

MIXED LEGAL SYSTEMS IN COMPARATIVE PERSPECTIVE

PROPERTY AND OBLIGATIONS IN
SCOTLAND AND SOUTH AFRICA

EDITED BY

REINHARD ZIMMERMANN, DANIEL VISSER
AND KENNETH REID

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Preface

'SATURDAY 16 FEBRUARY 1776. I had ever since last Friday been in bad spirits. I this night felt a momentary sensation of gay pleasure while drinking a glass of white Cape wine. I came home between twelve and one, quite cool' (*Journal* of James Boswell, advocate at the Scottish bar and biographer of Samuel Johnston).

South Africa is perhaps better known in Scotland for its drink than for its laws, and the view from South Africa of Scotland is, for the most part, no better informed. Yet the private law of Scotland and of South Africa have a great deal in common, and a lawyer from the one jurisdiction feels immediately at home with the law books of the other. That this should be so in respect of countries lying at opposite ends of the globe is, at first, puzzling and even unsettling. In fact it is due to the accident of shared sources and not to the stimulus of mutual influence, and it is only in modern times that it has come to be acknowledged at all.

This volume marks the growing interest in each jurisdiction in the laws of the other. It follows the publication of two earlier works which explored the history of legal doctrine, first in South Africa and then in Scotland: *Southern Cross: Civil Law and Common Law in South Africa* (eds. R. Zimmermann and D. Visser, 1996) and *A History of Private Law in Scotland* (eds. K. Reid and R. Zimmermann, 2000). The current volume is to some extent a companion to those earlier works. By examining the pattern of similarity and difference in the private law of Scotland and South Africa, it seeks to contribute to the legal development of both jurisdictions. For in similarity there may be the comfort of corroboration, in difference a cause for reflection. There are many questions to ask. Do common solutions indicate doctrinal strength or merely a lazy adoption of a common source? If solutions diverge, is it because one system has strayed unwisely, or because of differences in the underlying circumstances? What role is played by social policy, by devotion to dogma, by a quest for coherence, or by sheer chance? A study of sisters in law is always likely to intrigue and to instruct. And to look closely at another system is to extend the horizons of one's own.

The result is not, of course, a comprehensive treatment of the private law of either Scotland or South Africa. Only property and obligations are considered, and even within these subjects the treatment is selective. The work focuses on those topics where, in the opinion of the experts assembled for this project, a comparison seemed valuable and stimulating. For information on other subjects the reader is directed to the rich legal literature which has been a feature of both jurisdictions in the recent past.

The work has also a wider aim. Mixed legal systems have become a subject of international interest, both for their own sake, as a discrete legal family, and also for their potential as a bridge between the worlds of the civil law and the common law. A study of two of the uncodified systems gives an opportunity to determine whether, and if so to what extent, mixed systems speak with a distinctive legal voice.

In preparing this book we have received help from many people. We would wish particularly to thank David Yuill, Andrew Purchase and Catherine Moodie for valuable editorial assistance, and Peter Birks for friendship and encouragement. The Leibniz Prize of the German Research Association, held recently by one of us, allowed the contributors to meet together for conferences and on other occasions, and so contributed in an important way to the distinctive nature of this work.

Reinhard Zimmermann, Daniel Visser, and Kenneth Reid
Hamburg/Cape Town/Edinburgh, January 2004

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List of Abbreviations

Part I: Books

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| Bankton | Andrew McDouall, Lord Bankton, <i>An Institute of the Laws of Scotland in Civil Rights</i> (1751–53), reprinted by the Stair Society, vols. 41–43 (1993–5) |
| Bell, <i>Commentaries</i> | George Joseph Bell, <i>Commentaries on the Law of Scotland and the Principles of Mercantile Jurisprudence</i> (7th edn. by J. McLaren, 1870; reprinted 1990) |
| Bell, <i>Principles</i> | George Joseph Bell, <i>Principles of the Law of Scotland</i> (10th edn. by W. Guthrie, 1899, reprinted 1989) |
| <i>Bill of Rights Compendium</i> | <i>Bill of Rights Compendium</i> (various authors) (1996) |
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| Burchell, <i>Delict</i> | Jonathan M. Burchell, <i>Principles of Delict</i> (1993) |
| Burchell, <i>Personality Rights</i> | Jonathan M. Burchell, <i>Personality Rights and Freedom of Expression: the Modern actio iniuriarum</i> (1998) |
| Carey Miller, <i>Corporeal Moveables</i> | D. L. Carey Miller, <i>Corporeal Moveables in Scots Law</i> (1991) |
| Carey Miller, <i>Ownership</i> | D. L. Carey Miller, <i>Acquisition and Protection of Ownership</i> (1986) |
| Carey Miller & Pope, <i>Land Title</i> | D. L. Carey Miller (with Anne Pope), <i>Land Title in South Africa</i> (2000) |

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- Chaskalson et al., *Constitutional Law* Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz and Stuart Woolman, *Constitutional Law of South Africa* (1996)
- Christie, *Contract* R. H. Christie, *The Law of Contract in South Africa* (4th edn., 2001)
- CISG Convention on the International Sale of Goods 1980 (Vienna Convention)
- Cooper, *Landlord and Tenant* W. E. Cooper, *Landlord and Tenant* (2nd edn., 1994)
- Craig Thomas Craig of Riccarton, *Jus Feudale* (3rd edn. by J. Baillie, 1732, transl. by Lord Clyde, 1934)
- Cusine & Paisley, *Servitudes* D. J. Cusine and R. R. M. Paisley, *Servitudes and Rights of Way* (1998)
- Cusine & Rennie, *Missives* D. J. Cusine and R. Rennie, *Missives* (2nd edn., 1997)
- Cusine & Rennie, *Standard Securities* D. J. Cusine and R. Rennie, *Standard Securities* (2nd edn., 2002)
- De Vos, *Verrykingsaanspreeklikheid* W. de Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (3rd edn., 1987)
- De Waal et al., *Bill of Rights Handbook* Johan de Waal, Iain Currie and Gerhard Erasmus, *The Bill of Rights Handbook* (4th edn., 2001)
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- Erskine John Erskine of Carnock, *An Institute of the Law of Scotland* (8th edn. by J. B. Nicholson, 1871, reprinted 1989)
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| Stair | James Dalrymple, 1st Viscount Stair, <i>Institutions of the Law of Scotland</i> (6th edn. by D. M. Walker, 1981) |
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| Voet | Johannes Voet, <i>Commentarius ad</i> |

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