 'The Codification of Commercial Law in Victorian Britain', 108 (1992) L.Q.R. 570. <85>

was at least perceived to have been based, on Civilian principles. This is a point worth stressing because it presents something of a puzzle. Scots law, because of "reception" in the areas that will be examined had in fact already adopted English law by the time of the latter's re-orientation. English law then founded upon the Civilian principles that had earlier been part of Scots law because they were seen to produce better results than the contemporary English law now in force in both England and Scotland.

The central role in the practice of drawing on Scots law, and through it, on the Civil law, for the benefit of England has been played by the House of Lords acting as the court of final appeal in private law matters for both jurisdictions. Some judges of the House of Lords clearly saw the practical utility in founding sometimes on the traditions of both Scotland and England in the formation of one law for Britain. Provided one accepts the desirability of the end result — one law for one Britain — this is entirely sensible. The United Kingdom has an extraordinarily rich legal heritage drawn from both the Common law and the Civil law on which to build a new law for Britain. However, the House of Lords does not have the legislative power which makes what is often the forced legal synthesis of codification possible. I will show that a fundamental difficulty confronting the approach of the House of Lords in this matter has been the strict interpretation of what constitutes a binding precedent in English law.

I will examine three decisions of the House of Lords which arose in the following chronology: *Cantiere San Rocco v. Clyde Shipbuilding and Engineering Co. Ltd* (1923)[7]; *Donoghue v. Stevenson* (1932)[8] and *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* (1943)[9]. *Cantiere* and *Fibrosa* will be discussed together because they concern the same subject matter. A central figure in the discussion is Lord Atkin. He had shown a keen interest in <86> the difficulties which *Cantiere* was concerned to resolve[10]. With Lord Macmillan he was also a member of the Judicial Committee of the House of Lords that heard both *Donoghue* and *Fibrosa*. The decisions in *Donoghue* and *Fibrosa* effected major changes in English law but the debt to the Civil law that these decisions owed has never been acknowledged. The reason, I will argue, in essence concerns the problem of precedent referred to

[7] 1923 S.C. 725; 1923 S.C. (H.L.) 105.
[8] 1929 S.C. 461; 1932 S.C. (H.L.) 31; [1932] A.C. 562.
[9] [1943] A.C. 32. <85>
[10] *Russkoe Obscheslvo D'Lia Izgslovlenia Snariadov L'Voennick Pripassov v. John Stirk and Sons Ltd*, (1922) 10 Ll. L. Rep. 214 at p. 216.

above. If either *Fibrosa* or *Donoghue* were to have been decided expressly on Scottish authorities, neither would have operated immediately as a source of English law and as a precedent for the British Empire beyond which was Lord Atkin's aim. That this would have been the case was a lesson learnt by Lord Atkin from *Cantiere*.

II. Cantiere San Rocco v. Clyde Shipbuilding and Engineering Co. Ltd

The case concerned a sale of marine engines to be manufactured and supplied by the defenders. Payment of the price was to be made in instalments; the first on signature of the contract and the remainder at specified stages in the construction of the engines. After payment of the first instalment, but before construction of the engines had commenced, the outbreak of war rendered further performance of the contract legally impossible. The point at issue was whether the pursuers could recover the sum that they had paid as the first instalment. The issue, though seemingly simple, was one which had to be resolved by the House of Lords.

It was accepted at all levels of the appeal that had the contract been void *ab initio*, or that had the performance failed as a result of the fault of the sellers, the pursuers would have been entitled to recover what they had paid, provided in the latter case that they had chosen first to rescind the contract. However, the non-performance of the contract was not attributable to the sellers' fault and the effect of the outbreak of war was merely to discharge the parties from further performance of their duties and not to render the contract void. This being the case, one approach to the issue of recoverability of the first instalment of the price was that everything done in fulfilment of the contract up to the moment of frustration was rightly done. In effect there was said to be a general rule that losses arising from performance of a contract up to the moment of frustration should lie where they fall. The main authority for this approach was *Chandler v. Webster*[11], one of the so-called "Coronation" cases of English law. A house owner let seats to view a Coronation procession for a sum of £141 which was payable before the procession. £100 was paid in advance and £41 was still out- <87> standing when the procession was cancelled due to the King's illness. The parties sued each other, the house owner for the balance of £41 and the other party for recovery of his £100. The Court of Appeal held that the house owner was entitled to retain what he had

[11] See also esp. *Krell v. Henry*, [1903] 2 K.B. 740. <87>

received. Consistent with the reasoning that this payment was "rightly" made in fulfilment of an existing obligation, it was also held that the house owner was entitled to the balance of £41 because the obligation in respect of this sum was also referable to the time before the frustration and therefore still properly exigible.

When *Cantiere* was heard on appeal before the Court of Session recovery of the price was denied mainly on the authority of the "Coronation" cases. The alternative approach to the issue of recoverability found in the pleadings, which was subsequently to be approved by the House of Lords, was that the prepayment was recoverable in principle on the grounds that it had been given for a consideration that had failed. The inspiration for recoverability was found in the *condictio causa data causa non secuta (condictio c. d.)* of Roman and Scots law.

III. Further Analysis of the "Coronation" Cases

Frustration does not annul a contract but merely operates to terminate future performance. In such circumstances, according to the "Coronation" cases, losses should be allowed to lie where they fall at the moment of frustration. This approach did not preclude re-adjustment of the relations of the parties. The critical enquiry concerned what the parties had performed in fulfilment of obligations that were properly enforceable up to the moment of frustration. Thus if, by chance, P had paid a sum in advance which was not in fact exigible until after the frustrating event, he could claim it back. The approach of the courts appears to have been one of allocation of risk under a valid, albeit unenforceable, contract. The result was harsh in the circumstances where, for example, P had agreed to pay the full price in advance for the manufacture of certain goods since he would lose the money without being entitled to the goods. However, it was open to him either to insure or to provide for an alternative allocation of losses expressly in the contract.

We should note that although "total failure of consideration" appears as a concept in the pleadings in the "Coronation" cases, very little indeed is said about it in the judgments. The emphasis, in what is regarded as the *locus classicus* for the approach of the "Coronation" cases[12], is that the validity of the contract excluded a claim for "total failure of consideration". The reasoning was that, if the contract still subsists, regulation of the relationship

[12] Per *Collins M. R.* at p. 499. <88>

of the par- <88> ties is achieved by reference to the contract and not by reference to the law of restitution[13]. Thus Collins M. R. observed in *Chandler*[14]:

> the doctrine of failure of consideration does not apply. The rule adopted by the Courts in such cases is I think to some extent an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be.

IV. Further Analysis of Cantiere

The cause of action expressed by the *condictio c. d*. lies within the law of unjustified enrichment. Thus *Cantiere* differed from the "Coronation" cases in the fundamental respect that it established a claim for unjustified enrichment on the grounds of failure of consideration where a contract had been frustrated. *Cantiere* also cleared up doubts concerning the nature of the consideration in a reciprocal contract and the circumstances in which its failure was "total".

The foundation of the pursuer's claim in *Cantiere* was the *condictio c. d*. of Roman law. This provides a claim where something is given for a *causa* that fails. It was assumed by the House of Lords that the failure of *causa* was no different from a failure of consideration. As I will show below, the House of Lords' understanding of the *condictio c. d.* was not fully consistent with either Roman or Scots law. It was certainly the claim of English law concerning total failure of consideration that was partly the model on which the House of Lords understood the *condictio*. Thus, when dealing with the *condictio c. d*., Lord Shaw was concerned, for example, to demonstrate that the consideration had "entirely" failed[15]. The failure of "consideration" was seen to consist of the non-supply of the engines, the actual *supply* of the engines being the reciprocation for which the buyer had paid the price[16].

[13] This is the approach adopted by the House of Lords in the recent Scottish Appeal, *Dollar Land (Cumbernauld) Ltd v. CIN Properties Ltd,* 1998 SLT 992 with the difference that on this occasion the relationship between the parties was expressly regulated by the terms of the contract. See further, *H. MacQueen*, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective', 1997 Acta Juridica 176.

[14] At p. 499.

[15] At p.117.

[16] At p. 117.

Therefore price and *res* were regarded as the reciprocal considerations within a normal contract of sale.

The House of Lords was of the view that, at least on the facts before them, it was not possible to split up the consideration[17] by attributing part of it to the signing of the contract and the remainder to the delivery of the *res*. Thus, each party was seen to perform in consideration of the full performance by the other <89> party. Any difficulties concerning the coincidence between "frustration" and "(total) failure of consideration" were thereby resolved. Frustration of a sale which has not been fully performed in respect of the payment of price and delivery of the *res* will normally give rise to a claim of (total) failure of consideration since anything short of full performance in these respects is normally a total failure.

The effect of the decision in *Cantiere* was to introduce a rule of general application to frustrated contracts in Scots law that what is transferred in fulfilment of the contract is recoverable subject to any counter-claim by the other party for expenses which he had incurred in the performance of his side of the bargain. Instead of following the general rule of contemporary English law that losses should be left to lie where they fall, the House of Lords in *Cantiere* applied the law of unjustified enrichment to strike a balance between the parties. It was, and remains, unclear from the terms of the decision whether this balance was to be struck strictly according to the principles of "enrichment" or whether the first defender was entitled to counter-claim for losses which he had incurred even if the other party had not been enriched thereby. The general rule of *rei interitus* that *res perit domino* was seen to be inapplicable to a case of this kind because no *res* had ever come into existence to which risk could attach.

V. Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd

It was twenty years before the House of Lords was provided with the opportunity to bring English law into conformity with Scots law as expressed in its decision in *Cantiere*. As Lord Macmillan observed in *Fibrosa* "The mills of the law grind slowly"[18]. The facts of *Fibrosa* were similar to those of *Cantiere*. A contract of sale was concluded for the supply of machinery. As required, part of the price had been paid in advance before the contract was

[17] Per *Lord Shaw* at p. 117. <89>
[18] At p. 58. <90>

frustrated by the outbreak of war. At issue was whether the advance payment could be recovered or not.

The decision of the House of Lords in *Cantiere* had a very significant influence on *Fibrosa*. *Cantiere* regulated the interests of parties to a frustrated contract by reference to a claim in the law of unjustified enrichment effectively on the grounds of total failure of consideration. The availability of this claim established the principle of recoverability in such circumstances which broke apart the approach represented by the "Coronation" cases which *Fibrosa* overruled. <90>

Whereas "failure of consideration" was barely mentioned in the judgments in the "Coronation" cases, it was the essential factor on which the decision in *Fibrosa* was made to turn. In approaching the case from this point of view *Fibrosa* had to confront a central problem of definition. A considerable degree of uncertainty was apparent in the "Coronation" cases and in *Cantiere*, when it was before the Court of Session, as to what constituted the consideration for payment. The problem was that in English law "consideration" is a term which has different meanings depending on whether it is used in a contractual or restitutionary sense. Viscount Simon in *Fibrosa* distinguished these meanings in the following manner"[19]:

... in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise ...:

The "Coronation" cases were seen to have confused these meanings. By excluding a claim for total failure of consideration because of the validity of the contract they ascribed the consideration to the promise and not to its performance. The "factual" conception of the restitutionary meaning of failure of consideration as dependent on the performance of the promise is, arguably, another level on which *Cantiere* influenced *Fibrosa*. As stated, according to the House of Lords in *Cantiere* the price was paid for the *supply* of the engines. That this conclusion was reached from an understanding of the operation of the *condictio c. d.* in Roman law, albeit accommodated to the requirement of English law that the failure of consideration must be "total", is made clear by Lord Shaw[20]:

[19] At p. 48.
[20] At p.117. <91>

> The consideration as a whole stands with reference to the price and every part of the price. It is an admitted fact in the case that that consideration has entirely failed. Therefore, this, as I say, would be a typical case of restitution under the Roman law and one for the application of the maxim *causa data causa non secuta*. The *condictio* under that head would have been, in my humble opinion, plainly applicable. If not applicable to this and to similar cases of outstanding simplicity, then the whole chapter of the Roman law devoted to that *condictio* need never have been written.

The significant feature of the *condictio c. d*. is its formulation in terms of "*dare*". *Dare* emphasises the failure of the actual *performance* of the bargain because, within a sale for example, it focuses, not on the existence of the promise, but on its execution; the price is *given* for the consideration of the object of the sale which is then not forthcoming. <91>

By understanding the *condictio c. d*. as it did, the House of Lords in *Cantiere* found the justification for the application of a claim of unjustified enrichment to frustrated contracts on the basis of failure of consideration. In terms of its use of unjustified enrichment (restitution) in this context and its principal result, *Cantiere* was the model for *Fibrosa*. The importance of this change in conception is observed by Goff and Jones[21]:

> the so-called rule in *Chandler v. Webster*, rested on the misconception that there could be no total failure of consideration unless the contract was void *ab initio*. Severely criticised by judge and jurist, the fallacy underlying *Chandler v. Webster* was exposed in *Fibrosa.*

VI. Roman Law and Scots Law Misunderstood

Roman law was seen to have allowed a claim of unjustified enrichment in the form of a *condictio c. d*. on frustration of a contract of sale. However, the House of Lords misconstrued the operation of the *condictio c. d*. both in Roman law and Scots law[22]. The essential point is that this claim applies only *outwith* contract. Roman law recognised a *numerus clausus* of agreements as contracts. One difficulty which this created was what to do when one party

[21] The Law of Restitution (4th ed., London 1993) 407 f.

[22] See *W. W. Buckland*, '*Casus* and Frustration in Roman Law and Common Law', (1932-3) 46 Harvard L.R. 128; *R. Evans-Jones*, 'Unjust Enrichment, Contract and the Third Reception of Roman Law in Scotland', (1993) 109 L.Q.R. 663; *G.D. MacCormack*, 'The *Condictio Causa Data Causa Non Secuta*', in: The Civil Law Tradition in Scotland, ed. R. Evans-Jones (Stair Society 1995) 253.

had transferred something under an agreement that was not binding as a contract and the other party then refused to perform his part of the bargain. Since the counter-performance was unenforceable, the first party was allowed to recover what he had transferred with the *condictio c. d*. In Scots law the function of the *condictio c. d*. is still basically the same[23]. There is a penumbra of agreements which, although perfectly legal, are unenforceable as contracts notwithstanding the acceptance by modern law of the principle that all agreements seriously intended to have legal effect should be recognised as contracts *(pacta servanda sunt)*. It is within this narrow zone that the *condictio c. d*. applies. For example, P sets you up as a dentist provided you marry his son. Having taken his money you then think better of the marriage. P cannot insist that you marry his son or claim damages for your repudiation but he is entitled to recover what he gave you. <92>

The *condictio c. d*., properly understood, simply cannot operate properly within the context of valid contracts. In the Civilian tradition a party to a valid contract performs his obligations, not to receive the reciprocation promised by the other party, but to discharge his obligations under the contract. Thus, when the buyer paid the price in *Cantiere*, because he thereby discharged his obligation to pay, the *causa* was in fact *secuta*! In other words, the House of Lords applied the *condictio c. d*. to facts to which, by definition, it was inapplicable. It is dangerous to think of the *condictio c. d*. as a claim to recover what is given for a "consideration" that fails because of the confusion which this engenders with contractual consideration. Lord Shaw in *Cantiere* relied heavily on H.J. Roby's analysis of the *condictio c. d*. in Roman law[24]. Roby speaks of this claim as concerning what was given for a "purpose" that failed. A further interesting feature of *Cantiere* is how Lord Shaw slips from the language of "purpose" to "consideration". This is not the context in which to examine the problems that the introduction by the House of Lords of the *condictio c. d*. into the field of contract has caused in Scots law. Suffice it to say that they remain serious[25].

[23] See *R. Evans-Jones*, 'The Claim to Recover what was Given for a Lawful Purpose Outwith Contract that Fails', 1997 Acta Juridica 139. <92>

[24] Lord Shaw and Roby were friends; see *A. Rodger*, 'The Use of the Civil Law in Scottish Courts', in: The Civilian Tradition and Scots Law, edd. D. Carey Miller/R. Zimmermann (Berlin 1997) 225 at p. 228.

[25] See esp. *J.A. Dieckmann and R. Evans-Jones*, 'The Dark Side of *Connelly v. Simpson*', 1995 J.R. 90; *R. Evans-Jones*, 'The Claim to Recover what was Transferred for a Lawful Purpose Outwith Contract that Fails', 1997 Acta Juridica 139.

VII. A Restitutionary Response to Frustration of Contract

Scots and English law drew upon the model of Roman law in its perceived use of the law of unjustified enrichment in cases of frustration. Thereby the principle of recoverability of benefits was established. However, the further consequences of the restitutionary approach were not worked out. *Fibrosa* is particularly surprising in this regard. Differently from the position adopted in *Cantiere*, it was stated that the sellers in *Fibrosa* were not entitled to set-off the expenses which they had incurred in the performance of their contract[26]. It seems, therefore, that the harsh consequence for the buyer who had paid the full price in advance resulting from the rules expressed in the "Coronation" cases was replaced in *Fibrosa* by an equally harsh result for the seller who had incurred expense in preparation of the performance of the contract. It is likely that this result was seen to be supportable only because it was known by the time of the decision in *Fibrosa* that a new statutory regime would shortly be introduced governing frustration of contracts in English law. Given the back-<93> ground against which it was enacted it is understandable why the Law Reform (Frustrated Contracts) Act 1943 introduced "a scheme of mutual restitution" between the parties to a frustrated contract. The statute solves one of the main difficulties arising from *Fibrosa* by permitting the defendant, where it is deemed to be just, to set-off (or recover) expenses which he had incurred in the performance of the contract[27]. In Scots law, which is still governed by *Cantiere*, confusion exists concerning the criteria to be observed in the assessment of the measure of recovery. If, given the nature of the *condictio c. d.*, a strict "enrichment" approach is adopted the payee will not be entitled to set-off the expenditure which he had incurred if it did not enrich the other party[28]. For this reason, although there is strong contrary authority[29], it has been argued that, instead of "enrichment", principles of equity should be observed in the context of frustrated contracts[30].

The regulation of the consequences of frustrated contract by means of "mutual restitution" is now generally regarded as flawed in certain important

[26] Deriving from the logic that there had been a "total" failure of consideration. <93>

[27] Section 1(2).

[28] The defence of change of position is undeveloped in this context.

[29] See *Fibrosa* per *Lord Atkin* at p. 54.

[30] *Lord Cooper*, 'Frustration in Scots Law', (1946) 28 Journal of Comparative Legislation, Part III, 1; reproduced in: Selected Papers 1922-1954 (1957) 124.

respects[31]. Modern statutory provisions have generally preferred an approach which provides for a fair apportionment of losses between the parties[32]. This differs even from the "equitable" approach to *Cantiere*[33]. Thus, it seems that the restitutionary response to frustrated contracts, which was initiated in Britain by *Cantiere*, is now perceived to be unsatisfactory. One recent commentator speaks of its "grave deficiencies"[34]. This takes us back full circle to the "Coronation" cases. The solution to the "Coronation" cases could have been to change the content of the rules governing the allocation of losses under the contract. However one set of inflexible rules may thereby merely have been replaced by another. The real need was to establish a means within the law of contract whereby such adjustments between the parties as was fair in all the circumstances of the case could be made. The application of a principle of *bona* <94> *fides* comes to mind as one possible option. It was precisely the lack of flexibility in the law of contract of both Scotland and England which was solved in the context of frustration by reference to the law of unjustified enrichment. It imports a different set of rules which were used to achieve results which conformed with what was seen to be just in the field of contract. The witness of the fact that the essence of the problem was not addressed by this approach is that the restitutionary regimes governing frustration of contract in Britain now do not find widespread favour.

VIII. Some General Observations: One Law for Britain

Cantiere was a Scottish appeal. At first instance it was held that the first payment was recoverable. On appeal in the Court of Session this decision was reversed, but before the House of Lords the right of recovery was affirmed once more. The reasoning adopted to justify recovery or non-recovery at each stage of the appeal relied either on the authority of the "Coronation" cases or upon the *condictio c. d*.

[31] See the instructive study by *E. McKendrick*, 'Frustration, Restitution, and Loss Apportionment', in: Essays on the Law of Restitution, ed. A. Burrows (Oxford 1991) 147.

[32] The British Columbian Frustrated Contracts Act 1974, the New South Wales Frustrated Contracts Act 1978, and the South Australian Frustrated Contracts Act 1988.

[33] *McKendrik*, *op. cit*. at p. 166. The payee's claim "does not hinge upon the fortuitous circumstance of the making of a prepayment by the payer; the payee can bring his expenditure into account and his claim is not limited by the ceiling of the payer's prepayment".

[34] *McKendrik*, *op. cit*. at p. 170. <94>

The House of Lords saw there to be a fundamental difference of principle between English law and Scots law, at least when the latter was properly understood[35], concerning the issue of recoverability. Contemporary English law was seen to be regulated by the "Coronation" cases and the result of non-recoverability which they imported was, and indeed had been, regarded as highly unsatisfactory for some time in England before the decision of the House of Lords in *Cantiere*. Lord Shaw observed[36]:

> I am not surprised that there is in high legal quarters a feeling both of uneasiness and of disrelish as to the English rule, and that that feeling has found expression. I cite, for instance, the language of Sir Frederick Pollock in his work on Contracts (8th ed.), p. 440, in which, summing up the English decisions, he observes: — "The contract is not avoided when the failure of condition assumed as its foundation is ascertained, but all outstanding obligations under it, and those only, are discharged; that is, payments already made cannot be recovered back, and any payment actually accrued due is still recoverable. Only the House of Lords can review these decisions, but they are not universally approved in the profession".

Although the contemporary English law was regarded as unsatisfactory by English lawyers, it was precisely due to the influence of English law that recovery had been denied when *Cantiere* was heard on appeal in the Court of Session. Lord Shaw is also instructive in this regard[37]: <95>

> I cannot avoid feeling that any Scotch Judge would have decided this case in favour of the appellants on principles well known to the Roman law, and also for at least over two centuries embodied in the law of Scotland, had it not been for the intrusion of ideas derived from English law, and from principles which are neither Scotch nor Roman, and which, as I shall show, are viewed with uncertainty, even in England itself.

Later Lord Shaw is more forceful concerning his own view of the merits of contemporary English law. Clearly with the "Coronation" cases in mind he said[38]:

> Counsel was right; the "something for nothing" doctrine goes the whole length. This result under other systems of jurisprudence might be viewed as monstrous; but in England, it was contended, this is the law ...

[35] As not being bound by the "Coronation" cases.
[36] At p.121.
[37] At p. 116. <95>
[38] At p. 121.

Before the decision of the House of Lords in *Cantiere*, the same position had been reached in Scotland as in England concerning the recovery of payments made in fulfilment of a contract which was subsequently frustrated. Scots law had adopted English law on this point. The position of English law had been regarded as unsatisfactory by English lawyers for some time before the Scottish appeal reached the House of Lords. The House of Lords relied upon Roman law to reach a result in Scotland that was both different from the contemporary English law and consistent with what would have been regarded as satisfactory in England had the case been an English appeal. More precisely, since the *condictio c. d*., as conceived by the House of Lords, was identical to "total failure of consideration" the *condictio c. d*. was really a contrived bridge over which to draw the cause of action of English law into the field of frustration. Although, as a matter of fact, the English "Coronation" authorities were followed by the Court of Session when it reached its decision in *Cantiere*, they were not regarded as binding precedents for Scots law by the House of Lords.

The House of Lords in *Cantiere* approved the foundation of the pursuer's claim on the *condictio c. d*. of Roman law. Quite correctly the Committee also regarded Roman law as a source of Scots law only to the extent that it had been "received" as part of Scots law. Nevertheless classical Roman law and Scots law were regarded as essentially the same in this context. Again I refer to Lord Shaw who, when analysing the nature of the *condictio c. d*., said[39]:

> I am happy to cite, in connexion with this topic, the views of that great scholar and latinist, Mr Roby. He deals in his observations in the fifth chapter of his Roman Private Law, book V., chapter 3, on *Condictiones*, with this one. ... And upon the substance of the matter I desire to quote the quite remarkable exposition of the condiction which Mr Roby gives, remarkable because it expresses not only the true foundation, but almost the precise limits and extent of the principle involved; and it <96> does so in language which is, according to my view, entirely consistent with the development of the doctrine in the law of Scotland ...

Besides a fairly extensive discussion of Roman law, with references to jurists like Ulpian, Africanus, Celsus and Paul, the judgments in the House of Lords are remarkable for their strong reliance on the works of the Scottish institutional writers like Stair, Bankton and Erskine. A decision drawn from Roman law and the Scottish institutional writers could not, as it turned out,

[39] At p. 117. <96>

possibly act as an authority for English law even although, if Lord Shaw is to be believed, the result achieved in *Cantiere* was precisely what was desired for English law by their leading lawyers of the time. As an ancillary point it is also worth noting that the prospect of a different result being achieved in Scots law from English law was regarded by the House of Lords as undesirable as a matter of principle. The view appears to have been that, especially perhaps in commercial matters, it was preferable to have one law governing Britain. Thus Viscount Finlay observed[40]:

> It would be unfortunate that in matters of this kind, which may, as here, affect foreigners, the results should be different in the two parts of Great Britain.

Summary

It is likely that the *condictio c. d*. of Roman law was seen by the House of Lords as the means to achieve a better result for both Scots and English law in the regulation of frustrated contracts. The *condictio c. d*. of Roman law had been perceived as essentially the same claim as that of English law to recover what was paid for a consideration that had totally failed, with the difference that the former was seen to be available following frustration of contract whereas the latter, because of the doctrine enshrined in the "Coronation" cases, was not. The application of the *condictio* to cases of frustration in *Cantiere* was attributed to Roman law which in turn was seen to determine the proper scope of that claim in Scots law and the similar claim of English law. The desire immediately to achieve a different and better result in both Scotland and England was, however, defeated by the character of the judgments in *Cantiere* which emphasised the Civilian origins of the doctrine. Generally, Lord Shaw was regarded as having over-stated his case. Lord Chancellor Simon's displeasure is evident when in *Fibrosa* he observed that "Lord Dunedin's restraint was not imitated by Lord Shaw"[41]. The House of Lords had to wait twenty years after *Cantiere* before it was able to achieve a uniform result for both Scotland and England in its *Fibrosa* decision. *Cantiere*, I suggest, was the model for *Fibrosa*. <97>

The difficulties in using *Cantiere* as an authority in English law will certainly have been observed by Lord Atkin who had occasion to deal with

[40] At p.115.
[41] At p. 44. <97>

cases on frustration when sitting in the Court of Appeal[42]. When the Scottish appeal of *Donoghue v. Stevenson* came before the House of Lords he saw it as an opportunity immediately to extricate English law from the unsatisfactory state in which he found one aspect of the law of negligence. A hurdle that he had to overcome was to persuade his Scottish colleague, Lord Macmillan, that he should not repeat the mistakes made most prominently by Lord Shaw which had prevented an immediate solution to a pressing problem that was seen to exist at the time of *Cantiere* in both English and Scottish law.

IX. Donoghue v. Stevenson

Introduction

This Scottish case can be better understood by placing it in the wider setting of the decisions of the House of Lords in *Cantiere* and *Fibrosa*. I will draw on the important discovery by Alan Rodger[43] that Lord Macmillan re-wrote his judgment in *Donoghue* very shortly before it was given in order to exclude the "native" Scottish authorities on which the first final version of his judgment was partly based. I will confirm Rodger's "speculation" that Lord Macmillan was prevailed upon by Lord Atkin to suppress the Scottish authorities in order to ensure that *Donoghue* could immediately be founded upon as a precedent by English law. I differ from Rodger on the significance which I attribute to this excision of the Scottish authorities. Certainly, given the history of *Cantiere*, it was necessary to make this change if Lord Atkin's aim were immediately to be achieved by *Donoghue*. In fact the Scots law that was excised by Lord Macmillan was not as insignificant as Rodger suggests. It contained references to a general principle of delictual liability which found its origin in the *Lex Aquilia*. The nature of Aquilian liability in Roman law had been transformed in the hands of practising lawyers during the period of the *ius commune*. This liability was then given expression as a general principle by the natural lawyers and by the Scottish institutional writers on whom the natural lawyers had exerted a profound influence[44]. I will show that *Donoghue*

[42] *Russkoe Obschestvo D'Lia Izgstovlenia Snariadov L'Voennick Pripassov v. John Stirk and Sons Ltd*, (1922) 10 Ll. L. Rep. 214 at p. 216.

[43] 'Lord Macmillan's speech in *Donoghue v. Stevenson*' (1992) 108 L.Q.R. 236.

[44] See *D. McKenzie and R. Evans-Jones*, 'The Development of Remedies for Personal

was a very finely balanced de- <98> cision which involved a major difference of view between, principally, Lord Atkin and Lords Buckmaster and Tomlin. The general principle of delictual liability drawn from the Civilian tradition was certainly one, and conceivably a critical, inspiration for Lord Macmillan's decision which in turn was followed by Lord Atkin in certain significant respects. The conclusion to be drawn is that the general principles of delictual liability formulated by the Civil law played an important role in a decision which is recognised as having created the foundations of a central part of the Common law of negligence. Why it was thought necessary to suppress the fact that "native" Scots law, and through it the Civil law, had played this role in *Donoghue* is also explained.

The Facts

There are few cases whose facts are better known. Mrs Donoghue drank part of a bottle of ginger beer bought for her by a friend when they were taking refreshments in a cafe in Paisley. Her friend then poured out the remaining contents of the bottle which contained a snail in a state of decomposition. Mrs Donoghue sustained shock (presumably from the sight of the snail) and illness from the contents she had drunk and raised a claim in delict against the manufacturer for compensation. She averred that the defender had been negligent in the manufacture of the ginger beer, principally in allowing a snail to enter the bottle that she had consumed. The defence was that a manufacturer owed no duty of care to a consumer with whom he had no contract unless the facts fell within two well known exceptions which they did not on this occasion. At first instance the pursuer was allowed to go to proof on the issue of negligence but this decision was overturned by the Second Division of the Court of Session. The Second Division followed English authority in reaching its decision that the manufacturer would not have been liable even if he had been negligent since he owed no duty of care to Mrs Donoghue. Thus, just as in *Cantiere*, the Court of Session reached its decision on the basis of English authorities which, by the time the case came on appeal to the House of Lords, were regarded as importing an undesirable result for English law by (some) leading English lawyers. It was accepted at all stages of the appeal that

Injury and Death', in: The Civil Law Tradition in Scotland, ed. R. Evans-Jones (Stair Society 1995) 277. *Rodger* relies on scholarship which argues that the Scottish institutional writers did not recognise such a general principle. This view is no longer credible. See, for example, *MacQueen/Sellar*, *op. cit*. n. 4. <98> <99>

English and Scots law were identical in this context. Since Scots law had been decided on the basis of English authorities this assumption, subject to an important reservation, was not unreasonable.

The Judgments in the House of Lords

The decision was carried by a majority of three to two. In this respect it was quite evenly balanced. For the reasons that have been intimated, the case was pled and judged virtually exclusively on the basis of the English authorities. When one observes, as we will see, that the majority of the English judges dissented and that it was part of Lord Atkin's purpose that *Donoghue* should im- <99> mediately form a precedent for English law, the fine nature of the balance and the critical role played by Lord Macmillan becomes clearer. The leading judgment for the dissenting minority was given by Lord Buckmaster with whom Lord Tomlin agreed. The other main judgments were given by Lord Atkin and Lord Macmillan with whom the other Scot, Lord Thankerton, agreed. It is on the principal three judgments that I will concentrate. I will highlight a fundamental difference of approach in respect of the merits of the contemporary English law that *Donoghue* was set to clarify. The interpretation which Lords Atkin and Macmillan put upon the English authorities was seen to import a result in English law which was regarded as nothing short of dangerous by Lords Buckmaster and Tomlin. I shall also highlight a different method adopted towards the case law by Lords Atkin and Macmillan from those who took the opposing view of the merits of the pursuer's claim.

Lord Buckmaster

One remarkable feature of Lord Buckmaster's judgment is how often it stressed the importance of deciding the case on the basis of the authorities of English law. For example, he said[45]:

> The law applicable is the common law, and, although its principles are capable of application to meet new conditions not contemplated when the law was laid down, these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.

The strength of feeling with which Lord Buckmaster approached the issue that a manufacturer might be liable in negligence to persons with whom

[45] At p. 35.

he had no contractual relationship is consistently emphasised. He said, for example[46]:

> It is impossible to accept such a wide proposition, and indeed, it is difficult to see how, if it were the law, trade could be carried on.

Later, still more emphatically, Lord Buckmaster agreed with the following statement of Lord Anderson which was made when the Court of Session rejected a claim[47] on facts similar to those of *Donoghue*:

> In a case like the present, where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public ...

Lord Buckmaster added[48]: <100>

> In agreeing, as I do, with the judgment of Lord Anderson, I desire to add that I find it hard to dissent from the emphatic nature of the language with which his judgment is clothed.

In similar vein to Lord Buckmaster, Lord Tomlin talks in *Donoghue* of the "alarming consequences" of accepting the validity of the pursuer's claim[49]. Given the language in which their judgments were framed there can be no doubt whatsoever that the issue was one on which Lords Buckmaster and Tomlin had formed views which differed very strongly indeed from the remainder of the Committee. As we will see, it is equally clear that Lords Atkin and Macmillan had formed correspondingly strong views of the merits of their own position.

Lord Buckmaster subjected the English authorities to a minute examination. His general approach was restrictive in the sense that each case was treated as establishing a narrow precedent within an understanding of the law that sought to restrict the range of claims of negligence in the context in question. He expressed his general conclusion in the following terms[50]:

[46] At p. 41.
[47] *Mullen v. Barr and Co.*, 1929 S.C. 461 at p. 479.
[48] At p. 43. <100>
[49] At p.57.
[50] At p. 42.

> In my view, therefore, the authorities are against the appellant's contention; and apart from authority, it is difficult to see how any common law proposition can be formulated to support her claim.

Lord Atkin

Lord Atkin identified the issue as whether, as a matter of law, the defender owed any duty to the pursuer to take care. However, he complained[51]:

> It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty (to take care).

However, where Lord Buckmaster had sought to restrict the authorities to narrow propositions, Lord Atkin looked in the same case law precisely for evidence of general principles governing English law. Thus he said[52]:

> At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances.

Thereafter Lord Atkin proceeded to enunciate the general neighbour principle for which he has become famous. <101>

Throughout his judgment Lord Atkin emphasised the importance of principle. However, where he saw an affirmation of this principle[53] in a case like *Heaven v. Pender*[54] Lord Buckmaster had said of the *dicta* in the same case: "that they should be buried so securely that their perturbed spirits shall no longer vex the law"[55] and that they have "been used as a *tabula in naufragio* for many litigants struggling in the seas of adverse authority"[56]. Lord Atkin expressed equally strong views concerning the merits of the pursuer's case which, in his view, the existence of the general principle supported. Thus, he said[57]:

[51] At p. 44.
[52] At p. 44. <101>
[53] At p. 44.
[54] 11 Q.B.D. 503.
[55] At p. 42.
[56] At p. 39.
[57] At p. 46.

> It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect ... I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

The differences between Lord Atkin and Lord Buckmaster were clearly very keenly felt indeed.

Lord Macmillan

The official version of Lord Macmillan's speech takes a fairly liberal view of some of the English authorities. Thus, for example, it assumes that their tensions can be explained by the fact that they represent the meeting place of two rival (albeit fairly elementary[58]) principles of law: that no one other than a party to a contract can complain of a breach of that contract, and that negligence apart from contract gives a right of action to the party injured by that negligence. Lord Macmillan concludes that "Where, as in cases like the present, so much depends upon the avenue to the question, it is very easy to take the wrong turning"[59]. We might speculate on what Lord Buckmaster made of such a liberal treatment of the English authorities by a Scottish judge and the implicit correction of his own approach which this statement implied.

In his more detailed treatment of the authorities Lord Macmillan's stated purpose was to show that "there is in the English reports no such unbroken and <102> consistent current of decisions" as would justify the aspersion that the law of England has committed itself irrevocably to what is neither reasonable nor equitable"[60]. Later, in the same manner as Lord Atkin, Lord Macmillan took an abstract approach which sought once more to identify in the cases general principles governing the identification of the circumstances in which there was a duty to take care[61].

[58] But perhaps not so elementary; see *S. F. C. Milsom*, Historical Foundations of the Common Law (2nd ed. 1981) esp. at p. 400; also *T.B. Smith*, 'The Common Law Cuckoo', in: Studies Critical and Comparative (1962) 89 esp. at pp. 107 and 113.

[59] At p. 65. <102>

[60] At p. 63.

[61] For example, at p. 70.

The First Final Version of Lord Macmillan's Speech[62]

Alan Rodger discovered that Lord Macmillan had prepared a final version of his judgment which, shortly before it was given, was reworked in some important respects. In this version, instead of declaring, as he did in the official speech, that English law showed no "unbroken and consistent current of decisions" against the pursuer's claim, Lord Macmillan concluded[63]:

> I am prepared to agree that the general, though by no means the uniform, trend of English decisions below has been adverse to the admission of such a claim as your Lordships are considering in the present appeal. But the matter is open in your Lordship's House.

We can well understand how undesirable such an admission that the English authorities were against the pursuer's claim would have appeared in the eyes of Lord Atkin. He was in the minority of the English judges in his interpretation of the English cases and had to rely on Lord Macmillan's support if *Donoghue* were immediately to act as a precedent in English law. Still more problematic in Lord Macmillan's first version of his speech was that, as Rodger has observed[64]:

> Not only did Lord Macmillan originally begin by looking at the Scots law: he actually professed to decide the case on the basis of Scots law and then to go on to see, without prejudice to that decision, whether the same result would be reached for English law.

This approach is reminiscent of Lord Shaw in *Cantiere*. Lord Atkin, sitting in the Court of Appeal, had occasion to comment on the undesirable consequences of the "Coronation" cases long before the opportunity arose to overrule them in *Fibrosa*, and he must have been aware of the lessons to be learnt from *Cantiere*[65]. Rodger is therefore quite correct in his "speculation"[66] that <103> Lord Atkin prevailed upon Lord Macmillan to revise his speech shortly before it was given in order to ensure that *Donoghue* would act immediately as a precedent for both English and Scots law. We may observe

[62] The text is presented in the Appendix to *Rodger*'s article cited at n. 43.
[63] Appendix, at p. 258.
[64] At p. 239.
[65] *Russkoe Obschestvo D'Lia lzgstovlenia Snariadov L'Voennick Pripassov v. John Stirk and Sons Ltd*, (1922) 10 Ll. L. Rep. 214 at p. 216. <103>
[66] At p. 247.

how extraordinarily instrumental both Lord Atkin and Lord Macmillan were prepared to be in achieving the result that they desired. We may also speculate that this fact was not lost on Lords Buckmaster and Tomlin. The change effected by Lord Macmillan in his speech shortly before it was given perhaps explains the strength with which the dissenting opinions in *Donoghue* were ultimately framed.

As regards the excision from Lord Macmillan's speech of all references to the "native" Scottish authorities Rodger observed[67]:

> ... although Lord Macmillan originally visited what he called "the fountain heads of Scots law", his trip was essentially a detour which achieved little even in purely Scottish terms. We lost nothing of significance for Scots law when he altered his speech in the way in which he did.

Rodger recognises that the inspiration for Lord Macmillan's speech in support of the pursuer's claim was the "native" Scottish authorities and also that reference to these had to be suppressed to achieve wider goals. Whether the contribution of Scots law was quite so insignificant as Rodger suggests is a point which I doubt. Most importantly, Lord Macmillan commenced his treatment of Scots law by reference to the institutional writers. It is no coincidence that Erskine is given the greatest prominence since it is in his *An Institute of the Law of Scotland* first published in 1773 that we find the clearest expression of the general principle of delictual liability drawn from the Civilian tradition which at times has proven to be such a rich source for the development of Scots law[68]. Erskine says[69]:

> *Alterum non laedere* is one of the three general precepts laid down by Justinian, which it has been the chief purpose of all civil enactments to enforce. In consequence of this rule, every one who has the exercise of reason, and so can distinguish between right and wrong, is naturally obliged to make up the damage befalling his neighbour from wrong committed by himself. Wherefore every fraudulent contrivance or unwarrantable act by which another suffers damage, or runs hazard of it, subjects the delinquent to reparation.

[67] At p. 242.

[68] See *D. McKenzie/R. Evans-Jones*, *op. cit*. n. 44.

[69] An Institute of the Law of Scotland 3, 1, 13. I quote more from this section of *Erskine* than *Lord Macmillan*. It is worth comparing *Erskine*'s statement with that found in the German Civil Code BGB § 823 which draws on the same source.

The other passage to which Lord Macmillan refers[70] from Erskine was this[71]: <104>

> Wrong may arise not only from positive acts of trespass or injury, but from blameable omission or neglect of duty.

In Erskine we therefore find a succinct expression of a general principle of delictual liability the limits of which are drawn by reference to "neighbourhood". Liability is said to arise from acts, omissions or neglect of duty.

X. Influences

What evidence is there that Erskine was influential on the decision of the House of Lords in *Donoghue*?

George v. Skivington[72] and *Heaven v. Pender*[73] were given particular prominence in Lord Atkin's judgment since they contain broad statements from which the existence in English law of a general principle equivalent to that expressed by Erskine can be deduced. However, the testimony of cases like *Heaven v. Pender* is problematic. However one reads his judgment concerning the existence of a general principle of liability arising from negligence[74], Brett M. R. certainly restricted its effect by suggesting that the case before him in fact fell within a recognised exception to the position of non-recoverability adopted by English law[75]:

> This case is also, I agree, within that which seems to me to be a minor proposition — namely, the proposition which has often been acted upon, that there was in a sense, an invitation of the plaintiff by the defendant, to use the stage.

[70] Appendix p. 249.
[71] *Ibid*. <104>
[72] L.R., 5 Ex. 1.
[73] (1883) 11 Q.B.D. 503.
[74] *Lord Buckmaster* was of the view that no such general principle had been expressed.
[75] At p. 514. A point which is noted by *Lord Buckmaster* in *Donoghue* at p. 39. *Lord Buckmaster* also notes at p. 40 that there were narrow limits within which *Brett M. R.* (*Lord Esher*) was prepared to apply such a principle (if it were to exist).

Another influence upon Lord Atkin in his search for general principle was the judgment of Cardozo J. given some years earlier in New York[76] which Lord Atkin himself mentions[77]. Cardozo J. appears to have been seeking to discover a general principle of the law of negligence but his judgment was also still constricted by the assumption that a manufacturer did not owe a duty of care *as a matter of principle* to those with whom he had not contracted. In his dissenting judgment Willard Bartlett, Ch. J. stated the law as follows[78]: <105>

> the liability of the vendor of a manufactured article for negligence arising out of the existence of defects therein does not extend to strangers injured in consequence of such defects but is confined to the immediate vendee. The exceptions to this general rule which have thus far been recognized in New York are cases in which the article sold was of such a character that danger to life or limb was involved in the ordinary use thereof; in other words, where the article sold was inherently dangerous.

The significance of Cardozo J.'s judgment lay in the liberality with which he was prepared to regard objects as "dangerous"[79].

It is possible to view the general principle of liability for negligence which Lord Atkin enunciated as a mere confusion arising from the narrow exceptions to the opposite position of non-recoverability espoused by Lords Buckmaster and Tomlin[80]. To the same effect, while admitting a principle of recoverability, this might be treated as subject to detailed exceptions which defeated the claim in point[81]. The first problem, as Lord Atkin saw it, was to identify "fundamental principles of the common law"[82] which ensured the success of Mrs Donoghue's claim. There is a striking correspondence between the general principle of English law as he finally expressed it and Erskine[83]:

[76] *MacPherson v. Buick Motor Co*., 217 N.Y.R. 382.

[77] At p. 56.

[78] At (Lexis) p. 25. <105>

[79] Cf. *Winterbottom v. Wright*, 10 M. & W. 109. Also *John D. Gordon III*, 'The American Authorities in *Donoghue v. Stevenson*: A Resolution', 115 (1999) L.Q.R. 183.

[80] When is a principle of recoverability or non-recoverability no longer such a principle when subject to a large number of exceptions. See per *Lord Buckmaster* concerning *Heaven v. Pender* at pp. 40-41.

[81] For example, it might not apply to the relationship between a manufacturer and a consumer. Thus, if we assume that *Brett M. R*. recognised the principle of recoverability in *Heaven* we must also accept that he did not apply it to the relationship between mortgagees and surveyor in *Le Lievre and Dennes v. Gould*, [1893] 1 Q.B. 491.

[82] At p. 56.

[83] At p. 44.

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

According to Lords Buckmaster and Tomlin[84], the position in English law was to deny a claim on the facts of *Donoghue* unless it fell within certain recognised exceptions. Lords Atkin and Macmillan, by contrast, adopted a very different method, the "generality" of which is observed by Rodger[85]:

> Essentially what Lord Macmillan did when he prepared the May version (of his speech) was to take the generalised reasoning which he had originally used for Scots law and apply it to the law of both systems. <106>

Similarly, it was by the discovery and application of principle that Lord Atkin approached the merits of Mrs Donoghue's claim.

For Erskine, "neglect of duty" possibly only arose within a narrow class of relationships where persons, because of their position or office, had assumed special responsibilities towards the pursuer. The examples he gives are of a jailor and a clerk of court[86]. However, by the beginning of the twentieth century "breach of duty" was expressed as a general precept of the Scots law of delict[87]:

> and damages will be given only when there is a legal wrong, an invasion of another's right; in other words a breach of duty[88].

English law, historically, had recognised limited relationships within which there might be a "breach of duty"[89]. Lord Atkin, by reference to "neighbourhood" generalised the class of persons to whom a duty was owed in negligence independent of contract[90]. However, in response to any extension of the Common law Lord Buckmaster had warned: "If one step, why not

[84] At p. 38.

[85] At p. 242. <106>

[86] 3,1,13.

[87] *Bell*, Principles of the Law of Scotland (10th ed. 1899), ed. William Guthrie para 553, 1. I am grateful to Professor *D.P. Visser* for this observation.

[88] For a highly instructive overview of the early use of the term "breach of duty" in Scots law, see *H. MacQueen/W.D.H. Sellar*, *op. cit*. n. 4.

[89] *P.H. Winfield*, 'The History of Negligence in the Law of Torts', 42 (1926) L.Q.R 184; 'Duty in Tortious Negligence', 34 (1934) Columbia Law Review 41.

[90] On the differences in significance of the decision for England and Scotland, see the perceptive observations of *K. McK. Norrie*, 'Obligations Arising from a Wrongful Act', The Laws of Scotland, Stair Memorial Encyclopaedia (Edinburgh 1996) vol. 15 para. 258.

fifty?"[91] Lord Atkin's further problem was therefore to draw limits to his principle that would make it acceptable in the world of practice whose interests Lord Buckmaster was protecting. Again Lord Atkin did this by reference to the idea of "neighbourhood". He said[92]:

> The liability for negligence, whether you style it such or treat it as in other systems as a species of *culpa*, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot, in a practical world, be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy ... the lawyer's question, "Who is my neighbour?" receives a restricted reply ... The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. <107>

The fact that other judges and other powerful voices of the Common law[93] were seeking to broaden the range of the law of negligence provided the background against which Lord Atkin gave his famous judgment in *Donoghue*. It is acknowledged that, before he altered his speech, Lord Macmillan decided the case on the basis of Scots law. Equally, Lord Atkin, we can be sure, was well aware of the native Scots law which formed part of the background to the claim[94]. The principle found in one of "the fountain heads of Scots law" produced the result which Lords Atkin and Macmillan desired and there are indications that it also proved influential in respect of the method, concepts and language which they adopted in their judgments.

XI. Significance

The position in English law preceding *Donoghue* concerning the limits on the range of persons who owed a duty of care in negligence was historically based[95]. There are certainly indications that some English judges had been

[91] At p. 42. The phrase was lifted from the judgment of *Alderson B*. in *Winterbottom v. Wright*, 10 M. & W. 109 at p.115.

[92] At p. 44. <107>

[93] *Pollock*, Law of Torts (13th ed. 1929) at p. 570.

[94] Hence his reference at p. 44 to systems of law which approached the subject matter of the claim on the basis of "*culpa*".

[95] See *S.F.C. Milsom*, Historical Foundations of the Common Law (2nd ed. 1981) esp. at p. 400. Also *Winterbottom v. Wright*, 10 M. & W. 109.

striving to discover a principle of the law of negligence that expressed a more general duty of care that included that of a manufacturer towards the consumer independent of contract, but the whole area was clouded by contrary authority. English law unequivocally effected the discovery of principle in *Donoghue*.

Donoghue has assumed a central position in the ideology of the Common law. Rodger describes it as "probably the most famous case in the whole Commonwealth world of the Common law"[96]. One reason concerns central images of the Civil and Common law. The former is seen to be principled but (too) abstract. The latter pragmatic but constricted by precedent. *Donoghue* confounds this image of the Common law because of its dynamic discovery of principle. An advantage is seen to lie in the discovery of principle by judges because it is mediated by the pragmatism of the practical lawyer which makes it more workable in the real world.

There are grounds on which to question *Donoghue*'s contribution to this view of the Common law. All legal systems at times need to find the impetus and means to re-orientate. There is a good chance that the majority in *Dono-* <108> *ghue* drew on Scots law and on the Civilian tradition which lay behind it. Given the fact that it was a Scottish appeal this is no bad thing. A principle of the Scots law of delict, unfettered by the problems concerning the interface between negligence and contract, provided the avenue through which to break through the rigidities that had been created in the Common law by history and precedent. However, Lord Atkin was certainly creative with what he found in Erskine, especially in his elaboration of the neighbourhood principle. *Donoghue* is therefore best seen, not as an example of the Common law developing in isolation, but as an important occasion on which the House of Lords founded upon the principle of the Civil law[97], and developed it through the pragmatism[98] of the Common law in the development of one law

[96] *A. Rodger*, 'Mrs Donoghue and Alfenus Varus', (1988) 1 C.L.P. 1 at p. 2. Some descriptions of the significance of the case are extravagant; see the example quoted by *R. Zimmermann*, The Law of Obligations, Roman Foundations of the Civilian Tradition (1990) p. 1039 n. 264. <108>

[97] In *Le Lievre and Dennes v. Gould*, [1893] 1 Q.B. 491 at p. 497 *Lord Esher M. R.*, says, "So too, if a man is driving along a street in a town, a similar duty not to drive carelessly arises out of contiguity or neighbourhood". It is likely that reference was being made to a concept of physical proximity; see *Donoghue* per *Lord Buckmaster* at pp. 40-41.

[98] *Lord Atkin* shows a mistrust of principle that is too generally stated; for example, at p. 46 he says, "it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary".

for Britain. The bridge between the Common and Civil law was again provided by Scotland.

XII. Conclusions

Sitting as the highest court of appeal for both jurisdictions, the House of Lords, on a number of occasions this century, has actively sought to create a unitary law, or to achieve similar results, for both Scottish and English private law. The normal practice is that Scots law is made to conform with the law of England, even where the principles of its law would not naturally lead to such a result. Thus, the desire to achieve a result that was common to both Scotland and England provides the most likely explanation for the nature of the recent decision in *Sharp v. Thomson*[99]. Yet, sometimes the usual direction of flow between Scots and English law is reversed. Recently in *Woolwich Building Society v. IRC*[100], an English appeal before the House of Lords, Lord Goff explicitly drew upon the judgments of Lord Mansfield, and on the Civilian (and Scottish) *condictio indebiti*, when stating that over-paid tax in the circumstances of the case before him was recoverable in English law on the grounds of no consideration[101]. Lord Goff was possibly unwise so clearly to identify the source of his inspiration. It caused a vigorous reaction amongst English academics who successfully argued that such a cause of action drawn from the Civil law would <109> be highly damaging if introduced into the Common law[102]. Nevertheless *Woolwich* also caused a strong reaction against the rule that payments made in mistake of law are irrecoverable. The Law Commission shortly thereafter provisionally recommended that the rule should be abolished in English law[103]. The issue was quickly addressed for Scotland in *Morgan Guaranty Trust Co. of New York v. Lothian Regional Council*[104] where the Court of Session, with copious references to Civilian authority, decided that the cases which introduced the mistake of law rule into Scots law from English law had been wrongly decided. The intention in *Morgan Guaranty* was to bring Scots law into line with England concerning the

[99] 1997 S.L.T. 636 (H.L.), discussed by *R. Evans-Jones*, *op. cit*. n. 4.

[100] [1993] A.C. 70.

[101] At p. 166 and p. 172. <109>

[102] See *R. Evans-Jones*, *op. cit*. n. 4 at p. 240 and the literature cited.

[103] *LAW Commission*: C.P. No. 120, Restitution of Payments Made Under a Mistake of law (1991) paras 2.36-2.37.

[104] 1995 S.C. 151; 1995 S.L.T. 299.

recovery of over-paid taxes after the changes which *Woolwich* had just effected for English law. The leading judgment in *Morgan Guaranty* was given by Lord President Hope who was a member of the House of Lords before whom *Kleinwort Benson Ltd v. Lincoln City Council*[105] was recently heard. The judgments in that case do not rely, at least expressly[106], to any great degree on the Civil law. However, given the background against which the decision arose its abolition of the mistake of law rule in English law should come as no surprise.

My study of *Cantiere*, *Donoghue* and *Fibrosa* shows that, where English law has been perceived to be unsatisfactory, "native" features of Scots law were founded upon to achieve what was regarded as desirable results for English law. By this means Civilian concepts, albeit mediated through their understanding by the judiciary and the interpretation which they receive in Scots law, have provided the stimulus for important developments in English private law this century. This raises questions concerning the definition of "mixed" legal systems. As this term is used of Scots law it is the large degree of mixture viewed at a particular time in its history that needs to be explained. The degree of mixture can possibly best be explained by the manner in which it came about; namely by "reception"[107].

It is questionable whether the opportunity to draw on the best features of the Common law and Civil law traditions existing within the United Kingdom has been fully realised for Britain. The development towards one law has been <110> achieved almost exclusively on the basis of English law. In my own view this "reception" of English law in Scotland was driven by deep running cultural forces and not directly by a desire to achieve results which were qualitatively better for Scotland[108]. Thus, we saw that Scots law had received aspects of English law that, by the time of *Cantiere* and *Donoghue*, were regarded as unsatisfactory for England by leading English lawyers. Nevertheless, on occasion, English law has drawn on Scots law, and through Scots law, on its Civilian tradition. This process has been motivated by the perception that a different and better result can be achieved for English

[105] [1998] 3 W.L.R. 1095.

[106] I am grateful to *Reinhard Zimmermann* for pointing out that I have probably underestimated the degree of influence of the Civil law on the decision. The issue is examined in detail by *Zimmermann* and *S. Meier* in this volume of the Law Quarterly Review. [See addendum]

[107] See *R. Evans-Jones*, *op. cit*. n. 4. <110>

[108] *R. Evans-Jones*, *op. cit*. n. 4.

law. However, the independence of the jurisdictions of England and Scotland was maintained by the Union. The authorities of one jurisdiction are therefore not formally binding on the other. English law has also never experienced the same pressures for "reception" that explains why its law has proved to be so influential in Scotland. *Cantiere*, *Donoghue* and *Fibrosa* show that the strength with which English lawyers adhere to their own precedent can create an obstacle to the adoption of ideas from different traditions. They also show how, on occasion, that obstacle has been overcome. Thus, while English law has "borrowed" from Scots law there are also good reasons why the fact of the "loan" has sometimes had to be suppressed[109].

Addendum

To footnote 106: The article by Zimmermann and Meier appeared as: Sonja Meier and Reinhard Zimmermann, 'Judicial Development of the Law, *Error Iuris*, and the Law of Unjustified Enrichment—A View from Germany', 115 (1999) L.Q.R. 556-65.

[109] I am grateful to *Peter Duff*, *Angus Campbell*, *Phillip Hellwege*, *Geoffrey MacCormack*, *Scott Styles* and *Neil Walker* for their help and comments.