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Fraud in Scots Law

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## **Abstract**

This thesis seeks to provide a deeper understanding of the Scots law of fraud. Adopting a method that is both historical and doctrinal, it provides a critical analysis of the current understanding of fraud and argues for an approach that is more consistent with Scotland's legal history which, in turn, was profoundly influenced by a much older tradition of European legal thought.

It begins by exploring the historical scope of fraud in both a criminal and civil context with specific focus on questions of definition and the extent to which "fraud" was used in the broader sense of activities not involving deceit. A detailed analysis is given of the widespread concept of presumptive fraud by means of which Scots law was able to provide a remedy for unfair or unwarrantable behaviour without any requirement for a deceitful intention and for misstatements made unintentionally. The argument is made that presumptive fraud was a mechanism for delivering substantive justice and that its conceptual roots lie in an Aristotelian understanding of justice as equality. A comparison is made between the scholastic doctrine of restitution, which was developed by Thomas Aquinas as the outworking of the Aristotelian virtue of justice, and the scheme of Scots law created in the *Institutions of the Law of Scotland* by Viscount Stair (1619-1695), who is said to be the founding father of Scots law. It is suggested that the religious and philosophical conditions which existed in seventeenth century Scotland were particularly fertile soil for scholastic legal ideas which conceptualised law within a moral and religious framework.

The second half of the thesis undertakes a doctrinal analysis of fraud in three parts. First, the complex relationship between fraud, error and misrepresentation is examined and the case is made that misrepresentation, whether intentional or unintentional, sits more comfortably in the law of fraud than in the law of error. Secondly, modern legal literature is critically assessed and the dominant modern narrative – that error induced by misrepresentation is a native concept in Scots law –

is questioned. Thirdly, a new taxonomy of fraud is proposed which distinguishes between *primary* and *secondary* fraud. The operation of secondary fraud (which amounts to “participation” in the primary fraud of another and therefore involves three-party situations) is explored through the application of two familiar legal maxims: the “fraud” principle (that no one should be enriched through the fraud of another) and the good faith purchaser for value. In the context of secondary fraud, it is argued that the criteria for its operation - *mala fides* and a gratuitous transaction - are both core components of the older concept of presumptive fraud. The thesis comes full circle as it is suggested that while the broader equitable definition of fraud, rooted in equality, may have disappeared in the context of primary fraud, secondary fraud retains it.

### ***Declaration***

I hereby declare that I have composed this thesis, that it is my own work and that it has not been submitted for any other degree.

Signed:

Date:



### ***Acknowledgements***

My thanks are due to many people for the help and support they offered in the writing of this thesis. I would like to thank former colleagues at Strathclyde University Law School, in particular Dr. Laura Piacentini and Prof. Simon Halliday for their support and encouragement in darker moments; colleagues at Glasgow University Law School; the staff on floor 7 of Glasgow University Library and the Squire Law Library in Cambridge; and the trustees of the Edinburgh Legal Education Trust for the scholarship which enabled me to undertake doctoral study.

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## ***Introduction***

Fraud is an amorphous and ill-defined concept and, to add to the difficulties of definition, it means different things in different contexts. In its primary meaning it involves dishonesty and deception and can trigger both criminal and civil liability, for it is both a crime and a civil wrong. In modern Scots law fraud is most commonly described, using Erskine's formulation, as "a machination or contrivance to deceive",<sup>1</sup> itself a rendition of the classic or Labeonic definition of *dolus malus* in Justinian's *Digest: omnem calliditatem fallaciam machinationem ad circumveniendum fallendum decipiendum alterum adhibitam*.<sup>2</sup> In this guise fraud, as well as being a crime, has long been recognised as "the paradigm of an intentional delict"<sup>3</sup> and as a factor vitiating consent in voluntary transactions, grounds for the annulment of a contract and for reduction of a property transaction.

This thesis seeks to add to the current understanding of the Scots law of fraud. Its focus is a definitional one, charting the changing concept of fraud from a broad principle of substantive injustice, underpinned by the principle of inequality, to the narrow modern definition of fraud as intentional deceit. The method used to examine the law of fraud is both doctrinal and historical. Doctrinal analysis is conducted in its historical context using primary source materials, the judgments of the Scottish courts and the Institutional texts, with reference to the extensive secondary literature in the field. A further historical dimension is provided by examining the influence of the Aristotelian concept of justice, mediated by Thomas Aquinas, which influenced Scots law in a significant way.

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<sup>1</sup> Erskine, *Institute* III.1.16.

<sup>2</sup> D.4.3.1.2.

<sup>3</sup> Thomson (2009) para 2.10.

This study does not attempt to restate the modern law of fraud, much of which is settled, nor does it attempt to resolve all of the contested issues raised by academic commentators and by an extensive body of case law. However, it does address the definitional question of what constitutes fraud in both a criminal and a civil context. Its particular focus lies in the outer boundaries of fraud and the extent to which the label of fraud can be extended beyond intentional deceit. In both a criminal and a civil context, this is territory which borders on moral as much as legal standards and the perennial question of the boundary between law and morality. Is fraud in its older sense of unconscionable<sup>4</sup> behaviour or bad faith relevant to Scots law in the twenty-first century and, if so, can the concept be rationalised so that it is grounded in principles that can be articulated, that have boundaries and that can usefully be applied?

It is suggested that existing academic treatments have been too quick to settle on the narrow definition of fraud derived from *Derry v Peek*,<sup>5</sup> not because doing so represents a break with previous Scottish tradition (although that is undoubtedly true), but because adopting such a restrictive concept of fraud has disabled Scots law from developing a methodology and a taxonomy for dealing with substantive unfairness. The late nineteenth century in particular was a period when the House of Lords found it necessary to reverse a series of Scottish fraud cases in order to give redress for perceived injustice in the decisions of the Court of Session.<sup>6</sup> Horns were locked in a familiar ideological battle between certainty and commercial interest on the one hand and substantive fairness on the other. And the judgments of the Inner House at times appear constrained by a narrow legal formalism which casts doubt on

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<sup>4</sup> “Unwarrantable” is the term often used by the Scottish courts; for instance, in *Trinch v Watson* (1669) Mor 4958 a disposition granted by a vulnerable woman was described as “very unwarrantable” and reduced “as being presumed fraudulent and unwarrantable”. See also *Gordon v Crauford* (1730) 1 Paton 47; Erskine, *Institute* III.1.13, reparation must be made for “every fraudulent contrivance, or unwarrantable act”.

<sup>5</sup> (1889) LR 14 App Cas 337.

<sup>6</sup> Most of these cases concerned either fraud or error: *McPherson’s Trs v Watt* (1878) 5 R (HL) 9; *Knox v Mackinnon* (1888) 15 R (HL) 83; *Raes v Meek* (1889) 16 R (HL) 31; *Stewart v Kennedy* (1890) 17 R (HL) 25; *Menzies v Menzies* 1893 20 R (HL) 108; *Carruthers v Carruthers* (1896) 23 R (HL) 55; *Mair v Rio Grande Rubber Est. Ltd* 1913 SC (HL) 74. The late twentieth century saw a similar phenomenon, for instance *Smith v Bank of Scotland* 1997 SC (HL) 111; *Sharp v Thomson* 1997 SC (HL) 66.

the boast of legal nationalists<sup>7</sup> such as TB Smith and Lord Cooper that Scots law embodied principles of equity in a more evident way than her southern neighbour.<sup>8</sup>

All legal systems from the ancient Greeks and Romans to the modern European codifications contain mechanisms for addressing substantive injustice, often through the mechanism of *bona fides*:<sup>9</sup>

[The principles of *bona fides*] thus contribute ... to the realisation of a social ideal. Without this constant regard for fairness and justice Roman law would not have survived throughout the ages; and the modern codifications, too, would soon have become useless and outdated, had they not provided space for the operation of *bona fides*.

Historically, Scots law appears to have used *bona fides* in a “glass half empty” way and has used the concept of fraud,<sup>10</sup> broadly defined, to address substantive unfairness or inequality. Since the nineteenth century there have been consistent attempts to limit its scope in the interests of commercial freedom. However, this approach contains a risk that the law is brought into disrepute, and it is arguably moving in a different direction from other European jurisdictions.<sup>11</sup> It is perhaps going too far to say that the Scots law of fraud could become “useless and outdated”, but at a time of broader European legal development, it is certainly timely to examine where we are and how we got here. And, at a time when another sea-change may be in the air in the aftermath of an economic crisis that has travelled around the globe and created in western Europe the worst economic conditions since the second world war; when banks, corporations and the financial sector have been demonised in popular culture and in the media and may be subjected to government sanctions;

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<sup>7</sup> On legal nationalism and the “Cooper–Smith ideology” see MacQueen (2005b) and references cited therein at n.1; Osler (2007).

<sup>8</sup> A typical example can be found in Smith (1962b) p.89: “Contact with English law... has had the result in “mixed” systems of restricting interpretation of broader and more satisfactory principles which had been established before the infiltration of English influence”.

<sup>9</sup> Schermaier (2000) p.92.

<sup>10</sup> Sometimes *mala fides* is also used in this sense, but usually only in the context of secondary fraud, as outlined in ch.7 pp.249-255.

<sup>11</sup> Sefton-Green (2005).

when the model of perpetual growth and unrestrained markets is beginning to be questioned as the sole economic paradigm;<sup>12</sup> and when the balance between support for commercial risk-taking and protection of the public may have reached a tipping point it is apposite to re-evaluate the tangled history of fraud to see if it still embodies principles that help to translate law into justice.

Stair's *Institutions of the Laws of Scotland* provided the legal and philosophical foundations for modern Scots law, and his text will be the main historical point of reference in this study. That is not to deny the importance of later Institutional writers, but it is in Stair's account that the fundamental principles are best articulated at a conceptual level. In addition, my overall argument rests on demonstrating the influence of Aquinas' theory of liability on Stair specifically. A comparison is also made with the modern doctrinal analysis of fraud which demonstrates that, in relation to fraud, those foundational principles of justice did not withstand the onslaught of countervailing forces (both legal and philosophical) which were to affect Scotland so profoundly over the course of the two centuries after the publication of Stair's *Institutions*. I will also suggest that Stair provided a model that was more internally coherent than the one we have in the twenty-first century.

The principal aim of this thesis is to explore the definition of fraud in its historical context. From its early roots as a manifestation of inequality to its modern formulation as deception, a new narrative is offered which contends that it was not the influence of English law which narrowed the older concept of fraud, but rather that the Scottish courts were already working towards that position. The influential case of *Derry v Peek* merely provided authority for a phenomenon which was Scottish at root, and it is suggested that some of impetus for change can be attributed to forces outside the law, particularly the influence of Scottish Enlightenment thinking.<sup>13</sup>

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<sup>12</sup> For harsh critique of the current economic model see Harvey (2010); Hutton (2011).

<sup>13</sup> See further ch. 3 pp.126-131.

In the process of developing this narrative it has proved necessary to examine the law of error as well as the law of fraud, for as the definition of fraud narrowed many of the functions it fulfilled in the older law – functions which operated as a delivery mechanism for substantive justice in a very wide range of circumstances, but chiefly in relation to unintentional misstatements – were transferred to the law of error. In the process, this has created one of the least rational doctrines in modern Scots private law. It is suggested that the rules of fraud contain a more coherent structure for dealing with misrepresentation than the current law of error.

Finally, a new taxonomy of fraud is developed which differentiates between *primary fraud* and *secondary fraud*. Primary fraud is the territory of wrongdoing which takes place between two parties, whether criminal or civil. Analysis becomes more difficult when three parties are involved and in three-party situations fraud appears to operate in a different way, as an exception to the usual rules. This is what I will refer to as *secondary fraud*, in modern terminology often referred to as bad faith.<sup>14</sup> By exploring the parameters of both and the relationship between the two, it is hoped that a more solid foundation will be laid for the doctrine of fraud.

Chapter 1 begins by examining the criminal law of fraud through the lens of the civil law. There is particular focus on the relationship between fraud, theft and breach of trust; the doctrine of *vitium reale*; and the divergent definitions of fraud which have emerged in criminal and civil law.

Chapter 2 provides the first detailed analysis of the broad concept of fraud which operated prior to the nineteenth century. It examines three concepts which were often designated as fraudulent: *mala fides*; the principle that *culpa lata aequiperatur dolo*; and the wider doctrine of presumptive fraud. The purpose is to demonstrate the fact that fraud extended far beyond intentional deceit as a well-established historical pattern.

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<sup>14</sup> In the context of property transfers, where formerly “fraud” was used to describe the behaviour of a second purchaser acting in knowledge of a first purchaser’s prior right, it has been suggested that “[m]odern statements of the principle ask whether a second purchaser was in good or bad faith”, McBryde (2007) para 17-24.

Chapter 3 examines the historical roots of the principle of inequality inherent in presumptive fraud. The Aristotelian concept of justice as equality, which was developed by Thomas Aquinas and the scholastic moral theologians of the Counter-Reformation, offers important structural insights into Stair's *Institutions*.

Chapter 4 provides an account of the transformation of fraud over the course of the nineteenth century. It includes detailed analysis of the fundamentally important case of *Derry v Peek*, and its effects on both the law of England and the law of Scotland.

Chapter 5 examines the complex relationship between fraud, error and misrepresentation and argues that as the definition of fraud narrowed many of its functions were transferred to the law of error and that this development was misconceived.

Chapter 6 critically reviews the modern law of fraud, as expressed by legal commentators, and the relationship between fraud and error.

Chapter 7 explores the concept of secondary fraud, as expressed in two familiar legal maxims: the "fraud" principle (that no one should be enriched through the fraud of another) and the good faith purchaser for value. It returns to Aquinas' account of restitution as an important reference point for the conceptual underpinning of accessory liability and the doctrine of the *particeps fraudis*.

Part of this thesis was published in 2008 in the *Journal of Legal History* and is reprinted at Appendix 2 with the publisher's permission.

## ***Chapter 1: Lessons from the Criminal Law of Fraud***

Stair says that fraud is “of a criminal nature”<sup>15</sup> and criminal fraud is a helpful starting point for this study, in the first place because this is where the definition of fraud ought to be clearest, considering the higher standard of proof and what one might expect to be more explicit criteria for liability where personal liberty may be at stake; secondly, because the elements required for fraudulent behaviour have been subject to extensive analysis in the criminal courts; and, thirdly, because in the aftermath of a criminal conviction we can begin to examine the civil consequences of secondary fraud. This is not an exhaustive study of criminal fraud.<sup>16</sup> Rather it views the criminal law through the eyes of the civil law in order to gain a better understanding of the latter, including definitional comparisons. It also includes an examination of a selection of cases familiar in the civil law of fraud, but which began life as crimes.

In a criminal law context, the popular meaning of fraud conjures up images of white collar crime and financial scandal. The aftermath of the 2008 banking crisis provides classic examples, for instance the accusations of fraud levelled at Goldman Sachs for selling “Abacus” financial products with private knowledge, disclosed in email correspondence, that they were likely to fail.<sup>17</sup> Criminal fraud, like its civil counterpart, has been described as being “of very wide denotation in modern Scots law”.<sup>18</sup>

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<sup>15</sup> Stair, *Institutions*, IV.40.21 (hereafter “Stair”).

<sup>16</sup> For the leading textbook see Gordon, GH (2001) ch.18; also useful is Gill (1975).

<sup>17</sup> On 16<sup>th</sup> April, 2010 the Securities and Exchange Commission filed charges against Goldman Sachs for fraudulent misstatements and omissions (<http://www.sec.gov/litigation/litreleases/2010/lr21489.htm>). The bank settled the civil suit for \$550 million, a minimal sum in comparison with annual earnings, with no admission of wrongdoing (<http://dealbook.nytimes.com/2010/07/15/goldmans-fine-14-days-of-earnings/?ref=goldmansachsgroupinc>).

<sup>18</sup> Gordon, GH (2001) para 18.01.



## 1. Common Law Fraud

Fraud was traditionally labelled as “falsehood, fraud and wilful imposition” and its essence was property-related i.e. depriving another person of his property by fraudulent means.<sup>19</sup> The modern meaning is, however, broader than the protection of ownership. MacDonald defines it as “the bringing about of some practical result by means of false pretences”,<sup>20</sup> the practical result usually, but not necessarily, causing economic loss to another.<sup>21</sup> Classic examples of fraudulent dealings would be inducing someone to hand over property or money by making false claims as to personal identity, creditworthiness, or the value of an article being sold. Criminal fraud can be committed expressly or impliedly, or even by omission where there is deemed to be a pre-existing duty to disclose the truth.<sup>22</sup>

The *mens rea* of fraud, although it appears to be a relatively unexplored issue,<sup>23</sup> involves making a false representation “falsely and fraudulently”.<sup>24</sup> This of course raises issues of motive and whether or not fraudulent criminal behaviour must be intentional, with knowledge that the representation is false, or if a standard of recklessness will suffice. In Gordon’s discussion of *mens rea*, which he also concedes is not settled in criminal law,<sup>25</sup> he relies on the definition of fraud outlined in the English civil case of *Derry v Peek*.<sup>26</sup> This case is discussed in more detail in

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<sup>19</sup> The Scottish Institutional writers all consider the crime to consist of a misappropriation of property (see Gordon, GH (2001) para 18.14), and this appears to have been an essential element in 19<sup>th</sup> century case law, for instance HM Advocate v Livingstone (1888) 15 R (J) 48.

<sup>20</sup> MacDonald (1948) p.52.

<sup>21</sup> “It is, however, a mistake to suppose that to the commission of a fraud it is necessary to prove an actual gain by the accused, or an actual loss on the part of the person alleged to be defrauded. Any definite practical result achieved by the fraud is enough.” Adcock v Archibald 1925 JC 58 at 61 per Lord Justice-Clerk Clyde. For examples of other types of practical result see Gordon, GH (2001) paras 18.21-18.25.

<sup>22</sup> Gordon, GH (2001) paras 18.03-18.07. Many of the criteria (for instance, this rule) which apply to fraudulent criminal behaviour apply equally to the definition of a fraudulent misrepresentation in the civil law, for instance, rules relating to advertisements and “puffing” (para 18.09), distinctions between statements of fact, opinion and intention (paras 18.08, 18.10 and 18.11).

<sup>23</sup> Gane et al. (2009) para 13-14.

<sup>24</sup> Gordon (2001) para 18.30.

<sup>25</sup> *Ibid.* para 18.31.

<sup>26</sup> (1889) 14 App.Cas. 337.

relation to civil fraud in chapter 4, but Lord Herschell's criteria for fraudulent behaviour are that it must be carried out:<sup>27</sup>

(1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.

Gordon concludes that while “[i]n principle Scots law might accept a false statement made recklessly as sufficient”,<sup>28</sup> in practice people are usually prosecuted for fraud committed intentionally.<sup>29</sup> While Scots criminal law in theory extends beyond intentional fraud, it appears that prosecution is unlikely unless there is intention to deceive, sometimes referred to as the *sciens* requirement. Furthermore, it appears not to be a crime for a representation to be made with an honest belief that it is true, however carelessly it is made.<sup>30</sup>

## 2. Relationship between Fraud, Theft and Breach of Trust

The Scottish criminal courts have had particular difficulties in their attempts to distinguish between the related crimes of theft, fraud and breach of trust or embezzlement. They have acknowledged “the thin and shadowy lines which distinguish theft from possession obtained by fraud”;<sup>31</sup> and in relation to breach of trust it has been said that “the distinctions between theft and breach of trust are the most evanescent and slimmest known in our criminal law”.<sup>32</sup> These difficulties are not new. In Roman law and even for the writers of the mediaeval *Ius Commune*, theft (*furtum*) was conceptually part of the law of obligations, a private delict for the protection of property owners, rather than a public

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<sup>27</sup> *Ibid.* at 374.

<sup>28</sup> Gordon (2001) para 18.31.

<sup>29</sup> *Ibid.* para 18.31.

<sup>30</sup> *Brander v Buttercup Dairy Co* 1920 2 SLT 381; see also the more general comments about mistaken belief as a criminal defence in *Jamieson v HM Advocate* 1994 SLT 537 at 541 per Lord Justice-General Hope: “where a substantive defence is based on a belief which is mistaken, there need not be reasonable grounds for that belief”.

<sup>31</sup> *Brown v Marr, Barclay & others* (1880) 7 R 427 at 446 per Lord Gifford.

<sup>32</sup> *Climie* (1838) 2 Swinton 118 at 127 per Lord Cockburn.

crime.<sup>33</sup> Zimmermann demonstrates that in the Digest the concept of *furtum* was “so wide as to include almost any species of dishonesty”,<sup>34</sup> including examples not only of what would now be considered fraud, but also unauthorised borrowing and embezzlement. By the end of the Republic “[i]t had been made to cover almost any situation in which a person, through someone else’s deliberate act, suffered patrimonial loss other than by physical damage to property”.<sup>35</sup> However, as the public law systems of Europe developed, the punitive sanctions of the criminal law demanded a more differentiated approach which resulted in a narrower and more familiar definition of theft and the creation of separate crimes of dishonesty.<sup>36</sup>

It is clear that fraud, theft and breach of trust as “crimes of dishonesty” have from ancient times been close bedfellows and their historical roots in *furtum* as a means of redressing economic loss remain evident. The similarities between the three are greater than the differences in that all three require patrimonial loss or detriment,<sup>37</sup> all turn on the question of the owner’s consent and all, unsurprisingly, require dishonesty.<sup>38</sup> The question of the owner’s consent is the key definitional criterion for “it is the absence of consent which distinguishes theft from fraud”.<sup>39</sup> Moreover, this is a critical distinction for the civil law because of the consequences of the doctrine of *vitium reale*, examined below. The close relationship between fraud and breach of trust also provides important insights into the way in which the language of “fraud” is used pervasively in a criminal context, beyond the confines of the specific crime of fraud, to indicate a more general notion of dishonesty.

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<sup>33</sup> Zimmermann (1990) pp. 922-923. Zimmermann identifies the appearance of the *Constitutio Criminalis Carolina* in 1532 as the significant date when theft definitively became a public crime (Zimmermann (1990) p.944).

<sup>34</sup> *Ibid.* p.925.

<sup>35</sup> *Ibid.* p.928.

<sup>36</sup> *Ibid.* p.947.

<sup>37</sup> Historically all three were economic crimes, but subsequent to the decision in *Adcock v Archibald* 1925 JC 58 the “practical result” no longer need involve any patrimonial loss. However, it has been pointed out that “the notion of prejudice is surely still important otherwise it would be a criminal offence to induce someone to act to their advantage by deception.” (Gane et al. (2009) para 13-11 Note 1). It does (probably) “involve loss of a value which is protected by law” (Gordon, GH (2001) para 18.20).

<sup>38</sup> This assumption is questioned in relation to fraud by one textbook (Gane et al. (2009) para 13-11), although on the basis of little evidence. See also Gordon, GH (2001) para 18.33.

<sup>39</sup> Gordon, GH (2001) para 14.36.

### 3. Fraud and Theft: Civil and Criminal Divergence

Scotland's Institutional writers, in particular Hume, considered theft to have a narrowly defined scope, an understandable requirement in light of the fact that until 1887 it was a capital crime.<sup>40</sup> Hume's definition of theft is rooted in the civil law: *contrectatio fraudulosa rei alienate, lucre faciendi gratia*, which he translates as "the felonious taking away of the property of another, for lucre".<sup>41</sup> For Hume the distinction between theft and the "lower offences" of fraud, swindling and breach of trust turned on the issue of consent: when possession of property is obtained with the consent of the owner, and that possession includes a right to deal with the property (to dispose of or administer it in some way), even if possession has been obtained fraudulently it is nevertheless different from theft. In these lower offences there has been no "felonious taking", according to Hume, for the owner has consented, however flawed that consent may turn out to have been retrospectively. Hume's examples of lesser offences include dishonest appropriation by borrowers, hirers, those holding moveable property as security, trusted employees or sales involving a false identity or false representation as to credit-worthiness.<sup>42</sup> However, over the course of the nineteenth century, the judiciary wrestled with and ultimately rejected Hume's analysis, gradually extending the scope of theft.

This process has continued to the present day and in modern criminal law the definition of theft is so wide that there is almost no need for any other crime of dishonesty. Indeed, it has been pointed out that almost all of what Hume considered to be "lower offences" would now constitute theft.<sup>43</sup> The modern definition of theft still insists on the owner's (or rightful possessor's) lack of consent, but there is no longer any need for a "felonious taking", the essential modern *actus reus* being "unauthorised appropriation".<sup>44</sup> Thus even a temporary interference with the rights of

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<sup>40</sup> *Ibid.* para 14.03. Serious theft remained a capital crime until the Criminal Procedure Act 1887, s.56. Gordon points out that in practice the last recorded death sentence for theft was much earlier in 1833 (para 14.04, n.31).

<sup>41</sup> Hume, *Commentaries*, 1.57.

<sup>42</sup> *Ibid.*

<sup>43</sup> Gane et al. (2009) para 11-03.

<sup>44</sup> Gordon, GH (2001) para 14.01.

ownership or possession (wheel-clamping by a private contractor) is an act of theft.<sup>45</sup> Procedurally it is no longer necessary to make the fine distinctions required of the courts in an earlier era, for the Criminal Procedure (Scotland) Act 1995 provides that an accused charged with fraud or embezzlement can be convicted of theft and vice versa.<sup>46</sup> Gordon confirms that “all deliberate and unauthorised borrowing of property belonging to another is theft, and the fact that some other offence may be charged in the same circumstances does not alter the position at all”.<sup>47</sup> The expanded scope of theft may have brought a greater degree of simplicity to the criminal courts, but it has not helped create taxonomic clarity and has led to an unhelpful divergence between the criminal and civil definitions of theft (discussed below). This is particularly surprising in Scotland where the same judges staff the criminal and civil bench and so have been responsible for developing this definitional contradiction. As Gordon points out, although the three offences discussed have been conflated to a large extent in criminal law, the distinctions between them are much more important in civil law. Theftuous behaviour carries very different consequences from fraudulent behaviour because of the doctrine of *vitium reale*.<sup>48</sup>

#### ***(a) The Doctrine of Vitium Reale***

It is settled law that stolen property cannot pass because a *vitium reale* (or *labes reales*)<sup>49</sup> attaches to it, thus tainting the property and preventing the transfer of ownership even to a good faith purchaser for value. Stair describes it as “inherent vitiosity”<sup>50</sup> and even to the present day the law recognises “the pervasive quality of the *vitium reale* of theft”.<sup>51</sup> However, for the most part the doctrine of *vitium reale* is asserted rather than discussed in case law and its origins are unexplored. The roots of the doctrine appear to derive from the Roman concept of *vitium* as a defect in property which was for sale. Roman owners of slaves had to declare any emotional,

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<sup>45</sup> *Carmichael v Black* 1992 SCCR 709. Gordon describes this case as “driving a coach and four through many concepts, if not the whole structure, of the traditional law of theft” (*ibid.* para 14.01).

<sup>46</sup> Criminal Procedure (Scotland) Act Sch. 3 para 8 (3) and (4).

<sup>47</sup> Gordon, GH (2001) para 14.01.

<sup>48</sup> *Ibid.* para 14.02 n.17.

<sup>49</sup> Apparently interchangeable terms, see Reid (1996) para 614.

<sup>50</sup> Stair II.12.10.

<sup>51</sup> *Carey Miller* (2005a) para 10.15.

moral or physical defect in their property to the buyer, who had a remedy if that information proved to be false.<sup>52</sup> The *vitium* was later extended to physical defects in sales of livestock and by the time of the *Institutes* it had extended into all sales.<sup>53</sup> The Scottish courts regard stolen property as being “tainted with a *labes realis*, which will follow it into the hands of all parties, however innocently acquiring rights therein.”<sup>54</sup> According to Stair:<sup>55</sup>

Yet in moveables, purchasers are not quarrelable upon the fraud of their authors, if they did purchase for an onerous equivalent cause. The reason is, because moveables must have a current course of traffic, and the buyer is not to consider how the seller purchased, unless it were by theft or violence, which the law accounts as *labes reales*, following the subject to all successors, otherwise there would be the greatest encouragement to theft and robbery.

Property acquired by theft or robbery is tainted by a *vitium reale* and cannot be voluntarily transferred no matter how innocent the transferee may be. However, apart from one apparently inconsistent passage,<sup>56</sup> Stair holds that fraud is “no *vitium reale* affecting the subject, but only the committer of the fraud and these who are partakers of the fraud.”<sup>57</sup> The property consequences arising from theft are therefore much more severe than those arising from fraud and it is of cardinal importance in civil law to distinguish between the two. Innocent third party purchasers can never acquire stolen property, but they can safely acquire property acquired by fraud because “positive law secures the buyer”.<sup>58</sup> The apparent inconsistency in Stair, noted above, can be explained by looking at Stair’s overall scheme of justice (which will be considered in its historical context in chapter 3). The passage in question says:<sup>59</sup>

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<sup>52</sup> Jolowicz and Nicholas (1972) p.294.

<sup>53</sup> Buckland (1963) p.492.

<sup>54</sup> *Brown v Marr, Barclay & others* (1880) 7 R 427 at 447 per Lord Gifford.

<sup>55</sup> Stair IV.40.22, see also II.12.10.

<sup>56</sup> IV.35.20.

<sup>57</sup> I.9.15.

<sup>58</sup> I.7.4.

<sup>59</sup> IV.35.20.

yet the parity of reason in fraud or force, should secure the innocent purchaser, who neither was accessory to the force, nor knew of it when he purchased, which requires a statute; for force, as well as fraud, are *labes reales* by common law.

A possible explanation for this seeming lapse in Stair's treatment of the effects of fraud on third parties lies in the fact that the natural law and the positive law consequences of fraud were different in his mind. This is clear from *Institutions* I.7.4 where, in the context of restitution, he discusses circumstances in which a third party has in *bona fide* acquired things "belonging" to another. Stair's view is that "[i]n such cases we are bound to restore them to the owner, though thereby we lose what we gave, except in some cases, wherein positive law secures the buyer, and leaves the owner to seek the seller." The "natural obligation of restitution"<sup>60</sup> demands that the property be restored regardless of the good or bad faith of the acquirer, but positive law, for policy reasons ("[t]he reason is, because moveables must have a current course of traffic"<sup>61</sup>), protects the innocent third party. This commercial imperative is also consistent with Stair's three principles of positive law which are "society, property and commerce".<sup>62</sup>

Two further points should be noted in relation to the doctrine of *vitium reale*: first, it has created inconsistency between the criminal and the civil definitions of theft; and, secondly, although primary fraud is no *vitium reale*, it may be that secondary fraud is.<sup>63</sup>

### ***(b) Strict Theft and Constructive Theft: Divergent Definitions***

One of the few Scottish cases to discuss the application of *vitium reale* is *Brown v Marr, Barclay & Others*<sup>64</sup> in which a jeweller was running a fraudulent scheme acquiring gold watches from wholesalers on sale or return for the approval of non-

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<sup>60</sup> I.7.4.

<sup>61</sup> IV.40.21.

<sup>62</sup> I.1.22.

<sup>63</sup> The concept of secondary fraud is explored in ch.7 pp.232-238.

<sup>64</sup> (1890) 7 R 427.

existent customers and subsequently pawning them. He was charged with both fraud and theft, but pleaded guilty to fraud and the theft charge was dropped. It was a classic case of two innocent parties litigating over the ownership of property in the aftermath of a criminal conviction: the original owners, who argued the watches had been theftuously obtained and therefore a *vitium reale* attached to them; and the pawnbrokers who had acquired them in good faith. The court held that the innocent third party acquirer was protected since this was a contract induced by fraud and not by theft. There would have been little difficulty in convicting the jeweller for theft in the criminal courts, but the Second Division was unwilling to accept such a broad definition of theft in the civil law. The existence of a contract was important (on the basis of which the property had been “voluntarily entrusted” to the jeweller), as was a line of English authority which held that between two innocent parties “he shall suffer who has enabled the wrongdoer to commit the fraud.”<sup>65</sup> Lord Gifford explicitly stated that the result of the criminal trial “does not determine in the present question that Marr was not guilty of theft, and that question is entirely open”.<sup>66</sup> It was for the civil law to determine the question of how far the doctrine of *vitium reale* applied, a category which was “not easily to be extended”.<sup>67</sup> In this case the jeweller’s actions did not amount to “theft in the strict sense of that term – not theft in the sense that it attaches a *vitium reale* to the subject itself into whose hands soever it may come”.<sup>68</sup> And in a valiant attempt to resolve criminal and civil definitions he suggested the jeweller’s actions could amount to “constructive theft”,<sup>69</sup> the consequences of which do not apparently involve *vitium reale* or stolen property.

In an earlier criminal case with similar facts a retail jeweller fraudulently induced a wholesale jeweller to send him goods on approval and subsequently pawned the goods.<sup>70</sup> Despite the fact that the court accepted that there was a contract between the parties, it concluded that fraudulently induced consent was invalid consent so there could be no transfer of property; hence Wilson was guilty of theft. Gordon considers

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<sup>65</sup> *Ibid.* at 435 per Lord Justice-Clerk Moncreiff .

<sup>66</sup> *Ibid.* at 445.

<sup>67</sup> *Ibid.* at 447.

<sup>68</sup> *Ibid.* at 446.

<sup>69</sup> *Ibid.* at 447.

<sup>70</sup> *Wm. Wilson* (1882) 5 Couper 48.



this case to be wrongly decided<sup>71</sup> for it would mean that “all goods fraudulently appropriated bear a *vitium reale*”<sup>72</sup> and clearly in the civil law this is not the case.<sup>73</sup> Furthermore, Gordon warns that if “theft for the purposes of the law of *vitium reale* has a different meaning from theft in the criminal law, [this] would introduce a new and unnecessary confusion into the law”.<sup>74</sup> It is submitted that such confusion already exists: the definition of theft in criminal law is now wide enough to include fraudulent and embezzled appropriations and the criminal courts do not generally concern themselves with the civil consequences of the crime (nor does criminal procedure require such a degree of precision).<sup>75</sup> Gordon’s concerns about divergent definitions of fraud and theft do not appear to be shared by civil lawyers.

Gordon looks to the law of contract for assistance, attempting to draw a parallel between void contracts, where there is deemed to be no *consensus in idem*, and theft. In particular, he considers the possibility that fraud leading to essential error could render a contract void and in those circumstances, he suggests, a subsequent appropriation of the property could be classified as theft because of the owner’s lack of consent:<sup>76</sup>

Where the contract by which the owner consents to transfer ownership to the accused is void, and not merely voidable, the consent can be disregarded, and the accused is guilty of theft.

Clearly the criminal courts are unlikely to plunge into the murky waters of the law of error. Moreover, while this would be a neat systematic approach and would provide a retrospective rationalisation of some of the case law, it has not found favour with the civil courts.

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<sup>71</sup> Gordon, GH (2001) para 14.42; also of this view are Gane et al. (2009) para 11-21.

<sup>72</sup> Gordon, GH (2001) para 14.42.

<sup>73</sup> See for instance *Tennent v City of Glasgow Bank* (1879) 6 R (HL) 69.

<sup>74</sup> Gordon, GH (2001) para 14.42.

<sup>75</sup> The reverse is also true, in that the civil courts do not concern themselves with the outcome of any foregoing criminal prosecution as the decisions in *Morrisson v Robertson* 1908 SC 332 and *MacLeod v Kerr* 1965 SC 253 demonstrate. In both the rogue was convicted of theft, but this did not influence the divergent outcomes of the civil cases, as discussed below.

<sup>76</sup> Gordon, GH (2001) para 14.37, see also para 14.43.

Gordon's discussion of the question of consent is influenced by two controversial contract cases (*Morrisson v Robertson*<sup>77</sup> and *MacLeod v Kerr*<sup>78</sup>) and the debate initiated by TB Smith about the correct legal analysis of *Morrisson* in which he argued that it should have been recognised as a case of theft.<sup>79</sup> Both cases followed a criminal prosecution and both were civil actions to determine the ownership of property as between two innocent victims who had been duped into parting with their property or money by the respective rogues. In *Morrisson* cows were obtained from their owner on the false pretence that the fraudster was acting as agent for a creditworthy buyer known to the seller, and they were subsequently resold to an innocent third party. The action was for delivery of the cows from the third party on grounds of theft or alternatively essential error. The reasoning of the court is reminiscent of the arguments used in the criminal cases examined above to distinguish between theft, fraud and breach of trust, in particular discussion of whether the owner intended to transfer ownership or merely possession. The former requires the owner's consent to part with ownership and therefore cannot be theft, but unauthorised appropriation by a possessor can be and in fact Telford, the fraudster, was convicted of theft.<sup>80</sup> The court held there was no contract of sale because the owner's intention was to transfer the property on credit to someone else entirely, and to transfer only possession or custody to Telford.

There is extensive reference to the same English cases relied on in *Brown* above,<sup>81</sup> a line of authority to the effect that in circumstances where the identity of the purchaser is falsely represented, so that the buyer does not know whom he is contracting with, there is no *de facto* contract in existence, no *consensus in idem* and no transfer of property. However, the English law of mistake is quite different from the Scots law of error (or at least, this has been true since the nineteenth century, when error in Scots law was put to a different purpose) and is much more

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<sup>77</sup> 1908 SC 332.

<sup>78</sup> 1965 SLT 358; 1965 SC 253.

<sup>79</sup> Smith (1962) pp.816-817.

<sup>80</sup> Gordon, GH (2001) para 14.39 n.57.

<sup>81</sup> *Higgons v Burton* (1857) 26 LJ Ex 342; *Hardman v Booth* (1863) 1 H & C 803; *Cundy v Lindsay* (1878) LR 3 App Cas 459.

restrictive.<sup>82</sup> The operative mistake (which is always shared) must destroy the very basis of the contract,<sup>83</sup> and resembles the law of frustration more than the law of fraud (the distinction lies in the timing of the operative mistake).<sup>84</sup> The principle that a mistake must be fundamental (in this instance, regarding the identity of the other contracting party), thereby rendering the contract void, was most recently asserted in *Shogun Finance Ltd v Hudson*.<sup>85</sup> In *Morrisson*, perhaps influenced by English developments, the contract was held to be void on grounds of essential error induced by fraud. But was it theft?

TB Smith argued that it was and that, while the correct result had been reached in *Morrisson*, the decision was based on a “false premise” relying on misleading English authority.<sup>86</sup> He did, somewhat inconsistently, advocate that the narrow definition of *vitium reale* laid down in *Brown* should govern the civil law definition of theft, rather than the wide criminal definition.<sup>87</sup> However, despite this, he nevertheless argued that *Morrisson* was a case of theft and the third party could not retain the property because of the operation of a *vitium reale* operating on the transfer of property. TB Smith’s purpose in this discussion was to question the influence on Scots law of the English void/voidable dichotomy in contract as well as the scheme of English property law.

He was in effect arguing for a Scots property law analysis of *Morrisson* based on a civilian abstract theory of transfer whereby the agreement between buyer and seller (the underlying contract) is a separate question from the owner’s consent to transfer (the conveyance).<sup>88</sup> On this analysis the question of consent in the underlying

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<sup>82</sup> See ch.5 pp.170-175 for further discussion of the Scots law of error.

<sup>83</sup> *Bell v Lever Bros* [1932] AC 161.

<sup>84</sup> For a lucid account of the complex history of the law of mistake in English law see McKendrick (2010) ch.16; also MacMillan (2010).

<sup>85</sup> [2004] 1 AC 919; for Scottish comment on the case see Carey Miller (2005c).

<sup>86</sup> Smith (1962) p.816. For a full explanation of the development of TB Smith’s views in relation to *Morrisson* see MacQueen (2005) pp.154-156.

<sup>87</sup> Smith (1962) p.817 n.46.

<sup>88</sup> For discussion of a causal or abstract system of transfer see Reid (1996) para 608; Carey Miller (2005a) paras 8.06 - 8.11.

contract is irrelevant and the issue ought to be whether or not a real vice (or *vitium reale*) was operating *in rem* on the owner's intention to transfer in the conveyance:<sup>89</sup>

The test is whether, according to the doctrine of *justa causa traditionis*, the transferor intended to pass ownership to the person who took delivery; it is not whether the contract which may have underlain delivery was valid. Considerable confusion has resulted at times in Scotland from considering these problems in connection with English doctrines regarding "void" and "voidable" contracts.

TB Smith demonstrated in a later article that the rogue in *Morrisson* had in fact been convicted of criminal theft,<sup>90</sup> but in a sense this was an irrelevant fact given that the criminal definition of theft was not the definition used for the application of the doctrine of *vitium reale* in the civil courts, as he himself had pointed out.<sup>91</sup>

TB Smith's "theft theory" appears to have been accepted by modern academic commentators.<sup>92</sup> This is a curious acquiescence in view of the fact that it was explicitly rejected by the First Division in *MacLeod v Kerr* and TB Smith himself later distanced himself from his earlier views.<sup>93</sup> In *MacLeod* the fraudster paid for a car using a stolen cheque book and sold the car onto an innocent third party before the fraud was discovered. Once again there was a competition between the former owner of the car and the innocent third party purchaser. The sheriff accepted TB Smith's theft argument on the basis that "there is no doubt that Galloway [the rogue]

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<sup>89</sup> Smith (1962) p.539; Gordon points out that no Scottish authority is cited in this passage (Gordon, WM (1970) p.216, n.2). It is arguable that the decisions in both *Morrisson* and *MacLeod* would support a causal rather than an abstract theory of transfer. McBryde takes the view that the abstract theory is neither supported by authority nor necessary (McBryde (2007) paras 13-06 - 13-10).

<sup>90</sup> Smith (1967) pp.206ff.

<sup>91</sup> Smith (1962) p.817 n.46.

<sup>92</sup> Gordon, GH (2001) para 14.39 ; Reid (1996) para 617 (authored by Gordon, WM) says of *Morrisson* "the transferee was also dishonest and his conduct would seem to amount to theft", citing as authority Smith (1978) pp.170-172 and Scottish Law Commission (1976) para 19. TB Smith was a Law Commissioner at the time, and his influence on the output of the Scottish Law Commission is evident, see Reid (1996) para 609 n.5.

<sup>93</sup> Smith (1978) p.172.

stole the car”.<sup>94</sup> On appeal, the real argument was whether the crime which had been committed was fraud or theft, i.e. did the owner consent or not? The court held that the car was not stolen because the owner voluntarily agreed to transfer it to the person who came in response to the advertisement. Lord President Clyde is dismissive of Smith’s theft argument, relied on by the pursuer, and he clarifies unequivocally that *Morrisson* was correctly decided.<sup>95</sup>

The case truly was a case of error regarding the identity of the purchaser, and the learned author was quite wrong in suggesting that Telford was in the position of a thief for *Morrisson* voluntarily and intentionally delivered the cows to Telford.

The Short Commentary was written prior to the decision in *MacLeod*, and TB Smith did modify his theft theory in a later article where he commented that “[t]heft has been construed in the criminal law and civil law to cover a wider scope of situations than forcible or clandestine dispossession, but it does not follow that because conviction for theft would be justified, the real vice attaches in the context of civil law”.<sup>96</sup> However, it may be possible to understand *Morrisson* in the way that TB Smith argued it should be understood not by extending the civil definition of theft but by extending the scope of *vitium reale* beyond theft to denote all circumstances in which a transaction is void.

### *(c) Real and Personal Vices*

It is certainly the case that in early case law the doctrine of *vitium reale* was not restricted to theft and robbery or violence. References to *vitium reale* in the brief reports contained in Morison’s Dictionary<sup>97</sup> suggest that not only were the Scottish

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<sup>94</sup> 1965 SLT 358 at 361; Galloway was convicted of fraud and theft of the car (reported at 1965 SC 253 at 254).

<sup>95</sup> 1965 SLT 358 at 363. Gordon questions Lord Clyde’s observations on the relationship between void contracts and theft and points out that the case is “not technically binding on the High Court” (Gordon, GH (2001) para 14.43 n.74).

<sup>96</sup> Smith (1978) p.172.

<sup>97</sup> In particular the title “Personal and Real”, Morison’s Dictionary 10162-10317, and App. 1-15.

courts at the end of the seventeenth century distinguishing between real and personal vices (or *exceptions*) as well as real and personal rights, but also that a *vitium reale* was a general term to designate a real vice which could be pleaded against innocent third parties. Undoubtedly it extended beyond theft. For instance, *spuilzie*,<sup>98</sup> which Stair regarded as the civil law equivalent of theft and robbery, was included,<sup>99</sup> as was force and fear or extortion.<sup>100</sup> In an early domestic violence case the wife argued after her husband's death that she had been compelled to consent to a disposition of property through fear of her husband who beat and threatened her.<sup>101</sup> Despite the fact that the purchaser was in *bona fide* "and was neither partaker of the violence enforced, nor cause of fear, neither knew thereof", the court reduced the disposition on grounds of *metus*. The law of deathbed was similarly classified as a *labes realis* and deeds granted *in capito lecti* could be reduced even against an innocent third party purchaser.<sup>102</sup> These are very brief reports, but indicative of a more general concept of a real vice.

Modern commentators are more conservative as to what constitutes a real vice, but it is accepted that the doctrine extends beyond theft. In a 1976 Memorandum the Scottish Law Commission included theft, robbery and *spuilzie*.<sup>103</sup> Reid, whose terminology distinguishes between a "real vice" or *vitium reale* and a "vice of consent", includes in the former theft,<sup>104</sup> *spuilzie*<sup>105</sup> and error when it amounts to error *in persona*, relying on *Morrisson* albeit following TB Smith's suggestion that the transferee's dishonest conduct amounted to theft.<sup>106</sup> However, *Morrisson* does not need to be classified as a case of theft, rather the "real effect" of a void contract or transfer has the equivalent effect. In *Morrisson* the court outlines the usual rules which would apply to a fraudulent sale, i.e. that property would pass under the

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<sup>98</sup> "The taking away or intermeddling with moveable goods in the possession of another, without either the consent of that other, or the order of law" (Erskine, *Institute*, III.7.16).

<sup>99</sup> Stair I.9.16; *Hay v Leonard* (1677) Mor 10286.

<sup>100</sup> Stair I.9.8 ("such deeds and obligations as are by force and fear, are made utterly void"); *Anderson v Spence* (1683) Mor 10286.

<sup>101</sup> *Cassie v Fleming* (1632) Mor 10279; also *Woodhead v Nairn* (1662) Mor 10281.

<sup>102</sup> Stair says that deeds granted *in capito lecti* are null but does not use the language of *vitium reale* (Stair III.4.27-31 and IV.20.37-39); however the courts do, see *Liviston v Burn* (1697) Mor 10287.

<sup>103</sup> Scottish Law Commission (1976) para 17.

<sup>104</sup> Reid (1996) para 618.

<sup>105</sup> *Ibid.* para 165.

<sup>106</sup> *Ibid.* para 617.

contract and the owner could either have an action for damages against the fraudster or could reduce the sale; but the right of an innocent third party acquirer would be indefeasible.<sup>107</sup> However, this was not a fraudulent sale. Telford had not misrepresented his own “character and credit”, but claimed to be buying for another, hence there was no sale at all, no contract and no transfer. The whole transaction was, therefore, void and Telford had no better title than if he had stolen the cows,<sup>108</sup> the implication being that a void contract has the same effect as theft, i.e. a real vice operates on the putative contract. Lord Kinnear likens this to dealing with an agent when the person is not an agent at all, implying that a real vice will also operate on a contract entered into with an agent acting without authority.<sup>109</sup>

Carey Miller contrasts property transfers which are subject to a “radical defect” with those which are “merely reducible”.<sup>110</sup> The primary example of a radical defect is theft, but he also includes incapacity.<sup>111</sup> The effect of force and fear is controversial and while historically it was a real vice, modern commentators tend not to include it in that category but to see it as leading to a voidable rather than a void contract or transfer.<sup>112</sup> The most comprehensive modern treatment concludes that the issue has not been settled in modern Scots law mainly because of evidence in case law that third parties have been able to acquire rights where the transaction is defective on account of force and fear,<sup>113</sup> but concedes that “[t]he balance of modern authority ... accepts that force and fear gives rise to voidness”.<sup>114</sup>

The doctrine of *vitium reale* and indeed the categorisation of these “vices” is particularly important in property law because of the effect they have on third party transferees. However, they are most commonly analysed in a contractual context for their effect on the consent of the parties. And indeed property lawyers take the view that the categorisation of defects “must be determined by reference to rules of

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<sup>107</sup> *Morrisson v Robertson* 1908 SC 332 at 336 per Lord McLaren.

<sup>108</sup> *Ibid.* at 337 per Lord McLaren.

<sup>109</sup> *Ibid.* at 339 per Lord Kinnear.

<sup>110</sup> Carey Miller (2005a) para 10.17.

<sup>111</sup> *Ibid.* para 10.17 n.67.; see also McBryde (2007) para 13-08 .

<sup>112</sup> Reid (1996) para 615; Carey Miller (2005a) para 10.17 n.68; *contra* McBryde (2007) para 17-02.

<sup>113</sup> Du Plessis (2004) p.70.

<sup>114</sup> *Ibid.* p.71.

contract”,<sup>115</sup> a surprising assertion given the lengths to which modern commentators go to emphasise the fact that contractual intention is separate from intention to transfer. It suggests, therefore, that there is a strong correlation between what will lead to a void or voidable contract and a void or voidable transfer. In relation to moveable property (which along with money will usually be the target of fraud), the causal/abstract discussion is somewhat meaningless because in most cases the owner will be able to recover the thing or its value and, in any event, in most cases the vice (real or consensual) will have the same effect on the conveyance as on the underlying contract.<sup>116</sup> The question is only significant in relation to third parties or creditors.

As for the consequences of fraud, it is settled that fraud is not a real vice, but merely a personal one or a “vice of consent”, leading to a voidable contract or a voidable transfer.<sup>117</sup> Some commentators take the view that fraud leading to essential error would amount to a real vice<sup>118</sup> (as was the case in *Morrisson*) but that will be a relatively rare occurrence and the courts have been reluctant to affirm that position.

However, if, as I have suggested, the idea of a real vice or *vitium reale* is used to indicate voidness, i.e. circumstances whereby third parties cannot retain the property or money they have acquired, in certain circumstances secondary fraud operates in a similar way.

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<sup>115</sup> Carey Miller (2005a) para 10.17; Reid says, “the rules as to validity and intention are the same, or at least very similar, in relation to both personal and real contracts. The law applies a uniform regime in respect of matters such as error or misrepresentation or capacity; and, furthermore, these rules come from the law of contract and not from the law of property”; and “[o]nly in relatively unusual circs will the factors invalidating the contract not also have the effect of invalidating the conveyance” (Reid (1997), p.235); Gordon takes the view that criminal law would also follow the rules of contract in this matter (Gordon, GH (2001) para 14.43).

<sup>116</sup> Reid (1997), p.235.

<sup>117</sup> McBryde (2007) para 14-53; Reid (1996) para 616; *Price & Pierce Ltd v Bank of Scotland* 1910 SC 1095 at 1106 per Lord Kinnear. MacLeod points out that Erskine appears to elevate fraud, together with error and force and fear, to the status of a real vice (see Erskine, *Institute*, III.1.16 and IV.1.25). However, this is not a position which is reflected in other Institutional accounts or in the decisions of the courts (MacLeod (2010) pp.403-404).

<sup>118</sup> Gordon, GH (2001) para 14.43; McBryde (2007) para 14-56. Thomson’s views are difficult to reconcile: he suggests that even fraudulently induced essential error leads to a voidable contract (Thomson (2009) para 2.10); but in earlier work he took the view that even taking advantage of the other party’s error could prevent consensus in idem (Thomson (1990) para 706). It may be that his views have altered over time, or alternatively that he does not regard a void contract as being equivalent to preventing the constitution of a contract.



*(d) Fraud and Real Vices*

In older case law, as in modern Scots law, it is also clear that fraud is a “personal” rather than a “real” vice. However, when the courts are dealing with the situation where a third party has acquired property tainted by fraud there are two conditions which must be fulfilled for the third party to be protected: first, he must be innocent and must not have *participated* in the fraud; secondly, the transaction must not be gratuitous. This is the essence of secondary fraud, and if one or other of these requirements is not satisfied, the third party must restore the property. In other words, secondary fraud acts as the equivalent of a *vitium reale* and transforms a personal vice into a real vice which is effective against third parties. A detailed analysis of these rules will be given in chapter 7, but it is instructive that in an earlier period secondary fraud appears to have been related to the idea of *vitium reale*.

When Stair deals with fraud in the context of reparation he is clear that it is no *vitium reale*. However, read carefully, we see that this position is qualified. Fraud is a personal vice and the fraudster is therefore liable, but so are “partakers” or accessories. Partaking is the essence of secondary fraud (although Stair does not use that terminology) and by implication it has “real” characteristics in relation to participating third parties, as a selection of passages from Stair illustrates:

[fraud] was also personal, and reached no further than the person committing the fraud, and not *in rem*, reaching the thing, if lawfully it came to any other *not partaking of the fraud*.<sup>119</sup>

Fraud is no *vitium reale* affecting the subject, but only the committer of the fraud and *these who are partakers of the fraud*.<sup>120</sup>

Seventhly, any ground of fraud is a sufficient reason of reduction, or preference against the committer of the fraud, or *these who are partakers of*

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<sup>119</sup> Stair I.9.10, emphasis added. He also alludes to the requirement of onerosity in his reference to the Digest (*nisi in causa lucrativa, ref D.44.4.4.30*).

<sup>120</sup> *Ibid.* I.9.15, emphasis added.

*the fraud*, but not against singular successors, who are not partakers of the same.<sup>121</sup>

and likewise fraud being of a criminal nature, it is not relevant against singular successors, not partakers of the fraud, but only against the committers of the fraud, and these representing them, especially as to feudal rights...; and therefore no action can be effectual against them, upon the fraud of their authors, *unless they were accessory thereto*, at least by knowing the same when they purchased.<sup>122</sup>

In an interesting historical case dating from 1702,<sup>123</sup> and therefore almost contemporaneous with Stair, property was disposed gratuitously in order for Sir John Dempster to qualify to become a Parliamentary candidate. When he subsequently sold the land an action was raised to reduce the transfer on grounds that to sell it was a breach of trust. The court held that the “trust” could not affect the third party’s right as it was not a *vitium reale* unless the third party was “*consciis fraudis*, or knew of the trust”. Knowledge, in this case of a breach of trust, would be enough to penalise the third party, with the implication that the same consequences would arise as if it had been a *vitium reale*. Again in *Duff v Fowler*<sup>124</sup> it was argued that it was fraudulent for an assignee to take a tack that had already been given to a couple under a marriage contract. The court held that this would be a relevant defence if either “[D’s] right was without an onerous cause, or that when he took it he knew that it was contrary to the contract of marriage”.<sup>125</sup> It had been argued that fraud was *vitium reale* to which the reply was that the assignee could not be prejudiced “unless it were proved that he were *particeps fraudis*”.<sup>126</sup> The crucial word is “unless” indicating an exception to the rule that fraud does not affect third parties.<sup>127</sup>

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<sup>121</sup> *Ibid.* IV.35.19, emphasis added.

<sup>122</sup> *Ibid.* IV.40.21, emphasis added.

<sup>123</sup> *Anderson v Dempster* (1702) Mor 10213.

<sup>124</sup> *Duff v Fowler* (1672) Mor 10282.

<sup>125</sup> *Ibid.* at 10283.

<sup>126</sup> *Ibid.* at 10283, Gosford’s Report.

<sup>127</sup> See also *Andersons v Lows* (1863) 2 M 100.

The concept of *particeps fraudis*, also expressed as *consciis fraudis*, implies that knowledge by the third party of a wrong amounts to participation in that wrong and therefore to shared liability. This will be discussed further in chapter 7, but it should be noted that Gosford reports, in the context of assignation, that “fraud and deceit being *vitium reale* doth affect singular successors”.<sup>128</sup> Fraud appears to have real effect where “personal rights” are concerned,<sup>129</sup> another exception to the general protection given to onerous singular successors.<sup>130</sup> In summary, in a variety of situations, either related to knowledge or participation in another’s wrongdoing or where the transaction is gratuitous, secondary fraud appears to have “real” effect. And the courts at this early period in Scots law freely use the terminology of *vitium reale* well beyond its traditional territory of theft to denote that real effect.

#### 4. Fraud and Breach of Trust

Returning to questions of definition, the criminal offence which appears to have given the courts most difficulty is breach of trust, which was treated as a species of fraud by Scottish Institutional writers.<sup>131</sup> In modern criminal law breach of trust and embezzlement constitute the single crime of embezzlement (although Gordon speculates that breach of trust may have wider, albeit undeveloped, limits)<sup>132</sup> but attempts to define it and to distinguish it from fraud and from theft remain elusory.<sup>133</sup>

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<sup>128</sup> *Duff v Fowler* (1672) Mor 10282 at 10283, Gosford’s Report. For extensive case reports on the position of assignees see the title “Personal and Real” in Morison’s Dictionary.

<sup>129</sup> McBryde comments that Stair’s scheme of the consequences of fraud is over-complex ((2007) para 14-75), but this remains the law. See also *McDonnells v Carmichael* (1772) Mor 4974 where the court affirms the exception for assignees despite arguments that they should be given the same protection as an onerous singular successor. The leading case (*Scottish Widows’ Fund v Buist* (1876) 3 R 1078) affirms that position for modern Scots law. The effect of fraud against creditors is a similar exception. In both contexts fraud operates as a *vitium reale* against third parties regardless of their good faith. The suggestion has been made that the exception for assignation can be justified on policy grounds for the protection of the debtor, see McBryde (2007) para 14-80. Anderson (2007) expresses a different view.

<sup>130</sup> For instance in *Scot v Cheisly* (1670) Mor 4867 the court “sustained the declaratory against Thomson, as being *particeps fraudis*; albeit they could not find that *dolus* and circumvention was *vitium reale* which did affect a singular successor” (at 4869).

<sup>131</sup> See Hume, *Commentaries*, 1.61; Burnett refers to “that species of trust, the breach of which is punishable only as fraud” ((1811) pp.111-113).

<sup>132</sup> Gordon, GH (2001) para 17.01.

<sup>133</sup> Gordon puts forward different possible definitions for breach of trust (see Gordon ch.17) but another commentator suggests that “[n]one are particularly satisfactory” (Gane et al. (2009) para 11-48).

Many of the facts of breach of trust cases resemble cases classified as either theft or fraud and there is considerable inconsistency in decided cases.<sup>134</sup>

The essence of breach of trust appears to lie in the fact that a trusted person has been authorised to deal in some way with property or money (the usual case) and has appropriated it for his own use or failed to account to its rightful owner.<sup>135</sup> Jones and Christie consider the trusted person to be in a position equivalent to an agent or someone in a fiduciary or quasi-fiduciary position,<sup>136</sup> but Gordon's position is somewhat different. He concedes that trust is a key factor but argues against a narrower fiduciary criterion: "trust' is nowhere defined in this connection, and there is ample authority that a person entrusted with money can steal it".<sup>137</sup> In Gordon's analysis anyone "who receives the property of another under some duty in respect of it ... can be said to receive it under trust", thereby including the possibility that custodians or any other temporary possessors may be potential embezzlers.<sup>138</sup> The courts have defined embezzlement as "the criminal violation of a contract of trust",<sup>139</sup> and typical cases do appear to involve fiduciaries such as senior employees,<sup>140</sup> agents,<sup>141</sup> solicitors,<sup>142</sup> bank managers,<sup>143</sup> trustees, executors<sup>144</sup> and stockbrokers. It is essential to the crime of embezzlement that the accused has been authorised to deal with the property or money in question, i.e. the owner has given consent to the course of dealing. In *Kent v HM Advocate*<sup>145</sup> the accused could not be convicted of embezzlement because there was insufficient evidence that he had been authorised to act on behalf of the firms in question. Consent, therefore, is a common element to both fraud and breach of trust.

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<sup>134</sup> See Gordon, GH (2001) ch.17 and cases discussed there.

<sup>135</sup> *Ibid.* para 17.31; Gane et al. (2009) paras 11-48 - 11-61.

<sup>136</sup> Jones and Christie go so far as to describe the trusted person as being in a position of quasi-ownership ((2008) para 10-40).

<sup>137</sup> Gordon, GH (2001) para 17.07.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Catherine Cosgrove or Bradley* (1850) J Shaw 301 at 306 per Lord Justice-Clerk Hope. Gordon believes this case to be wrongly decided (Gordon, GH (2001) paras 17.08 and 14.30).

<sup>140</sup> *Allenby v HM Advocate* 1938 JC 55.

<sup>141</sup> *Alex Mitchell* (1874) 3 Couper 77.

<sup>142</sup> *JB Walker Lee* (1884) 5 Couper 492; *Edgar v Mackay* 1926 JC 94.

<sup>143</sup> *HM Advocate v City of Glasgow Bank Directors* (1879) 4 Couper 161.

<sup>144</sup> *John Lawrence* (1872) 2 Couper 168.

<sup>145</sup> 1950 JC 38.

In many breach of trust cases there are explicit references to fraudulent behaviour,<sup>146</sup> and, as mentioned previously, the Institutional writers regarded breach of trust as a species of fraud.<sup>147</sup> The owner's authority (consent) is essential and the crime is committed when the embezzler acts outwith that authority. In *John Lawrence*<sup>148</sup> the accused was an executor who appropriated some of the executry funds for his own purposes. He and his co-executor had found a cash sum belonging to the deceased which was to be deposited in the bank but instead Lawrence appropriated it. He argued that at most this amounted to a breach of promise to the co-executor but was not a crime. However, Lord Neaves held that if "he employs [the trust funds] in such a manner as to put them to any risk, he commits a wrong",<sup>149</sup> in this case embezzlement. On the evidence of the cases, it is arguable that embezzlement is a form of fraud with close affinities to the civil wrong of breach of fiduciary duty, which has an equally close relationship with civil fraud.

Gordon, however, rejects the notion that breach of trust is a species of fraud arguing that "it has more affinities to theft than to fraud".<sup>150</sup> He suggests that there may be sociological stereotypes at work, positioning theft as a "lower-class" crime and embezzlement as a white-collar one:<sup>151</sup>

Message-boys and railway porters steal, while the defalcations of solicitors, stockbrokers or company directors are usually dignified by the less crude term "embezzlement".

He considers breach of trust to be closer to theft than fraud for two reasons: first, the *mens rea* of embezzlement, like that of theft, consists in appropriation without the

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<sup>146</sup> William McGall (1849) J Shaw 194; HM Advocate v City of Glasgow Bank Directors (1879) 4 Couper 161.

<sup>147</sup> See n.131 above.

<sup>148</sup> John Lawrence (1872) 2 Couper 168.

<sup>149</sup> *Ibid.* at 173 per Lord Neaves.

<sup>150</sup> Gordon, GH (2001) para 17.02.

<sup>151</sup> *Ibid.* para 17.06.

consent of the owner<sup>152</sup> and, secondly, embezzlement does not require a false representation to have been made.<sup>153</sup>

The question of consent is the key to distinguishing between these three offences of dishonesty. It is a strange claim to make for breach of trust that no consent is involved, for as we have seen the embezzler is necessarily entrusted with property or funds. And yet that was admittedly the effect of *George Brown*,<sup>154</sup> where a bench of seven judges broadened the longstanding definition of theft and held by a majority that a watchmaker to whom watches had been entrusted for repair was guilty of theft when he appropriated them for his own gain. Despite the fact that the property had been given with the consent of the various owners, “the owner’s consent to the transference of possession is only a qualified and conditional consent, for a special and particular purpose”.<sup>155</sup>

Lengthy and learned arguments were advanced on both sides, referring extensively to the civil law and to *Regiam Majestatem*. The prosecution successfully argued that it was time to abandon the notion that consent must be judged according to the initial act of transfer, according to the civil law principle *initium unius cujusque actionis semper est attendendum*.<sup>156</sup> The distinction between theft and breach of trust “does in no way depend upon the fraud or the honesty of the first acquiring of the goods”,<sup>157</sup> which the court accepted and consequently drew a distinction between cases in which the property is given only in “custody” (whereby possession remains with the owner) and cases which involve the transfer of possession and a power of management. Dishonest appropriation in the former case can amount to theft, in the latter it is breach of trust.

The reasoning in *Brown* is somewhat tortuous, even unconvincing, but the court did expand the definition of theft to include situations where “bare custody” was

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<sup>152</sup> *Ibid.* para 17.33.

<sup>153</sup> *Ibid.* para 17.02 n.17, with reference to Walter Duncan (1849) J Shaw 270.

<sup>154</sup> (1839) 2 Swinton 394.

<sup>155</sup> *Ibid.* at 430 per Lord Mackenzie.

<sup>156</sup> *Ibid.* at 395.

<sup>157</sup> *Ibid.* at 400.

consented to and subsequently abused (Gordon refers to these cases as “theft-embezzlement” cases).<sup>158</sup> However, it remains the case that in true breach of trust cases (the usual case is the administration of money or incorporeal assets) possession is clearly consented to and there is a closer analogy with fraud. It could be argued that the owner consented to possession, but did not consent to the subsequent dishonest appropriation. But on this version of consent, the same could be argued for fraud: usually the fraudster has obtained possession with consent but that consent (retrospectively evaluated) has been obtained dishonestly and had the owner known the true position no consent would have been given. Consent is normally given to the embezzler just as much as to the fraudster. In true breach of trust cases, I would argue, with the support of the Institutional writers and considerable case law, that breach of trust and embezzlement is a species of fraud.

On Gordon’s second point, namely that breach of trust does not require a false representation, there is certainly modern authority to that effect. For instance in *Guild v Lees*<sup>159</sup> the Secretary of the World Curling Association, who was entitled to use the Association’s cheque book for travelling expenses on behalf of the Association, used it to pay his own domestic electricity bill. Lord Justice-General Hope affirmed that the correct charge was breach of trust and not fraud as he had made no false representation. Despite this, a convincing argument can be made that in most embezzlement cases fraud by concealment is involved even if there is no explicit false representation, for instance where a lawyer failed to inform his former clients that he had collected money belonging to them.<sup>160</sup> There is ample authority to demonstrate that the criminal courts consider fraud to have a wider meaning than the making of a false representation, as do the civil courts. In *HM Advocate v City of Glasgow Bank Directors*<sup>161</sup> the bank’s directors were charged with fraud, breach of trust and theft for, respectively, falsifying the balance sheets, taking unauthorised advances in abuse of their position as directors and stealing the proceeds of a bill of exchange. The fraud charge clearly related to making false representations, but in

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<sup>158</sup> Gordon, GH (2001) para 17.04.

<sup>159</sup> *Guild v Lees* 1994 SCCR 745.

<sup>160</sup> For fraudulent concealment as a crime see Gordon, GH (2001) para 18.07 and cases cited therein.

<sup>161</sup> (1879) 4 Couper 161.

relation to breach of trust and embezzlement Lord Justice-Clerk Moncreiff discusses what is necessary for a director's breach of duty to become a criminal as well as a civil offence:<sup>162</sup>

“before this can be raised into a criminal offence ..there must be superadded to the illegality of the act some element of bad faith, some corrupt motive, some guilty knowledge, some fraudulent intent, which shall raise that which, although illegal, was not a crime, into the category of a crime ... the corrupt motive, the bad faith, is essential to the crime itself, and without it there is no crime.”

The synonyms used here – bad faith, corrupt motive, guilty knowledge, fraudulent intent – suggest that the court was familiar with a wider sense of fraud which was related to subjective motive and a broad conception of dishonesty and bad faith. On this definition breach of trust is a close relative of the older meaning of fraud in civil law. Breach of trust appears to involve questions of honesty and dishonesty:<sup>163</sup> it is described as being “inconsistent with honesty”,<sup>164</sup> a somewhat loosely defined moral standard, and as Gordon comments, “the cases lead to the rather vague conclusion that A is guilty of embezzlement only if he has acted ‘dishonestly’.”<sup>165</sup> Certainly when the civil courts are describing actions which would amount to a criminal breach of trust they do not hesitate to describe it as fraud. In *Heritable Reversionary Co Ltd v Millar*<sup>166</sup> the House of Lords referred to a trustee's appropriation of trust property in breach of his fiduciary duty as amounting to both fraud and breach of trust and embezzlement.<sup>167</sup> It seems a reasonable conclusion that in a criminal context the

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<sup>162</sup> *Ibid.* at 187.

<sup>163</sup> Gordon, GH (2001) para 17.33.

<sup>164</sup> *Edgar v Mackay* 1926 JC 94 at 97 per Lord Justice-Clerk Alness. Lord Hunter, dissenting, found no evidence of “actual dishonesty” (at 98) and that the lawyer's former clients should have raised a civil action to recover the money. Lord Anderson dismisses this suggestion: “I demur to the suggestion that a citizen who knows or has some reason for suspecting that a crime of this sort has been committed must bring a civil action before reporting it to the proper authorities” (at 100).

<sup>165</sup> Gordon, GH (2001) para 17.30.

<sup>166</sup> (1892) 19 R (HL) 43.

<sup>167</sup> Lord Herschell said that had the trustee dishonestly appropriated the proceeds he would have committed the crime breach of trust (*ibid.* at 44-45); Lord Watson described his actions as both fraud and breach of trust and embezzlement (at 47, and 50-52); Lord Macnaghten commented that he could



courts have in the past used the terms “fraud” or “fraudulently” to characterise behaviour or intentions as dishonest even where a specific crime must be libelled.

These subtleties shed light on some of the definitional issues concerning fraud, particularly the question of whether fraud requires actual deceit (a question hotly contested in the civil law in the nineteenth century and particularly after the decision in *Derry v Peek*), and demonstrate that at this period the criminal courts were using fraud in the broad general sense of acting dishonestly or in a way that is inconsistent with good faith. Dishonesty appears to be a common requirement for theft,<sup>168</sup> fraud<sup>169</sup> and embezzlement, a vague and necessarily subjective concept even in a criminal law context. Lord Young’s charge to the jury in the criminal trial of a solicitor who appropriated a client’s money for his own (temporary) use, could be summed up in one fundamental question: “do you think his conduct was that of a dishonest man?”<sup>170</sup> It can be argued, then, that in a criminal context acting “fraudulently” can simply mean acting dishonestly or contrary to the standards of good faith. This is consistent with the use of similar language in the civil courts, and is indicative of a concept of fraud that goes beyond specific wrongs and which expresses a general sense of dishonesty, injustice or improbity. However, as will be demonstrated, criminal and civil definitions have moved in different directions: just as the criminal concept of fraud has broadened to be almost coterminous with theft, so the civil definition has narrowed from a broad overarching category of wrongful behaviour to the more restrictive standard of intentional deceit.

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not have applied the property to his own purpose “without committing a fraud for which he might have been made criminally responsible” (at 54).

<sup>168</sup> Gordon, GH (2001) paras 14.23 and 14.51.

<sup>169</sup> *Ibid.* para 18.33 .

<sup>170</sup> JB Walker Lee (1884) 5 Couper 492 at 497.

## ***Chapter 2: The Historical Scope of Fraud***

### **1. An Introduction to Civil Fraud**

One of the notable features of current literature on fraud is the diversity of opinion which it represents. This leads to the curious result that for some the civil law of fraud conveys a wider spectrum of behaviour than criminal fraud, while for others it is considerably narrower than the account given in chapter 1. The most widely accepted definition in modern Scots law is Erskine's, namely that fraud is "a machination or contrivance to deceive",<sup>171</sup> hence deceit is an essential element. However, there is little doubt that historically fraud had a wider meaning and was often used as a means of describing substantive unfairness even where there was no deceit.

The dominant narrative today accepts that in early Scots law fraud did have this wider meaning,<sup>172</sup> but for historical reasons (the crucial period of transformation being the nineteenth century) its meaning was restricted to deliberate or reckless deceit, to which a plea of honest belief was a defence. This narrative will be explored in more detail than has previously been done to demonstrate that the Scots law of fraud is not so much a "mixture or muddle"<sup>173</sup> but simply a muddle which continues to have significant impact on the law.<sup>174</sup> The usual arguments about inauspicious borrowings from English law could be advanced, but it would be more accurate to say that the Scottish judiciary was responsible (whether innocently or deliberately) for misunderstanding the scope of English decisions and the relationship between common law and equity. This, together with a change in the zeitgeist, combined to

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<sup>171</sup> Erskine, *Institute*, III.1.16; McBryde (2007) para 14-02; Thomson (1990) para 702; Smith (1962) p.739, although it should be noted that Smith only accepts this definition for delictual fraud; Walker (1981) p.885; Gloag (1929) p.475.

<sup>172</sup> McBryde (2007) para 16-01; Thomson (1990) para 702; Smith (1962) p.286.

<sup>173</sup> This phrase was first used in relation to the Scots law of error by Peter Stein (Stein (1958) p.192).

<sup>174</sup> Support for this view can also be found in Stein (1958) pp.191-192; see also *Ritchie v Glass* 1936 SLT 591 at 593 per Lord Carmont.

create a new understanding of fraud which was deemed to be more appropriate for Scotland's growing economy.

Beyond the truisms that civil fraud has long been recognised as a delict and as a factor vitiating consent in contracts and property transactions almost nothing about the law of fraud is uncontested. The fact that fraud straddles the law of obligations creates doubt as to where it fits in the general scheme of private law. At one end of the spectrum of liability Thomson classifies fraud as an intentional delict which requires *mens rea*<sup>175</sup> (delict being the civil equivalent of crime); but in a contractual context he regards fraud as “a particular aspect of error”.<sup>176</sup> Nor is the *effect* of fraud entirely without controversy. It usually renders a contract voidable, but it is at least arguable that fraud inducing essential error could bring about absolute nullity and, as argued in chapter 7, secondary fraud may have similar effect. When the Scottish Law Commission addressed the issue in 1978, on the one hand it recommended that fraud cease to exist as a separate ground of annulment from “caused error”.<sup>177</sup> At the other extreme, it invited opinion on whether fraud could be strengthened as a concept to create a *vitium reale*.<sup>178</sup> While it is unlikely that the latter was a serious suggestion for law reform, this disparity in the potential operation of fraud reflects uncertainty as to how best to integrate it into modern Scots law.

Going back to the doctrinal roots of modern Scots law, certainly it is true that in the seventeenth and eighteenth centuries the Scottish courts used the word *fraud* to apply to a wide range of situations. Its primary meaning involves intentional deceit causing harm or loss and to that extent Erskine's definition is accurate. However, it is, and always was, incomplete in that it does not take account of other situations where one party gained an advantage through loss to another in a variety of circumstances not necessarily involving deceit.

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<sup>175</sup> Thomson (2009) para 2.10.

<sup>176</sup> Thomson (1990) para 707.

<sup>177</sup> Scottish Law Commission (1978) p.102.

<sup>178</sup> *Ibid.* p.100.

In this chapter the historical scope of what was deemed to be fraudulent behaviour is examined in relation to three legal concepts: *mala fides*, the principle *culpa lata dolo aequiparatur* and the wider doctrine of presumptive fraud. All three were at times labelled fraud but encompassed behaviour which was not intentionally deceitful. Much has been written about the first of these categories, but the latter two are almost entirely ignored in modern literature. It is acknowledged that this analysis is, therefore, a preliminary attempt to create a taxonomy of the older definition of fraud and that more research into the historical sources is needed.

## 2. Fraud and Mala Fides

It is a common assumption that in older Scots law fraud could denote *mala fides*. While there is some evidence for this,<sup>179</sup> a distinction must be made between two party transactions (the territory of primary fraud) and those involving three parties (secondary fraud).<sup>180</sup> In the former there is a reasonably clear distinction between fraud and *mala fides*; but in the latter bad faith is often referred to as fraud.

Historically there are three contexts in which *bona fides* or *mala fides* are relevant in two party situations: *bona fide* possession, *bona fide* consumption (of fruits) and *bona fide* payment.

The first two contexts relate to property law. Bad faith is constituted by actual knowledge of someone else's right, or ignorance and uncertainty about one's own right.<sup>181</sup> A good faith possessor is "one who, though he be not truly proprietor of the subject which he possesses, yet has reasonably ground to believe himself to be so".<sup>182</sup> If it is established that a person possesses in bad faith, by determining whether or not possession is held on a justifiable or "colourable" title, he is liable for the "fruits" of the property, even those already consumed, and any profits derived from it.<sup>183</sup> If bad

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<sup>179</sup> Campbell v Moir (1681) Mor 4889; Wood v Baird (1696) Mor 4860; Howes v Cunningham (1758) Mor 1799 where it was suggested that a tutor's fraud "consisted in making payment *mala fide*" (at 1802).

<sup>180</sup> This concept is explored in ch.7.

<sup>181</sup> Gray v Watson (1672) Mor 1754.

<sup>182</sup> Bowman v Henderson (1805) Mor App. *Bona et Mala Fides* p.6.

<sup>183</sup> Dick v Oliphant (1677) Mor 1757.

faith is not established, there is no liability for fruits already consumed, only to the extent that the possessor is *in quantum lucrati*. The liability of the bad faith possessor is one of the outworkings of the scholastic theory of liability outlined in chapter 7, in that bad faith increases the severity of the consequences.

The third context, *bona fide* payment,<sup>184</sup> usually consists of payment made in error, often involving the *condictio indebiti* in what could be considered early examples of unjustified enrichment.<sup>185</sup> *Findlay v Monro*<sup>186</sup> is a typical example. An ox was delivered in error, which the family salted and consumed. The defender subsequently argued it had been *bona fide* consumption, and in any event he had received little benefit as “a little Highland cow would have served his small family”.<sup>187</sup> It was replied that “[i]t is a law of nature, *jus suum cuique tribuere* .... and whether you was *in dolo* or *culpa*, yea or no, I may vindicate my property wherever I find it; and there was not so much a title of donation, or any other to sustain his *bona fides*; *et nemo debet locupletari cum alterius jactura*”.<sup>188</sup> Bad faith amounts to knowledge of another’s right, in this case manifested in an error which the defender either knew about or ought to have known about. Such examples are rarely referred to as fraud.

Stair is clear that fraud and *mala fides* are distinct, albeit related, legal concepts. In the *Institutions* fraud is primarily a “delinquence” or delict<sup>189</sup> involving deceit: “Circumvention signifieth the act of fraud, whereby a person is induced to a deed or obligation by deceit, and is called *dolus malus*, in opposition to *dolus bonus* or *solertia*”.<sup>190</sup> There is little doubt that the primary meaning of fraud involves deceitful intent; *mala fides*, on the other hand, indicates, at most, private knowledge.

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<sup>184</sup> Some cases involve payments made to the wrong person: *Porterfield v Cunninghame* (1629) Mor 1781; *Lord Blantyre v Parishioners of Bothwell* (1628) Mor 1780; *Lady MacGill v Crawford* (1716) Mor 1783. Others concern payments made in error: *Tersie v Burnet* (1711) Mor 1783; *The Collector of the Vacant Stipends v Parishioners of Mayboll and Girvane* (1666) Mor 1791.

<sup>185</sup> See generally Morison’s Dictionary, title on *Bona et Mala Fides*, Sect IX “With what modifications *Bona Fide* Consumption Saves from Repetition” pp.1765ff.

<sup>186</sup> *Findlay v Monro* (1698) Mor 1767.

<sup>187</sup> *Ibid.* at 1768.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Stair* I.9.4.

<sup>190</sup> *Ibid.* I.1.9-10.

Stair's most extensive discussion of *mala fides* is in relation to possession,<sup>191</sup> for different consequences apply to good faith and bad faith possessors and his distinction provides some insight into the meaning of bad faith.<sup>192</sup> There is, in fact, a relatively rare instance in Stair's discussion where he appears to use bad faith and fraud interchangeably but this is an unusual occurrence, perhaps influenced by the more frequent conflation of the two by the Scottish courts of his time.<sup>193</sup>

“[u]nder which distinction are comprehended *possessio bonae fidei*, which may be called innocent possession, and *malae fidei* or fraudulent”.

Innocent possessors are those “who do truly think that which they possess to be their own, and know not the right of any other” or, where a third party is concerned, if he is “not accessory to, or conscious of” the fact that his predecessor acquired the property wrongfully.<sup>194</sup> On the other hand, if the words above are read dispositively, Stair may simply be outlining three states of mind, moving from innocent to fraudulent, which would suggest he envisaged *mala fides* to be somewhere in the no man's land between innocence and fraud.

Bad faith almost always consists of private knowledge which, in a property context, means knowledge of someone else's property right. Stair appears to suggest there must be actual knowledge:<sup>195</sup>

“But private knowledge upon information, without legal diligence, or other solemnity allowed in law, at least unless the private knowledge be certain, it is not regarded, nor doth constitute the knower in *mala fide*”.

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<sup>191</sup> There is also a lengthy discussion in Stair's title on Prescription, see II.12.5-7.

<sup>192</sup> For an exposition of the role of good faith in property law see Carey Miller (2005a) paras 8.28 - 8.33. I would respectfully disagree with his conclusion that bad faith amounts to actual knowledge and cannot be presumed.

<sup>193</sup> Stair II.1.21.

<sup>194</sup> *Ibid.* II.1.24.

<sup>195</sup> *Ibid.*

However, he goes on to qualify that position by citing cases, for instance *Children of Wolmet v Lady Wolmet*, in which there were “several presumptions of her knowledge of their right”.<sup>196</sup> The presumption of knowledge is what today would be referred to as constructive knowledge or a “due diligence” approach,<sup>197</sup> which can be inferred from certain fact situations or from the presence of facts which ought to put the possessor on enquiry. Stair recognises that since matters of good or bad faith are “hidden acts of the mind, it is very difficult to know who is in *bona fide* or *mala fide*”.<sup>198</sup> Good faith is presumed, but he nevertheless allows for circumstances in which there is a “contrary probation or vehement presumption” of bad faith.<sup>199</sup>

Scots law historically had a tendency, one which persists to the present day, to discuss questions of bad faith rather than good faith. This is unsurprising because good faith was not used as a stand-alone legal concept; rather it operated as a defence.<sup>200</sup> In his opening discussion of the principles of law, Stair defines the limits of the law’s intervention in human life and enters into a philosophical (and theological) exposition of the distinction between “duty which is necessary, and wherein we are obliged” and “matters of expediency [which] are but *bona utilia*, and

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<sup>196</sup> *Children of Wolmet v Douglas and Cuningham* (1662) Mor 1730. In Stair’s report of this case (*Stair’s Decisions Book 1*, 20 November 1662) there was argument about whether actual knowledge was required to put a person in *mala fide*. Stair reports that the very fact of the child in her womb inferred knowledge prior to its birth.

<sup>197</sup> Carey Miller (2005a) para 8.30. Carey Miller and others do not accept a “due diligence” approach (para 8.31 and references at n.81) but insist that actual knowledge of another’s right is required; Wortley argues that the leading modern authority, *Rodger (Builders) Ltd v Fawdry* 1950 SC 483, extended the rule from actual knowledge to constructive knowledge (Wortley (2002) pp.292-300).

<sup>198</sup> Stair II.12.7

<sup>199</sup> *Ibid.* The presumption arises in a variety of circumstances: where there is possession without title; common knowledge that the property belongs to someone else; if the possessor was informed before acquiring the property that it belonged to someone else; admission of the possessor that it belonged to someone else; if “solemnities” have not been observed in the acquisition; if acquired from a procurator without warrant; if acquired from “a prodigal person”; if unusual security measures are taken; finally that ignorance of the law is no excuse (*scire et scire debere aequiparantur in jure*, trans. to know a thing, and to be bound to know it, are regarded in law as equivalent).

<sup>200</sup> See Taylor (1927) para 672. This is also consistent with Lord Hope’s modern description of good faith as being “generally an underlying principle of an explanatory and legitimating rather than an active or creative nature” (*R v Immigration Officer at Prague Airport* [2005] 2 AC 1 at para 60, with reference to MacQueen, HL “Delict, Contract, and the Bill of Rights: a Perspective from the United Kingdom” (2004) 121 South African LJ 359 at 382; and MacQueen, HL “Good Faith in the Scots Law of Contract: An Undisclosed Principle?” in *Good Faith in Contract and Property Law* (1999) ed. Forte, ADM).

not *inhonesta*”.<sup>201</sup> In matters of “expediency” or individual conscience even if mistakes are made, it is *bona fides* which acquits men of wrongdoing.<sup>202</sup>

it were a sad rack to the consciences of men, if their errors and mistakes in the matters of expediency were to lie as a guilt upon their consciences: but that *bona fides* or *conscientia illaesa*, so much spoken of in the law, is that which cleareth and acquitteth men in such mistakes.

Stair discusses good faith almost in religious terms and equates it with a clean conscience so that even when people get things wrong, good faith will absolve them. The liberating and defensive role of good faith is borne out in case law.<sup>203</sup>

Clearly there is some overlap between fraud and bad faith. The predominant meaning of the latter is private knowledge and a large number of early cases of fraud involved fraudulent concealment.<sup>204</sup> The distinction may lie in the fact that fraudulent concealment often involves intention to deceive, and in modern law it is usually treated as a sub-category of misrepresentation; bad faith, on the other hand, is doing nothing despite having private knowledge that would be to another person’s advantage. It is an internal state of mind. The comparison is between action and omission, although in the case of fraudulent concealment (sometimes referred to by commentators as active concealment for this reason) it is obviously a very fine line, and hence understandably the language of fraud overlaps with bad faith in case law. For Stair *mala fides* does have legal consequences. He devotes no title to it, no systematic treatment, and yet it is woven throughout the text of the *Institutions*, most

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<sup>201</sup> Stair I.1.20. This terminology is borrowed from the religious debates of Reformation Scotland. There is a considerable literature on the heated theological arguments concerning matters which demanded obedience and those which were merely expedient or “indifferent”. In Calvinist Scotland even matters of indifference were not a question of personal choice, but were subject to the demands of Christian duty. This is the backdrop against which Stair’s “obediential” obligations should be seen, see Ford (1988) pp.74-78. On the concept of adiaphorism generally see Verkamp (1977) ch.7; for Scotland see Ford (1994); for England see Rose (2005).

<sup>202</sup> Stair I.1.20.

<sup>203</sup> For instance *Stuart v Earl of Orkney* (1713) Mor 1796, argued at 1797 that “bona fides doth liberate a man from repetition of annualrents, fruits and profits”.

<sup>204</sup> Examples include *Kincaird v Lauder* (1629) Mor 4857; *Kennedy v Blackbarony* (1687) Mor 4858; *Hogg v Hogg* (1749) Mor 4862.



often in relation to three party situations or secondary fraud.<sup>205</sup> There appears to be a presumption of fraud where a person is designated *particeps fraudis* i.e. has knowledge of and is deemed to participate in someone else's fraud.<sup>206</sup>

Bad faith is, therefore, treated in early Scots law as a separate concept from fraud except in the context of secondary fraud, where bad faith is said to amount to fraud.<sup>207</sup> However, two other features which form part of Stair's discussion of fraud significantly extended its meaning: the use of the maxim *culpa lata dolo aequiparatur* and the wider concept of *presumptive* fraud.

### 3. Presumptive Fraud in Delict: *culpa lata dolo aequiparatur*

The effect of the maxim *culpa lata dolo aequiparatur* was to deem as fraud (*dolus*) conduct which did not meet the delictual standard of intentional deceit and it was used in a variety of contexts. It most commonly occurred in relation to agency and the behaviour of fiduciaries, where it still has some currency in modern law.<sup>208</sup> But it also had a wider significance in that it was a means of attributing liability for fraud where behaviour was considered "unwarrantable",<sup>209</sup> or where there was a lack of due care, thus resembling what we would now consider negligence.. The doctrine of *culpa lata*, therefore, considerably expanded the scope of fraud.

#### (a) A historical note on presumptive fraud

Attempts to broaden the scope of fraud are neither new, nor are they unique to Scots law. All legal systems, ancient and modern, have to grapple with the problem of behaviour which is considered morally unacceptable but does not quite come up to

<sup>205</sup> The language of presumptive fraud is also used in case law, for instance, *Blackwood v Creditors of Sir George Hamilton* (1749) Mor 4898.

<sup>206</sup> In *Hamilton v Hamilton* (1669) Mor 16169, it was held "that it was sufficient to infer simulation, if the right was *mala fide* acquired; and that the donatar, at, or before he bought the land, knew of the other party's right" (at 16170).

<sup>207</sup> Discussed in ch.7 pp.249-255.

<sup>208</sup> *Ferguson v Paterson* (1900) 2 F (HL) 37; see Scottish Law Commission (2003) paras 3.23 – 3.30.

<sup>209</sup> Examples include *Scot v Cheisly* (1670) Mor 4867; *Oliver v Suttie* (1840) 2 D 514; *Callendar v Milligan* (1849) 11 D 1174; *Adamson v Glasgow Water-Works Commissioners* (1859) 21 D 1012; *Boyd & Forrest v Glasgow & SW Railway Co* 1912 SC (HL) 93.

the standard of intentional deceit. In Roman law there was a gradual extension of the definition of *dolus malus* from initially requiring simulation or pretence<sup>210</sup> to the classic Labeonic definition which shifted the focus onto deceit practised by any means.<sup>211</sup> However, Zimmermann demonstrates<sup>212</sup> that *dolus* developed beyond Labeo's classic definition (which "is hardly ever even referred to"<sup>213</sup>) to comprise a variety of cases which fell short of intentional deceit, and that both the *actio de dolo* and the *exceptio doli* came to be used in any situation which a party turned to his advantage against the precepts of natural equity.<sup>214</sup>

From here it is only a small step to the recognition of the fact that *dolus* was a kind of opposite number to *bona fides*.

*Dolus* was also an important principle in canonist legal thinking because it was "*si proche de la morale*".<sup>215</sup> This resulted in the Roman concept of *dolus* being modified by the canonist doctrine of restitution<sup>216</sup> in light of "*des exigences de la morale et des enseignements des théologiens*".<sup>217</sup> The connection between fraud and the doctrine of restitution is explored in greater detail in chapter 3, but from a definitional perspective this led to some very fine distinctions. The canonists adopted a purposive approach, judging behaviour by its goal according to the standards of Christian morality, which meant that non-fraudulent behaviour could be equally reprehensible if its outcome was causing harm to another. *Dolus* and fraud thus became separate entities, *dolus* being the "*espèce*", fraud the (broader) "*genre*".<sup>218</sup>

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<sup>210</sup> See generally Zimmermann (1990) pp.664-672.

<sup>211</sup> Zimmermann (1990) p.665. The Labeonic definition, *omnem calliditatem fallaciam machinationem ad circumveniendum fallendum decipiendum alterum adhibitam*, can be found at D.4.3.1.2.

<sup>212</sup> *Ibid.* p.668.

<sup>213</sup> *Ibid.* p.666.

<sup>214</sup> *Ibid.*

<sup>215</sup> "so close to morality", Lemosse (1949) p.1358.

<sup>216</sup> *Ibid.*

<sup>217</sup> "the demands of morality and the teaching of theologians", *ibid.*

<sup>218</sup> *Ibid.* p.1361.

The canonists were concerned with the question of intention, which was not of great interest to Roman law.<sup>219</sup> By contrast, the Labeonic definition of *dolus*<sup>220</sup> focused on conduct – *calliditas, fallacia, machinatio* – whereas the canonists required the sin of a guilty intention. The influence of Aquinas was also considerable. His exposition of an Aristotelian scheme of justice with its fundamental dividing line between voluntary and involuntary acts meant that there was no liability where there was no knowledge.<sup>221</sup> Another principle was developed by the canonists to modify that doctrine: *dolus praesumptus*, which Lemosse defines as *culpa latior*, unintentional fault which is equivalent of *dolus*.<sup>222</sup> In situations where there was no knowledge or intention, *dolus* could be presumed. Even in ancient legal history, presumptive fraud was not without its difficulties, particularly in relation to the requirement for proof of fraud.<sup>223</sup> The canonists resolved this by imbuing certain fact situations with an inherent guilty intention, thus bringing into play a presumption of fraud and bypassing the need for proof.<sup>224</sup> There was further development of presumptive fraud in the fifteenth century beyond *culpa lata* to apply to any inequitable conduct which was *contra naturam*,<sup>225</sup> thus bringing it back into line with the Roman development of *dolus* via a very different route.

The roots of the doctrine of *culpa lata* in Scots law, part of an overarching doctrine of presumptive fraud, are consistent with this more general historical development.

### *(b) Stair and presumptive fraud in delict*

Stair begins his account of fraud as a delict with the oft-repeated mantra that “[f]raud is not to be presumed, but must be proven”.<sup>226</sup> This was a commonplace assertion in

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<sup>219</sup> *Ibid.* p.1366. See Zimmermann (1990) pp.549-553 for details of the way in which the canonist doctrine of *causa* became the bridge between the formalistic approach of Roman law to the enforceability of contracts and the modern focus on intention of the parties.

<sup>220</sup> See above n.211.

<sup>221</sup> See below, p.100

<sup>222</sup> “c’est la *culpa latior*, la faute assimilable au dol, bien que non-intentionnelle”, Lemosse (1949) p.1366. Lemosse regards *culpa latior* and *culpa lata* as equivalents (p.1368).

<sup>223</sup> See Lemosse (1949) p.1367.

<sup>224</sup> *Ibid.*

<sup>225</sup> *Omnia quae fiunt contra naturam praesumuntur dolose fieri, ibid.* p.1368.

<sup>226</sup> Stair I.9.11.

the learned laws,<sup>227</sup> but a presumption of fraud was nevertheless raised in certain situations. Stair does the same, for he then goes on to qualify his statement in that proof can consist of showing either that a person “designed to deceive or that he did such acts from whence fraud is presumed,”<sup>228</sup> thus admitting the possibility that proof may take the form of a presumption of fraud in certain circumstances.

In his discussion of presumptive fraud, at times Stair appears to be conflicted. On the one hand, equity and morality demand that the law take account of harm caused by less than deceit; on the other hand there are the requirements of commerce, a tension repeated down the centuries:<sup>229</sup>

For nothing is more prejudicial to trade, than to be easily involved in pleas; which diverts merchants from their trade, and frequently mars their gain, and sometimes their credit. Therefore we allow not the quarrelling of bargains upon presumed fraud *ex re ipsa* ... if there be not sophistication, or latent insufficiency, which we exactly consider, because it is destructive to trade.

Stair says that Scots law, unlike Roman law, only allows presumptive fraud for “sophistication” (in old Scots this meant “sophistication of ware”, i.e. “adulteration” of goods)<sup>230</sup> or latent insufficiency.<sup>231</sup> The implied warranty that goods should be of marketable quality is the first, and most obvious, type of presumed fraud and historically Scots law, unlike English law, presumed it to be fraudulent if a seller sold goods below that standard. According to Lord Kilbrandon, by providing that any warranty as to quality must be express rather than implied and, in effect, embedding the principle of *caveat emptor* in Scots law, “[t]he Mercantile Law Amendment (Scotland) Act 1856 saw the end of the old-fashioned commercial morality”.<sup>232</sup> In

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<sup>227</sup> Lemosse (1949) p.1367.

<sup>228</sup> Stair I.9.11. Stein notes the same apparent inconsistency in Bankton, firstly repeating the axiom that proof of fraud is required, then giving examples of cases where “the deeds themselves, without any actual proof of Circumvention, shall infer fraud, and a design to deceive”, (I.10.65), see Stein (1958) p.177.

<sup>229</sup> Stair I.9.10.

<sup>230</sup> See Dictionary of the Scots Language, <http://www.dsl.ac.uk/>.

<sup>231</sup> Stair I.9.10; he returns to this subject in I.10.15.

<sup>232</sup> Lord Kilbrandon (1967) p.9.

1967 he wondered whether Scots law had been “off the rails for the last 100 years or so”.<sup>233</sup> Stein provides a detailed history of the disappearance of latent insufficiency and its replacement with an approach in favour of the seller where the buyer’s “eye was his merchant”.<sup>234</sup>

A second type of presumptive fraud for Stair is “where the deeds alleged can have no fair construction, but do infer fraud”, for instance deeds which cause “great lesion to the subscriber”; or wills which are not read before signing; or collusion between family members to prevent a creditor doing diligence.<sup>235</sup> He then embarks on a lengthy exposition of the provisions of the Bankruptcy Act 1621, mostly in relation to what we would now classify as gratuitous alienations or fraudulent preferences to defeat creditors.<sup>236</sup> It has sometimes been suggested that this is a type of presumptive fraud but the legislation considered such actions to be fraud proper, rather than inferred.<sup>237</sup> There was, however, a presumption in relation to the “three-day rule”, namely that a bankrupt person could not enter into transactions within three days of bankruptcy. This rule is consistent with the other categories of presumptive fraud mentioned above in that its rationale was concealment, in this case of impending insolvency.<sup>238</sup> The presumption did not survive. Classifying the attempts to trade in a state of debt as presumptive fraud was rejected by Bell as being “inconsistent with an advanced state of commerce”<sup>239</sup> and for the same reasons by Hume, who attributed the change to the more “lax morality” of nineteenth century Scotland.<sup>240</sup>

In his discussion of cases where the deeds themselves infer fraud, Stair includes *Wardlaw v Dalziel*,<sup>241</sup> an early case in which a “comprising [was] impugned by way of exception *quod dolo*”.<sup>242</sup> He goes on to say that the wrongdoing in *Wardlaw*, which amounted to a failure to disclose information, “and that of latent insufficiency,

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<sup>233</sup> *Ibid.* p.10.

<sup>234</sup> Stein (1958) chs. 14 and 15.

<sup>235</sup> Stair I.9.11.

<sup>236</sup> *Ibid.* I.9.14-15.

<sup>237</sup> McBryde (2007) paras 14-07, 14-25 and 14-26.

<sup>238</sup> *Ibid.* paras 14-27 - 28 and case law referred to therein.

<sup>239</sup> *Ibid.* para 14-28.

<sup>240</sup> Quoted in Stein (1958) p.173.

<sup>241</sup> (1620) Mor 2427.

<sup>242</sup> *Ibid.*

be rather *lata culpa quae dolo aequiparatur*”, in contrast to *dolus*, and he explains the contrast between the two thus:<sup>243</sup>

For the difference betwixt *dolus* and *lata culpa* is, that *dolus est magis animi*, and oftentimes by positive acts, and *lata culpa* is rather *facti*, and by omission of that which the party is obliged to show.

This is a fascinating philosophical observation by Stair, namely that the kind of wrongdoing inherent in *dolus* is principally about intention, it is about motive, the territory of the mind. By contrast, *culpa lata* is about *facti*, about deeds or things done, i.e. it is presumed from fact scenarios or circumstances. The second distinction is that *dolus* is about positive actions, whereas *culpa lata* is the territory of omissions.<sup>244</sup>

Recent scholarship on the history of Scots law has demonstrated that Stair’s influential scheme of obediencial obligations in private law still dominates the way the law of delict is structured.<sup>245</sup> It has been said that Stair’s account of reparation (which he considers to be the civil equivalent of crime)<sup>246</sup> deals only with intentional delicts, including fraud, and that negligence was a later development. However, in his juxtaposition of *dolus* and *culpa lata* Stair foreshadows the modern law in which the whole of the law of negligence, formulated as breach of a duty of care, amounts to liability for omissions. In the *culpa lata* principle we find the historical roots of the way in which Scots law dealt with situations amounting to negligence. As MacQueen and Sellar point out, by using the relatively undeveloped law of *culpa* “the law might well have taken another path, pursuing notions of wrongfulness or unlawfulness such as had established themselves on the Continent rather than the duty of care”.<sup>247</sup>

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<sup>243</sup> Stair I.9.11.

<sup>244</sup> MacQueen and Sellar (2000) pp.544-545.

<sup>245</sup> See in particular Visser & Whitty (2000) pp.437-446; Norrie (2000) pp.481-484; MacQueen & Sellar (2000) pp.521-524.

<sup>246</sup> Norrie (2000) p.477; McKechnie (1958) pp.265ff.

<sup>247</sup> MacQueen and Sellar (2000) p.546.

In summary, the maxim *culpa lata dolo aequiperatur* is part of Stair's account of the law of delict. It would perhaps be fair to call it the delictual version of presumptive fraud as opposed to the contractual version which was even wider in scope.<sup>248</sup> It was principally about omissions, often situations amounting to a lack of due care. This in turn made it a suitable tool to deal with breaches of a fiduciary duty by trustees, executors and partners, as well as with unintentional misrepresentations. It seems clear, therefore, that Stair's treatment of delict was not limited to "intentional injuries amounting to crime"<sup>249</sup> in that *culpa lata* goes beyond the territory of intentional wrongdoing. This account may also cast doubt on the assertion that as a general principle of Scots law *culpa* did not emerge until the late nineteenth century.<sup>250</sup> In the guise of *culpa lata dolo aequiperatur* it was alive and well long before then.

It is perhaps worth noting that Stair's reference to *Wardlaw v Dalziel* may suggest that there is a link between the *culpa lata* principle and the *exceptio doli*. In *Wardlaw* (which Stair relates explicitly to behaviour involving *culpa lata*) a "comprising [was] impugned by way of exception *quod dolo*".<sup>251</sup> In South African law there has been discussion of the *exceptio doli* as a broad equitable principle and one potential route towards a general principle of good faith,<sup>252</sup> although this theory has been rejected by the courts.<sup>253</sup> While there are occasional references in older Scottish cases,<sup>254</sup> it does not appear that the *exceptio doli* was used with any regularity. The *culpa lata* principle is much more familiar. It is also interesting to note that the same principle has played a role in English equity, particularly in the eventual recognition of liability for negligent misstatements:<sup>255</sup>

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<sup>248</sup> See below pp.65-90.

<sup>249</sup> Visser and Whitty (2000) p.433.

<sup>250</sup> MacCormack (1974) p.29.

<sup>251</sup> (1620) Mor 2427.

<sup>252</sup> Lubbe (1996); Zimmermann (1996) pp.211-241; also Zimmermann (1990) pp.84-87.

<sup>253</sup> *Bank of Lisbon & South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A).

<sup>254</sup> *Wardlaw v Dalziel* (1620) Mor 2427; *McDonnells v Carmichael* (1772) Mor 4974 at 4976 in the argument of counsel; Erskine, *Institute* III.1.16: "Hence, if he who is guilty of the fraud shall sue for performance, the other party may be relieved by an exception of dolo; or though no suit shall be brought against him, he himself may sue for setting aside the contract *ex capite doli*." The expression *ex capite doli* is found in older case law more frequently than *exceptio doli*.

<sup>255</sup> Lubbe (1996) p.296.

Although the Roman sources putting *culpa lata* on an equal footing with *dolus* are not quoted in the relevant cases, the shift in Equity towards the recognition of liability for honest but negligent misrepresentation seems to have come about as a result of an equation of gross negligence with fraud. Similar tendencies are evident with regard to that part of equitable fraud that is normally classified under the rubric constructive fraud.

One influential English textbook<sup>256</sup> specifically discusses “the broad principle that, so far as civil liability is concerned, gross negligence is to be treated as equivalent to fraud,”<sup>257</sup> citing the *Digest*, several English cases<sup>258</sup> and one Scottish appeal case.<sup>259</sup> It was obviously a principle that had some currency up until the end of the nineteenth century north and south of the border and the similarities with developments in Scots law would merit further study. Broadly speaking, *culpa lata* involved lack of reasonable care: in modern terminology negligence.

### *(c) Culpa lata and negligence*

The cases discussed below rely on the concept of *culpa lata* to express a broad notion of fault by omission. This weaker sense of *culpa lata* as *fault* appears to have been the meaning ascribed to it, rather than the later tendency to translate it as “gross recklessness”. Liability is often assessed on policy grounds in terms of whether or not the defender acted with reasonable care and caution particularly where property was acquired in circumstances which ought to have put the acquirer on guard. In these cases *culpa lata* comes close to denoting bad faith.

For instance in *Brown v Marr, Barclay & Others*<sup>260</sup> the court had concerns about the behaviour of a third party recipient who was a pawnbroker because a substantial quantity of jewellery had been pawned in a short period of time. According to Lord

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<sup>256</sup> Moyle (1892), cited in Lubbe (1996) p.296.

<sup>257</sup> Moyle (1892) pp.59ff.

<sup>258</sup> *Evans v Edmonds* (1853) 13 CB 786; *Reese River Silver Mining Co v Smith* (1869) LR 64 HL 4; *Weir v Bell* (1898) 3 Ex D 238 CA.

<sup>259</sup> *Western Bank v Addie* (1867) LR 1 Sc App 145.

<sup>260</sup> *Brown v Marr, Barclay & Others* (1890) 7 R 427.



Moncreiff “[the] question arises whether the defenders exercised such reasonable care and caution as to give them a right to be considered as *bona fide* or innocent parties in this question,”<sup>261</sup> or “whether they acted so rashly in making the advances and in taking the watches in security thereof as to deprive them on the benefit of being held *bona fide* and onerous holders”.<sup>262</sup> In this context bad faith is not limited to questions about the third party’s private state of knowledge. It also involves scrutiny of behaviour according to a more objective standard of “reasonable care and caution”. In *Brown* the pawnbrokers were not entirely free of blame because of the lack of enquiry into Marr’s title to the goods, but the court was not prepared to go so far as to call them “*mala fide* possessors”.<sup>263</sup>

The clearest explanation of the *culpa lata* principle is found in *Faulds v Townsend*,<sup>264</sup> a case normally considered to illustrate principles of unjustified enrichment. The defender was a manufacturing chemist whose business involved the slaughter of animals which were no longer fit for butchering. In order to avoid nuisance to the neighbourhood, the purchase and processing of the animals usually took place during the night. The pursuer’s horse was stolen, hastily sold to Townsend for less than its market value, and the same night was boiled up for manure. It was not until afterwards that it came to light the animal had been stolen, and the owner brought an action for the value of the horse. Lord Ardmillan set out the various possible responses of the law where stolen property has been acquired by a third party:

- a) stolen property can always be recovered by an owner because of the doctrine of *vitium reale* and the good faith of the recipient is no defence;<sup>265</sup>
- b) if the third party recipient parted with possession honestly and in good faith, he would only be liable *in quantum lucratus* and “the owner would be left to seek restitution from the possessor”.<sup>266</sup>

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<sup>261</sup> *Ibid.* at 437 per Lord Moncreiff.

<sup>262</sup> *Ibid.* at 451 per Lord Gifford.

<sup>263</sup> *Ibid.*

<sup>264</sup> (1861) 23 D 437.

<sup>265</sup> *Ibid.* at 439 per Lord Ardmillan (aff by 1<sup>st</sup> Div.); on *vitium reale* see ch. 1 pp.20-22.

<sup>266</sup> *Ibid.*

c) if the third party acquired the property “not merely in good faith, and without knowledge that it was stolen, but with due care and caution under the circumstances” and subsequently disposed of it also with “due care and caution”, again he would only be liable *in quantum lucratus*;

d) however, if the third party put an end to possession “*in mala fide* or by *dole*, or by such fault as is equivalent to *dole* ... he would be liable in the proved value of the animal”.<sup>267</sup>

Because of the unusual nature of the business, and the fact that it afforded “temptation to theft”, as a matter of public policy a high degree of care and caution was required and, in this case, was not exercised in the purchase and disposal of the horse. The defender was, therefore, guilty of *culpa lata quae equiparatur dolo* and liable for the full value of the horse.<sup>268</sup>

Besides providing some insight into third party liability, Lord Ardmillan also appears to equate *culpa lata* with a more general notion of “fault”:<sup>269</sup>

Want of care and caution is fault – not always *culpa lata*; but it may be *culpa lata* in circumstances where great care and caution are required, and are not given. The peculiar circumstances which demand great care and caution raise the character of the *culpa* which consists in the want of that care and caution. When, on grounds of public policy, an unusual degree of care and caution is required from a person who carries on a business which must afford temptation to theft, then the want of that care and caution in the purchase and

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<sup>267</sup> *Ibid.*

<sup>268</sup> *Ibid.* See also McKay v Forsyth (1758) Mor 4944 where a purchase of salmon was found not to have been made in good faith (with intention to defraud creditors), and the defender was liable for its value.

<sup>269</sup> (1861) 23 D 437 at 439-440 per Lord Ardmillan. This explanation is reminiscent of Bell’s discussion of *culpa lata* ((1839) *Principles* §233-4) which comes under the heading “Responsibility for Neglect, Actual or Presumed”, and is immediately followed by a similarly policy-based liability applying to common carriers, innkeepers and stables. The roots of this liability arise from the Praetorian Edict, which is “enlarged” because they are “cases supposed to be peculiarly exposed to the dangers of collusion and carelessness” (§ 235).

disposal of a stolen article is not only a fault, and a fault through which the purchaser has acquired the property, or has ceased to possess it, and prevented the possibility of vindication, but it is a fault in regard to which public policy, and consequent personal responsibility in the matter, have raised and aggravated the quality.

On this analysis there are two possible faults in the behaviour of a third party recipient: the first is the question of how the property was acquired; the second is the question if and how it was disposed of. In *Faulds* the third party was liable on both counts, but Lord Ardmillan appears to suggest that either would have created liability. Bad faith is a familiar criterion for liability in the acquisition of the property by a third party. The second type of fault, applicable to both acquisition and disposal, is a more objective standard of due care and caution, which derives in *Faulds* from public policy. It comes closer to the idea of constructive knowledge where the acquirer ought to have been put on enquiry. To modern eyes it appears closely related to negligence, failure to meet a reasonable standard of care and caution, and it is at least arguable that this amounts to a delictual claim, based on *culpa* as Stair would have had it, and treated as an aspect of fraud. It was a familiar characterisation of behaviour which could not be classified as either a crime or an intentional delict, amounting to fault, in a looser sense of the word, which was inferred on grounds of public policy.<sup>270</sup>

***(d) Breach of fiduciary duty, negligence and culpa lata***

The *culpa lata* principle was also used in relation to trustees and breaches of fiduciary duty in the late nineteenth century, at a time when the courts were grappling with liability for negligent misstatements. It is a notable feature of the authorities on fraud in its wider meaning that many of the cases involve agents, trustees or other fiduciary or quasi-fiduciary relationships. But in the cases discussed below it appears that the Scottish courts had a restrictive view of what constituted a

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<sup>270</sup> “under malice I would include gross recklessness, *culpa lata quae equiparatur dolo*. Malice in a wide sense, imports not only a bad motive, but the want of any good motive”, *Callendar v Milligan* (1849) 11 D 1174 at 1176 per Lord MacKenzie.

breach of a fiduciary duty, and the House of Lords used the *culpa lata* principle to expand liability. The language of fraud is sometimes used in the judgments, which cast light on the relationship between fraud and breach of fiduciary duty as well as on the scope of *culpa lata*.

In *McPherson's Trs v Watt*<sup>271</sup> a solicitor, who had acted for family members in various transactions, purchased trust property for himself but concealed from the family his identity as purchaser. It was argued that he had been acting as agent for the family, that there had been concealment and, in addition, that he had not bought at a fair price. Lord President Inglis denied liability on grounds that there was no agency relationship;<sup>272</sup> Lord Deas agreed and, in addition, held that although the solicitor concealed he was the buyer, there was no deceit so fraud was not proved.<sup>273</sup> Lord Shand dissented on both counts (and his judgment was affirmed on appeal): the solicitor's liability arose from a combination of concealment and the relationship between the parties, which was fiduciary in character; there was evidence that he had obtained the property for less than the market price; and he should not be allowed to retain a benefit obtained in these circumstances. He affirmed the decision of the Lord Ordinary that a purchase by an agent is a transaction which "the law regards, and rightly regards, with jealousy" and any such agent "must come into Court with clean hands, and must show that his client was acting with full information upon every material matter, and that the price was adequate".<sup>274</sup> A relationship of confidence, disclosure, good faith and equality in the transaction are identified as relevant factors for inferring *culpa*.

The House of Lords agreed with Lord Shand that there was a "relation of confidence" between the solicitor and the family,<sup>275</sup> which, although not strictly fiduciary in that he was not acting for them in this particular transaction (although he had done previously), implies that any relation of confidence would import the same duty. And even if there was no intentional deceit in the concealment, the combination

<sup>271</sup> (1877) 4 R 601; rev 1878 5 R (HL) 9.

<sup>272</sup> *Ibid.* at 610 per Lord President Inglis.

<sup>273</sup> *Ibid.* at 613 per Lord Deas.

<sup>274</sup> *Ibid.* at 617 per Lord Shand.

<sup>275</sup> (1878) 5 R (HL) 9 at 15 per Lord Chancellor Cairns.

of the relationship plus non-disclosure could not stand. There was no need to investigate his motives:<sup>276</sup>

He may not have had any fraudulent design; he may have conceived himself warranted in acting as he did; he may not have apprehended the duties imposed by fiduciary relations; but it is not the less clear that the law must be enforced and the purchase nullified.

Regardless of his intention, this combination of factors inferred *culpa* or fraud. It is also worth remarking that in the late nineteenth century the Scottish courts appear somewhat reluctant to penalise fiduciaries, many of whom were lawyers like themselves. *McPherson* was followed a decade later, almost contemporaneously with the decision in *Derry v Peek*, by a trilogy of cases all of which involved the liability of trustees who had acted negligently with trust assets and had incurred losses (usually following a bankruptcy). The actions were brought by the beneficiaries arguing that the trustees should be personally liable for the losses incurred.

In *Knox v Mackinnon*<sup>277</sup> some of the trustees had made an imprudent loan to a family member who subsequently became insolvent. Lord Watson held (affirming the decision of the Inner House<sup>278</sup>) that an indemnity clause in the trust deed was “ineffectual to protect a trustee against the consequences of *culpa lata*, or of gross negligence on his part, or of any conduct which is inconsistent with *bona fides*”.<sup>279</sup> Even though they had acted from honest motives in making the loan they had nevertheless committed a breach of trust.

In the following year in *Raes v Meek*<sup>280</sup> trust funds were lent for property development and the borrower again became insolvent. The case was clearly controversial in Scotland where a bench of seven judges held by a narrow margin

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<sup>276</sup> *Ibid.* at 19 per Lord O’Hagan.

<sup>277</sup> (1888) 15 R (HL) 83.

<sup>278</sup> The case is reported as *Millar’s Factor v Millar’s Trs* (1886) 14 R 22, decided on the narrower ground that the breach of trust consisted in not ensuring that there was adequate security for the loan.

<sup>279</sup> (1888) 15 R (HL) 83 at 86 per Lord Watson.

<sup>280</sup> (1889) 16 R (HL) 31.

(four to three) that the trustees were not personally liable. This was reversed on appeal and Lord Herschell's speech, with which the rest of the court concurred, relied on the decision in *Knox* and on Lord Watson's reference to the *culpa lata* principle. According to Lord Herschell, *culpa lata* is indistinguishable from "the want of that care which a man of ordinary prudence would display in the management of his own affairs".<sup>281</sup> In *Raes* it is used as an early formulation of liability for negligence in the context of a breach of trust.

Lord Shand was one of the three dissenting voices in the Inner House in *Raes*, where there was clearly controversy about extending liability for misrepresentations made without deceitful intent. By the time of *Carruthers v Carruthers*<sup>282</sup> Lord Shand was no longer on the Scottish bench but he had handed on the dissenting mantle to Lord Rutherford Clark. Once again trustees were in the frame for not having conducted any regular examination of accounts, subsequent to which one of their number absconded with part of the trust fund and became insolvent. And yet again the House of Lords affirmed the dissenting judgment, holding that the trustees' breach of duty amounted to *culpa lata*, now equated to gross negligence. Just as the meaning of fraud became more restrictive in the second half of the nineteenth century, so we see a similar narrowing of the *culpa lata* principle. Where previously it had been used to denote a broad sense of fault, now the standard was one of gross negligence, equivalent to both a delict and (probably) a crime.

Several points are worth noting in relation to these cases. The Scottish courts attributed no liability to the trustees either because they did not consider the relationship to be fiduciary in character; or because they had a lower standard for what constituted a fiduciary duty; or because they considered the trustees to be protected by a variety of immunity or indemnity clauses in the trust deeds. The House of Lords consistently overruled and attempted to articulate the fine line between fraud and breach of trust which was imperceptible in the Scottish decisions. In some of these cases fraud was argued, but the ground of liability settled on to

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<sup>281</sup> *Ibid.* at 35 per Lord Herschell.

<sup>282</sup> (1896) 23 R (HL) 55.

create liability for the trustees was the *culpa lata* principle. A variety of explanations for the principle were put forward in a fiduciary context. It was sometimes referred to as negligence or gross negligence; sometimes merely as an omission or failure to take the care expected of a fiduciary; sometimes equivalent to a breach of trust; and sometimes it was related to misrepresentation and misstatements made without intention to deceive. Just as for a criminal breach of trust there was no need to show intention, so in a civil context the language of fraud was used, but the test for whether the duty had been breached was judged objectively. Another point of interest is that the Scottish courts appeared to apply a lower standard in relation to when a relationship was fiduciary in character and what constituted breach of a fiduciary duty. The nature and extent of the fiduciary obligation and the relationship between fraud and a breach of that obligation would be fruitful territory for further research.

*(e) Unintentional misrepresentation and culpa lata*

Courts north and south of the border were exercised in the mid-nineteenth century about how to deal with misrepresentations which were unintentional. In an era of commercial expansion and, towards the end of the nineteenth century, a financial crisis in which many banks and other financial institutions failed, contractors, builders, shareholders and other members of the public were trying to find a way either to get their money back or to be compensated for the higher than anticipated costs of performing contracts.

Peter Stein has argued that in older Scots law unintentional misrepresentation was dealt with in two different ways: by an implied warranty against latent defects and “by applying the principle that *culpa lata* is the equivalent of *dolus*.”<sup>283</sup> It is easy to find evidence of the former in older case law, as Stein demonstrates. However, the *culpa lata* principle appears to have been used in this way only occasionally in early case law, and only becomes associated with misrepresentation in the second half of the nineteenth century.<sup>284</sup> The *culpa lata* principle is certainly part of the complex

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<sup>283</sup> Stein (1958) pp.171-172; Stein’s treatment of latent insufficiency as presumptive fraud is convincing (see *ibid.* pp.186-190).

<sup>284</sup> *Scot v Cheisly* (1670) Mor 4867 may be an early example.

story of how the Scottish courts treated unintentional misrepresentations, and this is considered in some detail in chapter 5.

*(f) The fate of culpa lata*

As has been demonstrated, the *culpa lata* principle was used in a variety of contexts which can be considered examples of presumptive fraud in a delictual context. It was applied to the behaviour of third party recipients of property who were in *mala fides* or failed to make enquiry, sometimes explained on grounds of public policy.<sup>285</sup> It was also relevant in a fiduciary context to attribute liability for a failure to adhere to the standards of behaviour expected of a prudent trustee. Its meaning has been little explored<sup>286</sup> but it covers a broad range of behaviour ranging from gross negligence (the modern understanding of the phrase), to a lack of the care expected of a prudent fiduciary or employee,<sup>287</sup> to a broader range of unconscionable behaviour which has been characterised as “conduct which is inconsistent with *bona fides*”.<sup>288</sup> It also brought within the scope of fraud behavior which did not involve intentional deceit by deeming it to be “equivalent” to dole. The tendency was to apply the principle in cases which today we would consider the territory of negligence, and in all cases the defender’s honesty or lack of it was not relevant and did not amount to a defence.

The *culpa lata* principle has survived almost exclusively in the context of breach of trust where it is now understood to mean gross negligence,<sup>289</sup> rather than its weaker sense of unwarrantable behaviour.<sup>290</sup> After the decision in *Carruthers v Carruthers*<sup>291</sup> there was some debate about whether the prohibition on excluding liability for fraud would also apply to cases of *culpa lata*, a principle which was accepted in Scotland

<sup>285</sup> *Faulds v Townsend* (1861) 23 D 437 at 439 per Lord Ardmillan.

<sup>286</sup> There is a brief treatment in *MacCormack* (1972) pp.160ff.

<sup>287</sup> *Raes v Meek* (1889) 16 R (HL) 31 at 35 per Lord Herschell; *Boyd & Forrest v Glasgow & SW Railway Co* 1911 SC 33 at 49.

<sup>288</sup> *Knox v Mackinnon* (1888) 15 R (HL) 83 at 86 per Lord Watson; TB Smith later uses the same phrase in connection with the general principle of *culpa*, *Smith* (1962) p.833.

<sup>289</sup> *Ferguson v Paterson* (1900) 2 F (HL) 37; see discussion in *Scottish Law Commission* (2003) paras 3.23 – 3.30.

<sup>290</sup> Although it still has a broader definition in *Lee v Ritchie* (1904) 6 F 642; *Eaton v Buchanan* 1911 SC (HL) 40; *Clarke v Clarke's Trustees* 1925 SC 693; *Inglis, Petitioners* 1965 SLT 326.

<sup>291</sup> (1896) 23 R (HL) 55.



but not in England.<sup>292</sup> Since then there have been a number of judicial pronouncements about *culpa lata* alleging that as a doctrine it is not useful<sup>293</sup> or even that it is simply no longer in fashion.<sup>294</sup> Lord Justice-Clerk Alness' comments in *Kolbin & Sons v United Shipping Co* are typical:<sup>295</sup>

There has been much refinement in the older cases regarding *culpa levissima*, *culpa levis*, and *culpa lata*. I venture respectfully to doubt whether these somewhat fine distinctions assist in the solution of the problem today. I incline to the view expressed by an eminent English judge, who said that gross negligence is just negligence, with a vituperative adjective attached to it.

This view was questioned by Lord President Cooper in *Hunter v Hanley*<sup>296</sup> who noted that the terms “gross negligence”, “*culpa lata*” and “*crassa negligentia*” had often been used in connection with the liability of trustees. Although it was not relevant to the question before the court (professional negligence) he nevertheless affirmed: “I am not therefore prepared to say that the concept of gross negligence forms no part of the law of Scotland today”.<sup>297</sup> In England, it has been regarded as the Scottish equivalent of equitable fraud,<sup>298</sup> which is perhaps uncomfortable but, in substance, may be more consistent with history.

*Culpa lata* appears to have all but vanished in modern law as a general concept outwith the context of the law of trusts.<sup>299</sup> This is regrettable in that it could have laid

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<sup>292</sup> *Clarke v Clarke's Trustees* 1925 SC 693; *Verrico v Hughes & Son Ltd* 1980 SC 179; *Lutea Trustees Ltd v Orbis Trustees Guernsey Ltd* 1997 SC 255; *Armitage v Nurse* [1998] Ch 241.

<sup>293</sup> *Kolbin & Sons v Kinnear & Co Ltd* 1931 SC (HL) 128.

<sup>294</sup> *SS Baron Vernon v SS Metagama* 1927 SC 498 at 509 per Lord Justice-Clerk Alness.

<sup>295</sup> 1930 SC 724 at 746, referring to *Wilson v Bretty* (1843) 11 M & W 113 at 115 per Baron Rolfe.

<sup>296</sup> 1955 SC 200.

<sup>297</sup> *Ibid.* at 205-206; retention of the concept has been recommended by the Scottish Law Commission ((2003) para 3.30).

<sup>298</sup> *Dovey v Cory* [1901] AC 477, where it was argued for the appellant, “But *culpa lata dolo aequiparatur*; is equivalent ... to equitable fraud” (at 479).

<sup>299</sup> It has, however, made a recent appearance in the context of exclusion clauses. While it is accepted in Scotland that liability cannot be excluded for either fraud or *culpa lata* (see cases at n.292 above), it continues to be a matter of debate in other parts of the United Kingdom. In a recent Privy Council appeal from Guernsey the court considered the *culpa lata* principle and reviewed Scots law in some detail, see *Spread Trustee Company Ltd v Hutcheson* [2011] UKPC 13 at para 48 per Lord Clarke; at

the foundations for the Scottish law of negligence to develop independently based on the broad principle of *culpa*,<sup>300</sup> developing a line of case law that had been established over a long period.

#### 4. Presumptive Fraud in Contract

There are suggestions in case law that bad faith or knowledge is a species of presumptive fraud<sup>301</sup> and, as discussed above, Stein also includes *culpa lata* and latent insufficiency within its scope.<sup>302</sup> For the purpose of this analysis I have treated bad faith as a separate concept from fraud, other than in the context of secondary fraud;<sup>303</sup> and the *culpa lata* principle as an aspect of Stair's discussion of presumptive fraud in a delictual context. Bad faith amounts to private knowledge and lack of disclosure; *culpa lata* is, arguably, an attempt to create a more objective standard of behaviour, with reference to limiting devices such as public policy, reasonableness or prudence, and it has some affinity with the modern concept of negligence. Both of these categories essentially cover omissions. However, there is another version of presumptive fraud in a contractual context which has a different rationale and is almost entirely subjective. Broadly defined, one party has acted in an underhand way so as to cause disadvantage or lesion to another and this is deemed to be fraudulent behaviour. It may be helpful to think of bad faith and *culpa lata* as the passive voice of presumptive fraud; contractual presumptive fraud, on the other hand, is a more active concept – a sword rather than a shield.

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paras 88-102 per Lord Mance; at paras 132-133 and 136 per Lady Hale; at paras 146 and 169-175 per Lord Kerr.

<sup>300</sup> As TB Smith advocated, Smith (1962) p.830.

<sup>301</sup> Campbell v Moir (1681) Mor 4889; Blackwood v Creditors of Sir George Hamilton (1749) Mor 4898; Miller v Geils (1847) 10 D 715, where the concept of "legal fraud" was used to indicate concealment without deceit as a type of presumed fraud; in addition almost all of the cases under the title "Private Knowledge of a Prior Right" in Morison's Dictionary, which would now be considered cases involving "offside goals" regard private knowledge as fraud. This is dealt with in more detail as a species of secondary fraud, see ch. 7 pp.249-255.

<sup>302</sup> Stein (1958) pp.177-185.

<sup>303</sup> See ch.7 pp.249-255.

*(a) Stair and presumptive fraud in contract*

Stair returns to the question of when fraud is presumed in his treatment of “conventional obligations”. Presumptive fraud in the context of delict is principally about concealment, whether of defects, of the import of deeds, or of a state of insolvency. However, in title I.10, his discussion of presumptive fraud is part of a philosophical exploration of the basis of a contract, in which Aristotelian influence is evident. Equality is the philosophical basis for contracting:<sup>304</sup>

It is the property of permutative contracts, that the purpose of the contractors is to keep an equality in the worth and value of the things, fruit, or worth interchanged, the value whereof is regulated according to the common esteem and custom of men in every place.

He then asks the fundamentally important question,<sup>305</sup>

Whether in these contracts there be a moral necessity to keep an exact equality, that whosoever *ex post facto*, shall be found to have made an unequal bargain, the gainer ought to repair the loser.

His answer is that in Scots law it is the will of the parties that will prevail:<sup>306</sup>

the equality required in these contracts, cannot be in any other rate than the parties agree on.

There is a pattern in Stair’s writing that could be described as scholastic in character, a method which would have been familiar from his time as regent at Glasgow University.<sup>307</sup> It is particularly obvious in this discussion. He makes a general statement of a legal principle, then puts forward arguments for and against, in the manner of disputations. Just as he had qualified his requirement for proof of fraud in

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<sup>304</sup> Stair I.10.14.

<sup>305</sup> *Ibid.*

<sup>306</sup> *Ibid.*

<sup>307</sup> Shepherd (1975) p.9.

his discussion of fraud as a delict,<sup>308</sup> now he does the same with his assertion of the high principle of freedom of contract. This is perhaps explicable on grounds of style and method, but some insight into his unease can also be found by placing Stair in his religious context. While freedom was a cardinal principle of the Presbyterian Church, it was always bound by the greater importance of duty;<sup>309</sup> likewise for Stair the conventional obligations are always qualified by the obediential. Immediately after asserting that the only equality required is that which the parties agree on, he says this:<sup>310</sup>

but in [permutative contracts], as in all others, if any party hath disadvantage by fraud or guile, it ought to be repaired; but not by virtue of the contract, but from the obligation arising from delinquence.

There appears to be a certain amount of vacillation in this passage, as though Stair is torn between the requirements of commerce and the moral character of the law: Roman law punishes enorm lesion, Grotius demands equality, but Scots law does not; on the other hand, the Scriptures tell us that “unjust balances are an abomination to the Lord”, and so there is redress for certain kinds of inequality. This is a closely argued passage and the detail is important. The obvious cases of inequality are false money, or latent insufficiency or latent defects in the sale of goods, unless those defects were,<sup>311</sup>

obvious and easily perceivable by the acquirer, in which case there can be no presumption of fraud, “his eye is his merchant”. But in others, according to the sentence of Ambrose; “In contracts,” saith he, “even the defects of the things which are sold ought to be laid open, and unless the seller intimate the same, there is competent to the buyer an action of fraud.” *So also* ...

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<sup>308</sup> Stair I.911; see discussion above pp.50-53.

<sup>309</sup> Ford (1988) ch.7.

<sup>310</sup> I.10.14.

<sup>311</sup> *Ibid.*, emphasis added.

It is not insignificant that Stair openly refers to Ambrose for authority, an influential fourth century ecclesiast and one of the four Doctors of the Church, thus making clear that his source lies not in the civil law, but in theology and morality. In the previous title on delinquence he had already discussed the fact that latent insufficiency was a case of presumptive fraud, and the crucial words “so also” indicate that there are other cases too. Thus not only are latent defects an example of inequality (protecting buyers); so are situations where “the buyer take[s] advantage of the ignorance and simplicity of the seller” (protecting sellers); holding onto goods “till pinching necessity, which raiseth extreme dearth” is another; or inflating the price where the buyer has some special need that puts him at the mercy of the seller, which would violate “the natural obligation of charity”.<sup>312</sup> These exceptions to the freedom of contracting are part of a discussion of inequality, but they are also inextricably linked to fraud. They considerably extend the range of situations in which fraud is presumed, this time in a contractual context.<sup>313</sup> They also demonstrate that inequality (which must derive from Stair’s understanding of Aristotelian and Thomist philosophy) is the root of the presumption.<sup>314</sup> This is borne out in the case law of the seventeenth and eighteenth centuries.

***(b) Presumptive fraud as inequality***

There is abundant evidence that presumptive fraud was an active concept in the Scottish courts well into the nineteenth century. Cases of presumptive fraud were most frequently based on “fraud and circumvention”.<sup>315</sup> For Stair, circumvention was synonymous with fraud. However, over the course of the nineteenth century the meaning of circumvention came to denote the various species of fraud which did not involve intentional deceit.<sup>316</sup> In *Clunie v Stirling*<sup>317</sup> Lord Cockburn explained that,

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<sup>312</sup> *Ibid.*

<sup>313</sup> For discussion of the treatment of presumptive fraud in Bankton and Erskine see Stein (1958) pp.177-179, and discussion below, pp.75-76. Bell is different in that his treatment fraud is eclipsed by error (Stein (1958) pp.184ff.) and there is little trace of presumptive fraud.

<sup>314</sup> Lubbe regards the early development of the doctrine of misrepresentation in England as being an attempt “to prevent injustice resulting from transactions entered into between unequal parties”, Lubbe (1979) pp.124-125.

<sup>315</sup> See McBryde (2007) paras 16-08 – 16-11 for the debate in the Court of Session regarding the form of the issue.

<sup>316</sup> *Mann v Smith* (1861) 23 D 435 is typical of the period, where the courts were exercised by whether or not the action was based on fraud or circumvention, some perceiving a difference, others

“[t]he inference of fraud may be drawn from the whole case, although no one act can be pointed out as in itself a direct instance of the practice of deceit”.<sup>318</sup> He commented on the terminology used in such cases:<sup>319</sup>

Circumvention sometimes amounts to fraud, and some cases of fraud are cases of simple circumvention; and the two pass into each other by such shadowy gradations, that they are often difficult to be distinguished.

Under the influence of English Chancery cases, a similar distinction evolved using the unfortunate categories of moral fraud and legal fraud.<sup>320</sup> Whatever the terminology that was used, most of these cases did not amount to fraud proper in the sense of intentional deceit. It was imposition or taking advantage that created inequality and brought legal sanctions down upon the defender.

The basis of contractual presumptive fraud is inequality, often referred to explicitly in the cases.<sup>321</sup> However, not every case of inequality in a bargain was actionable, bearing in mind the demands of commerce and the *caveat emptor* principle.<sup>322</sup> In *Gillespie v Russel* a landlord claimed to have been manipulated into granting a lease for far below its value but there was not enough in the facts to substantiate a case of

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insisting they amounted to the same thing. Even as late as 1931 Lord Anderson stated that circumvention was “a *nomen iuris* given to that form of fraud which takes the form of dishonest impetration of a will” (*McDougal v McDougal’s Trs* 1931 SC 102 at 116). McBryde takes the view that Lord Anderson was wrong (McBryde (1976) p.99), also see his discussion of the difference between fraud and circumvention (*ibid.* pp.96-101).

<sup>317</sup> (1854) 17 D 15.

<sup>318</sup> *Ibid.* at 18 per Lord Cockburn.

<sup>319</sup> *Ibid.*

<sup>320</sup> *Ferguson v Wilson* (1904) 6 F 779 at 782; *Oliver v Suttie* (1840) 2 D 514 at 516-7. The expression was often used in English cases dealing with negligent and innocent misrepresentation in the same period. It was, however, discredited by the quip of Bramwell, LJ in *Weir v Bell* (1878) 3 Ex D 238: “I am of opinion, with an exception I will presently advert to, that to make a man liable for fraud, moral fraud must be proved against him. I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud, or of anything else, except where some duty is shown and correlative right, and some violation of that duty and right.” (at 243). Lubbe suggests that “legal fraud” denoted negligence liability in English law (Lubbe (1979) p.126).

<sup>321</sup> *Gordon v Crauford* (1730) 1 Paton 47; *Arbuthnot v Siene* (1797) 3 Pat 613 (HL); *McNiell v Moir* (1824) 2 Shaws App 206; *McDiarmid v McDiarmid* (1826) 4 S 583; *Murray v Murray’s Trs* (1826) 4 S 374.

<sup>322</sup> *Nisbet v Kinnaird* (1698) Mor 4872; *Fairie v Inglis* (1669) Mor 14231 in which it was argued that “in so gross inequality [of price] *ex re praesumitur dolus*” (at 14231) which was held to be insufficient grounds to reduce a bargain.

inferred fraud principally because it was a straightforward commercial transaction, the pursuers could not argue that they were vulnerable, and they did not lack opportunity to attend to their own interests as normal landlords would have done.<sup>323</sup> For inequality to raise a presumption of fraud, there generally had to be a further aggravating factor. It is, therefore, inequality *plus* the aggravating factor which creates a presumption of fraud and not simply a disadvantageous bargain. In cases where the presumption was established the courts appear to weigh up a number of factors which may indicate what is sometimes called gross inequality: the presumption may arise from the nature of the deed itself or the circumstances in which it was signed; it may turn on the weakness or vulnerability of the person imposed upon;<sup>324</sup> it may relate to the nature of the behaviour which caused the inequality;<sup>325</sup> or it may arise from exploitation of a relationship of trust and confidence. And in that mix of factors, there is often discussion of whether or not the transaction is gratuitous and whether the vulnerable party had independent legal advice. It is difficult to categorise these cases with any precision, and often several factors work in combination. Detail is given below of the principal categories where presumptive fraud is found.

### *(c) Inequality arising from the deed*

Some of the presumptive fraud cases involve deeds, particularly wills, which were not read aloud to ill or dying people before they were signed. Unsurprisingly, it was held that “fraud is easily inferred by such an act.”<sup>326</sup> In others, the transactions in question were so disadvantageous to one of the parties that the very nature of the deed raised a presumption of fraud,<sup>327</sup> or at least ought to have put the other party on

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<sup>323</sup> (1856) 18 D 677 at 688 per Lord Curriehill.

<sup>324</sup> *Alison v Bothwell* (1696) Mor 4954; *Morrison v Morrison* (1841) 4 D 337; *Clunie v Stirling* (1854) 17 D 15; *Love v Marshall* (1870) 9 M 291; *Mann v Smith* (1861) 23 D 435.

<sup>325</sup> *Scot v Chiesly* (1670) Mor 4867; *Taylor v Tweedie* (1865) 3 M 928 where “impetrated” was preferred to the term “induced” to reflect the fact that the behaviour amounted to taking advantage rather than deceit.

<sup>326</sup> *Galloway v Duff* (1672) Mor 4959.

<sup>327</sup> *Murray v Murray’s Trs* (1826) 4 S 374 in which it was held that “[t]he very nature of the deed itself shows that he must either have been an idiot, or must have been imposed on” (at 378 per Lord Hermand).

enquiry as to the probity of the transaction, even for an arms'-length transaction.<sup>328</sup> It was argued in *McDiarmid v McDiarmid*,<sup>329</sup> where a frail elderly man had signed over property with no independent legal advice, that fraud was “manifest *ex facie* of the deed”. Despite argument that no specific acts of fraud could be proved, Lord Hermand held that “the deed itself proves the fraud”<sup>330</sup> on account of the inequality of the bargain he had entered into. Lord President Hope went further and equated such behaviour with “gross fraud”.<sup>331</sup>

*(d) Inequality plus vulnerability*

A particularly common combination of circumstances giving rise to a presumption of fraud was an unequal bargain with a vulnerable person.<sup>332</sup> The rationale for punishing inequality in these circumstances is this:<sup>333</sup>

It is nothing but a notification to the lieges of the weakness of the person interdicted, and to caution them against dealing with that person, unless on an equal footing. It was therefore wrong in the defenders to take advantage of the known facility of Jean Mackie, and to elicit from her dispositions for a song, at least far under their true value.

There was no need to prove deception in these cases, merely that there was vulnerability which had been taken advantage of causing the vulnerable party to suffer lesion or disadvantage. In *Love v Marshall*<sup>334</sup> the relationship between intentional deceit and taking advantage was discussed. It was said that it was not fraud “in the ordinary sense of the term, - that is to say, it is not a case of a deed

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<sup>328</sup> *Nisbet v Kinnaird* (1698) Mor 4872; *Nisbet v Cairns and Howden* (1864) 2 M 863.

<sup>329</sup> (1826) 4 S 583.

<sup>330</sup> *Ibid.* at 585.

<sup>331</sup> *Ibid.* at 586.

<sup>332</sup> In *Maitland v Fergusson* (1729) Mor 4956 (aff *Fergusson v Maitland* (1729) 1 Pat 73) a discharge was reduced “upon fraud and circumvention, which was principally presumed from the facility and weakness of the granter, joined with the very great inequality of the bargain”.

<sup>333</sup> *Mackie v Maxwell* (1752) Mor 4963 at 4964.

<sup>334</sup> (1870) 9 M 291.



procured by a specific act of deception”.<sup>335</sup> Rather it involved taking advantage of a facile person,<sup>336</sup>

on whom a general influence has been used of an undue and improper character. This influence implies a course of deception, rightly characterised by the word circumvention, which is fraud in grain, but not fraud perpetrated by a single specific act.

The term “circumvention” gradually replaced fraud in circumstances where advantage was taken of weakness, laying the foundations for a discrete doctrine of facility and circumvention, the roots of which clearly lie in presumptive fraud.<sup>337</sup> However, unless those roots are properly understood, the doctrine of facility and circumvention may lack a doctrinal basis and risks being misapplied. An example from the early twentieth century can be found in *McDougal v McDougal’s Trs*<sup>338</sup> at a period when presumptive fraud was no longer a familiar legal doctrine. A will was challenged on grounds of facility and circumvention but the claim was rejected by the Lord Ordinary on grounds that there were no express averments of fraud. On appeal it was argued that the pursuers had shown enough for the court to infer fraud. However, the Second Division affirmed the earlier judgment. Lord Justice-Clerk Alness considered a charge of circumvention to be “almost criminal in its character”<sup>339</sup> and that proof of fraud, deceit and “moral obliquity” had to be shown. In an astonishing statement he claims to be unable to recall any case of the kind where deceit was not present.<sup>340</sup> This is surely wrong but it amply demonstrates that when modern legal doctrines are detached from their history, courts have a tendency to lapse into a narrow formalism because they do not have sufficient understanding

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<sup>335</sup> *Ibid.* at 297 per Lord Kinloch.

<sup>336</sup> *Ibid.*

<sup>337</sup> For a detailed account of the history of facility and circumvention see McBryde (1976) pp.92-101.

<sup>338</sup> 1931 SC 102.

<sup>339</sup> *Ibid.* at 111.

<sup>340</sup> *Ibid.* at 112. His colleagues on the bench did acknowledge that in some circumstances fraud could be inferred, but required a much higher degree of dishonesty than in most of the older authorities. A more recent expression of the same sentiment can be found in *Hartdegen v Fanner* 1980 SLT (Notes) 23 at 24 per Lord Maxwell, although this may have been the result of inadequate authorities put before the court.

to develop the law in a way that is historically consistent without fear of “opening the floodgates” and creating uncertainty.

The conceptual basis of presumptive fraud as inequality is stated most clearly in *McNeill v Moir*<sup>341</sup> where an 80 year old man had granted a gratuitous deed of discharge “to the granter’s great hurt and prejudice, and enormous lesion”.<sup>342</sup> He was found not to have fully understood the deed, nor had he received independent legal advice, and the Lord Ordinary held that it was “a most unequal and unfair transaction”.<sup>343</sup> On appeal, it was argued before the First Division *inter alia* that it was not relevant to state that there had been inequality,<sup>344</sup> to which the court’s response was that “the transaction upon the face of it appeared so grossly unequal and irrational, that it was plain that it could only have been brought about by a fraudulent advantage having been taken of the facility”.<sup>345</sup> *McNeill* contains a number of aggravating factors which, in combination, amounted to presumptive fraud although the separate doctrine of facility and circumvention was beginning to emerge. However, the courts clearly understood it as part of the law of fraud:<sup>346</sup>

Facility and lesion by themselves have not been held as sufficient grounds of reduction by the law of Scotland; fraud has been reckoned a necessary ingredient; at the same time, where the other two are great, a lesser degree of fraud will be sufficient, and will, in certain cases, be presumed: great facility and great lesion will presume fraud. The Lords, however, in some late cases, seem to hold that facility and lesion, even without fraud, are sufficient.

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<sup>341</sup> (1824) 2 Shaws App 206.

<sup>342</sup> *Ibid.* at 209.

<sup>343</sup> *Ibid.* at 210.

<sup>344</sup> *Ibid.* at 211.

<sup>345</sup> *Ibid.* at 211-212.

<sup>346</sup> *Robertson v Fraser* (1777) 5 BS 566 (Tait’s Reports).

*(e) Inequality plus a relationship of trust and confidence*

Fraud could also be presumed in cases where a relationship of trust or confidence was taken advantage of either between family members,<sup>347</sup> or in relationships which were fiduciary or quasi-fiduciary in character such as those involving curators and tutors.<sup>348</sup> There is clearly overlap with the way in which the *culpa lata* principle was used in relationships of trust.<sup>349</sup> The important point is that both doctrines assumed that exploitation of such relationships was part of the law of fraud. In some of these cases, particularly those involving wills, there is both a family relationship and vulnerability in that the person imposed upon may be a family member who is also old or frail. There is a tendency to focus more on the person's weakness than on the nature of the relationship, facility being a more familiar ground of challenge.<sup>350</sup> The cases discussed below represent, in my view, a historical basis in Scots law for what would now be understood as the territory of undue influence. This is perhaps controversial as it has been authoritatively asserted<sup>351</sup> (an assertion first made in 1940 by an English barrister and which has subsequently remained unchallenged<sup>352</sup>) that undue influence was imported into Scots in the late nineteenth century through *Gray v Binny*<sup>353</sup> and that the native ground of challenge in Scots law was facility and circumvention.<sup>354</sup> While *Gray v Binny* may represent a turning point in terms of formal affirmation that the English equitable doctrine of undue influence was compatible with Scots law (with the important caveat that it was neither imported in

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<sup>347</sup> *Wright v Ritchie* (1746) Mor 4952 (an unsuccessful challenge between a husband and wife); *Mann v Smith* (1861) 23 D 435; *Tennent v Tennent's Trs* (1868) 6 M 840 (this was also unsuccessful on the facts, but it was acknowledged that exploitation of a relationship could be a relevant challenge).

<sup>348</sup> *Scot v Chiesly* (1670) Mor 4867 (tutor and ward); *Munro v Strain* (1784) 1 R 1039 (clergy); *Trinch v Watson* (1669) Mor 4958 (curator and ward).

<sup>349</sup> See above, pp.58-62.

<sup>350</sup> For instance, *Taylor v Tweedie* (1865) 3 M 928.

<sup>351</sup> "A new ground of reduction was suggested in the middle of the nineteenth century – undue influence" (McBryde (2007) para 16-22).

<sup>352</sup> "It is from *Gray v Binny* that must be dated the reception of the doctrine of undue influence into Scots law", Winder (1940) p.102; McBryde (2007) para 16-24.

<sup>353</sup> (1879) 7 R 332.

<sup>354</sup> McBryde (2007) paras 16-24 and 16-26; this view appears to be supported by an *obiter* statement from Lord Deas in *Gray v Binny* to the effect that facility and circumvention could be expanded to cover the territory of undue influence and that the case could have been dealt with (but was not) by "that secondary or lower species of fraud which is our law is known as circumvention" (*Gray v Binny* (1879) 7 R 332 at 351).

its entirety nor could it be considered a faithful reproduction),<sup>355</sup> it is inaccurate to say that Scots law did not recognise situations involving abuse of a relationship. Such situations may not be (and are not usually) called “undue influence”, which was not a term of art in Scots law,<sup>356</sup> but that is not to say that exploitation of a relationship of trust and confidence was not sanctionable as part of the scope of presumptive fraud.

There are many early cases involving “status” relationships which have a fiduciary or quasi-fiduciary character. In the *Institutions* Stair begins his treatment of the substantive law with status relationships.<sup>357</sup> The duties arising from these relationships are “obediential” and although Stair does not specifically refer to them in his treatment of fraud, there are strong parallels with other examples of presumptive fraud. Where in the previous category facility and lesion amounted to presumptive fraud, in some of the relationship cases it is minority and lesion which is the actionable combination.<sup>358</sup> It could rightly be argued that minority and lesion has its modern equivalent in the law of incapacity, but it also appears to be regarded as a type of presumptive fraud.

Other Institutional sources are more explicit in making the link with fraud, as are the courts. Bankton’s list of circumstances in which fraud can be inferred (“without any proof of actual circumvention”) supports this typology: as well as transactions involving people who transact in the knowledge of impending insolvency, fraud can be presumed from the deed itself if it causes “great lesion”, for instance where the

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<sup>355</sup> Winder (1940) p.105; in particular Scots law did not import the presumptions which operate in the English law of undue influence, which arise where there is a relationships of trust and confidence between the parties, see *Barclays Bank plc v O’Brien* [1993] 4 All ER 417 at 423 per Lord Browne-Wilkinson; nor does it distinguish between undue influence in a contractual and a testamentary context (*contra* Winder (1940) pp.106-112; *cf.* McBryde (2007) para 16-27).

<sup>356</sup> Although the term is not unknown in the early law. For instance, in Morison’s Dictionary there is a subheading of fraud entitled “Undue Influence” (p.4952); see also Bower, *Complainer* (1750) Mor 8910.

<sup>357</sup> Stair I.4 Conjugal Obligations; I.5 Obligations between Parents and Children; I.6 Obligations between Tutors and Pupils.

<sup>358</sup> Stair I.6.44; the passage in question relates to the obligations of tutors and curators (who are under the same duty in this respect, see I.6.29). Stair also considers husbands and fathers to have a type of curatorship (I.4.13; I.5.12; I.6.1) hence similar considerations would apply in family relationships.

granter is a “weak person”; and, in addition, “all latent rights, among very conjunct and confident persons, are presumed fraudulent”.<sup>359</sup>

Erskine perhaps states it most strongly:<sup>360</sup>

All bargains which, from their very appearance discover oppression, or an intention in any of the contractors to catch some undue advantage from his neighbour’s necessities, lie open to reduction on the head of dole or extortion, without the necessity of proving any special circumstance of fraud or circumvention on the part of that contractor.

And while presumptive fraud is not so clearly articulated in the relationship cases as in those where facility is present,<sup>361</sup> there is nevertheless sufficient authority to indicate that Scots law was always concerned about abuse of relationships of trust and considered it to be a close bedfellow of fraud.

Where lesion was caused to a minor or pupil the courts were quick to reverse the transaction. Sometimes this was done to remove the disadvantage caused, sometimes to restore equality, sometimes to punish unwarrantable behaviour.<sup>362</sup> A disposition was reduced on grounds of minority and lesion where the young woman did not receive a “competent price”, on grounds that “the minor was found thereby circumvented”.<sup>363</sup> In a very early case it was seen as fraudulent (described as “*summa fraude et dolo se gessit*”) for a tutor’s son to purchase property belonging to

<sup>359</sup> Bankton, *Institute*, I.10.66; also I.10.69-79. Bankton explains that “conjunct” refers to family relationships; and “confident” in this context denotes relationships of confidence (I.10.76).

<sup>360</sup> Erskine, *Institute* IV.1.27.

<sup>361</sup> While there is evidence that the courts considered abuse of confidence to be a type of fraud the classification is not crystal clear. For example, there are also suggestions that it can give rise to a kind of illegality or *pactum illicitum* (McBryde (2007) para 16-23, citing *Anstruther v Wilkie* (1856) 18 D 405 and *Logan’s Trs v Reid* (1885) 12 R 1094); that it might be *contra bonos mores* (*Wright v Murray* (1746) Mor 4952); or even a type of extortion, presumably where a more extreme degree of “persuasion” is used to bring about the desired result (Erskine, *Institute*, IV.1.27).

<sup>362</sup> There is a substantial body of case law in this area. Examples include *Davidson v Hamilton* (1632) Mor 8988 (marriage contract between a father-in-law and son-in-law partially reduced on grounds of minority and lesion); *Byres v Reid* (1708) Mor 8995 (wife in competition with husband’s creditors); *Hume v Riddel* (1635) Mor 8989 (lesion presumed from the terms of the bargain founding on the proposition *minor laesus est restituendus*).

<sup>363</sup> *Houston v Maxwell* (1631) Mor 8986 at 8987.

his father's minor.<sup>364</sup> Not only were curators or tutors barred from gaining any personal benefit, but this extended to their close relatives and to contravene that principle was described in the language of fraud.<sup>365</sup> It is the principle of equality which is emphasised in *Carmichael v Castlehill*, an action to reduce an assignation granted by a minor which was argued on grounds of inequality and lesion. The court found lesion and wanted to adjust the transaction "to bring up the terms to an equality and equilibrium".<sup>366</sup> In *Bower, Complainer*,<sup>367</sup> a sectarian-flavoured competition for control of the estate of a 10 year old boy, it was alleged that his Catholic relatives had him sign a document naming them as his curators and subsequently carted him off to the Scots College at Paris "to be educated in the Popish religion".<sup>368</sup> The court reduced the deed and appointed a closer (Protestant) relative curator, explaining that "wherever there is suspicion of undue management, or of imposition on the minor, it is competent to the Court *ex officio*, in order to prevent undue influence, to sequestrate the person of the minor for some time".<sup>369</sup>

Perhaps of greater interest are cases where the young person has reached majority but a transaction involving a former curator or tutor is nevertheless reduced, with more explicit references to the fraudulent nature of the transaction. The relationship between minority and lesion and presumptive fraud can be seen in argument in *Cockburn v Oxenfoord*<sup>370</sup> where a young man who had recently attained majority attempted to reduce a bond granted to his former governor. The counter-argument, that "neither will all the grounds adduced infer circumvention of a person that was major", implies that fraud would readily have been inferred had he been a minor. And in *Trinch v Watson*<sup>371</sup> a contract entered into between a young woman and her former curator was reduced despite the fact she had reached majority. There was some evidence of facility, but fraud was presumed from the fact that she had recently

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<sup>364</sup> Lord Sanquhar v Crichton (1583) Mor 16233.

<sup>365</sup> Relationships involving curators and tutors are also couched in fiduciary terminology and at times the principle *auctor in rem suam* is appealed to, for instance, Thomson v Pagan (1781) Mor 8985.

<sup>366</sup> (1698) Mor 8993 at 8995.

<sup>367</sup> (1750) Mor 8910.

<sup>368</sup> *Ibid.* at 8912 (Falconer's Report).

<sup>369</sup> *Ibid.* at 8912.

<sup>370</sup> (1676) Mor 9028.

<sup>371</sup> (1669) Mor 4958.

been his minor, that the contract was “upon such unequal terms” and was “very unwarrantable on the curator’s part”.<sup>372</sup> However, inequality on its own was not a sufficient ground of reduction unless the presumption of fraud was raised by another aspect of the transaction.<sup>373</sup>

There are other cases in which family members were able to reduce a deed without evidence either of facility or of circumvention. In *Fraser v Fraser’s Trs*,<sup>374</sup> which concerned a discharge of rights obtained by a father from his own child, Lord President Hope’s charge to the jury highlights the legal and moral significance of the relationship:<sup>375</sup>

I need not tell you, for I am sure your own good sense will point out to you, that both in law and reason, where bargains and contracts are entered into between persons standing in the relationship to each other, such as that of husband and wife, parent and child, every thing ought to be done as fairly, equally, openly and candidly as possible.

Again the root of injustice is inequality which arises because of the imbalance of power and influence in the relationship, thus creating a higher duty of honesty. As Lord President Hope goes on to explain:<sup>376</sup>

on one side you have marital authority, parental authority and influence; while, on the other side, you have conjugal love and regard, filial duty and affection

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<sup>372</sup> *Ibid.* However, no fraud was presumed in similar circumstances in *Smith v Napier* (1697) Mor 4955 (uncle and nephew, where it was said the presumptions were weak) or in *Monymusk v Leslie* (1635) Mor 4956 (where presumptive fraud was argued between a curator and his nephew, who had recently reached majority).

<sup>373</sup> In *Abercromby v Earl of Peterborough* (1745) Mor 4894, a disadvantageous transaction with a young man (of majority) was argued to be exorbitant and therefore fraudulent, the counter-argument being that “it would not hinder a bargain of that sort to stand, that it was not precisely equal; if no fraud were condoned on, since parties in these cases judge for themselves”. The court did, however, adjust the terms of the contract in the young man’s favour, and was inclined to find it *contra bonos mores*.

<sup>374</sup> (1834) 13 S 703.

<sup>375</sup> *Ibid.* at 710.

<sup>376</sup> *Ibid.* at 711.

And, therefore,

they do not treat each other upon fair and equal terms, unless every thing be laid by the father fairly and openly before the child.

The children in this particular case had no independent advice nor did their father present them with accounts or any other evidence before asking for their signature. This amounted to fraud, which consisted in concealment plus taking advantage of the child's affection.<sup>377</sup>

The impact of the relationship is obvious where husbands and wives are concerned,<sup>378</sup> or parents and children,<sup>379</sup> but abuse of a position of trust and confidence is not limited to immediate family. In *Murray v Murray's Trs*<sup>380</sup> a young man (who was not a minor) had been persuaded by his uncle to sign a discharge of his inheritance rights. In addition to his youth, he had led a sheltered life, had never travelled beyond the Isle of Skye and was uneducated. An action to reduce the discharge was successful, not on grounds of facility, but of inequality and taking advantage of a trusted position. The Lord Ordinary notes that "without being obliged to establish facility, a very unequal transaction entered into, by which a great advantage has been obtained by one of the parties from the ignorance or want of experience of the other, who ought to have been invited to seek the aid of a friend or man of business to advise with, may be set aside".<sup>381</sup> The First Division considered it an "ugly" case<sup>382</sup> which was "tainted with fraud",<sup>383</sup> for gross advantage had been taken of the pursuer. In *Ballantyne v Neilson*<sup>384</sup> despite the fact that the pursuer was

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<sup>377</sup> *Ibid.* at 712.

<sup>378</sup> *Wright v Murray* (1746) Mor 4952 (it was argued the husband's influence was *contra bonos mores*, but the court found no evidence of "a corrupt bargain").

<sup>379</sup> *Ewen v Mags of Montrose* (1830) 4 W & S's Scottish Appeals 346 (it was argued that inequality inferred fraud, but the House of Lords held the deed was void from uncertainty without addressing the question of fraud); *Smith Cunningham v Anstruther's Trs* (1872) 10 M (HL) 39.

<sup>380</sup> (1826) 4 S 374.

<sup>381</sup> *Ibid.* at 377.

<sup>382</sup> *Ibid.* at 378 per Lord Hermand.

<sup>383</sup> *Ibid.* at 379 per Lord Balgray.

<sup>384</sup> *Ballantyne v Neilson* (1682) Mor 4891.



“major, *sciens et prudens*”, a contract was reduced on grounds of fraud and circumvention because he had been “grossly imposed upon under pretence of friendship ... to go into so disadvantageous a contract”. Once again abuse of a relationship of trust was a route to inferring fraud. It is, therefore, suggested that a relationship of confidence acts as an aggravating factor – just as frailty or vulnerability does in the previous category of cases – in raising a presumption of fraud. In one judicial explanation it was regarded as fortifying the presumption: “I think the presumption, or more than presumption of *mala fides*, is strengthened by the relation of the parties”.<sup>385</sup>

The idea of aggravation is discussed in the important case of *Tennent v Tennent's Trs*<sup>386</sup> which concerned the family partnership of Tennent Breweries. The father had entered into an agreement with one of his sons (Gilbert) that he would advance money to meet his extensive debts on condition that Gilbert renounced his rights under the partnership. After the father's death Gilbert raised an action to have the agreement annulled on various grounds including the allegation that it had been signed for a grossly inadequate consideration and that his consent had been “fraudulently impetrated” on account of the relationship of trust and confidence.<sup>387</sup> The action was unsuccessful, but largely because there was no evidence for his allegations. The court considered that there was adequate consideration in that he had received a substantial amount of money to pay off his debts, even if it was much less than the potential value of his partnership rights. Nor was there any evidence that pressure had been brought to bear on him: indeed he had initiated the transaction because he was in desperate financial straits. Moreover, he had been a practising lawyer and could hardly argue that he did not understand the nature of what he had signed. There are many references in the judgments to the fact that he went into the transaction with his eyes open, which largely accounts for his lack of success.<sup>388</sup> However, there is extensive *obiter* discussion of the combination of factors that might have led to a successful reduction – the lack of adequate consideration,

<sup>385</sup> *Macgowan v Robb* (1864) 2 M 943 at 949 per Lord President McNeill.

<sup>386</sup> (1868) 6 M 840, aff (1870) 8 M (HL) 10.

<sup>387</sup> *Ibid.* at 845 per the Lord Ordinary (Barcaple).

<sup>388</sup> *Ibid.* at 852-853 per Lord Curriehill; at 877 per Lord President Inglis; Lord Deas says “it does not follow that what a man does with his eyes open is to be set aside” (at 860).

parental influence, the lack of independent legal advice, all of which had been successful in some of the cases explored above. An argument was made about the inequality of the bargain, and while it was recognised to be unequal, this alone was not enough without the presence of an aggravating factor, and there were none. However, the majority of the court accepted that the relationship could have been a factor had there been sufficient proof.<sup>389</sup>

I can perfectly understand the application of the legal principle against influence of a father over a son, or even of one brother over another, in a case where the party is got to sign a deed giving up valuable rights, the extent and nature of which are not fully revealed or known to him. If there had been anything of that kind here, - any withholding of information which could have been given, even upon matters as to which, in dealing with third parties, there might have been no duty of disclosure, or any deception as to the nature of the transaction, I think the relationship would have been most important, probably having led to the signing of the deed, in reliance, on the pursuer's part, that those who were so related to him would conceal from him nothing they themselves knew.

Lord Ardmillan, in a dissenting judgment, considered that the circumstances inferred fraud (although by now the concept of presumptive fraud is so far removed from familiar legal doctrine that he attributes it to English law):<sup>390</sup>

It is an element of importance to be weighed with all the other circumstances, and if, in the relations or the conduct of the parties, there are any suspicious circumstances, then gross inadequacy of consideration may reasonably furnish what the English lawyers call "a vehement presumption of fraud".

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<sup>389</sup> *Ibid.* at 861 per Lord Deas.

<sup>390</sup> *Ibid.* at 865, relying on the authority of Story on Equity and Erskine, *Institute*, IV.1.27. It is not clear why Lord Ardmillan should refer to this as an "English" presumption unless he is referring to the "vehement" adjective. There was clearly ample Scottish authority for such a presumption. It may also illustrate that even judges who were sympathetic to, even searching for, such a principle were unfamiliar with it by the second half of the nineteenth century.

The fact that a transaction is unequal, extortionate, and unfair, cannot be left out of consideration in conducting the inquiry whether it was fraudulent.

Lord Ardmillan's decision supports the suggestion that aggravating factors operate to raise a presumption of fraud. In *Tennent* he, unlike his colleagues, accepted that the combination of a number of factors was sufficient to infer fraud and to reduce the agreement: great inequality in the transaction, taking advantage of a relationship of confidence and of the son's financial difficulties; and lack of legal advice.<sup>391</sup> For Lord Ardmillan this was a case of presumptive fraud:<sup>392</sup>

The gates of justice are open wide in the tracing of fraud .... The violation of confidence, the breach of faith, is an incident and an element in the fraud, and an aggravation of it.

By this period in the nineteenth century, it is only the dissenting judgment which supports an analysis of presumptive fraud. Lord President Inglis appeared to disagree fundamentally, or is usually taken to do so,<sup>393</sup> for he did not include abuse of a relationship in what looks like a closed list of grounds for reduction of a contract:<sup>394</sup>

Incapacity is one well known ground of reduction; force and fear is another category; facility and circumvention is a third; fraud is a fourth, - and fraud may consist either in fraudulent misrepresentation or in fraudulent concealment, or in both together; and, lastly, there is essential error. But really, beyond these categories, I am not myself, as a lawyer, - as a Scottish lawyer, - acquainted with any other ground of reduction applicable to deeds.

He examined each of the arguments in turn, but concluded that although there was no doubt that fraud "comprehends within it an infinite variety of cases", there was no

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<sup>391</sup> *Ibid.* at 868.

<sup>392</sup> *Ibid.* at 874.

<sup>393</sup> McBryde (2007) para 16-22.

<sup>394</sup> (1868) 6 M 840 at 876.

evidence here of “fraud, in the proper sense of the term”.<sup>395</sup> Lord President Inglis specifically refused to make a general pronouncement about whether the alleged factors combined (gross inadequacy of consideration, undue influence arising from a confidential relationship, plus lesion on the one hand and great advantage on the other) would be a sufficient ground of reduction in other cases without proof of deceit, regarding it as “dangerous” to do so.<sup>396</sup> Undoubtedly the Lord President considered that abuse of a relationship could, in principle, infer fraud, but there was simply no evidence of abuse in this case.<sup>397</sup> It failed on the facts rather than the law. Given his judgment less than ten years later in *Gray v Binny* it would have been surprising had he rejected relationship as a relevant aggravating factor. For in that case he founded on the trust and confidence between the parties, particularly in relationships which are unequal:<sup>398</sup>

If [the contracting parties] are strangers to each other, and dealing at arm’s-length, each is not only entitled to make the best bargain he can, but to assume that the other fully understands and is the best judge of his own interests. If, on the other hand, the relation of the parties is such as to beget mutual trust and confidence, each owes the other a duty which has no place as between strangers. But if the trust and confidence, instead of being mutual, are all given on one side and not reciprocated, the party trusted and confided in is bound, by the most obvious principles of fair dealing and honesty, not to abuse the power thus put in his hands.

It has been said that Scots law makes a clear distinction between fraud and breach of a fiduciary duty<sup>399</sup> but in an earlier period the two are much more closely related.

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<sup>395</sup> *Ibid.* at 876.

<sup>396</sup> *Ibid.*

<sup>397</sup> *Ibid.* at 877.

<sup>398</sup> *Gray v Binny* (1879) 7 R 332 at 342 per Lord President Inglis.

<sup>399</sup> McBryde (2007) para 14-34, relying on *Harris v A Harris Ltd* 1936 SC 183, where Lord Murray, in a lengthy discussion of equitable fraud, said (at 202) “But the true basis of all such actions as the present is some breach of fiduciary duty. The action complained of may amount to actual fraud or afford evidence from which the presence of *mens rea* may be inferred, but this is merely accidental, not essential. Actual fraud is, in short, only an extreme case of some abuse of power or breach of a fiduciary duty”. He did in fact envisage a continuum which included fraud and breach of fiduciary duty.

Many cases involving fiduciaries use the language of fraud (both via the *culpa lata* principle and presumptive fraud) and it is also to the law of agency that Lord Shand turned to illustrate that Scots law had its own remedy where relationships were abused. In *Gray v Binny* he made a clear analogy with agent/client cases which represented “only one of the various known relations of life in which influence arises from confidence given”.<sup>400</sup> There is little evidence that the courts regarded fraud, including presumptive fraud, as an entirely different species of wrong from a breach of a fiduciary duty, and the case law is at times used interchangeably.<sup>401</sup> The principles which operated in fiduciary relationships, particularly the relationship between agent and principal where there was a growing body of case law, were extended to include anyone in a position in trust, regardless of whether or not there was strictly a fiduciary duty. Although the Scottish courts had a restrictive approach to the standard of behaviour expected of a fiduciary (i.e. breach of fiduciary duty), they did not regard the fiduciary relationship as being different in character from other relationships of trust and confidence, and interpreted it generously in that respect.

In *Munro v Strain*,<sup>402</sup> where a will which had been altered in favour of a clergyman who was also the testator’s confessor, Lord Justice-Clerk Moncreiff explained the nature of relationships with a trusted professional:<sup>403</sup>

unquestionably if persons in those relations use the influence so acquired in order to accomplish purposes of their own, and overcome the will of the client, or parishioner, or patient, such acts will be viewed with great jealousy.

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<sup>400</sup> (1879) 7 R 332 at 349 per Lord Shand. The cases he relies on include *Anstruther v Wilkie* (1856) 18 D 405; *Harris v Robertson* (1864) 2 M 664; *Grieve v Cunningham* (1869) 8 M 317; *Munro v Strain* (1874) 1 R 522. There is some lack of clarity about the basis of these decisions, all of which involve abuse of a fiduciary or quasi-fiduciary relationship. For instance in *Anstruther* there is a suggestion that a solicitor’s exploitation of his client’s financial embarrassment for his own gain is “inherently faulty, and open to be set aside as illegal” (at 419 per Lord Cowan); in *Harris* the issue was adjusted to be breach of duty; in *Grieve* (an unsuccessful action to reduce a will in favour of a solicitor) it was accepted that in some circumstances the solicitor’s influence could amount to a presumption of fraud (at 322); in *Munro* it was regarded as circumvention.

<sup>401</sup> As well as the example in *Gray v Binny* cited above, Lord Shand also used fiduciary cases to illustrate the meaning of the “fraud principle”, see ch. 7 pp.247-249.

<sup>402</sup> (1874) 1 R 522.

<sup>403</sup> *Ibid.* at 525.

A jury found that there was fraud and circumvention, but the case came before the Second Division a second time because of the absence of a finding of facility in the jury's verdict.<sup>404</sup> The court affirmed the verdict and facility was said to be inferred from the nature of the relationship:<sup>405</sup>

facility may be inferred from, or may consist in, circumstances giving to one man an unusual power or influence over another, not necessarily mental weakness.

It would have been more usual at the time to infer *fraud* from the nature of the relationship, but instead it is facility which is inferred, albeit leading to the same end result. What is clear is that a number of factors may raise the same inference, particularly where they are found in combination. Lord Ormidale took the view that both facility and fraud could be inferred from a variety of causes or a combination of them, including the relationship between the parties:<sup>406</sup>

Nor was it disputed in the argument in this case that the weakness and facility necessary to be established may be of a varied character, and may arise from a variety of different causes; that it may arise from the natural disposition of the individual, or from the decay and prostration of his mental and bodily powers consequent upon advanced age or severe affliction, or many other agencies.

In like manner, the fraud or circumvention which ought to be established in conjunction with weakness or facility may differ in degree according to circumstances. Nor is it necessary that there should be direct and positive proof of the fraud or circumvention. It is enough that there are facts and circumstances sufficient to entitle a jury to infer in a reasonable sense that

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<sup>404</sup> *Munro v Strain* (1874) 1 R 1039.

<sup>405</sup> *Ibid.* at 1043 per Lord Justice-Clerk Moncreiff; Lord Benholme's reasoning was that facility "may take its character and its nature from the fraud or circumvention with which it is combined", including from "professional relations which led the one to exercise and the other to submit to a certain intellectual dominion which would not have occurred had that relation not subsisted" (at 1044).

<sup>406</sup> *Ibid.* at 1043 and 1047-1048 per Lord Ormidale.

there has been fraud or circumvention. And in considering this matter, as well as the matter of facility and weakness, it is competent and proper for the jury to look at them not separately merely, but also in combination, and in the light of all the surrounding circumstances. I need scarcely add that among these circumstances there can be none more important than the nature and effect of the challenged deed itself, the way in which it was obtained from the granter, and the relative position of the granted and the party by whom it was obtained or procured from him.

In a historical analysis of undue influence McBryde describes the second half of the nineteenth century as a period in which “the doctrine of undue influence had been slowly fermenting”<sup>407</sup> with reference to many of the cases discussed here. This fermentation may have been prompted by familiarity with English law, but in my view it can also be viewed as a continuation of a line of legal doctrine which had been present in Scots law for many hundreds of years. The scrutiny of close relationships was not an unfamiliar aspect of presumptive fraud for the Scottish courts.<sup>408</sup> However, it is true that the language of presumptive fraud became more infrequent and unfamiliar and the courts began to look to other doctrines (such as undue influence and, particularly, the law of error) to fulfil the same function.

*Gray v Binny* represents a turning point of terminology and language. The action was based on fraud and circumvention or facility and circumvention, but the court (particularly Lord Shand) was uncomfortable about naming abuse of a relationship “fraud” and regarded it as shoe-horning undue influence into the law of fraud. However, the fact that fraud or circumvention did not require proof of intentional deceit was not in question and the court rejected the argument that the pursuer must show fraudulent misrepresentation, fraudulent concealment or facility and circumvention as the only grounds for which Scots law provides a remedy,<sup>409</sup>

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<sup>407</sup> McBryde (2007) para 16-23.

<sup>408</sup> Later cases in which relationship was an important factor include *Gray v Binny* (1879) 7 R 332; *Inglis’s Trs v Inglis* (1887) 14 R 740; *Menzies v Menzies* (1893) 20 R (HL) 108; *Stewart v Bruce’s Trs* (1898) 25 R 965; *Carmichael v Baird* (1899) 6 SLT 369.

<sup>409</sup> *Gray v Binny* (1879) 7 R 332 at 346 per Lord Shand.

drawing a parallel with other cases of circumvention in its broad sense.<sup>410</sup> To insist on intentional deceit,<sup>411</sup>

would lead, on the one hand, to transactions obviously unjust, entered into by one of the parties in the position of not being truly an entirely free agent, being nevertheless held valid, because it could not be shewn that the deed was procured by deceit; or, on the other hand, to the particular facts and circumstances of cases in which gratuitous benefits have been gained through such influence as I have referred to being held as amounting to fraud or deceit, only by taking a strained and exaggerated view of them.

It was now considered inappropriate to use the language of fraud in this category of cases.

Before leaving the topic of presumptive fraud, there are two other factors which are often considered in combination with the categories outlined above, and indeed are often present either singly or in combination: whether or not the exploited party received independent legal advice and whether or not the transaction was gratuitous.<sup>412</sup> Both are part of the mix of aggravating factors precisely because they indicate inequality. If one party has no independent advisor there is a question of equality of arms and so the presumption is raised. Likewise, if only one party gains a benefit from a transaction, the law is suspicious and asks if the un-benefitted party has truly consented.

*(f) Inequality plus lack of independent legal advice*

Where there is an imbalance of power, caused either by weakness or a dominant relationship, a further aggravating factor which often arises is whether the person

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<sup>410</sup> *Ibid.* at 347-8, with reference to *Clunie v Stirling* (1854) 17 D 15 and *Mann v Smith* (1861) 23 D 435. Lord Deas also analysed it under “that secondary or lower species of fraud which is our law is known as circumvention” (at 351).

<sup>411</sup> *Ibid.* at 347.

<sup>412</sup> *McDiarmid v McDiarmid* (1826) 4 S 583.



imposed on has been independently advised.<sup>413</sup> This continues to be of significance in modern Scots law, particularly in the context of spousal cautionary obligations and in relation to wills. However, it appears to be the case that it does not raise a sufficiently strong presumption of fraud on its own; rather it is significant in combination with the other factors enumerated above. In a case where a father had his daughter sign a discharge of her rights to her disadvantage, the Scottish courts did not consider the fact that she was young and lacked an independent advisor to amount to inferred fraud.<sup>414</sup> The House of Lords reversed the decision on grounds that the deed was void from uncertainty, without addressing the question of fraud.<sup>415</sup>

*(g) Inequality plus a gratuitous transaction*

Of much greater significance is the special treatment of gratuitous transactions or those which are granted for inadequate consideration as an aspect of presumptive fraud.<sup>416</sup> This is particularly important in relation to secondary fraud, and is discussed in greater detail in chapter 7, but it is also relevant to ordinary contractual relations.<sup>417</sup> In a sense, a gratuitous transaction is the ultimate embodiment of inequality for there is no reciprocity at all. Historically Scots law has been suspicious of gratuitous or “lucrative” transactions,<sup>418</sup> and there are close links with presumptive fraud as well as the more general presumption against donation.<sup>419</sup> There are obvious historical comparisons with concepts such as just price and *enorm lesion*. In

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<sup>413</sup> Cases where this is a significant factor include: *Murray v Murray’s Trs* (1826) 4 S 374; *Fraser v Fraser’s Trs* (1834) 13 S 703; *Anstruther v Wilkie* (1856) 18 D 405; *Purdon v Rowatt’s Trs* (1856) 19 D 206; *Wardlaw v MacKenzie* (1859) 21 D 940; *Gray v Binny* (1879) 7 R 332; *Carmichael v Baird* (1899) 6 SLT 369.

<sup>414</sup> *Grahame v Ewen’s Trs* (1828) 6 S 479 at 485.

<sup>415</sup> *Ewen v Magistrates of Montrose* (1830) 4 W & S’s Scottish Appeals 346.

<sup>416</sup> There is a large body of case law including: *Galloway v Duff* (1672) Mor 4959; *Gordon v Crawford* (1730) 1 Pat 47; *Lindsay v Ewing* (1770) Mor 8997; *Arbuthnot v Siene* (1797) 3 Pat 613; *McNiell v Moir* (1824) 2 Shaws App 206; *Anstruther v Wilkie* (1856) 18 D 405; *Taylor v Tweedie* (1865) 3 M 928; *Gray v Binny* (1879) 7 R 332; *Carmichael v Baird* (1899) 6 SLT 369.

<sup>417</sup> It is worth noting that in *Stair’s* account “extortion” can also be presumed where one party is weak or vulnerable, or in gratuitous transactions (I.9.8).

<sup>418</sup> An interesting parallel is found in older cases dealing with the distinction between onerous and gratuitous or “lucrative” transactions and titles. A lucrative title could be “purged” (i.e., defended) by showing a “cause onerous and equivalent”, *Lyon of Muirask v Laird of Elsick* (1664) Mor 9792. See also *Elliot v Elliot* (1698) Mor 9782; *Hadden v Haliburton* (1676) Mor 9794. The link with presumptive fraud can be seen either explicitly or implicitly in, for instance, *Street v Mason* (1672) Mor 4911; *Wilson v Smith* (1772) Mor 9833; *Gardener v Davidson* (1802) Mor 9841.

<sup>419</sup> See *MacQueen & Hogg* (2012).

*Arbuthnot v Siene*<sup>420</sup> it was argued that for reduction of a lease to take place there must be *enorm lesion* and not simply inequality combined with facility. The circumstances could have amounted to presumptive fraud. However, the Lord Chancellor (Loughborough) held that such a disadvantageous transaction was acquired in effect “without consideration” by inducing fear in the elderly landlord.<sup>421</sup> It is a feature of these cases that the Scottish courts frequently refer to “consideration”, perhaps surprisingly as Scots law proudly disclaims any such doctrine in the law of contract. However, although the language appears to glance at English law, the division between gifts and bilateral contracts and the underlying suspicion of gratuitous or inadequately valued transactions has a different root. It is possible to trace the distinction between gratuitous and onerous transactions back to the Aristotelian (and Thomist) virtues of liberality (which involved right giving or donation) and justice.<sup>422</sup> The English doctrine of consideration fulfils a quite different function and historically the common law was not concerned with “distinguishing gift transactions from other transactions, or gratuitous transactions from non-gratuitous transactions, and no doctrine about derisory considerations ever developed.”<sup>423</sup> An inadequate transaction or one which has no consideration is sometimes latinised and becomes *sine causa*,<sup>424</sup> and it was said that “it is a principle with us, that if a discharge be granted *sine causa*, it may be reduced”.<sup>425</sup>

In relationships of trust there is particular scrutiny of gifts (“the law looks with great jealousy on all gratuitous benefits obtained by the exercise of influence arising from these relations [of trust]”),<sup>426</sup> and although Scots law did not place an absolute bar on gifts to an agent, a solicitor’s taking advantage of a financially embarrassed client by

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<sup>420</sup> (1797) 3 Pat 613.

<sup>421</sup> *Ibid.* at 618.

<sup>422</sup> *Ethics* IV.1.1120a

<sup>423</sup> Simpson (1975a) p.448; Simpson (1975b) p.263; see also Ibbetson (1999) pp.141-145; and for a useful overview of different theories of consideration see Hogg (2011) pp.125-127. Hogg also suggests that the canon law concept of *causa* may have been interpreted in quite different ways in England and Scotland, paving the way for a doctrine of consideration in the former and the enforceability of promises in the latter (*ibid.* p.126). This would be consistent with the suggestion that *causa* in an Aristotelian sense could derive either from the virtue of justice (equality) or from liberality (donation). Scots law accepted both.

<sup>424</sup> *Dickson v Halbert* (1854) 16 D 586; *Macandrew v Gilhooley* 1911 SC 448.

<sup>425</sup> *Dickson v Halbert* (1854) 16 D 586 at 595 per Lord President McNeill.

<sup>426</sup> *Gray v Binny* (1879) 7 R 332 at 347 per Lord Shand.

insisting on a “gift” was “inconsistent with the confidence and trust which the relation of agent implies”<sup>427</sup> and could be considered “inherently faulty, and open to be set aside as illegal”.<sup>428</sup>

A transaction which lacks consideration or adequate consideration is clearly part of the matrix of factors which creates inequality between the parties. Lord President Inglis explains why it should raise a presumption of fraud, linking it to the question of consent:<sup>429</sup>

Is it not because it goes far to shew that the party who executed the deed, to his own loss and injury, did not very well understand what he was about? That is the reason why inadequacy of consideration affords a presumption of fraud: but if it is obvious otherwise – from evidence – that the party who signed the deed knew perfectly well what he was about, the importance of this element very nearly disappears altogether.

The requirement for onerosity continues to be an important factor in the law of fraud, particularly in three-party situations.

## 5. Conclusion

By the end of the nineteenth century, presumptive fraud had had its day (albeit there were still occasional references to it), particularly after the decision in *Derry v Peek*. In its place discrete doctrines such as facility and circumvention and undue influence began to take hold, although the courts well into the twentieth century recognised that the roots of both lay in the broad doctrine of fraud. In *Ross v Gosselin's Exrs* Lord President Clyde referred to distinctions between the two categories:<sup>430</sup>

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<sup>427</sup> *Anstruther v Wilkie* (1856) 18 D 405 at 416 per Lord Justice-Clerk Hope.

<sup>428</sup> *Ibid.* at 419 per Lord Cowan.

<sup>429</sup> *Tennent v Tennent's Trs* (1868) 6 M 840 at 877 per Lord President Inglis.

<sup>430</sup> *Ross v Gosselin's Executors* 1926 SC 325 at 334 per Lord President Clyde.

I think it would be extravagant and fallacious to refuse to recognise the distinction between these two different kinds of questions, merely because they are both ultimately referable to the same broad category of fraud.

Other categories of presumptive fraud are now embodied in legislation, for instance the modern rules relating to unfair preferences or gratuitous alienations.<sup>431</sup> Perhaps the most controversial manifestation of presumptive fraud in this overview are cases where the courts appear to penalise a bad bargain, although it is evident that inequality in itself was only in rare cases – when it amounted to gross inequality – sufficient to annul a transaction, but rather had to be accompanied by an aggravating factor. Modern commentators rely on the growing dominance of the *caveat emptor* principle to explain the disappearance of considerations of inequality or injustice in setting aside a bargain.<sup>432</sup> And yet it could be argued that the purpose of legislation such as the Unfair Contract Terms Act 1977 or the Unfair Terms in Consumer Contracts Regulations<sup>433</sup> is to reassert the same underlying principle of protecting the weaker party, even those trading in a commercial context, from abuse of the power of the more dominant one, a manifestation of inequality.

However, it is important to recognise that, historically, any of the aggravating factors which created inequality could be penalised under the head of presumptive fraud. If this is not appreciated then the conceptual basis of the wider concept of fraud becomes an anomaly. Arguably, that is what we are now experiencing. Fraud in its wider sense is little understood by the current generation of lawyers, nor is it taught to new generations of law students. Consequently, when new situations arise which raise questions of injustice and inequality, there is little sense that historical precedents can be appealed to or worked with to deliver a coherent response. Exploitation of a weaker person's vulnerability, or an unequal relationship, or a gratuitous transaction that brings great disadvantage to its granter, or obtaining

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<sup>431</sup> Bankruptcy (Scotland) Act 1985 ss.34 and 36, although the development of commercial society did allow, even encourage, an insolvent to trade (McBryde (2007) para 14-28).

<sup>432</sup> Thomson (1990) para 708.

<sup>433</sup> SI 1999/2083; as amended by the Unfair Terms in Consumer Contracts (Amendment) Regulations 2001, SI 2001/1186.

consent to a deed in an improper way – all of these are aspects of presumptive fraud and are as likely to recur in 2012 as in earlier centuries.

This exploration of the ways in which Scots law dealt with situations which were considered fraudulent without involving intentional deceit demonstrates that an enormously wide range of behaviour was included in the scope of fraud. Omissions and concealment were dealt with as bad faith or by using the *culpa lata* principle without the need to show any pre-existing duty of disclosure but simply on the basis that equality between the parties demanded it. And behaviour which amounted to imposition or bad faith, whether because of the disadvantageous terms of the bargain itself, or because of the vulnerability of one of the parties, or because of a relationship which could be exploited, raised a presumption of fraud, fortified often by a lack of independent legal advice or the fact that the transaction was gratuitous or lacked adequate consideration. Furthermore, instead of regarding references to fraud in this context as anomalous, it may be helpful to recognise that fraud was a unified and coherent doctrine in the early law, whether proven or inferred. It may also prove helpful at a deeper level to recognise a unifying principle based on the underlying principle of justice as inequality. This was a philosophical concept, rooted in an Aristotelian account of justice, and it is argued in the next chapter that it was a foundational concept for university-educated men in Scotland in the seventeenth century, hence for Stair, whose influence on the subsequent development of the law was, and is, immense.

### ***Chapter 3: The influence of Philosophy and Religion on Scots Law - Justice as Inequality***

It could be argued that equality is inherent in all concepts of justice, and certainly countries which have adopted formal Constitutions include equality as a foundational principle.<sup>434</sup> However, the principle of equality examined in this chapter does not concern the rights of citizens, rather it is a term of art which derives from Aristotelian philosophy as the primary characteristic of justice. It will be argued that history and geography combined in late seventeenth century Scotland to create an environment in which Stair was profoundly influenced by these philosophical ideas and, as a result, the first systematic treatment of Scots law bears their imprint.<sup>435</sup>

The importance of Stair's *Institutions of the Law of Scotland* for modern Scots law can hardly be overstated. Its publication in 1681 has been described as “[t]he most significant event in Scottish legal development”<sup>436</sup> in that it provided, for the first time, a systematic and rational exposition of Scots private law. To the present day it is regarded as foundational and authoritative by courts and commentators alike, even when Stair's account of the law proves troublesome for the development of a modern taxonomy. For instance, in the recent trilogy of cases which have reshaped the law of unjustified enrichment the leading judgments all relied on Stair's authority despite the difficulties inherent in doing so.<sup>437</sup> Indeed in 1998 in *Shilliday v Smith*<sup>438</sup> an

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<sup>434</sup> Article 1 of the French Constitution states “La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens”. Amendment XIV of the US Constitution provides that “no state shall ... deny to any person within its jurisdiction the equal protection of the laws”.

<sup>435</sup> A more detailed discussion of the Aristotelian principle of inequality can be found in Reid (2008), which is reprinted at Appendix 2.

<sup>436</sup> Watson (1974) p.48.

<sup>437</sup> *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SC 151 at 157-158 per Lord President Hope; *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90 at 99

argument of counsel is specifically rejected as being “inconsistent with Stair’s statement of the law”.<sup>439</sup>

Stair was remarkable not only for his formidable intellect, but also the extent of his involvement in the civic life of Scotland in the seventeenth century. He devoted his life to religion, law and politics, probably in that order, and was deeply immersed in the struggles between Kirk and state which dominated that period.<sup>440</sup> He was a committed Presbyterian, an allegiance which affected both his personal life and his formulation of the law. For Stair was intent not only on creating a rational system of law, but one which was godly in character and would, in turn, yield godly Scottish citizens.

The *Institutions* have been scrutinised by many eminent jurists with the result that we have considerable understanding of the context within which Stair wrote,<sup>441</sup> the sources he relied on and, in particular, the (not unqualified) civilian pedigree of his work.<sup>442</sup> It is also recognised that his initial training in philosophy brought a conceptual depth to his writing that was not matched by the Scottish jurists who followed in his footsteps and the *Institutions* have provided fertile ground for jurisprudential analysis.<sup>443</sup> But there remain puzzling aspects of his thought. In 1954 Professor Campbell’s analytical study of the *Institutions* identified the fact that Stair’s treatment of obligations was unusual in that it did not “fit harmoniously” either with his own stated aim of enumerating rights<sup>444</sup> or with the scheme of Roman law.<sup>445</sup> He concluded that Stair’s structure did not derive either from the civilian

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per Lord Hope of Craighead; *Shilliday v Smith* 1998 SC 725 at 730 per Lord President Rodger; at 732 per Lord Kirkwood; at 734 per Lord Caplan.

<sup>438</sup> 1998 SC 725.

<sup>439</sup> At 730 per Lord President Rodger.

<sup>440</sup> Ford (2004); Mackay (1873).

<sup>441</sup> See in general contributions to Walker (1981c); also Ford (2007).

<sup>442</sup> Gordon, WM (1985) pp.571-583; Gordon, WM (1980) pp.120-126; Gordon (1981) pp.107-112; Watson (2002) pp. 243-254; Watson (1974) ch.7; Stein (1963) pp.205-245; Birks & McLeod (1986) pp.56-58; Cairns (1997) pp.204-206.

<sup>443</sup> Campbell (1954); MacCormick (1981) pp.187-199; MacCormick (1979) pp. 387-410; Stein (1981) pp.181-187; MacIntyre (1988) ch.10.

<sup>444</sup> Stair I.1.18; I.1.22.

<sup>445</sup> Campbell (1954) p.16.

tradition<sup>446</sup> or from the natural law thinking of the “mighty Grotius”<sup>447</sup> and suggested a possible source in moral theology:<sup>448</sup>

I suspect that one might need not only to explore the Protestant theologians but also to trace the relationship, whether by derivation or by repulsion, between their doctrines and those of their Catholic predecessors and contemporaries.

This chapter contributes to the debate by focusing on Stair’s encounter with the scholasticism of Thomas Aquinas which was later developed by the Spanish moral theologians of the Counter-Reformation.<sup>449</sup> The territory is complex and in many ways counter-intuitive, for who would expect the legal system of fiercely Protestant Scotland to have been profoundly influenced by Roman Catholic theologians? And yet Stair’s formulation of natural law and, consequently, his treatment of what he called “obediential” obligations<sup>450</sup> may derive from this source. This chapter traces the direct influence of Aquinas on Stair’s overall conception of justice. It focuses particularly on the Aristotelian definition of justice as inequality, a concept which was juridified by Aquinas and his scholastic followers. And it argues that herein lie the roots of the unifying concept of inequality evident in the earlier account of the law of presumptive fraud.

### 1. The Canonist Doctrine of Restitution

The story begins with canon law. The church had enormous influence on European legal development because of the intellectual and literary resources of its clerics, the efficiency of its legal system and, not least, its ubiquitous presence. Wieacker describes the “intimate interplay” of canon and civil law in northern Europe,

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<sup>446</sup> Campbell (1954) pp.17-20.

<sup>447</sup> *Ibid.* p.20. Campbell identified greater similarity with Pufendorf’s *De Iure Naturae* (*ibid.* p.21) but recent research on the dating of the *Institutions* suggests this is an unlikely source, see Ford (1994b) p.138.

<sup>448</sup> Campbell (1954) p.23.

<sup>449</sup> The influence of Protestant theologians on Stair remains largely untouched, but see Ford (1994b) pp.144-158.

<sup>450</sup> Stair I.3.2.



mediated by clerics trained in both, from the thirteenth century on.<sup>451</sup> The intermingling of juristic traditions inevitably meant that concepts from the one infiltrated the other. In the century following the compilation of Gratian's *Decretum* (1140) canonist jurists were prepared to borrow Roman terminology and concepts where there were gaps to fill or details to be elaborated.<sup>452</sup> However, the borrowing was not always faithful in that civilian rules were modified if they were deemed inadequate to provide ethical solutions to ethical problems.

We have here a "reception" which is not so much a wholesale *acceptance* of Roman law *qua* valid norms of law, as an *interpretation* of norms contained in the older canonical sources in the light of principles of civil jurisprudence, when such interpretation was feasible and possible. In other words, we have assimilation, not canonisation of Roman law.<sup>453</sup>

The breadth of ecclesiastical jurisdiction represented a potential threat to the civil law since most human disputes could be interpreted as having a moral or spiritual dimension.<sup>454</sup> But this jurisdictional "pull" arose also from the fact that the law of the church was perceived to be "the true source of Christian equity",<sup>455</sup> superior both morally and legally to the pagan and secular civil law. Its enduring legacy lies in the dissemination of broad equitable and moral principles such as "*aequitas (canonica), bona fides, conscientia, honestas* and *misericordia*",<sup>456</sup> norms which became part of the fabric of the *ius commune* and infiltrated the substantive doctrines of the civil law.<sup>457</sup> Dolezalek suggests that the conventional characterisation of the *ius commune* as predominantly civil law is misconceived, for history shows "canon law travelling

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<sup>451</sup> Wieacker (1995) pp.52-54, pp.84-90.

<sup>452</sup> Mayali (2000) pp.133-134.

<sup>453</sup> Kuttner (1990) p.354.

<sup>454</sup> For instance, in 13<sup>th</sup> century Germany either party or the civil judge could unilaterally have a case transferred to the church courts "if the civil relief or procedures available were adjudged to be unfair or unfit" (Witte (2000) p. 186).

<sup>455</sup> *Ibid.* p.190.

<sup>456</sup> Wieacker (1995) p.52.

<sup>457</sup> For the role of the canonists in creating a new ethical conception of law see d'Entreves (1951) pp.37-42.

throughout Europe in a state-coach; and on the footboard of that state-coach, there travelled Roman law”.<sup>458</sup>

Recent scholarship<sup>459</sup> on this complex process of cross-fertilisation between the canonists and civilians suggests broadly that in order to preserve the pre-eminent position of Roman law during a period of wider political struggle between Pope and Emperor, canonist doctrines were appropriated and “Romanised” by the civilians, thus removing the need to have recourse to canon law as an independent legal system. This is illustrated in the development of the canonist doctrine of restitution.

Restitution has an ancient pedigree stretching at least as far back as the Old Testament Decalogue where it was umbilically linked to the commandment not to steal: “a thief must certainly make restitution”.<sup>460</sup> And not only the thief, but also the person whose livestock grazed in another’s field,<sup>461</sup> the borrower<sup>462</sup> or the person who caused damage to another’s property<sup>463</sup> were subject to the same obligation. The canonists expanded its scope even further as a matter of substantive justice to include depriving a person not only of property, but of health, reputation, freedom or even the taking of a life.<sup>464</sup> Restitution became so broad a concept that it could be regarded as the remedy for all “patrimonial distortions”.<sup>465</sup>

In Roman law there was no equivalent general principle.<sup>466</sup> The *condictiones* were actions restricted to particular fact scenarios and the famous maxim of Pomponius in the *Digest*, that no-one should be enriched at the expense of another,<sup>467</sup> was not a specific rule of law but “only a formula for a general principle of commutative

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<sup>458</sup> Dolezalek (2002) p. 52; Stein (2004) pp.161-162.

<sup>459</sup> Wieacker (1995) pp.47-54, pp.84-86; Hallebeek (1995); Stein (1999) ch.3; Kuttner (1990); Berman (2000).

<sup>460</sup> Exodus 22 v 3.

<sup>461</sup> Exodus 22 v 5.

<sup>462</sup> Exodus 22 v 14 (if the property was damaged or, if an animal, died).

<sup>463</sup> Exodus 22 v 6 (by starting a fire).

<sup>464</sup> For the early development of the canonist doctrine see Weinzierl (1936); also Dolezalek (1992) p.107; Hallebeek (1996) p.25.

<sup>465</sup> Dolezalek (1992) p.108.

<sup>466</sup> Evans-Jones (2003) para 1.43; Feenstra (1995) pp. 198-199.

<sup>467</sup> *Jure naturae aequum est, neminem cum alterius detrimento et injuria fieri locupletioem*, D.50.17.206.

justice.”<sup>468</sup> As early as the twelfth century the question whether or not there was a general restitutionary principle provoked what Hallebeek calls a “sham fight”<sup>469</sup> amongst the glossators:<sup>470</sup>

not one of the learned jurists would venture to oppose the canon law doctrine of restitution and to deny the general validity of the prohibition of enrichment . . . . What is at stake is rather the political question whether the Roman sources themselves entail this general validity.

Here was a doctrinal dispute with political consequences. So widespread was the doctrine of restitution that if the civil law denied a remedy the public might resort to the church for relief. The response was to expand the existing *condictiones* to meet public demands. Roman law retained its position of supremacy by being sufficiently flexible to assimilate the doctrine of restitution. But there remained a fundamental difference of conceptualisation: for the civilians it was a gradual development of existing legal categories, but the canonists “continue[d] to think within the scope of their all-embracing doctrine of restitution”.<sup>471</sup> The end result in the systems of Western Europe which received Roman law is a concept of restitution which has Romanist form but predominantly canonist content.

However, it is the subsequent development of the doctrine of restitution, when it encountered Aristotelian philosophy in the moral theology of Thomas Aquinas, that led to its lasting impact on the later “natural law school” of jurists to which Stair belonged. Before looking at restitution in more detail, it is instructive to consider the theoretical framework within which justice was located.

## 2. The Scholastic Concept of Justice

One of the most profound influences on later medieval jurist-theologians was the work of St Thomas Aquinas (1225-74), whose *Summa Theologiae* provided an

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<sup>468</sup> Feenstra (1995) p.198.

<sup>469</sup> Hallebeek (1996) p.38; also Dolezalek (1992) p.105.

<sup>470</sup> Hallebeek (1996) p.38.

<sup>471</sup> *Ibid.* p.45.

account of justice which remains the “*locus classicus* for Western natural law theories”.<sup>472</sup> Thomas was a Dominican, educated in Paris where he later became professor of theology at a period when works of Greek philosophy were becoming available in translation for the first time.<sup>473</sup> The full text of Aristotle’s *Nicomachean Ethics* became available around 1246<sup>474</sup> and this was to have a profound effect on Thomas’ work.<sup>475</sup>

The greatest impact on the thought of the thirteenth century was made by the extended knowledge of Aristotelianism. By means of the translations Aristotle was converted from being more or less a logician into the expounder of a comprehensive system .... [which] came ... to represent philosophy, while its author was known as “The Philosopher”.

In the *Summa* Thomas drew on Aristotle to create a system of Christian ethics with a rational foundation.<sup>476</sup> It could perhaps be said that he brought about the “Christianisation” of virtue ethics: the fusion of Aristotelian philosophy (based on reason) with Augustinian theology (faith).<sup>477</sup> To that end, he engages with a variety of intellectual authorities some of which are spiritual (the Bible, the church fathers and Gratian); some philosophical (Socrates, Plato, Cicero and above all Aristotle); some legal (both canon and civil law). His was an ambitious project: to create an account of human good and human action which was philosophically literate and theologically sound.

#### (a) *The Influence of the Nicomachean Ethics*

Aristotle, referred to simply as “the Philosopher”, is the dominant source for Thomas’ treatment of justice and natural law. In the *Nicomachean Ethics* Aristotle’s account of human action is teleological or purposive, in that man’s goal is to achieve

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<sup>472</sup> Lisska (1996) p.84.

<sup>473</sup> Weisheipl (1974) pp.53ff. and pp.237-241.

<sup>474</sup> Brett (1997) p.89.

<sup>475</sup> Copleston (1972) pp.154-155.

<sup>476</sup> *Ibid.* p.189; d’Entreves (1951) pp. 42-47.

<sup>477</sup> See MacIntyre (1988) ch.10.

the virtuous life.<sup>478</sup> Thomas' vision is similarly teleological, but the goal is now spiritual rather than secular – knowledge of God rather than human happiness – even if the path to that end, practice of the virtues, is the same.<sup>479</sup>

Justice is the greatest of the Aristotelian virtues for, uniquely, it operates in relation to other people.<sup>480</sup> In the *Ethics* justice comes in two forms – distributive justice<sup>481</sup> and corrective justice. The purpose of the latter is to preserve equality in transactions between private individuals:<sup>482</sup>

The justice in transactions between man and man is a sort of equality indeed, and the injustice a sort of inequality.

The principle of equality,<sup>483</sup> crucially important for later scholastic thought, is articulated in terms of gain and loss. It denotes the rebalancing of transactions between individuals in order to preserve what is one's own, for justice will restore to each his own where it has been interfered with either by punishment of the wrongdoer or by restoration of what has been lost.<sup>484</sup> Corrective justice is served where there is equivalence or equal exchange:<sup>485</sup>

These names, both loss and gain, have come from voluntary exchange; for to have more than one's own is called gaining, and to have less than one's original share is called losing.

The position of equilibrium is to be in undisturbed possession of “what is one's own”, a concept which extended beyond notions of private property to the essence of

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<sup>478</sup> *Ethics*, I.12.1098a.

<sup>479</sup> Copleston (1980) p.93; d'Entreves (1951) pp. 44-45.

<sup>480</sup> *Ethics*, V.1.1129b.

<sup>481</sup> “Distributions of honor or money or the other things that fall to be divided among those who have a share in the constitution”, *Ethics*, V.2.1130b.

<sup>482</sup> *Ethics*, V.4.1132a; V.2.1130b.

<sup>483</sup> For an explanation of the different ways in which equality (as the mean) is applied in distributive justice (geometric) and corrective justice (arithmetic) see Gordley (1995) pp.133-134.

<sup>484</sup> *Ethics*, V.4.1132a.

<sup>485</sup> *Ibid.* V.2.1132b.

the person, or as one commentator puts it, “one’s own is an extension of the ego”.<sup>486</sup> Hence all acts of interference with what is one’s own are acts of injustice or inequality, the two being synonymous.

A further Aristotelian classification is the division of human actions (and transactions) into those which are *involuntary* (involving ignorance or compulsion) and those which are *voluntary* (undertaken out of choice and knowledge). Only the latter constitute virtue, for only then is a person behaving as a rational creature who is capable of choice,<sup>487</sup> but both demand the equalising function of justice. In relation to voluntary, or what we might now call consensual, transactions such as sale, loan, deposit or hire,<sup>488</sup> justice requires equivalence or equal exchange:<sup>489</sup>

When [buyers and sellers] get neither more nor less but just what belongs to themselves, they say that they have their own and that they neither lose nor gain.

Involuntary transactions, on the other hand, involve causing harm or injury to another.<sup>490</sup> The equalising role of justice is carried out either by punishment of the wrongdoer or by restoration of what has been lost.<sup>491</sup>

### ***(b) Aquinas and Justice***

Only a small part of Thomas’ *Summa Theologiae* deals explicitly with law<sup>492</sup> for it is principally a work of moral theology. However, it is a crucially important part because natural law is integral to Aquinas’ broader ethical purpose of elucidating the

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<sup>486</sup> Rommen (1998) p.207. It is important to qualify what appears to be a statement of individualism. For Aristotle man was designed to function in community, indeed justice was directed to that aim; see *ibid.* 209-210; MacIntyre (1988) pp.122ff.

<sup>487</sup> *Ethics*, II.6.1107a; III.1.1111a.

<sup>488</sup> *Ibid.* V.2.1131a.

<sup>489</sup> *Ibid.* V.2.1132b.

<sup>490</sup> *Ibid.* V.2.1131a.

<sup>491</sup> *Ibid.* V.4.1132a.

<sup>492</sup> The main references are found in *Summa*, I-II qq.90-108 Treatise on Law; II-II qq.57-79 On Justice and Right.

path towards goodness.<sup>493</sup> Drawing on Book V of the *Nicomachean Ethics*, Thomas affirms that justice is the highest virtue for it relates to the common good.<sup>494</sup> Its central characteristic is equality:<sup>495</sup>

The proper characteristic of justice, as compared with the other moral virtues, is to govern a man in his dealings towards others. It implies a certain balance of equality.

Injustice is, therefore, inequality but only where the will is engaged<sup>496</sup> for, like Aristotle, ignorance and unintentional consequences do not constitute injustice.<sup>497</sup> Legal consequences flow from the combination of external actions plus internal knowledge, a theme which he develops in his account of restitution.

Aquinas brings to Aristotle's ethical system two innovative elements: religion and law. The *Summa* is pervaded by references to the Bible and St. Augustine as well as statements of Christian doctrine.<sup>498</sup> Secondly, Aristotle's broad principles undergo a process of juridification. So the concept of "one's own" is rendered in familiar civilian terms<sup>499</sup> as *jus suum unicuique tribuens*.<sup>500</sup> Likewise notions of loss and gain have a more legal or commercial flavour. For instance, "to have more than one's own is called gain or profit [*lucrum*], and to have less than one had at the outset is called loss [*damnum*]"<sup>501</sup>.

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<sup>493</sup> *Summa*, I-II q.92.5, ad.1.

<sup>494</sup> *Ibid.* II-II q.58.12.

<sup>495</sup> *Summa*, II-II q.57.1. *Aequalitas* and *inaequalitas* are inconsistently translated in the Blackfriars edition of the *Summa*, variously as equality, evenness, balance, or fairness (or their opposite numbers). I have revised the translation in places to show more clearly the use of specific terminology even if this means a less polished English version. On Thomas' notion of equality more generally see Hallebeek (1996) p.48; Dolezalek (1992) pp.110-112; Gordley (2002) p.228.

<sup>496</sup> *Summa*, II-II q.59.2.

<sup>497</sup> *Ibid.* q.58.1; q.59.3.

<sup>498</sup> *Ibid.* q.58.2 ad.3.

<sup>499</sup> D.1.1.10 *iustitia est constans et perpetua voluntas ius suum cuique tribuendi. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere* ("Justice is the constant and perpetual will of giving each his own; the precepts of law are to live honestly, not to harm others and to give each his own", translation from Honoré (2002) p.215).

<sup>500</sup> *Summa*, II-II q.58.1. At other times he renders it *reddere unicuique quod suum*, *ibid.*, q.58.11.

<sup>501</sup> *Ibid.* q.58.11 ad.3.

Similarly, inequality is refashioned as a *debitum*: “each person’s own is that which is due to him [*debetur*] in proportion to making things equal”;<sup>502</sup> or “a voluntary transfer comes under justice in so far as it involves the notion of something due [*de ratione debiti*]”.<sup>503</sup> Conceptually, the modification of the more neutral terminology of loss and gain into the language of debt and owing allows Thomas to create a framework of obligations. Injustice and inequality now create both a moral and a legal obligation to restore in the one who has gained. And he thus creates the rationale for his discussion of the prime canonist obligation - restitution.

### (c) *Stair’s Concept of Justice*

Given the dominance of scholastic thought in Scottish universities in the seventeenth century,<sup>504</sup> Stair would have been exposed to these ideas of justice. The influence of both Aristotle and Aquinas on Stair’s work is not a novel discovery. The *Institutions* are said to “owe much in structure and content to the Aristotelian philosophy which he both learned and later taught in the old College of Glasgow”.<sup>505</sup> His scheme of obligations similarly “owes much to the analysis of Aquinas, developed by later scholastic theologian-jurists”.<sup>506</sup> Stair’s Glasgow theses as regent in 1646 are likewise characterised as “Aristotelian”;<sup>507</sup> in his speech given on admission to the Faculty of Advocates in 1648 he is described as having “strayed into the domain of the moral theologians, [and having drawn] on his knowledge of Aristotelian philosophy”;<sup>508</sup> and his later *Vindication of the Divine Perfections*<sup>509</sup> is seen as an example of “the method of the scholastic logic applied to Protestant theology”.<sup>510</sup>

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<sup>502</sup> *Ibid.* q.58.11.

<sup>503</sup> *Ibid.* q.61.3.

<sup>504</sup> For an overview see Shepherd (1975).

<sup>505</sup> MacCormick (1982a) p.60; see also MacCormick (1979) p.388; MacCormick (1981) p.187; Campbell (1954) pp.8-9; Lewis (1976) pp.134-135.

<sup>506</sup> Walker (1981b) p.25; see also MacQueen & Sellar (1995) p. 291.

<sup>507</sup> Shepherd (1975) p.107.

<sup>508</sup> Ford (2004); Ford (2007) p.29. The oration itself is preserved in Sir John Scot of Scotstarvet’s “Trew Relation” (1916) pp.380-392.

<sup>509</sup> “A Vindication of the Divine Perfections, illustrating the Glory of God in them by Reason and Revelation, methodically digested into several Meditations. By a Person of Honour” (1695), attributed to Stair, see MacKay (1873) pp.272-273.

<sup>510</sup> Mackay (1873) p.283.



In the introductory title of the *Institutions* Stair references the *Nicomachean Ethics* in his discussion of commutative justice (Aquinas' terminology for corrective justice), which he renders as "the inclination to give every man his *right*".<sup>511</sup> But generally there are slim pickings in the search for explicit borrowings from either Aristotle or Aquinas<sup>512</sup> for the Aristotelian character of Stair's work lies in its underlying method, argument and conceptual framework.

Stair's approach in the *Institutions* (and in his other writings) is teleological, working deductively from first principles to desired ends. Hence, "material justice (the common law of the world) is, in the first place, orderly deduced from self-evident principles".<sup>513</sup> The purposive nature of law is most clearly seen in Stair's discussion of the law of obligations. The source of obligations lies either in God's will and the law of nature (obediential obligations) or in the human will (conventional obligations).<sup>514</sup> Indeed, he rejects the scheme of Roman law on grounds that there is an inadequate explanation of cause and effect. The Roman four-fold division (intro contract, quasi-contract, delict and quasi-delict),<sup>515</sup>

insinuates no reason of the cause or rise of these distinct obligations, as is requisite in a good distinct division; and therefore, they may be more appositely divided, according to the principle or original from whence they flow, as in obligations obediential, and by engagement, or natural and conventional.

His insistence on efficient and final causes, the "Aristotelian clothing"<sup>516</sup> which he assumed in order to expound the most fundamental principles of law, shaped his legal reasoning and the nature of the law of obligations. In pride of place is equity: "The principles of equity are the efficient cause of rights and laws".<sup>517</sup> Stair

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<sup>511</sup> Stair I.1.2, emphasis added.

<sup>512</sup> For other examples see Stair I.1.7; I.2.2.

<sup>513</sup> Stair p.59, Stair's dedication to the King from the 1<sup>st</sup> edition, 1681.

<sup>514</sup> *Ibid.* I.3.3.

<sup>515</sup> *Ibid.* I.3.2.

<sup>516</sup> MacCormick (1981) p.189; see also pp.187-188 for a fuller explanation of Stair's borrowing of Aristotelian causality.

<sup>517</sup> Stair I.1.17.

explicitly makes the connection between equity and the principle of equality in commutative justice, the balancing of gain and loss:<sup>518</sup>

This law of nature is also called Equity, from that equality it keeps amongst all persons, from that general moral principle, *Quod tibi fieri non vis, alteri ne feceris*, whereby just persons in their deliberations and resolutions state themselves in the case of their adversaries, and so change the scales of the balance; which holds most in commutative justice.

This is the “alterity”<sup>519</sup> of Aristotelian justice which, above all, looks to the good of the other or the common good.<sup>520</sup> It is Stair’s belief that true equality in this sense would bring happiness to society.<sup>521</sup>

Stair’s account of equity forms part of a lengthy discussion of the law of nature. It is here that we see most clearly the fusion of philosophy and religion which he was engaged in, whether consciously or unconsciously. The widespread failure to take account of the depth of Stair’s religious convictions leads to a distorted view of the law which he expounded. The philosopher Alasdair MacIntyre has observed:<sup>522</sup>

In Stair’s *Institutions* the theology cannot be excised without irreparable damage to the whole. Scottish seventeenth- and eighteenth- century law, like Scottish seventeenth- and eighteenth-century life, is pervasively and ineliminably theological.

This perhaps also explains Stair’s sometimes ambivalent approach to Roman law. In places his attitude is peremptory,<sup>523</sup> in others critical,<sup>524</sup> albeit more reliant on it in

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<sup>518</sup> *Ibid.* I.1.6.

<sup>519</sup> Brett (2002) p.35.

<sup>520</sup> *Ethics*, V.1.1129b; *Summa*, II-II q.58.12 (justice as the good of another); II-II q.58.6 (justice as the common good).

<sup>521</sup> Stair I,1,6.

<sup>522</sup> MacIntyre (1988) p.231.

<sup>523</sup> Gordon, WM (1985) p.583; see also Watson (2002) pp.249-252 for the way in which Stair used Roman terminology because of its authoritative status, but “transformed” the original meaning to suit his own conceptual purposes.

his discussion of contractual obligations.<sup>525</sup> From a contemporary perspective Stair is viewed as the founding father of Scots law, its *starting point*. However, he perhaps saw himself as much a reformer of the past as a prophet of the future and may have been reacting against what he perceived to be an over-reliance on the civilian texts and commentators.<sup>526</sup> Intent on articulating a legal system which was both intrinsically religious and rational, Roman law was less likely to provide the tools he needed than the scholastic jurist-theologians who were the staple diet of his academic life for one obvious reason: God had no place in their work. Watson describes their mindset:<sup>527</sup>

The classical Roman jurists stopped writing books around 235, and they were all pagans. Hence, no Christianity in the law in the *Institutes*. They were positivists, hence no philosophical notion of natural law.

By contrast, Thomas and his scholastic commentators were, for their own eras, engaged in the task of creating a system of natural law with God at its centre, permeated by the philosophical genius of Aristotle, the doctrines of St Augustine and the church fathers, and integrated with established legal rules only in so far as the latter were compatible with the spiritual man. This was a task he could identify with.

Stair's Aristotelian account of equity<sup>528</sup> is embedded within an account of the law of nature which is overwhelmingly religious, for the very essence of natural law is God himself, the "eternal law".<sup>529</sup> The source of natural law is the very nature of God, given human expression in the Golden Rule of Matthew's Gospel: "Do to all, as you have would have them do to you [Matt.vii,12], which must be understood, if you

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<sup>524</sup> For his most explicit critique see Stair I.1.17 where he describes the "confused order of the civil law" as its "greatest blemish" and goes on: "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". Stair takes issue with Roman law in almost every title of the obediational obligations, see Stair I.1.19; I.1.23; I.2.9; I.3.9; I.4.11-12; I.5.11; I.7.2; I.10.7; I.10.10.

<sup>525</sup> Stair I.10; see Ford (2007) p.418, for the suggestion that this was because there had been "relatively little local development" in contract law.

<sup>526</sup> See Ford (2007) pp.418-422 for Stair's view of the role of the learned laws.

<sup>527</sup> Watson (2002) p.248.

<sup>528</sup> See pp.104-105 above.

<sup>529</sup> Stair I.1.1.

were in their case, and they in yours”.<sup>530</sup> This positive (and religious) formulation of the Rule is preferred by Stair to what he describes as the “negative” expression given to it by “Heathen Philosophers”.<sup>531</sup>

For Stair, the law of nature, the eternal or divine law, the moral law, reason, conscience and equity are used almost synonymously, a marriage of the philosophical with the religious. Purpose, efficient and final causes, equity as justice and equality working for the common good, the role of human reason and will – all derive from an Aristotelian view of the world. The more prescriptive rules of behaviour derive from God’s law, the Scriptures, mediated through St. Augustine and the church fathers for Aquinas and rooted in Stair’s Presbyterian and Calvinist faith. So, the first title of the *Institutions* locates the principles of Scots law explicitly within a moral and religious framework. This is what distinguishes Stair both from his peers and from the jurists who followed in his footsteps. His vision is most clearly expressed in his account of the obediencial obligations, which represent natural law in its purest form.

### 3. Scholastic Influence in Seventeenth Century Scotland

One of the puzzling aspects of this historical investigation is why Aristotelian philosophy and Thomist moral theology had such lasting impact on legal development, long after the influence of the Catholic Church as a political and legal force had waned. Part of the answer lies in the revival of Aquinas’ writings in the sixteenth century by a group of jurist-theologians known as the late scholastics or the Spanish natural law school whose number included Francisco de Vitoria (c.1485-1546), Domingo de Soto (1494-1560), Diego de Covarrubias (1512-77), Luis de Molina (1535-1600), Francisco Suárez (1548-1604) and Leonardo Lessius (1554-1623).<sup>532</sup> These Counter-Reformation thinkers wrote voluminous commentaries on the *Summa*<sup>533</sup> and used Aquinas’ account of natural law and human rationality to

<sup>530</sup> *Ibid.* Identification with the “other” is emphasised, just as it is in relation to equity.

<sup>531</sup> i.e., *quod tibi fieri non vis, alteri ne feceris* quoted in *Institutions*, I.1.1. Stair may be overstating his case here, since this “negative formulation” was not unique to the philosophers.

<sup>532</sup> Lessius was Flemish but is generally included within this group.

<sup>533</sup> Principally the account of justice in *Summa*, II-II, qq.57-79.

construct a renewed vision of the Catholic faith in order to combat perceived heresies emanating both from Reformation theology and from Christian humanism.<sup>534</sup>

The fundamental move which the Thomists made in discussing the concept of political society was to revert to Aquinas' vision of a universe ruled by a hierarchy of laws.<sup>535</sup>

The system of natural law and justice set out by Aquinas was used to restate the marriage between law and morality which Luther and Calvin were attempting to divorce in their determination to separate the spiritual from the secular in Protestant northern Europe. The success of the late scholastics lay in providing the law with an articulate ethical basis, but equally in fleshing out the detail of Aquinas' skeletal principles. Their fusion of substantive law with the moral and philosophical underpinning of the *Summa* had profound repercussions on the natural lawyers of northern Europe in the seventeenth century.<sup>536</sup> Grotius, on whom these influences have been clearly identified,<sup>537</sup> is described as having outlined a system of law in his *Inleidinge tot de Hollandsche rechtsgeleerdheid* which was "largely based on concepts of natural law, as developed by 16<sup>th</sup> century theologians ... who in their turn commentated the *Summa Theologiae* of Thomas Aquinas".<sup>538</sup>

Stair lies within the northern natural law tradition, but the influence of the late scholastics on his work has been little explored. Nor is it within the scope of this chapter to do so in any detail. Their development of the doctrine of restitution into a fully-fledged legal concept is an important historical phenomenon which has received considerable academic attention.<sup>539</sup> It is suggested here that Stair may also have gone to the original source: Aquinas. In addition, whilst he was undoubtedly

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<sup>534</sup> Brett (1997) pp.154ff.; Skinner (1978) pp.135-141; Gordley (1991) pp.70ff.

<sup>535</sup> Skinner (1978) p.148.

<sup>536</sup> Gilby (1975) p.169; Gordley (2006); Gordley, (1991); Gordley (1995); Brett (1997) ch.4; Noonan (1957) pp.2-3.

<sup>537</sup> Feenstra (1974); Feenstra (1996); Feenstra (1995); Tuck (1979) ch.3.

<sup>538</sup> Feenstra (1995) p.198.

<sup>539</sup> See in particular Hallebeek (1996); Hallebeek (1995); Feenstra (1974); Feenstra (1996); Feenstra (1995); Gordley (2006); Gordley, (1991); Gordley (1995); Dolezalek (1992).

exposed to later scholastic accounts during his time as regent, they do not fundamentally modify Thomas' conceptual scheme.

However, this history is not one of seamless transition. For the Protestant Reformation in northern Europe not only fundamentally changed religious belief and practice, it also changed the role of law in society. No longer was it viewed as the means to a virtuous life: the new doctrinal emphasis on the fall of man meant that only God's grace was able to offer salvation no matter how virtuous the individual. Aquinas' medieval optimism about man's innate ability to reason and to make virtuous choices in pursuit of the common good had been transformed by the Reformers into a deep sense of the depravity of human nature.<sup>540</sup> In order to explain why Protestants such as Grotius and Stair were, therefore, able to preserve a view of man as a rational being, capable of choice and the exercise of the will, another piece of the historical jigsaw is needed. This lies in part with the phenomenon which has come to be known as "Protestant Scholasticism".

#### *(a) The Protestant Scholastics*

In recent theological research there has been a re-assessment of the relationship between post-Reformation Protestant theologians and Catholic scholasticism.<sup>541</sup> Throughout Europe in the late sixteenth and early seventeenth centuries there was an unexpected revival of interest in Aristotle, particularly in the *Nicomachean Ethics*, and in Aquinas, his best-known commentator. It was unexpected since both were associated with the doctrines of a discredited Catholic church and the revival took place in the humanities and theological faculties of both Protestant and Catholic universities. We do know that Scottish universities at that time were dominated by a version of "scholastic Aristotelianism".<sup>542</sup>

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<sup>540</sup> "the reason of our mind ... is miserably subject to vanity"(Calvin, *Institutes*, II,2,25); or compare Calvin's description of human beings as being "so shrouded in the darkness of errors that [they] hardly begin to grasp through this natural law what worship is acceptable to God" (*ibid.* II,8,1).

<sup>541</sup> For an overview of the concept of "Protestant Scholasticism" see contributions to Trueman (1999).

<sup>542</sup> MacIntyre (1988) p.225.

Scotland is described as having had “a tremendous appetite for scholastic theology”,<sup>543</sup> akin to a “reception”.<sup>544</sup> The reasons are predictably complex. Undoubtedly the Kirk required a new and rational theology and the scholastic emphasis on reason, together with their enormous learning, may have proved attractive. Durkan has suggested that Covenanting attitudes “paradoxically worked in favour of Jesuit-inspired philosophy”,<sup>545</sup> but does not explain the paradox any further. It is plausible that the Scottish Presbyterians may, equally paradoxically, have been able to make common cause with the political struggles of the Spanish scholastics. James I’s imposition of the Oath of Allegiance on his Catholic subjects in 1606, subsequent to the Gunpowder Plot, led to an outpouring of polemic from Counter-Reformation thinkers. Suárez’s treatise *Defensio Fidei Catholicae, et Apostolicae Adversus Anglicanae Sectae Errores* (1612) specifically refuted the Anglican “heresy” of the divine right of kings and attempts to place the church under the rule of the monarch.<sup>546</sup> James had the work publicly burned. In view of the battles waged by the Scottish Presbyterians in the 1630s against the imposition of Episcopacy and the royal control which it represented,<sup>547</sup> there may well have emerged an unlikely alliance. My enemy’s enemy .....

One commentator has suggested a more pragmatic reason for the turn to scholasticism: the fact that in the late sixteenth century Aristotle “was the only teaching aid on the market”!<sup>548</sup> What we do know with certainty is that James Dalrymple personally encountered it at Glasgow University.

### *(b) Scholasticism and Glasgow University*

Stair was a student at Glasgow University from 1633-37, where he pursued the usual course of study in the humanities and philosophy, and returned there to take up a post

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<sup>543</sup> Ryken (1999) p.198.

<sup>544</sup> *Ibid.*

<sup>545</sup> Durkan (1979) p.24.

<sup>546</sup> Leonardo Lessius’ *Defensio potestatis summi pontificis* was similarly associated with refuting this heresy.

<sup>547</sup> Mackie (1960) pp.167-168; Paterson (1998) ch.1; Ford (1994) p.45.

<sup>548</sup> Clark (1999) p.122.

as regent from 1641-47.<sup>549</sup> The university at that time has been described as being “in essence a religious seminary”<sup>550</sup> and the normal pattern was indeed for regents to become ministers of the Kirk rather than professors.<sup>551</sup>

The arts curriculum of Scottish universities was overwhelmingly both Aristotelian and scholastic throughout the seventeenth century.<sup>552</sup> Earlier attempts by Andrew Melville to sweep away the scholastic philosophers and to replace them with Protestant humanists had been temporarily successful in the sixteenth century,<sup>553</sup> but the reinstatement of Aristotle and Aquinas in the seventeenth represented the return to “a safe rational theology”.<sup>554</sup> Shepherd’s study of authorities cited by university regents shows a variety of traditional and more modern (humanist) commentators on Aristotle, but she concludes that the medieval scholastics were ubiquitous:<sup>555</sup>

[Aquinas, Scotus and Occam] appear in virtually every set of logic dictates and theses. Discussion of their views was considered an indispensable part of the course.

Over the course of the century, scholasticism began to wane in the east, but Glasgow remained committed to it for longer and student lecture notes or dictates in Glasgow continued to be “more Aristotelian” and “less modern than their Edinburgh equivalents”.<sup>556</sup> Curiously, it was in Presbyterian conservative Glasgow that the influence of scholastic Aristotelianism was strongest and lasted longest.<sup>557</sup> It may be that those conservative instincts feared the impact of the progressive ideas of Hobbes, Newton, Descartes and Locke which were on the horizon and clung to the

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<sup>549</sup> Ford (2004).

<sup>550</sup> *Ibid.*

<sup>551</sup> Henderson (1937) p.121.

<sup>552</sup> Shepherd (1975); Durkan (1977) pp.102-126.

<sup>553</sup> Kirk (1994) pp.279-282.

<sup>554</sup> Durkan (1979) p.18.

<sup>555</sup> Shepherd (1975) pp.63 and 97.

<sup>556</sup> *Ibid.* pp.75-78.

<sup>557</sup> *Ibid.* pp.319-321.



familiarity of scholastic thought. However, it is clear that “whatever existed in theology, there was no obvious cultural frontier in the arts curriculum.”<sup>558</sup>

Within nine months or so after resigning his post as regent Stair applied to be admitted to the Faculty of Advocates.<sup>559</sup> Very little is known about his legal education but it does seem an implausibly short period in which to gain sufficient knowledge of Scots law, even for one so brilliant! Stair was not one of those who studied law abroad at French and Dutch universities,<sup>560</sup> and although he satisfied the Faculty’s preference for “university educated men”,<sup>561</sup> his training was in the liberal arts. He appears to have had no formal legal education<sup>562</sup> and it is likely that he acquired his knowledge of the law “by private and undirected study during his time as a regent”.<sup>563</sup> One source alleges that during his regency he studied “Latin and Greek literature, classical history and antiquities, and the civil law of Rome”.<sup>564</sup> Assuming that to be the case, it would be reasonable to assume that the resources of Glasgow University library would have been important.

### *(c) Glasgow University Library in the Seventeenth Century*

As noted above, the university which Stair, its former student, returned to as regent from 1641 until 1647 was a predominantly religious institution, training its student for the Kirk.<sup>565</sup> We cannot know with any certainty what Stair read during his time at the university since individual borrowing records do not date back that far. However, some indication of the library’s holdings at that time can be gleaned from the 1691 catalogue, the earliest systematic catalogue still extant.<sup>566</sup> This early

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<sup>558</sup> Durkan (1979) p.18.

<sup>559</sup> Ford (2004).

<sup>560</sup> Cairns (1999) p.34; Watson (1977) pp.1167-1168.

<sup>561</sup> Cairns (1999) p.40.

<sup>562</sup> Ford (2007) p.10; Walker (1990) p.2.

<sup>563</sup> Ford (2004).

<sup>564</sup> Walker (1990) p.2; Walker (1985) p.107, citing as authority William Forbes, Preface to *A Journal of the Session. Containing the Decisions of the Lords of Council and Session, in the Most Important Cases, Hear'd and Determin'd from February 1705, till November 1713*, (1714) p.30.

<sup>565</sup> Ford (2004); Henderson (1937) p.121

<sup>566</sup> For details of the 1691 catalogue see Appendix 1.

catalogue is the best indication of the character of the library at this period, and consequently of the printed works which may have been available to Stair.

The catalogue confirms the overwhelmingly religious character of the library's stock at the end of the seventeenth century, which "corresponds to the strong orientation of the University towards Divinity".<sup>567</sup> The extensive holdings on religious polemics also suggest that the university's mission was to educate right-thinking graduates who would emerge in a doctrinally correct state of mind as leaders of the Kirk.

Legal holdings are relatively sparse, particularly Scottish legal resources, which have justifiably been described as "very scanty",<sup>568</sup> limited to three titles, two of which are collections of statutory materials,<sup>569</sup> the third a copy of *Regiam Majestatem*.<sup>570</sup> It is clear that Glasgow University Library had very little native (Scots) law available to Stair at the time he was a regent there. Certainly, the library had the key source materials of Roman law and its commentators, and we know that Stair acknowledged his acquaintance with the civil law to the Session, albeit describing himself as having "straggled in these byways without a guide".<sup>571</sup> In short, it is safe to assert that this was a library which was weak on the resources needed to equip a Scots lawyer attempting to teach himself the laws of the land.

The strengths of the university library undoubtedly lay in philosophy and religion, and it was particularly well equipped with materials relating to the doctrinal debates typical of Protestantism in the sixteenth and seventeenth centuries. Works on theology and philosophy far outnumber those on law. Stair therefore "had to pursue his interest in law in an environment dominated by the study of theology".<sup>572</sup> It is perhaps surprising in light of Glasgow's conservative Presbyterian tradition that

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<sup>567</sup> <http://special.lib.gla.ac.uk/exhibns/1691Catalogue/Classification.html>.

<sup>568</sup> Walker (1990) p.2.

<sup>569</sup> "The acts of Parliament of the Kings and Queen Mary in fol: Edit: Edinburg: 1568" (GUL Sp Coll Bn6-d.8); and "The Acts of Some Parliaments of Scotland in King James the sixth his tyme in Fol: Edit: Edinburgh 1611" (GUL Sp Coll f418, modern classification uncertain).

<sup>570</sup> "Regiam majestatem Scoticae in Fol: Edit: Edinburg: 1609" (GUL Sp Coll Bn6-d.11/B113-a.6).

<sup>571</sup> Scotstarvet's "Trew Relation" (1916) p.381.

<sup>572</sup> Ford (2004).

Catholic writers are so well represented.<sup>573</sup> The sections on Catholic Biblical commentators and scholastics are well stocked and represent a sizeable proportion of the library's holdings. Confessional issues clearly did not prevent the library from acquiring this material, nor regents from using it in their lectures.<sup>574</sup> These are the sources he is likely to have relied on to pursue his private studies. It has previously been suggested that Stair's *Institutions* were deeply influenced by Aristotelian and scholastic thinking.<sup>575</sup> Here perhaps lies the evidence and the source material. Taken in conjunction with what is known about the character of the curriculum he taught, at the very least it seems reasonable to speculate that Stair's early thinking was influenced by these texts. The works of Aristotle dominate the philosophy classification of the library and it held all of the major works of Aquinas, including the *Summa Theologiae*, together with Thomist commentaries too numerous to count.

Of course, we cannot know with certainty which printed source materials Stair relied on in the writing of the *Institutions* and any attempt at historical reconstruction is at best speculative. As a well-connected man he would have had access to private libraries, and undoubtedly one of his own.<sup>576</sup> When he went to the bar, he would have been exposed to civilian materials acquired by Scottish lawyers who studied abroad. However, it is not far-fetched to suggest that the overwhelmingly scholastic character of Glasgow University at a formative period in his education must be significant. Aristotle, Aquinas and their commentators dominated his learning and his intellectual framework for more than ten years, and shortly prior to the writing of the *Institutions*.<sup>577</sup> It is highly plausible that the scholastic and philosophical influences he was immersed in were drawn on to create the conceptual scheme for which the *Institutions* are noted.

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<sup>573</sup> Osler (1997).

<sup>574</sup> Shepherd (1975) p.107.

<sup>575</sup> MacCormick (1979) p.388; MacCormick (1982a) p.60; MacCormick (1981) p.187; Campbell (1954) pp.8-9; Lewis (1976) pp.134-135.

<sup>576</sup> For instance, he appears to have had access to Craig's *Ius Feudale* before it was printed in 1655, see Cairns (1997) p.206.

<sup>577</sup> Most recently thought to have been in the late 1650s, see Ford (2007) pp. 68-74.

*(d) Stair's Legal Influences*

It is undoubtedly true that Stair's legal knowledge would have continued to expand once he became a practising advocate and subsequently a judge of the Court of Session. Few of the jurists cited by Stair in his *Institutions* were available to him when he embarked on his study of the law.<sup>578</sup> The extensive civilian materials apparently available to Scots lawyers in the seventeenth century may have circulated informally between colleagues, since the Advocates' Library<sup>579</sup> was only officially opened in 1689.<sup>580</sup> However, Lord Cooper's picture of the busy practitioner exposed on a daily basis to citations from learned civilians educated on the Continent is questionable at this early period of Stair's career.<sup>581</sup> Political events disrupted the administration of justice and the court was dysfunctional for long periods of time.<sup>582</sup> Stair may have had the benefit of more study time than he had anticipated, but what he did not have was daily immersion in the pleadings of the court.

A short chronology of the events of the 1640s and 50s will demonstrate his very limited experience of the operation of the Scottish courts and of Scots or any other type of law in practice. Stair was admitted to the bar in February 1648, but the first meeting of the Session did not take place for over a year, in June 1649,<sup>583</sup> the same month in which Stair returned to Scotland having been absent for four months as a member of a parliamentary commission sent to negotiate with Charles II.<sup>584</sup> The Session operated for only nine months until it was again suspended in February 1650,<sup>585</sup> when the administration of Scottish justice was taken over temporarily by a committee of English officers.<sup>586</sup> Even during the brief period when the Session was

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<sup>578</sup> From the list of 18 named sources which Stair cites in the *Institutions* (Walker (1981b) p.20), only 3 are to be found in the library catalogue up to 1645, namely Balduinus, Hotman and Mattaeus.

<sup>579</sup> Watson describes it as having "one of the world's great collections of pre-nineteenth century Roman law books", (1981) p.34.

<sup>580</sup> Cooper (1954) p.2.

<sup>581</sup> *Ibid.* p.5.

<sup>582</sup> Ford (2004); Hutton (1981b) pp.80-82; Mackay (1873) pp.34-65; Walker (1996) pp.65, and 419-423.

<sup>583</sup> Ford (2004); Mackay (1873) pp.34-35.

<sup>584</sup> Ford (2004); Mackay (1873) pp.37-42; Walker (1981b) p.2.

<sup>585</sup> Walker (1996) p.419.

<sup>586</sup> *Ibid.*

functioning, its sittings were infrequent, for at least some of that period “confined to weekday mornings during June and July”.<sup>587</sup>

Only between 1652 and 1658 did Stair gain experience of law in practice, first as an advocate and subsequently, from July 1657, as a judge when, controversially, he was appointed to the bench as one of the minority Scottish judges in the “English” court during the period of the Commonwealth, confirmed by Cromwell himself.<sup>588</sup> Of the seven Commissioners appointed as judges, four were English and three were Scots, the former being paid double the salary of the Scots and also its senior members.<sup>589</sup> Many Scots advocates and judges refused to co-operate with the English court<sup>590</sup> and Stair was subject to criticism for his involvement,<sup>591</sup> although he and other lawyers withdrew their participation for a short period in 1654 until the imposition of the “Tender”, an oath of allegiance to the Commonwealth, was withdrawn.<sup>592</sup> This was certainly his most extensive period of practice prior to writing the *Institutions* and may have increased his knowledge of the workings of English law<sup>593</sup> more than Scots, for it was an overt aim of the court to assimilate the law of Scotland to that of England.<sup>594</sup> The Cromwellian vision was a more complete union of Scotland and England than in fact was achieved in 1707, amounting to “an enlarged England”.<sup>595</sup> However, the administration of justice ceased after Cromwell’s death<sup>596</sup> and the Court of Session only began to function again as Scotland’s supreme court, applying Scots law, in 1661.<sup>597</sup>

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<sup>587</sup> Ford (2004).

<sup>588</sup> *Ibid.*; Mackay (1873) p.65; Walker (1996) p.420.

<sup>589</sup> Walker (1996) p.419; by the time Stair was appointed a Commissioner, English control had relaxed a little and the Scots were in a majority of 5 to 4, but the differential in salary continued, *ibid.* pp.420 and 422.

<sup>590</sup> *Ibid.* p.420.

<sup>591</sup> Mackay (1893) p.65.

<sup>592</sup> Ford (2004); Mackay (1873) p.35; Walker (1981b) p.3; Hutton (1981a) p.5.

<sup>593</sup> Mackay (1873) p.66.

<sup>594</sup> Ford (2004); Walker (1996) p.65, 421; Hutton (1981b) p.82.

<sup>595</sup> Ferguson (1977) p.138, see also Ford (2011).

<sup>596</sup> Ford (2004) dates the cessation of the English court April 1659; Mackay ((1873) p.66) and Walker ((1981b) p.3) respectively date it slightly earlier in 1658.

<sup>597</sup> Ford (2004); Walker (1981b) p.3; Walker (1996) p.422-423.

Stair's first completed manuscript of the *Institutions* is known to have circulated from 1662,<sup>598</sup> and it has been surmised that much of the writing took place during the "enforced period of leisure that preceded the restoration of the session [in 1661]".<sup>599</sup> Hutton suggests that his writing of the first draft took place from the period of his elevation to the bench in 1657, when he began to record the court's decisions, until 1663. From Stair's appointment, Hutton estimates that he only served for around fifteen months (since, as noted above, the court was closed after Cromwell's death in 1658 and the re-established Court of Session did not meet until April 1661). Hutton speculates that during this period of enforced "vacation" he may have begun to write the *Institutions*.<sup>600</sup>

Therefore, between the time of his admission to the bar and the writing of the first manuscript lies a period of around thirteen or fourteen years and during that period Stair only had opportunities to practise law for a period of eight months in the Court of Session. It was only after 1652 that he would have gained practical knowledge of the law, but in a court which sought to minimise the differences between Scotland and England and where English law was applied whenever possible.<sup>601</sup> It has been noted that "it was against the background of Dalrymple's experience as an advocate and judge in the English court that the treatise first took shape",<sup>602</sup> a fact that does not seem insignificant. He perhaps felt a good deal of sympathy with the "sustained and largely successful struggle by the local lawyers against the Anglicization of their legal system"<sup>603</sup> and the power of what amounted to an occupying force in Scotland may have provided the impetus to set down the law of Scotland in order to protect it from greater risk of Anglicisation or even demise.

One final suggestion is that Stair may have borrowed references and citation of authority second-hand from other writers. The works of Suarez in particular, all of

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<sup>598</sup> Watson (1981) p.31; Ford (1988) p.24; Sellar (1981) p.142; Hutton ((1981b) p.79) dates the earliest manuscript to 1664.

<sup>599</sup> Ford (2004).

<sup>600</sup> Hutton (1981b) p.81; Hutton also points out that this theory also rules out the influence of later writers such as Pufendorf or Voet, at least on early editions, *ibid.* p.80, n.1.

<sup>601</sup> Ford (2004).

<sup>602</sup> *Ibid.*

<sup>603</sup> *Ibid.*

which were available in Glasgow University library at this period and which are extremely well-referenced, would repay closer comparison with the *Institutiones*. Suarez's principal work on law, *De Legibus*, contains a less detailed analysis of substantive law than some of the other scholastic writers, for instance Lessius or Molina, but it is more philosophical and more theoretical. He begins with a discussion about the nature of law,<sup>604</sup> its causes and effects, and goes on to expound the relationship between eternal law, divine law and natural law and the functional roles of law, reason and conscience.<sup>605</sup> The foundations of law are derived from an Aristotelian account of justice overlaid with an account of God's moral law.

In Suarez's *De Legibus* natural law could also be called divine, "being decreed, as it were, directly by God himself".<sup>606</sup> He quotes from Thomas (who, in turn, borrowed the quote from St Augustine): "for who save God writes the natural law in the hearts of men?"<sup>607</sup> Natural law proceeds "immediately from a dictate of the reason"<sup>608</sup> and is described both as "the natural light of the intellect"<sup>609</sup> or reason, also written in the hearts of men,<sup>610</sup> but illuminated by "the natural light of the intellect".<sup>611</sup> After a lengthy discussion he concludes that after all natural law is "truly and properly divine law, of which God is the Author".<sup>612</sup>

The parallels with Stair's account of the interplay of eternal, divine and natural law are noteworthy, as are the roles attributed to reason and conscience. Suarez's account of the nature of laws is lengthy, detailed and exceptionally well referenced. The Bible, St. Augustine, Thomas and Aristotle – in that order – are his constant companions, with no fewer than 210 index citations to the *Summa Theologiae*. But citations of Greek and Roman philosophers, Roman and canon law, civilian jurists, the church fathers and other scholastic theologians also abound, including

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<sup>604</sup> Suarez, *De Legibus ac Deo Legislatore* (1612) Book 1 (hereafter "Suarez").

<sup>605</sup> Suarez Book 2.

<sup>606</sup> Suarez I.3.9.

<sup>607</sup> *Ibid.*

<sup>608</sup> Suarez II.5.12.

<sup>609</sup> Suarez II.5.14.

<sup>610</sup> *Ibid.*

<sup>611</sup> *Ibid.*

<sup>612</sup> Suarez II.6.13.

Covarruvias, De Soto and Molina. If Stair did indeed borrow references from another source, Suarez may be a contender, both conceptually and for the abundance of referenced material. Hutton comments that “much of Suarez’s legal and political thought was entirely acceptable to Stair, despite his well-known anti-Catholic sentiments”.<sup>613</sup>

From Aquinas onwards, the scholastics were characterised by an emphasis on human reason. They had a more optimistic view of human nature and human capacities than, for example, St Augustine. The “fallen man” of the Reformed church was weak, passive and sinful, entirely dependent on God’s grace. Perhaps Stair was drawn conceptually to the scholastic tradition because of the focus on God-given reason and the greater role given to human agency than in orthodox Presbyterian doctrine, attracted by the fusion of religion and reason and the strongly moral content of law. And in terms of substantive law, this crucially important piece of Stair’s conceptual jigsaw is worked out in what he calls the *obediential* (or natural)<sup>614</sup> obligations, which derive directly from natural law, particularly in his account of restitution, recompense and reparation.

#### 4. The Scholastic Doctrine of Restitution

It has been argued above that Stair was profoundly influenced by the pervasive Aristotelian and scholastic influence of seventeenth century Scotland. The question which then must be answered is whether or not this had any significant impact on the substantive law expounded in the *Institutions*. The parallels are most clearly observed by examining the scholastic doctrine of restitution, which occupied a pivotal place in the work of both Aquinas and Stair.

##### *(a) Restitution and Recompense in Thomas Aquinas*

In Aquinas’ account of justice, we have seen that Aristotelian equality is translated into a framework of debt and owing, gain and loss. Justice requires a rebalancing of

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<sup>613</sup> Hutton (1981b) p.91.

<sup>614</sup> Stair I.3.5.



those positions, and the mechanism for doing so is restitution. Given its doctrinal importance within canonist thinking, it is unsurprising that the doctrine of restitution takes pride of place in Thomas' account of law, as it did in other juristic and theological texts from Duns Scotus<sup>615</sup> through to the late scholastics.<sup>616</sup> The pervasive moral character of restitution, as well as its extensive scope, made it a fundamental building block in a theory of justice.

For Aquinas restitution is an aspect of the virtue of justice, an act of commutative justice which governs equality in exchanges between private parties.<sup>617</sup> Such exchanges can be involuntary and unilateral whereby one party causes harm (*iniuria*) or loss (*damnum*) to the other, or they can be voluntary reciprocal transactions.<sup>618</sup> In the former category (equivalent to delictual harm or loss) restitution is due for injury caused to a person, their reputation or their property.<sup>619</sup> In this broad canonist sense of restitution Old Testament justice – “an eye for an eye” – is the basis for a general obligation to restore equality by means of recompense (*recompensatio*):<sup>620</sup>

In all such cases the nature of commutative justice demands that equal recompense according to equality be made, namely that the reaction as recompense is equal to the action.

This form of justice amounts to carrying out right action: “right (*ius*) or the just thing (*iustum*) is a certain action which is equal in relation to another person according to a certain mode of equality”.<sup>621</sup> An example of “right action” is the obligation to *recompense* by paying a wage for a service rendered.<sup>622</sup>

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<sup>615</sup> Scotus, *Ordinatio Article IV (De Obligatione Restitutionis)*; see Wolter (2001) pp.66ff.

<sup>616</sup> For instance Molina, *De Iustitia et Iure*, 1.2 Disp 49-51; De Soto, *De Iustitia de Iure* 4.5-4.6; Lessius, *De Iustitia et Iure*, Book 2, ch. 13-16.

<sup>617</sup> *Summa*, II-II q.61.3; for a detailed account see Karl Weinzierl (1939).

<sup>618</sup> *Summa*, II-II q.61.3.

<sup>619</sup> *Ibid.* It is interesting for Stair's scheme that restoring equality for an offence to dignity is referred to as reparation (“*reparetur*”, *ibid.* q.62.2, ad.3). See Weinzierl (1939) pp.164-165 for a definition of restitution as “*reparatio inaequalitatis*” in Aquinas' commentary on Lombard's *Sentences*.

<sup>620</sup> *Summa*, II-II q.61.4 (my translation).

<sup>621</sup> *Ibid.* q.57.2, translation from Brett (1997) p.91.

<sup>622</sup> *Ibid.* q.57.1.

Recompense is translated in various ways and does not appear to be a term of art for Aquinas, or at least for his translators. Sometimes it is rendered punishment,<sup>623</sup> sometimes repayment, compensation or reparation.<sup>624</sup> In the *Summa* it amounts to a general principle indicating a duty to restore equality in relation to a wide range of behaviour, but chiefly concerned with actions which cause harm or loss.

Justice which concerns “things” belonging to another, as opposed to the actions of another, is the territory of restitution in a narrower sense: it is “the recompense of thing for thing”.<sup>625</sup> Aquinas does, however, locate this type of exact restitution within the broad principle of recompense in that “restitution is a kind of recompense for that which has been taken away”.<sup>626</sup> The function of exact restitution is to bring about justice by restoring the loss of things<sup>627</sup> or money<sup>628</sup> to the rightful owner or possessor: “to make restitution appears to be nothing else than to re-establish a person in possession of or dominion over a thing which is his”.<sup>629</sup>

The relationship between recompense and restitution appears to be based on whether or not the property in question can be restored. If it cannot (and therefore exact restitution is not possible) Aquinas resorts to the general obligation of recompense as a fall-back remedy:<sup>630</sup>

And so when the equal of what has been taken cannot be restored (*non est restituibile*), recompense (*recompensatio*) must be made as far as is possible.

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<sup>623</sup> *Ibid.* q. 61.4, ad.3.

<sup>624</sup> *Ibid.* q. 61.4.

<sup>625</sup> “*secundum recompensationem rei ad rem*”, *ibid.*, q.62.1.

<sup>626</sup> *Ibid.*; Weinzierl (1939) pp.167-168.

<sup>627</sup> *Summa*, II-II q.61.2.

<sup>628</sup> *Ibid.* q.62.3.

<sup>629</sup> *Ibid.* q.62.1-2, bearing in mind that the scholastic use of *dominium* was broader than the Civilian concept of ownership, extending to those with control over property, see Brett (1997) pp.20-26, and pp.127-8.

<sup>630</sup> *Summa*, II-II q.62.2, ad.1-2, for instance where someone has lost a limb through the injury of another, recompense must be made; Weinzierl (1939) pp.172-173.

Restitution is a central element in Thomas's account of justice, but it is as much a moral and spiritual duty as a legal one. Not only is it necessary to address inequality, it is also necessary for salvation.<sup>631</sup>

*(b) Restitution and Recompense in Stair*

To a Scots lawyer the terminology of restitution and recompense is immediately recognisable. Together with reparation, Stair's delictual category, they form a trilogy of substantive obediencial obligations in the first book of the *Institutions*.<sup>632</sup> Stair's division of obligations into those which are "obediencial" or "natural" (deriving from the will of God) or conventional (from the will of man) appears to be unique.<sup>633</sup> The term "obediencial" is thought to derive from theology<sup>634</sup> and certainly these obligations have a strong moral and religious content.

Stair's account of restitution<sup>635</sup> and recompense<sup>636</sup> are not exact equivalents of Thomas' categories but there are enough similarities to warrant comparison. Stair explicitly relates both to the Aristotelian principle of equality, describing restitution as "extending the proportion of equality";<sup>637</sup> or recompense as "obliging to do one

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<sup>631</sup> *Summa*, II-II q.62.2.

<sup>632</sup> Reference to Stair's "trilogy" often denotes the three "R's" of Scots enrichment law prior to its recent reformulation, which were traditionally restitution (for property), repetition (for money) and recompense (for services). However, repetition is not part of Stair's taxonomy and is mentioned in only one passage: "Restitution of things belonging to others, may seem to be an effect of property, whence coming the right of vindication or repetition of any thing; but, beside the real action, the proprietor hath to take or recover what is his own, ... there is a personal right, which is a power in the owner to demand it" (I.7.2). It seems likely from the context that Stair envisages repetition to be a personal right or claim available to an owner, contrasted with his real right of vindication, i.e. a pursuer can claim repetition corresponding to the obligation (of restitution) on the defender. This would be consistent with the meaning of "repeat" in old Scots (to claim or ask for something back), "repeter" in Latin and *répéter* in old French. Grotius also uses it in this sense (*ad repentendum*), *Inleidinge tot de Hollandsche rechtsgeleerdheid*, III.30.18. In older Scottish cases "repetition" is sometimes used in the sense of the pursuer's claim, but not consistently, see *Wallwood v Gray* (1684) Mor 14235; *Morison & Glen v Forrester* (1712) Mor. 14236; *Ralston v Robertson* (1761) Mor. 14238; *Lady Hisleside v Baillie of Littlegil* (1683) Mor. 1765 (repetition of fruits); *Miln v Lady Galraw* (1715) Mor. 1759 (repetition of rent). For the post-Stair history of repetition see Evans-Jones (2003) paras 1.22-23.

<sup>633</sup> Stair I.3.2-5; see MacQueen and Sellar (1995) pp.290-293.

<sup>634</sup> Campbell (1954) p.15. It is possible that the term was used in Presbyterian debates of the period, in which the question of obedience was hotly debated.

<sup>635</sup> Stair I.7.

<sup>636</sup> *Ibid.* I.8.

<sup>637</sup> *Ibid.* I.1.15 (fifthly).

good deed for another”.<sup>638</sup> Even reparation for delictual harm involves the rebalancing of loss and gain:<sup>639</sup>

Damage is called *damnum, a demendo*, because it diminisheth or taketh away something from another, which of right he had .... The Greeks, for the like reason, call it ελαττον, by which man hath less than he had.

Restitution is an obligation which arises from property, the restoring of “things” (property or money),<sup>640</sup> “whereby that which is another’s coming into our power, without his purpose to gift it to us, and yet without our fault, ought to be restored”.<sup>641</sup> It is conceptually equivalent to Aquinas’ narrow sense of restitution. Stair does not replicate the breadth of the scholastic doctrine but is at pains to circumscribe the territory of restitution by excluding from its scope legal relationships created either by contract (“by voluntary engagement”) or by fault (“by delinquence”)<sup>642</sup> although, as will be discussed in chapter 7, he is not entirely successful at doing so. Title I.7 of the *Institutions* is addressed to possessors, for the source of the obligation lies in the fact of possession,<sup>643</sup> whether acquired unilaterally (for instance by finding lost things, or recovering property from thieves or pirates) or through a bilateral transaction such as something which is “bought *bona fide*”.<sup>644</sup>

Recompense, on the other hand, is principally about actions rather than things, as it was for Aquinas, where *deeds* are done “not *animo donandi*, but of purpose to oblige the receiver of the benefit to recompense”.<sup>645</sup> Recompense is based on the

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<sup>638</sup> *Ibid.* I.8.1.

<sup>639</sup> *Ibid.* I.9.3.

<sup>640</sup> *Ibid.* I.7.9; I.7.11.

<sup>641</sup> *Ibid.* I.7.1.

<sup>642</sup> *Ibid.*

<sup>643</sup> *Ibid.* I.7.13 “the ground [of the obligation] be the *having* of that which is to be restored” (emphasis added).

<sup>644</sup> *Ibid.* I.7.1.

<sup>645</sup> *Ibid.* I.8.2. Evans-Jones ((2003) paras 1.10, and 9.12-13) defines restitution as the restoration of a *certum*, recompense as making good an *incertum*; Birks equates restitution with “*dare*” and recompense with “*facere*” (Birks (1985) p.236) as does Whitty ((1994) p.201), recognising that there are exceptions within recompense. Stair’s framing of the benefit as having been conferred “of purpose to oblige” suggests that there must be intention on the part of the benefitor, which would be consistent with the exclusion of incidental benefits. His definition also contains no requirement that the pursuer should have suffered a loss, see Evans-Jones (2003) paras 7.37ff.

presumption against donation, which would be activated by a gratuitous transfer of property (as he had already alluded to in relation to restitution),<sup>646</sup> whereby “trust is rather presumed than donation”.<sup>647</sup> Likewise, gratuitous actions are to be recompensed by *negotiorum gestio*<sup>648</sup> or by the broader formulation of an obligation arising from “what we are profited by the damage of others without their purpose to gift, or as the law expresseth it *in quantum locupletiores facti sumus ex damno alterius*”.<sup>649</sup> Recompense is, therefore, concerned with removing gain where it has not been intended: gratuitous benefits must be quantified and returned to whomever conferred them.

However, although recompense ostensibly concerns deeds rather than things, when Stair refers to “the other obligation of recompense ... whereby we are enriched by another’s means, without purpose of donation”,<sup>650</sup> it is clear that recompense also indirectly concerns property in two ways, both of which concern making profit from someone else’s property. First, its function is to remove profit gained through someone else’s property by any means other than simply possession (which is the territory of restitution), for instance by building on another man’s land or carrying out unnecessary repairs to his house.<sup>651</sup> Secondly, (as was already adverted to in Stair’s discussion of restitution) if the *bona fide* possessor is no longer in possession (and restitution is, therefore, no longer possible) recompense is the appropriate response to remove any benefits gained during possession, such as fruits or profits deriving from the property.<sup>652</sup>

The parallels with Thomas’ account of the relationship between restitution and recompense are evident. Restitution functions principally to restore property, recompense redresses gratuitous benefit gained either through the actions of another

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<sup>646</sup> Stair I.7.1 (“without his purpose to gift it to us”).

<sup>647</sup> *Ibid.* I.8.2.

<sup>648</sup> *Ibid.* I.8.3-5.

<sup>649</sup> *Ibid.* I.8.2; for analysis of the scope of recompense in the *Institutions* and its subsequent development see MacQueen and Sellar (1995) pp.294-296, pp.305-314.

<sup>650</sup> *Ibid.* I.8.6.

<sup>651</sup> *Ibid.*

<sup>652</sup> *Ibid.* I.7.10-12; whilst Aquinas alludes to “virtual loss” (*Summa*, II-II, q.62.5), liability for fruits was developed by the late scholastics, although it is already present in Duns Scotus’ account of restitution, *Ordinatio Article IV (De Obligatione Restitutionis)*, q.3.

or from the use or possession of another's property if restitution can no longer take place. Recompense, therefore, involves a quantification of gain or profit (*in quantum lucratus*) for it is not about specific assets, more accurately it is only indirectly about those assets.<sup>653</sup> By the time Stair was writing, the Aristotelian concept of inequality did not demand equal exchange. Instead, within the obligation of recompense, equality is translated into onerosity and it reinforces the different legal consequences which arise from onerous and gratuitous transactions. As was discussed in chapter 2, this was also considered an aspect of presumptive fraud.

### *(c) The link with fraud*

The principle of inequality which was central to the Thomist account of justice and the scholastic doctrine of restitution permeated not only Stair's *Institutions*, but the broad doctrine of fraud as expressed in the decisions of the courts.<sup>654</sup> It has been shown that the doctrine of presumptive fraud was widespread and that its function was to restore balance and equilibrium in circumstances where an unequal advantage had been gained.<sup>655</sup> The inequality could arise from a relationship of trust or dependence; from a weakness or facility in a person; from inequality of knowledge or legal advice; or from a gross inequality in the transaction itself, most obviously where it was gratuitous.

It has already been noted that presumptive fraud has many similarities to the expansive concept of equitable fraud in English law.<sup>656</sup>

In Chancery the term "fraud" thus came to be used to describe what fell short of deceit, but imported breach of a duty to which equity attached its sanction.

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<sup>653</sup> This analysis is preserved in modern Scots law, cf. *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90 at 99B-C where Lord Hope describes recompense as "a process of assessment, as it requires a value to be placed on the benefit".

<sup>654</sup> This theme is taken up again in ch. 7 (pp.238-242) where the Thomist account of restitution is used as a point of reference for secondary fraud.

<sup>655</sup> See above ch.2 pp.65-90.

<sup>656</sup> *Nocton v Lord Ashburton* [1914] AC 932 at 953 per Viscount Haldane. See Sheridan (1957) for a detailed examination of "Fraud in Equity" in two-party situations.

Classic examples of equitable fraud were taking wrongful advantage of vulnerable people or of close relationships, breach of fiduciary duty or breach of trust. Fraud could even be presumed from the intrinsic unfairness of a bargain or from a gift.<sup>657</sup> In search of common principles, Sheridan suggests that the doctrine of equitable fraud involved situations where consent was improperly obtained, or a position of power or authority was abused. The doctrine of notice (and constructive notice) was also part of equitable fraud.<sup>658</sup> Lord Field encapsulates the classic Chancery formulation thus:<sup>659</sup>

Necessity and weakness on the one side, and advantage in fact on the other, gained by a representation untrue in fact, and materially inducing the bargain, render it contrary to good conscience.

This is historically familiar “fraud” territory for Scots law, but the route taken to reach similar results was different as was the underlying theoretical basis: the unifying principle for the exercise of the equity jurisdiction was whether behaviour was contrary to good conscience; in Scotland it lay in the expression of injustice as inequality. Inequality could perhaps be seen as a more objective standard than “conscience” or even equity itself. And in the early decisions of the Scottish courts involving presumptive fraud we do not find an unfettered exercise of discretion. Rather discrete categories of inequality are developed to deal with situations in which the law ought to intervene, and the doctrine of presumptive fraud is the tool employed. Had the Scottish courts continued down this path of judicial development the modern law might be a more coherent entity.

## 5. A Change in the Zeitgeist: the Scottish Enlightenment

However, the world was changing. Stair’s moral and religious view of law could not survive the seismic shift that was happening all over Europe, one which was especially relevant in Scotland: the phenomenon now known as the Scottish

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<sup>657</sup> Sheridan (1957) pp.100-102. See also Spencer Bower (1915), pp.614ff.

<sup>658</sup> Sheridan (1957) pp.191 ff.

<sup>659</sup> *Menzies v Menzies* (1893) 20 R (HL) 108 at 148.

Enlightenment. Although the most obvious changes in the law of fraud took place in the nineteenth century,<sup>660</sup> one of the sources of that transformation must lie in the change of worldview which took place over the course of the eighteenth century. A vast literature now exists on the Scottish Enlightenment and no attempt is made here to provide anything other than a brief overview.<sup>661</sup> My purpose is to reflect the fact that the writers and thinkers of the Enlightenment changed the way people thought about the world, and particularly about the law.<sup>662</sup>

As has been demonstrated in the previous chapter, for at least a century after the publication of Stair's *Institutions* fraud – whether proven or inferred – had been a broad overarching doctrine designed to deal with a spectrum of behavior from deceit through to simply private knowledge. It was the equalising force which the courts used to deliver substantive justice. However, over the course of the nineteenth century the courts increasingly lacked confidence in this use of the doctrine, and the definition of fraud gradually narrowed to the point where it became more or less the equivalent of criminal fraud. The question is why this development took place. Cases still came before the courts which raised the same problems, and indeed the court developed other means to deal with some of them (for instance, the doctrines of facility and circumvention and undue influence, and – with regrettable consequences – the law of error).

With the benefit of hindsight, it seems likely that influences outside the law were having an effect on the Scottish bench as well as on wider civil society. This was the aftermath of what is now known as the Scottish Enlightenment, a period in which philosophical giants like Francis Hutcheson, Adam Smith and David Hume were writing and debating about the way in which human beings formed a “moral sense”; about how society should be governed; and crucially, about the separation between morality and the rules of positive law. Gone was the older scholastic concept of

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<sup>660</sup> See ch. 4.

<sup>661</sup> Despite that vast literature there has been little analysis of the impact of the Enlightenment on substantive Scots law, territory which, in my view, is ripe for further research.

<sup>662</sup> My thinking about the issue has been influenced by the following texts: Stein (1970); Haakonssen (2003), (1996) and (1989); Berry (1997) ch.6; Moore (1994); MacIntyre (1988); MacCormick (1982); Hochstrasser (2000); and Forbes (1982).



justice as virtue, or for the natural lawyers, justice as God's moral law. For Hume "the sense of justice and injustice is not deriv'd from nature"; rather it "arises artificially, tho' necessarily from education, and human conventions".<sup>663</sup>

For the Enlightenment thinkers it was not the function of law to make men "good", indeed it seems that an agreed concept of the good was no longer possible.<sup>664</sup> This does not mean they had no concept of morality, and indeed justice was a central pillar of the theories of both Smith and Hume, for the law would still punish men who were "bad". However, law was now a *reactive* rather than an *active* force for good in the ordering of society. Reacting against the natural law theories of the seventeenth century, Hume described justice as a *negative virtue* which demanded only that human beings refrain from doing harm.<sup>665</sup>

Mere justice is, upon most occasions, but a negative virtue, and only hinders us from hurting our neighbour. The man who barely abstains from violating either the person, or the estate, or the reputation of his neighbours, has surely very little positive merit. He fulfils, however, all the rules of what is peculiarly called justice, and does every thing which his equals can with propriety force him to do, or which they can punish him for not doing. We may often fulfil all the rules of justice by sitting still and doing nothing.

This runs in parallel with Smith's economic theory, which argued that the most successful model for growth was one in which every person was "left perfectly free to pursue his own interest in his own way".<sup>666</sup> The function of law, therefore, was not to regulate consumption nor to interfere or "watch over the economy of private people";<sup>667</sup> rather individuals should be left alone to pursue their own interests.<sup>668</sup> This was a non-interventionist model of justice, and of the role of government more generally, classically known as *laissez-faire*. Just action was "inaction", refraining

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<sup>663</sup> Hume, *A Treatise of Human Nature*, III.2.1.

<sup>664</sup> MacIntyre (1988) p.207.

<sup>665</sup> Smith, *The Theory of Moral Sentiments*, II.2.1.9.

<sup>666</sup> Smith, *Wealth of Nations*, IV.9.51.

<sup>667</sup> *Ibid.* II.3.36.

<sup>668</sup> Berry (1997) p.129.

from hurting one's neighbours.<sup>669</sup> The logical consequences of this view is that the law must be neutral regarding moral behaviour, its proper role is to regulate relations between independent moral agents, each capable of choosing their own ethical path. It need only intervene when things are particularly grave.<sup>670</sup>

In a Scottish context, the contrast with Stair, for whom the perfect ideal of law was the law of nature, the divine law, the moral law, could not be clearer. It was no longer regarded as part of human nature, fashioned in the image of God and in the light of human reason, to act justly. For Stair, rooted in the Aristotelian tradition, justice was the prime virtue; for the Enlightenment thinkers law was merely an "artificial" virtue,<sup>671</sup> a social construct or convention which was essential for social cohesion.

Hochstrasser argues that one of the changes brought about by the Enlightenment was an "invention of autonomy",<sup>672</sup> a change of focus from a metaphysical (and religious) understanding of the world to "the anthropological understanding of the individual".<sup>673</sup> This is matched by a paradigm shift in legal thinking, from the language of duties and obligations (characteristic of Stair)<sup>674</sup> to that of natural rights.<sup>675</sup> Smith and Hume were dismissive of the natural lawyers (although they admired Grotius), because "they tried to do too much"<sup>676</sup> in that "[t]hey were concerned with what the good man, the man with the most delicate scruples of conscience, should think himself bound to perform".<sup>677</sup> In the new world jurisprudence "is concerned not with what the good man should be disposed to do, but with what a judge should compel him to do".<sup>678</sup>

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<sup>669</sup> Smith, *A Theory of Moral Sentiments*, II.2.1.10.

<sup>670</sup> Haakonssen (2003) p.214.

<sup>671</sup> Haakonssen (1989) p.11.

<sup>672</sup> Hochstrasser (2000) p.5.

<sup>673</sup> *Ibid.*; see also MacIntyre (1988) p.210.

<sup>674</sup> Stein (1970) p.151; Campbell (1954) pp.16-20.

<sup>675</sup> Hochstrasser (2000) p.6.

<sup>676</sup> Stein (1970) p.161.

<sup>677</sup> *Ibid.*

<sup>678</sup> *Ibid.*

There is also a contrast in relation to the concept of equality. Returning to Stair's question:<sup>679</sup>

Whether in these contracts there be a moral necessity to keep an exact equality, that whosoever *ex post facto*, shall be found to have made an unequal bargain, the gainer ought to repair the loser.

Adam Smith's response is indicative of the wider change that was taking place:<sup>680</sup>

In all voluntary contracts, both parties gain. For a long time, however, people were possessed of the idea, that one man's gain is another's loss.

Unfortunately, legislation proceeded on this fallacy, and consequently busied itself with restrictions, prohibitions, compensations and the like.

The thinkers of the Enlightenment were reconceptualising philosophy, but perhaps more importantly they were reconceptualising Scottish society. Their view of justice reflects and underpins their whole idea of society as a community of strangers, motivated by self-interest, which is restrained by the rules of justice for the sake of utility (Hume) or the common good (Smith) or conscience (Thomas Reid). They were driven by the need to provide an analysis of a commercial society in which the goal was both opulence and freedom: opulence because all human beings want to increase their wealth; freedom because commercial society, unlike its feudal predecessor, offers the opportunity to all who labour to increase their wealth. Justice is the foundation stone for the operation of commerce. However, its functions are limited to upholding property transactions and contracts, and to providing rules of certainty, accuracy and predictability so that people can have confidence in their trading partners and in the markets in order for commerce to flourish.

So the ground shifts from a concept of justice which is inextricably linked with morality and conscience, to justice which is only negative and can be fulfilled by

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<sup>679</sup> Stair I.10.14.

<sup>680</sup> Stein (1970) p.162; the quotation is from one of Smith's footnotes to the *Wealth of Nations*.

sitting still. The function of justice is now to maintain social order and to serve commerce rather than embodying principles of right living, virtue and godliness. This worldview represented a complete break with the traditions of the past – both intellectual and legal. As Scotland moved into Smith's fourth stage of development,<sup>681</sup> commercial utility became a strong driving force, and the values of the market and economic growth were increasingly to prevail.<sup>682</sup> It is no surprise that the Court of Session in the nineteenth century gave voice to those values.

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<sup>681</sup> i.e. a commercial one, for an outline of the four stages see MacCormick (1981b) pp.251ff.

<sup>682</sup> MacIntyre (1988) p.258.

### **Chapter 4: The Transformation of Fraud**

The modern law of fraud is very different from the broad picture outlined in chapter 2. This chapter will examine the reasons why the history of fraud presented above is almost unrecognisable today. It examines in some detail the case law of the nineteenth century, the crucial period in which the definition of fraud was transformed, focusing on two particular aspects of the process: the changing attitude of the Scottish courts over the course of the nineteenth century and the impact of the English decision *Derry v Peek*,<sup>683</sup> the most frequently cited authority for the modern definition of fraud in Scots law.

Instances of presumptive fraud became more infrequent over the course of the nineteenth century, as has been shown, and it was in this period that the definition of fraud was fundamentally altered. In the later decades of the nineteenth century there are few instances where fraud was presumed or inferred in the broader sense of inequality or unwarrantable behaviour outside the by-now established categories of facility and circumvention or undue influence.<sup>684</sup> The broader doctrine of presumptive fraud was lost to the Scottish judiciary. Although individual judges attempted to invoke it in hard cases from time to time, there was insufficient familiarity with the historical material, accompanied, often explicitly, by the sense that commercial men demanded a more robust definition of what amounted to fraud.

However, it would be inaccurate to say that the emasculation of fraud was entirely the work of the English judges in *Derry v Peek*. Although *Derry* provided an ideal case study for legal nationalists in the twentieth century seeking to redeem Scots law

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<sup>683</sup> (1889) LR 14 App Cas 337.

<sup>684</sup> Although see *Gordon v Stephen* (1902) 9 SLT 397.

from pernicious English influence,<sup>685</sup> the transformation of fraud cannot be laid at the door of English law. There is evidence that the Scottish courts were already reaching for a narrower definition of fraud on their own, with the result that there is considerable inconsistency in the case law of the nineteenth century and great difficulty in reconciling the often contrary views expressed by individual judges. Indeed, perhaps the tension had always existed to some extent at an ideological level.<sup>686</sup> However, despite the fact that fraud, encompassing non-intentional deceit, had been a familiar legal concept in Scotland, over the course of the nineteenth century a narrower definition was emerging. Nevertheless, there remained instances where the broader concept of fraud was resorted to by the courts in circumstances where unfair practices were combined with aggravating factors.

This very inconsistency suggests that an ideological battle was being waged in the Scottish courts. To some extent they were simply reacting to the cases which came before them in the aftermath of a period of economic turmoil after the collapse of two Scottish banks.<sup>687</sup> Fraud became a key issue as shareholders with the prospect of bankruptcy before them argued they had made investments on the basis of a misrepresentation. However, the court was clearly divided, as was wider Scottish society, about the appropriate role the law should play in such an economic and social crisis. This was a classic policy dilemma in which competing concepts of substantive justice and commercial expediency battled for supremacy. And fraud was in the centre of the debate. Some judges used a broad concept of fraud to provide a remedy; others interpreted it narrowly in order to give more protection to entrepreneurs, in particular the directors of companies and financial institutions. Their judgments often contain pronouncements on the havoc that would be wreaked by putting individual fairness before the interests of a growing economy.

The battle for the definition of fraud began, therefore, long before *Derry v Peek*. A flavour of the conflicting views held by the court can be seen in *Railton v Mathews*

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<sup>685</sup> Principally TB Smith, see Smith (1962) pp.828ff.

<sup>686</sup> See for instance *Nisbet v Kinnaird* (1698) Mor 4872.

<sup>687</sup> Lenman (1977) p.190; Campbell (1985) pp.112-114.

*& Leonard*<sup>688</sup> in which the judges of the Inner House disagreed as to whether an issue of “undue concealment or deception” contained two different standards of dishonesty or whether both amounted to intentional deceit. The majority held that the creditor in a bond of caution was under no duty to disclose information which bore on the debtor’s reliability and creditworthiness; and furthermore, that withholding facts to the other party’s disadvantage must be done willfully and intentionally before there would be liability.<sup>689</sup> In a dissenting judgment Lord Cockburn was of the view that deception and undue concealment amounted to two different species of fraud: even if the creditor was “perfectly honest”, if he had concealed material facts which induced the cautioner to sign the bond, it would be “undue” concealment.<sup>690</sup> Both sides appealed to Scottish authorities. Lord Moncreiff claimed he could find no previous case where a bond of caution was reduced without evidence of “unfair or fraudulent purposes”;<sup>691</sup> Lord Cockburn, on the other hand, could not reconcile the majority decision “with justice, or with the object of the law” or even with established Scottish practice “which always uses the word “undue” as something short of fraud”,<sup>692</sup> a category he described as the “negative” form of fraud.<sup>693</sup> These arguments typify the uncertainty that surrounded the meaning and scope of fraud as the nineteenth century progressed, even among such eminent Scottish jurists.

There is, therefore, considerable inconsistency in mid-century cases dealing with questions of fraud, error and misrepresentation and it is not possible to reconcile all of the statements made about the definition of fraud. There was no clear linear progression from the broad concept of presumptive fraud to the modern concept of fraud as deceit. However, despite the evident contradictions, there is a discernible pattern of decisions which will be outlined in this chapter. The view presented here is that a broad concept of fraud was familiar in the Scottish courts well into the nineteenth century and that the narrowing of fraud to intentional deceit took place in

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<sup>688</sup> (1844) 6 D 536; there were of course similar arguments prior to the nineteenth century, for instance in *Nisbet v Kinnaird* (1698) Mor 4872. However, at that earlier period the refusal to intervene in order to redress unfair transactions was more unusual.

<sup>689</sup> (1844) 6 D 536 at 551 per Lord Moncreiff.

<sup>690</sup> *Ibid.* at 552 per Lord Cockburn.

<sup>691</sup> *Ibid.* at 547 per Lord Moncreiff.

<sup>692</sup> *Ibid.* at 553 per Lord Cockburn.

<sup>693</sup> *Ibid.* at 554 per Lord Cockburn.

the second half of the century once liability for misstatements had been transferred from the law of fraud to the law of error in a way that was inconsistent with the history of those doctrines. *Derry v Peek* then provided the authority required to make the change permanent.

## 1. Divergent Views of Fraud in the nineteenth century

### *(a) The broad view*

The conflict between law and morality was – and is – a far wider debate than questions of Scottish legal doctrine, but its effects can be felt in the growing reluctance of the Scottish bench to use legal principles to enforce moral standards. It is suggested that the change of worldview which the Enlightenment represents, combined with economic growth, should be recognised as the context within which the law of fraud was transformed from being a barometer of conscience, intrinsically moral, and containing many shades of grey, to a legal rule which penalised only criminal behaviour causing harm by means of intentional deceit. Of course, no seismic philosophical shift is ever explicitly articulated in legal judgments.

Underlying values rarely are. But that is not to say that they do not have a profound effect on legal principles and on the people who pronounce them. Seen through the lens of Scottish intellectual history, the growing reluctance of the Scottish bench to label as “fraud” behaviour which was morally dubious but not intentionally deceitful becomes more comprehensible. The law was no longer seen as an instrument for enforcing moral standards, and legal rules were gradually being transformed into the “negative”, minimally-invasive principles which Hume and Smith had advocated for a commercial world.<sup>694</sup>

Another important factor in all of this was religion. Scotland was not only becoming more commercial, it was also becoming more secular and the Kirk was no longer regarded as the arbiter of thought and behaviour. With religious freedom came a moral relativism in which different conceptions of what was “good” or “right” could

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<sup>694</sup> See above, pp.126-131.



compete for supremacy. The legal positivists of the nineteenth and twentieth centuries went on to provide a jurisprudential framework to justify the separation of law and morality which came to represent legal orthodoxy. It is difficult to see how any legal doctrine which involved making moral judgements about conduct and motive, as fraud had done, could survive intact in such an intellectual climate.

Nevertheless, there is ample evidence that behaviour which fell short of deceit could be and was described as “fraudulent” well into the nineteenth century, while at the same time resistance to that broad definition of fraud was gaining ground in some quarters. In *Gillespie v Russel*,<sup>695</sup> a disadvantageous transaction was not reduced, accompanied by *dicta* expressing the non-interventionist policy of the law where the parties were capable of looking after their own interests. However, despite the apparent application of a *caveat emptor* principle,<sup>696</sup> the court did leave open the possibility that in other circumstances fraud could have been inferred:<sup>697</sup>

it may vary, according to the relative position of the parties, – the strength of weakness of their minds, – their respective means of knowledge, – or the other circumstances of each case.

*Oliver v Suttie*<sup>698</sup> is, arguably, another example of a refusal by the courts to countenance any version of fraud short of deception. It involved an unintentional error (an “innocent” misrepresentation) in a lease which turned out to include less land than in the original advertisement. The pursuer covered all bases, arguing fraud, misrepresentation and essential error and the Lord Ordinary refused the claim, making a clear distinction between fraud and error when he said that there was “no room or authority, or sound principle, for any *mid plea* between fraud and

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<sup>695</sup> (1856) 18 D 677.

<sup>696</sup> This case is cited by Thomson as an example of the *caveat emptor* principle. However, it should be recognised that the court did not rule out the possibility of inferring fraud in other circumstances. It is clearly an unusual case where a landlord claimed to have been taken advantage of by his new tenant, although he had every opportunity of ascertaining the value of the minerals on his land. Lord President McNeill comments that he does not recollect a similar case (at 682).

<sup>697</sup> *Gillespie v Russel* (1856) 18 D 677 at 686 per Lord Curriehill.

<sup>698</sup> (1840) 2 D 514.

unintentional error.”<sup>699</sup> In *Oliver* it can also be seen that the meaning of *culpa lata* was shifting from the broad idea of lack of due care to the narrower “gross negligence” (“in law it is notorious that *culpa lata dolo equiparatur*, and if the pursuers had truly been able to substantiate a case of *gross culpa*, it should have been set forth clearly and distinctly on record; and then it is probable that the case would have been treated as one of fraud; as where a party has been injured by the gross fault of another, it would be difficult to draw any distinction in a question of reparation between moral and legal fraud.”)<sup>700</sup> However, it is also important to pay attention to context. In *Oliver* the lease was already at an end and it was an action for damages. The Lord Ordinary was, arguably, correct to refuse to award damages for anything less than deceit, but the result might have been different had this been a contractual action. Stein points out that *Oliver v Suttie* cannot be regarded as having rejected the doctrine of innocent misrepresentation,<sup>701</sup> as some commentators have alleged,<sup>702</sup> because it was an action for damages and he suggests that the pursuers might have been entitled to reduction.

It is worth remarking that in many modern commentaries on the law of fraud (and even some court decisions) there is indiscriminate use of the case law with little attention to whether or not it is being discussed in a contractual or a delictual context.<sup>703</sup> This goes some way to explaining the definitional confusion which emerged. *Derry v Peek* was a delictual (tort) action, and yet it was (and is) cited as representing the definition of fraud in all contexts despite the fact that contractual fraud had always had a wider meaning. Cases like *Oliver v Suttie* and others like it are used in a similarly indiscriminate way.

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<sup>699</sup> *Ibid.* at 516.

<sup>700</sup> *Ibid.* at 516-7.

<sup>701</sup> Stein (1958) p.195.

<sup>702</sup> Stein’s particular target here appears to have been TB Smith’s article on error (Smith (1955)).

<sup>703</sup> *Manners v Whitehead* (1898) 1 F 171 is a notable exception, in which Lord McLaren makes a clear distinction between non-fraudulent misrepresentations leading to “restitution” and fraudulent misrepresentations for which an action for damages is competent (at 177); similarly in *Ferguson v Wilson* (1904) 6 F 779, an action to reduce a partnership agreement and not a claim for damages, the court distinguished the context very clearly: “the case of *Derry v Peek*, which related to an action of deceit, - that is, an action of damages on the ground of fraudulent misrepresentation, - does not apply. Proof of fraud is not required in this case” (at 784 per Lord Moncreiff).

The same issue arose in *Campbell v Boswall*<sup>704</sup> in which a lease of a mine which had been advertised with an engineer's report turned out to have no workable coal. The court discussed what was required to show that there had been false representation, and – foreshadowing *Derry v Peek* – held that the seller had been “in perfect *bona fide*” and therefore could not be made liable for the error.<sup>705</sup> However, two important points should be made about the decision. In the first place, this was again an action for damages because, like *Oliver*, the lease was already at an end, and to send the issue to the jury “either gross negligence or fraud must be proved”.<sup>706</sup> Once again, this would not support any rejection of a broader definition of fraud in contract, because it was a delictual action. The second point is that even in a delictual context it was a relevant factor that the tenant had the opportunity to inspect the ground and to commission his own report; hence there is more than a suggestion of negligence on his part.<sup>707</sup>

Up to the 1860s and 1870s fraud (or “circumvention”) was, generally speaking, still given a wide meaning. It was still regarded as “fraudulent” to take advantage of someone else's vulnerability or a relationship of confidence, both in a contractual context<sup>708</sup> and, particularly, where will-making was concerned.<sup>709</sup> Lord Cockburn explained in *Clunie v Stirling* that “[t]he inference of fraud may be drawn from the whole case, although no one act can be pointed out as in itself a direct instance of the practice of deceit”.<sup>710</sup> There is also evidence that inequality was still the underlying principle which unified the cases and, consistent with historical practice, aggravating factors such as family relationships in succession cases, or personal friendships in contracts of caution, were significant. The context of the transaction and the relationship of the parties remained important factors to be taken into account,

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<sup>704</sup> (1841) 3 D 639

<sup>705</sup> *Ibid.* at 644 per Lord Gillies

<sup>706</sup> *Ibid.* at 645 per Lord Gillies

<sup>707</sup> Lord MacKenzie comments that had the pursuer relied entirely on the landlord's statement without any personal inspection of the property the result may have been different, for “if [the landlord] fail to make proper enquiries, he is as much in *mala fide* as if he stated what he knew to be incorrect.”

<sup>708</sup> *Clunie v Stirling* (1854) 17 D 15; *Wardlaw v Mackenzie* (1859) 21 D 940.

<sup>709</sup> *McKellar v McKellar* (1861) 24 D 143 (taking advantage of an elderly man was described as “constructive or legal fraud, not fraud in the sense of the criminal law”, at 144 per Lord President McNeill); see also *Dempster v Raes* (1873) 11 M 843; *Love v Marshall* (1870) 9 M 291.

<sup>710</sup> (1854) 17 D 15 at 18 per Lord Cockburn.

particularly if there was an imbalance, or an inequality, of power or of knowledge between the parties: “[i]f the party who is to lose is in ignorance, and the party who is to gain is well-informed, it is a case of the grossest fraud.”<sup>711</sup>

Even in a more commercial context, fraud was relevant in situations which fell short of outright deceit. There was a considerable amount of litigation following the collapse of two large Scottish banks in the 1860s and 1870s. In facts which closely mirror *Derry v Peek*, two separate shareholder actions were brought against the Western Bank’s liquidators to reduce share purchases,<sup>712</sup> alleging that the company’s financial statements had grossly overstated the bank’s capital with the knowledge of the directors. By the time the actions were raised the whole capital of the bank had, in fact, been lost and the company was insolvent. The difficult issue in many of these cases was the effect of a misstatement made by company directors which had, apparently, not been made with intention to deceive.

In *Addie v Western Bank*<sup>713</sup> the Inner House was prepared to accept that it would not constitute fraud so long as the directors had reasonable grounds for believing the misstatement to be true.<sup>714</sup> If there were no reasonable grounds for that belief, i.e., if the directors had failed in their duty to acquaint themselves with the facts, it would be “equivalent to fraud”.<sup>715</sup> There are obvious resonances with the way in which the *culpa lata* principle was used to deem behaviour as fraudulent in order to impose liability. In the context of negligent company directors, the broad notion of fraud was used in a similar way. It was said that fraud would not be “imputed”<sup>716</sup> if the directors had fulfilled their duty. *Addie* was reversed on appeal<sup>717</sup> but the majority of the House of Lords did not disagree with the fact that, where misstatements were

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<sup>711</sup> *Dempster v Raes* (1873) 11 M 843 at 846 per Lord Justice-Clerk Moncreiff.

<sup>712</sup> One of the actions came twice before the Inner House, but although a jury found for the pursuer on grounds of fraud, the verdict was overturned because *restitutio in integrum* was no longer possible, *Graham v Western Bank* (1864) 2 M 559; *Graham v Western Bank* (1865) 3 M 617.

<sup>713</sup> *Addie v Western Bank* (1865) 3 M 899.

<sup>714</sup> *Ibid.* at 907 per Lord Curriehill; at 909 per Lord Deas; at 913 per Lord Ardmillan; at 915 per Lord President Inglis.

<sup>715</sup> *Ibid.* at 905 per Lord Curriehill.

<sup>716</sup> *Ibid.* at 906 per Lord Curriehill.

<sup>717</sup> *Western Bank of Scotland v Addie* (1867) 5 M (HL) 80. The decision was not overturned on the question of definition, but on other grounds.

concerned, company directors must honestly believe the statements to be true and there must be reasonable grounds for that belief.<sup>718</sup>

Fifteen years of economic turmoil later, the Inner House was not quite so sure and in *Lees v Todd*<sup>719</sup> shareholders of the failed City of Glasgow bank had less success with the same argument. The court found various reasons to hold the directors not liable, such as the fact that they were entitled to rely on the officers of the company who had prepared the reports, or that the misstatements were not material. In principle, the court still recognised that negligent misrepresentations could be regarded as a species of fraud in some circumstances, even if it was becoming more difficult in practice to attribute liability:<sup>720</sup>

A man making a statement on any subject which he believes to be untrue, though he does not know it to be false, is dishonest, but if he merely makes a statement which he does not actually believe to be true, that is a negative state of mind, and his honesty or dishonesty will depend on his relation to the facts which he states, and to the persons whom he addresses. A statement on a matter of indifference both to the speaker and the listener, even though the speaker has no actual belief in the truth of the statement, provided he does not believe it to be false, will not infer dishonesty on his part. He is not seeking to mislead anybody. But a statement of facts made regarding a matter of interest to both speaker and listener stands in a very different position. If the speaker, having no actual belief in the statement, though not believing it to be untrue, volunteers the statement, inconsistent with facts, to a person interested in the statement, and likely to act on it, he is dishonest and guilty of deceit, because he produces, and intends to produce, on the mind of the listener a belief which he does not himself entertain.... it must be *bona fide*.

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<sup>718</sup> With the exception of Lord Cranworth who doubted the proposition and suggested the Lord President had overstated the rule, *ibid.* at 91 per Lord Cranworth.

<sup>719</sup> (1882) 9 R 807.

<sup>720</sup> *Ibid.* at 854 per Lord President Inglis.

These cases can be seen as an incremental development by the Scottish courts of the principles which underlay both the *culpa lata* principle and the doctrine of presumptive fraud, particularly where non-fraudulent misstatements were at issue. As illustrated in the passage quoted above, a range of criteria could be applied, all of which would have been familiar from the historical scope of fraud, to determine whether or not the misrepresentor was liable: an assessment of his *bona fides* in making the statement; a requirement that an “honest” belief in the truth should be based on reasonable grounds; or that the misstatement should be material; or the extent to which the misrepresentee relied on it. In this mix of factors the courts could take account of the relative positions of the parties and their relationship to each other. It would have been a short step to develop these principles, in particular the *culpa lata* principle,<sup>721</sup> as a means of deeming unintentional but reprehensible behaviour – or what in English law was described as legal fraud<sup>722</sup> – to be the equivalent of fraud and to re-fashion the concept of presumptive fraud for a modern commercial society. However, the extended litigation in *Boyd & Forrest*<sup>723</sup> probably marked the demise of *culpa lata* as a historically appropriate means of dealing with unintentional misrepresentations, other than in a fiduciary context.<sup>724</sup> *Boyd & Forrest* was also the culmination of an ill-fated process by which Scots law turned to the law of error for a solution.

### *(b) The narrow view*

Of greater significance are cases where the courts refused to find a relevant averment of fraud in circumstances where it would almost certainly have been recognised at an earlier period.<sup>725</sup> This development was also accompanied by an emphasis on

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<sup>721</sup> *Oliver v Suttie* (1840) 2 D 514; *Adamson v Glasgow Waterworks Commissioners* (1859) 21 D 1012.

<sup>722</sup> Which Lubbe suggests was a form of “negligence liability” (Lubbe (1979) p.126).

<sup>723</sup> *Boyd & Forrest v Glasgow & SW Railway Co* 1911 SC 33, see discussion below, pp.191-194.

<sup>724</sup> See ch.2 pp.58-62.

<sup>725</sup> Cases where a narrower view of fraud is evident include *Ehrenbacher & Co v Kennedy* (1874) 1 R 1131 (diss. Lord Deas); *Boustead v Gardner* (1879) 7 R 139 (although this involved a claim for *legitim* the court clearly had no sympathy for the daughter’s “speculate claim” in what they viewed as a perfectly reasonable family arrangement); *Young v Clydesdale Bank* (1889) 17 R 231; *Howe v City of Glasgow Bank* (1879) 6 R 1194; *Thomson v Clydesdale Bank Ltd* (1893) 20 R (HL) 59; *Manners v Whitehead* (1898) 1 F 171; *Robinson v National Bank of Scotland Ltd* 1916 SC 46.

requiring proof of fraud<sup>726</sup> (albeit this had always been a requirement, even for the Institutional writers, but it had not prevented fraud from being inferred) or the need to show a pre-existing duty before disclosure could be required.<sup>727</sup> It also involved a dilution, even a dismissal, of principles which had previously been applied in similar circumstances. An example of the direction the law was taking can be seen in discussions of what amounted to an “honest belief”, post-*Addie v Western Bank*.<sup>728</sup> In *Brownlie v Miller*<sup>729</sup> the *caveat emptor* principle was explicitly affirmed by the Inner House in the context of a property transaction in which the seller had concealed the existence of a mid-superiority. The court held that the law agent responsible for the misstatement had had an honest belief in its truth, thereby excluding fraud. This in itself was fairly unexceptional: the innovation lies in the criteria for determining when such a belief was honest. Lord Shand referred to the objective test laid down in *Addie* (that it must be based on reasonable grounds) and shared Lord Cranworth’s scepticism, saying that it “cannot be accepted as settled that a statement or representation may be held to be fraudulent because false in fact, and made upon what some persons would regard as insufficient grounds, if made in an honest belief in its truth.”<sup>730</sup> *Brownlie* also marks a subtle, and somewhat circular, shift in emphasis in that instead of the honest belief being subject to a reasonable grounds test, the reasonable grounds test is satisfied if there is honest belief.<sup>731</sup>

But if he refrained from inquiry, not from any unwillingness to know the truth, but because he was really satisfied he had reasonable grounds of belief, and his belief be thus honestly entertained, I do not think his statements, though false, can be held to be fraudulent in law, as it certainly is not in fact. A statement made in an honest belief in its truth cannot be fraudulent.

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<sup>726</sup> See in particular *Manners v Whitehead* (1898) 1 F 171, although it should be noted that this was a claim for damages and the distinction was clearly made by the court.

<sup>727</sup> *Broatch v Jenkins* (1866) 4 M 1030; *Menzies v Menzies* (1890) 17 R 881; *Robinson v National Bank of Scotland Ltd* 1916 SC 46.

<sup>728</sup> *Addie v Western Bank* (1865) 3 M 899 rev. *Western Bank of Scotland v Addie* (1867) 5 M (HL) 80.

<sup>729</sup> (1878) 5 R 1076, aff. *Brownlie v Miller* (1880) 7 R (HL) 66.

<sup>730</sup> *Ibid.* at 1092 per Lord Shand.

<sup>731</sup> *Ibid.* at 1091 per Lord Shand. Lord Shand did affirm a broader definition of fraud as *culpa lata* for negligent omissions where there was a relationship of confidence, as seen in his dissenting judgments in *McPherson’s Trs v Watt* (1877) 4 R 601 and *Raes v Meek* (1889) 16 R (HL) 31.

*Brownlie* is often cited as a leading authority for the narrow definition of fraud, but two things should be noted: first, as is evident from the quotation, Lord Shand left open the possibility of inferring fraud from a lack of reasonable grounds for an honest belief; and secondly, alongside this apparently definitive statement there exists authority to the contrary.<sup>732</sup>

*(c) The problem of unintentional misrepresentation*

There was certainly a strand of Scottish judicial opinion which allowed only a narrow scope for fraud. However, there was a stronger inclination – perhaps rooted in a sense of historical familiarity – to continue to use fraud to deal with substantive unfairness, particularly where loss was caused by another party’s misstatement. The debate crystallised around the question of non-fraudulent misrepresentations.<sup>733</sup> False statements, and not only those fraudulently made, had been firmly part of the law of fraud in an earlier period but this was beginning to change.

*British Guarantee Association v Western Bank of Scotland*<sup>734</sup> concerned representations made by the bank about the way in which cash was handled. These were not fraudulent misrepresentations, they were at most negligent, or even “innocent” in that the bank alleged this was their usual practice. It turned out that a bag marked £1000 gold was weighed but not opened or inspected and it turned out to contain only silver and copper. Lord Cockburn did not question the fact that a material misrepresentation on which the other party had relied was a relevant issue.<sup>735</sup>

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<sup>732</sup> For instance, *Clunie v Stirling* (1854) 17 D 15; *Wardlaw v Mackenzie* (1859) 21 D 940; *McKellar v McKellar* (1861) 24 D 143; *Love v Marshall* (1870) 9 M 291As ; *Dempster v Raes* (1873) 11 M 843; see also *Lees v Todd* (1882) 9 R 807 at 854 per Lord President Inglis; and *Mair v Rio Grande Rubber Est. Ltd* 1913 SC (HL) 74 at 82 per Lord Shaw.

<sup>733</sup> For an illuminating analysis of the doctrine of innocent misrepresentation in England and South Africa see Lubbe (1979). The relationship between misrepresentation and “fault” is particularly interesting from the perspective of Scots law (pp.129-135).

<sup>734</sup> (1853) 15 D 834.

<sup>735</sup> *Ibid.* at 838.



I never heard the general principle even questioned, that a contract entered into on a material misrepresentation by one of the parties, is voidable on this account by the opposite party, who is thereby injured. ....Since even substantial error is a ground of reduction, I cannot comprehend how substantial misrepresentation – or a substantial representation of a future practice not adhered to – should not be a ground of reduction also. This principle is so familiar to every Scotch lawyer – so perfectly rudimental – that it is really needless to say more about it.

The court was also clear that the relevant tests were the *materiality* of the misrepresentation combined with the *reliance* of the other party,<sup>736</sup> both of which have been restated in the leading modern authority on misrepresentation,<sup>737</sup> both classically part of the law of fraud.

However, as the nineteenth century progressed the courts had considerable difficulty marking a clear line between fraud and error and a number of cases turn on whether the issue is one or the other.<sup>738</sup> It remains something of a mystery why the question of misstatements caused such difficulty, since this was no new phenomenon. Stein's view that the turning point was the Mercantile Law (Scotland) Amendment Act 1856, which in effect embedded the principle of *caveat emptor* in Scots law, may be correct.<sup>739</sup> Whatever may be the cause, the ultimate outcome towards the end of the nineteenth century was a migration from fraud to error, a development which is discussed in greater detail in chapter 5. Mid-century there is merely confusion and a good deal of disagreement in the Inner House.

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<sup>736</sup> “The representation may not be material, or the agreement, to which it was precedent, may not have been entered into in reliance on it” (*ibid.* at 840 per Lord Wood).

<sup>737</sup> *Ritchie v Glass* 1936 SLT 591.

<sup>738</sup> *McConechy v McIndoe* (1853) 16 D 315; *Purdon v Rowatt's Trs* (1856) 19 D 206; *Wilson v Caledonian Railway Company* (1860) 22 D 1408; *Graham v Western Bank* (1864) 2 M 559; *Hogg v Campbell* 2 MacPh 848; *Harris v Robertson* (1864) 2 Macph 664 (confusion about fraud, error and breach of fiduciary duty); *Hare v Hopes* (1870) 8 SLR 189; *Dempster v Raes* (1873) 11 M 843; *Munro v Strain* (1874) 1 R 522; *Beresford's Trs v Gardner* (1877) 4 R 363.

<sup>739</sup> Stein (1958) pp.188-190; see also Lord Kilbrandon (1967) p.9-10.

When Lord Carmont later reviewed the law relating to essential error and misrepresentation he acknowledged even in 1936 that it was “in a state of confusion”.<sup>740</sup> That very confusion suggests that the courts were not familiar with essential error being used as an alternative to fraud or misrepresentation, i.e. induced error was not a familiar concept in the Scottish courts. However, the “error” analysis was gaining ground, particularly in relation to careless or “innocent” misstatements. As will be shown in chapter 5, it was only at the end of the nineteenth century that it was finally accepted that non-fraudulent misstatements were part of the law of error, and only after the definition of fraud had become so narrow that it was no longer capable of providing a remedy. *Derry v Peek* played a part in that development.

## 2. The Impact of *Derry v Peek*

No case has had more influence on the Scots law of fraud than the English decision in *Derry v Peek*.<sup>741</sup> It has been said that “[i]n both Scotland and England the principle applicable in both the civil and criminal law [of fraud] is that laid down by the House of Lords in *Derry v Peek*”.<sup>742</sup> Despite a host of contrary native authorities, this case cemented a restrictive definition of fraud fundamentally and (probably) irreversibly. Lord Herschell’s oft-quoted dicta meant that the broad scope of civil fraud set out in detail above was narrowed to denote only intentional or reckless deceit.

The late nineteenth century was a period of economic turmoil when, during a previous “credit crunch”, falling markets led to stock market losses and the collapse of companies, banks and other financial institutions. During this period many challenges were made to contracts for the purchase of shares or other investment instruments on the grounds that the investor had been fraudulently induced to enter into the agreement,<sup>743</sup> leading the Lord Chancellor (Cairns) to comment that “during

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<sup>740</sup> *Ritchie v Glass* 1936 SLT 591 at 593.

<sup>741</sup> Black (1996) para 683; Thomson (1990) paras 719, 726-728, 783; Smith (1962) pp. 286, 829, 830, 833; McBryde (2007) paras 14-02, 14-12; Gloag & Henderson (2007) para 6.14.

<sup>742</sup> Gill (1975) p.82.

<sup>743</sup> *Western Bank of Scotland v Addie* (1867) 5 M (HL) 80 (the action was unsuccessful on contractual grounds because the company had been wound up and on delictual grounds because an action of damages had to be brought personally against the directors and not the company); *Houldsworth v City of Glasgow Bank* (1879) 6 R 1164, on appeal (1880) 7 R (HL) 53 and *Tennent v*

the last quarter of a century actions in every shape and form have been brought or attempted to be brought arising out of dealings in shares alleged to have been fraudulent”.<sup>744</sup> This was the climate in which *Derry v Peek*<sup>745</sup> was decided.

It will be argued that the Scottish courts used *Derry* to reinforce a process of narrowing which was already well underway in the Scots law of fraud. It is clear from subsequent case law that the definition of fraud laid down in *Derry* was relatively quickly limited to common law fraud by the English courts, and was firmly distinguished from the much broader meaning of fraud in equity. The lack of a separate equitable jurisdiction in Scotland meant that the same process of reinterpretation never took place for Scots law, despite the fact that the Court of Session had ample Scottish authority at its disposal had it wished to do so. The end result is that different interpretations of *Derry* prevail north and south of the border with the important consequence that by adopting an unrevised version of Lord Herschell’s definition of fraud Scots law lost its mechanism for dealing with substantive unfairness in one fell swoop and, unlike English law, had nothing to replace it with. Despite the oft-acclaimed inherent equitable jurisdiction of the Court of Session, which arguably could have done for Scotland what, as we shall see, *Nocton v Lord Ashburton*<sup>746</sup> did for England, the judges of the late nineteenth century showed themselves unwilling to use it for that purpose. It has also meant that Scots law has, at significant moments,<sup>747</sup> continued to use the language of fraud in its older

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City of Glasgow Bank (1879) 6 R 554 (both decided on similar grounds to *Addie*); *Lees v Todd* (1882) 9 R 807 (after the failure of the City of Glasgow bank the directors were not liable because they were *in bona fide* and unaware of misleading financial reports); *Mair v Rio Grande Rubber Estates Ltd* 1912 SC 183, on appeal 1913 SC (HL) 74 (the 1<sup>st</sup> Division found misleading statements made in the company’s prospectus about the suitability of a site for rubber plantation not to be attributable to the directors, only to a third party who was not an agent of the company; this was reversed on appeal); *Robinson v National Bank of Scotland Ltd* 1916 SC 46, on appeal 1916 SC (HL) 154 (cautioners brought the action against the bank for failure to disclose the financial position of the debtor, who subsequently became bankrupt; the 2<sup>nd</sup> Division held there was no duty to disclose, Lord Salvesen diss.; affirmed on appeal, although the House of Lords was clearly uncomfortable for the agent was “culpably careless” although not fraudulent (per Earl Loreborn at 156), and refused to award costs); *Smyth v Muir* (1891) 19 R 81 (unsuccessful action subsequent to buying worthless shares in Indian “tea gardens”).

<sup>744</sup> *Houldsworth v City of Glasgow Bank* (1880) 7 R (HL) 53, at 55.

<sup>745</sup> (1889) LR 14 App Cas 337.

<sup>746</sup> [1914] AC 932.

<sup>747</sup> Two important Scottish appeal cases in the 1990s relied partly on a broader definition of “fraud” to temper the perceived unfairness of Scots law, see *Smith v Bank of Scotland* 1997 SC (HL) 111 at 116-

and broader sense of unfairness with no underlying rationale for why this should be so, no analysis of the content of fraud when used in this sense, and no discussion of how a broader meaning of fraud might co-exist with the rule laid down in *Derry v Peek*.

*(a) The Decision in Derry v Peek*<sup>748</sup>

*Derry v Peek* was an action in tort, in substance typical of the late nineteenth century, where the plaintiff had bought shares in a tramway company relying on the company prospectus which claimed that it had the right to use steam instead of horse power, thus making it considerably more profitable than its competitors. In fact, permission to use steam power was subject to the consent of the Board of Trade, and was not granted. The shareholder brought an action of deceit against the directors of the company alleging they had made a false statement and claiming damages for fraudulent misrepresentation. The arguments turned on whether or not an action in deceit required intention, whether a negligent misstatement would suffice, and the effect of honest belief on the part of the defendants. There are various important elements in the House of Lords decision, which, given its influence on Scots law, warrants detailed analysis.

On the question of intention versus negligence, the court insisted that a successful action in tort required “*mens rea*” on the part of the directors.<sup>749</sup> Lord Herschell, in the leading judgment, held that “without proof of fraud no action of deceit is maintainable”<sup>750</sup> and his definition of fraud meant that a misstatement must be wilfully or knowingly made.<sup>751</sup> Mere inaccuracy was not enough,<sup>752</sup> nor was carelessness.<sup>753</sup> To repeat the influential definition:<sup>754</sup>

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117 per Lord Clyde; and *Sharp v Thomson* 1997 SC (HL) 66 at 84-85 per Lord Clyde. Both cases, arguably, involve questions of “secondary” fraud, discussed in ch.7.

<sup>748</sup> For a most interesting account of the context in which the decision took place see Lobban (1996).

<sup>749</sup> (1889) 14 App Cas 337 at 344 per Lord Halsbury

<sup>750</sup> *Ibid.* at 362 per Lord Herschell.

<sup>751</sup> *Ibid.* at 362.

<sup>752</sup> *Ibid.* at 344 per Lord Halsbury.

<sup>753</sup> *Ibid.* at 369 and 375 per Lord Herschell.

<sup>754</sup> *Ibid.* at 374 per Lord Herschell.

fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.

The third aspect, he said, is merely an instance of the second for it cannot be fraud if there is honest belief in the truth of the statement.<sup>755</sup> In an earlier Scottish appeal with similar facts, *Western Bank of Scotland v Addie*,<sup>756</sup> the question of honest belief had been addressed. Lord Cranworth, disagreeing with the Lord President, held that honest belief was a defence to a charge of fraud, even if there were no reasonable grounds for that belief. The court in *Derry v Peek*, reversing the Court of Appeal on this point, was firmly of the same view.<sup>757</sup> Despite the fact that Lord Bramwell accepted that the defendants “knew that what they said was untrue”<sup>758</sup> (in the sense that they knew permission had not been granted when the prospectus was written, although they were confident it would be granted), this was not fraud.

The court may also have been influenced by the fact that the defendants were “respectable and intelligent men”<sup>759</sup> (one was a member of the bar) and they certainly considered it their duty to support free enterprise. Lord Bramwell quoted with approval the “excellent” remarks made in the Court of Appeal:<sup>760</sup>

mercantile men dealing with matters of business would be the first to cry out if I extended the notion of deceit into what is honestly done in the belief that these things would come about, and when they did not come about, make them liable in an action of fraud.

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<sup>755</sup> *Ibid.*

<sup>756</sup> *Western Bank of Scotland v Addie* (1867) 5 M (HL) 80.

<sup>757</sup> (1889) 14 App.Cas. 337 at 345 per Lord Watson; at 349 per Lord Bramwell; at 357-358 per Lord Fitzgerald; at 361 per Lord Herschell.

<sup>758</sup> *Ibid.* at 348.

<sup>759</sup> *Ibid.* at 346 per Lord Bramwell.

<sup>760</sup> *Ibid.* at 349.

He went further, for “to say that there is a “right to have true statements only made” [as the Court of Appeal had held], I cannot agree, and I think it would be much to be regretted if there was any such right. Mercantile men, as Stirling J. says, would indeed cry out”.<sup>761</sup> It was acceptable, even essential, for speculators to speculate, even if members of the public relied on those speculations to their detriment.

Moral philosophers these judges were not, albeit they ventured forth with confidence. Some of their pronouncements make little sense, but they demonstrate the confusion which the idea of negligence engendered at this time. Lord Bramwell said that “[t]here are various kinds of untruth”:<sup>762</sup> there are “absolute” untruths which constitute fraud and untruths that are honestly made which do not. He also appears to invent a new category of fault:<sup>763</sup>

But if there is moral culpability, I agree there is responsibility. But to believe without reasonable grounds is not moral culpability, but, (if there is such a thing) mental culpability.

Lord Fitzgerald reached for the same nebulous distinction and appeared to suggest that there was a distinction in law between moral truth and actual truth, the former being as acceptable as the latter. He did not consider the misstatement in the prospectus to be “untrue in a popular or business sense”,<sup>764</sup> for although it was “inaccurate in point of law in one particular, [it]seems on the whole to have been morally true”.<sup>765</sup>

Lord Herschell’s views were more measured, and in *obiter* remarks he considered that there may be a “moral duty” on company directors to be vigilant that a prospectus contains truthful facts. He conceded that “there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements, made under

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<sup>761</sup> *Ibid.* at 350 .

<sup>762</sup> *Ibid.* at 348.

<sup>763</sup> *Ibid.* at 351.

<sup>764</sup> *Ibid.* at 355.

<sup>765</sup> *Ibid.* at 356.

such circumstances, are true, should be an actionable wrong. ... If it is to be done the legislature must intervene”,<sup>766</sup> and indeed it did. The following year, in response to *Derry v Peek* and other similar cases, the Directors’ Liability Act 1890 was enacted to impose liability on directors who made false statements, whether intentionally or negligently. Mercantile men did not appear to cry out, at least in public.

A further point is worth noting in the decision, of crucial importance to the reasons why fraud was given such a narrow definition, but which appears to have been ignored in the application of the case to Scotland. First, the court made clear that Lord Herschell’s definition only applied to an action in deceit. It was explicitly stated that the decision was limited to the law of tort. Had this been a contractual action, the result would have been very different:<sup>767</sup>

I think it important that it should be borne in mind that such an action [“an action of deceit, a mere common law action”] differs essentially from one brought to obtain rescission of a contract of the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed, it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved ...

Lord Bramwell referred to “the equitable rule (which is not at issue here), that a material misrepresentation, though not fraudulent, may give a right to avoid or rescind a contract where capable of such rescission.”<sup>768</sup> This was an action in tort, not in contract. Furthermore, this was a common law action, not an equitable one; and it left untouched the much broader doctrine of fraud in equity which labelled as “fraudulent” activities far beyond the scope of fraudulent misrepresentation. This

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<sup>766</sup> *Ibid.* at 376.

<sup>767</sup> *Ibid.* at 359 per Lord Herschell.

<sup>768</sup> *Ibid.* at 347.

distinction, as we shall see, was firmly reasserted by the English courts in the aftermath of *Derry v Peek* in order to preserve the territory of equitable fraud. There was no equivalent Scottish rehabilitation of a broader doctrine of fraud.

*(a) The Response to Derry v Peek in England: Nocton v Lord Ashburton*

The decision in *Derry v Peek* was almost immediately reversed. It was clearly perceived to be a wrong decision by Parliament, by other members of the judiciary and by academic commentators.<sup>769</sup> The Directors' Liability Act 1890 was Parliament's response to the decision, albeit limited to statements made in company prospectuses, and it directly addressed the question of honest belief. Despite opposition at the Committee stage from some of the same judges who had decided *Derry v Peek*,<sup>770</sup> legislation was passed which made directors liable for untrue statements made in company prospectuses unless they believed them to be true and had reasonable grounds for such a belief.<sup>771</sup> It took longer for the common law to react:<sup>772</sup>

[T]he general effect of the judgments in *Derry v Peek* was to give an impression to the courts, and to the legal profession as a whole, that only when actual fraud had been proved could misrepresentors be held liable for damages: it was fraud, properly so-called, or nothing.

In fact, it took twenty-five years before the decision in *Nocton v Lord Ashburton*<sup>773</sup> authoritatively held that *Derry v Peek* had been applied too widely. *Nocton* firmly

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<sup>769</sup> There was lively academic debate on the merits of the House of Lords decision. Sir Frederick Pollock strongly criticised it as having “dangerously relaxed the legal conception of honesty in the statement of facts”, urging other common law jurisdictions not to follow it (Pollock (1889) p.422); Sir William Anson responded with support for the decision and the “practical common sense” of the common law (Anson (1890) p.74). For detailed history of the case in English law see Goodhart (1964) pp.289-292.

<sup>770</sup> Some of the arguments advanced in committee reflected the views expressed in the case itself, see the discussion of the House of Lords Committee in Hansard HL Deb, 05 August 1890, vol. 347 cc.1864-86, available online at <http://hansard.millbanksystems.com/lords/1890/aug/05/directors-liability-bill-no-242>.

<sup>771</sup> Directors' Liability Act 1890 s.3(1).

<sup>772</sup> Goodhart (1964) p.291, citing decisions such as *Le Lievre v Gould* [1893] 1 QB 491.

<sup>773</sup> [1914] AC 932.



reasserted the principle that there were different meanings of fraud at common law and in equity, and the latter encompassed liability for statements which were false but which had not been made with intention to deceive. *Nocton* is also considered in some detail because of its significance for the definition of fraud, and while it is an English decision, it has been relied on in Scots law.<sup>774</sup> Moreover, two of the judges in the House of Lords were eminent Scottish jurists (Lord Dunedin and Lord Shaw of Dunfermline) and their speeches are of particular interest. *Nocton* also became a foundational case in the law of negligence. It was the principal authority used half a century later to establish a general principle of liability for negligent misstatements in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>775</sup> and was instrumental in transforming the law of negligence in both jurisdictions.

The plaintiff in *Nocton* argued that he had been induced to make a risky property investment on the improper advice of Nocton, his solicitor, who also had a financial interest in the property. He argued that the advice given to him had not been given in good faith but for Nocton's own financial advantage and the question for the court was whether or not this amounted to fraud. The defendant relied on *Derry v Peek* to argue that it was not.

Viscount Haldane gave a lengthy speech which focused on the definition of fraud and the distinction between the tort of deceit and the broader doctrine of fraud in equity. He explained that “[i]n the old cases in equity the term “fraud” was frequently applied to cases of a breach of fiduciary obligation”.<sup>776</sup> He held that the solicitor had committed such a breach and that damages were available to the plaintiff. However, the court had to deal with the consequences of *Derry v Peek*, because “[t]here appears to have been an impression that the necessity which recent

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<sup>774</sup> See *Glasgow & South Western Railway Co v Boyd & Forrest* 1915 SC (HL) 20; *Robinson v National Bank of Scotland Ltd* 1916 SC 46, aff 1916 SC (HL) 154; *Harris v A Harris Ltd* 1936 SC 183.

<sup>775</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. It was also applied in *White v Jones* [1995] 2 AC 207, and it was of significance in the following important cases: *Spring v Guardian Assurance Plc* [1995] 2 AC 296; *Smith v Eric S Bush* [1990] 1 AC 831; *Caparo Industries Plc v Dickman* (1988) 4 BCC 144; *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] AC 871; *Esso Petroleum Co Ltd v Mardon* [1975] QB 819.

<sup>776</sup> [1914] AC 932 at 943 per Viscount Haldane.

authorities have established of proving moral fraud in order to succeed in an action of deceit has narrowed the scope of this remedy [fraud as breach of fiduciary duty]. For the reasons which I am about to offer to your Lordships, I do not think that this is so.”<sup>777</sup>

The court did not deny that where an action for deceit was concerned the rule in *Derry v Peek* must apply, i.e., that “mens rea” or “moral fraud” or “intention to deceive” was required.<sup>778</sup>

it should not be forgotten that *Derry v. Peek* was an action wholly and solely of deceit, founded wholly and solely on fraud, was treated by this House on that footing alone, and that—this being so—what was decided was that fraud must ex necessitate contain the element of moral delinquency.

However, dishonesty was not limited to the tort of deceit, nor was the availability of legal remedies:<sup>779</sup>

In reality the judgment covered only a part of the field in which liabilities might arise. There are other obligations besides that of honesty the breach of which may give a right to damages.

The key effect of *Nocton v Lord Ashburton* with respect to the law of fraud is that it reinterpreted the scope of the decision in *Derry v Peek*. The court did so by first limiting its application to the law of tort, and then by insisting that fraud in its equitable sense was an entirely separate doctrine. Viscount Haldane explained that “fraud” was used in a much wider sense in the Chancery jurisdiction, particularly in cases involving breach of fiduciary duty:<sup>780</sup>

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<sup>777</sup> *Ibid.* at 946.

<sup>778</sup> *Ibid.* at 954 per Viscount Haldane; see also at 971 per Lord Shaw; at 963 per Lord Dunedin.

<sup>779</sup> *Ibid.* at 947 per Viscount Haldane.

<sup>780</sup> *Ibid.* at 954.

in this strict sense it was quite natural that Lord Bramwell and Lord Herschell should say that there was no such thing as legal as distinguished from moral fraud. But when fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression “constructive fraud” came into existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience.

Fraud in the Courts of Chancery amounted to breach of a moral standard which could be enforced in law and he was mildly critical of the lack of recognition given to this fact in *Derry v Peek*:<sup>781</sup>

If among the great common lawyers who decided *Derry v. Peek* there had been present some versed in the practice of the Court of Chancery, it may well be that the decision would not have been different, but that more and explicit attention would have been directed to the wide range of the class of cases in which, on the ground of a fiduciary duty, Courts of Equity gave a remedy.

Viscount Haldane also provided a more general lesson in jurisprudence on the meaning of “fraud” in its equitable sense.<sup>782</sup>

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<sup>781</sup> *Ibid.* at 951.

the Court of Chancery exercised an exclusive jurisdiction in cases which, although classified in that Court as cases of fraud, yet did not necessarily import the element of *dolus malus*. The Court took upon itself to prevent a man from acting against the dictates of conscience as defined by the Court, and to grant injunctions in anticipation of injury, as well as relief where injury had been done. Common instances of this exclusive jurisdiction are cases arising out of breach of duty by persons standing in a fiduciary relation, such as the solicitor to the client... I can hardly imagine that those who took part in the decision of *Derry v. Peek* imagined that they could be supposed to have cast doubt on the principle of any cases arising under the exclusive jurisdiction of the Court of Chancery.

Fraud was the broad term used to indicate behaviour which was contrary to conscience, the most common example of which was found in cases relating to fiduciary duties (the heart of the Chancery jurisdiction), but Viscount Haldane took care to explain that it was not limited to a fiduciary context. Broadly speaking, fraud was a “*nomen generalissimum*” for dealing with circumstances “in which the Court is of opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained”.<sup>783</sup> Typical examples include:<sup>784</sup>

contracts obtained by persons from others over whom they have dominion, contracts obtained by persons in a fiduciary position, contracts for the sale of shares obtained by directors through misrepresentation contained in the prospectus, in respect of which it was never necessary to allege or prove that the directors were wilfully guilty of moral fraud in what they had done.

What is most interesting from the perspective of this study is that most of the examples given of equitable fraud correspond closely to those which the Scottish

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<sup>782</sup> *Ibid.* at 952.

<sup>783</sup> *Ibid.* at 953.

<sup>784</sup> *Ibid.* at 953, quoting from *Torrance v Bolton* (1872) LR 8 Ch. 118 at 124 per James, LJ.

courts historically dealt with as presumptive fraud.<sup>785</sup> In Scotland the rule was based on the Aristotelian notion of justice as equality; in England as a manifestation of conscience. In both, justice demanded that additional protection should be given to weaker contracting parties or to persons standing in a relationship of trust which had been abused, both of which were labelled fraud, neither of which required intentional deceit or *mens rea*. Fraud was constituted by a legal advantage gained in unconscionable circumstances, as judged to be so by the court. Negligence also came within the ambit of equitable fraud because it was against conscience that those responsible for making false statements, regardless of their motives, should benefit from them.

So how was the law to be applied in future cases where the broader meaning of fraud was at issue? Three different scenarios were identified by Viscount Haldane.<sup>786</sup> First, there was dishonesty or fraud in the strict (*Derry v Peek*) sense which required intention to deceive. This was part of the law of torts.<sup>787</sup> Secondly, there was dishonesty which led to rescission of a contract because of a misrepresentation, even if innocently made. No intention to deceive was needed; but it was subject to the condition that *restitutio in integrum* must be possible.<sup>788</sup> Thirdly, there was a category of cases based on relationship which would create a duty of honesty and – crucially – breach of that duty did not require intention to deceive.<sup>789</sup>

But side by side with the enforcement of the duty of universal obligation to be honest and the principle which gave the right to rescission, the Courts, and especially the Court of Chancery, had to deal with the other cases to which I have referred, cases raising claims of an essentially different character, which have often been mistaken for actions of deceit. Such claims raise the question whether the circumstances and relations of the parties are such as to give rise to duties of particular obligation which have not been fulfilled. Prior to *Derry*

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<sup>785</sup> Sheridan (1957) gives the most detailed account of the scope of equitable fraud.

<sup>786</sup> His general analysis of when a duty arises is also supported by Lord Dunedin ([1914] AC 932 at 963-964).

<sup>787</sup> *Ibid.* at 954.

<sup>788</sup> *Ibid.* at 955.

<sup>789</sup> *Ibid.*

v. Peek the distinction between the different classes of case had not been sharply drawn, and there was some confusion between fraud as descriptive of the dishonest mind of a person who knowingly deceives, and fraud as the term was employed by the Court of Chancery and applied to breach of special duty by a person who erred, not necessarily morally but at all events intellectually, from ignorance of a special duty of which the Courts would not allow him to say that he was ignorant.

The question of liability would then depend on whether or not such a special duty existed. It might arise “from the circumstances and relations of the parties”<sup>790</sup> and, reinforcing the point that it was not limited to discrete fiduciary relationships, such a duty could be “inferred”. In *Derry v Peek* no such special duty was inferred, but that did not mean that it could not be in the future, even in similar circumstances:<sup>791</sup>

They must indeed be taken to have thought that the facts proved as to the relationship of the parties in *Derry v. Peek* were not enough to establish any special duty arising out of that relationship other than the general duty of honesty. But they do not say that where a different sort of relationship ought to be inferred from the circumstances the case is to be concluded by asking whether an action for deceit will lie.

The starting point, therefore, was the relationship between the parties which could give rise to a special duty to exercise care that any statements made were accurate. That relationship might be contractual (or one which was equivalent to contract), or fiduciary, or it might be another relationship of trust.<sup>792</sup> Viscount Haldane clearly regarded it as a principle of wide application which could be developed for new situations.<sup>793</sup>

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<sup>790</sup> *Ibid.* at 955 per Viscount Haldane.

<sup>791</sup> *Ibid.* at 947 per Viscount Haldane.

<sup>792</sup> *Ibid.* at 955-6 per Viscount Haldane.

<sup>793</sup> “Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many cases in which that relationship may be properly treated as giving rise to a special duty of care in statement”, *ibid.* at 948 per Viscount Haldane.

The two Scottish Law Lords were largely in agreement with Viscount Haldane's general analysis of the circumstances in which a duty to take care arises. Lord Dunedin, who was arguably over-confident that Scots law would have dealt with the situation better,<sup>794</sup> recognised that a legal duty might arise from a general obligation not to harm others, or from contract, or from relationship. In addition, he considered (betraying his Scottish background) that all of these breaches would be based on *culpa*.<sup>795</sup> Lord Dunedin's speech is sometimes taken to have held that, in respect of misrepresentations, a duty to take care can only arise where there is a fiduciary relationship.<sup>796</sup> However, read carefully, the passage in which he claimed that all Chancery cases of this type were fiduciary in nature was part of his summing up of his understanding of the history of the Chancery jurisdiction.<sup>797</sup> It was neither a statement of the present law nor a prescriptive rule for the future. If in fact he did understand equitable fraud to be confined to fiduciary obligations then he was wrong, as Viscount Haldane's lengthy exposition of equitable fraud demonstrates.<sup>798</sup> In addition, Lord Dunedin then went on to extrapolate from the particular breach of a fiduciary duty to a more general analysis of breach of duty, with a particular focus on

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<sup>794</sup> "In such a state of facts, I think it is not doubtful that the plaintiff ought to have a remedy, nor in any system in which law and equity were not separated would there, I think, any difficulty arise" (*ibid.* at 962 per Lord Dunedin). He might have borne in mind a number of cases in which those who had suffered loss at the hands of negligent fiduciaries were not given a remedy in the Scottish courts, but where the House of Lords overruled, see for instance *McPherson's Trs v Watt* (1877) 4 R 601; rev 1878 5 R (HL) 9; *Knox v Mackinnon* (1888) 15 R (HL) 83; *Raes v Meek* (1889) 16 R (HL) 31; *Carruthers v Carruthers* (1896) 23 R (HL) 55; *Menzies v Menzies* (1893) 20 R (HL) 108.

<sup>795</sup> [1914] AC 932 at 964 per Lord Dunedin.

<sup>796</sup> *Robinson v National Bank of Scotland Ltd* 1916 SC 46 at 67 per Lord Dundas; *McBryde* (2007) para 14-34, citing *Harris v A Harris Ltd* 1936 SC 183. Lord Murray's judgment in *Harris* is perhaps the most extensive consideration of *Nocton* in Scots law (at 239-241). Lord Murray does distinguish fraud proper from breach of fiduciary duty, but the separation is not rigid. He is attempting to impose a higher standard than intentional deceit and to that end he says: "The action complained of may amount to actual fraud or afford evidence from which the presence of *mens rea* may be inferred, but this is merely accidental, not essential. Actual fraud is, in short, only an extreme case of some abuse of power or breach of a fiduciary duty" (at 239).

<sup>797</sup> "Turning now to equity, here again, as I understand the situation, there was a jurisdiction in equity to keep persons in a fiduciary capacity up to their duty. The matter has been exhaustively dealt with by my noble friend on the woolsack, and I do not propose to examine the cases. I will only make a few remarks. In the first place, it will be found that the word "fraud" in the older cases in Chancery is often used where the thing so characterised is a wrongful breach of duty, without a consideration of whether there is such a *mens rea* as would found an action for deceit. In the second place, all the cases are based upon the existence of a fiduciary relationship, and subsequently the breach of duty arising", [1914] AC 932 at 963-964 per Lord Dunedin.

<sup>798</sup> See also the thorough treatment in *Sheridan* (1957).

negligence, which suggests he understood the issue before the court to be of wider significance than a rule relating to fiduciaries.

Had the issue been in any doubt, the following year in a Scottish appeal case (not involving a fiduciary relationship) Viscount Haldane reiterated and clarified what he had said in *Nocton*. In *Robinson v National Bank of Scotland*<sup>799</sup> the Court of Session had occasion to consider the impact of *Nocton*. This was a cautionary obligation in which a cautioner raised an action for fraud against the bank alleging that he had relied on misleading information provided by the bank about the financial position of his co-cautioners, who subsequently became bankrupt. *Derry v Peek* could not be applied without considering the significance of *Nocton*. However, the Court of Session interpreted it narrowly, as might be expected having applied the principles in *Derry* for almost two decades, and the issue was reduced to the question of whether or not there was a duty of disclosure on the part of the bank's agent. Such a duty would only arise in the case of a special type of relationship and on the facts there was no special relationship and, therefore, no duty. Lord Dundas held that *Nocton* had no relevance to the case before the court, relying on Lord Dunedin's speech to limit its application to fiduciary relationships. Dismissing *Nocton*, he said:<sup>800</sup>

It was an English decision, in regard to which Lord Dunedin explained that no difficulty would arise “in any system in which law and equity were not separated”... Our own books afford numerous examples of the liability of a solicitor to his client for erroneous (though not fraudulent) advice in regard to his affairs, and of similar cases arising from a fiduciary relationship between the parties.

The Scottish courts reverted to the rule in *Derry v Peek*, together with Erskine's traditional formulation of fraud, and found no “machination to deceive”.<sup>801</sup>

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<sup>799</sup> 1916 SC 46 (diss. Lord Salvesen).

<sup>800</sup> *Ibid.* at 67 per Lord Dundas; it was, however, relied on in *Harris v A Harris Ltd* 1936 SC 183.

<sup>801</sup> *Ibid.* at 84 per Lord Guthrie.



The House of Lords<sup>802</sup> did not reverse the decision in *Robinson* but they were clearly uncomfortable with it and mitigated its effect by refusing to award costs.<sup>803</sup> Viscount Haldane agreed that there were no special circumstances arising from an enquiry from one banker to another so as to create a duty of honesty, but he reasserted the principles laid down in *Nocton* and made clear that those principles applied to many kinds of relationships, not only those considered to be fiduciary:<sup>804</sup>

it is a great mistake to suppose that, because the principle in *Derry v Peek* clearly covers all cases of the class to which I have referred, therefore the freedom of action of the Courts in recognising special duties arising out of other kinds of relationship which they find established by the evidence is in any way affected. I think, as I said in *Nocton's* case, that an exaggerated view was taken by a good many people of the scope of the decision in *Derry v Peek*. The whole of the doctrine as to fiduciary relationships, as to the duty of care arising from implied as well as express contracts, as to the duty of care arising from other special relationships which the Courts may find to exist in particular cases, still remains, and I should be very sorry if any word fell from me which should suggest that the Courts are in any way hampered in recognising that the duty of care may be established when such cases really occur.

The other Scottish Law Lord in *Nocton*, Lord Shaw, agreed that the crucial question was first to establish the relationship between the parties but he appeared to apply the principle in a more general way:<sup>805</sup>

What was the relation in which the parties stood to each other at the time of the transaction in respect of which the claim for damage, compensation, or restitution is made? In the answer to that question, in my judgment, may be

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<sup>802</sup> 1916 SC (HL) 154.

<sup>803</sup> "Honest though [the bank's agent] may have been, it was most negligent and most misleading, and but for it this litigation would probably never have been started", *ibid.* at 158 per Lord Atkinson.

<sup>804</sup> *Ibid.* at 157 per Viscount Haldane.

<sup>805</sup> [1914] AC 932 at 968-9 per Lord Shaw.

found a solution of not a few of the difficulties which arise in such actions....

Once, my Lords, the relation of parties has been so placed, it becomes manifest that the liability of an adviser upon whom rests the duty of doing things or making statements by which the other is guided or upon which that other justly relies can and does arise irrespective of whether the information and advice given have been tendered innocently or with a fraudulent intent.

Lord Shaw's analysis of the "relationship" question was later relied on by the court in *Hedley Byrne* to formulate the concept of proximity. However, his framing of the issue also reflects a view which was gaining ground in Scotland in the latter decades of the nineteenth century, namely the detachment of misrepresentation from the law of fraud and its insertion into the law of error:<sup>806</sup>

the principle to be found running through this branch of the law is, in my opinion, this: That once the relations of parties have been ascertained to be those in which a duty is laid upon one person of giving information or advice to another upon which that other is entitled to rely as the basis of a transaction, responsibility for *error amounting to misrepresentation* in any statement made will attach to the adviser or informer, although the information and advice have been given not fraudulently but in good faith.

The final nail in the coffin for the decision in *Derry v Peek* in respect of English law came in *Hedley Byrne v Heller*,<sup>807</sup> in which *Nocton* was the leading authority. It was argued for the respondents that "Derry v Peek ruled out any liability not arising from a fiduciary relationship and that indicates that the area was not covered by Nocton's case."<sup>808</sup> Lord Reid acknowledged that "[m]uch of the difficulty in this field has been caused by Derry v Peek".<sup>809</sup> As far as Lord Bramwell's formulation that "[t]o found

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<sup>806</sup> *Ibid.* at 972, emphasis added.

<sup>807</sup> [1964] AC 465.

<sup>808</sup> *Ibid.* at 475.

<sup>809</sup> *Ibid.* at 483 per Lord Reid.

an action for damages there must be a contract and breach, or fraud"<sup>810</sup> is concerned, *Derry* – and subsequent case law applying *Derry* – could no longer be relied on:<sup>811</sup>

But it was shown in this House in *Nocton v Lord Ashburton* that that is much too widely stated. We cannot, therefore, now accept as accurate the numerous statements to that effect in cases between 1889 and 1914, and we must now determine the extent of the exceptions to that rule.

Lord Reid quoted at length the passages referred to above from Viscount Haldane's speech in *Nocton* and his reiteration of the principle in *Robinson*, and he concluded that Viscount Haldane,<sup>812</sup>

did not think that a duty to take care must be limited to cases of fiduciary relationship in the narrow sense of relationships which had been recognised by the Court of Chancery as being of a fiduciary character. He speaks of other special relationships, and I can see no logical stopping place short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him.

Lord Devlin took a similar view:<sup>813</sup>

The House clearly considered the view of *Derry v. Peek*, exemplified in *Le Lievre v. Gould*, too narrow. It considered that outside contract (for contract was not pleaded in the case), there could be a special relationship between parties which imposed a duty to give careful advice and accurate information. The majority of their Lordships did not extend the application of this

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<sup>810</sup> *Derry v Peek* (1889) 14 App.Cas. 337 at 347.

<sup>811</sup> [1964] AC 465 at 484 per Lord Reid.

<sup>812</sup> *Ibid.* at 486 per Lord Reid.

<sup>813</sup> *Ibid.* at 523 per Lord Devlin.

principle beyond the breach of a fiduciary obligation but none of them said anything at all to show that it was limited to fiduciary obligation. Your Lordships can, therefore, proceed upon the footing that there is such a general principle and that it is for you to say to what cases, beyond those of fiduciary obligation, it can properly be extended.

I have argued above that the standard interpretation of *Nocton* in subsequent Scottish cases (that a broader definition of fraud was limited to the context of fiduciary relationships) is a misreading of the case. This argument was confirmed by the highest judicial authority in *Hedley Byrne*.

It is also interesting to note that although *Derry v Peek* was an action in tort, *Nocton* was a contract case, founding on misrepresentation to seek a remedy. The court began with the relationship of trust between the parties and used the concept of reliance to extend that relationship beyond status or fiduciary relationships. It developed far beyond contract law and is the foundation for the “neighbourhood principle” so familiar from the law of negligence,<sup>814</sup> which created a duty of care between parties not in any special relationship with each other, neither fiduciary, nor contractual, nor even known to each other. However, the principle is the same.

In English law, therefore, *Derry v Peek* was very quickly qualified both by the legislature and by the judiciary. The wider definition of fraud as unconscionable behaviour or taking undue advantage was, first of all, reinstated in *Nocton v Lord Ashburton* by confining *Derry* to actions of deceit and by using the concept of a special relationship which would create a special duty to ensure the accuracy of statements. That same principle was further developed in *Hedley Byrne* to formulate the concept of proximity as a determinant of liability for negligent misstatements. A duty of care would arise not only in contractual and fiduciary relationships, but in other relationships which were “equivalent to contract”<sup>815</sup> such as solicitors and their

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<sup>814</sup> “The rule that you are to love your neighbour becomes in law, you must not injure your neighbour” (*Donoghue v Stevenson* [1932] AC 562 at 580 per Lord Atkin).

<sup>815</sup> [1964] AC 465 at 529 per Lord Devlin.

clients or bankers and their customers,<sup>816</sup> although the list is not closed. The key criteria for the imposition of liability appear to be: the relationship between the parties (whether fiduciary, contractual, or a relationship of trust, or whether it is described as proximity); reliance by one party on the advice given or statements made by the other, in circumstances where the party giving advice knew or ought to have known there would be reliance; loss caused to the party who acted on the advice given or statements made.

There is nothing remarkable about these criteria from a contemporary perspective, for they have become part of the standard formulation for ascertaining negligence in cases of economic loss. However, the route through which those criteria were developed – essentially from the law of fraud, first (briefly) narrowed by *Derry v Peek*, subsequently expanded in *Nocton v Lord Ashburton*, then reformulated into a general principle in *Hedley Byrne v Heller* – provide an important insight. Narrowing the meaning of fraud to intentional deceit was considered too restrictive (and wrong) outwith the tort of deceit. The English courts required a more flexible device to deliver justice when loss was caused by unintentional but careless misstatements and they used the principles inherent in equitable fraud to create one.

Those same principles are closely analogous to what was previously known in Scots law as presumptive fraud. As intellectual constructs equitable fraud and presumptive fraud were not identical. The former was rooted in the notion of conscience, the latter in a more objective concept of Aristotelian inequality. The former worked from the basis of the fiduciary relationship, extrapolating general principles such as duty, proximity and reliance, which were put to service to develop the law of negligence. Presumptive fraud, however, was broader even than equitable fraud. Relationship provided only one category of cases where a remedy was given, for the underlying principle of inequality was able to touch unequal relationships, even in a commercial context in a way that equitable fraud could not (in particular, the liability of the seller for latent defects). Inequality in the relationship; inequality in the balance of power or the relative strength and weakness of the parties; inequality in their respective

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<sup>816</sup> *Ibid.* at 530 per Lord Devlin.

states of knowledge; all could be addressed by extending the reach of fraud. However, the end result was similar north and south of the border up to the end of the nineteenth century. English law found a way to reassert those equitable principles and to re-invent them within the modern tort of negligence. *Nocton* had no equivalent in Scots law.

*(b) The Aftermath of Derry v Peek in Scotland*

While *Derry v Peek* was fundamentally reinterpreted to limit its impact in English law, it was accepted as an accurate statement of the Scots law of fraud with little protest. Unlike its history in English law, there were only half-hearted attempts by the Scottish judiciary to distinguish different definitions of fraud for different contexts; and there was little recognition that contractual fraud and delictual fraud might involve different standards, different definitions or different motives. There was no particular focus on the relationship in which the parties stood to each other. *Nocton* may have prompted a radical shift in English law but it had little effect north of the Tweed.

Perversely, it may have narrowed the scope of fraud even further in that it was (inaccurately) relied on as authority for the principle that disclosure was only required where there existed a pre-existing duty between the parties. Whereas the idea of special relationship or special duty in *Nocton* was broadly interpreted in the English Chancery courts to open the way for a general duty of care in negligence, in Scots law it had the opposite effect. *Nocton* was relied on to narrow the duty of disclosure in cases of misrepresentation: liability for false statements would only exist where there was a special relationship which created a special duty of disclosure. Scots law not only lost the heart of the law of fraud, and hence the ability to work from general principles of fault or *culpa*, but in the process it gained a law of error which is no source of pride.<sup>817</sup>

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<sup>817</sup> Developments in the law of error are considered in ch.5.

Presumptive fraud and fraud proper had co-existed into the nineteenth century in Scots law, admittedly in a way which was largely unarticulated, but familiarity with the underlying principles allowed the Scottish courts to exercise a broad discretion and to offer protection in situations ranging from intentional deceit, through negligent misstatements and omissions, to taking advantage of vulnerability or to providing redress where transactions showed manifest inequality. However, the very fact that there was little analysis, judicial or other, meant that Scots law lacked a structure within which to assimilate *Derry v Peek*. It would have been possible, as happened in England, to use *Derry* to distinguish between different species of fraud and different legal contexts, and to reformulate a taxonomy of fraud using familiar Scottish principles. This would probably have meant recognising that Scots law did not operate a unitary concept of fraud and, arguably, would have been a more honest recognition of the historical scope of fraud. However, the reassertion of a unified notion of fraud across the legal spectrum meant that all definitions of fraud which ranged beyond intentional or reckless deceit were laid to rest. Moreover, this took place with little recognition that *Derry v Peek* was a tort case<sup>818</sup> and with little analytical subtlety in relation to English law. As will be demonstrated, this did not mean that lawyers and judges did not continue to seek solutions for non-intentional fraud. Once the door to a broad notion of fraud was closed, they turned to a combination of misrepresentation and error in an attempt to regain some of the territory that had been lost.

There are various possible explanations for the enthusiastic reception of *Derry v Peek* in Scots law and the depth and longevity of its influence. First, Lord Herschell's definition of fraud cannot really be described as a foreign concept or as having a contaminating effect on the purity of Scots law as is sometimes said or implied. It was consonant with the native definition of fraud as "a machination or contrivance to deceive",<sup>819</sup> which, from the time of Erskine, was the most commonly

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<sup>818</sup> There are authorities which clearly indicate that the definition of fraud is different depending on whether the context is contractual or delictual, and they limit the definition in *Derry v Peek* to delict, for instance *Manners v Whitehead* (1898) 1 F 171 at 177 per Lord McLaren, and *Ferguson v Wilson* (1904) 6 F 779 at 784 per Lord Moncreiff. However, they have not prevented the importation of the rule across the private law spectrum in Scotland.

<sup>819</sup> Erskine, *Institute*, III.1.16.

used definition. On one view, Lord Herschell was merely restating what was already there. This, in turn, appears to contradict the long history of presumptive fraud explored in detail above. However, it should be remembered that Erskine's definition – like those of Stair and Bankton before him – only touched the primary meaning of fraud. The Institutional texts had also clearly allowed a place for presumptive fraud as a separate legal concept, which the courts applied expansively. Intentional fraud and presumptive fraud sat alongside one other as weapons in the armoury of the courts.

As has already been noted, instances of presumptive fraud became more infrequent over the course of the nineteenth century. Post-*Derry v Peek* there are no instances that I can find of the application of fraud which was presumed or inferred in the broader sense of inequality or unwarrantable behaviour outside the established categories of facility and circumvention or undue influence.<sup>820</sup> The concept of presumptive fraud had all but disappeared, and although individual judges continued to rely on old principles, by and large the battle had been lost. As Stein puts it, “the industrial revolution, and a resultant increase in commercial activity, brought before the Courts cases where it was impossible to infer fraud, or even *culpa lata*”.<sup>821</sup> One consequence of the narrowing of fraud, as already indicated, was that the Court of Session judges found their judgments being regularly reversed by the House of Lords in cases involving unintentional manifestations of fraud: this was the pattern where “fraud” indicated misrepresentations which were either negligent or innocent; or where “fraud” indicated abuse of a relationship, both fiduciary and non-fiduciary.

By the end of the century fraud had one meaning: intentional deceit requiring *mens rea*, relying either on Erskine's definition or on Lord Herschell's later formulation of fraud in *Derry v Peek*. Civil fraud had become almost indistinguishable from

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<sup>820</sup> It may be that *Gordon v Stephen* (1902) 9 SLT 397 is an example of presumptive fraud, however not explicitly so. An extortionate loan was reduced, but Lord Kincairney, although describing the transaction as “scandalously extortionate and unconscionable” (at 399) struggles to find the correct doctrine to strike it down. He considers it to have been induced by fraud (fraudulent misrepresentations as to the interest which would apply), but even if that were not the case, “apart from any question of fraud, the Court is not obliged to enforce such an extortionate transaction” (at 399). He appears eventually to settle on “injustice and extortion”.

<sup>821</sup> Stein (1958) pp.187-8.



criminal fraud, although, ironically, as the civil law was narrowing the definition, so the criminal law was expanding it.<sup>822</sup>

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<sup>822</sup> See ch. 1.

### **Chapter 5: Fraud, Error and Misrepresentation**

The doctrine of error is a perplexing one in Scots law and perhaps no other topic has attracted so much attention from academic commentators.<sup>823</sup> At the start of this investigation into the law of fraud it was certainly not my intention to investigate error at the same time. However, it has proved impossible to give a coherent account of the development of fraud, including its changing definition, without some explanation of its somewhat tortuous relationship with the law of error. I do so with some trepidation and in the knowledge that others have explored the topic in greater depth. Furthermore, this is not an exhaustive account of the history of error, but focuses solely on the relationship between fraud, error and misrepresentation.<sup>824</sup> My aim is to demonstrate that the modern category of *induced error* is not a historical one, as some have claimed and others assumed. It is argued in this chapter that the difficulties encountered by the courts in finding a way to deal with unintentional misstatements led both to a narrowing of the definition of fraud and simultaneously to a broadening of the scope of error; furthermore, that this was a misconceived process of judicial lawmaking which did irremediable damage to the law of fraud and set the law of error on a path to which it was ill-suited.

The process of mutation from fraud to error began in the middle of the nineteenth century. The “mischief” which the courts were attempting to address was the issue of misstatements which were not intended to deceive. Despite the fact that Scots law contained native solutions to the problem of misrepresentation, social, economic and

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<sup>823</sup> Gow (1952); Gow (1953); Gow (1954); Smith (1955); Stein (1958) pp.171-208; Smith (1962) pp.808-833; Smith (1967); Thomson (1978); Woolman (1986); Thomson (1992); McBryde (1977); McBryde (1997); McBryde (2000); McBryde (2007) paras 15-01 ff; Gloag and Henderson (2007) paras 6.21-6.32; Hogg (2009); MacLeod (2010).

<sup>824</sup> I acknowledge a debt to Peter Stein in this chapter. After extensive study of the case law it seems to me that his account of the law of error is the most accurate analysis (see Stein (1958) chs. 14 and 15).

legal conditions in nineteenth century Scotland were such that the courts looked for new ways to deal with old problems. Over the course of the century, particularly the second half, there was a conceptual relocation of misrepresentation from the law of fraud to the law of error. In 1889 the decision in *Derry v Peek* marked the end point of any attempt to reinvent the doctrine of fraud and cemented the invention of a category of induced error to deal with unintentional misstatements. What follows is an account of the relationship between fraud, error and misrepresentation which is controversial and stands in contrast to the analysis of almost all modern commentators.<sup>825</sup> It will argue that Scots law took a wrong turn and that misrepresentation – whether or not intended to deceive – is a more comfortable bedfellow of fraud than of error.

McBryde has pointed out that “[i]f there had been a major textbook writer on Contract, writing at the beginning of the 1850s it is doubtful if the law on error would have been taken much further than the institutional writers”.<sup>826</sup> This is an accurate statement, and begs the question: what was the doctrine of error in the Institutional writers, and particularly in Stair’s *Institutions* which appears to me still to be a theoretically coherent account of the law?

The most striking comparison with the modern law and its obsession with error is the fact that the topic is dealt with so briefly by the Institutional writers. Unlike their treatment of fraud, error prompts little discussion and authority is sparse.<sup>827</sup> And in almost complete contrast to the modern law of error, there is a very clear distinction between fraud and error. It appears from the historical sources that induced error is an almost entirely modern concept.

## 1. Fraud and Error in Stair and Bell

Conceptually fraud is part of Stair’s discussion of obediential obligations. It is a civil (as well as a criminal) wrong, perhaps the paradigm of a civil wrong, and it occupies

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<sup>825</sup> With the possible exception of Peter Stein, see previous footnote.

<sup>826</sup> McBryde (2000) p.80.

<sup>827</sup> For detailed treatments see Stein (1958) ch.14; McBryde (2000) ch.3.

a considerable part of his title on reparation.<sup>828</sup> We have already examined the breadth of his account of fraud, including the concept of presumptive fraud explored in chapter 2, and shown its relationship to the older scholastic tradition of the moral theologians.

Error, on the other hand, is discussed in title I.10 on conventional obligations and Stair makes a crystal clear distinction between error and fraud. He briefly states that “[t]hose who err in the substantials of what is done, contract not ....”<sup>829</sup> In the same sentence he explicitly states that he is not going to discuss the traditional “vices of consent” (including fraud) because, in structural terms, they are delicts and he has already discussed them in the previous title:<sup>830</sup>

We shall not here debate of the effect of extortion, error, or circumvention, what influence they have upon contracts, of which in the former title.”

In a crucially important passage, he reinforces the distinction by focusing attention on the “cause” of the contract:<sup>831</sup>

and though deceit were used, yet where it was not deceit, that was *the cause of the obligation or deed*, but the party’s proper motion, inclination or an equivalent cause onerous, it infers not circumvention. So neither doth error or mistake, though it be the cause of the obligation or deed and be very prejudicial to the erring party. And though, if it had been fraudulently induced by the other party, it would have been sufficient; yet not being so, there is no circumvention; and the deed is valid, unless the error be in the substantials of the deed, and then there is no true consent, and the deed is null .... But if the error or mistake, which *gave the cause to the contract*, were by machination, project or endeavour, of any other than the party errant, it would be circumvention. So that there is nothing more frequently to be adverted,

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<sup>828</sup> Stair I.9.

<sup>829</sup> *Ibid.* I.10.13.

<sup>830</sup> *Ibid.*

<sup>831</sup> *Ibid.* I.9.9, emphasis added.

than whether the error be through the party's own fault, or through the deceit of another; and therefore *errore lapsus* and *dolo circumventus* are distinct defects in deeds.

To paraphrase:

- a) If error is the cause of the obligation, it will not infer fraud, and there can only be reduction if the error is in the substantialia because there is no consent between the parties.
- b) If, however, the error has been fraudulently induced by the other contracting party, it amounts to circumvention (fraud).
- c) Therefore, great care should be taken (it is to be adverted) to establish whether the error is unilateral or induced.

He repeats the same analysis in a later passage:<sup>832</sup>

The fifth common exception is that of *errore lapsus*: for generally lawyers treat these two as congenerous allegiances, *errore lapsus et dolo circumventus*. But the exception upon error is seldom relevant, because it depends on the knowledge of the person erring, which he can hardly prove. Neither will error have any effect, if it be not *in substantialibus*. For it will be no defence for a purchaser to allege, that he was deceived in the value of the thing bought, or that the thing bought was insufficient, by a visible fault: for in these the answer will only be, *caveat emptor*; and if it be a latent insufficiency, it will rather be esteemed that he was *dolo circumventus*, than *errore lapsus*: for it will rather be presumed, that the seller knew that fault and concealed it, than that the other was ignorant of it.

While Stair recognises that there is a close relationship between error and fraud (although proving error is a considerable hurdle to overcome and even latent insufficiency amounts to presumptive fraud), there is a clear distinction between the two in his mind.

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<sup>832</sup> *Ibid.* IV.40.24.

There is one passage where Stair appears to acknowledge a concept of induced error, using a Biblical example. In the story of Jacob and Rachel in Genesis 29 v 21-30 Jacob fell in love with Rachel and worked seven years for her hand, but on the wedding night her father deceived Jacob by sending her older sister Leah to lie down with him instead of Rachel. He then had to work another seven years for the younger sister too. Did he make an error or was he deceived? A nice question. Stair's view is that he was certainly deceived, but it "was by his own fault".<sup>833</sup> Had he spoken to her in the dark he would immediately have known. This may seem a somewhat far-fetched example, and Stair does not end with a definitive statement, but he appears to suggest that it might be both error and fraud. However, taken in conjunction with his earlier clarity on the subject, it can be assumed this would amount to fraud. McBryde acknowledges that "to the extent that the example of Rachel and Leah reflected the thinking on the subject the Scots law of error was being built on a shaky foundation".<sup>834</sup> The foundations would undoubtedly be shaky because Stair saw this as fraud rather than error.

The clear message is that fraud and error are two distinct, albeit related, doctrines, with different consequences. And, importantly, if an error is induced by machination or intrigue, it amounts to fraud and not error. For Stair at least, error was a no-fault category. It could annul a contract if it was *in substantialibus* and could be proved, but if it was induced, that amounted to fraud and the remedy was either restitution or damages.<sup>835</sup>

Bell is the Institutional writer who deals with the law of error in most detail. In early editions of his *Principles*, there is similarly no category of induced error.<sup>836</sup> In the second edition he begins, "Error in substantialis, whether in fact or in law, invalidates consent, where reliance is placed on the particular in question", and then goes on to

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<sup>833</sup> *Ibid.* IV.40.24.

<sup>834</sup> McBryde (2000) p.74.

<sup>835</sup> Stair I.9.4.

<sup>836</sup> McBryde confirms that "[m]isrepresentation and fraud are not mentioned" (McBryde (2000) p.77).

outline the five categories which amount to error in the substantial.<sup>837</sup> If we compare this same passage in later editions, we can see how the law was developing in the nineteenth century. In the fourth edition, also written by Bell himself in 1839, he introduces error caused by fraud:<sup>838</sup>

Error by fraud of the former kind, though not in substantial, if induced by stratagem sufficient to deceive a person of ordinary capacity; or accompanied by imbecility and loss on the party of the obligor; or induced in a case in which the obligor relied on the obligee for his information, as in insurance contracts; will ground an action for reducing the contract, or an exception in defence against an action grounded on it: error by fraud of the latter kind, will give relief by damages only.

Arguably, since the remedy is in damages, this is still essentially fraud and not error. It is therefore questionable whether Scots law had a category of induced error even when Bell was writing.<sup>839</sup>

However, by the tenth edition of the *Principles*, edited by Guthrie in 1899, at a time when the definition of fraud was hotly debated,<sup>840</sup> error caused by misrepresentation had become part of the taxonomy of error:<sup>841</sup>

Error has in itself no legal effect. It becomes operative on a man's legal position only in exceptional cases... Error is operative only when it prevents an act or deed from being done or executed, or an agreement from being concluded, according to the true intention of the actor or grantor or contracting parties. The effects in such cases are: that obligations and contracts are annulled or dissolved on the ground either of essential error, or

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<sup>837</sup> Bell, *Principles* § 11(2<sup>nd</sup> edn.).

<sup>838</sup> Bell, *Principles* § 13 (4<sup>th</sup> edn.).

<sup>839</sup> Stein points out that in support of his treatment of error several of the cases cited by Bell were decided on grounds of fraud (Stein (1958) p.185).

<sup>840</sup> "Much of the Scottish case law on error ... was after Bell's death in 1843" (McBryde (2000) p.78; McBryde (2007) para 15-08).

<sup>841</sup> Bell, *Principles*, I.11 (10<sup>th</sup> edn.).

of error produced by misrepresentation or fraud; testamentary writings are avoided on like grounds; and what has actually been paid or delivered in error may be recovered back.

The discussion of error is now interlaced with a discussion of fraud and misrepresentation in a structure which lacks clarity.<sup>842</sup> However, this is probably consistent with what was happening in the courts at the same period and Guthrie cannot be blamed entirely for being unable to provide a coherent account of how the three concepts related to one another.

There are few cases of error in older Scots law sources. Morison's Dictionary, for instance, contains no title on error, but has a very significant title on fraud which covers a vast range of situations, with sub-categories of *False Misrepresentations*, *Fraudulent Concealment* and *Underhand Dealing*. It is noteworthy that the majority of cases discussed under the title Fraud are instances of presumptive fraud. Most cases involving error are related to the *condictio indebiti*, although there are a few examples of error in expression in the eighteenth century.<sup>843</sup> Error clearly did not come before the courts often although the historical waters are muddied by a modern tendency to re-classify fraud or presumptive fraud cases retrospectively as illustrations of error.<sup>844</sup> This seems unhelpful in attempting to delineate the correct application of either doctrine.

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<sup>842</sup> Stair I.11-14.

<sup>843</sup> Maclean v MacNeill (1757) Mor 14164; Hepburn v Campbell (1781) Mor 14168; Sword v Sinclairs (1771) Mor 14241. It is interesting that two of these cases deal with an error known to and taken advantage of by the other party, which might suggest that it was the knowledge and taking advantage which led to a legal remedy rather than the error itself, see below pp.195-200.

<sup>844</sup> Bell himself used fraud cases to illustrate error (Stein (1958) p.185). In his recent article ((2010) pp.404-407) MacLeod discusses three "error" cases, two of which are more accurately classified as fraud. In Dunlop v Cruikshank (1752) Mor 4879 MacLeod acknowledges that error is not mentioned (also reported by Elchies as "Fraud" nos 25 and 26). Similarly, in Forbes v Forbes (1765) 2 Pat App 84, the appellant argued on the basis of a fundamental error which had been induced, as well as fraud and imposition. MacLeod concludes it is an error case because there is no evidence of fraud. However, if my analysis of the breadth of presumptive fraud is accepted, this is a classic case. Despite the respondent's argument that fraud had not been proved (at 89), the deed was reduced. Forbes is an interesting example because the headnote classifies it as "Reduction – Error in Essentials of Agreement". This would have been unusual in 1765, but Volume 2 of Paton's Reports was not published until 1851, at which point induced error was being argued more frequently.



## 2. The Problem of Unintentional Misrepresentation

The doctrine of induced error emerged over the course of the nineteenth century and it did so in response to the problem of unintentional misrepresentation. And yet this begs the question: how did Scots law historically deal with misrepresentations which were not intended to deceive? Misleading statements are as old as humankind, and this was not a new legal problem but it appeared to require a new legal solution.

There was not so much difficulty with misstatements made negligently. The *culpa lata* doctrine was capable of dealing with any form of negligence by equating it to fraud, as has been shown. However, “innocent misrepresentation” was the mischief the courts were attempting to address.

Stein has suggested that relief was given for innocent misrepresentation “by applying the implied warranty in the case of sale, or by inferring fraud where a representation had been made negligently, on the principle *culpa lata dolo aequiparatur*”.<sup>845</sup> In my view, this is a more accurate assessment of historical developments than can be found in most recent commentaries.<sup>846</sup> Both of Stein’s suggested solutions are considered below, and they are arguably both part of presumptive fraud.

### (a) *Latent Insufficiency*

It is undoubtedly the case that the seller’s liability for latent insufficiency, regardless of his state of knowledge or honesty, gave protection to buyers prior to the Mercantile Law Amendment (Scotland) Act 1856. There is considerable case law on the soundness of horses or the viability of grass seed which attest to this. For instance, in *Ralston v Robertson*<sup>847</sup> the seller argued that if he had upheld the horse as sound he would be liable in contract, and if he had “wilfully deceived or imposed upon the pursuer” he would be liable in delict, but as neither was the case “it is not easy to see upon what principle of law re-payment of the price can be demanded”.<sup>848</sup>

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<sup>845</sup> Stein (1958) p.186.

<sup>846</sup> See also Ashton-Cross (1951) for an analysis of a large number of cases of unintentional misrepresentation which, he argues, were actionable in Scots law.

<sup>847</sup> (1758) Mor 14238.

<sup>848</sup> *Ibid.* at 14239.

Nevertheless, the contract was reduced and the seller was liable to the buyer for the price. It is also noted from the Bench:<sup>849</sup>

That when a man sells a horse for full value, there is an implied warrandice, both of soundness and title, nor is there any necessity to prove the knowledge of the seller.

This was a form of presumptive fraud, the essence of which is lack of *mens rea* or knowledge and Stair considers it an aspect of the *culpa lata* principle:<sup>850</sup>

Though this case, and that of latent insufficiency, be rather *lata culpa, quae dolo aequiperatur*.

Similarly, in *Baird v Pagan*<sup>851</sup> strong ale, which was being exported to the West Indies, turned bad owing to the heat, and the seller was held liable because he knew it had been bought for export and needed to be prepared for the climate. In Kames' report he confirms that this is not a question of deceit or intention.<sup>852</sup>

It was not supposed the brewer had been guilty of any wilful wrong; but this defence was sustained upon the following rule of equity, that a man who purchases goods for a certain purpose, is not bound to receive them unless they answer that purpose.

Not only did the seller require no intention or deceit, but even uncertainty was enough to reduce the sale. The buyer in *Adamson v Smith*<sup>853</sup> wanted perennial seed and his purchase turned out to be annual seed. The seller argued he did not know if it was annual or perennial and did not warrant it to be perennial, but the court held that he was liable (in damages) apparently because the buyer believed it to be perennial,

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<sup>849</sup> *Ibid.* at 14239.

<sup>850</sup> Stair I.9.11, see also his earlier discussion in I.9.10.

<sup>851</sup> (1765) Mor 14240.

<sup>852</sup> *Ibid.* at 14241.

<sup>853</sup> (1799) Mor 14244.

and the seller conducted the sale “without explaining his own uncertainty”.<sup>854</sup> There was certainly no *caveat emptor* principle at work in these cases.<sup>855</sup> In *Adamson* the implied warranty appears to amount to a duty of disclosure, which bears an anachronistic resemblance to a requirement of good faith where the buyer’s expectations are known to the seller. It is certainly not the case that “[t]he institutional writers were not concerned with misrepresentation, unless there was fraud”<sup>856</sup> unless fraud is intended in the broad sense of presumptive fraud.

However, it is perhaps predictable that solutions designed to deal with the agrarian economy of seventeenth and eighteenth century Scotland, with unsound horses and unreliable seed, would prove inadequate to deal with the complexities of the financial services world which emerged in the nineteenth. As commerce and industry grew, as companies formed and shares were listed, as a certain creativity was brought to finance and banking, the political and legal pressure grew to protect entrepreneurs and company directors. This had a substantive impact on the law of misrepresentation. In addition, there is little doubt that the Mercantile Law Amendment (Scotland) Act 1856 had a role to play.

***(b) The Impact of the Mercantile Law Amendment (Scotland) Act 1856***

It is no coincidence that most of the problematic cases of misrepresentation which perplexed the Scottish courts arose in the second half of the nineteenth century, and that there was an increase in litigation after the passing of the 1856 Act.<sup>857</sup> The rule in contracts of sale up to that point had been that there was an implied warranty of

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<sup>854</sup> *Ibid.* at 14245.

<sup>855</sup> For other examples see *Brown v Laurie* (1791) Mor 14244; *Durie v Oswald* (1791) Mor 14244; *Brown v Gilbert* (1791) Mor 14244.

<sup>856</sup> McBryde (2007) para 15-43.

<sup>857</sup> A non-exhaustive list includes: *Wardlaw v Mackenzie* (1859) 21 D 940; *Adamson v Glasgow Water-Works Commissioners* (1859) 21 D 1012; *Wilson v Caledonian Railway Company* (1860) 22 D 1408; *Hogg v Campbell* (1864) 2 M 848; *Graham v Western Bank* (1864) 2 M 559; *Addie v Western Bank* (1865) 3 M 899; *Western Bank of Scotland v Addie* (1867) 5 M (HL) 80; *Hare v Hopes* (1870) 8 SLR 189; *Dempster v Raes* (1873) 11 M 843; *Beresford’s Trs v Gardner* (1877) 4 R 363; *Houldsworth v City of Glasgow Bank* (1879) 6 R 1164, (1880) 7 R (HL) 53; *Tennent v City of Glasgow Bank* (1879) 6 R 554; *Lees v Todd* (1882) 9 R 807; *Young v CB* (1889) 17 R 231; *Stewart v Kennedy* (1889) 16 R 857; *Menzies v Menzies* (1890) 17 R 881, (1893) 20 R (HL) 108; *Smyth v Muir* (1891) 19 R 81; *Woods v Tulloch* (1893) 20 R 477; *Manners v Whitehead* (1898) 1 F 171.

quality in Scots law. This, in effect, dealt with misrepresentations in the context of sale and the seller would be liable regardless of his intention. Under the new legislation, the seller's obligation was reduced from a general implied warranty of quality so that he would only be liable for unknown defects where he had given an express warranty or where the goods were sold for a specified purpose.<sup>858</sup>

It is difficult from the distance of a century and a half to assess the impact of legislation on the law of the period. However, the serialisation of an article (by an unknown author) on the law of fraud published in the *Journal of Jurisprudence* in 1857 provides some insight.<sup>859</sup> The author is specifically responding to two things: the 1856 legislation<sup>860</sup> and criticism of the state of Scottish pleading in matters of fraud by the House of Lords.<sup>861</sup> He explicitly sets out to give an account of the general principles of the law of fraud, with extensive reference to case law, because those will be required now that the legislation has removed the seller's warranty, and he acknowledges from the start that unlike error and force, fraud is complex as "a colour of fraud may be thrown over any transaction".<sup>862</sup> His starting point is that contracts are governed by the *caveat emptor* principle, otherwise "much of the incentive to mercantile enterprise and invention would be withdrawn".<sup>863</sup> Hence, fraud must be proved and is seldom presumed, and in words that echo Stair he affirms that there is no redress "for every inequality" or "for every slight misrepresentation".<sup>864</sup> However, he does concede that there are also cases where the rule *ex re presumitur dolus* "seems to have been acted on", cases involving relationships of confidence, or the circumstances of the party defrauded.<sup>865</sup>

He also outlines the different forms fraud can take:<sup>866</sup>

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<sup>858</sup> Mercantile Law Amendment (Scotland) Act 1856 s.5; see Gordon (2000) pp.326-327.

<sup>859</sup> "On the Law of Fraud in Contracts". The article is in 4 parts: *Journal of Jurisprudence* Vol. 1 pp.489-493 and 513-524; Vol 2 pp.7-13 and pp.55-61.

<sup>860</sup> Vol.1 p.489.

<sup>861</sup> Vol.1 p.489, referring to the trenchant criticism made in *National Exchange Co. Of Glasgow v Drew & Dick* (1855) 2 Macq. 105.

<sup>862</sup> Vol.1 p.489.

<sup>863</sup> Vol. 1 p.490.

<sup>864</sup> Vol. 1 p.491.

<sup>865</sup> Vol. 2 pp.58-59.

<sup>866</sup> Vol. 1 p.493.

All fraud must consist in misrepresenting; or allowing a party to be ignorant of; or misconceive the facts material to the bargain; or in inducing or permitting him to draw false conclusions from the real facts.

Redress for fraud (he is mainly concerned with misrepresentation) depends on various criteria: it must be material; it must have happened prior to the transaction; and it must have been relied on by the other party.<sup>867</sup> These are familiar long-standing criteria for fraud, and incidentally – error notwithstanding – they are also the oft-repeated criteria in the modern law of misrepresentation.<sup>868</sup> But it is not only the materiality of the misrepresentation which is relevant; it also depends,<sup>869</sup>

on the position of the parties in regard to knowledge of the circumstances material to the contract; on the manner in which fraud is effected; on the nature of the contract; on the general relations of the parties; and on the capacity of the party deceived.

Despite the fact that fraud is not to be presumed, these are categories inherent in presumptive fraud and it is clear they were familiar, yet perhaps reluctantly acknowledged, in 1857.

The writer uses fraud and misrepresentation almost interchangeably, and his treatment extends to unintentional misrepresentation. He distinguishes between intentional and unintentional misrepresentations by using the labels of moral and legal fraud. So, for instance, “[t]he degree of moral fraud in misstatement or concealment, will generally depend very much on the inequality of the parties in point of actual information, supposing that the party well-informed is aware of the ignorance of the other party”,<sup>870</sup> or again “A party may misrepresent through

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<sup>867</sup> Vol. 1 p.492.

<sup>868</sup> *Ritchie v Glass* 1936 SLT 591 at 593.

<sup>869</sup> Vol. 1 p.493. He repeats the criteria several times, see Vol. 1 pp.523-524; and Vol 2 pp.10-11 where the same categories also dictate where a duty of disclosure arises in his discussion of fraud by concealment.

<sup>870</sup> Vol. 1 p.493.

inadvertence or through rashness, without intending to deceive, yet the contract induced thereby will be reducible on the ground of legal fraud”.<sup>871</sup> It seems clear that all forms of misrepresentation are included in his definition of fraud, if they meet the relevant criteria, and regardless of whether they amount to moral or legal fraud there is a legal remedy. It is also highly significant that there is absolutely no mention of the doctrine of error, or any possible relationship to misrepresentation.

Even after the passing of the 1856 Act we still find remnants of the principle that if statements are false they are assumed to be fraudulent. In *Lees v Todd*,<sup>872</sup> a shareholder case, Lord President Inglis appears to suggest that false statements may amount to dishonesty depending on the relationship of the parties and the question of reliance:<sup>873</sup>

If the speaker, having no actual belief in the statement, though not believing it to be untrue, volunteers the statement, inconsistent with facts, to a person interested in the statement, and likely to act on it, he is dishonest and guilty of deceit, because he produces, and intends to produce, on the mind of the listener a belief which he does not himself entertain.

On this definition, many, if not most, misrepresentations could be considered not “innocent”. However, a much more restrictive view, namely a requirement of knowledge and intention to deceive, had been expressed several years earlier in *Brownlie v Miller*<sup>874</sup> and it is this view that has prevailed in modern law. It is a subtle distinction, but in *Lees* Lord President Inglis presumes deceit from a lack of positive belief in the truth of the statement made; in *Brownlie* there is no such presumption, rather a requirement to show intention or recklessness, in effect the test set out in *Derry v Peek*, although Lord Shand does preserve a test of reasonable grounds for that belief:<sup>875</sup>

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<sup>871</sup> Vol. 1 p.519.

<sup>872</sup> (1882) 9 R 807.

<sup>873</sup> *Ibid.* at 854.

<sup>874</sup> (1878) 5 R 1076 at 1091 per Lord Shand.

<sup>875</sup> *Ibid.*

I cannot see that a statement can be characterised as fraudulent either in fact or in law when it is made with an honest belief in its truth. To found a claim on fraudulent misrepresentation it is, in my opinion, necessary to prove not only that the representation was false in fact, but that the person making the representation knew it to be false, or at least did not believe it to be true. The state of knowledge or belief of the person making the representation is to be determined on the evidence, and if he have refrained from making inquiries which would have disclosed the truth it may often be a legitimate inference that he did not believe in the truth of his assertion. But if he refrained from inquiry, not from any unwillingness to know the truth, but because he was really satisfied he had reasonable grounds of belief, and his belief be thus honestly entertained, I do not think his statements, though false, can be held to be fraudulent in law, as it certainly is not in fact. A statement made in an honest belief in its truth cannot be fraudulent.

The analysis in *Lees* was adopted more recently in the Outer House where a government department had misrepresented that potatoes being exported were free from a particular disease. Clearly, there was no intention to deceive on the part of the officials, but the Lord Ordinary relied on *Lees* to find the department liable in damages for a fraudulent misrepresentation:<sup>876</sup>

where both parties have an interest in what is said, the law regards it as dishonest for a person to make an assertion having no actual belief in its truth.

His decision was reversed and both the First Division and the House of Lords found there had been no fraudulent misrepresentation.<sup>877</sup>

There is no doubt that it would be possible, even using a restrictive definition of fraud, to interpret the test of honest belief to include most forms of misrepresentation, and to situate them conceptually within the law of fraud.

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<sup>876</sup> *H & JM Bennett (Potatoes) Ltd v Secretary of State for Scotland* 1986 SLT 665 at 671 per Lord Davidson.

<sup>877</sup> 1990 SC (HL) 27.

Insistence on honest belief in the truth of a statement, and that the belief should be reasonable, would import in most cases a duty to enquire. Most examples of negligent misrepresentation would fall within this test, and arguably many cases of innocent misrepresentation as well. In the shareholder cases, requiring directors to have an honest belief in statements made in a share prospectus would have the same effect. In cases where one of the parties has been provided with false information by the other and has subsequently relied on it,<sup>878</sup> it would surely be reasonable to insist that, for instance, technical specifications should be based on an honest belief that they contain accurate information. It is not difficult to see how this could legitimately come within the scope of a fraudulent misrepresentation, and therefore be subject to the traditional criteria for fraud.

However, despite occasional signs of sympathy for this approach by individual judges, the modern tendency is to restrict the definition of fraud to intentional deceit and the interpretation of honest belief to a lack of knowledge of falsehood. So in *Milne v Gray*<sup>879</sup> Lady Dorian held that a defender must be a “knowing party” to a false misrepresentation,<sup>880</sup> and on the question of honest belief she insisted:<sup>881</sup>

The case based on failure to inquire is at heart a case that by ordinary diligence or with very little further inquiry the defenders might have satisfied themselves that the representations were inconsistent with fact. Such averments are clearly insufficient to establish a lack of honest belief.

There is arguably no “clearly” about the matter, and to my mind it represents a lack of attention to doctrinal history and legal authority.

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<sup>878</sup> For instance, *Adamson v Glasgow Water-Works Commissioners* (1859) 21 D 1012; or the complex litigation which began in *Boyd & Forrest v Glasgow & SW Railway Co* 1911 SC 33 (*Boyd & Forrest* is discussed in more detail below, pp.191-194).

<sup>879</sup> [2008] CSOH 84.

<sup>880</sup> *Ibid.* at para 31.

<sup>881</sup> *Ibid.* at para 36; another recent example can be found in *Cramaso LLP v Viscount Reidhaven's Trustees* [2010] CSOH 62 in which Lord Hodge held, “In conclusion, there was no reasonable basis in the evidence for Mr Lewis's representation that the counts were representative of the moor as a whole, but it was honestly made” (at para 102). Honesty, however unreasonable, is apparently the modern test.



*(c) The culpa lata principle and misrepresentation*

Modern commentators assume that misrepresentation was historically part of the law of error, as discussed in chapter 6, but an alternative view is that it was historically assumed to be part of the law of fraud, regardless of whether there was intention to deceive. The confusion in the case law would seem to suggest that it was, at least, unsettled. Stein suggests that Scots law had historically used the principle that *culpa lata dolo aequiperatur* to deal with unintentional misrepresentation.<sup>882</sup> It is more accurate to say that that principle was used after the passing of the 1856 Act to find a new solution. Most of the relevant cases date from the second half of the century.

The *culpa lata* principle was used in an unsuccessful argument for unintentional misrepresentation in *Oliver v Suttie*<sup>883</sup> in the mid-nineteenth century, the point at which the conflation of fraud and induced error began to take place. The Lord Ordinary held that there was “no room or authority, or sound principle, for any *mid plea* between fraud and unintentional error”<sup>884</sup> although had the pursuers been able to prove *culpa lata* it would have been treated as a case of fraud (and not error).

The issue was addressed again in *Adamson v Glasgow Water-Works Commissioners*<sup>885</sup> which concerned the building of the Mugdock tunnel and reservoir. The pursuers had tendered for the work relying on technical information supplied by the defenders which turned out to be wrong, so that the cost of the work was significantly higher than anticipated. The court held that the combined effect of a misrepresentation and essential error was a relevant and sufficient ground of liability.<sup>886</sup> As Lord President McNeill expressed it: “I think, when a party is induced by misrepresentation to enter into a contract, that implies that he is under error as to the contract.”<sup>887</sup> This was a difficult case, and there was considerable debate with counsel on the correct form of the issue. The majority of the Inner House thought it amounted to essential error induced by misrepresentation, but as Stein points out they

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<sup>882</sup> Stein (1958) pp.171 and 186.

<sup>883</sup> (1840) 2 D 514.

<sup>884</sup> *Ibid.* at 516.

<sup>885</sup> (1859) 21 D 1012.

<sup>886</sup> *Ibid.* at 1018 per Lord President McNeill and Lord Deas.

<sup>887</sup> *Ibid.* at 1020.

“did not address .. the question whether misrepresentation merely inducing a contract was a ground for rescission”.<sup>888</sup> Lord Deas was clearly uncomfortable with this approach:<sup>889</sup>

The case is in a very embarrassing predicament, for the parties have agreed upon an issue, and at the same time differ as to its meaning. The Court also differ as to its interpretation, for I do not agree with Lord Curriehill that the substance of the case is essential error. I think it is misrepresentation on an essential point; - misrepresentation, involving *culpa lata*, which the law holds equivalent to fraud. If the case does not come up to that, there is no case at all. I would have kept out essential error altogether.

He is arguably right but he was ploughing a lonely furrow.

Lord Deas took the same position in the important case of *Hogg v Campbell*<sup>890</sup> and his doubts about this use of the law of error to my mind support the analysis that it was a novel argument.<sup>891</sup> In *Hogg* it was argued that a deed had been “fraudulently impetrated”, also that it had been signed under essential error induced by fraud. Much of the debate turned on the correct form of the issues, and whether an induced essential error could be pleaded at all, but it is clear that the four judges of the First Division, all of whom expressed their difficulty with the question, held it to be fraud and not error. Lord President McNeill confirmed that this was not a familiar argument:<sup>892</sup>

We have not many cases of pure essential error. They are generally accompanied with some circumstances that characterise them – essential error in regards to deeds granted without value, or cases in which there has been

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<sup>888</sup> Stein (1958) p.196.

<sup>889</sup> (1859) 21 D 1012 at 1020 per Lord Deas. Walker identifies Adamson as the recognition of innocent misrepresentation in Scots law (Walker (1954) p.130); McBryde disagrees both with Walker and Stein (McBryde (2007) para 15-47 n.116). This is hotly disputed territory.

<sup>890</sup> (1864) 2 M 848.

<sup>891</sup> See the cases discussed below, and also Beresford’s Trs v Gardner (1877) 4 R 363.

<sup>892</sup> (1864) 2 M 848 at 858.

mutual error; at all events, if it is a deed of this kind, there ought to be something which is to connect the defender, the principal party, with that essential error.

The focus was firmly on the behaviour of the defender rather than the consent of the pursuer and commenting, with some clarity in my view, on induced error the Lord President said:<sup>893</sup>

Now the difficulty which I had mainly in regard to that, was a difficulty in seeing exactly what case could be presented to the jury of error, induced by William Campbell, which was not also a case of fraud.

Lord Deas (who, in a dissenting judgment, would not allow a separate issue of induced error) thought the behaviour amounted only to fraud and nothing else.<sup>894</sup> However, in *Hogg*, we see the majority of the court in *obiter* remarks beginning to outline the territory of induced essential error. The Lord President speculated that perhaps induced error would be relevant where the defender,<sup>895</sup>

by his silence, or by his actings – by his silence after previous actings – whether silence fraudulently maintained, or inadvertently, or it may have been in failing to make [the pursuer] aware of doubt as to whether the clause had been included or no [sic].

Lord Curriehill considered that an error arising as a result of “a mistake or misunderstanding or carelessness”<sup>896</sup> could be an issue of essential error. We can see in *Hogg* the separation beginning: the relegation of fraud to intentional behaviour, while behaviour amounting to carelessness or negligence becomes the territory of induced error rather than the older *culpa lata* principle.

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<sup>893</sup> *Ibid.*

<sup>894</sup> *Ibid.* at 860.

<sup>895</sup> *Ibid.* at 858.

<sup>896</sup> *Ibid.* at 859.

“Innocent” misrepresentation shortly afterwards made the same transition. In *Hare v Hopes*<sup>897</sup> the question was whether there could be separate issues of fraud and induced essential error, in the context of an alleged fraudulent balance sheet on the basis of which the pursuer became a partner. It was held to be a case of fraud and not error, and Lord President Inglis again attempted to delineate the territory of induced error.<sup>898</sup>

if the misrepresentations and concealment averred had been *innocent* it might have been a good case for reduction upon essential error.

By now Lord Deas, somewhat reluctantly, seemed to have accepted the competence of a plea of induced essential error and he commented that essential error would rarely be granted in conjunction with “assumed innocence”; rather, “[i]t is probably only applicable to cases in which error is alleged with regard to the subject matter of the contract, as in those cases of *Wilson* and *Adamson* quoted to us”.<sup>899</sup>

When Lord Carmont later reviewed the law relating to essential error and misrepresentation he acknowledged even in 1936 that it was “in a state of confusion”.<sup>900</sup> That very confusion suggests that induced error was not a familiar concept in the Scottish courts. However, the “error” analysis was gaining ground, particularly in relation to careless or “innocent” misstatements. Hence, we find statements such as, “essential error is a well established ground of reduction. It is properly connected with misrepresentation, in the case of an onerous contract, in which both parties are not said to have been deceived, but one to have misled the other”.<sup>901</sup> And yet essential error combined with inducement clearly was not well established, as the case law shows. It was only at the end of the nineteenth century, post-*Derry v Peek*, that Scots law finally accepted that non-fraudulent misstatements

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<sup>897</sup> (1870) 8 SLR 189.

<sup>898</sup> *Ibid.* at 192, emphasis added.

<sup>899</sup> *Ibid.*

<sup>900</sup> *Ritchie v Glass* 1936 SLT 591 at 593.

<sup>901</sup> *Wilson v Caledonian Railway Company* (1860) 22 D 1408 at 1409 per the Lord Ordinary (Jerviswoode).

were part of the law of error, and only after the definition of fraud had become so narrow that it was no longer capable of providing a remedy.

### 3. The Final Transition from Fraud to Error

Even after *Derry v Peek* Scots law did sporadically attempt to found on the broad concept of *culpa* expressed in cases of presumptive fraud, albeit with decreasing enthusiasm and a growing lack of familiarity with the underlying principles and authorities. By the end of the century presumptive fraud had all but disappeared. In addition, the law relating to unintentional misrepresentation was subsumed in its entirety into the law of error. Two important cases are examined below because they mark the end point in the process of detaching fraud from its historical roots, and together they demonstrate that, rather than attempting to restrict the meaning of *Derry v Peek* as the English courts had done, Scots law looked to the law of error to solve the problem of misrepresentation. A third case, *Mair v Rio Grande Rubber Estates Ltd*, suggests that another older maxim emerged to fill the gap.

#### (a) *Menzies v Menzies*

In *Menzies v Menzies*<sup>902</sup> a son raised an action to have an agreement with his father reduced on grounds of fraudulent misrepresentation and concealment. The son was in debt to the tune of £6000 and had been led to believe that signing it was the only way to avoid financial ruin. He argued that he would not have agreed to it had he known his legal rights, but he was under the mistaken belief that he would not otherwise be able to raise money to pay his debts, a belief induced by the representations of his father's solicitor. The development of the case is worth exploring because it represents the transformation described in this chapter.

It begins with the Lord Ordinary's (Lord Low) judgment which concludes that misrepresentations had been made which were not fraudulent. Nevertheless, the

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<sup>902</sup> (1890) 17 R 881; the full history is given in the House of Lords report of the case, (1893) 20 R (HL) 108.

agreement should be reduced because of a combination of factors: this was a family relationship; the pursuer had no independent legal advice; and the misrepresentations caused lesion to the pursuer, who had surrendered valuable rights for inadequate consideration.<sup>903</sup> The decision appears to be based on non-fraudulent misrepresentation which caused lesion, with a range of aggravating factors in the mix. In an earlier era this would have been a classic case of presumptive fraud. Significantly, there is no mention of error. The summary of Lord Low's judgment is as follows:<sup>904</sup>

Finds that the pursuer was induced to enter into the agreement ... by representations in regard to a material matter of fact..; that the said representations, although not made fraudulently or with intent to deceive the pursuer, were not consistent with fact; and that the said agreement was to the lesion of the pursuer, he having thereby surrendered rights of great value for a wholly inadequate consideration; and finds that in law these facts constitute a sufficient ground for reduction of the documents libelled.

However, the definition of fraud having narrowed to intentional deceit, the Inner House held that there was no fraud on the part of the solicitor, and certainly no fraud could be inferred despite the fact that the son had no independent legal advice and was acting on the advice of his father's agent to his great lesion. Moreover, they were censorious of the son's character (describing him as a "scapegrace son loaded with debt" and referring to "his mere selfish ends"<sup>905</sup>), in the process attracting the opprobrium of the House of Lords.<sup>906</sup> Lord Rutherford Clark dissented on grounds that would have been commonplace in an earlier era: that the son had been "stripped of an inheritance secured by deed of entail, that he had no legal advice, and that those who took the deed from him knew that he could procure the money at infinitely less cost".<sup>907</sup> When the case came before the Inner House for the second time, the issue

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<sup>903</sup> (1893) 20 R (HL) 108 at 114-115 per Lord Low.

<sup>904</sup> *Ibid.* at 111 per Lord Low.

<sup>905</sup> (1890) 17 R 881 at 892 per Lord Young.

<sup>906</sup> Lord Watson comments that he cannot approve of the comments of the Second Division "upon the character and truthfulness of the applicant" ((1893) 20 R (HL) 108 at 143).

<sup>907</sup> (1890) 17 R 881 at 892 per Lord Rutherford Clark.

was whether there could be misrepresentation without fraud, the answer to which was negative. The solicitor had merely been expressing an opinion, giving reasonable advice. There could be no misrepresentation unless there was also fraud and the solicitor's behaviour did not constitute fraud, narrowly defined.<sup>908</sup>

However, on appeal the House of Lords reversed the Inner House decision, relying on the judgments of Lord Low and Lord Rutherford Clark. Lord Watson held that the representations made by the father's agent induced the son to surrender valuable rights and that those allegations were "sufficient to infer the appellant's right to rescind".<sup>909</sup> He then made his infamous pronouncement about the law of error, which had not been argued up to that point and appears to come out of the blue. *Menzies* is not a case about the law of error, it is about the effect of non-fraudulent misrepresentation. The decision of the Law Lords relied heavily on the fact that the son was not independently advised and was therefore in ignorance as to his legal rights, as well as the relationship between the parties (father and son), and concluded that in these sorts of cases "moral fraud" was not required.<sup>910</sup> As Lord Field put it:<sup>911</sup>

Necessity and weakness on the one side, and advantage in fact on the other, gained by a representation untrue in fact, and materially inducing the bargain, render it contrary to good conscience.

This was the classic Chancery formulation of behaviour contrary to conscience. It could have been decided on grounds of inequality, but by this time presumptive fraud was an unfamiliar concept. Had that been the case, the English doctrine of innocent misrepresentation might not have found such fertile soil in Scotland.<sup>912</sup>

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<sup>908</sup> *Ibid.* at 895 per Lord Justice-Clerk MacDonald.

<sup>909</sup> (1893) 20 R (HL) 108 at 142 per Lord Watson.

<sup>910</sup> *Ibid.* at 148 per Lord Field.

<sup>911</sup> *Ibid.*

<sup>912</sup> In effect the decision of the House of Lords in *Menzies* was an application of the principles of innocent misrepresentation, following *Adam v Newbigging* (1888) LR 13 App Cas 308. See Scottish Law Commission (2011) para 5.55.

The significance of *Menzies* for the law of error is well-known<sup>913</sup> but insufficient attention has been given to the context, and the reason why error was even referred to. *Menzies* began as a fraud case.<sup>914</sup> It raised questions of definition and motive, and the legal issue was whether a non-fraudulent misrepresentation was actionable. In the second appeal to the Inner House – fraud having been rejected in the first – Lord Rutherford Clark adopted a formula which runs in parallel with the narrowing of fraud, namely the expansion of error. He suggested that the pursuer’s agreement was induced either “by fraudulent misrepresentation, or by misrepresentation which led him into essential error”,<sup>915</sup> and it is against that background that the case was appealed to the House of Lords. It began as non-fraudulent misrepresentation and ended up being framed in terms of induced error,<sup>916</sup> a pattern repeated time and again in the case law of the nineteenth century. A hundred years earlier it would have been dealt with using presumptive fraud or the *culpa lata* principle.

**(b) *Boyd & Forrest v Glasgow & SW Railway Co***

*Boyd & Forrest v Glasgow & SW Railway Co* has become the leading case on the doctrine of innocent misrepresentation, a case which engendered a good deal of litigation, including two separate appeals to the House of Lords.<sup>917</sup> In its early stages appeal was made to the older principle *culpa lata dolo aequiparatur* to find a remedy for an “innocent” misrepresentation and this was probably the final attempt to do so. The principle was accepted by the Scottish courts, but on appeal to the House of Lords Lord Atkinson applied the narrow definition of fraud set out in *Derry v Peek*<sup>918</sup> with apparent disregard for the fact that he was applying a delictual definition in a

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<sup>913</sup> The usual interpretation of *Menzies* is that Lord Watson’s (*obiter*) remarks altered the meaning of essential error, lowering the standard from the 5 categories set out in Bell’s *Principles* §11 to simply a material error, see McBryde (2007) para 15-64.

<sup>914</sup> It has been stated that the two actions in *Menzies* involved respectively “undue influence and essential error induced by misrepresentation” (McBryde (2000) p.90). With respect, this is difficult to substantiate.

<sup>915</sup> (1893) 20 R (HL) 108 at 122 per Lord Rutherford Clark.

<sup>916</sup> Although it should be noted that this was not the *ratio* of the decision. Lord Rutherford Clark held it to be a fraudulent misrepresentation, for it was made recklessly.

<sup>917</sup> 1911 SC 33; 1912 SC (HL) 93 (first appeal to House of Lords); 1914 SC 472 (second appeal to Inner House); 1915 SC (HL) 20 (second appeal to House of Lords).

<sup>918</sup> (1889) 14 App Cas 337.



contractual context.<sup>919</sup> The facts were that contractors had been given inaccurate information in relation to the geology of the ground being used to construct a railway line. The Scottish courts accepted the argument that this amounted to *culpa lata*, which was equivalent to fraud. It is highly significant, as well as historically consistent, that in the Scottish courts it could still be argued that the whole of the law of misrepresentation – fraudulent, negligent or innocent – could be conceptually located within the doctrine of fraud. The Lord Ordinary (Johnstone) held that the defender was not guilty of “intentional fraud, but I cannot acquit him of such recklessness as *aequiparatur dolo*.”<sup>920</sup> This was affirmed by the Second Division in a judgment which is worth quoting at length because it demonstrates the territory which the Scottish courts attributed to the *culpa lata* principle and the attempt to distinguish fraud, as the author of the 1857 article had done, by reference to motive (legal fraud and moral fraud):<sup>921</sup>

I agree with the Lord Ordinary in not imputing direct *mala fides* to Mr. Melville. ... I have no doubt he thought that he was drawing a sound inference, but he must have known that he was putting forward his inference and passing it off as ascertained fact, stated by the borer, which it was not. I cannot acquit him of legal fraud in doing so... This was, in my opinion, a most reckless thing to do; although possibly not done in conscious fraud, yet it was equal to dole... But, if there is unfair dealing, as I hold there is here, a party cannot take benefit by his own fraud, or reckless conduct *quod aequiparatur dolo*.

This decision was overturned by the House of Lords relying on the narrow definition of fraud laid down in *Derry v Peek*.<sup>922</sup> Lord Shaw found the defender’s behaviour was neither fraud nor “equal to fraud”.<sup>923</sup>

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<sup>919</sup> 1912 SC (HL) 93 at 99 per Lord Atkinson.

<sup>920</sup> 1911 SC 33 at 49 per Lord Johnstone.

<sup>921</sup> *Ibid.* at 61 per Lord Justice-Clerk MacDonald.

<sup>922</sup> 1912 SC (HL) 93 at 99 per Lord Atkinson.

<sup>923</sup> *Ibid.* at 105 per Lord Shaw.

Of the charge of fraud preferred against him by the pursuers it is not for me to pronounce whether it was unscrupulously made; it is sufficient that it is unfounded in fact. I think that the attempt to bring Mr Melville's conduct into the same range as to be equal to fraud also fails; that the plea of fraud is as entirely devoid of legal as it is of ethical warrant.

The action failed on the facts, but Lord Shaw did accept that the *culpa lata* principle could have been relevant had relevant facts been established. In the second round of appeals, fraud having been rejected, the Inner House held that although not fraudulent, Mr Melville's behaviour amounted to essential error induced by innocent misrepresentation and a remedy was granted (of *quantum meruit*, which the House of Lords points out was in effect the equivalent of damages). In terms of legal doctrine, fraud had been rejected, as had the *culpa lata* principle. The only route left to provide a remedy – which the Scottish courts clearly wanted to do – was to look to the law of error. As in the earlier case of *Adamson v Glasgow Water-Works Commissioners*,<sup>924</sup> the court conceptually combined unintentional misrepresentation with essential error.<sup>925</sup>

I consider that the pursuers entered into this contract under essential error, induced by misrepresentation and concealment (though without any fraud).

This is an understandable development. In the history of this case the House of Lords had rejected the notion that innocent misrepresentation could be equated with fraud by an enlargement of the notion of *culpa*. The only remaining option was to situate it somewhere else, removing any suggestion of fault, dishonesty or bad faith and dissociating it from the moral overtones inherent in the word “fraud”. *Boyd & Forrest* was the last serious attempt to use the *culpa lata* principle outwith the context of fiduciaries. After *Derry v Peek* Scots law had closed the door to any broad concept of fraud, and it was finally received into Scots law in *Boyd & Forrest*.<sup>926</sup>

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<sup>924</sup> (1859) 21 D 1012, discussed in ch. 2.

<sup>925</sup> 1914 SC 472 at 495 per Lord President Dundas; this decision was subsequently reversed by the House of Lords because no dishonesty was proved, using the narrow *Derry v Peek* definition.

<sup>926</sup> Smith (1962) p.834 n.62; McBryde (2007) para 14-16.

For cases of unintentional misrepresentation error was the tool of the future and a misstatement causing error, whether made intentionally, negligently or “innocently”, was actionable. Thus, the historical link between fraud and misrepresentation was severed.

*(c) Mair v Rio Grande Rubber Estates Ltd*

*Mair v Rio Grande Rubber Estates Ltd*<sup>927</sup> also deals with unintentional misrepresentations and takes a slightly different approach to the issue. It was also a shareholder case, alleging that the shares had been bought on the basis of false and fraudulent misrepresentations. The argument was unsuccessful before the First Division which found the misrepresentations neither false nor fraudulent, but it was reversed on appeal to the House of Lords. In this context, which raises questions of agency, Lord Shaw now appears to lower the standard required for fraud: it was enough that the representations were not true, and not necessary to prove that the directors knew they were false for “if it were proved that the statements were, in fact, false, then they must have been fraudulent as well.”<sup>928</sup> His definition of fraud harks back to an older version of the doctrine and includes within it non-fraudulent misrepresentations:<sup>929</sup>

Fraud is not far away from – nay, indeed, it must be that it accompanies – a case of any defendant holding a plaintiff to a bargain which has been induced by representations which were untrue; for it is contrary to good faith and it partakes of fraud to hold a person to a contract induced by an untruth for which you yourself stand responsible. It is elementary that a party cannot take advantage of a benefit derived from a contract sprung out of his own fraud, and I think it is equally sound that a party cannot take a benefit from a contract sprung out of a falsehood which he has placed before the other party as an inducing cause.

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<sup>927</sup> 1912 SC 183; rev 1913 SC (HL) 74.

<sup>928</sup> 1913 SC (HL) 74 at 82 per Lord Shaw.

<sup>929</sup> *Ibid.*

Under this definition all that was required was falsehood, reliance and loss and it would involve a renaming of “innocent” misrepresentation. What is interesting about *Mair* is that another principle is drawn on, which I refer to as the “fraud principle” or the “no benefit from fraud” rule. The company could not evade liability for the false statements on the basis that it could not benefit from its own fraud.<sup>930</sup> The fraud principle is discussed in greater detail in chapter 7 but it is probably no coincidence that it took on new life after fraud in the strict sense had been redefined and could be interpreted as searching for an alternative to the doctrine of error.

#### 4. Steuart’s Trs v Hart: Fraud or Error?

One further aspect of the law of error is relevant to a discussion of the borderline between fraud and error. There is an apparently anomalous group of cases<sup>931</sup> in which one party is labouring under an (uninduced unilateral) error and the other party knows about the error and takes advantage of it, a type of concealment in other words. In these cases the *caveat emptor* principle does not seem to apply, hence their exceptional nature, and the party in error has been granted a remedy in some circumstances: where the error in question is an error of expression, known to and taken advantage of in an unwarrantable fashion. In modern law the rule is considered controversial<sup>932</sup> and a narrow exception to the rule that an uninduced unilateral error is not sufficient to annul a contract.

In the leading case, *Steuart’s Trs v Hart*,<sup>933</sup> a property owner accepted a lower price for land because he mistakenly believed it to be burdened with a higher feu duty than it was (he claimed that getting rid of the feu duty was one of the reasons for selling). However, the purchaser knew that only a small feu duty was payable and that the seller had made an error. The court reduced the sale “on grounds of essential error

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<sup>930</sup> *Ibid.* at 82 per Lord Shaw; at 77 per the Lord Chancellor; at 84 per Lord Moulton.

<sup>931</sup> *Sword v Sinclairs* (1771) Mor 14241; *Hepburn v Campbell* (1781) Mor 14168; *Purdon v Rowatt’s Trs* (1856) 19 D 206; *Steuart’s Trs v Hart* (1875) 3 R 192; *Inglis’ Trs v Inglis* (1887) 14 R 740; *Angus v Bryden* 1992 SLT 884; *McLaughlin v The New Housing Association Ltd* 2008 SLT (Sh Ct) 137; *Parvaiz v Thresher Wines Acquisition Ltd* [2008] CSOH 160, 2009 SC 151.

<sup>932</sup> *Gloag* (1929) p 438, who explicitly thought the case breached the *caveat emptor* rule; *Walker* (1995), para 14.41; *Thomson* (1990) para 694; *Scottish Law Commission* (2011) para 5.56.

<sup>933</sup> (1875) 3 R 192.

known to the purchaser and taken advantage of by him”.<sup>934</sup> It is clear that a remedy was granted because of the defender’s behaviour and because of the element of fault, or “unfair advantage”,<sup>935</sup> or as Lord President Inglis put it, “I am not prepared to say that this is a wrong without a remedy”.<sup>936</sup> In the Outer House Lord Shand also found it to be an essential error known to and taken advantage of by the seller, but suggested that it could also be fraud.<sup>937</sup>

If it were necessary, however, that fraud should be established in order to give the pursuers that remedy, I am disposed to think there is enough in the case to entitle the pursuers to succeed.

There is of course hesitation on the part of the judges to find that mere private knowledge is effective to set aside a property sale, particularly at this period in the nineteenth century. After all, the purchaser had done nothing other than remain silent. In an earlier era these cases could have been examples of presumptive fraud, in that they demonstrate the application of the principle of equality, whereby one party’s ignorance is taken advantage of and has suffered lesion, but they are generally considered to be part of the law of error.<sup>938</sup> Many fall within the category of personal relationships or relationships of confidence; but others are commercial arms’-length transactions.

The case might have come within the scope of presumptive fraud, because of the imbalance of knowledge between the parties, but there are two reasons for doubting whether it would have been effective. First, the courts were now too unfamiliar with the categories of presumptive fraud for it to be a useful device. Instead, once again, they turned to the law of error. Secondly, the traditional roles are reversed in *Steuart’s Trs* in that it would normally be the seller who was in a position of

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<sup>934</sup> *Ibid.* at 200, per Lord President Inglis.

<sup>935</sup> *Ibid.* at 195 per Lord Shand.

<sup>936</sup> *Ibid.* at 199 per Lord President Inglis; at 201 per Lord Ardmillan.

<sup>937</sup> *Ibid.* at 198 per Lord Shand.

<sup>938</sup> McBryde (2007) paras 15-31 - 15-34.

knowledge or who had access to information about the property. Had the mistake been the purchaser's it would be easier to see how fraud might operate.

However, this does appear to be another instance of importing what amounts to wrongful behaviour or fault into the law of error, and it presents great difficulties. The court is clear that the defender's behaviour has been "injurious"<sup>939</sup> to the pursuer, but despite the fact that this is the language of delict, the remedy comes from the law of contract and enrichment: reduction of the sale, plus reimbursement of expenditure (although Lord Ardmillan calls it "restitution"<sup>940</sup>). Perhaps this is reparation in the broad sense in which Stair used it, whereby it can encompass restitution of property as well as pecuniary damages.

In other examples of the rule, some cases fall within the category of relationship cases, and are more easily classified as fraud, in the presumptive sense. In *Purdon v Rowatt's Trs*<sup>941</sup> the action was to reduce a deed, alleging that it had been granted in error as to its effect and obtained by fraud. The granter was a person not fully capable of understanding the deed, he had no independent legal advice and, in addition, the transaction was gratuitous. Separate issues of fraud and error were sent to the jury, who did not find fraud but found the deed was obtained by "unfair practices on the part of Mr Gebbie, their agent, unduly taking advantage of the situation of Robert Purdon in the absence of his legal advisor".<sup>942</sup> On appeal, the court was clearly of the view that in circumstances where the lawyer took advantage of the other party's ignorance in order to procure the deed, it could amount to fraud. Lord Murray thought such a claim competent and said that it was not clear why the jury did not return a finding of fraud.

Similarly, *Inglis' Trs v Inglis*<sup>943</sup> is a succession case where a sister had elected for legitim instead of a testamentary provision in the belief that the trustees of the estate, who included her brother, had agreed she was entitled to the whole legitim fund,

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<sup>939</sup> (1875) 3 R 192 at 201 per Lord Ardmillan.

<sup>940</sup> *Ibid.*

<sup>941</sup> (1856) 19 D 206.

<sup>942</sup> *Ibid.* at 211.

<sup>943</sup> (1887) 14 R 740; affd (1890) 17 R (HL) 76.

subsequent to which her brother asserted his claim to one half. The First Division allowed her to revoke the election on grounds of essential error. The reason for the decision appears to be an error which is taken advantage of by the other party, relying on *Steuart's Trs.*<sup>944</sup> The court's focus was clearly on the behaviour of the brother, which is variously referred to as a lack of "fair play"<sup>945</sup> and "fault".<sup>946</sup> The key question for the court was not the error *per se*, but "how was the misapprehension brought about"?<sup>947</sup> As discussed above, this appears to be typical of the approach of the Scottish courts. They are, of course, concerned with vitiated consent, but the way in which it was vitiated (the cause) is more important than the flawed consent in itself (the result). Of course, both are necessary for a successful challenge to a deed previously granted. Hence, on the face of it, this was a successful challenge on grounds of essential error, but in reality it was the taking advantage of her ignorance, in the context of a family relationship, which was conclusive. It was an "erroneous belief" brought about by "the fault" of the brother,<sup>948</sup> and could conceptually have been a presumptive fraud case. Lord Shand attempted to explain the operative principle:<sup>949</sup>

I think it is a principle of the law that whatever may be the real intention of any person interested in a transaction, wherever an intention has been manifested, so as to induce another to act upon it, the person who has so induced another to act will be barred from afterwards denying that the intention he manifested was his real intention.

He also made a policy statement:<sup>950</sup>

That doctrine has been made part of the law for the purpose of enforcing honest dealing between parties to pecuniary transactions, and has been

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<sup>944</sup> (1875) 3 R 192.

<sup>945</sup> (1887) 14 R 740 at 746, per the Lord Ordinary (Trayner).

<sup>946</sup> *Ibid.* at 758 per Lord President Inglis.

<sup>947</sup> *Ibid.* at 751 per Lord President Inglis.

<sup>948</sup> *Ibid.* at 758 per Lord President Inglis.

<sup>949</sup> *Ibid.* at 760 per Lord Shand.

<sup>950</sup> *Ibid.*

enforced in many cases with the result of compelling parties to act honestly towards each other.

This is the territory of substantive justice, of “unfairness” or “dishonest dealing”, once the territory of the law of fraud, now identified as essential error, but the key determinant of liability is the “fault” of the other party.

Cases where there is no relationship of trust are more difficult because in a commercial context, in theory, each party should look out for his interests without the law’s intervention. However, as in *Steuart’s Trs*, it is the behaviour of the parties which is under scrutiny and the courts appear to be enforcing a standard of honesty, particularly where there is inequality in the knowledge of the parties. So, in *Sword v Sinclairs*<sup>951</sup> it is clearly relevant that an inexperienced apprentice who copied down a mistaken price without querying it, was taken advantage of by an experienced buyer.<sup>952</sup> However, again the difficulty presents itself that the roles are reversed, as in many of these cases, in that the law normally offers greater protection to buyers than to sellers. Some more recent cases exhibit the same role reversal. In *Angus v Bryden*<sup>953</sup> it was again the purchaser who took advantage; in *McLaughlin v The New Housing Association Ltd*<sup>954</sup> it was the tenant who took advantage of the Housing Association’s error ; and in the Singaporean case *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd*<sup>955</sup> it was students who took advantage of the commercial giant Hewlett Packard’s error. Perhaps therein lies the clue, for had the more powerful party in these cases been the one taking advantage of the other’s ignorance it would probably fall on the fraud side; fault by the weaker party appears to raise different issues.

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<sup>951</sup> (1771) Mor 14241.

<sup>952</sup> In McBryde’s analysis of the Session Papers for the case he suggests that although judicial reasoning is sparse, it was relevant that the seller was described as an “apprentice” who was inexperienced, in contrast to the buyer who was an experienced trader who snatched at a bargain (McBryde (1997) p.286).

<sup>953</sup> 1992 SLT 884.

<sup>954</sup> 2008 SLT (Sh Ct) 137.

<sup>955</sup> [2004] 2 SLR 594; [2004] SGHC 71.



Cases like *Steuart's Trs* are an interesting case study of where the border lies between fraud and error. They are probably at the extreme edges of both and do not fit entirely comfortably with either. The determining factor is whether the contract is reduced because of the *error* (for instance, if an error as to price is an essential error) or because of the defender's *fault*, in which case it is more suited to the law of fraud.

## 5. Fraud or Error: does it matter?

It might be argued that so long as a legal remedy is provided it matters little where that remedy is structurally located. On the other hand, the modern law of error – still unsettled and confusing – is testament to the view that it may matter from the perspective of understanding and developing the law in a coherent and predictable way. In my view, the law of error is no place to develop rules and limitations for the morally complex circumstances engendered by conduct which the law regards as unconscionable or, in Scottish parlance, unwarrantable. Error solves problems by looking at issues of consent;<sup>956</sup> fraud is essentially about making distinctions between behaviour which is culpable or non-culpable. Error, therefore, concerns itself with the consent of the pursuer; fraud with the behaviour of the defender. Error does not – or should not – concern itself with questions of fault; hence the reason why traditionally the limiting criteria in the law of error concern the type of error (whether it is *in substantia*), rather than how it was caused.<sup>957</sup> Fraud, on the other hand, is quintessentially about fault and the rules of fraud – intentional or presumptive – are honed to make fine distinctions about whether the behaviour of the defender is culpable.

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<sup>956</sup> Modern debates on the law of error tend to focus on whether consent is subjective or objective; whether error renders a contract void or voidable; the extent to which unilateral error is justiciable; and how to interpret the substantive content of Bell's categories of essential error.

<sup>957</sup> This analysis is in agreement with MacLeod's characterisation of Stair's view of error, namely that it essentially concerned consent, and did not concern fault (MacLeod (2010) pp.399-401). I would, however, disagree with his characterisation of Stair as belonging to the *ius commune* rather than the scholastic-natural law tradition. Stair may have been pragmatic in relation to the operation of error, but only because error was not his "fault" category. His treatment of fraud demonstrates that he was deeply concerned with questions of motive and fault.

Hence, in the law of fraud subjective motive is important, whether intentional, negligent or “innocent”; if the latter, then the test of honest belief, and the reasonableness of the grounds for that belief can be scrutinised (even if modern courts appear to reject the opportunity to do so). The matrix of liability could also include questions of whether or not there was gross inequality in the terms of the bargain (the most obvious example being whether or not the transaction in question was gratuitous); whether or not both parties stood on equal terms and had equal access to legal advice; whether there was a relationship of confidence, all historically familiar categories from the old law of presumptive fraud. Error, in theory, does not concern motive. And nor should it, because in its essence error is a category of strict liability, it is about “no fault”. The attempt to transform it into an overarching category which encompasses all forms of unintentional misrepresentation, without regard to motive or culpability, is therefore flawed.

Perhaps the most compelling reason to regret the fact that error has become the repository for unintentional misrepresentation is a structural one. *Dempster v Raes*<sup>958</sup> was an action to reduce an agreement entered in by legatees on grounds that their consent had been obtained by fraudulent misrepresentation and concealment, greatly to their prejudice. There was also a separate issue of induced essential error. One of the defender’s arguments was that there was no duty to disclose, hence no relevant issue of concealment. Lord Justice-Clerk Moncreiff held that “[i]f the party who is to lose is in ignorance, and the party who is to gain is well-informed, it is a case of the grossest fraud.”<sup>959</sup> This is particularly so in the context of succession, but there are clear echoes of earlier presumptive fraud criteria, namely the relationship of the parties, and the inequality in their knowledge. Indeed, Lord Moncreiff foreshadows his later judgment in *Steuart’s Trustees v Hart*<sup>960</sup> when he comments in *Dempster* that “the pursuers were ignorant, and known to be ignorant by the defenders, who took advantage of this to make a most unfair bargain. It is not so much any specific error that is alleged as general ignorance.”<sup>961</sup> It is significant that three of the judges

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<sup>958</sup> (1873) 11 M 843.

<sup>959</sup> *Ibid.* at 846.

<sup>960</sup> (1875) 3 R 192, discussed below, pp.194-9.

<sup>961</sup> (1873) 11 M 843 at 847.

in *Dempster*<sup>962</sup> took the view that there was no need for an issue of error induced by misrepresentation, only one of fraud.<sup>963</sup> Lord Benholme objected to the issue of induced error on the grounds that the *onus* is quite different depending on whether error or fraud is argued:<sup>964</sup>

My objection to the second issue is that there is no sufficient statement of essential error on record. Besides, if the issue were allowed without the word “fraudulent” it would change very much the nature of the *onus*. Now, in this case the *onus* ought to be as heavy on the pursuers as is implied in the word “fraudulent”.

It is worth repeating the fact that fraud has a stable set of criteria for its application, consistent over centuries, which apply to all forms of fraud, including misrepresentation: materiality, reliance and causation. If the focus is on the fraudulent conduct of the defender, the traditional criteria of the law of fraud come into play and the focus is on the defender’s behaviour. The misstatement must be material, the pursuer must have relied on it to his detriment, and there must be a causative link between the conduct and the loss caused.<sup>965</sup> However, if the focus of the enquiry is on the consent of the pursuer, the limiting criteria are whether or not the error was “essential” using Bell’s five categories, and (possibly)<sup>966</sup> whether the error was just and reasonable. It is not necessary to investigate the misrepresenter’s honesty or good faith or whether or not there were reasonable grounds for his belief that his statement was true.<sup>967</sup> And, arguably, Lord Watson’s ostensible redefinition of essential error in *Stewart v Kennedy*<sup>968</sup> and *Menzies v Menzies*,<sup>969</sup> which has attracted the criticism of almost all academic commentators, was simply an attempt to grapple with the impossible task of marrying the criteria of fraud with the content

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<sup>962</sup> Lord Cowan accepts as relevant an issue of essential error induced by misrepresentation, *ibid.* at 847.

<sup>963</sup> *Ibid.* at 847.

<sup>964</sup> *Ibid.*

<sup>965</sup> Clearly restated in *Ritchie v Glass* 1936 SLT 59.

<sup>966</sup> This is a suggestion made by TB Smith in his discussion of the law of error (Smith (1955) p.521), but there is precious little evidence of its existence as a criterion in case law.

<sup>967</sup> *Boyd & Forrest v Glasgow & SW Railway Co* 1914 SC 472 at 494 per Lord Dundas.

<sup>968</sup> (1890) 17 R (HL) 25 at 29-30.

<sup>969</sup> (1893) 20 R (HL) 108 at 142.

of error by preserving a test of causation from the former (the “but for” test) and lowering the standard from “essential” to “material” in the latter.

If the issue is one of error rather than fraud, it changes not only the onus, but the whole structure of the legal argument. In Birksian language,<sup>970</sup> framing the issue in terms of the law of error is to make the mistake of starting with the result rather than the causative event. It is axiomatic that fraud causes error, for it is in the very nature of deceit or imposition. The error of one party is the *sina qua non* of the fraud of the other. But to start with the outcome rather than the behaviour which caused the error is to put the cart before the horse. It is submitted that this is part of the explanation for the state of confusion in the court decisions of the nineteenth century, as well as the problems inherent in the modern law of error.

Peter Stein made an important observation on the subject more than fifty years ago.<sup>971</sup>

Following its tradition of eclecticism, [Scots law] could have adopted either the English rule or the Continental rule. Either course would have constituted an innovation, but neither would have violated the basic principles of the Scots law of contract. The adoption of the English rule would have meant extending the grant of reduction for fraud to cover also innocent misrepresentation *dans causam contractui*. The adoption of the Continental rule would have meant extending the grant of reduction for error in substantial to cover also error not in substantial. But instead of making a deliberate choice, the exponents of Scots law adopted a muddled mixture of the two, taking the rules laid down in English cases, and clothing them in pseudo-civilian dress. The law thus laid down was difficult to apply, and

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<sup>970</sup> Birks criticised English law for lack of a coherent taxonomy, particularly in relation to unjust enrichment (Birks (2005) p.20), and proposed a high level structure for private law which looked principally to the causative event rather than the response to that event, thereby providing a model for separating wrongs as one of those events from unjust enrichment which is a separate event (Birks (1998) p.14).

<sup>971</sup> Stein (1958) pp.191-192.

some judges were unaware that any extension of the law had taken place, and continued to apply the old law.

Lawson made a similar point even earlier, namely that both civil and common law probably reached the same end result but by different routes: in English law the work is done by “equitable fraud with its sub-departments of innocent misrepresentation and undue influence”;<sup>972</sup> whereas, Continental law has a more subjective concept of error, with safeguards which he identifies as *culpa in contrahendo*, negative interest and an overarching principle of good faith.<sup>973</sup>

More recently Sefton-Green’s comparative analysis demonstrates that Scots law is not alone in its confusion. The broad pattern which emerges from her survey of European jurisdictions is that civilian systems employ the concept of mistake but bolstered by other criteria (*culpa in contrahendo*, good faith, reliance interest), whereas the English common law makes a clear separation between mistake and misrepresentation. She points to a helpful conceptual distinction in how different jurisdictions use the doctrine of mistake: some focus on the mistake itself, others emphasise how the mistake was caused.<sup>974</sup> The former she characterises as a “static” concept of mistake, which does not look under the mistake, in contrast with a “dynamic” one which focuses on the cause, and on the basis of her study she suggests that there is a perceptible tendency to move towards the latter. Her study shows “that the law is putting more emphasis on the parties’ behaviour” across Europe,<sup>975</sup> which she claims goes in tandem with “a raising of standards of contractual behaviour more generally”.<sup>976</sup> Whether or not this proves to be the case, Scotland historically had a static concept of error, and arguably still has, the key being the content of the error and whether or not it is *in substantia*. However, the use of error to deal with unintentional deceit has meant an inevitable move to a more dynamic concept. Unlike English law, where mistake is static, and misrepresentation

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<sup>972</sup> Lawson (1936) p.104.

<sup>973</sup> *Ibid.* pp.81 and 103.

<sup>974</sup> Sefton-Green (2005) p.380. She acknowledges that this is a distinction borrowed from Zweigert and Kotz.

<sup>975</sup> *Ibid.* p.384.

<sup>976</sup> *Ibid.*

is the dynamic part of the law, Scotland no longer separates the two, but is attempting to make the law of error do both jobs. In Scots law we are trying to have both a static and a dynamic concept of error, perhaps one explanation for its current unhappy state.

To some extent the choice of one or the other is a policy choice, although such a choice ought to be made from a well-informed position. Stein's point about the lack of conscious analysis on the part of the courts is well made and, as has been shown, the picture has been one of confusion. It might have fallen to academic lawyers to provide analysis of the change that was taking place, but instead they may have compounded the problem, as will be discussed in chapter 6.

### ***Chapter 6: Fraud as Deceit - the modern law***

As has been demonstrated, historically fraud encompassed an enormously wide range of behaviour which the law was prepared either to prevent or otherwise remedy. However, the definition of fraud was considerably narrowed towards the end of the nineteenth century and, as a consequence, the scope of error was expanded to incorporate misrepresentation and to do part of the job fraud had previously done. Commentators (and teachers of the law) then had to grapple with the structural difficulties which this change represented. This chapter looks at the way in which fraud is represented in modern legal literature. The focus remains on the question of definition, and, in line with the views presented in the previous chapter, it also considers the account which modern commentators give of error and misrepresentation and their relationship with fraud. It will be evident to those familiar with modern Scots private law that my analysis differs from the accepted modern view in several respects: in particular, the limitation of fraud to intentional deceit; the related view that “innocent” misrepresentation was not part of the law of fraud; that all forms of unintentional misrepresentation were, rather, part of the law of error. On the contrary, I have presented the case that historically misrepresentation was part of the law of fraud and, consequently, that the category of “induced” error is misconceived. In this chapter, therefore, I offer a critical review of the modern taxonomy of fraud in light of the historical account previously given.

Three important academic treatments represent a wide spectrum of views as to the meaning and substance of fraud. At one end of the spectrum is TB Smith<sup>977</sup> who laments the narrowing of the scope of fraud to intentional deceit through malign English influence, and who argues for a more expansive meaning as the modern

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<sup>977</sup> Reference is made principally to Smith’s *Short Commentary* (Smith (1962)).

expression of *dolus* or bad faith. At the opposite end is Thomson<sup>978</sup> who takes the authorities to support a much narrower definition, one which he views as being more appropriate for modern Scotland's market economy and the application of the *caveat emptor* principle. McBryde's work perhaps occupies the middle ground although his views have altered over time, moving from a broad view closer to a narrow one. In order to establish how these writers eliminate part of the older definition of fraud from modern accounts of the law, it is necessary to examine how they deal with the doctrines of misrepresentation and error in their work.

### 1. The Modern Law of Fraud, Error and Misrepresentation

Undoubtedly, the view which emerged at the end of the nineteenth century, namely that unintentional misrepresentation was part of the law of error, presented taxonomical difficulties for those attempting to systematise Scots law in its wake. The result of creating a category of induced error meant that misrepresentation had to be divided into two basic categories: intentional misrepresentation and unintentional misrepresentation (whether negligent or "innocent"). The former remained part of the law of fraud; the latter was part of the law of error.

#### (a) *Gloag, The Law of Contract*

In the first major treatise on Scots contract law, Gloag's *Law of Contract*, the author structures his account into three chapters: chapter 22 deals with error; chapter 23 with misrepresentation and concealment; and chapter 24 with fraud.<sup>979</sup> There is some overlap in that within misrepresentation he has to include a section on the "Meaning of Essential Error",<sup>980</sup> but it is a sensible treatment of the issues given their history. Gloag preserved the same division in the second edition (1929), but the substantive content had significantly changed in that his treatment of error was considerably expanded and included a new section on "error induced by fraud". However, within

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<sup>978</sup> Thomson (1990); Thomson (2000); Thomson's views are also expressed in the Scottish contribution to Sefton Green (2005).

<sup>979</sup> Gloag (1914) Index pp.xv-xvi.

<sup>980</sup> *Ibid.* p.523.



each of the three chapters there is frequent cross-referencing. Gloag's discussion of error and fraud is laced with the concept of misrepresentation; that of misrepresentation frequently digresses into fraud and error, including an explanation of essential error.<sup>981</sup> The attempt to treat each separately is only partly successful and involves considerable repetition of the same point within different chapters.

Gloag treats fraud and facility and circumvention together, considering the latter a species of fraud. Fraud, therefore, "may consist in misrepresentation ... or in taking an unfair advantage in circumstances where the word misrepresentation is hardly applicable".<sup>982</sup> In relation to misrepresentation, if the defender "was aware that his representations were untrue, or made them recklessly" it would amount to fraud. However, if he was not so aware, "the case may be one of misrepresentation, but not of fraud", because "the essence of fraud consists in the deceitful intention of the party".<sup>983</sup> He then goes on to distinguish the effects of different types of misrepresentation. For a misrepresentation to be fraudulent it "always implies a moral wrong. Mere negligence is not fraud".<sup>984</sup> Negligent misrepresentation is therefore not fraud, nor is innocent misrepresentation, which Gloag locates within the law of error:<sup>985</sup>

The principle is not that an innocent misrepresentation amounts to a wrong, but that a man has no right to insist on a contract which he would not have obtained if he had not led the other party into error by misrepresenting the facts, or that, if fraud is necessary, it is involved in maintaining an advantage so derived.

Gloag does include the tentative possibility that innocent misrepresentation might sometimes amount to fraud because of "a wider principle, which covers the case of innocent misrepresentation by the agent, viz., that a man cannot take any advantage obtained by his agent's misstatements. In cases of fraud this has, in recent cases,

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<sup>981</sup> Gloag (1929) p.472.

<sup>982</sup> *Ibid.* p.475.

<sup>983</sup> *Ibid.*

<sup>984</sup> *Ibid.* p.476 .

<sup>985</sup> *Ibid.* p.471.

been treated as a commonplace”.<sup>986</sup> Here he relies on the authority of *Mair v Rio Grande Rubber Est. Ltd*, as discussed above,<sup>987</sup> and would appear to relate innocent misrepresentation loosely to fraud in an agency context. His account of fraud proper is, however, narrow and he asserts that the principles laid down in *Derry v Peek* “are in entire accordance with the general trend of modern decisions in Scotland”.<sup>988</sup>

Gloag could be accused of following the pattern of English law, which clearly separates mistake and misrepresentation, but his account does accurately reflect the difficulties inherent in the decisions of the Scottish courts at that time.

### *(b) The Aberdeen contribution*

There was further interest in the law of error in the 1950s and 1960s when a group of scholars from Aberdeen University were exercised about its scope. This renewed examination of error by the Aberdeen scholars, JJ Gow, TB Smith and (later) Peter Stein,<sup>989</sup> was prompted by the publication of an article by the comparative scholar FH Lawson which contained the heresy that the English law of mistake and the Scots law of error were “almost interchangeable”.<sup>990</sup> In contrast to Continental law, as Lawson called it, which adopted a subjective concept of error and focused on the effect of the error on the consent of the parties, English law had a much more restrictive (and objective) doctrine of mistake and only allowed relief in exceptional cases where the thing bargained for no longer existed. Lawson suggested that *Stewart’s Trs v Hart* might be wrongly decided,<sup>991</sup> as it appeared to go against the English rule in *Smith v Hughes*<sup>992</sup> which, Lawson claimed, would be “fully accepted” in Scots law.<sup>993</sup> If that were the case, it would rule out unilateral mistake, including

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<sup>986</sup> *Ibid.* p.465.

<sup>987</sup> See ch.5, pp.194-195.

<sup>988</sup> Gloag (1929) p.478.

<sup>989</sup> Stein’s views are quite different from both Gow and Smith and, as has already been stated, they appear to me to represent a more accurate historical account. They are discussed in detail in ch.5 and are not incorporated into this review.

<sup>990</sup> Lawson (1936) p.99. For details of the debate see MacQueen (2005) pp.150-156.

<sup>991</sup> Lawson (1936) p.102. Lawson boldly suggested that the First Division “had not realized [*sic*] the full implications of the change introduced by the Mercantile Amendment Acts” (p.102).

<sup>992</sup> *Smith v Hughes* (1871) LR 6 QB 597.

<sup>993</sup> Lawson (1936) p.102.

knowledge and taking advantage of another's mistake, because there was no question of English law granting a remedy for an error in motive.<sup>994</sup> The English law of mistake is a very restrictive category, and it was Lawson's implication that the Scots law of error was similarly narrow that prompted the Aberdeen lawyers to react.<sup>995</sup>

Gow and Smith were what might be called legal nationalists,<sup>996</sup> alert to the independent identity of Scots law and the risk of its being subsumed into the law of a larger and more powerful neighbour. They, therefore, pointed the finger of blame at the influence of English law for any confusion about the law of error: Gow took a dim view of borrowings from England;<sup>997</sup> and for TB Smith any such confusion was the result of "incautious use of English precedents and references to English legal treatises".<sup>998</sup> In a flurry of publications they attempted to clarify the Scots law of error, relying on a historical analysis, arguing that since the time of Stair a remedy had been granted for unilateral error and, logically therefore, how much more would the pursuer deserve a remedy if the error was induced.

In essence, both Gow and Smith were arguing for a broader doctrine of error in Scotland, one capable of dealing with innocent misrepresentation. Gow's view was that "Scots law has, in practice, failed to enlarge the ambit of error *in substantia*, or, if it did, has of recent years restricted it, and also failed consciously to develop what Professor Lawson describes as the equitable relief of innocent misrepresentation."<sup>999</sup> Gow raised a bigger question, namely whether "Scots law has not fallen between the two stools of Roman error *in substantia* and English equitable fraud".<sup>1000</sup> He then embarked on a historical analysis of Scots law "prior to the English invasion"<sup>1001</sup> which, broadly summarised, made the case that historically Scots law accepted a doctrine of error *in substantia* even if the error was unilateral, limited only by

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<sup>994</sup> For a helpful overview of the English law of mistake see Cartwright (2007) pp.65ff.; McKendrick (2010) ch.16; MacMillan (2010).

<sup>995</sup> The reaction is explicit, see Gow (1952) p.472.

<sup>996</sup> MacQueen (2005b); Osler (2007) pp.172-178.

<sup>997</sup> Gow (1953) p.251.

<sup>998</sup> Smith (1962b) p.99.

<sup>999</sup> Gow (1952) p.474.

<sup>1000</sup> *Ibid.*

<sup>1001</sup> *Ibid.* p.478.

proving that the error was *justus et probabilis*.<sup>1002</sup> It should be pointed out that Gow cited no Scottish authority for this proposition, the only footnote citation being to *The South African Law of Obligations*,<sup>1003</sup> the only cases cited being cases of fraud or presumptive fraud.<sup>1004</sup> Having established that unilateral error was operative, by analogy so must induced unilateral error be. Crucially, Gow then asserted that innocent misrepresentation was not a distinct category in Scots law but “merely one of the inductive causes of error”.<sup>1005</sup> In fact the “gulf” which existed between the English and Scottish concepts of misrepresentation lay in the fact that in Scots law misrepresentation “enables a pursuer to get into the category of essential error”.<sup>1006</sup> In a later article Gow expressed the view that innocent misrepresentation was unknown to Scots law,<sup>1007</sup> and he was also particularly critical of Lord Watson’s reinterpretation of essential error in *Stewart v Kennedy* and *Menzies v Menzies*.<sup>1008</sup> In terms of the Institutional writers, many of Gow’s propositions are questionable. As discussed above, Stair relies on fraud and not error to deal with misrepresentation (as do Bankton, Erskine and cases up to the mid-nineteenth century), and unintentional misrepresentation was part of the law of presumptive fraud.

TB Smith’s views are considered in more detail below, but the importance of this academic debate is that both Gow and Smith took considerable pains to show that unilateral error, including error which was induced, was historically part of Scots law. Gow referred to “the indigenous principles of Scots law”,<sup>1009</sup> TB Smith’s interpretation of history was that “in the field of contract fraud either inducing contract or creating *error in substantialibus* was recognised by the Institutional writers”,<sup>1010</sup> since, therefore, the Institutional writers recognised unilateral error *in substantialibus* “it followed *a fortiori* that innocent non-fraudulent misrepresentation

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<sup>1002</sup> *Ibid.*

<sup>1003</sup> *Ibid.* n.32; the reference is to Lee, RW and Honoré, AM. The South African Law of Obligations (1950).

<sup>1004</sup> *Ibid.* n.33.

<sup>1005</sup> *Ibid.* p.479.

<sup>1006</sup> Gow (1953) p.243.

<sup>1007</sup> *Ibid.* p.250.

<sup>1008</sup> Gow (1952) pp.482-483; Lord President Clyde’s interpretation of *Menzies* along the lines I have suggested above is considered to be “a misstatement of Scots law” (Gow (1953) p.252).

<sup>1009</sup> Gow (1953) p.248.

<sup>1010</sup> Smith (1955) p.511.

by one party has always been relevant to explain and establish fundamental *error in substantialibus*.<sup>1011</sup> With respect, it is suggested that this was not how error was historically conceptualised in Scots law, indeed the expansion of error was a battleground throughout the nineteenth century. However, these articles on the law of error are important in that they set the pattern for the modern law, and the narrative that the doctrine of error historically included induced error has never been seriously questioned since.<sup>1012</sup>

The articles also give a very different view to the one presented in this thesis, namely that “induced error” was not a historically accurate category, but that it was part of the law of fraud. No-one has questioned the wisdom of creating a category of induced error: it has simply been accepted as the way forward. This can be seen as an attempt to make sense of a body of case law that was inconsistent and confusing. Alternatively, for some, adherence to what looked like a civilian rule was an attractive option for the future of Scots law. However, much of the focus of academic critique has been on the damage done to the law of error by Lord Watson’s redefinition of it in *Stewart and Menzies*. No-one appears to have noticed the damage done to the law of fraud in the process except perhaps Peter Stein, whose short account of the way in which error and misrepresentation merged seems to me the most accurate reading of the historical sources.<sup>1013</sup>

### (c) *TB Smith*

TB Smith is an important part of the story of fraud and error, and, in a sense, he can be seen as the bridge to modern commentary on the law of fraud. Many eminent modern scholars were his students in Edinburgh’s Old College and his influence as a writer and as a Law Commissioner was considerable. The overall scheme presented

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<sup>1011</sup> *Ibid.* p.511-512. Earlier Smith did recognise that in the early 19<sup>th</sup> century unintentional misrepresentation was sometimes decided on grounds of what he called “quasi-fraud” (p.510), which would appear to contradict the assertion that it had always been part of the law of error. The cases cited are all cases of presumptive fraud or unintentional misrepresentation (p.510 n.12).

<sup>1012</sup> McBryde, for instance, accepts that up to the middle of the 19<sup>th</sup> century the proposition that “innocent misrepresentation must induce essential error” is correct (McBryde (1977) p.5).

<sup>1013</sup> Stein (1958) chs.14 and 15.

in his *Short Commentary on the Law of Scotland*, written later than his article on error, is somewhat perplexing in relation to these topics and he might be accused of a lack of joined-up thinking.

In the *Short Commentary*, error and misrepresentation are both considered as grounds of nullity to a contract and are treated together.<sup>1014</sup> However, in this chapter there are also frequent references to fraud, and indeed even a fraudulent misrepresentation is presented simply as an aspect of induced error, albeit it also has delictual effect. It appears that the whole of the law of misrepresentation is now subsumed within the law of error.<sup>1015</sup>

It is important to recognise that when it is said that reduction may be sought on grounds of fraud, misrepresentation or concealment, this is only a short way of stating that error or misapprehension induced regarding certain matters, by these means, may justify reduction of contract. Misrepresentation which does not in fact deceive has no effect upon the validity of an agreement; error of some kind must be proved. Indeed, so far as the law of contract is concerned, misrepresentation merely widens the scope of the doctrine of error to include cases of error in motive which would not *per se* justify reduction without the element of misrepresentation.

Fraud, on the other hand, is treated as a delict under the heading “Wrongs to Property”, where he considers fraud and misrepresentation together in one short paragraph.<sup>1016</sup> However, Smith’s views on the general concept of *culpa* are well known and are relevant in this context. In his discussion of *culpa* as a general fault principle, he argued that it could be used to encompass liability for negligent misstatements. Clearly this was prior to *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>1017</sup> and the creation of a statutory basis for liability,<sup>1018</sup> but the fact that he

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<sup>1014</sup> Smith (1962) ch.37.

<sup>1015</sup> *Ibid.* pp.808-809.

<sup>1016</sup> *Ibid.* p.739.

<sup>1017</sup> [1964] AC 465.

<sup>1018</sup> Law Reform (Miscellaneous Provisions) Act (Scotland) 1985, s.10.

regarded some forms of unintentional misstatements as based in a principle of *culpa* and at the same time as part of the law of error is arguably a systemic difficulty.

Smith's treatment of fraud is curious because on the one hand he acknowledged the traditional breadth of fraud beyond intentional deceit, a type of fraud which he described as being "inconsistent with bona fides"<sup>1019</sup> and which was analogous to English equitable fraud. He recognised that the Scottish courts,<sup>1020</sup>

at times construed *dolus* in the wider meaning of the Civil law, i.e., not in the restricted delictual sense, but in the broader sense of conduct inconsistent with bona fides, or applied the maxim *culpa lata dolo aequiperatur*.

Or again,<sup>1021</sup>

In exercise of inherent equitable powers, the Court of Session was on occasion prepared to grant reduction in cases of fraud in the sense of *mala fides*, where there had been unconscionable dealing, misrepresentation or unconscionable concealment.

Furthermore, he insisted that the definition of fraud in *Derry v Peek* should be restricted to the law of delict. It was, therefore, important to Smith to maintain two different definitions of fraud: one consistent with *Derry v Peek* which was the territory of delict; the other a broader notion of bad faith which, he claimed, was still effective to reduce a contract.<sup>1022</sup> He attempted to square the circle by taking the view that innocent misrepresentation involved situations where "there has been neither *dolus* nor *culpa*"<sup>1023</sup> and rejected "the peculiarly English idea that misrepresentation which is not deliberately fraudulent is not culpable".<sup>1024</sup> However, because of his adherence to the error analysis, this is a somewhat unsatisfactory

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<sup>1019</sup> Smith (1962) p.833.

<sup>1020</sup> *Ibid.* p.830.

<sup>1021</sup> *Ibid.*

<sup>1022</sup> *Ibid.* p.833.

<sup>1023</sup> *Ibid.* p.835.

<sup>1024</sup> *Ibid.*

account of fraud, error and misrepresentation and lacks coherence at a conceptual level. Given the influence he had on future generations, had Smith extended his argument about the broad notion of fraud into the territory of unintentional misrepresentation, the modern law might look quite different.

*(d) Professor McBryde*

The most detailed examination of fraud in Scots law is the work of Professor McBryde which spans more than three decades, from his doctoral thesis in 1976<sup>1025</sup> through to the third edition of *The Law of Contract in Scotland* in 2007.<sup>1026</sup> Like his predecessors McBryde regards it as important to separate fraud from misrepresentation and in all three editions of *The Law of Contract* misrepresentation is treated as a subcategory of error, thus creating some repetition because fraudulent misrepresentations are also treated as part of the chapter on fraud.<sup>1027</sup>

*McBryde's treatment of error*

In the chapter entitled "Error and Misrepresentation",<sup>1028</sup> McBryde deals at length with the development of negligent and innocent misrepresentation, acknowledging that "[i]n the classical law of essential error there was no distinction between uninduced and induced error".<sup>1029</sup> McBryde's position is that Scots law historically treated innocent misrepresentation as a question of essential error.<sup>1030</sup>

To be relevant, innocent misrepresentation must induce essential error. In the context of the development of Scots law up to the middle of the 19<sup>th</sup> century this proposition was correct.

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<sup>1025</sup> McBryde (1976).

<sup>1026</sup> McBryde (2007). McBryde's account of fraud was first set out in his PhD thesis. Much of the material in *The Law of Contract* is based on his thesis and the broad structure has not changed, although some aspects of his thinking have, and these will be noted.

<sup>1027</sup> McBryde (2007) paras 14-10 – 14-12.

<sup>1028</sup> References are given to the third edition of *The Law of Contract in Scotland*, except where previous editions are relevant. McBryde (2007) ch.15. Misrepresentation is the largest single topic in this chapter, see paras 15-42 – 15-87; for his analysis of the law of error see also McBryde (1977) and McBryde (2000).

<sup>1029</sup> McBryde (2007) para 15-43.

<sup>1030</sup> *Ibid.* para 15-50.



It is, however, at least arguable that the link between innocent misrepresentation and error was only confirmed at the end of the nineteenth century, and that it was part of the law of fraud up to that point. McBryde would take issue with that argument.

On the question of innocent misrepresentation, like Smith, McBryde also regrets the redefinition of essential error by Lord Watson and the ensuing confusion.<sup>1031</sup> He disagrees with Stein's analysis<sup>1032</sup> that innocent misrepresentation was a concept known to Scots law and dealt with by using categories of presumptive fraud. As mentioned above, I regard Stein's interpretation as convincing; Professor McBryde would, therefore, presumably disagree with the analysis presented in this thesis. There are, however, areas of agreement: for instance McBryde acknowledges that the classical law of error "denied any importance to whether or not error was induced. Uninduced essential error and induced essential error had the same effect on a contract. The contract was void. Innocent misrepresentation came into Scots law on the back of an extended doctrine of essential error".<sup>1033</sup> We would, therefore, agree about the general development of error, albeit not about the timing of it, but that is only part of the story. The missing part of the accepted narrative is that innocent misrepresentation was dealt with as a species of fraud, and not error. McBryde specifically denies that the Institutional writers were concerned with misrepresentations other than where there was fraud (deceit)<sup>1034</sup> and provides evidence that the courts did not give a remedy for misstatements which were false but not fraudulent. However, the cases used to illustrate this point were actions for damages, where presumptive fraud was not relevant unless it amounted to *culpa lata*.<sup>1035</sup> He regards fraud and error as separate and distinct doctrines with no overlap,

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<sup>1031</sup> *Ibid.* paras 15-61 – 15-64 .

<sup>1032</sup> *Ibid.* para 15-47 n.116, referring to Stein (1958) chs. 14 and 15. He also disagrees with Professor Walker's view that innocent misrepresentation was recognised as a separate doctrine from error (*ibid.* referring to Walker, DM "Equity in Scots Law" 1954 JR 103 at p.130).

<sup>1033</sup> McBryde (1977) p.19.

<sup>1034</sup> McBryde (2007) para 15-43.

<sup>1035</sup> The cases cited are *Oliver v Suttie* (1840) 2 D 514 and *Campbell v Boswell* (1841) 3 D 639, see McBryde (2007) paras 15-43 - 15-44. He does acknowledge that the latter was an action for damages.

despite abundant evidence that the Scottish courts had a good deal of difficulty making that distinction, and his views are clearly stated:<sup>1036</sup>

Traditionally, Scots law took little notice of misrepresentation, unless it amounted to fraud ... it prefers to draw a fundamental distinction between fraud on the one hand, and error induced by misrepresentation on the other.

McBryde's exposition of the law of error has been influential, particularly his "error plus"<sup>1037</sup> analysis, namely that error will only be an effective ground of challenge where there is an additional factor: misrepresentation; taking advantage of the error; "mutual"<sup>1038</sup> error or a gratuitous transaction. It is interesting to note that similar "aggravating factors"<sup>1039</sup> are found in the older law of presumptive fraud, but perhaps this is consistent with an analysis which places most of the law of unintentional fraud within the law of error.

#### *McBryde's treatment of fraud*

McBryde's treatment of the history of fraud is one which is in substantial agreement with my account of presumptive fraud in chapter 2 above. He does concede that historically fraud had a broader meaning and (in his PhD thesis) that there was "a tendency to infer fraud"<sup>1040</sup> although "[n]o clear indication is given of those circumstances in which fraudulent intent must be proved and those in which it may be inferred".<sup>1041</sup> He recognises that facility and circumvention "developed from the Scots law of fraud"<sup>1042</sup> albeit it was "a very different form of fraud"<sup>1043</sup> which did

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<sup>1036</sup> Du Plessis & McBryde (2004) p.122.

<sup>1037</sup> McBryde (2007) para 15-23.

<sup>1038</sup> McBryde is somewhat vague about the meaning he attributes to the term "mutual", but he appears to use it as a catch-all category for errors that are either shared by the parties or where the parties are at cross purposes (*ibid.* para 15-34). Most modern commentators make a distinction between "mutual" error (where the parties are at cross purposes usually leading to dissensus) and "common or shared" error, "where both parties contract under the same mistaken belief" (Gloag and Henderson (2007) paras 6.23-6.24).

<sup>1039</sup> McBryde (2000) p.78.

<sup>1040</sup> McBryde (1976) p.73.

<sup>1041</sup> *Ibid.*

<sup>1042</sup> McBryde (2007) para 16-01.

<sup>1043</sup> *Ibid.* para 16-07.

not require deceit, merely taking advantage of weakness or facility.<sup>1044</sup> In addition, fraud was readily inferred in two other situations: unequal bargains with vulnerable people;<sup>1045</sup> and transactions by insolvents who either alienated goods to defeat creditors or purchased goods aware of their own insolvent status.<sup>1046</sup> His view is that this type of fraud has “disappeared”<sup>1047</sup> and its place has been taken by the discrete rules which exist for facility and circumvention,<sup>1048</sup> or by the legislation governing the behaviour of bankrupts.

Another common category of presumed fraud involved taking advantage of a confidential or fiduciary relationship. There is an obvious connection with the modern law of undue influence or that of fiduciary relationships. However, McBryde does not consider either to have been historically part of the law of fraud:<sup>1049</sup>

Facility and circumvention involve an element of fraud (in a special sense of that term), but undue influence does not.

The reason for excluding undue influence is because “there need not be corrupt motive, or deceit or fraudulent conduct.”<sup>1050</sup> It might be pointed out that in his account of facility and circumvention he recognises that no deceit is required, so it is not clear why one is said to derive from fraud and the other not.<sup>1051</sup> It may be because he takes the view that undue influence came to be accepted in Scotland as a result of English influence.<sup>1052</sup> He concedes that cases of parental “undue” influence would “probably have been considered evidence of fraud” in earlier case law, although again it is not clear why only the parental relationship is singled out, as there is ample evidence that the abuse of other confidential relationships was

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<sup>1044</sup> *Ibid.* para 16-17. Gloag offers a similar analysis, Gloag (1929) pp.484-486.

<sup>1045</sup> McBryde (2007) para 16-03.

<sup>1046</sup> *Ibid.* paras 14-25 ff.

<sup>1047</sup> *Ibid.* paras 16-04 – 16-07.

<sup>1048</sup> See McBryde (2007) ch.16 for a full account of those rules.

<sup>1049</sup> *Ibid.* para 16-39; and on the distinction between fraud and breach of fiduciary duty, see para 14-34.

<sup>1050</sup> *Ibid.* para 16-39.

<sup>1051</sup> “It is clearly the law that there need not be deceit”, *ibid.* para 16-17.

<sup>1052</sup> *Ibid.* para 16-24.

presumed to be fraud.<sup>1053</sup> In *Ross v Gosselin's Exrs* Lord President Clyde took the view that both facility and circumvention and undue influence came from the same root:<sup>1054</sup>

I think it would be extravagant and fallacious to refuse to recognise the distinction between these two different kinds of questions, merely because they are both ultimately referable to the same broad category of fraud. Cases vary infinitely in their special circumstances; and there are no doubt cases in which the holding of a position of influence may be no more than an item of evidence of circumvention.

McBryde identifies the turning point away from inferred fraud: “When it was settled that fraud needed specific averments, it must have been difficult to reconcile this with cases of facility in which the proof of fraud was absent but fraud was inferred.”<sup>1055</sup> This is, of course, to ignore the fact – as do all modern courts and commentators – that when the Institutional writers insisted on proof of fraud it went hand in hand with the exceptions they all acknowledged as cases where fraud could be inferred.<sup>1056</sup>

The modern law of fraud is, therefore, limited to intentional deceit and no more than that. Furthermore, McBryde’s account of the law of fraud, other than its history, is strongly influenced by Gloag. McBryde analyses fraudulent behaviour under three headings: fraudulent representation, fraudulent concealment and unfair activities.<sup>1057</sup> This closely mirrors Gloag’s taxonomy in which fraud “may consist in misrepresentation ..., or in taking an unfair advantage in circumstances where the word misrepresentation is hardly applicable”, active concealment being an aspect of

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<sup>1053</sup> See ch.2 pp.74-87.

<sup>1054</sup> *Ross v Gosselin's Executors* 1926 SC 325 at 334 per Lord President Clyde; see also *Log's Trs v Reid* (1885) 12 R 1094 in which Lord Kinneir said, “It would appear to me, therefore, that conveyances obtained by undue influence, whether actually exercised or presumed by law in consequence of the relation of the parties, are in precisely the same position as conveyances obtained by fraud” (at 1100).

<sup>1055</sup> McBryde (1976) p.94.

<sup>1056</sup> See ch.2 pp.66-68.

<sup>1057</sup> McBryde (2007) paras 14-10 - 14-24.

misrepresentation.<sup>1058</sup> McBryde is clear that for a misstatement to constitute “fraud” it must be uttered with intention to deceive:<sup>1059</sup>

A contract induced by a false statement is not necessarily a contract induced by fraud. The falsity of the statement could arise from an innocent or negligent mistake ... A statement honestly made, but wrong, is not fraudulent.

Gloag took a similar view and, on the authority of *Derry v Peek*, stated:<sup>1060</sup>

[W]here a misrepresentation is involved, fraud always implies a moral wrong. Mere negligence is not fraud.

In relation to fraudulent concealment, McBryde distinguishes active concealment (which, following Gloag, is an aspect of misrepresentation) from silence, presumably passive concealment. He notes that in earlier Scots law concealment of private knowledge to gain an advantage could amount to fraud, but over the course of the nineteenth century – under the influence of “English ideas of caveat emptor”<sup>1061</sup> – concealment became a relevant challenge only where there was deemed to be a duty to disclose information. That duty arises in particular types of contracts (usually referred to as contracts *uberrimae fidei*) such as insurance, or where fiduciary or quasi-fiduciary relationships are involved.<sup>1062</sup> However, even if such a duty exists the concealment must be “part of a machination or contrivance to deceive” in order to constitute fraud, i.e. negligent or innocent concealment do not amount to fraud.<sup>1063</sup>

It might be thought that McBryde’s third category of “unfair activities” would offer scope for a broader definition of fraud. However, this category is principally to address “cases which cannot easily be classed as a representation or a concealment but which involve a plan to deceive”, the classic example being the use of a white

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<sup>1058</sup> Gloag (1929) p.475.

<sup>1059</sup> McBryde (2007) para 14-11; this is also the view of Thomson ((1990) para 703).

<sup>1060</sup> Gloag (1929) p.476. Even less does innocent misrepresentation amount to fraud (p.471).

<sup>1061</sup> McBryde (2007) para 14-14.

<sup>1062</sup> *Ibid.* paras 14-14 – 14-15; *Broatch v Jenkins* (1866) 4 M 1030.

<sup>1063</sup> *Ibid.* para 14-18; again, this is close to Gloag’s approach, see Gloag (1929) pp.459-462.

bonnet at auction.<sup>1064</sup> His insistence on deceit confines the definition once more to restrictive territory. This is again similar to Gloag's explanation that fraud can consist "in taking an unfair advantage in circumstances where the word misrepresentation is hardly applicable", using the white bonnet as his example.<sup>1065</sup>

There appear to me to be two justifications for treating misrepresentation as error rather than fraud:

- a) in order to find a location for innocent misrepresentation, as discussed at length above; and
- b) in order to preserve a structure for fraud that necessarily involves deceit, but which does not lead to error. To illustrate fraud which does not involve error McBryde's recurrent example is the white bonnet at auction (he might these days give the example of shill bidding on eBay<sup>1066</sup>), whereby the seller or someone acting for the seller bids to increase the price.<sup>1067</sup> Arguably, these are unusual instances of "unfair activities" which do involve deceit in comparison with the myriad of cases involving misrepresentation or concealment. It appears that the exceptional case has, unhelpfully in my view, dictated the structure.

As McBryde's writing on this topic spans four decades, it is particularly interesting to note the development in his thinking. His overall structure has remained broadly consistent, but there are some differences of emphasis and one significant substantive change. In his thesis McBryde strongly disagreed with Gloag's view that "[t]he principles laid down in *Derry v Peek*, though inconsistent with certain dicta, are in

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<sup>1064</sup> McBryde (2007) para 14-19. This example survives from his thesis (McBryde (1976) pp.83 ff.) through all editions of *The Law of Contract in Scotland*. A "white bonnet" is a term used to describe a sham bidder who has no intention of buying but who is planted by the seller to bid in order to inflate the auction price of the property.

<sup>1065</sup> Gloag (1929) p.475.

<sup>1066</sup> This is the modern equivalent of the white bonnet. A seller, for instance on eBay, may ask the "shill" or plant, often friends or family, to bid on their item in order to create a bidding war and drive up the auction price.

<sup>1067</sup> McBryde (2007) para 14-19. Other examples are also cited, which he suggests may be examples of devices contrary to public policy, for instance plans to defeat creditors, or obtaining credit on the basis of assets which are immediately disposed of after the credit is advanced.

entire accordance with the general trend of modern decisions in Scotland”.<sup>1068</sup> In his thesis, perhaps with the boldness of youth, he criticised this view,<sup>1069</sup> and in the first edition of the *Law of Contract in Scotland* (1987) he went further, saying that to regard *Derry v Peek* as the extent of the Scots law of fraud “would be a holocaust of centuries of case law”.<sup>1070</sup> However, there is a significant change in his thinking by the time of the third edition (2007), which demonstrates the complex way in which commentators influence one another. He now explicitly refutes his own previous views on *Derry*, and accepts that Lord Herschell’s definition does represent Scots law in relation to misstatements. McBryde was clearly influenced initially by the views expressed in TB Smith’s *Short Commentary*<sup>1071</sup> but he later confessed, “[i]t is now thought that this approach was misguided”.<sup>1072</sup> By 2007 he had accepted that *Derry v Peek* was the law of Scotland, with the caveat that the context was misrepresentation, and not other (deceitful) activities which might constitute fraud.

Perhaps the most significant development in McBryde’s thinking is the introduction of a section on “Good Faith” in the second edition of *The Law of Contract*<sup>1073</sup> which is significantly expanded in the third.<sup>1074</sup> It is under this heading that he recognises that there is “a mass of authority” on the effect of bad faith in Scottish sources, in the sense of knowledge or underhand behaviour<sup>1075</sup> and acknowledges that “[s]ome of the cases viewed the issue as one of fraud (fraud having a wide meaning in the early law)”.<sup>1076</sup> This sense of fraud has recently been used by the courts to create a general contractual principle of good faith<sup>1077</sup> and in an important passage, McBryde recognises that acting contrary to good faith was historically an aspect of fraud:<sup>1078</sup>

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<sup>1068</sup> Gloag (1929) p.478.

<sup>1069</sup> McBryde (1976) p.76.

<sup>1070</sup> McBryde (1987) para 10-10.

<sup>1071</sup> Specifically referring to p.828 ff.

<sup>1072</sup> McBryde (2007) para 14-12 n.42.

<sup>1073</sup> McBryde (2001) para 17-25 ff.

<sup>1074</sup> McBryde (2007) paras 17-23 – 17-34.

<sup>1075</sup> *Ibid.* para 17-24.

<sup>1076</sup> *Ibid.*

<sup>1077</sup> *Smith v Bank of Scotland* 1997 SC (HL) 111 at 121 per Lord Clyde. This development is discussed in greater detail in ch. 7.

<sup>1078</sup> McBryde (2007) paras 17-30 – 17-31.

This illustrates what may be a neglected feature of the early law. Underhand dealing was treated in Scots law as an aspect of fraud, which had a wide definition. Scots law had a concept of bad faith.... A general doctrine of fraud gave birth to other examples of actions in bad faith, such as facility and circumvention and fraudulent preferences in bankruptcy.... The cases on underhand dealing could have been used to formulate a broad principle.

He goes on to suggest that cases involving underhand dealing or private knowledge (of which he gives many examples), all treated as fraud historically, could have been used to formulate a general principle of good faith but concludes that there is no such general principle, leaving open the possibility of future developments.<sup>1079</sup> What is most interesting is that having closed down the meaning of fraud to intentional deceit, McBryde finds it necessary to create another category to do the job that fraud once did. I would agree with his assessment, with the significant caveat that within the law of fraud Scots law did have a general principle of penalising bad faith, but modern Scots law neither knows how to find it nor how to explain it.

But there is no doubt that contractual primary fraud in the work of both McBryde and Gloag is limited to deceitful behaviour, albeit the ways in which deceit might be practised are broad and open-ended. It is in this sense that McBryde can assert that “[T]he categories of fraud are never closed”.<sup>1080</sup>

#### *The Scottish Law Commission*

It is worth commenting briefly on the view of fraud taken by the Scottish Law Commission in its 1978 Memorandum on *Defective Consent and Consequential Matters*.<sup>1081</sup> The Memorandum relies heavily on McBryde’s, at that time, recent PhD thesis<sup>1082</sup> and a similar view might be expected. However, it must be borne in mind

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<sup>1079</sup> *Ibid.* paras 17-32 and 17-34.

<sup>1080</sup> *Ibid.* para 14-03.

<sup>1081</sup> Scottish Law Commission (1978).

<sup>1082</sup> The Memorandum quotes extensively from McBryde’s PhD thesis on fraud, see e.g. Scottish Law Commission (1978) pp.98-99, pp.101-104, on facility and circumvention and on undue influence.



that TB Smith was a Commissioner at the time,<sup>1083</sup> with a powerful countervailing influence. As a working definition Erskine's formulation is accepted "as probably the most serviceable which could be devised".<sup>1084</sup> It is emphatically stated that the Commission does not accept that *Derry v Peek* represents Scots law on the subject of fraud,<sup>1085</sup> quoting McBryde's assertion that such an acceptance would be a "remarkable result".<sup>1086</sup> The Commission accepts McBryde's conclusion (which accorded with TB Smith's own views) that misrepresentation "was treated merely as one of the means by which essential error could be brought about. It was not a separate ground of vitiation of consent and was relevant in a contractual context only as being one of the ways (but by no means the only one) whereby essential error might be caused."<sup>1087</sup> The Scottish Law Commission's considered view in 1978 was that fraud should cease to exist as a separate category and should be incorporated into the law of error as "caused error".<sup>1088</sup>

It appears that the Commission understood McBryde to be expressing a wide view of the definition of fraud, and certainly he did (and does) not conceive it to be restricted to misrepresentation or concealment (as exemplified by the white bonnet example). However, the quotations used, for instance, that "fraud was given a wide meaning" or that "[t]he categories of fraud should never be closed" must be read in the context that it was essential to the definition of fraud for McBryde in 1976, as it still is in 2007, that deceit be present. This is clearly at odds with TB Smith's much broader view of *culpa*, as discussed above. It is difficult to understand why TB Smith would put forward a broader (and strongly held) view of the definition of fraud in the *Short Commentary* and yet affirm a much more restrictive concept in the Commission's Memorandum. This can be explained either by speculating that the Commission misconceived what McBryde was saying in his thesis; or alternatively, that TB Smith's own views had altered over time.

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<sup>1083</sup> MacQueen (2005) pp.139, and pp.162-163; TB Smith was nearing retirement when it was published in 1978, so it may be surmised that his views on fraud had changed.

<sup>1084</sup> Scottish Law Commission (1978) p.95.

<sup>1085</sup> *Ibid.* p.94.

<sup>1086</sup> *Ibid.* p.99.

<sup>1087</sup> *Ibid.*

<sup>1088</sup> *Ibid.* p.102.

*(e) Professor Thomson*

Professor Thomson's title on "Fraud" in the *Stair Memorial Encyclopaedia* analyses its effect both in voluntary<sup>1089</sup> and in involuntary obligations.<sup>1090</sup> In a delictual context Thomson uses the concept of *mens rea* to reinforce the idea that fraud requires intention, and identifies the nineteenth century as the point when "delictual liability for fraud came to be restricted to a narrow range of circumstances dependent on the *mens rea* of the defender",<sup>1091</sup> namely intentional deceit.

His treatment of contractual fraud, on the other hand, is almost entirely discussed in relation to error. In general, Thomson's definition of fraud is restrictive, and yet in some respects his treatment of the effects of fraud is surprisingly broad. He begins by accepting that fraud can prevent consensus, i.e. in effect it leads to a void rather than a voidable contract, where it has induced an "essential" error, as in the case of *Morrisson v Robertson*,<sup>1092</sup> although he concedes this will be rare because of the difficulties of proof and the application of objective criteria to the question of consent.<sup>1093</sup> The question of the effect of an induced error on third parties is an ongoing debate among academic commentators<sup>1094</sup> and it is unsurprising to find it raised as an issue. What is much more surprising is that Thomson takes the view that where fraud prevents *consensus in idem* the behaviour in question does not need to amount to "fraud *stricto sensu*: absence of good faith can suffice",<sup>1095</sup> i.e. simply taking advantage of the other contracting party's error, as opposed to inducing it, is enough to prevent *consensus*. This is a surprising proposition from a commentator whose views on uninduced unilateral error and the (non) effects of good faith have

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<sup>1089</sup> Thomson (1990) paras 703ff.

<sup>1090</sup> *Ibid.* paras 719 ff. He also considers fraud in a number of other areas such as property law, succession, trusts and insolvency which are not relevant to the question of definition.

<sup>1091</sup> *Ibid.* para 719.

<sup>1092</sup> 1908 SC 332, and see earlier discussion of this case in ch. 1.

<sup>1093</sup> Thomson (1990) paras 705-706.

<sup>1094</sup> See for instance McBryde (2007) paras 15-79 – 15-85.

<sup>1095</sup> Thomson (1990) para 706.

been unequivocally expressed elsewhere.<sup>1096</sup> It may have been an early view that was later superseded.

Thomson acknowledges that the definition of fraud is wider in the context of voluntary obligations than in involuntary, but in terms of definition, like McBryde, he adopts Erskine's formulation requiring deceit. Therefore "a false statement of fact or law made in good faith does not constitute fraud unless 'it is destitute of all reasonable grounds, or which the least inquiry would immediately correct.'"<sup>1097</sup> His discussion of contractual fraud is almost entirely framed as an aspect of the law of error,<sup>1098</sup> and the thrust of his treatment is similar to McBryde's, except for the omission of a category of unfair activities carried out deceitfully. He argues that fraud no longer has the wide meaning it had in early Scots law, and he adopts a restrictive semantic approach outlining the "new" manifestations of fraud<sup>1099</sup> which have superseded the old rules. However, he is of the view that both facility and circumvention and undue influence are, in substance, derivations from the older meaning of fraud,<sup>1100</sup> albeit the latter is a concept imported from English law.<sup>1101</sup>

Thomson concedes that historically fraud had a broader meaning which included activities "which were fraudulent only in the sense of being considered unfair".<sup>1102</sup> He also asserts that "until the mid-nineteenth century it was a principle of Scots law that parties when negotiating contractual obligations should act in good faith", evidenced by the liability of a seller for concealment of latent defects in goods sold, a species of fraud which did not necessarily involve intentional deceit.<sup>1103</sup> Thomson's historical timeline is that there was a change in the second half of the nineteenth century because of "commercial interests" when Scots law "became influenced by the principle of *caveat emptor* and the significance of acting in good faith was

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<sup>1096</sup> Thomson (1999).

<sup>1097</sup> Quoting from *Western Bank v Addie* (1867) 5 M (HL) 80 at 87, per Lord Chelmsford.

<sup>1098</sup> Thomson (1990) paras 708-712.

<sup>1099</sup> in a contractual context, facility and circumvention or undue influence, *ibid.* paras 733ff. and 738ff.

<sup>1100</sup> *Ibid.* paras 733 and 738.

<sup>1101</sup> *Ibid.* para 738.

<sup>1102</sup> *Ibid.* para 702.

<sup>1103</sup> *Ibid.* para 708.

increasingly eroded”.<sup>1104</sup> He cites judicial authority for the narrowing of the definition of fraud to the effect that “a certain degree of cunning, craft, and even deceit” was acceptable in the commercial world.<sup>1105</sup>

Doctrinal analysis inevitably involves selection of authority to affirm the views being expressed, but it could be argued that Thomson is being particularly selective in his use of case law to make this argument. There is ample authority throughout the nineteenth century to suggest that some on the Scottish bench were willing to impose higher ethical standards and were active in doing so. Moreover, it is not incontrovertible that Scots law has ever fully accepted the *caveat emptor* principle, nor does it appear to be as quintessentially an English doctrine as is often asserted in Scotland.<sup>1106</sup>

Thomson does allow a narrow field of operation for the operation of good faith (or more accurately penalising bad faith) in certain situations where greater disclosure is demanded. Like McBryde’s analysis, this includes fiduciary relationships and others of a confidential nature,<sup>1107</sup> as well as the scenario where one of the contracting parties knows that the other party is in error;<sup>1108</sup> but Thomson finds the latter at odds with the *caveat emptor* principle and prefers to classify *Steuart’s Trs v Hart* as a case of essential error.<sup>1109</sup>

In a later historical analysis, Thomson does touch on presumptive fraud, and acknowledges that there were cases based on inequality in which the pursuer argued he had suffered lesion and “in so gross inequality *ex re praesumitur dolus*”.<sup>1110</sup> He examines the historical sources and concludes that inequality of price was never enough to annul a bargain:<sup>1111</sup>

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<sup>1104</sup> *Ibid.* para 708.

<sup>1105</sup> *Ibid.* para 708, quoting from *Gillespie v Russel* (1856) 18 D 677 at 686 per Lord Curriehill.

<sup>1106</sup> See Lobban (2012) pp.116-123.

<sup>1107</sup> *Ibid.* para 712.

<sup>1108</sup> *Ibid.*, citing *Steuart’s Trs v Hart* (1875) 3 R 192.

<sup>1109</sup> *Ibid.*

<sup>1110</sup> Thomson (2000) p.166.

<sup>1111</sup> *Ibid.* pp.168-9.

It is submitted that, in the light of the case law, by the end of the eighteenth century the substantive fairness of the contract was not in itself sufficient to have it modified or set aside. Nor would it appear that there was any presumption of fraud and deceit to be drawn from an unfair bargain unless in very exceptional circumstances where the contract *ex facie* demonstrated oppression. Such cases would be rare, indeed.

His analysis accords with the one presented in chapter 2, where it is clear that inequality on its own, unless it was gross inequality – usually evidenced by the presence of an aggravating factor – was not enough. However, he does not examine the circumstances where those aggravating factors were present. Most of the examples he cites relate to price between trading parties. It is clear that price was never a ground of inequality, and most of the presumptive fraud cases concern inequality between the parties on other grounds, including relationship, means of knowledge, and access to legal advice.

## 2. Comment

The casual observer of modern Scots law could be forgiven for thinking that there are in fact many frauds, with different definitions and different effects. Or that the way in which fraud operates in contract law is different from, say, fraud as a delict, or fraud in an enrichment or a property context, or the fraudulent behaviour of fiduciaries, agents or trustees. This is most evident in the work of Thomson, whose aim is to look at “the effect of fraud in relation to juristic acts”<sup>1112</sup> and who specifically wants to illustrate “how the conception of fraud varies according to the particular legal context in which it arises”.<sup>1113</sup> Smith appears to support this view, for he repeatedly distinguishes between “the broad contractual (as opposed to delictual) sense” of fraud.<sup>1114</sup> However, it should be borne in mind that Smith’s purpose was to limit the effect of *Derry v Peek*<sup>1115</sup> and by putting clear blue water between delictual

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<sup>1112</sup> Thomson (1990) para 701.

<sup>1113</sup> *Ibid.*

<sup>1114</sup> Smith (1962) p.286.

<sup>1115</sup> *Derry v Peek* (1889) LR 14 App Cas 337.

fraud where intentional deceit was required, he was able to preserve a broader meaning for contractual fraud.<sup>1116</sup> McBryde, on the other hand, strongly rejects the notion of different frauds and cites extensive authority, both Institutional and judicial, in support of his argument that such a distinction has been rejected in Scots law.<sup>1117</sup>

Fraud as a delict and fraud as a factor vitiating consent in a contract are not, of course, mutually exclusive concepts although they lead to different consequences. One way of resolving the “many frauds” issue would be to consider whether fraud and other factors which are deemed to vitiate consent could be subsumed under one single principle of “improper obtaining of consensus” as a delictual category.<sup>1118</sup> There is a certain logic to this. Just as inducing a breach of contract is a recognised delict, why should improper inducement to enter into an obligation not also be a delictual wrong? It does, of course, beg the question: what is “improper”? The suggestion from South African academics who have explored the idea is that “the consent will have been improperly obtained if the conduct by means of which it was obtained was *wrongful* in the delictual sense of the term”.<sup>1119</sup> There is perhaps some circularity in this argument and, in addition, unlike South Africa where wrongfulness is considered to be a “well-defined existing concept”,<sup>1120</sup> it is not in Scots law,<sup>1121</sup> as the attitude of the courts to fraud in the nineteenth century surely demonstrates. The Scottish courts are a long way from considering this option, preferring to adopt an approach which favours individual civil wrongs with their own individual rules. However, it may be a helpful insight that a more general theory of pre-contractual liability and a clearer view of the role of fault would be helpful in rationalising the function of fraud.

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<sup>1116</sup> “In modern practice, however, as a result of a bywind from the English case of *Derry v Peek*, there has been a tendency to restrict the term “fraud” to imply such conduct as would found an action in delict. It may be stressed, nevertheless, that as Scottish institutional writers clearly discerned, the contractual and delictual effects of fraud are distinct” (Smith (1962) p.286). See also *ibid.* pp.833-835.

<sup>1117</sup> McBryde (2007) para 14-04 and authorities cited therein.

<sup>1118</sup> The suggestion is borrowed from Van der Merwe et al (2007) paras 4.1.2 and 4.5.

<sup>1119</sup> *Ibid.* para 4.5.2.

<sup>1120</sup> *Ibid.* p.133.

<sup>1121</sup> For exploration of the topic see Blackie (1992) and Blackie (1997).

One final observation is that although fraud has a narrow definition in modern literature, some commentators allow for one significant exception. McBryde states a general rule that “error induced by the fraud of a third party does not constitute a ground for avoiding a contract”.<sup>1122</sup> However, he then notes three significant exceptions to that rule: when the transaction is gratuitous; where the third party is an agent; and where the third party has participated in a fraudulent scheme.<sup>1123</sup> He also links this to the “no benefit from fraud” rule.<sup>1124</sup> These exceptions are part of the concept of secondary fraud, discussed in chapter 7, which is clearly acknowledged still to be an accepted part of Scots law and part of the law of fraud.

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<sup>1122</sup> McBryde (2007) para 14-44.

<sup>1123</sup> *Ibid.*

<sup>1124</sup> *Ibid.* paras 14-45 – 14-46, also see 14-48.

### ***Chapter 7: Secondary Fraud - the remnants of inequality***

In the preceding chapters I have examined the definition of fraud in a criminal and a civil law context in the light of historical sources. All of that discussion concerns situations where one party has been deceived or taken advantage of by another in a way that the law designates as fraudulent. The behaviour in question may be a criminal or a civil wrong, often both, and it is sufficient to warrant a legal remedy. That remedy may consist of criminal sanctions, reparation or damages in delict, restitution following unjustified enrichment, or reduction of a contract or a property transaction. This is the territory of *primary fraud*.

At various stages along the way I have made reference to *secondary fraud*. In previous chapters it has been suggested that secondary fraud may have real effect, the equivalent of a *vitium reale*;<sup>1125</sup> that the principle of inequality evident in presumptive fraud is even more relevant to secondary fraud, particularly where there is an imbalance of knowledge between the parties or a gratuitous transaction;<sup>1126</sup> and that the fraud principle relied on in *Mair v Rio Grande Rubber Estates Ltd*<sup>1127</sup> was an aspect of secondary fraud.<sup>1128</sup> This begs the question: what is secondary fraud? This chapter will attempt to answer that question.

One of the aims of this thesis is to create a more comprehensive taxonomy of fraud: one which goes beyond the modern law's limitation of fraud to intentional deceit to a recognition that fraud was and is a broader concept of substantive justice rooted in an

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<sup>1125</sup> See ch.1 pp.20-26.

<sup>1126</sup> See ch.2 pp.68-90.

<sup>1127</sup> 1913 SC (HL) 74.

<sup>1128</sup> See pp.193-4.



underlying concept of inequality. Hence, there are situations where intention is irrelevant and where fraud is inferred from certain fact scenarios which are deemed to constitute inequality. In older Scots law, this was the territory of presumptive fraud, but even in the modern law there are occasions when the courts refer to “fraud” in a sense which seems out of step with the account given of fraud by most legal commentators and which does not amount to a “machination to deceive”. An adequate taxonomy must take account of this wider sense of fraud, not only in historical perspective, but where it appears in the modern law. This chapter argues that presumptive fraud as a manifestation of inequality is alive and well in the doctrine of secondary fraud and it is primarily concerned with questions of definition.

### 1. What is secondary fraud?

The question under consideration is this: to what extent are third parties protected where a transaction is tainted with fraud and in what circumstances can property or money be recovered from them? It is in this area that fraud appears to operate in inconsistent ways, often perceived to be an exception to general rules within particular areas of the law. In this context fraud appears to operate like theft, like a *vitium reale*, enabling the property to be recovered from the third party. For instance, in property law the so-called “offside goals rule” would suggest that if there has been a double grant of property, even after the property has been transferred the prior grantee is capable of reducing that transfer if the second transferee is “fraudulent”, in a sense which clearly encompasses more than outright deceit and which is an exception to the normally rigid rules of property law.<sup>1129</sup>

Likewise in enrichment law, where assets have been acquired by a third party (usually money, for Scotland has no developed law of tracing and property law, therefore, provides no solution), in some circumstances the law is able to reach beyond the immediate fraudster to recover the assets as a major exception to the

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<sup>1129</sup> Reid (1996) para 695, see discussion in ch.1 pp.26-27.

general rule limiting recovery to the immediate recipient of the enrichment.<sup>1130</sup> In a contractual context, cautionary obligations provide yet another example of a three party transaction where fraud as bad faith is capable of bringing about reduction or restitution.<sup>1131</sup> An agent acting without authority constitutes a fourth scenario,<sup>1132</sup> and perhaps the most disconcerting “exception” of all, is the rule that fraud passes against creditors<sup>1133</sup> despite the general protection that Scots law has given creditors from as long ago as the bankruptcy legislation of 1621. While these can be regarded as isolated and unusual examples within their discrete subject areas, the consistency of the exception would suggest that where there is a combination of fraud and three-party situations, there is a unified phenomenon at work: this type of fraud has *real* effect. In his analysis of the unsecured creditors rule, Reid does at least pose a wider question: “whether the exception for fraud is wider than this single rule is a matter of conjecture.”<sup>1134</sup>

Reviewing the Scottish academic literature dealing with fraud, it appears that there has been little attempt to cross-reference the workings of fraud across disciplinary boundaries. For instance, McBryde and Whitty in their respective treatments of fraud in a contractual and in an enrichment context identify,<sup>1135</sup> albeit somewhat tentatively, the fact that in certain circumstances fraud has third party effect:<sup>1136</sup>

There are exceptional cases of indirect enrichment where recovery has been allowed, notably where a principal is gratuitously benefited by the unauthorised act of his agent or where a third party is gratuitously benefited

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<sup>1130</sup> Whitty (1994) pp.251-269. Whitty also finds the “creditors rule” anomalous (pp.267-269).

<sup>1131</sup> See *Smith v Bank of Scotland* 1997 SC (HL) 111, at 120I – 121C where Lord Clyde specifically makes an analogy with two “offside goals” cases in order to equate the doctrine of notice with a Scottish requirement of “good faith” on the part of a third party; also at 117B-D where he refers to the “fraud” principle.

<sup>1132</sup> McBryde (2007) paras 14-44 and 14-48; Whitty (1994) pp.251-252.

<sup>1133</sup> Reid (1996) para 694; *Mansfield v Walker’s Trs* (1835) 1 Sh & Macl 203; *AW Gamage Ltd v Charlesworth’s Trustee* 1910 SC 257.

<sup>1134</sup> Reid (1996) para 294, referencing, among others, the enrichment case *Clydesdale Bank v Paul* (1877) 4 R 626 and Lord Shand’s rule that no-one should profit from the fraud of another (at 629).

<sup>1135</sup> McBryde (2007) paras 14-44, 14-45 and 14-48; Whitty (1994) pp.251-269.

<sup>1136</sup> Whitty (1994) p.207.

by the fraudulent or other wrongful act of another, though here the law is uncertain.

It is highly significant that both identify the same rules: the third party must either be in bad faith or have been a gratuitous recipient or, alternatively, a recipient from an agent acting without authority.<sup>1137</sup> Reid, in a property context, identifies the first two rules, but not the third.<sup>1138</sup> However, although the phenomenon has been identified, it has received very little analysis, and certainly no attempt has been made to situate it within the general law of fraud.

*(a) Suggested criteria for the operation of secondary fraud*

In essence, secondary fraud, in modern terminology often referred to as bad faith,<sup>1139</sup> involves three party transactions in which the third party is deemed to have participated in the primary fraud of one of the other parties (*particeps fraudis*). In other words it is a form of accessory liability. It is also a manifestation of presumptive fraud in that there is no question of intention or motive; rather a presumption of fraud arises from the circumstances. The criteria for the operation of secondary fraud are suggested below, but it should be noted that in this attempt to outline a concept of secondary fraud there are more questions than answers and this analysis should be regarded as a preliminary step:

- (i) One party has committed an act of fraud against another (an act of primary fraud) whereby property or money has been acquired. This in turn raises questions of definition: for instance does it apply only to intentional acts of deceit? The preceding discussion of the broad historical definition of fraud

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<sup>1137</sup> Whitty does not explicitly link the rules relating to agency with those relating to the *bona fide* purchaser, but the principles outlined are nevertheless the same.

<sup>1138</sup> Reid (1996) para 695, although in his earlier treatment of fraud as a vice of consent, leading to a voidable title, he does suggest that agency could be relevant, with reference to *Morrisson v Robertson* 1908 SC 332.

<sup>1139</sup> In the context of property transfers, where formerly “fraud” was used to describe the behaviour of a second purchaser acting in knowledge of a first purchaser’s prior right, it has been suggested that “[m]odern statements of the principle ask whether a second purchaser was in good or bad faith”, McBryde (2007) para 17-24.

should be borne in mind. For instance, would modern manifestations of presumptive fraud, such as undue influence or facility and circumvention, bring the principle into operation? Would lack of independent legal advice be relevant?

(ii) The fraudulently acquired assets have been transferred on to a third party recipient.

(iii) The third party has “participated” in the fraud in one of two ways: he has either acquired the assets gratuitously; or he is in bad faith.<sup>1140</sup> In this context bad faith amounts to knowledge or constructive knowledge, i.e. it can be either subjective or objective, and it is sometimes framed as knowledge of the other’s wrongdoing or, more usually in a property context, knowledge of the prior right of another party which has been interfered with.

*(b) The particeps fraudis*

There are numerous instances in reported cases, ancient and modern, where a third party is deemed to be acting “fraudulently” if he benefits from or has knowledge of another’s wrongdoing. The most consistent framing of the issue is the idea of participation: the third party is deemed to have “participated” in the fraud and, as previously referred to in chapter 1, the idea of the *particeps fraudis* is not new to Scots law. From as far back as the seventeenth century it has been a relevant ground for reduction, restitution or recompense.<sup>1141</sup> For instance, in *Wemyss v Lord Torphichen*<sup>1142</sup> the defender was considered to be a *particeps fraudis* on grounds of knowledge and lack of an “onerous cause” and had to repay money “*in quantum est*

<sup>1140</sup> These general rules also apply in an agency context, and many of the cases considered below are agency cases. The specialities of agency, such as undisclosed principal or unauthorised agent, are not examined in detail but would merit further research.

<sup>1141</sup> For instance in *Cassie v Fleming* (1632) Mor 10279; *Wemyss v Lord Torphichen* (1661) Mor 1693; *Auchinleck v Williamson* (1667) Mor 10282; *Scot v Cheisly* (1670) Mor 4867; *Crichton v Crichton* (1671) Mor 4886; *Duff v Fowler* (1672) Mor 10282; *Street v Mason* (1672) Mor 491; *Prince v Pallat* (1680) Mor 4932; *Anderson v Dempster* (1702) Mor 10213; *Irvine v Osterbye* (1755) Mor 1715; *Bouack v Croll* (1748) Mor 1695; *Dougall v Marshall* (1833) 11 S 1028; *Wemyss v Lord Torphichen* (1661) Mor 1693.

<sup>1142</sup> (1661) Mor 1693.

*lucratus alterius dispendio*". The same two criteria – whether or not the defender had knowledge and whether or not the cause was onerous or “lucrative”<sup>1143</sup> – are consistently applied to determine liability.<sup>1144</sup> An example in a property law context can be found in *Anderson v Lows*,<sup>1145</sup> where an owner sold one storey of a tenement building to a purchaser and later disposed the whole tenement gratuitously to his wife. Lord Curriehill believed that the double alienation of the property was probably an error rather than involving some “dishonest purpose,”<sup>1146</sup> but despite the lack of intentional deceit the court applied the well-established rule of civil law expressed in the Latin maxim *dolus auctoris non nocet successori nisi in causa lucrativa*<sup>1147</sup> (frequently cited alongside the *particeps fraudis* designation):<sup>1148</sup>

The rule that the fraud of an author is not pleadable against a successor does not operate, if that successor either be in *mala fide*, or be not an onerous successor.

In property law the rule is usually expressed as having private knowledge of a prior right, rather than knowledge of a fraudulent act. However, it amounts to the same thing, the important aspect being that a wrong has been committed, or a right infringed, whether intentionally, negligently or innocently. Secondary fraud, inferred fraud, will provide a remedy even if primary fraud no longer does and the debates about whether the fraud of the *particeps* has a broad or narrow definition are not relevant (although it is highly relevant to the initial act of fraud being participated in).

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<sup>1143</sup> This is the terminology most frequently used in older case law, see cases in Morison’s Dictionary under the title “Personal and Real”.

<sup>1144</sup> *Bouack v Croll* (1748) Mor 1695; *Dougall v Marshall* (1833) 11 S 1028.

<sup>1145</sup> (1863) 2 M 100.

<sup>1146</sup> *Ibid.* at 103

<sup>1147</sup> I am grateful to Prof. Niall Whitty for the insight that this maxim, the “author’s fraud” rule derives from the Praetor’s edit, see *Tennent v City of Glasgow Bank* (1879) 6 R 554 at 558 per Lord President Inglis.

<sup>1148</sup> (1863) 2 M 100 at 104

Stair employed the “partaker” metaphor<sup>1149</sup> and there is the suggestion, as there is in case law, that fraud may have real effect:

yet the parity of reason in fraud or force, should secure the innocent purchaser, who neither was accessory to the force, nor knew of it when he purchased, which requires a statute; for force, as well as fraud, are *labes reales* by common law.<sup>1150</sup>

This passage is sometimes regarded simply as an inconsistency in the *Institutions* as Stair clearly does not regard fraud as a *vitium reale* or *labes realis* in his other discussions.<sup>1151</sup> It may be that he is still thinking of the accessory, the purchaser in bad faith, for in those circumstances there is no protection and secondary fraud has real effect. The semantic structure used by the courts is almost always framed in the negative, i.e., there is no *vitium reale* “unless” or “*nisi*” the third party is a *particeps fraudis*.<sup>1152</sup> In *Crichton v Crichton*<sup>1153</sup> it was argued that fraud was a *vitium reale* reaching to a third party, but the court held that “the reason of reduction could have no effect against him, unless it were proven that he knew, and so were partaker of the fraud.”<sup>1154</sup>

Stair certainly attributed liability to anyone “partaking” in fraud by being in *mala fide* about the right of another. And, as in modern law, *mala fides* can be actual (subjective) knowledge or even doubt, which crosses into more objective territory:<sup>1155</sup>

The common ground in which all agree, is that the possessor’s credulity and

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<sup>1149</sup> Stair mentions the partaker in almost every discussion of fraud and there are numerous examples, for instance I.9.9-10; I.9.15; IV.35.19-20; IV.40.20-21.

<sup>1150</sup> Stair IV.35.20.

<sup>1151</sup> “Fraud is no *vitium reale* affecting the subject, but only the committer of the fraud and these who are partakers of the fraud, as is clear by this statute bearing an exception of lawful purchasers not partakers of the fraud” (I.9.15).

<sup>1152</sup> *Duff v Fowler* (1672) Mor 10282; *Anderson v Dempster* (1702) Mor 10213; *Andersons v Lows* (1863) 2 M 100.

<sup>1153</sup> (1671) Mor 4886.

<sup>1154</sup> *Ibid.* at 4888.

<sup>1155</sup> Stair II.12.6.

belief of his own and his author's right makes *bona fide*, and his knowledge of the right of another, *malam*, which seemeth to infer, that he who doubteth, must be in *mala fide* because he believeth not his author to have had right, doubt and belief being contraries.

The fact that secondary fraud is able to reach third parties if either of the criteria is met seems anomalous. It flies in the face of *caveat emptor* and appears to have been untouched by the debates which raged about the definition of fraud in its primary context. For secondary fraud to take effect no intention to deceive is required, nor negligence, nor any requirement for error, nor any honest belief. This raises a bigger question: why should there be liability when the third party has not committed any wrong (in a delictual sense) and should the law penalise private knowledge or unequal transactions in this way? Perhaps more importantly where does this rule come from?

## 2. Aquinas, Stair and Third Party Liability

It has previously been shown in chapter 3 that there are a number of important parallels between Aquinas' doctrine of restitution and Stair's account of restitution and recompense. In summary, Aquinas translated the Aristotelian principle of equality into a legal framework of debt and owing and the function of justice (via the doctrine of restitution) was to restore equality. Where property was involved, restitution (in a narrow sense) was required; where the imbalance amounted to harm or loss that could not be restored, the broader category of recompense performed the same rebalancing function. Stair parallels this scheme in that restitution is an obligation arising from property;<sup>1156</sup> whereas recompense is about actions rather than things, whereby *deeds* are done "not *animo donandi*, but of purpose to oblige the receiver of the benefit to recompense". Recompense is conceptually related to the presumption against donation in Scots law, in that it would be activated by a gratuitous transaction.<sup>1157</sup>

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<sup>1156</sup> *Ibid.* I.7.9; I.7.11.

<sup>1157</sup> *Ibid.* I.7.1 ("without his purpose to gift it to us").

However, there is another function within the Thomist account of recompense, only implicitly perceptible in Stair's account, which is activated by fault.<sup>1158</sup>

A fundamental distinction in Aquinas' analytical division of restitution and recompense concerns the source of the obligation to restore property. Restitution can arise on account of the thing itself, i.e. from the very fact of possession where no *culpa* is involved, which he refers to as restitution *ratione rei* (on account of the thing).<sup>1159</sup> Simply holding the property of another creates an obligation to restore but that obligation ceases along with possession. However, the obligation of restitution can also arise from wrongful receipt of property and this is his fault-based category, restitution *ratione acceptionis*.<sup>1160</sup> The way in which possession was acquired must be examined and, in contrast to *ratione rei*, if it involved fault restitution is required regardless of the state of possession:<sup>1161</sup>

Then a man is bound to restitution, not only because of the thing he takes, but also because of his injurious action, even though it is no longer in his possession.

The obligation subsists even after possession has been lost, at which point recompense is the appropriate remedy.<sup>1162</sup> However, Thomas also takes account of the ultimate destination of the property and the question of third parties acquiring possession through the wrongful actions of an intermediary:<sup>1163</sup>

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<sup>1158</sup> This scheme is dealt with in more detail my article, Reid (2008) pp.209-213 (reprinted at Appendix 2 below).

<sup>1159</sup> Or *ipsa res accepta* (*Summa*, II-II q.62.6). See Hallebeek (1995) pp.48-49; Gordley (2006) p.424; Gordley (2002) p.228; Dolezalek (2002) p.112, for discussion of the treatment of Thomas' subdivision of restitution by the late scholastics.

<sup>1160</sup> Or *ipsa acceptio* (*Summa*, II-II q.62.6). Weinzierl suggests that this scheme, original to Thomas, arises from his engagement with the civil law, in that restitution *ratione rei* is analogous to a real action, restitution *ratione acceptionis* to a personal action based on relationship ((1939) pp.177-181, and pp.220-221).

<sup>1161</sup> *Summa*, II-II q.62.6; also Dolezalek (2002) p.112.

<sup>1162</sup> *Summa*, II-II q.62.6.

<sup>1163</sup> *Ibid.* ad.1.



So then even though he who took something from another no longer has it, for it has passed to someone else, nevertheless, since the other is deprived of what is his, both the taker and the holder alike are bound to restitution, the former on account of his injurious action, and the latter on account of the thing itself.

The intermediary is liable on account of the wrongful taking and the third party simply by possessing (*ratione rei*), by analogy with two party transactions. However, if the third party has been “a cause of the unjust taking”,<sup>1164</sup> he is liable on both counts. All who have been either a direct cause (by commanding, giving advice or express consent) or an indirect one (by not preventing or by covering up after the event) form part of the chain of liability ranking in the order specified.<sup>1165</sup> The range of participatory liability is wide, and, consistent with the voluntariness of virtue and vice, the unifying factor is that they all require the third party’s knowledge of the injustice. Aquinas does not dwell on the detail of third party liability, but here perhaps are the foundations for the liability of the *particeps*.

Stair’s translation of the Thomist account of restitution into Scots law is complex and largely implicit but the combination of loss of possession and fault certainly imports a different kind of liability. Throughout title I.7 Stair is addressing possessors who are in *bona fide*, a requirement which he insists on in almost every section. The consequences of loss of possession for a possessor in *bona fides* correspond to Aquinas’ account of restitution *ratione rei*:<sup>1166</sup>

In all these, the obligation of restitution is formally founded upon the having of things of others in our power, and therefore, that ceasing, the obligation also ceaseth.

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<sup>1164</sup> *Ibid.* q.62.7.

<sup>1165</sup> *Ibid.* Aquinas is more tentative about indirect liability and suggests that advice, flattery and keeping silent will not always import liability, only where they were a cause of the action.

<sup>1166</sup> Stair I.7.11.

Aquinas' second category of restitution has not entirely disappeared from Stair's obediential obligations, but it is dealt with in his title on reparation because this is the territory of delict. If property has been wrongfully taken (by theft or fraud), restitution is required and, like *ratione acceptionis*, the wrongdoer is liable for the full value of the property:<sup>1167</sup>

Reparation is either by restitution of the same thing, in the same case, that it would have been in if it had remained with the owner, and this is most exact; or where that cannot be, by giving the like value, or that which is nearest to make up the damages.

Delict is, therefore, the second source of restitution for Stair if possession has been wrongfully acquired (or indeed wrongfully disposed of),<sup>1168</sup> sometimes called its "binary" nature in modern Scots law.<sup>1169</sup> Reparation is Stair's "fault" category, the paradigm example of which is fraud.<sup>1170</sup> However, it could be argued that restitution is not binary in nature; rather there is a third source of obligation, which also corresponds to Thomas' category of *ratione acceptionis* and which is, at best, only implicit in Stair's account. Coming back to Stair's insistence on the *bona fides* of the possessor, it is apparent from a careful reading of title I.7 that many of the situations he describes involve three party transactions. For instance, if the *bona fide* possessor is liable to restore property recovered from thieves or pirates, there must be a wrongful intermediary in the shape of a thief or pirate! Similarly, when he suggests that even a *bona fide* purchaser for value must restore property,<sup>1171</sup> recognising that, on policy grounds, "positive law secures the buyer, and leaves the owner to seek the seller", there is implicitly an intermediary seller who has done wrong. Consistent with restitution *ratione rei*, it is the *bona fides* of the third party which will protect him from any liability once possession has been lost.

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<sup>1167</sup> *Ibid.* I.9.4.

<sup>1168</sup> *Ibid.* I.7.2 where "fraudful" disposal of property is also clearly a "delinquency".

<sup>1169</sup> Carey Miller (2005a) p.238 and generally ch. 10.

<sup>1170</sup> Stair I.7.2.

<sup>1171</sup> *Ibid.* I.7.4 and I.7.11.

But what of the *mala fide* possessor? For the answer, we have to look outwith Stair's obediential obligations to his treatment of possession in Book II of the *Institutions*, where he defines *bona fide* possessors as those "who do truly think that which they possess to be their own, and know not the right of any other".<sup>1172</sup> If the third party has private knowledge of another's right (or, presumably, of the intermediary's wrong) he is also deemed to be a "partaker in the fraud"<sup>1173</sup> which raises the obligation to restore and removes any protection for the third party.

As noted previously, Whitty identifies the effects of fraud in "indirect" or three party enrichment cases as a major exception to a general rule against recovery.<sup>1174</sup> For if the third party is either in bad faith or the transaction is gratuitous a "restitutionary obligation"<sup>1175</sup> is created, usually recompense. In addition, unlike the strict liability nature generally asserted for claims in unjustified enrichment, "liability is fault-based".<sup>1176</sup> The principal elements of Aquinas' *ratione acceptionis* lie within this rule. However, the principle is not confined to enrichment law, rather it has explanatory effect for the broad sweep of secondary fraud. Aquinas' exposition of fault-based liability is illuminating for the modern law and it is suggested that the concept of a participant (*particeps*) has scholastic roots and scholastic consequences in that it creates inequality and requires the intervention of the law. It is also clear that there are strong moral overtones, perhaps unsurprising given these were rules developed by moral theologians. For both Stair and Aquinas moral and religious duties were as important as legal ones: to return goods to others which are rightfully theirs; to recompense them for profits made at their expense; to maintain equality in transactions; and even to penalise knowledge of and profit from another's wrongdoing.

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<sup>1172</sup> *Ibid.* II.1.24, see also II.1.24 for the further explanation that even a "colourable" title will be effective, because of the presumption of ownership which arises from possession of moveables in Scots law.

<sup>1173</sup> *Ibid.* IV.40.21-22; also see II.1.42.

<sup>1174</sup> Whitty (1994) pp.251-269.

<sup>1175</sup> *Ibid.* p.257.

<sup>1176</sup> *Ibid.*

### 3. Accessory Liability and the “No Profit from Fraud” Rule

Accessory liability, or liability for participation in fraud, was, therefore, a familiar concept in Scots law from at least the seventeenth century, and it had two criteria: either the third party had to be in bad faith or have acquired the property gratuitously. The requirements of bad faith and onerosity operate independently of each other, either being sufficient to amount to participation in fraud.

There is another well-established rule in which these criteria are combined, namely the “good faith purchaser for value”, equity’s darling in English law, which most commonly operates in contract and in property law. In Scots law it was traditionally framed in the negative as the rule penalising private knowledge of a prior right, commonly now known as the offside goals rule in property law or the doctrine of notice. It has been described as a “doctrinal anomaly” and its classification as a type of fraud as “merely a fiction to provide it with theoretical support”.<sup>1177</sup> However, viewing it in the light of accessory liability and as part of a doctrine of secondary fraud may provide the doctrinal support necessary for its survival as a useful part of Scots law where it is regarded as an “exception”<sup>1178</sup> to the usual principles inherent in the transfer of ownership.

The classic case is a double grant of property, and the rule operates to ensure that the second purchaser will have good title only if he is in good faith and has given value. Much has been written about the rule against offside goals,<sup>1179</sup> and there is extensive case law exploring its meaning and effect.<sup>1180</sup> It is not, therefore, intended to explore the doctrine in detail, other than to note that in a number of these cases bad faith is

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<sup>1177</sup> Zimmermann (1996) p.237.

<sup>1178</sup> Reid (1996) para 695. It’s usefulness as a modern doctrine has also been questioned (Anderson (2005)).

<sup>1179</sup> *Ibid.* paras 695-700; Wortley (2002); Carey Miller (2005b); Anderson (2005); Anderson (2007); Webster (2009); Anderson and MacLeod (2009).

<sup>1180</sup> There are too many cases to provide an exhaustive list, but they include *Bell v Gartshore* (1737) Mor 2848; *Blackwood v Hamilton’s Creditors* (1749) Mor 4898; *Redfearn v Sommervail* (1813) 1 D 50; *Marshall v Hynd* (1828) 6 S 384; *Petrie v Forsyth* (1874) 2 R 214; *Stodart v Dalzell* (1876) 4 R 236; *Morior v Brownlie & Watson* (1895) 23 R 67; *Moncrieff v Lawrie* (1896) 23 R 577; *Rodger (Builders) Ltd v Fawdry* 1950 SC 483; *Wallace v Simmers* 1960 SC 255; *Trade Development Bank v David W Haig (Bellshill) Ltd* 1983 SLT 510; *Trade Development Bank v Crittal Windows Ltd* 1983 SLT 510; *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644; *Alex Brewster & Sons v Caughey* 2002 GWD 15-506; *Gibson v Royal Bank of Scotland* 2009 SLT 444.

equated with fraud<sup>1181</sup> and that the operative criteria are bad faith and a gratuitous transaction.<sup>1182</sup>

However, in *Wardlaw v Mackenzie*<sup>1183</sup> the court made a significant connection between those two criteria and another legal maxim, namely *quod nemo debet locupletari aliena jactura*, a form of the Pomponius maxim<sup>1184</sup> which is usually associated with the law of unjustified enrichment.

*Wardlaw* concerned a three party family cautionary transaction in which the sister (the cautioner) alleged misrepresentation about the nature and extent of her obligation. The plea was not successful in the Outer House, because despite the fact that it was held to be fraud (it had all the marks of presumptive fraud), the third party had not participated in or had knowledge of it. On appeal the Lord Justice-Clerk (Inglis) stated the general rule that fraud does not affect innocent third parties, contrasting it with force and fear, which renders a contract null.<sup>1185</sup> However, he noted that there were exceptions:<sup>1186</sup>

The chief fallacy which pervades the defenders' argument arises from their assuming it to be an universal rule of equity, that fraud is not a relevant ground for reducing an obligation in a question with an innocent third party, and from forgetting another rule of equity equally important, and quite as extensively applicable as the former, *quod nemo debet locupletari aliena jactura*.

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<sup>1181</sup> For instance, *Morrison v Sommerville* (1860) 22 D 1082; it has been noted that “[m]odern statements of the principle ask whether a second purchaser was in good or bad faith” (McBryde (2007) para 17-24) but I would argue that, nevertheless, it is conceptually part of the law of fraud.

<sup>1182</sup> There is sometimes thought to be one additional rule for its operation, namely that the prior right should be capable of being made real (*Wallace v Simmers* 1960 SC 255 at 260 per Lord President Clyde). However, this has been doubted, thus potentially giving the rule broader scope, see *Gibson v Royal Bank of Scotland* 2009 SLT 444; Reid (1996) para 695; Webster (2009).

<sup>1183</sup> (1859) 21 D 940.

<sup>1184</sup> *neminem cum alterius detrimento et iniuria fieri locupletioem*, D 50.17.206.

<sup>1185</sup> (1859) 21 D 940 at 947.

<sup>1186</sup> *Ibid.*

He went on to quote Lord Kames:<sup>1187</sup>

There is one circumstance that, without much connection, real or personal, extends to many cases the maxim, *quod nemo, &c.*, and that is fraud, deceit, or any sort of wrong. If by means of a third person's fraud one gains, and another loses, a Court of equity will interpose, to make up the loss out of the gain. And this resolves into a general rule, that no man, however innocent, ought to take advantage of a tortuous act by which another is hurt.

He then cited numerous English cases where the rule had been applied, and added a significant qualification to it:<sup>1188</sup>

In all these authorities [English authorities], it is of course assumed that the innocent third party has given no consideration for that which has been obtained by the fraud, but is seeking gratuitous advantage.

Lord Benholme makes a further connection with the “well-recognised maxim, that a gratuitous assignee is liable to be affected by the fraud of his cedent”<sup>1189</sup> or *nemo debet locupletari damno alterius*.

In effect, the court in *Wardlaw* made a connection between the criteria traditionally required for accessory liability, bad faith or a gratuitous transaction, and the enrichment principle. That connection was to mutate into the rule that “no-one should profit from the fraud of another”, which I refer to as the “fraud principle”,<sup>1190</sup> and which has received relatively little academic analysis although it appears in case law with increasing regularity over the course of the nineteenth century.<sup>1191</sup>

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<sup>1187</sup> *Ibid.*, quoting from Kames, *Principles of Equity* ((1767) p.107).

<sup>1188</sup> *Ibid.* at 948.

<sup>1189</sup> *Ibid.* at 955.

<sup>1190</sup> I am grateful to Prof. Niall Whitty for the suggestion that the “author’s fraud” rule may be another manifestation of the fraud principle, mainly used in the context of property rather than money.

<sup>1191</sup> An honourable exception is Whitty (1994) pp.252-267; Whitty acknowledges that he is not concerned with the question of the definition of fraud or bad faith (p.253), which this thesis addresses.

More recently in *Smith v Bank of Scotland*<sup>1192</sup> Lord Clyde referred to both principles<sup>1193</sup> as representing exceptions to the rule that fraud (including misrepresentation and undue influence)<sup>1194</sup> committed by a third party was not relevant to reduce a transaction (in this case a contract of caution). And although he famously based his decision to reduce the contract “upon the broad principle in the field of contract law of fair dealing in good faith”<sup>1195</sup> he used both principles to get to that point. It could be said that they represent the mirror image of good faith, namely penalising bad faith, a more familiar formulation in Scots law.

### (a) *The enrichment principle*

The most striking aspect of the fraud principle is its similarity to the enrichment principle, that no-one should profit from the loss to another. The original formulation from Pomponius is *neminem cum alterius detrimento et iniuria fieri locupletiores*<sup>1196</sup> but the received version in Scots law has many variations. Stair adapted it so that no-one should profit from the “*damnum*” of another rather than the original *detrimento* or *iniuria*,<sup>1197</sup> and referred to the Ciceronian version prohibiting profit from “another’s damage” or “the spoil of others”.<sup>1198</sup> Bankton used the familiar enrichment formula of profit from the loss of another (*jactura*);<sup>1199</sup> Erskine transliterated the maxim as being “a gainer to his neighbour’s cost”;<sup>1200</sup> and Bell focused only on the gain side of the equation without reference to any corresponding loss or harm.<sup>1201</sup> Kames also used the enrichment formula, but envisaged a wider principle which could reach to any kind of wrongdoing:<sup>1202</sup>

<sup>1192</sup> 1997 SC (HL) 111.

<sup>1193</sup> He refers to the fraud principle at 117; and the rule against offside goals at 121.

<sup>1194</sup> *Ibid.* at 117.

<sup>1195</sup> *Ibid.* at 118.

<sup>1196</sup> Listed as one of the *regulae iuris* in D 50.17.206.

<sup>1197</sup> Stair I.6.33 (in the context of obligations between minors and curators), again in I.8.2 (*ex damno alterius*). *Damnum* is later defined by Stair as “diminish[ing] or tak[ing] away something from another, which of right he had” (I.9.3).

<sup>1198</sup> Stair I.8.6.

<sup>1199</sup> Bankton, *Institute*, I, 9.

<sup>1200</sup> Erskine, *Institute*, III, 1, 10.

<sup>1201</sup> Bell, *Principles* § 538.

<sup>1202</sup> Kames (1767) p.107.

There is one circumstance, that, without much connection real or personal, extends to many cases the maxim, *nemo debet locupletari aliena jactura*; and that is fraud, deceit or any sort of wrong.

It appears that the Scottish Institutional writers were prepared to adapt the original Pomponius maxim to their own purposes, depending on the degree of loss, harm or damage required.<sup>1203</sup> We can also see a progression (or regression) in the way harm was conceptualised, with a gradual decrease in the standard of severity moving from Stair in the seventeenth century to Bell in the nineteenth. Stair's use of *damnum* linked enrichment to the delictual standard used in his title on Reparation; Erskine and Kames more explicitly envisaged the harm to be financial or patrimonial (cost or loss); and by the time Bell was writing it was the enrichment which mattered with no mention of an equivalent loss.<sup>1204</sup> The Institutional writers, therefore, formulated the maxim broadly and flexibly, but they did not use it in relation to fraud or *dolus*: this was a later judicial development.

*(b) The fraud principle and the Scottish courts*

The fraud principle often arises in what would generally be considered cases involving principles of unjustified enrichment, but it is applied by the courts more generally in cases of fraud.<sup>1205</sup> Gloag suggested it was a “liability closely resembling

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<sup>1203</sup> Trayner cites the maxim as “No one should be enriched out of the loss or damage sustained by another”, describing it as “a maxim of the Roman law, founded upon equity, the principle of which has been adopted by the Scotch law”, the example given being negotiorum gestio (Trayner's Latin Maxims (1993, 4<sup>th</sup> edn.) p.377).

<sup>1204</sup> Although the courts have not accepted Bell's omission of loss, see *Edinburgh and District Tramways Co Ltd v Courtenay* 1909 SC 99 at 105-106 per Lord President Dunedin.

<sup>1205</sup> Cases include *Wardlaw v Mackenzie* (1859) 21 D 940; *Taylor v Tweedie* (1865) 3 M 928; *Gibbs v British Linen Bank* (1875) 4 R 630; *Clydesdale Bank v Paul* (1877) 4 R 626; *Houldsworth v City of Glasgow Bank* (1879) 6 R 1164, aff (1880) 7 R (HL) 5; *Thomson and Others v Clydesdale Bank Ltd* (1893) 20 R (HL) 59; *Mair v Rio Grande Rubber Est. Ltd* 1913 SC (HL) 74; *Price & Pierce Ltd v Bank of Scotland* 1910 SC 1095; *New Mining & Exploring Syndicate Ltd v Chalmers & Hunter* 1912 SC 126; *GM Scott (Willowbank Cooperage) Ltd v York Trailer Co Ltd* 1969 SLT 87; *Royal Bank of Scotland plc v Watt* 1991 SLT 138; *M & I Investment Engineers Ltd v Varsada* 1991 SLT 106 (OH); *Universal Import Export GmbH v Bank of Scotland* 1995 SLT 1318; *Bank of Scotland v MacLeod Paxton Woolard & Co* 1998 SLT 258 (OH); *Subsea Offshore Ltd v Broom* 2003 SCLR 309.



that resulting from the principle of recompense”,<sup>1206</sup> and Lord Coulsfield more recently referred to it as “a principle analogous to recompense, namely that no one can profit from another person's fraud or breach of trust.”<sup>1207</sup> However, there is a subtle difference in the mutation: no profit from another’s loss implies a two party situation; no profit from another’s fraud implies three parties – as well as the victim of the fraud, there is a third party who has gained from the actions of a fraudulent intermediary.

Decisions on third parties and fraud in early Scots law were dealt with by the *particeps* concept, and that principle is clearly settled, as are the criteria for its operation. Indeed, in 1998 Lord Coulsfield affirmed, “It is a well settled principle that no one is entitled to profit gratuitously or knowingly as a result of a fraud.”<sup>1208</sup> However, the marriage between the *particeps fraudis* and the enrichment principle and its appearance in the form of the fraud principle date from the nineteenth century. The first statement of the fraud principle in its current form appears to have come in *Wardlaw v Mackenzie*,<sup>1209</sup> discussed above. Some years later, it was formulated into a general principle by Lord Shand in two significant decisions shortly after he came to the bench. The most definitive statement, on which most subsequent case law relies, is his dictum in *Clydesdale Bank v Paul*:<sup>1210</sup>

a person cannot avail himself of what has been obtained by the fraud of another, unless he is not only innocent of the fraud but has given some valuable consideration.

Lord Shand, like Lord Inglis in *Wardlaw*, was in fact quoting from an English judgment but this has subsequently become the standard formula, relied on

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<sup>1206</sup> Gloag (1929) p.332.

<sup>1207</sup> *Bank of Scotland v MacLeod, Paxton, Woolard & Co* 1998 SLT 258 at 272.

<sup>1208</sup> *Ibid.* at 277.

<sup>1209</sup> (1859) 21 D 940.

<sup>1210</sup> (1893) 4 R 626 at 628-9. For analysis of the difficulties inherent in the decision see Whitty (1994) pp.260-263.

repeatedly in enrichment cases where there is an element of fraud.<sup>1211</sup> Unlike the somewhat vague outline in *Wardlaw*, in *Clydesdale Bank* Lord Shand restated the specific criteria for the operation of the principle, namely to be innocent of the fraud and to have given value. The familiar criteria of bad faith and a gratuitous transaction, deriving from the *particeps fraudis*, have therefore been translated into modern legal concepts, most commonly the rule against offside goals and the fraud principle.

Lord Shand also made clear that the principle goes beyond the law of principal and agent, or employer and employee; rather it is of general application.<sup>1212</sup> Later qualifications of the rule suggest that it is not a delictual rule and therefore not competent to found a remedy in damages,<sup>1213</sup> but that it is competent for actions of reduction or recompense.

#### 4. The Bad Faith Criterion

The rule against “offside goals” or the doctrine of notice is a controversial, and somewhat anomalous, doctrine within property law and the legal underpinning of this type of accessory liability is little understood.<sup>1214</sup> However, there is extensive evidence in case law that the third party is deemed to have behaved “fraudulently” if he has acquired a benefit either gratuitously or with knowledge of another party’s prior *right* or knowledge of another party’s *wrongdoing*.

There has certainly been a resurgence of interest in *bona fides* in Scotland after Lord Clyde’s restatement of a good faith principle in contract law,<sup>1215</sup> as well as academic

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<sup>1211</sup> *Gibbs v British Linen Bank* (1875) 4 R 630 at 634; *M & I Investments v Varsada* 1991 SLT 106 at 108 per Lord Milligan; *Bank of Scotland v MacLeod, Paxton, Woolard & Co* 1998 SLT 258 at 272 per Lord Coulsfield; *Subsea Offshore Ltd v Broom* 2003 SCLR 309 at 316.

<sup>1212</sup> *Clydesdale Bank v Paul* (1893) 4 R 626 at 629.

<sup>1213</sup> *Houldsworth v City of Glasgow Bank* (1879) 6 R 1164, aff (1880) 7 R (HL) 5. The Inner House held there could have been a remedy for “rescission” but not for damages, Lord Shand dissented and suggested that in other circumstances damages could be competent (at 1186).

<sup>1214</sup> Attempts to examine the doctrinal basis of the doctrine of notice in South Africa and in Scotland have largely been inconclusive, see Lubbe (1992) and Wortley (2002).

<sup>1215</sup> *Smith v Bank of Scotland* 1997 SC (HL) 111 at 121 SLT 1061 at 1067 per Lord Clyde.

debate.<sup>1216</sup> However, prior to and post-*Smith* there has been considerable judicial reluctance to embark on any widespread adoption of the concept. Bad faith, on the other hand, is more comfortable territory. The general concept of bad faith was considered in chapter 2,<sup>1217</sup> where it was shown that it usually amounts to private knowledge, or constructive knowledge where the third party ought to have been put on enquiry. The disputed territory is how far beyond actual (subjective) knowledge the principle extends.

*(a) What amounts to knowledge?*

In the context of the rule against offside goals it is clear that bad faith extends to constructive knowledge. In *Rodger (Builders) Ltd v Fawdry*,<sup>1218</sup> the leading modern case, Lord Jamieson made clear that actual knowledge was not required:<sup>1219</sup>

But fraud in the sense of moral delinquency does not enter into the matter. It is sufficient if the intending purchaser fails to make inquiry which he is bound to do. If he fails he is no longer *in bona fide* but *in mala fide*.

Bad faith, therefore, does not require actual knowledge but can be inferred from the circumstances when it amounts to a failure to inquire or shutting one's eyes to the truth.<sup>1220</sup> This is a consistent principle in the property cases.

*(b) A due diligence approach*

It may be that the test of bad faith reaches even further than that as a logical extension of constructive knowledge towards what could be called a "due diligence

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<sup>1216</sup> see, for example, the various contributions in Good Faith in Contract and Property Law (1999).

<sup>1217</sup> See ch.2 pp.43-48.

<sup>1218</sup> 1950 SC 483.

<sup>1219</sup> *Ibid.* at 499; the principle was established in *Marshall v Hynd* (1828) 6 S 384; *Petrie v Forsyth* (1874) 2 R 214; *Stodart v Dalzell* (1876) 4 R 236.

<sup>1220</sup> *Marshall v Hynd* (1828) 6 S 384; *Petrie v Forsyth* (1874) 2 R 214; *Stodart v Dalzell* (1876) 4 R 236; *Rodger (Builders) Ltd v Fawdry* 1950 SC 483; *Smith v Bank of Scotland* 1997 SC (HL) 111, where wilful ignorance or putting one's head in the sand is deemed to be "equivalent to knowledge" (at 113 per Lord Jauncey).

approach”. In *Faulds v Townsend*<sup>1221</sup> neither restitution nor vindication of the property was competent because the horse was already dead, so the court examined the liability of the third party. Townsend had acted in *bona fide* without knowledge that the horse had been stolen. However, the very nature of the business was said to represent such a temptation for thieves that particular care and caution was necessary. The lack of such care in the purchase of the pursuer’s property was, therefore, wrongful, characterised simply as “fault” or “*culpa quae equiparatur dolo*”.<sup>1222</sup> The court held: “Here there has not been reset of theft or *mala fides*, or actual dole, but there has been want of care and caution”.<sup>1223</sup> That lack of care in the purchase and disposal of the horse was equivalent to *culpa* on grounds of public policy; therefore the defender was liable for the full value of the horse.

The basis of the decision in *Faulds* has been characterised variously as a type of reparation<sup>1224</sup> or as “*sui generis*”.<sup>1225</sup> Whatever its correct classification, its rationale arguably stems from what has been suggested to be Stair’s third source of recompense,<sup>1226</sup> which does not derive from property ownership or from delict but sits in a somewhat undefined area involving enrichment, third parties and “fault” which falls short of a delictual standard.<sup>1227</sup> It may also be regarded as an aspect of secondary fraud since its function is to extend liability beyond the thief or the rogue to third parties who are “partakers” in the *culpa*.

The cases discussed below rely on the concept of *culpa lata*,<sup>1228</sup> as a general expression of fault by omission<sup>1229</sup> and in this context it is equated to bad faith. The liability of the third party (in all of the cases discussed below the third party is a

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<sup>1221</sup> (1861) 23 D 437. For the facts of the case see ch.1 p.56.

<sup>1222</sup> *Ibid.* 439.

<sup>1223</sup> *Ibid.* “Reset” in Scottish criminal law is broadly equivalent to handling stolen goods, see Criminal Law (Consolidation) (Scotland) Act 1995, s.51.

<sup>1224</sup> Carey Miller (2005a) para 10.08, on the basis that *bad faith* equates to Stair’s notion of fraud.

<sup>1225</sup> Evans-Jones (2003) para 9.33.

<sup>1226</sup> See ch.3 pp.122-126.

<sup>1227</sup> It may be closer to negligence, but again only implicitly.

<sup>1228</sup> See earlier discussion in ch.2 pp.48-65.

<sup>1229</sup> This weaker sense of *culpa* as *fault* appears to have been the meaning ascribed to it historically, rather than the “gross recklessness” which would be the modern translation.

business) is assessed on policy grounds in terms of whether or not they acted with reasonable care and caution.

In *Brown v Marr, Barclay & Others*<sup>1230</sup> the court had some doubts about the behaviour of a third party pawnbroker because Marr had pawned a substantial quantity of jewellery in a short period of time. According to Lord Moncreiff “[the] question arises whether the defenders exercised such reasonable care and caution as to give them a right to be considered as *bona fide* or innocent parties in this question”<sup>1231</sup> or whether they acted so rashly as to deprive them of being in *bona fide*.<sup>1232</sup> Good faith is not only a question of examining the third party’s state of knowledge, but it also involves scrutiny of behaviour according to an objective standard of “reasonable care and caution”. The pawnbrokers were considered not entirely free of blame because of the lack of enquiry into Marr’s title, but the court was not prepared to go so far as to call them “*mala fide* possessors”.<sup>1233</sup>

Similar reasoning can be seen in *Jarvis v Manson*,<sup>1234</sup> in which an employee stole jewellery from her employer’s house, sold it to a retail jeweller and was subsequently convicted of theft. Meanwhile the jeweller renovated the jewellery and sold some of it in cash sales to unknown customers before being notified that the articles had been stolen. The owner was able to recover the property remaining in the hands of the jeweller because it was tainted with a *vitium reale* and, in relation to the property which had been sold, they argued they were entitled to the value of that jewellery because the jeweller was in bad faith. In fact, the court held there was no evidence that the defender was in bad faith or aware the articles had been stolen, a decision reached after careful examination of the circumstances in which the jewellery had been acquired. Hence, it was relevant that it was bought by two different partners, neither of whom was aware the other had bought from the same seller;<sup>1235</sup> in addition, although the jewellery was bought for a price below market value, this

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<sup>1230</sup> (1890) 7 R 427.

<sup>1231</sup> *Ibid.* at 437 per Lord Moncreiff.

<sup>1232</sup> *Ibid.* at 451 per Lord Gifford.

<sup>1233</sup> *Ibid.*

<sup>1234</sup> 1953 SLT (Sh Ct) 93.

<sup>1235</sup> *Ibid.* at 94.

alone would not be enough to put them in bad faith (the implication being that a low price combined with other factors might be); and finally, the jewellery was disposed of by cash sale where it was not usual practice to take the names and addresses of cash customers. Hence the jewellers' lack of bad faith meant they were only liable *in quantum lucratus* for the profit they had made.

This could be considered as an aspect of secondary fraud whereby the "participation" of the third party does not amount to private knowledge, but is a failure to take sufficient care in acquiring property which has been wrongfully taken from its owner. It is a more objective standard than private (subjective) knowledge and comes closer to the idea of constructive knowledge in that it imposes a duty, not merely of enquiry, but a duty to take reasonable care and it is justified on grounds of public policy.

### *(c) The narrowing of bad faith*

However, things are less clear in relation to the fraud principle. In the same way that primary fraud underwent a process whereby the definition of fraud narrowed, so it appears that a similar pattern is perceptible in relation to secondary fraud. In *Thomson v Clydesdale Bank Ltd*<sup>1236</sup> a stockbroker absconded with funds belonging to investors which he had paid into his own account. The question was whether or not the third party (the bank) was liable to repay the funds. In a number of cases involving the fraud principle the difficulty lies in attributing knowledge to artificial legal persons, the mantra being that fraud is personal. And the court was conscious of commercial realities, for if banks had a duty to inquire about the source of all money deposited it would make business impossible. Lord Watson held that in order to show bad faith,<sup>1237</sup>

[i]t is not enough for them to prove that the respondents acted negligently; in order to succeed, they must establish that the respondents knew, not only that

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<sup>1236</sup> (1893) 20 R (HL) 59.

<sup>1237</sup> *Ibid.* at 61.

the money represented by the cheque did not belong to the broker, but that he had no authority from the true owner to pay it into his bank account.

Lord Shand, now in the House of Lords, held that a third party would be liable “only where it can be shewn directly, or as the reasonable inference from facts proved, that these parties were cognizant that the money was being wrongfully used, in violation of the agent's duty and obligation.”<sup>1238</sup> This is certainly a narrower test of bad faith, but it should also be noted that *Thomson* concerned the law of agency, as do many of the cases invoking the fraud principle, and more work needs to be done to establish the way in which breach of a fiduciary duty relates to a more general remedy for fraud. Admittedly, Lord Shand had earlier made the point that the fraud principle was one of general application,<sup>1239</sup> but in later decisions he does not seem quite so convinced.

The definition of bad faith is still very much an issue for the modern judiciary. At the very least there appears to be some disagreement. In *Advice Centre for Mortgages v McNicoll*<sup>1240</sup> Lord Drummond-Young adopted the traditional test, affirming that knowledge also meant a duty to inquire:<sup>1241</sup>

Fraud in the sense of moral delinquency does not enter into the matter. It is sufficient if the intending purchaser fails to make the inquiry which he is bound to do. If he fails he is no longer *in bona fide* but *in mala fide*... Thus implied or constructive knowledge, just as much as actual knowledge, will bring the principle into operation and render the second purchaser in *mala fide*.

However, in another recent Outer House decision, *Bank of Scotland v MacLeod, Paxton, Woolard & Co*,<sup>1242</sup> Lord Coulsfield took a considerably more restrictive

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<sup>1238</sup> *Ibid.* at 62.

<sup>1239</sup> *Clydesdale Bank v Paul* (1893) 4 R 626 at 629.

<sup>1240</sup> 2006 SLT 591.

<sup>1241</sup> *Ibid.* at para 45.

<sup>1242</sup> 1998 SLT 258.

view. He had to consider the definition of bad faith in considerable detail in a complex fraud case where the pursuers were trying to recover funds paid out by a bank. The case before him turned on the knowledge of the bank and he asked “what the pursuers have to prove in order to show that the bank were not in bona fide”, claiming that existing Scottish authorities were of no help.<sup>1243</sup> After reviewing *Thomson* in some detail, as well as English authorities including the “Baden Delvaux” taxonomy of bad faith,<sup>1244</sup> he concluded:<sup>1245</sup>

It seems to me, therefore, that it must now be taken to be clear that dishonesty is an essential element in the establishing of liability against a third party in cases such as this.

He does leave open the possibility of taking into account “evidence of acts or omissions which might be described as showing wilful blindness, wilful or reckless failure to ask questions, commercially unacceptable conduct or any other form of doubtful behaviour”<sup>1246</sup> to draw an inference of dishonesty, but nevertheless is insistent that “dishonesty or improbity”<sup>1247</sup> are required.

It appears that the spectre of *Derry v Peek* raises its head and threatens to emasculate secondary fraud as it did over a century ago for primary fraud. With respect, Lord Coulsfield only had to look across the disciplinary border to property law, or investigate the older sources, in order to give substance to the meaning of bad faith. He might even have thought to look to Stair’s *Institutions*. It is respectfully suggested that his pronouncements on bad faith are wrong.

It may be that since the rule against offside goals is a much more established category of bad faith, with a good deal of consistency in the decisions of the courts,

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<sup>1243</sup> *Ibid.* at 274. He is referring to *New Mining & Exploring Syndicate Ltd v Chalmers & Hunter* 1912 SC 126; *M & I Investment Engineers Ltd v Varsada* 1991 SLT 106; *Universal Import Export GmbH v Bank of Scotland* 1995 SLT 1318; and *Style Financial Services Ltd v B of S* 1996 SLT 421.

<sup>1244</sup> *Baden v SG Developpement du Commerce SA* [1992] 4 All ER 161.

<sup>1245</sup> *Ibid.* 1998 SLT 258 at 275.

<sup>1246</sup> *Ibid.* at 276.

<sup>1247</sup> *Ibid.* at 276.



constructive knowledge is accepted in that context, but contested in the context of the fraud principle or in cases which appear to raise issues of unjustified enrichment. Since the fraud principle has become associated with enrichment, and since there is no settled view of how wrongful behaviour interacts with enrichment principles, that is perhaps unsurprising. The interface between the two remains a matter for the future as does the relationship between the fraud principle and cases involving indirect enrichment. However, again it would seem sensible to look at the matter in the round, to recognise that similar principles are at work, and to create a scheme which has consistency across the borders of private law.

### 5. The Gratuitous Criterion

Finally, although Stair does not couple together participation in wrongdoing with the requirement that the transaction be onerous,<sup>1248</sup> the courts consider a lack of onerosity almost an aspect of participation in fraud. Transactions can be undone in relation to third parties who have acquired gratuitously even although there has been no knowledge or participation, as one brief report expresses it:<sup>1249</sup>

Reduction upon the head of fraud is good against gratuitous acquirers, tho' not partakers of the fraud.

From earliest times gratuitous transactions have been regarded with suspicion in Scots law. By contrast, Scotland is almost unique in recognising a gratuitous unilateral promise as a binding legal obligation, often thought to be the result of the strength of Scotland's religious and moral heritage and the influence of canon law.<sup>1250</sup> However, this is not a recognition that comes without safeguards and it is balanced against the "presumption against donation" with which it co-exists.<sup>1251</sup> The effect of the presumption is to scrutinise gratuitous transactions and in some cases to

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<sup>1248</sup> Stair does require onerosity, but it is discussed separately and is conceptually different from fraud in that it does not involve wrongdoing but the operation of a presumption in law against donation.

<sup>1249</sup> Auchinleck v Williamson (1667) Mor 10282, also reported at Mor 6033 (Husband and Wife).

<sup>1250</sup> Sellar (2000) p.262-266.

<sup>1251</sup> For a recent treatment of donation see MacQueen & Hogg (2012).

reduce them if the circumstances suggest they have been entered into “fraudulently”, in the sense of taking advantage of a situation of inequality. As examined previously, this was a significant aggravating factor in the context of presumptive fraud, but it is also the second criterion for reduction of a transaction against a third party in the context of secondary fraud.

There is extensive case law on gratuitous transactions,<sup>1252</sup> particularly in relation to property titles. For instance, the courts looked for a “cause onerous and equivalent” to determine whether or not a passive title should be reduced.<sup>1253</sup> In *Boswell v Boswell*<sup>1254</sup> the question was whether “there was a considerable want of the equivalence of the price” in order to decide if the title was lucrative<sup>1255</sup> or onerous, which looks remarkably like an evaluation of whether or not there was adequate consideration. Some older cases also make an explicit link with presumptive fraud in these circumstances.<sup>1256</sup> In *Street v Mason*<sup>1257</sup> there was a competition between a son who was a gratuitous recipient and a creditor where it was argued that the father had known of his impending insolvency before granting the property to his son. The disposition was reduced on grounds of fraud. Another synonym which had the same effect was where a transaction was done *sine causa*,<sup>1258</sup> consistent with the need for it to have an onerous cause.

In terms of legal doctrine, the suspicion of gratuitous transactions and the presumption against donation are clearly close bedfellows of recompense. Stair’s very rationale for the obligation of recompense starts by asserting the presumption against donation:<sup>1259</sup>

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<sup>1252</sup> For older case law see the titles in Morison’s Dictionary under Passive Title and Presumptions.

<sup>1253</sup> Lyon of Muirask v Laird of Elsick (1664) Mor 9792; see also Hadden v Haliburton (1676) Mor 9794.

<sup>1254</sup> Boswell v Boswell (1661) Mor 9792.

<sup>1255</sup> Michel points out that the terms gratuitous and lucrative were not interchangeable in Roman law and were never confused: gratuitous had a meaning based on the social reality of friendship, whereas lucrative was a doctrinal legal concept. (Michel (1962) pp.394 ff.

<sup>1256</sup> Elliot v Elliot (1698) Mor 9782; Wilson v Smith (1772) Mor 9833; Street v Mason (1672) Mor 4911.

<sup>1257</sup> Street v Mason (1672) Mor 4911.

<sup>1258</sup> Dickson v Halbert (1854) 16 D 586; Macandrew v Gilhooley 1911 SC 448.

<sup>1259</sup> Stair I.8.2.

the obligations of recompense of what we are profited by the damage of others without their purpose to gift, or as the law expresseth it *in quantum locupletiores facti sumus ex damno alterius* .... It is a rule in law, *donatio non praesumitur*; and therefore, whatsoever is done, if it can receive any other construction than donation it is constructed accordingly.... Yea, trust is presumed rather than donation.

In fact the whole idea of recompense is built on this principle (with exceptions for certain categories of “conjunct persons”). And it is in the very nature of the doctrine that it arises out of inequality – for Stair this is because a benefit has been received gratuitously, and in Scots law reciprocal performance is the norm rather than donation. Recompense, therefore concerns profit or gratuitous benefit and not property (or only indirectly insofar as profit is derived from it). It is also important to note that, by definition, receipt of such a benefit only arises from the unilateral actions of another: the defender is merely the passive recipient. Therefore, the onerosity of transactions becomes one of the tests by which their validity is assessed.

Hence, enrichment scholars accept that the requirement of onerosity is part of the enrichment obligation, but are far less happy to accept the other secondary fraud criterion of bad faith.<sup>1260</sup> Whitty identifies that the requirement for onerosity is part of enrichment law, but says that the bad faith element is “fault-based”<sup>1261</sup> and indeed he questions whether *Clydesdale Bank v Paul* is a case of enrichment.<sup>1262</sup> There is an alternative approach to the question, which is to say that both elements derive from secondary fraud, and in the cases in question the doctrine of fraud is being applied in an enrichment context. The criteria are the same wherever secondary fraud is found, be it in contract, property, enrichment or agency. Of course, the details are yet to be worked out, but it would be a logical solution to a systemic difficulty.

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<sup>1260</sup> Whitty (1994) p.257.

<sup>1261</sup> *Ibid.*

<sup>1262</sup> *Ibid.* p.260.

It is in relation to the gratuitous criterion that the fraud principle intersects most with indirect, or three party, enrichment cases, and many of those cases turn on the meaning of “gratuitous”.<sup>1263</sup> It is a feature of this group of cases that there is no consistent meaning, and the definition appears to be decided on a case by case basis. So in *New Mining & Exploring Syndicate Ltd v Chalmers & Hunter*<sup>1264</sup> the Inner House had to decide whether it was a gratuitous benefit when a partner in a law firm fraudulently obtained clients’ funds and temporarily credited them to the partnership bank account. Despite the fact that the credits had reduced the firm’s overdraft, the court held that “[t]he fact that the money has been deposited in the safe does not *per se* benefit the firm”.<sup>1265</sup> It appeared to be a question of timing, in that the fraudulent partner had subsequently withdrawn the funds, indeed he withdrew more than had been deposited. In contrast to this fairly restrictive definition, in *M & I Investment Engineers Ltd v Varsada*<sup>1266</sup> Varsada, who was subsequently convicted, applied fraudulently acquired funds to purchase a house in his wife’s name. When the transaction was challenged on the basis of the fraud principle the court held that he had donated the money to her, and the transaction was gratuitous,<sup>1267</sup> despite the fact that she arguably obtained the benefit of a house purchased in her name.

If the fraud principle is to be a helpful rule, more thought must be given to questions of definition, both in relation to bad faith and what constitutes a gratuitous transaction. These should not be arbitrary or discretionary definitions and there is adequate authority to give form and substance to the criteria for liability. Once again, the modern judiciary can be criticised for a lack of joined up thinking. In the recent case *Advice Centre for Mortgages v McNicoll*,<sup>1268</sup> which was chiefly concerned with the two criteria in the context of the rule against offside goals, Lord Drummond-

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<sup>1263</sup> *Gibbs v British Linen Bank* (1875) 4 R 630; *New Mining & Exploring Syndicate Ltd v Chalmers & Hunter* 1912 SC 126; *M & I Investment Engineers Ltd v Varsada* 1991 SLT 106; *Universal Import Export GmbH v Bank of Scotland* 1995 SLT 1318; and *Style Financial Services Ltd v B of S* 1996 SLT 421. Also useful on this topic is Miller (1994) pp. 338-342.

<sup>1264</sup> 1912 SC 126; 1911 2 SLT 386.

<sup>1265</sup> 1911 2 SLT 386 at 390 per Lord Mackenzie.

<sup>1266</sup> 1991 SLT 106.

<sup>1267</sup> *Ibid.* at 109 per Lord Milligan.

<sup>1268</sup> 2006 SLT 591.

Young who was earlier quoted as having understood the scope of bad faith,<sup>1269</sup> had more difficulty with the gratuitous element of the equation. He held that knowledge of causing a breach of contract was sufficient to activate the knowledge requirement, and then speculated:<sup>1270</sup>

It seems that the consequences of the breach can also be visited on a person who acquires property gratuitously, or for a manifestly inadequate consideration, although so far as I can discover this situation has not been the subject of any decided cases outside the field of trusts.

This is clearly not an accurate statement either of the law or of the cases coming before the courts. But since it is the bad faith requirement which is most contested in the rule against offside goals, and the gratuitous requirement most often in the “no profit from fraud” rule, unless there is a coherent approach across the spectrum of private law statements like this will be the consequence.

## 6. A Brief Note on Secondary Fraud and Cautionary Obligations - from *Smith* to *Smith*

Another important example of third party fraud can be found in the recent controversial “cautionary wives” decisions where the requirement that the creditor in a cautionary obligation act in good faith is, I will argue, an application of secondary fraud.<sup>1271</sup> To illustrate the point, which again deserves consideration in much greater detail than space will allow, two decisions which are almost two centuries apart and both named *Smith v Bank of Scotland*, are briefly considered.

In the first *Smith*<sup>1272</sup> the House of Lords allowed reduction of a cautionary obligation on the grounds that the bank concealed the financial position of the debtor, i.e. a

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<sup>1269</sup> See p.254 above.

<sup>1270</sup> 2006 SLT 591 at para 45.

<sup>1271</sup> *Smith v Bank of Scotland* 1997 SC (HL) 111 at 113 per Lord Jauncey, and at 117-118 per Lord Clyde.

<sup>1272</sup> *Smith v Bank of Scotland* (1813) 1 Dow 272; 14 Revised Reports 67.

species of secondary fraud. If it could be shown that the bank knew about his financial state and had not disclosed it, that would be enough to show *mala fides*;<sup>1273</sup> even having doubts about his circumstances and concealing those doubts would be sufficient.<sup>1274</sup> Bad faith could also be constituted by taking advantage of private knowledge to someone else's detriment. The equitable principle applied was that "it was agreeable to the doctrines of equity, at least in England, that no one should be permitted to take advantage of such [mis]conduct."<sup>1275</sup>

More than a hundred and fifty years later, the same issues came before the court in the second *Smith*.<sup>1276</sup> Once more a cautionary obligation was involved, and the key question was the extent to which the bank was in bad faith about the husband's misconduct. Lord Clyde specifically made reference to authorities on the fraud principle,<sup>1277</sup> and the idea of being a participant in wrongdoing,<sup>1278</sup> which involved either bad faith or a gratuitous transaction. And in the context of caution, if the creditor suspected the transaction of being "tainted" in those circumstances he would be in bad faith if he did not make enquiry. Lord Clyde framed the principle in positive terms as an example of good faith, which places a positive obligation on the creditor "to take steps in the interest of the cautioner".<sup>1279</sup> It is interesting to note that he also alluded to other possible aggravating factors, all familiar from presumptive fraud or the modern law of undue influence, namely that "in relation to contracts between close relations the necessity for fairness and avoidance of undue pressure has already been recognised",<sup>1280</sup> and although in Scotland, unlike England, there is no presumption of undue influence in certain categories of relationship, in Scotland we regard a relationship of trust as an "invalidating tendency".<sup>1281</sup>

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<sup>1273</sup> (1813) 14 Revised Reports 67 at 69-70 per the Lord Chancellor (Eldon).

<sup>1274</sup> *Ibid.* at 72 per Lord Redesdale.

<sup>1275</sup> *Ibid.* at 69 per the Lord Chancellor (Eldon).

<sup>1276</sup> *Smith v Bank of Scotland* 1997 SC (HL) 111.

<sup>1277</sup> *Ibid.* at 117.

<sup>1278</sup> Both misrepresentation and undue influence are mentioned as examples of wrongdoing, but it is not suggested that this is a closed list (*ibid.*).

<sup>1279</sup> *Ibid.* at 118.

<sup>1280</sup> *Ibid.* at 119.

<sup>1281</sup> *Ibid.* at 120.

Lord Clyde went on to recognise an active principle of good faith, which has since been controversial. However, the criteria he used and the authorities he relied on are part of the doctrine fraud in its secondary context, and *Smith* may have had a better structural fit within Scots law had he used bad faith instead of good faith. One other consequence of the change from the negative to the positive frame is that it was unfamiliar. Had Lord Clyde relied either on the rule against offside goals or the fraud principle, both of which were part of his construction of the good faith principle, it would have been more familiar territory for future decisions. As it is, the development of similar cases in the Scottish courts has been a steady process of erosion of the principle of good faith.<sup>1282</sup> Almost all of the relevant criteria have subsequently been narrowed: the behaviour of the debtor;<sup>1283</sup> what is required to show bad faith in the creditor; whether there is, therefore, a positive duty on the creditor;<sup>1284</sup> and the extent to which the cautioner has received a gratuitous benefit.<sup>1285</sup>

In all of these areas, the Scottish courts have narrowed the meaning and scope of the decision in *Smith* until it has become only a shadow of what it might have heralded. Lord Justice-Clerk Gill has even questioned whether it was correctly decided<sup>1286</sup> and even academic commentators interpret the no profit from fraud rule as referring principally to fraudulent misrepresentation, which is to ignore large parts of the historical law of fraud.<sup>1287</sup> If the essence of secondary fraud is participation, its scope can only be determined by understanding what has been participated in. Is it only fraudulent (in a secondary sense) to have knowledge of intentional deceit? Or would

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<sup>1282</sup> *Braithwaite v Bank of Scotland* 1999 SLT 25; *Forsyth v RBS* 2000 SLT 1295; *Donald v Hutchinson* 2000 SLT 963; *Wright v Cotias Investments Inc* 2001 1 SLT 353; *Ahmed v Clydesdale* 2001 SLT 423; *Clydesdale v Black* 2002 SC 555; *Thomson v RBS* 2003 SCLR 964; *Broadway v Clydesdale Bank plc* 2003 SLT 707; *Royal Bank of Scotland v Wilson plc* 2004 SC 153.

<sup>1283</sup> Misrepresentation is now said to be required, *Braithwaite v Bank of Scotland* 1999 SLT 25 at 33 per Lord Hamilton, and he questions whether the relationship between husband and wife is enough in Scots law to infer undue influence or any other vitiating factor; *Royal Bank of Scotland v Wilson plc* 2004 SC 153; facility and circumvention was accepted in *Wright v Cotias Investments Inc* 2001 SLT 353.

<sup>1284</sup> *Forsyth v RBS* 2000 SLT 1295; *Wright v Cotias Investments Inc* 2001 1 SLT 353; *Clydesdale v Black* 2002 SC 555.

<sup>1285</sup> *Royal Bank of Scotland v Wilson plc* 2004 SC 153.

<sup>1286</sup> *Ibid.* at 159

<sup>1287</sup> *Eden* (2003) pp.110-111.

participation in other unfair (in the older sense of “fraudulent”) dealings be equally sanctionable. It is clear that a better understanding of the scope and definition of fraud, even if it is regarded as a historical relic, would be helpful for a modern understanding of the fraud principle. And the sad tale of the cautionary wives does highlight the need for greater clarity of definition when we talk about fraud in either its primary or its secondary context.



### ***Conclusion***

This thesis has challenged the current knowledge we have about fraud in Scots law. The existing narrative acknowledges that historically fraud had a much broader meaning than it has today, including the possibility that it could be inferred; that *Derry v Peek* had a significant impact by narrowing the definition of fraud to intentional deceit; that the law of error developed significantly in the second half of the nineteenth century; and that fraud operates in an anomalous way where three party transactions are involved.

On the face of it, this thesis tells a similar story. It has demonstrated that, despite the ubiquitous mantra that fraud must be proved, up to the mid-nineteenth century there was an extensive concept of presumptive fraud and detailed analysis has been given of the categories where it was operative. The underlying conceptual basis of presumptive fraud, inequality, has been examined in a wider historical context to show the impact of scholastic thinking on Stair's foundational account of Scots law, particularly on his treatment of the law of obligations. It has previously been pointed out that Stair was more concerned with obligations than with the assertion of rights; more concerned with the behaviour of the defender than the infringed rights of the pursuer.<sup>1288</sup> This was, of course, entirely in keeping with post-Reformation Scotland, permeated with the moral imperatives of Calvinism. Stair's religious convictions may, therefore, have made him more receptive to structural and substantive borrowings from Aquinas and scholastic moral theologians who were equally concerned with the internal forum and with questions of motive.

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<sup>1288</sup> Campbell makes the point that while Stair's *Institutions* are ostensibly about rights, he begins by "presenting obligations less in their aspect of rights than as limitations upon the right of liberty" (Campbell (1954) p.16).

The important role that *Derry v Peek* played in relation to the Scots law of fraud is acknowledged in this thesis, but only as part of the story. It has been shown that even before *Derry v Peek*, the Scottish courts were beginning to lose confidence in fraud and were looking for alternative solutions, with the result that some of its functions were transferred to the law of error. The mischief being addressed was how the law should treat unintentional misrepresentation. Crucially this thesis presents the argument, in contrast to the views of most commentators, that unintentional misrepresentation was historically part of the law of fraud and not the law of error, and that fraud remains conceptually and structurally a more appropriate solution. It is not entirely clear why this development took place, and difficult over a century later to speculate with any degree of certainty. However, it is at least plausible to suggest that economic and social forces outside the law were partly responsible. The mid-nineteenth century was an important period of change in Scotland and the combined impact of the Scottish Enlightenment and the industrial revolution was transforming the law, as well as wider society. The courts, often consciously, became part of the machinery for facilitating growth and commerce, and for rewarding entrepreneurs and company directors who took risks and who represented the agents of economic growth. Lenman points out that the message that growth was good, “rang from the pulpits”, and the paternalism of Kirk and state was giving way to the idea that “economic matters were best left to the providential interplay of unshackled economic forces”.<sup>1289</sup>

It is perhaps no coincidence that the transformation of fraud went hand in hand with a period of trauma for the Scottish economy. Many of the cases considered in this thesis were actions by shareholders who were affected by the collapse of banks or other companies, after a dramatic credit crunch in the financial sector.<sup>1290</sup>

By the end of 1845 there were 17 note-issuing Scottish banks and between 1850 and 1878 the number fell to ten as a result of four amalgamations, one

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<sup>1289</sup> Lenman (1977) p.158.

<sup>1290</sup> *Ibid.* p.190.

carefully managed collapse disguised as an amalgamation, and two sensational crashes.

The Western Bank collapsed in 1857 and the City of Glasgow Bank followed in 1878. Both were “run on aggressive lines”,<sup>1291</sup> and had over-extended their lending by offering higher interest rates than their more conservative Edinburgh counterparts.<sup>1292</sup> The losers were ordinary shareholders and, in the case of the City of Glasgow Bank, there was the added complication of fraudulent behaviour by the directors of the bank, who had attempted to conceal problems by falsifying the balance sheets.<sup>1293</sup> History repeats itself, they say, but in the nineteenth century there was no question of the government stepping in to bail out failing banks. Instead the courts were left to formulate policy and to attribute liability using the existing legal rules. Most of the actions raised by shareholders alleged fraud and misrepresentation and this is the context in which the mutation from fraud to error took place. One of the difficulties may have been a semantic one, because fraud sounds like (and is) a criminal offence<sup>1294</sup> and many company directors were professional people, including judges and lawyers. It may have been a step too far for their contemporaries in the courts to label them fraudsters simply for an inaccuracy in the share prospectus or in the accounts.

The final part of this thesis has attempted to create a new taxonomy of fraud and has argued that the “exception” which fraud represents in three party situations, such as the “offside goals” rule or the fraud principle, is a unified doctrine in itself. The dual criteria of bad faith and a gratuitous transaction – both categories within presumptive fraud – are remnants of the principle of inequality and it is only by appreciating the origins of these rules that they can be developed consistently with the rest of Scots law.

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<sup>1291</sup> *Ibid.*

<sup>1292</sup> Campbell (1985) pp.112-114.

<sup>1293</sup> Lenman (1977) p.114.

<sup>1294</sup> The directors of City of Glasgow did in fact go to prison, Campbell (1985) p.114.

One phenomenon that is noticeable from an extensive study of the cases relating to fraud and misrepresentation is the gradual narrowing of the scope not only of fraud but of almost all the criteria associated with it, so much so that the Court of Session found its decisions regularly being reversed by London on grounds of equity. Scots law was losing the broad concept of fraud which had been used for centuries to deal with unwarrantable behaviour and in the process was losing the ability to call on its equitable jurisdiction to deal with substantive unfairness. Fraud was narrowed to intentional deceit; the *culpa lata* principle became “gross negligence” rather than a lack of reasonable care and caution; it was disputed whether a misrepresenter needed to have reasonable grounds for an honest belief in the truth of his misstatement or whether it could simply be asserted; and even bad faith is currently on the way to requiring dishonesty in the way fraud did over a century earlier.

In his masterly account of the doctrine of notice in South Africa, Gerhard Lubbe makes a much wider comment on the need for theoretical work in private law:<sup>1295</sup>

The temptation ... to address the problem of substance by developing a dogmatic instrumentalism which assigns particular problem areas to the one or other area of private law with reference to the supposed socio-economic functions of the various divisions of private law, does not, it is submitted, provide a satisfactory solution in all respects.

He identifies the goal of legal science:<sup>1296</sup>

The challenge, therefore, for any proponent of a productive doctrine, is the development of a methodology to ensure that any theoretical treatment of the law takes place in a manner responsive to the needs of society, the parties involved and the demands of justice.

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<sup>1295</sup> Lubbe (1992) p.269.

<sup>1296</sup> *Ibid.* p.266.

It is submitted that this is no less true for Scots law except that there is precious little reference by our courts to the socio-economic functions of law other than the demands of commerce and the corresponding need for certainty (substitute rigidity). But the “dogmatic instrumentalism” of assigning cases to formalistic categories (as happened with the law of fraud) can be identified in other areas: the erosion of Lord Clyde’s “good faith” principle in a cautionary context and the requirement for dishonesty in the definition of bad faith are only two examples. It is possible to view developments in the law of fraud over the course of the nineteenth century as a dearth of legal science and an inability, or a refusal, to take an overarching view of how to achieve substantive fairness. However, and on the assumption that it is not controversial to suggest that part of the law’s function is to deliver fairness, balanced with certainty, legal scientists have to develop the rules, and the exceptions to those rules, in a way that is rational and historically consistent so that the law can develop in a coherent way (as well as the need to provide a reasoned explanation for the next generation of lawyers). The narrowing of fraud and the expansion of error was done in an irrational and historically inconsistent way: the end result is confusion that has lasted for a century.

My final suggestion is that fraud needs a new name. It may be desirable to reclaim some of the territory that the historical doctrine of fraud encompassed, but it would not be realistic to think it could still be called fraud. The definitions are too well established and the connotations too negative. However resistant Scots law may be to an overarching principle of good faith, it is very familiar with bad faith, and that may be a good place to start.

As this account of the law of fraud has demonstrated, from the time of Stair it was the delivery mechanism for substantive justice in Scots law. It acted almost as a moral arbiter of what was acceptable according to the mores of civil society as much as the application of legal rules. It could be argued that fraud in this wide historical sense was as close to a general *fault* principle as Scots law ever came. Fraud was Scottish equity at work. And all law needs equity, including Scots law, in order to

preserve the connection between law and justice, and to avoid the accusation that law is simply a body of complicated rules for the benefit of the legal industry.

To give Stair the last word:<sup>1297</sup>

As the natural law is *in aequo*, so the positive law is *in bono* or *utili*: and upon these two legs doth justice move, in giving every man his right.

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<sup>1297</sup> Stair I.1.18.

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## **Appendix 1: The 1691 Glasgow University Library Catalogue**

This appendix provides a more detailed analysis of Glasgow University library holdings according to the 1691 catalogue, the earliest systematic catalogue still extant. The 1691 library catalogue was an attempt to consolidate the holdings at that time.<sup>1298</sup> It is therefore likely to include the main collections of donations received up to that date. Dr. Stephen Rawles<sup>1299</sup> is currently engaged in transcribing the entries of the 1691 catalogue and has created a searchable database of records. He was kind enough to provide a subset of this database, restricted to 1645, which allows a more accurate assessment of the library's stock in the early 1640s. The 1645 subset contains all works from the 1691 catalogue which were published up to 1645. It is not possible to ascertain accurate dates of acquisition, so it remains possible that works published prior to 1645 may have been acquired after that date but before 1691. However, we do know that there was an "extraordinary pronounced peak"<sup>1300</sup> in the number of works dating from the first three decades of the seventeenth century, suggesting a higher level of acquisitions at that time.

Dr. Rawles' work confirms the religious character of the library's stock which "corresponds to the strong orientation of the University towards Divinity".<sup>1301</sup> A summary of the classification sequence gives a flavour:

The first alphabetical sequence deals with the Bible, followed by what we would now call Biblical criticism. The Greek and Latin Fathers follow, and then the Councils of the Church, then back to more patristics and ritual. The catalogue goes on to classify scholastics, then Reformed, followed by Catholic biblical commentary; "didactic" theology, perhaps equivalent to practical theology then lots of 'polemic' of various hues follows, and finally Church History. Non theological subjects commence the second sequence, with sizeable chunks of non-Church history and Philosophy. A "Miscellaneous" section follows, then the works donated by John Snell

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<sup>1298</sup> Although only a book by book comparison with the lists of bequests in the *Munimenta alme universitatis Glasguensis* (Vol. 3, C. Innes, ed., Glasgow, 1854, 403-64), could rule out the possibility that some were omitted. Full details of the *Concilia et Decreta* classification of the 1691 catalogue are printed in Robertson (1981) pp.124-127.

<sup>1299</sup> My thanks to Dr. Rawles for making this material available to me. A short summary of Dr. Rawles' work is available on Glasgow University Library (GUL) Special Collections website as an illustrated exhibition, see <http://special.lib.gla.ac.uk/exhibns/1691Catalogue/Introduction.html>. Additional information relating to the 1691 library catalogue derives from discussion with Dr. Rawles.

<sup>1300</sup> <http://special.lib.gla.ac.uk/exhibns/1691Catalogue/Stock.html>.

<sup>1301</sup> <http://special.lib.gla.ac.uk/exhibns/1691Catalogue/Classification.html>.

(1629-1679), founder of the Snell exhibitions at Balliol College Oxford, and finally more practical theology.<sup>1302</sup>

In the 1691 catalogue 191 pages are devoted to Theology and Divinity alone, and only 156 pages to all other subject classifications, for instance law, medicine, maths or philosophy.<sup>1303</sup> Some basic statistical work on the number of books<sup>1304</sup> within each classification makes this emphasis even more pronounced, since many of the “theological” pages are crammed full of entries, to the point where the writer has had to insert entries in margins and around the sides of the pages. This is particularly true in the sections on “*Polemici*” and Protestant biblical commentaries. The best stocked subjects in the 1691 catalogue are *Polemici* with 564 works, followed by Philosophy (353), Civil History (281) and Protestant Biblical commentary with 219 works. The section on *Scholastici* contains 173 works, still a sizeable collection. In contrast, *Juridici* has only 82 titles, Geography 95 titles and Medicine 100.

Examination of the 1645 subset of the catalogue presents a similar picture for the period in which Stair may have made use of the library’s resources.<sup>1305</sup> The subject classification with the largest holdings in 1645 was again *Polemici* (393 titles), which contained writings on Reformation doctrine, for instance the works of Luther<sup>1306</sup>, Calvin<sup>1307</sup>, Bucher<sup>1308</sup> and Knox.<sup>1309</sup> It also included doctrinal treatises,<sup>1310</sup> debates between Protestant theologians or works written to counter doctrinal heresy, both Roman Catholic<sup>1311</sup> and Protestant sectarian debates.<sup>1312</sup> The conflict which we know

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<sup>1302</sup> <http://special.lib.gla.ac.uk/exhibns/1691Catalogue/Classification.html>. The full classification list is shown below (I am grateful to GUL Special Collections for permission to use this illustration).

<sup>1303</sup> <http://special.lib.gla.ac.uk/exhibns/1691Catalogue/Classification.html>.

<sup>1304</sup> The term “books” is used in the loosest sense, since one catalogue entry may include up to 20 pamphlets bound together, see <http://special.lib.gla.ac.uk/exhibns/1691Catalogue/Stock.html>.

<sup>1305</sup> Any conclusions reached from this subset of the catalogue are tentative in that not all the works published prior to 1645 may have been acquired prior to 1645. But we can be certain that nothing published later than that date was acquired prior to it. Titles of books are given as they are listed in the catalogue.

<sup>1306</sup> “Martini Lutheri Opera polemica in fol: Edit: Wittebergae 1546” (GUL Sp Coll Bi7-e.4); or “Martinus Lutherus de servo Arbitrio in 8vo Edit: Wittebergae 1535” (GUL Sp Coll Bk4-l.10).

<sup>1307</sup> “Jo: Calvini Tractatus Theolog: in fol: Edit: Genevae 1576” (GUL Sp Coll Bm10-c.7).

<sup>1308</sup> “Martini Bucerii Defensio Christianae Reformationis in 4to Edit: Genevae 1613” (GUL Sp Coll Bn4-h.10); “Martin Bucerii opera in fol: Edit: Basil: 1577” (GUL Sp Coll Bn4-b.1).

<sup>1309</sup> “Jo: Knox concerning praedestination in 8vo Edit: 1560” (GUL Sp Coll Bi7-k.23).

<sup>1310</sup> For instance “A Scholasticall discourse against the Idolatrie of the crosse in fol: Edit: 1607” (GUL Sp Coll Bm5-e.10); or “Mr Baxter upon Infants Baptisme in 4to Edit: Lond: 1635” (GUL Sp Coll Bk6-g.15).

<sup>1311</sup> For instance “Tho: Beards Retractive from the Romish Religion in 4to Edit: Lond: 1616” (GUL Sp Coll B14-i.13); or “Christophorus contra Jesuitarum dogmata in 4to Edit: Francofurti 1608” (GUL Sp Coll Bh9-g.8) or “Cameron’s treatise against the papists Gall: in 8vo Edit: Rochell 1617” (GUL Sp Coll Bi4-i.6).

<sup>1312</sup> See “De Incarnatione Pedito-baptismo et Disciplina Eccl: contra Anabaptistos per Sam: Ampsingium in 8vo Edit: Lugd: Bat: 1619” (GUL Sp Coll Bi7-k.16); or “William Fulks Defence of the Translation of the Scriptures against Gregorie Martin in 8vo Edit: Lond: 1583” (GUL Sp Coll Bm4-k.22).



raged within Scotland at this time, particularly the battle between Episcopalians and Presbyterians is reflected in these works.<sup>1313</sup>

Next in terms of the size of the holdings up to 1645 is Philosophy (209), followed by Protestant Biblical commentary (181); Civil History (173) and *Scholastici* (110), similar in proportion to the holdings in 1691. Both the Philosophy and Scholastic sections would have been of particular relevance to the arts curriculum which Stair taught.

The legal holdings up to 1645 run to 66 works and it appears that for the library classifiers *juridici* meant the civil law of Rome or canon law, plus a few Scottish works and a smattering of materials relating to foreign jurisdictions.<sup>1314</sup> Most of the titles relate to Roman law, including Justinian's Institutes,<sup>1315</sup> the *Corpus Iuris Civilis*,<sup>1316</sup> and other general treatments of canon and civil law<sup>1317</sup> with commentaries by well known jurists, the best represented of which are Accursius,<sup>1318</sup> Bartolus,<sup>1319</sup> and Baldus.<sup>1320</sup> There is also a legal work by the scholastic jurist Luis de Molina, *De Justitia et Jure*.<sup>1321</sup>

Scottish legal resources are limited to three titles, two of which are collections of statutory materials,<sup>1322</sup> the third a copy of *Regiam Majestatem*.<sup>1323</sup> There is only marginally more English material - five titles, two of which are statutes of the

<sup>1313</sup> For instance "The Dew Right of Presbytrie by Mr Rutherford in 4to Edit: Lond: 1644" (GUL Sp Coll Bi8-i.7); or "A defence of the Presbyterian church Government by Jo: Pagit: in 4to Edit: Lond: 1641" (GUL Sp Coll Bk9-i.6).

<sup>1314</sup> For instance, "The statutes of Ireland the first vol: in fol: Edit: Dublin 1621" (GUL Sp Coll q556, modern classification uncertain); or "Juris Civilis in Hispaniae Regis Constitutiones Tom: Primus in Fol: Edit: Duaci 1612" (GUL Sp Coll Bm2-c.8); or "Stile and Practise of France Gall: in 12mo Edit: Paris:1552" (GUL Sp Coll Bh8-l.28).

<sup>1315</sup> "Justiniani Institutionum Lib: Quatuor a Joa: Crespino in 12mo Edit: 1597" (GUL Sp Coll Bh6-l.2); also see "Imperatoris Justiniani Vol: Continens Librum Authenticorum in novem Collationes Distinctum in Fol: Edit: Paris: 1529" (GUL Sp Coll Bi6-c.14).

<sup>1316</sup> "Corpus Juris Civilis Justiniani cum Comment: Accursii Tom: Primus Continens Digestum Vetus in Fol: Edit: Genevae 1625" (GUL Sp Coll Bm4-a.6-10/BR.1.11, modern classification uncertain); "Codicis Sacratissimi Imperatoris Justiniani Libri duodecim cum Comment: Accursii et aliorum in fol: Edit: Genevae 1625" (GUL Sp Coll Bm4-a.6-10/BR.1.11, modern classification uncertain).

<sup>1317</sup> For instance, "Lexicon juris Civilis et Cannoni in Fol: Lugd: 1574" (GUL Sp Coll Bn3-c.12); or "M. Antonii Cucchi Institutionis juris canonici libri quatuor Coloniae 1564" (GUL Sp Coll Bi2-l.28).

<sup>1318</sup> by whom there are 5 works, including "Volumen Legum Parvum cum Comment: Accursii et aliorum in Fol: Edit: Genevae 1625 It: Ejusdem de Consuetudine feudorum" (GUL Sp Coll Bm4-a.6-10/BR.1.11, modern classification uncertain).

<sup>1319</sup> by whom there are 5 works, including "Bartholi Operum, Commentaria in primam et 2dam digesti noti Vol: 1. in fol: Edit: Lugd: 1552" (GUL Sp Coll Bl6-a.1).

<sup>1320</sup> by whom there are 3 works, including "Baldi Comment: in Primam Digesti veteris partem in fol: Edit: Veneti: 1616" (GUL Sp Coll Bi3-a.8-10).

<sup>1321</sup> "Molinaeus De Justitia et jure Tom: Primus et 2dus in fol: Edit: Colon: Agrip:1613" (GUL Sp Coll Bm6-c.8).

<sup>1322</sup> "The acts of Parliament of the Kings and Queen Mary in fol: Edit: Edinburg: 1568" (GUL Sp Coll Bn6-d.8); and "The Acts of Some Parliaments of Scotland in King James the sixth his tyme in Fol: Edit: Edinburgh 1611" (GUL Sp Coll f418, modern classification uncertain).

<sup>1323</sup> "Regiam majestatem Scoticae in Fol: Edit: Edinburg: 1609" (GUL Sp Coll Bn6-d.11/Bl13-a.6).

University of Oxford.<sup>1324</sup> Only 16 more titles were acquired (or published) between 1645 and the complete catalogue in 1691 for the *Juridici* section and only three of those were Scottish works: a later collection of Scottish statutory material<sup>1325</sup> and two works by George McKenzie.<sup>1326</sup> The latter represents the first doctrinal legal material on Scots law held by the library, and it was certainly acquired after Stair's tenure as regent. Other late (post-Stair) additions include legal works by Vinnius<sup>1327</sup> and Paul Voetius,<sup>1328</sup> as well as Puffendorf's *Elementa Jurisprudentia*.<sup>1329</sup>

The works of Aristotle dominate the philosophy classification including the *Nicomachean Ethics*.<sup>1330</sup> The library held all of the major works of Aquinas,<sup>1331</sup> including the *Summa Theologiae*, together with numerous commentaries on Aquinas. Among these were familiar scholastic names, now associated with legal writing as well as theology and philosophy and somewhat inconsistently classified in the library catalogue. For example, Lessius' *De Justitia et Jure* and de Soto's *De Iustitia de Jure* are both classified with the scholastics,<sup>1332</sup> while Molina's work of the same title is with the *Juridici*.<sup>1333</sup> Suarez' complete works in fifteen volumes were available<sup>1334</sup> and he is represented both in philosophy and with the scholastics.

<sup>1324</sup> "The second part of the paralel or conference of the civill law Cannon law & comon law of England by William Fulbeck in 4to Edit: Lond" (GUL Sp Coll B16-i.23); "Statuta Selecta Universitatis Oxon: in 4to Edit: Oxoniae 1638" (GUL Sp Coll Bi6-l.10); "Eirenarcha or the office of the justices of peace in four books Collected by William Lambert in 8vo Edit: Lond: 1619, It: the Duties of the Constables &c by the same author" (GUL Sp Coll Bm5-k.7); "The Magazine of Honour by Mr Bird in 8vo Edit: Lond: 1642" (GUL Sp Coll Bk2-l.15); "Statuta selecta Universitatis Oxoniensis in 8vo Edit: Oxon: 1638" (GUL Sp Coll Bi6-l.10).

<sup>1325</sup> "The lawes of Parliaments of Scotland in Fol: Edit: Edinburg: 1681" (GUL Sp Coll RF 149).

<sup>1326</sup> "Sr George McKenzies Criminallus in 4to Edit: Edinburgi 1678", GUL Sp Coll Bk3-h.2; and "Idea Eloquentiae fforensis Hodiernae Aut: Georg: Mackenzieo R.A. 8vo Edinb: 1682" (GUL Sp Coll Bm5-k.3).

<sup>1327</sup> "Arnoldi Vinii Selectarum Juris Civilis quaestionum Lib: Duo: in 12mo Edit: Roterodami 1672" (GUL Sp Coll Bh4-h.13).

<sup>1328</sup> "Paulus Voetius Institutionum pars prior, 4to ultrajecti 1668" (GUL Sp Coll Bn4-k.12).

<sup>1329</sup> "Elementa Jurisprudentiae per Sam: Puffendorf in 8vo Edit: Hagae comit: 1660" (GUL Sp Coll Bo5-d.11).

<sup>1330</sup> Multiple copies were available in different editions and with commentaries attached, for instance "Aristoteles Ethica Gr: Lat: Antonio Riccobono Interp: cum Ejusdem Comment: in 8vo" (GUL Sp Coll RB 2858, modern classification uncertain); "Aristotelis Opera Gr: Lat: cum comment: Gul: Duvallii Tom: Ius in fol: Edit: Paris: 1629" (GUL Sp Coll Bi5-a.3-4)

<sup>1331</sup> These include "Aquinatis Summa Theologiae in fol: Edit: Colon: Agrip: 1622" (GUL Sp Coll Bk5-c.13); "Aquinas in 4tum Lib: Sententiarum in fol: Edit: Venetiis 1501"; "Quaest: Disputatae in fol: Edit: Lugd: 1586"; "Contra Gentiles in fol: Edit: Paris: 1552"; "Compendium Theologie Scholasticae Aquinatis per Ludovicum Carbonem in 4to Edit: Colon: 1609"; "Tertia pars Thomae cum Comment: Cajetani in fol: Venetiis 1509"

<sup>1332</sup> "Leonardus Lessius De Justitia et Jure ad 2dam 2dae Thomae in fol: Edit: Paris: 1613" (GUL Sp Coll Bm6-b.4); "Domenici Soto Lib: Decem de justicia et jure in 4to Edit: Venetiis 1608" (GUL Sp Coll B18-f.2)

<sup>1333</sup> "Molinaeus De Justitia et jure Tom: Primus et 2dus in fol: Edit: Colon: Agrip: 1613" (GUL Sp Coll Bm6-c.8)

<sup>1334</sup> "Fr: Suarezii Opera omnia in fol: Edit: Moguntiae 1620 Tom: Ius Contin: disp: in primam partem Thomae de Deo" (GUL Sp Coll Bm3-b.1-15)

Classification Index for the 1691 Catalogue, used with permission of Glasgow University Library, Special Collections

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### Classification headings

• A	Biblia	• AK	Poetae
• B-C	Philologi sacri	• AL-AM	Philol. Prof.
• D	Patres Graeci	• AN	Juridici
• E	Patres Latini	• AO	Medici
• F	Concilia et Decret	• AP	Ex dono Jo. Snell
• G	Bibliothecae Pat. et Ritual.	• AQ-AR	Theol. Pract.
• H-K	Scholastici	• AS-AZ	Miscellanei
• L-M	Comment. Reformati	• =====	
• N-O	Comment. Pontificii	• BA-BB	Philologi
• P	Theologi didactici	• BC	Polemici
• Q-X	Polemici	• BD-BE	[Misc. Theol.]
• Y-Z	Hist. Eccles.	• BF-BM	[Misc.]
• AA-AC	Hist. Civil	• BO	Philologi
• AD	Politici	• BP	Juridici
• AE	Geographia	• BQ	Medici
• AF	Mathem	• BR	Historici
• AG-AI	Philosophici	• BS	Philos & Math

***Appendix 2: Thomas Aquinas and Viscount Stair: the influence of scholastic moral theology on Stair's account of restitution and recompense***

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## Thomas Aquinas and Viscount Stair: the Influence of Scholastic Moral Theology on Stair's Account of Restitution and Recompense

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*This article examines the impact of scholastic moral theology on aspects of Stair's Institutions of the Laws of Scotland. It is argued that both Stair's general concept of justice and his account of the 'obediential' obligations of restitution and recompense were influenced by Aristotelian philosophy and Thomist moral theology. The complex interaction in Stair's thinking of Presbyterian religion, scholastic philosophy and a commitment to the rational natural law are sketched in order to shed light on the historical and cultural context within which he wrote. The result is a more complex picture of the influences which informed the writing of the Institutions.*

The importance of Viscount Stair's *Institutions of the Law of Scotland*<sup>1</sup> for modern Scots law can hardly be overstated. Its publication in 1681 has been described as '[t]he most significant event in Scottish legal development',<sup>2</sup> in that it provided, for the first time, a systematic and rational exposition of Scots private law. To the present day it is regarded as foundational and authoritative by courts and commentators alike, even when Stair's account of the law proves troublesome for the development of a modern taxonomy. For instance, in the recent trilogy of cases which have reshaped the law of unjustified enrichment the leading judgments all relied on Stair's authority despite the difficulties inherent in doing so.<sup>3</sup> Indeed, in *Shilliday v Smith* (1998), an argument of counsel is specifically rejected as being 'inconsistent with Stair's statement of the law'.<sup>4</sup>

Stair was remarkable not only for his formidable intellect, but also the extent of his involvement in the civic life of Scotland in the seventeenth century. He devoted his life to religion, law and politics, probably in that order, and was deeply immersed

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<sup>1</sup>James Dalrymple, Viscount of Stair, *The Institutions of the Law of Scotland*, 2nd ed., 1693, repr. David M. Walker, ed., Edinburgh and Glasgow, 1981, hereafter *Institutions*.

<sup>2</sup>Alan Watson, *Legal Transplants*, Edinburgh, 1974, 48.

<sup>3</sup>*Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 S.C. 151, at 157–158, per Lord President Hope; *Dollar Land (Cumbernauld) Ltd v C.I.N. Properties Ltd* 1998 S.C. (H.L.) 90, at 99, per Lord Hope of Craighead; *Shilliday v Smith* 1998 S.C. 725, at 730, per Lord President Rodger, 732, per Lord Kirkwood, 734, per Lord Caplan.

<sup>4</sup>1998 S.C. 725, at 730, per Lord President Rodger.

in the struggles between Kirk and state which dominated that period.<sup>5</sup> He was a committed Presbyterian, an allegiance which affected both his personal life and his formulation of the law. For Stair was intent not only on creating a rational system of law, but one which was godly in character and would, in turn, yield godly Scottish citizens.

The *Institutions* have been scrutinised by many eminent jurists with the result that we have considerable understanding of the context within which Stair wrote,<sup>6</sup> the sources he relied on and, in particular, the (not unqualified) civilian pedigree of his work.<sup>7</sup> It is also recognised that his initial training in philosophy brought a conceptual depth to his writing that was not matched by the Scottish jurists who followed in his footsteps, and the *Institutions* have provided fertile ground for jurisprudential analysis.<sup>8</sup> But there remain puzzling aspects of his thought. In 1954 Professor Campbell's analytical study of the *Institutions* identified the fact that Stair's treatment of obligations was unusual in that it did not 'fit harmoniously' either with his own stated aim of enumerating rights<sup>9</sup> or with the scheme of Roman law.<sup>10</sup> He concluded that Stair's structure did not derive either from the civilian tradition<sup>11</sup> or from the natural law thinking of the 'mighty Grotius',<sup>12</sup> and suggested a possible source in moral theology: 'I suspect that one might need not only to explore the Protestant theologians but also to trace the relationship, whether by derivation or by repulsion, between their doctrines and those of their Catholic predecessors and contemporaries.'<sup>13</sup>

This article contributes to the suggested exploration by focusing on Stair's encounter with the scholasticism of Thomas Aquinas and the Spanish moral

<sup>5</sup>J.D. Ford, 'Dalrymple, James, first Viscount Stair (1619–1695)', *Oxford Dictionary of National Biography*, Oxford, 2004 <<http://www.oxforddnb.com/view/article/7050>>, accessed 20 April 2008; A.J.G. Mackay, *Memoir of Sir James Dalrymple, First Viscount Stair*, Edinburgh, 1873.

<sup>6</sup>See in general contributions to David M. Walker, ed., *Stair Tercentenary Studies*, Edinburgh, 1981; also J.D. Ford, *Law and Opinion in Scotland during the Seventeenth Century*, Oxford, 2007.

<sup>7</sup>William M. Gordon, 'Stair, Grotius and the Sources of Stair's Institutions', in J.A. Ankum, J.E. Spruit, F.B.J. Wubbe, eds., *Satura Roberto Feenstra oblata*, Freiburg, 1985, 571–583; William M. Gordon, 'Stair's Use of Roman Law', in Alan Harding, ed., *Law Making and Law Makers in British History*, London, 1980, 120–126; William M. Gordon, 'Roman Law as a Source', in Walker, ed., *Tercentenary Studies*, 107–112; Alan Watson, 'Transformations of Law: Justinian's *Institutes* 1.2 *pr.*1; Stair; Mackenzie', in H.L. MacQueen, ed., *Miscellany IV*, Edinburgh, 2002, 243–254; Watson, *Legal Transplants*, ch.7; Peter G. Stein, 'The Influence of Roman Law on the Law of Scotland', [1963] *Juridical Review*, 205–245; Peter Birks and Grant McLeod, 'The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century before Blackstone', 6 *Oxford Journal of Legal Studies* (1986), 46–85, at 56–58; John W. Cairns, 'The Civil Law Tradition in Scottish Legal Thought', in David L. Carey Miller and Reinhard Zimmermann, eds., *The Civilian Tradition and Scots Law*, Berlin, 1997, 204–206.

<sup>8</sup>A.H. Campbell, *The Structure of Stair's Institutions*, Glasgow, 1954 (David Murray Lecture); Neil McCormick, 'Stair as Analytical Jurist', in Walker, ed., *Tercentenary Studies*, 187–199; Neil McCormick, 'Law, Obligation and Consent: Reflections on Stair and Locke', 45 *Archiv für Rechts- und Sozialphilosophie* (1979), 387–410; Peter G. Stein, 'The Theory of Law', in Walker, ed., *Tercentenary Studies*, 181–187.

<sup>9</sup>*Institutions*, I.1.18; I.1.22.

<sup>10</sup>Campbell, *Structure*, 16.

<sup>11</sup>*Ibid.*, 17–20.

<sup>12</sup>*Ibid.*, 20. Campbell identified greater similarity with Pufendorf's *De Iure Naturae* (*ibid.*, 21) but recent research on the dating of the *Institutions* suggests this is an unlikely source, see John D. Ford, 'Stair's Title "Of Liberty and Servitude"', in A.D.E. Lewis and D.J. Ibbetson, eds., *The Roman Law Tradition*, Cambridge, 1994, 135–158, at 138.

<sup>13</sup>Campbell, *Structure*, 23.

theologians of the Counter-Reformation.<sup>14</sup> The territory is complex and in many ways counter-intuitive, for who would expect the legal system of fiercely Protestant Scotland to have been profoundly influenced by Catholic theologians? And yet Stair's formulation of natural law and, consequently, his treatment of what he called 'obediential' obligations<sup>15</sup> may derive from this source. This article traces the influence of Aquinas on Stair's overall conception of justice and conducts a comparison between the Thomist doctrine of restitution and Stair's treatment of the obligations of restitution and recompense.

#### THE CANONIST DOCTRINE OF RESTITUTION

The story begins with canon law. The church had enormous influence on European legal development because of the intellectual and literary resources of its clerics, the efficiency of its legal system and, not least, its ubiquitous presence. Wieacker describes the 'intimate interplay' of canon and civil law in northern Europe, mediated by clerics trained in both, from the thirteenth century on.<sup>16</sup> The intermingling of juristic traditions inevitably meant that concepts from the one infiltrated the other. In the century following the compilation of Gratian's *Decretum* (c.1140) canonist jurists were prepared to borrow Roman terminology and concepts where there were gaps to fill or details to be elaborated.<sup>17</sup> However, the borrowing was not always faithful in that civilian rules were modified if they were deemed inadequate to provide ethical solutions to ethical problems:

We have here a 'reception' which is not so much a wholesale *acceptance* of Roman law *qua* valid norms of law, as an *interpretation* of norms contained in the older canonical sources in the light of principles of civil jurisprudence, when such interpretation was feasible and possible. In other words, we have assimilation, not canonisation of Roman law.<sup>18</sup>

The breadth of ecclesiastical jurisdiction represented a potential threat to the civil law since most human disputes could be interpreted as having a moral or spiritual dimension.<sup>19</sup> But this jurisdictional 'pull' arose also from the fact that the law of the church was perceived to be 'the true source of Christian equity',<sup>20</sup> superior both morally and legally to the pagan and secular civil law. Its enduring legacy lies in the dissemination of broad equitable and moral principles such as *aequitas*

<sup>14</sup>The influence of Protestant theologians on Stair remains largely untouched, but see Ford, 'Of Liberty', 144–158.

<sup>15</sup>*Institutions*, 1.3.2.

<sup>16</sup>Franz Wieacker, *A History of Private Law in Europe*, trans. Tony Weir, Oxford, 1995, 52–54, 84–90.

<sup>17</sup>Laurent Mayali, 'Romanitas and Medieval Jurisprudence', in Michael Hoeflich, ed., *Lex et Romanitas: essays for Alan Watson*, Berkeley, 2000, 121–138, at 133–134.

<sup>18</sup>S. Kuttner, *Studies in the History of Medieval Canon Law*, Aldershot, 1990, 354.

<sup>19</sup>For instance, in thirteenth-century Germany either party or the civil judge could unilaterally have a case transferred to the church courts 'if the civil relief or procedures available were adjudged to be unfair or unfit', John Witte, Jr., 'Canon Law in Lutheran Germany: A Surprising Case of Legal Transplantation', in Hoeflich, ed., *Essays*, 181–224, at 186.

<sup>20</sup>Witte, 'Canon Law', 190.

(*canonica*), *bona fides*, *conscientia*, *honestas* and *miserecordia*,<sup>21</sup> norms which became part of the fabric of the *ius commune* and infiltrated the substantive doctrines of the civil law.<sup>22</sup> Dolezalek suggests that the conventional characterisation of the *ius commune* as predominantly civil law is misconceived, for history shows ‘canon law travelling throughout Europe in a state-coach; and on the footboard of that state-coach, there travelled Roman law’.<sup>23</sup>

Recent scholarship<sup>24</sup> on this complex process of cross-fertilisation between the canonists and civilians suggests broadly that in order to preserve the pre-eminent position of Roman law during a period of wider political struggle between pope and emperor, canonist doctrines were appropriated and ‘Romanised’ by the civilians, thus removing the need to have recourse to canon law as an independent legal system. This is illustrated in the development of the canonist doctrine of restitution.

Restitution has an ancient pedigree stretching at least as far back as the Old Testament Decalogue where it was umbilically linked to the commandment not to steal: ‘a thief must certainly make restitution’.<sup>25</sup> And not only the thief, but also the person whose livestock graze in another’s field,<sup>26</sup> the borrower<sup>27</sup> or the person who causes damage to another’s property<sup>28</sup> are subject to the same obligation. The canonists expanded its scope even further as a matter of substantive justice to include depriving a person not only of property, but of health, reputation, freedom or even the taking of a life.<sup>29</sup> Restitution became so broad a concept that it could be regarded as the remedy for all ‘patrimonial distortions’.<sup>30</sup>

In Roman law there was no equivalent general principle.<sup>31</sup> The *condictiones* were actions restricted to particular fact scenarios and the famous maxim of Pomponius in the *Digest*, that no-one should be enriched at the expense of another,<sup>32</sup> was not a specific rule of law but ‘only a formula for a general principle of commutative

<sup>21</sup>Wieacker, *History*, 52.

<sup>22</sup>For the role of the canonists in creating a new ethical conception of law see Alexander Passerin d’Entrèves, *Natural Law: an introduction to legal philosophy*, London, 1951, repr. 2002, 37–42.

<sup>23</sup>Gero Dolezalek, ‘The Court of Session as a *Ius Commune* Court – Witnessed by “Sinclair’s Practicks” 1540–1549’, in MacQueen, ed., *Miscellany IV*, 52; Peter Stein, ‘The *Ius Commune* and its Demise’, 25 *Journal of Legal History* (2004), 161–167, at 161–162.

<sup>24</sup>Wieacker, *History*, 47–54, 84–86; Jan Hallebeck, ‘Developments in Mediaeval Roman Law’, in Eltjo J.H. Schrage, ed., *Unjust Enrichment: the comparative legal history of the law of restitution*, 2nd ed., Berlin, 1999, 59–120; Peter G. Stein, *Roman Law in European History*, Cambridge, 1999, ch.3; Kuttner, *Studies*; Harold J. Berman, ‘The Interaction of Spiritual and Secular Law: An Historical Overview with Special Reference to Sixteenth Century Lutheran Germany’, in Hoeflich, ed., *Essays*, 149–180.

<sup>25</sup>Exodus 22:3.

<sup>26</sup>Exodus 22:5.

<sup>27</sup>Exodus 22:14 (if the property is damaged or – if an animal – dies).

<sup>28</sup>Exodus 22:6 (by starting a fire).

<sup>29</sup>For the early development of the canonist doctrine see Karl Weinzierl, *Die Restitutionslehre der Frühscholastik*, Munich, 1936; also Gero Dolezalek, ‘The Moral Theologians’ Doctrine of Restitution and its Juridification in the Sixteenth and Seventeenth Centuries’, [1992] *Acta Juridica*, 104–114, at 107; Jan Hallebeck, *The Concept of Unjust Enrichment in Late Scholasticism*, Nijmegen, 1996, 25.

<sup>30</sup>Dolezalek, ‘Moral Theologians’, 108.

<sup>31</sup>Reinhard Zimmermann, *The Law of Obligations*, Oxford, 1996, 851–857; Robin Evans-Jones, *Unjustified Enrichment*, vol.1, *Enrichment by Deliberate Conferral: condictio*, Edinburgh, 2003, para 1.43; Robert Feenstra, ‘Grotius’ Doctrine of Unjust Enrichment as a Source of Obligations: Its Origin and its Influence in Roman-Dutch law’, in Schrage, ed., *Unjust Enrichment*, 197–236, at 198–199.

<sup>32</sup>D.50.17.206.



justice'.<sup>33</sup> As early as the twelfth century the question whether or not there was a general restitutionary principle provoked what Hallebeek calls a 'sham fight',<sup>34</sup> amongst the glossators: 'not one of the learned jurists would venture to oppose the canon law doctrine of restitution and to deny the general validity of the prohibition of enrichment ... What is at stake is rather the political question whether the Roman sources themselves entail this general validity.'<sup>35</sup>

Here was a doctrinal dispute with political consequences. So widespread was the doctrine of restitution that if the civil law denied a remedy the public might resort to the church for relief, with potentially disastrous consequences: 'loss of prestige, loss of function and eventually derogation or even worse'.<sup>36</sup> The response was to expand the existing *condictiones* to meet public demands.

Roman law retained its position of supremacy by being sufficiently flexible to assimilate the doctrine of restitution. But there remained a fundamental difference of conceptualisation: for the civilians it was a gradual development of existing legal categories, but the canonists 'continue[d] to think within the scope of their all-embracing doctrine of restitution'.<sup>37</sup> The end result in the systems of western Europe which received Roman law is a concept of restitution which has Romanist form but predominantly canonist content.

However, it is the subsequent development of the doctrine, when it encountered Aristotelian philosophy in the moral theology of Thomas Aquinas, that led to its lasting impact on the later 'natural law school' of jurists to which Stair belonged.

#### THE SCHOLASTIC CONCEPT OF JUSTICE

One of the most profound influences on later medieval jurist-theologians was the work of St Thomas Aquinas (1225–74), whose *Summa Theologiae*<sup>38</sup> provided an account of justice which remains the '*locus classicus* for Western natural law theories'.<sup>39</sup> Thomas was a Dominican, educated in Paris where he later became professor of theology at a period when works of Greek philosophy were becoming available in translation for the first time.<sup>40</sup> The full text of Aristotle's *Nicomachean Ethics* became available around 1246<sup>41</sup> and this was to have a profound effect on Thomas's work: 'The greatest impact on the thought of the thirteenth century was made by the extended knowledge of Aristotelianism. By means of the translations Aristotle was converted from being more or less a logician into the expounder of a comprehensive

<sup>33</sup> Feenstra, 'Grotius' Doctrine', 198.

<sup>34</sup> Hallebeek, *Concept*, 38; also Dolezalek, 'Moral Theologians', 105.

<sup>35</sup> Hallebeek, *Concept*, 38.

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

<sup>37</sup> *Ibid.*, 45.

<sup>38</sup> Thomas Aquinas, *Summa Theologiae*, London, Blackfriars edition, 1975, hereafter *Summa*.

<sup>39</sup> Anthony J. Lisska, *Aquinas' Theory of Natural Law*, Oxford, 1996, 84.

<sup>40</sup> James A. Weisheipl, *Friar Thomas d'Aquino: his life, thought and works*, Oxford, 1974, 53ff. and 237–241.

<sup>41</sup> Annabel S. Brett, *Liberty, Right and Nature: individual rights in later scholastic thought*, Cambridge, 1997, 89.

system . . . [which] came . . . to represent philosophy, while its author was known as “The Philosopher”.<sup>42</sup>

In the *Summa* Thomas drew on Aristotle to create a system of Christian ethics with a rational foundation.<sup>43</sup> It could perhaps be said that he brought about the ‘Christianisation’ of virtue ethics, the fusion of Aristotelian philosophy (based on reason) with Augustinian theology (faith).<sup>44</sup> To that end, he engages with a variety of intellectual authorities some of which are spiritual (the Bible, the church fathers and Gratian); some philosophical (Socrates, Plato, Cicero and above all Aristotle); some legal (both canon and civil law). His was an ambitious project: to create an account of human good and human action which was philosophically literate and theologically sound.

#### *The influence of the Nicomachean Ethics*

Aristotle, referred to simply as ‘the Philosopher’, is the dominant source for Thomas’s treatment of justice and natural law. In the *Nicomachean Ethics*<sup>45</sup> Aristotle’s account of human action is teleological or purposive, in that man’s goal is to achieve the virtuous life.<sup>46</sup> Thomas’s vision is similarly teleological, but the goal is now spiritual rather than secular – knowledge of God rather than human happiness – even if the path to that end, practice of the virtues, is the same.<sup>47</sup>

Justice is the greatest of the virtues for, uniquely, it operates in relation to other people.<sup>48</sup> In the *Ethics* particular justice comes in two forms – distributive justice,<sup>49</sup> and corrective justice. The purpose of the latter is to preserve equality in transactions between private individuals: ‘The justice in transactions between man and man is a sort of equality indeed, and the injustice a sort of inequality.’<sup>50</sup>

The concept of equality,<sup>51</sup> crucially important for later scholastic thought, is articulated in terms of gain and loss. The language of gain and loss is used to describe the rebalancing of transactions between individuals in order to preserve what is one’s own, for justice will restore to each his own where it has been interfered with, either by punishment of the wrongdoer or by restoration of what has been lost.<sup>52</sup> Corrective justice is served where there is equivalence or equal exchange: ‘These names, both loss and gain, have come from voluntary exchange; for to have more than one’s own is called gaining, and to have less than one’s original share is called losing.’<sup>53</sup>

<sup>42</sup>Frederick C. Copleston, *A History of Medieval Philosophy*, London, 1972, 154–155.

<sup>43</sup>Copleston, *History*, 189; d’Entreves, *Natural Law*, 42–47.

<sup>44</sup>See Alasdair MacIntyre, *Whose Justice? Which Rationality?*, London, 1988, ch.10.

<sup>45</sup>Richard McKeon, ed., *The Basic Works of Aristotle*, New York, 1941, hereafter *Ethics*.

<sup>46</sup>*Ethics*, I.12.1098a.

<sup>47</sup>Frederick C. Copleston, *Philosophies and Cultures*, Oxford, 1980, 93; d’Entreves, *Natural Law*, 44–45.

<sup>48</sup>*Ethics*, V.1.1129b.

<sup>49</sup>‘Distributions of honor or money or the other things that fall to be divided among those who have a share in the constitution’, *Ethics*, V.2.1130b.

<sup>50</sup>*Ethics*, V.4.1132a; V.2.1130b.

<sup>51</sup>For an explanation of the different ways in which equality (as the mean) is applied in distributive justice (geometric) and corrective justice (arithmetic) see James Gordley, ‘Tort Law in the Aristotelian Tradition’, in David G. Owen, ed., *Philosophical Foundations of Tort Law*, Oxford, 1995, 133–134.

<sup>52</sup>*Ethics*, V.4.1132a.

<sup>53</sup>*Ibid.*, V.2.1132b.

The position of equilibrium is to be in undisturbed possession of ‘what is one’s own’, a concept which extended beyond notions of private property to the essence of the person, or as one commentator puts it ‘one’s own is an extension of the ego’.<sup>54</sup> Hence all acts of interference with what is one’s own are acts of injustice or inequality, the two being synonymous.

A further Aristotelian classification is the division of human actions (and transactions) into those which are *involuntary* (involving ignorance or compulsion) and those which are *voluntary* (undertaken out of choice and knowledge). Only the latter constitute virtue, for only then is a person behaving as a rational creature who is capable of choice,<sup>55</sup> but both demand the equalising function of justice. In relation to voluntary, or what we might now call consensual, transactions such as sale, loan, deposit or hire,<sup>56</sup> justice requires equivalence or equal exchange: ‘When [buyers and sellers] get neither more nor less but just what belongs to themselves, they say that they have their own and that they neither lose nor gain.’<sup>57</sup>

Involuntary transactions, on the other hand, involve causing harm or injury to another.<sup>58</sup> However, Aristotle argues that the wrongdoer can be said to have ‘gained’ when his will has been achieved, and loss is caused for the victim. The equalising role of justice is carried out either by punishment of the wrongdoer or by restoration of what has been lost.<sup>59</sup>

#### *Aquinas and justice*

Only a small part of the *Summa* deals explicitly with law<sup>60</sup> for it is principally a work of moral theology, but it is a crucially important part because natural law is integral to Aquinas’s broader ethical purpose of elucidating the path towards goodness.<sup>61</sup> Drawing on Book V of the *Nicomachean Ethics*, Thomas affirms that justice is the highest virtue for it relates to the common good.<sup>62</sup> Its central characteristic is equality.<sup>63</sup> ‘The proper characteristic of justice, as compared with the other moral virtues, is to govern a man in his dealings towards others. It implies a certain balance of equality.’<sup>64</sup>

<sup>54</sup>Heinrich A. Rommen, *The Natural Law*, Indianapolis, 1998 (originally rev. and trans. 1947), 207. It is important to qualify what appears to be a statement of individualism. For Aristotle man was designed to function in community, indeed justice was directed to that aim; see *ibid.*, 209–210; MacIntyre, *Whose Justice?*, 122ff.

<sup>55</sup>*Ethics*, II.6.1107a; III.1.1111a.

<sup>56</sup>*Ibid.*, V.2.1131a.

<sup>57</sup>*Ibid.*, V.2.1132b.

<sup>58</sup>*Ibid.*, V.2.1131a.

<sup>59</sup>*Ibid.*, V.4.1132a.

<sup>60</sup>The main references are found in *Summa*, I-II qq.90–108 Treatise on Law; II-II qq.57–79 On Justice and Right.

<sup>61</sup>*Summa*, I-II q.92.5, ad.1.

<sup>62</sup>*Ibid.*, II-II q.58.12.

<sup>63</sup>On Thomas’s notion of equality, see Hallebeek, *Concept*, 48; Dolezalek, ‘Moral Theologians’, 110–112; James Gordley, ‘Restitution Without Enrichment’, in David Johnston and Reinhard Zimmermann, eds., *Unjustified Enrichment: key issues in comparative perspective*, Cambridge, 2002, 228.

<sup>64</sup>*Summa*, II-II q.57.1. *Aequalitas* and *inaequalitas* are inconsistently translated in the Blackfriars edition of the *Summa*, variously as equality, evenness, balance, or fairness (or their opposite numbers). I have revised

Injustice is, therefore, inequality, but only where the will is engaged<sup>65</sup> for, like Aristotle, Aquinas holds that ignorance and unintentional consequences do not constitute injustice.<sup>66</sup> Legal consequences flow from the combination of external actions plus internal knowledge, a theme which he develops in his account of restitution.

Aquinas brings to Aristotle's ethical system two innovative elements: religion and law. The *Summa* is pervaded by references to the Bible and St Augustine as well as statements of Christian doctrine, for instance, in holding that man's ultimate aim is not merely 'happiness' but the knowledge of God, or that the aim of justice is not only the common good but to serve God.<sup>67</sup>

Secondly, Aristotle's broad principles undergo a process of juridification. So the concept of 'one's own' is rendered in familiar civilian terms<sup>68</sup> as *ius suum unicuique tribuens*,<sup>69</sup> perhaps a reflection of Aquinas's desire to create an account of justice which engages both with the Philosopher and with the civilian texts. Likewise the concepts of loss and gain have a more legal or commercial flavour. For instance, 'to have more than one's own is called gain or profit [*lucrum*], and to have less than one had at the outset is called loss [*damnum*]'.<sup>70</sup> Similarly, inequality is refashioned as a *debitum*: 'each person's own is that which is due to him [*debetur*] in proportion to making things equal',<sup>71</sup> or 'a voluntary transfer comes under justice in so far as it involves the notion of something due [*de ratione debiti*]'.<sup>72</sup>

Conceptually, the modification of the more neutral terminology of loss and gain into the language of debt and owing allows Thomas to create a framework of obligations. Injustice and inequality now create both a moral and a legal obligation to restore in the one who has gained. And he thus creates the rationale for his discussion of the prime canonist obligation – restitution.

#### *Stair's concept of justice*

Given the dominance of scholastic thought in Scottish universities in the seventeenth century,<sup>73</sup> Stair would have been exposed to these notions of justice. The influence of both Aristotle and Aquinas on Stair's work is not a novel discovery. The *Institutions* are said to 'owe much in structure and content to the Aristotelian philosophy which he both learned and later taught in the old College of Glasgow'.<sup>74</sup> His scheme of

the translation in places to show more clearly the use of specific terminology even if this means a less polished English version.

<sup>65</sup>Ibid., q.59.2.

<sup>66</sup>Ibid., q.58.1; q.59.3.

<sup>67</sup>*Summa*, II-II q.58.2 ad.3.

<sup>68</sup>D.1.1.10 *iustitia est constans et perpetua voluntas ius suum cuique tribuendi. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere* ('Justice is the constant and perpetual will of giving each his own; the precepts of law are to live honestly, not to harm others and to give each his own', translation from Tony Honoré, *Ulpian*, 2nd ed., Oxford, 2002, 215).

<sup>69</sup>*Summa*, II-II q.58.1. Other times he renders it *reddere unicuique quod suum*, *ibid.*, q.58.11.

<sup>70</sup>Ibid., q.58.11 ad.3.

<sup>71</sup>Ibid., q.58.11.

<sup>72</sup>Ibid., q.61.3.

<sup>73</sup>See text accompanying nn.119ff, below.

<sup>74</sup>Neil MacCormick, *Legal Right and Social Democracy*, Oxford, 1982, 60; see also MacCormick, 'Reflections', 388; MacCormick, 'Analytical Jurist', 187; Campbell, *Structure*, 8–9; John Underwood

obligations similarly ‘owes much to the analysis of Aquinas, developed by later scholastic theologian-jurists’.<sup>75</sup> His Glasgow theses as regent in 1646 are likewise characterised as ‘Aristotelian’;<sup>76</sup> in his speech given on admission to the Faculty of Advocates in 1648 he is described as having ‘strayed into the domain of the moral theologians, [and having drawn] on his knowledge of Aristotelian philosophy’;<sup>77</sup> and his later *Vindication of the Divine Perfections*<sup>78</sup> is seen as an example of ‘the method of the scholastic logic applied to Protestant theology’.<sup>79</sup>

In the introductory title of the *Institutions* Stair references the *Nicomachean Ethics* in his discussion of commutative justice (Aquinas’s terminology for corrective justice) which he renders as ‘the inclination to give every man his *right*’.<sup>80</sup> But generally there are slim pickings in the search for explicit borrowings from either Aristotle or Aquinas<sup>81</sup> for the Aristotelian character of Stair’s work lies in its underlying method, argument and conceptual framework.

Stair’s approach in the *Institutions* (and his other writings) is teleological, working deductively from first principles to desired ends. Hence, ‘material justice (the common law of the world) is, in the first place, orderly deduced from self-evident principles’.<sup>82</sup> The purposive nature of law is most clearly seen in Stair’s discussion of the law of obligations. The source of obligations lies either in God’s will and the law of nature (obediential obligations) or in the human will (conventional obligations).<sup>83</sup> Indeed, he rejects the scheme of Roman law on grounds that there is an inadequate explanation of cause and effect. The Roman four-fold division (into contract, quasi-contract, delict and quasi-delict), ‘insinuates no reason of the cause or rise of these distinct obligations, as is requisite in a good distinct division; and therefore, they may be more appositely divided, according to the principle or original from whence they flow, as in obligations obediential, and by engagement, or natural and conventional’.<sup>84</sup>

His insistence on efficient and final causes, the ‘Aristotelian clothing’<sup>85</sup> which he assumed in order to expound the most fundamental principles of law, shaped his legal

Lewis, ‘The Moral Character of Positive Law in Viscount Stair’s *Institutions of the Law of Scotland* (1681): A Source for Rethinking the Nature of Legal Obligation’, [1976] *Juridical Review*, 134–135.

<sup>75</sup>David M. Walker, introduction to 1981 edition of the *Institutions*, 25; see also Hector L. MacQueen and W. David H. Sellar, ‘Unjust Enrichment in Scots Law’, in Schrage, ed., *Unjust Enrichment*, 289–321, at 291.

<sup>76</sup>C.M. Shepherd, ‘Philosophy and Science in the Arts Curriculum of the Scottish Universities in the 17<sup>th</sup> Century’, thesis submitted for the degree of Doctor of Philosophy, University of Edinburgh, Edinburgh, 1975, 107 (Edinburgh University Library no.26-1131).

<sup>77</sup>Ford, ‘Dalrymple’; Ford, *Law and Opinion*, 29. The oration itself is preserved in Sir John Scot of Scotstarvet’s ‘Trew Relation’, 13 *Scottish Historical Review* (1916), 380–392.

<sup>78</sup>*A Vindication of the Divine Perfections*, illustrating the Glory of God in them by Reason and Revelation, methodically digested into several Meditations. By a Person of Honour’ (1695), attributed to Stair, see Mackay, *Memoir*, 272–273.

<sup>79</sup>Mackay, *Memoir*, 283.

<sup>80</sup>*Institutions*, I.1.2 (emphasis added).

<sup>81</sup>For other examples see *Institutions*, I.1.7; I.2.2.

<sup>82</sup>*Institutions*, 59, Stair’s dedication to the king from the first edition, 1681.

<sup>83</sup>*Ibid.*, I.3.3.

<sup>84</sup>*Ibid.*, I.3.2.

<sup>85</sup>MacCormick, ‘Analytical Jurist’, 189; see also, *ibid.*, 187–188 for a fuller explanation of Stair’s borrowing of Aristotelian causality.

reasoning and the nature of the law of obligations. In pride of place is equity: 'The principles of equity are the efficient cause of rights and laws.'<sup>86</sup> Stair explicitly makes the connection between equity and the principle of equality in commutative justice, the balancing of gain and loss: 'This law of nature is also called Equity, from that equality it keeps amongst all persons, from that general moral principle, *Quod tibi fieri non vis, alteri ne feceris*, whereby just persons in their deliberations and resolutions state themselves in the case of their adversaries, and so change the scales of the balance; which holds most in commutative justice.'<sup>87</sup>

In short, justice involves putting yourself in the other's shoes, illustrated with the surprisingly modern suggestion that parents should think about how their children feel, or vice versa.<sup>88</sup> This is the 'alterity'<sup>89</sup> of Aristotelian justice which, above all, looks to the good of the other or the common good.<sup>90</sup> It is Stair's belief that true equality in this sense would bring happiness to society.<sup>91</sup>

Stair's account of equity forms part of a lengthy discussion of the law of nature. It is here that we see most clearly the fusion of philosophy and religion which he was engaged in, whether consciously or unconsciously. The widespread failure to take account of the depth of Stair's religious convictions leads to a distorted view of the law which he expounded. The philosopher Alasdair MacIntyre has observed: 'In Stair's *Institutions* the theology cannot be excised without irreparable damage to the whole. Scottish seventeenth- and eighteenth-century law, like Scottish seventeenth- and eighteenth-century life, is pervasively and ineliminably theological.'<sup>92</sup>

This perhaps also explains Stair's sometimes ambivalent approach to Roman law. In places his attitude is peremptory,<sup>93</sup> in others critical,<sup>94</sup> albeit more reliant on it in his discussion of contractual obligations.<sup>95</sup> From a contemporary perspective Stair is viewed as the founding father of Scots law, its *starting point*. However, he perhaps saw himself as much a reformer of the past as a prophet of the future and may have been reacting against what he perceived to be an over-reliance on the civilian texts and commentators.<sup>96</sup> Intent on articulating a legal system which was both

<sup>86</sup>*Institutions*, I.1.17.

<sup>87</sup>*Ibid.*, I.1.6.

<sup>88</sup>*Ibid.*

<sup>89</sup>Annabel Brett, 'Natural Right and Civil Community: The Civil Philosophy of Hugo Grotius', 45,1 *The Historical Journal* (2002), 31–51, at 35.

<sup>90</sup>*Ethics*, V.1.1129b; *Summa*, II-II q.58.12 (justice as the good of another); II-II q.58.6 (justice as the common good).

<sup>91</sup>*Institutions*, I.1.6.

<sup>92</sup>MacIntyre, *Whose Justice?*, 231.

<sup>93</sup>Gordon, 'Stair, Grotius', 583; see also Watson, 'Transformations', 249–252 for the way in which Stair used Roman terminology, because of its authoritative status, but 'transformed' the original meaning to suit his own conceptual purposes.

<sup>94</sup>For his most explicit critique see *Institutions*, I.1.17 where he describes the 'confused order of the civil law' as its 'greatest blemish' and goes on: '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.' Stair takes issue with Roman law in almost every title of the obediational obligations, see *Institutions* I.1.19; I.1.23; I.2.9; I.3.9; I.4.11–12; I.5.11; I.7.2; I.10.7; I.10.10.

<sup>95</sup>*Institutions*, I.10; see Ford, *Law and Opinion*, 418, for the suggestion that this was because there had been 'relatively little local development' in contract law.

<sup>96</sup>See Ford, *Law and Opinion*, 418–422 for Stair's view of the role of the learned laws.

intrinsically religious and rational, Roman law was less likely to provide the tools he needed than the scholastic jurist-theologians who were the staple diet of his academic life, for one obvious reason: God had no place in their work. Watson describes their mindset: 'The classical Roman jurists stopped writing books around 235, and they were all pagans. Hence, no Christianity in the law in the *Institutes*. They were positivists, hence no philosophical notion of natural law.'<sup>97</sup>

The lack of conceptual thinking and the appeal to secular principles would both have been anathema to Stair. By contrast, Thomas and his scholastic commentators were, for their own eras, engaged in the task of creating a system of natural law with God at its centre, permeated by the philosophical genius of Aristotle, the doctrines of St Augustine and the church fathers, and integrated with established legal rules only in so far as the latter were compatible with the spiritual man. This was a task he could identify with.

Stair's Aristotelian account of equity<sup>98</sup> is embedded within an account of the law of nature which is overwhelmingly religious, for the very essence of natural law is God himself, the 'eternal law'.<sup>99</sup> The source of natural law is the very nature of God, given human expression in the Golden Rule of Matthew's Gospel:<sup>100</sup> 'Do to all, as you have would have them do to you, which must be understood, if you were in their case, and they in yours.'<sup>101</sup> This positive (and religious) formulation of the Rule is preferred by Stair to what he describes as the 'negative' expression given to it by 'Heathen Philosophers'.<sup>102</sup>

There are two parts to this law of nature:<sup>103</sup> one (divine law) is known instinctively by all men, for it is 'written by the finger of God upon man's heart, there to remain for ever';<sup>104</sup> the other is called reason,<sup>105</sup> alternatively conscience,<sup>106</sup> both of which are God-given for those parts of the law of nature which require thought and deduction. Stair concedes that conscience 'relates more to the principles of religion, than of morality',<sup>107</sup> but that very admission reveals his understanding of the law of nature to be principally moral territory. Finally, there is equity<sup>108</sup> and the moral law of scripture.<sup>109</sup>

For Stair, the law of nature, the eternal or divine law, the moral law, reason, conscience and equity are used almost synonymously, a marriage of the philosophical with the religious. Purpose, efficient and final causes, equity as justice and equality

<sup>97</sup>Watson, 'Transformations', 248.

<sup>98</sup>See text accompanying nn.82–91, above.

<sup>99</sup>*Institutions*, I.1.1.

<sup>100</sup>Matt. 7:12.

<sup>101</sup>*Institutions*, I. 1.1 (editorial insertion deleted). Identification with the 'other' is emphasised, just as it is in relation to equity.

<sup>102</sup>I.e., *quod tibi fieri non vis, alteri ne feceris*, quoted in *Institutions*, I.1.1. Stair may be overstating his case here, since this 'negative formulation' was not unique to the philosophers.

<sup>103</sup>See Watson, 'Transformations', 250–251, for a similar analysis of Stair's account of the law of nature.

<sup>104</sup>*Institutions*, I.1.3.

<sup>105</sup>*Ibid.*, I.1.4.

<sup>106</sup>*Ibid.*, I.1.5.

<sup>107</sup>*Ibid.*, I.1.5.

<sup>108</sup>*Ibid.*, I.1.6.

<sup>109</sup>*Ibid.*, I.1.7.

working for the common good, the role of human reason and will – all derive from an Aristotelian view of the world. The more prescriptive rules of behaviour derive from God's law, the scriptures, mediated through St Augustine and the church fathers for Aquinas and rooted in Stair's Presbyterian and Calvinist faith. So the first title of the *Institutions* locates the principles of Scots law explicitly within a moral and religious framework. This is what distinguishes Stair both from his peers and from the jurists who followed in his footsteps. His vision is most clearly expressed in his account of the obediencial obligations, which represent natural law in its purest form.

#### SCHOLASTIC INFLUENCE IN SEVENTEENTH-CENTURY SCOTLAND

One of the puzzling aspects of this historical investigation is why Aristotelian philosophy and Thomist moral theology had such lasting impact on legal development, long after the influence of the Roman Catholic Church as a political and legal force had waned. Part of the answer lies in the revival of Aquinas's writings in the sixteenth century by a group of jurist-theologians known as the late scholastics or the Spanish natural law school whose number included Francisco de Vitoria (c.1485–1546), Domingo de Soto (1494–1560), Diego de Covarrubias (1512–77), Luis de Molina (1535–1600), Francisco Suárez (1548–1604) and Leonardo Lessius (1554–1623).<sup>110</sup> These Counter-Reformation thinkers wrote voluminous commentaries on the *Summa*<sup>111</sup> and used Aquinas's account of natural law and human rationality to construct a renewed vision of the Catholic faith in order to combat perceived heresies emanating both from Reformation theology and Christian humanism.<sup>112</sup> 'The fundamental move which the Thomists made in discussing the concept of political society was to revert to Aquinas's vision of a universe ruled by a hierarchy of laws.'<sup>113</sup>

The system of natural law and justice set out by Aquinas was used to restate the marriage between law and morality which Luther and Calvin were attempting to divorce in their determination to separate the spiritual from the secular in Protestant northern Europe. The success of the late scholastics lay in providing the law with an articulate ethical basis, but equally in fleshing out the detail of Aquinas's skeletal principles. Their fusion of substantive law with the moral and philosophical underpinning of the *Summa* had profound repercussions on the natural lawyers of northern Europe in the seventeenth century.<sup>114</sup> Grotius, on whom these influences have been clearly identified,<sup>115</sup> is described as having outlined a system of law in his *Inleidinge*

<sup>110</sup>Lessius was Flemish but is generally included within this group.

<sup>111</sup>Principally on Thomas's account of justice, *Summa*, II-II, qq.57–79.

<sup>112</sup>Brett, *Liberty*, 154ff.; Quentin Skinner, *The Foundations of Modern Political Thought*, vol.2, *The Age of Reformation*, Cambridge, 1978, 135–141; James Gordley, *The Philosophical Origins of Modern Contract Doctrine*, Oxford, 1991, 70ff.

<sup>113</sup>Skinner, *Foundations*, 148.

<sup>114</sup>Thomas Gilby, app.3 to vol.28 of the *Summa*, 169; James Gordley, *Foundations of Private Law*, Oxford, 2006; Gordley, *Philosophical Origins*; Gordley, 'Tort Law'; Brett, *Liberty*, ch.4; John T. Noonan, *The Scholastic Analysis of Usury*, Cambridge, MA, 1957, 2–3.

<sup>115</sup>Robert Feenstra, 'L'influence de la scolastique espagnole sur Grotius en droit privé', in *Fata Iuris Romani: etudes d'histoire du droit*, Leiden, 1974; Robert Feenstra, 'La Systématique du droit dans l'oeuvre de



*tot de Hollandsche rechtsgeleerdheid* which was 'largely based on concepts of natural law, as developed by 16<sup>th</sup> century theologians . . . who in their turn commentated the *Summa theologiae* of Thomas Aquinas'.<sup>116</sup>

Stair lies within the northern natural law tradition, but the influence of the late scholastics on his work has been little explored. Nor is it within the scope of this article to do so in any detail. Their development of the doctrine of restitution into a fully-fledged legal concept is an important historical phenomenon which has received considerable academic attention.<sup>117</sup> But my suggestion is that Stair may have gone to the original source: Aquinas. In addition, whilst he was undoubtedly exposed to later scholastic accounts during his time as regent, they do not fundamentally modify Thomas's conceptual scheme.

However, this history is not one of seamless transition. For the Protestant Reformation in northern Europe not only fundamentally changed religious belief and practice, it also changed the role of law in society. No longer was it viewed as the means to a virtuous life: the new doctrinal emphasis on the fall of man meant that only God's grace was able to offer salvation no matter how virtuous the individual. Aquinas's medieval optimism about man's innate ability to reason and to make virtuous choices in pursuit of the common good had been transformed by the Reformers into a deep sense of the depravity of human nature.<sup>118</sup> In order to explain why Protestants such as Grotius and Stair were, therefore, able to return to a view of man as a rational being, capable of choice and the exercise of the will, another piece of the historical jigsaw is needed. This lies in part with the phenomenon which has come to be known as 'Protestant Scholasticism'.

#### *The Protestant scholastics*

In recent theological research there has been a re-assessment of the relationship between post-Reformation Protestant theologians and Catholic scholasticism. Throughout Europe in the late sixteenth and early seventeenth centuries there was an unexpected revival of interest in Aristotle, particularly in the *Nicomachean Ethics*, and in Aquinas, his best-known commentator. It was unexpected since both were associated with the doctrines of a discredited Catholic church and the revival took place in the humanities and theological faculties of both Protestant and Catholic universities. We do know that Scottish universities at that time were dominated by a version of 'scholastic Aristotelianism'.<sup>119</sup>

Grotius', in *Legal Scholarship and Doctrines of Private Law, 13<sup>th</sup>–18<sup>th</sup> Centuries*, Aldershot, 1996; Feenstra, 'Grotius' Doctrine'; Richard Tuck, *Natural Rights Theories, Their Origin and Development*, Cambridge, 1979, ch.3.

<sup>116</sup>Feenstra, 'Grotius' Doctrine', 198.

<sup>117</sup>See in particular, Hallebeek, *Concept*; Hallebeek, 'Developments'; Feenstra, see n.115, above; Gordley, see n.114 above; Dolezalek, 'Moral Theologians'.

<sup>118</sup>'the reason of our mind . . . is miserably subject to vanity' (Calvin, *Institutes*, II.2.25) or the description of human beings as 'so shrouded in the darkness of errors that [they] hardly begin to grasp through this natural law what worship is acceptable to God' (ibid., II.8.1).

<sup>119</sup>MacIntyre, *Whose Justice?*, 225.

Scotland is described as having had ‘a tremendous appetite for scholastic theology’,<sup>120</sup> akin to a ‘reception’.<sup>121</sup> The reasons are predictably complex. Undoubtedly the Kirk required a new and rational theology and the scholastic emphasis on reason, together with their enormous learning, may have proved attractive. Durkan has suggested that Covenanting attitudes ‘paradoxically worked in favour of Jesuit-inspired philosophy’,<sup>122</sup> but does not explain the paradox any further. It is plausible that the Scottish Presbyterians may, equally paradoxically, have been able to make common cause with the political struggles of the Spanish scholastics. James I’s imposition of the Oath of Allegiance on his Catholic subjects in 1606, subsequent to the Gunpowder Plot, led to an outpouring of polemic from Counter-Reformation thinkers. Suárez’s treatise *Defensio Fidei Catholicae, et Apostolicae Adversus Anglicanae Sectae Errores* (1612) specifically refuted the Anglican ‘heresy’ of the divine right of kings and attempts to place the church under the rule of the monarch.<sup>123</sup> James had the work publicly burned. In view of the battles waged by the Scottish Presbyterians in the 1630s against the imposition of episcopacy and the royal control which it represented,<sup>124</sup> there may well have emerged an unlikely alliance. My enemy’s enemy . . .

One commentator has suggested a more pragmatic reason for the turn to scholasticism: the fact that in the late sixteenth century Aristotle ‘was the only teaching aid on the market’!<sup>125</sup> What we do know with certainty is that James Dalrymple personally encountered it at Glasgow University.

#### *Scholasticism and Glasgow University*

Stair was a student at Glasgow University from 1633 until 1637, where he pursued the usual course of study in the humanities and philosophy, and returned there to take up a post as regent from 1641 until 1647.<sup>126</sup> The university at that time has been described as being ‘in essence a religious seminary’<sup>127</sup> and the normal pattern was indeed for regents to become ministers of the Kirk rather than professors.<sup>128</sup>

The arts curriculum of Scottish universities was overwhelmingly both Aristotelian and scholastic throughout the seventeenth century.<sup>129</sup> Earlier attempts by Andrew

<sup>120</sup>P.G. Ryken, ‘Scottish Reformed Scholasticism’, in Carl R. Trueman and R. Scott Clark, eds., *Protestant Scholasticism: essays in reassessment*, Carlisle, 1999, 198.

<sup>121</sup>*Ibid.*

<sup>122</sup>John Durkan, ‘King Aristotle and Old “Butterdish”’: The Making of a Graduate in Seventeenth Century Glasgow’, 63 *College Courant* (1979), Glasgow University, 18–24, at 24.

<sup>123</sup>Leonardo Lessius’s *Defensio potestatis summi pontificis* was similarly associated with refuting this heresy.

<sup>124</sup>J.D. Mackie, *A History of the Scottish Reformation*, Edinburgh, 1960, 167–168; R.C. Paterson, *A Land Afflicted: Scotland the Covenanter wars 1638–1690*, Edinburgh, 1998, ch.1; John D. Ford, ‘The Lawful Bonds of Scottish Society: The five Articles of Perth, the Negative Confession and the National Covenant’, 37,1 *The Historical Journal* (1994), 45–64, 45.

<sup>125</sup>R.S. Clark, ‘The Authority of Reason in the Later Reformation’, in Trueman and Clark, eds., *Protestant Scholasticism*, 122.

<sup>126</sup>Ford, ‘Dalrymple’.

<sup>127</sup>*Ibid.*

<sup>128</sup>G.D. Henderson, *Religious Life in Seventeenth-Century Scotland*, Cambridge, 1937, 121.

<sup>129</sup>Shepherd, ‘Philosophy’; John Durkan, ‘The Early History of Glasgow University Library: 1475–1710’, 8 *The Bibliothek* (1977), 102–126.

Melville to sweep away the scholastic philosophers and to replace them with Protestant humanists had been temporarily successful in the sixteenth century,<sup>130</sup> but the reinstatement of Aristotle and Aquinas in the seventeenth represented the return to ‘a safe rational theology’.<sup>131</sup> Shepherd’s study of authorities cited by university regents shows a variety of traditional and more modern (humanist) commentators on Aristotle, but she concludes that the medieval scholastics are ubiquitous: ‘[Aquinas, Scotus and Occam] appear in virtually every set of logic dictates and theses. Discussion of their views was considered an indispensable part of the course.’<sup>132</sup>

Over the course of the century, scholasticism began to wane in the east, but Glasgow remained committed to it for longer and student lecture notes or ‘dictates’ in Glasgow continued to be ‘more Aristotelian’ and ‘less modern than their Edinburgh equivalents’.<sup>133</sup> Curiously, it was in Presbyterian conservative Glasgow that the influence of scholastic Aristotelianism was strongest and lasted longest.<sup>134</sup> It may be that those conservative instincts feared the impact of the progressive ideas of Hobbes, Newton, Descartes and Locke which were on the horizon and clung to the familiarity of scholastic thought. However, it is clear that ‘whatever existed in theology, there was no obvious cultural frontier in the arts curriculum’.<sup>135</sup>

Within nine months or so after resigning his post as regent Stair applied to be admitted to the Faculty of Advocates.<sup>136</sup> Very little is known about his legal education but it does seem an implausibly short period in which to gain sufficient knowledge of Scots law, even for one so brilliant! From around 1575, there were two routes to gaining entry to the Faculty of Advocates.<sup>137</sup> One was an academic route in pursuit of which large numbers of Scots law students attended French and Dutch universities;<sup>138</sup> the other was by demonstrating practical legal experience. Stair was not one of those who studied abroad, and although he satisfied the Faculty’s preference for ‘university educated men’,<sup>139</sup> his training was in the liberal arts. He appears to have had no formal legal education,<sup>140</sup> and it is likely that he acquired his knowledge of the law ‘by private and undirected study during his time as a regent’.<sup>141</sup> One source alleges that during his regency he studied ‘Latin and Greek literature, classical

<sup>130</sup>James Kirk, ‘“Melvillian” Reform in the Scottish Universities’, in A.A. MacDonald, Michael Lynch and Ian B. Cowan, eds., *The Renaissance in Scotland: studies in literature, religion, history and culture, offered to John Durkan*, Leiden, 1994, 276–300, at 279–282.

<sup>131</sup>Durkan, ‘King Aristotle’, 18.

<sup>132</sup>Shepherd, ‘Philosophy’, 63, 97.

<sup>133</sup>*Ibid.*, 75–78.

<sup>134</sup>*Ibid.*, 319–321.

<sup>135</sup>Durkan, ‘King Aristotle’, 18.

<sup>136</sup>Ford, ‘Dalrymple’.

<sup>137</sup>John W. Cairns, ‘Advocates’ Hats, Roman Law and Admission to the Scots Bar’, 20,2 *Journal of Legal History* (1999), 24–61.

<sup>138</sup>*Ibid.*, 34; Alan Watson, ‘The Rise of Modern Scots Law’, in *La Formazione Storica del Diritto Moderno in Europa* (Atti del Terzo Congresso Internazionale Della Società Italiana di Storia del Diritto), vol.3, Florence, 1977, 1167–76, at 1167–68.

<sup>139</sup>Cairns, ‘Advocates’ Hats’, 40.

<sup>140</sup>Ford, *Law and Opinion*, 10; David M. Walker, *Viscount Stair*, Glasgow, 1990 (Stevenson Lecture), 2.

<sup>141</sup>Ford, ‘Dalrymple’.

history and antiquities, and the civil law of Rome'.<sup>142</sup> Assuming that to be the case, it would be reasonable to assume that the resources of Glasgow University library would have been important.

We cannot know with any certainty what Stair read during his time at the university since no individual borrowing records exist for that period. However, some indication can be gleaned from the library's holdings up to 1645.<sup>143</sup> The 1691 library catalogue confirms the strongly religious character of the university, in that non-theological subjects account for only a small fraction of the holdings. The largest holdings were *Polemici* (393 titles) and Philosophy (209 titles). The former classification includes treatises on Reformation doctrine as well as both Roman Catholic and Protestant sectarian debates of the period.

Legal holdings (*Juridici*) run to only sixty-six titles, most of which relate to Roman or canon law: Justinian's *Institutes*, the *Corpus Iuris Civilis*, and commentaries by jurists such as Accursius, Bartolus and Baldus. The Scottish resources available to Stair have justifiably been described as 'very scanty',<sup>144</sup> limited to three titles, two of which are collections of statutory materials, the third a copy of *Regiam Majestatem*. It is safe to assert that the library was weak on the resources needed to equip a Scots lawyer attempting to teach himself the laws of the land.

The strengths of the university library undoubtedly lay in philosophy and religion and, together with the scholastic holdings (also sizeable with 110 titles), would have been of particular relevance to the arts curriculum which Stair taught. The works of Aristotle dominate the Philosophy classification. The library also held all of the major works of Aquinas, including the *Summa Theologiae* and commentaries by Lessius, de Soto and Molina among others. The complete works of Suárez in fifteen volumes were also available. Taken in conjunction with what is known about the character of the curriculum which he taught, it appears reasonable to speculate that Stair's early thinking was influenced by these texts.

We cannot with certainty know which printed source materials Stair relied on in the writing of the *Institutions*. As a well-connected man he would have had access to private libraries, and undoubtedly one of his own.<sup>145</sup> When he went to the Bar, he would have been exposed to civilian materials acquired by Scottish lawyers who

<sup>142</sup>Walker, *Viscount Stair*, 2; David M. Walker, *The Scottish Jurists*, Edinburgh, 1985, 107, citing as authority William Forbes, *Preface to A Journal of the Session. Containing the Decisions of the Lords of Council and Session, in the Most Important Cases, Hear'd and Determin'd from February 1705, till November 1713*, Edinburgh, 1714, 30.

<sup>143</sup>Dr Stephen Rawles has created a searchable database of records from the 1691 library catalogue, which was an attempt to consolidate the holdings at that time. It is therefore likely to include the main collections of donations received up to that date, although only a book by book comparison with the lists of bequests in the *Munimenta alme universitatis Glasguensis*, vol.3, C. Innes, ed., Glasgow, 1854, 403–464 could rule out the possibility that some were omitted. The catalogue allows for identification of works published prior to 1645. It is, of course, possible that they may have been acquired after that date. To date around 80 per cent of the holdings are included in the database, and I am grateful to Dr Rawles for making this material available (see <<http://special.lib.gla.ac.uk/exhibns/1691Catalogue/Introduction.html>>, accessed on 20 April, 2008). Full details of the *Concilia et Decreta* classification of the 1691 catalogue are printed in J.J. Robertson, 'Canon Law as a Source', in Walker, ed., *Tercentenary Studies*, 112–127, at 124–127.

<sup>144</sup>Walker, *Viscount Stair*, 2.

<sup>145</sup>For instance, he appears to have had access to Craig's *Ius Feudale* before it was printed, see Cairns, 'Civil Law', 206.

studied abroad.<sup>146</sup> However, the overwhelmingly scholastic character of Glasgow University at a formative period in his education must be significant. Aristotle, Aquinas and their commentators dominated his learning and his intellectual framework for more than ten years, and shortly prior to the writing of the *Institutions*.<sup>147</sup>

#### THE SCHOLASTIC DOCTRINE OF RESTITUTION

Having established conceptual similarities in the account of justice provided by Aquinas and Stair, and the likelihood of Stair's encounter with scholastic Aristotelianism, I want to turn finally to the doctrine of restitution, which occupied a pivotal place in the work of both men.

##### *Restitution and recompense*

In Aquinas's account of justice, we saw that Aristotelian equality is translated into a framework of debt and owing, gain and loss. Justice requires a rebalancing of those positions, and the mechanism for doing so is restitution. Given its doctrinal importance within canonist thinking, it is unsurprising that restitution takes pride of place in Thomas's account of law, as it did in other juristic and theological texts from Duns Scotus<sup>148</sup> through to the late scholastics.<sup>149</sup> The pervasive moral character of restitution as well as its extensive scope made it a fundamental building block in a theory of justice.

For Aquinas restitution is an aspect of the virtue of justice, an act of commutative justice which governs equality in exchanges between private parties.<sup>150</sup> Such exchanges can be involuntary and unilateral whereby one party causes injury (*iniuria*) or loss (*damnum*) to the other, or they can be voluntary reciprocal transactions.<sup>151</sup> In the former category (equivalent to delictual harm or loss) restitution is due for injury caused to a person, their reputation or their property.<sup>152</sup> In this broad canonist sense of restitution Old Testament justice – 'an eye for an eye' – is the basis for a general obligation to restore equality by means of recompense (*recompensatio*): 'In all such cases the nature of commutative justice demands that

<sup>146</sup>Although Lord Cooper's picture of the busy practitioner exposed on a daily basis to citations from learned civilians educated on the continent is questionable at this early period of Stair's career (T.M. Cooper, 'The Scottish Lawyer's Library in the Seventeenth Century', [1954] *Juridical Review*, 5). Political events disrupted the administration of justice and the court was dysfunctional for long periods of time, see Ford, 'Dalrymple'; Hutton, 'Stair's Aim', 80–82; Mackay, *Memoir*, 34–65; David M. Walker, *A Legal History of Scotland*, vol.4, *The Seventeenth Century*, Edinburgh, 1996, 65, 419–423.

<sup>147</sup>Most recently thought to have been in the late 1650s, see Ford, *Law and Opinion*, 68–74.

<sup>148</sup>Scotus, *Ordinatio Article IV (De Obligatione Restitutionis)*; see Allan B. Wolter, *John Duns Scotus' Political and Economic Philosophy*, New York, 2001, 66ff.

<sup>149</sup>For instance Molina, *De Iustitia et Iure*, 1.2 Disp 49–51; De Soto, *De Iustitia de Iure* 4.5–4.6; Lessius, *De Iustitia et Iure*, Book 2, ch.13–16.

<sup>150</sup>*Summa*, II-II q.61.3; for a detailed account see Karl Weinzierl, *Die Restitutionslehre der Hochscholastik bis zum Hl. Thomas von Aquin*, Munich, 1939.

<sup>151</sup>*Summa*, II-II q.61.3.

<sup>152</sup>*Ibid.* It is interesting for Stair's scheme that restoring equality for an offence to dignity is referred to as reparation ('reparetur', *ibid.*, q.62.2, ad.3). See Weinzierl, *Hochscholastik*, 164–165 for a definition of restitution as 'reparatio inaequalitatis' in Aquinas's commentary on Lombard's *Sentences*.

equal recompense according to equality be made, namely that the reaction as recompense is equal to the action.<sup>153</sup>

This form of justice amounts to carrying out right action: 'right (*ius*) or the just thing (*iustum*) is a certain action which is equal in relation to another person according to a certain mode of equality'.<sup>154</sup> An example of 'right action' is the obligation to *recompense* by paying a wage for a service rendered.<sup>155</sup>

Recompense is translated in various ways and does not appear to be a term of art for Aquinas, or at least for his translators. Sometimes it is rendered as 'punishment',<sup>156</sup> sometimes as 'repayment', 'compensation' or 'reparation'.<sup>157</sup> In the *Summa* it amounts to a general principle indicating a duty to restore equality in relation to a wide range of behaviour, but chiefly concerned with actions which cause harm or loss.

Justice which concerns 'things' belonging to another, as opposed to the actions of another, is the territory of restitution in a narrower sense: it is 'the recompense of thing for thing'.<sup>158</sup> Aquinas does, however, locate this type of exact restitution within the broad principle of recompense in that 'restitution is a kind of recompense for that which has been taken away'.<sup>159</sup> The function of exact restitution is to bring about justice by restoring the loss of things<sup>160</sup> or money<sup>161</sup> to the rightful owner or possessor: 'to make restitution appears to be nothing else than to re-establish a person in possession of or dominion over a thing which is his'.<sup>162</sup>

The relationship between recompense and restitution appears to be based on whether or not the property in question can be restored. If it cannot (and therefore exact restitution is not possible) Aquinas resorts to the general obligation of recompense as a fall-back remedy: 'And so when the equal of what has been taken cannot be restored (*non est restituibile*), recompense (*recompensatio*) must be made as far as is possible'.<sup>163</sup>

Restitution is a central element in Thomas's account of justice, but it is as much a moral and spiritual duty as a legal one. Not only is it necessary to address inequality, it is also necessary for salvation.<sup>164</sup>

To a Scots lawyer the terminology of restitution and recompense is immediately recognisable. Together with reparation, Stair's delictual category, they form a trilogy of substantive obediential obligations in the first book of the *Institutions*.<sup>165</sup> Stair's

<sup>153</sup>*Summa*, II-II q.61.4 (my translation).

<sup>154</sup>*Ibid.*, q.57.2, translation from Brett, *Liberty*, 91.

<sup>155</sup>*Ibid.*, q.57.1.

<sup>156</sup>*Ibid.*, q.61.4, ad.3.

<sup>157</sup>*Ibid.*, q.61.4.

<sup>158</sup>'secundum recompensationem rei ad rem', *ibid.*, q.62.1.

<sup>159</sup>*Ibid.*; Weinzierl, *Hochscholastik*, 167–168.

<sup>160</sup>*Summa*, II-II q.61.2.

<sup>161</sup>*Ibid.*, q.62.3.

<sup>162</sup>*Ibid.*, q.62.1–2, bearing in mind that the scholastic use of *dominium* was broader than the civilian concept of ownership, extending to those with control over property, see Brett, *Liberty*, 20–26, 127–128.

<sup>163</sup>*Summa*, II-II q.62.2, ad.1–2, for instance where someone has lost a limb through the injury of another, recompense must be made; Weinzierl, *Hochscholastik*, 172–173.

<sup>164</sup>*Summa*, II-II q.62.2.

<sup>165</sup>Reference to Stair's 'trilogy' often denotes the three 'R's' of Scots enrichment law prior to its recent reformulation, which were traditionally restitution (for property), repetition (for money), and recompense (for services). However, repetition is not part of Stair's taxonomy and in the only passage in which it is

division of obligations into those which are ‘obediential’ or ‘natural’ (deriving from the will of God) or conventional (from the will of man) appears to be unique.<sup>166</sup> The term ‘obediential’ is thought to derive from theology<sup>167</sup> and certainly these obligations have a strong moral and religious content.

Stair’s account of restitution<sup>168</sup> and recompense<sup>169</sup> are not exact equivalents of Thomas’s categories but there are enough similarities to warrant comparison. Stair explicitly relates both to the Aristotelian principle of equality, describing restitution as ‘extending the proportion of equality’,<sup>170</sup> or recompense as ‘obliging to do one good deed for another’.<sup>171</sup> Even reparation for delictual harm involves the rebalancing of loss and gain: ‘Damage is called *damnum*, a *demendo*, because it diminisheth or taketh away something from another, which of right he had . . . The Greeks, for the like reason, call it *ελαττον*, by which man hath less than he had.’<sup>172</sup>

Restitution is an obligation which arises from property, the restoring of ‘things’ (property or money),<sup>173</sup> ‘whereby that which is another’s coming into our power, without his purpose to gift it to us, and yet without our fault, ought to be restored’.<sup>174</sup> It is conceptually equivalent to Aquinas’s narrow sense of restitution. Stair does not replicate the breadth of the scholastic doctrine but is at pains to circumscribe the territory of restitution by excluding from its scope legal relationships created either by contract (‘by voluntary engagement’) or by fault (‘by delinquency’).<sup>175</sup> Title I.7 of the *Institutions* is addressed to possessors, for the source of the obligation lies in the fact of possession,<sup>176</sup> whether acquired unilaterally (for instance by finding lost things, or recovering property from thieves or pirates), or through a bilateral transaction such as something which is ‘bought *bona fide*’.<sup>177</sup>

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mentioned (‘Restitution of things belonging to others, may seem to be an effect of property, whence coming the right of vindication or repetition of any thing; but, beside the real action, the proprietor hath to take or recover what is his own, . . . there is a personal right, which is a power in the owner to demand it’, *Institutions*, I.7.2), it seems likely that Stair envisages it to be a personal right or claim available to an owner, contrasted with his real right of vindication, i.e. a pursuer can claim repetition corresponding to the obligation (of restitution) on the defender. This would be consistent with the meaning of ‘repeat’ in old Scots (to claim or ask for something back), *repetere* in latin and *répéter* in old French. Grotius also uses it in this sense (‘ad repentendum’), *Inleidinge tot de Hollandsche rechtsgeleerdheid*, III.30.18. In older Scottish cases ‘repetition’ is sometimes used in the sense of the pursuer’s claim, but not consistently, see *Wallwod v Gray* (1684) Mor. 14235; *Morison and Glen v Forrester* (1712) Mor. 14236; *Ralston v Robertson* (1761) Mor. 14238; *Lady Hisleside v Baillie of Littlegil* (1683) Mor. 1765 (repetition of fruits); *Miln v Lady Galraw* (1715) Mor. 1759 (repetition of rent). For the post-Stair history of repetition see Evans-Jones, *Condictio*, paras. 1.22–23.

<sup>166</sup>*Institutions*, I.3.2–5; see MacQueen and Sellar, ‘Unjust Enrichment’, 290–293.

<sup>167</sup>Campbell, *Structure*, 15. It is possible that the term was used in Presbyterian debates of the period, in which the question of obedience was hotly debated.

<sup>168</sup>*Institutions*, I.7.

<sup>169</sup>*Ibid.*, I.8.

<sup>170</sup>*Ibid.*, I.1.15 (fifthly).

<sup>171</sup>*Ibid.*, I.8.1.

<sup>172</sup>*Ibid.*, I.9.3.

<sup>173</sup>*Ibid.*, I.7.9; I.7.11.

<sup>174</sup>*Ibid.*, I.7.1.

<sup>175</sup>*Ibid.*

<sup>176</sup>*Ibid.*, I.7.13 ‘the ground [of the obligation] be the *having* of that which is to be restored’ (emphasis added).

<sup>177</sup>*Ibid.*, I.7.1.

Recompense, on the other hand, is principally about actions rather than things, as it was for Aquinas, where *deeds* are done ‘not *animo donandi*, but of purpose to oblige the receiver of the benefit to recompense’.<sup>178</sup> Recompense is based on the presumption against donation, which would be activated by a gratuitous transfer of property (as he had already alluded to in relation to restitution),<sup>179</sup> whereby ‘trust is rather presumed than donation’.<sup>180</sup> Likewise, gratuitous actions are to be recompensed by *negotiorum gestio*<sup>181</sup> or by the broader formulation of an obligation arising from ‘what we are profited by the damage of others without their purpose to gift, or as the law expresseth it *in quantum locupletiores facti sumus ex damno alterius*’.<sup>182</sup> Recompense is, therefore, concerned with removing gain where it has not been intended: gratuitous benefits must be quantified and returned to whomever conferred them.

However, although recompense ostensibly concerns deeds rather than things, when Stair refers to ‘the other obligation of recompense . . . whereby we are enriched by another’s means, without purpose of donation’,<sup>183</sup> it is clear that recompense also indirectly concerns property in two ways, both of which concern making profit from someone else’s property. First, its function is to remove profit gained through someone else’s property by any means other than simply possession (the territory of restitution), for instance by building on another man’s land or carrying out unnecessary repairs to his house.<sup>184</sup> Secondly (and this was already adverted to in Stair’s discussion of restitution), if the *bona fide* possessor is no longer in possession (and restitution is, therefore, no longer possible) recompense is the appropriate response to remove any benefits gained during possession, such as fruits or profits deriving from the property.<sup>185</sup>

The parallels with Thomas’s account of the relationship between restitution and recompense are evident. Restitution functions principally to restore property, recompense redresses gratuitous benefit gained either through the actions of another or from the use or possession of another’s property if restitution can no longer take place. Recompense, therefore, involves a quantification of gain or profit (*in quantum*

<sup>178</sup>*Ibid.*, I.8.2. Evans-Jones (*Condictio*, paras. 1.10, 9.12–13) defines restitution as the restoration of a *certum*, recompense as making good an *incertum*; Birks equates restitution with *dare* and recompense with *facere* (Peter Birks, ‘Six Questions in Search of a Subject – Unjust Enrichment in a Crisis of Identity’, [1985] *Juridical Review*, 236) as does Niall Whitty (‘Indirect Enrichment in Scots Law’, [1994] *Juridical Review*, 200–229 and 239–282, at 201), recognising that there are exceptions within recompense. Stair’s framing of the benefit as having been conferred ‘of purpose to oblige’ suggests that there must be intention on the part of the benefactor, which would be consistent with the exclusion of incidental benefits. His definition also contains no requirement that the pursuer should have suffered a loss, see Evans-Jones, *Condictio*, paras. 7.37ff.

<sup>179</sup>*Institutions*, I.7.1 (‘without his purpose to gift it to us’).

<sup>180</sup>*Ibid.*, I.8.2.

<sup>181</sup>*Ibid.*, I.8.3–5.

<sup>182</sup>*Ibid.*, I.8.2; for analysis of the scope of recompense in the *Institutions* and its subsequent development see MacQueen and Sellar, ‘Unjust Enrichment’, 294–296, 305–314.

<sup>183</sup>*Ibid.*, I.8.6.

<sup>184</sup>*Ibid.*, I.8.6.

<sup>185</sup>*Ibid.*, I.7.10–12; whilst Aquinas alludes to ‘virtual loss’ (*Summa*, II-II, q.62.5), liability for fruits was developed by the late scholastics, although it is already present in Duns Scotus’ account of restitution, *Ordinatio Article IV (De Obligatione Restitutionis)*, q.3.



*lucratus*) for it is not about specific assets, more accurately it is only indirectly about those assets.<sup>186</sup> By the time Stair is writing, the Aristotelian concept of inequality does not demand equal exchange. Instead, within the obligation of recompense, equality is translated into onerosity and it reinforces the different legal consequences which arise from onerous and gratuitous transactions.

However, there is another function within recompense, only implicitly perceptible in Stair's account, which corresponds more directly to its compensatory role within the Thomist structure. To understand the comparison it is necessary to examine how Aquinas integrates fault into his account of restitution.

#### *Restitution, fault and third parties*

Aquinas creates a further analytical division within his scheme of restitution and recompense which appears to be original. The obligation to restore property can arise from two different sources, potentially from both simultaneously, but with different consequences.<sup>187</sup> First, restitution can arise on account of the thing itself, that is, from the very fact of possession, which he refers to as restitution *ratione rei* (on account of the thing).<sup>188</sup> Simply holding the property of another, for instance, on deposit, will create an obligation to restore but that obligation will cease along with possession so long as no fault is involved in its subsequent disposal: 'If [the property] be taken from him without a fault [*culpa*] on his part, he is not bound to restitution. It would be otherwise were he gravely to blame for losing possession.'<sup>189</sup>

The second source of restitution arises from wrongful receipt of the property, which is restitution *ratione acceptionis*.<sup>190</sup> The way in which possession was acquired must be examined and, in contrast to *ratione rei*, if it involved fault restitution is required regardless of the state of possession: 'Then a man is bound to restitution, not only because of the thing he takes, but also because of his injurious action, even though it is no longer in his possession.'<sup>191</sup>

Within this second category fault is sometimes expressed as *culpa*, sometimes as *iniuria*, for instance the wrongful taking of property against the owner's will by theft.<sup>192</sup> However, wrongful receipt is not limited to delictual taking. For instance, if property is received on loan for one's own use with the owner's consent, and is subsequently lost without fault, restitution *ratione acceptionis* would be required, '[f]or he is bound to recompense the one who did him a favour, and this debt

<sup>186</sup>This analysis is preserved in modern Scots law, cf. *Dollar Land (Cumbernauld) Ltd v C.I.N. Properties Ltd* 1998 SC (HL) 90, at 99B-C, where Lord Hope describes recompense as 'a process of assessment, as it requires a value to be placed on the benefit'.

<sup>187</sup>*Summa*, II-II q.62, 6.

<sup>188</sup>Or *ipsa res accepta* (ibid., q.62.6). For the late scholastic treatment of Thomas's subdivision of restitution see Hallebeek, 'Developments', 48–49, Gordley, *Foundations*, 424, Gordley, 'Restitution', 228, Dolezalek, 'Moral Theologians', 112.

<sup>189</sup>*Summa*, II-II q.62.6.

<sup>190</sup>Or *ipsa acceptio* (ibid.). Weinzierl suggests that this scheme, original to Thomas, arises from Thomas's engagement with the civil law, in that restitution *ratione rei* is analogous to a real action, restitution *ratione acceptionis* to a personal action based on relationship (*Hochscholastik*, 177–181, 220–221).

<sup>191</sup>*Summa*, II-II q.62.6; also Dolezalek, 'Moral Theologians', 112.

<sup>192</sup>*Summa*, II-II q.62.6; Thomas uses the civilian delict *furtum*, translated as theft, but which in Roman law was 'so wide as to include almost any species of dishonesty', Zimmermann, *Obligations*, 925.

would not be met were the latter to suffer loss by his lending'.<sup>193</sup> These examples demonstrate that in Aquinas's scheme restitution *ratione acceptionis* is appropriate where possession of someone else's property has either been wrongfully gained (through injurious actions and without consent) or lawfully gained but resulting in a subsequent loss which must be restored. The obligation subsists even after possession has been lost, at which point recompense is the appropriate remedy.<sup>194</sup>

There is one further refinement which takes account of the ultimate destination of the property and which, therefore, concerns third parties acquiring possession through the wrongful actions of an intermediary:

So then even though he who took something from another no longer has it, for it has passed to someone else, nevertheless, since the other is deprived of what is his, both the taker and the holder alike are bound to restitution, the former on account of his injurious action, and the latter on account of the thing itself.<sup>195</sup>

The intermediary is liable on account of the wrongful taking and the third party simply by possessing (*ratione rei*), by analogy with two-party transactions. The dual liability of the taker and the present possessor subsists until restitution has been made by one of them. However, if the third party has been 'a cause of the unjust taking',<sup>196</sup> he is liable on both counts. All who have been either a direct cause (by commanding, giving advice or express consent) or an indirect one (by not preventing or by covering up after the event) form part of the chain of liability ranking in the order specified.<sup>197</sup> The range of participatory actions is wide, and, consistent with the voluntariness of virtue and vice, the unifying factor is that they all require the third party's knowledge of the injustice. Aquinas does not dwell on the detail of third party liability, but the foundation is laid for the later development of the role of the participant (the *particeps furti* or *fraudis*) and the continuing liability of the third party in modern law whose participation amounts to knowledge.

For Aquinas, therefore, liability for restitution depends on two factors: possession and wrongful receipt of property. If the current possessor (in both two- and three-party transactions) still has the property, restitution *ratione rei* demands that it be returned to the rightful owner or possessor. If possession has been lost, liability depends either on fault or on personal gain. This is restitution *ratione acceptionis*, in fact a species of *recompensatio*, and throughout his discussion of the consequences of lost possession Aquinas reverts to the general term. The principal function of recompense (or restitution *ratione acceptionis*) is, therefore, to make financial payment equivalent in value to the property. This applies even to innocent possessors whose personal gain from having possessed has created inequality and is, therefore, morally equivalent to wrongdoing.

<sup>193</sup> *Summa*, II-II q.62.6.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*, ad.1.

<sup>196</sup> *Ibid.*, q.62.7.

<sup>197</sup> *Ibid.* Thomas is more tentative about indirect liability and suggests that advice, flattery and keeping silent will not always import liability, only where they were a cause of the action.

Stair's translation of the Thomist account of restitution into Scots law is complex and largely implicit but the combination of loss of possession and fault certainly imports a different kind of liability. There are three potential sources from which the obligation of restitution can arise: from property law, from delict, and from unjustified enrichment. Stair deals with all three in his obediencial obligations but his model does not translate easily into modern legal categories. However, those difficulties may partly be due to his reliance on the scholastic doctrine.

Stair's scheme of restitution is controversial for modern scholars not least because he appears to conflate liability arising from property ownership with the law of obligations.<sup>198</sup> Many of Stair's examples of restitution are consistent with ownership, situations involving a real vice or *vitium reale* which prevents title from passing and allows an owner to vindicate, for instance property which has strayed, been lost or stolen;<sup>199</sup> or transfers of property which are vitiated by essential error;<sup>200</sup> or where possession, not ownership, has been transferred for the purpose of loan or security.<sup>201</sup> But restitution is also due for transfers corresponding to the Roman *condictiones*, whereby the underlying cause has failed or where possession (now widened to payment) is obtained through the owner's error that delivery or payment was due.<sup>202</sup>

Throughout Title I.7 Stair is addressing possessors who are in *bona fides*, where possession has been acquired 'without delinquency'.<sup>203</sup> He insists on this requirement in almost every section of Title I.7, an insistence which may derive from the fact that he is engaging with the broad scholastic concept of restitution, and is anxious to treat separately restitution which has its source in possession (*ratione rei*) and restitution which arises from fault or delinquency (*ratione acceptionis*). The consequences of loss of possession for a possessor in *bona fides* correspond to Aquinas's account of restitution *ratione rei*: 'In all these, the obligation of restitution is formally founded upon the having of things of others in our power, and therefore, that ceasing, the obligation also ceaseth.'<sup>204</sup>

No restitution is required after possession is lost, instead recompense fulfils the subsidiary role of compensating the original owner for profits made on a subsequent sale or fruits which have not been consumed in *bona fides*.<sup>205</sup>

Aquinas's second category of restitution has not entirely disappeared from Stair's obediencial obligations. However, it has been removed from Stair's main account of restitution and instead is considered as a delict, the territory of reparation. If property has been wrongfully taken (by theft or fraud), restitution is required and, like *ratione acceptionis*, the wrongdoer is liable for the full value of the property, plus 'the natural

<sup>198</sup>This has led to a distinction between 'vindicatory' restitution and 'enrichment' restitution in the modern law, see Kenneth Reid, 'Unjustified Enrichment and Property Law', [1994] *Juridical Review*, 169; also Evans-Jones, *Condictio*, para 1.13.

<sup>199</sup>*Institutions*, I.7.3.

<sup>200</sup>*Ibid.*, I.7.4.

<sup>201</sup>*Ibid.*

<sup>202</sup>*Ibid.*, I.7.7–9.

<sup>203</sup>*Ibid.*, I.7.3–4.

<sup>204</sup>*Ibid.*, I.7.11.

<sup>205</sup>*Ibid.*

fruits and profits':<sup>206</sup> 'Reparation is either by restitution of the same thing, in the same case, that it would have been in if it had remained with the owner, and this is most exact; or where that cannot be, by giving the like value, or that which is nearest to make up the damages.'<sup>207</sup>

Delict is, therefore, the second source of restitution for Stair if possession has been wrongfully acquired (or indeed wrongfully disposed of),<sup>208</sup> sometimes called its 'binary' nature in modern Scots law.<sup>209</sup> Reparation is Stair's 'fault' category, the paradigm example of which is fraud.<sup>210</sup> It clearly corresponds to the delictual element of *ratione acceptionis*, but Stair does not follow Thomas's scheme, perhaps mindful of the separate category of delict in Roman law, even though he prefers to base his account on native Scottish delicts.<sup>211</sup>

However, restitution is arguably not binary in nature; rather there is a third source of obligation, one that also corresponds to Thomas's category of *ratione acceptionis*, and which is, at best, only implicit in Stair's account. Coming back to Stair's insistence on the *bona fides* of the possessor, it is apparent from a careful reading of Title I.7 that many of the situations he describes involve three party transactions. For instance, if the *bona fide* possessor is liable to restore property recovered from thieves or pirates, there must be a wrongful intermediary in the shape of a thief or pirate! Similarly, when he suggests that even a *bona fide* purchaser for value must restore property,<sup>212</sup> recognising that although this is the requirement of natural law nevertheless in some cases, on policy grounds, 'positive law secures the buyer, and leaves the owner to seek the seller',<sup>213</sup> there is implicitly an intermediary seller who has done wrong. Consistent with restitution *ratione rei*, it is the *bona fides* of the third party which will protect him from any liability once possession has been lost.

But what of the *mala fide* possessor? For the answer, we have to look outwith Stair's obdiential obligations to his treatment of possession in Book II of the *Institutions*, where Stair defines *bona fide* possessors as those 'who do truly think that which they possess to be their own, and know not the right of any other'.<sup>214</sup> If the third party has private knowledge of another's right (or, presumably, of the intermediary's wrong) he is also deemed to be a 'partaker in the fraud'.<sup>215</sup>

Whitty's analysis of the effects of fraud in 'indirect' or three party enrichment cases suggests that it represents a major exception to a general rule against

<sup>206</sup>Ibid., I.9.4.

<sup>207</sup>Ibid.

<sup>208</sup>Ibid., I.7.2 where 'fraudful' disposal of property is also clearly a 'delinquency'.

<sup>209</sup>D.L. Carey Miller and D. Irvine, *Corporeal Moveables in Scots Law*, 2nd ed., Edinburgh, 2005, 238, and see generally ch.10.

<sup>210</sup>*Institutions*, I.7.2.

<sup>211</sup>Ibid., I.9.4. For Grotius' use of restitution *ratione acceptionis* see Robert Feenstra, 'Grotius' Doctrine of Liability for Negligence: its Origin and its Influence in Civil Law Countries until Modern Codifications', in *Histoire du droit savant (13e–18e siècle)*, Aldershot, 2005, 129–171, at 134–135.

<sup>212</sup>*Institutions* I.7.4 and I.7.11.

<sup>213</sup>Ibid., I.7.4.

<sup>214</sup>Ibid., II.1.24, see also II.1.24 for the further explanation that even a 'colourable' title will be effective, because of the presumption of ownership which arises from possession of moveables in Scots law.

<sup>215</sup>Ibid., IV.40.21–22; also see II.1.42.

recovery.<sup>216</sup> For if the third party is either in bad faith or the transaction is gratuitous, a 'restitutionary obligation'<sup>217</sup> is created, usually recompense. In addition, unlike the strict liability nature generally asserted for claims in unjustified enrichment, 'liability is fault-based'.<sup>218</sup>

The principal elements of Aquinas's *ratione acceptionis* lie within this rule. His account of the liability of those who acquired possession either directly as a result of a wrong (in delict) or indirectly as third parties from a culpable intermediary as founded on restitution *ratione acceptionis* appears to find a parallel in cases now characterised as indirect enrichment. If possession has been lost by the fault of the possessor, recompense<sup>219</sup> is required to restore equality, for the full value of the property (*quantum meruit* in modern Scots law).

It is not the intention of this article to trace Stair's development forward into Scots law, but some mention must be made of an unreconciled group of cases which have been described as 'unsatisfactory'.<sup>220</sup> The scholastic doctrine of restitution may shed some light.

To take one example, in *Faulds v Townsend* (1861)<sup>221</sup> the defender was a manufacturing chemist whose business involved the slaughter of animals which were no longer fit for butchering. In order to avoid nuisance to the neighbourhood, the purchase and processing of the animals usually took place during the night. The pursuer's horse was stolen, hastily sold to Townsend for less than its market value and the same night was boiled up for manure. Since neither restitution nor vindication of the now defunct horse were competent, the court examined the liability of the third party purchaser for value. Townsend had acted in *bona fides* without knowledge that the horse had been stolen. However, the very nature of the business was said to represent such a temptation for thieves that particular care and caution was necessary. The lack of such care in the purchase of the pursuer's property was, therefore, wrongful, characterised simply as 'fault' or '*culpa quae equiparatur dolo*'.<sup>222</sup> The court held: 'Here there has not been reset of theft or *mala fides*, or actual dole, but there has been want of care and caution.'<sup>223</sup>

In its judgment, the court examined principles deriving from Stair's account of restitution. If the defender had both acquired and lost possession in *bona fides* and with due care and caution, he would only be liable *in quantum lucratus* (Stair's recompense for profits).<sup>224</sup> However, the lack of care in the purchase and disposal

<sup>216</sup>Whitty, 'Indirect Enrichment', 251–269.

<sup>217</sup>Ibid., 257.

<sup>218</sup>Ibid.

<sup>219</sup>Whitty suggests this is the general remedy for indirect enrichment: 'Indirect Enrichment', 201, see also 252 for the 'no profit from fraud' rule.

<sup>220</sup>MacQueen and Sellar, 'Unjust Enrichment', 311. For other analogous cases see *ibid.*, fn.143; Evans-Jones, *Condictio*, para. 9.33, fnn.83–84; Whitty, 'Indirect Enrichment', 256–259 and accompanying notes; also the recent decision *Harpercollins Publishers Ltd v Young* [2007] CSOH 65 and cases referred to therein.

<sup>221</sup>(1861) 23 D 437.

<sup>222</sup>Ibid., 439.

<sup>223</sup>Ibid. 'Reset' in Scottish criminal law is broadly equivalent to handling stolen goods, see Criminal Law (Consolidation) (Scotland) Act 1995, s.51.

<sup>224</sup>(1861) 23 D 437, at 439.

of the horse was equivalent to *culpa* on grounds of public policy, therefore the defender was liable for the full value of the horse.

The basis of the decision in *Faulds* has been characterised variously as a type of reparation<sup>225</sup> or as '*sui generis*'.<sup>226</sup> Whatever its correct classification, its rationale arguably stems from what I have suggested to be Stair's third source of restitution (or recompense). It does not derive from property ownership or from delict. Instead, it sits in a somewhat undefined area involving enrichment, third parties and 'fault' which falls short of a delictual standard.<sup>227</sup> It may, however, derive from the scholastic account of restitution *ratione acceptionis*, which demands recompense both for the wrongful receipt of property even after possession has been lost (or even for innocent receipt which has brought about gain and loss), and which extends liability beyond the thief or the rogue to third parties who are 'partakers' in the *culpa*.

#### CONCLUSION

The history of the law of restitution and the rules which were developed by the theologians of ancient times to govern the probity of private transactions have had lasting impact. This article has examined Thomas Aquinas's account of justice and restitution and its potential impact on Stair's *Institutions*. For both men restitution and recompense have spiritual roots and are as much moral and religious duties as legal ones: to return goods to others which are rightfully theirs and to recompense them for profits made at their expense. The complex interplay between restitution, fault and three-party transactions may find a rationale within Thomas's scheme which partly explains the idiosyncratic nature of Stair's account.

What is also remarkable about Aquinas's scheme is its striking resemblance to the rules of 'knowing receipt' and 'knowing assistance' familiar to English equity.<sup>228</sup> It may be that the influence of Aquinas on medieval chancellors would prove enlightening.

The usual comparison for the Scots law of unjustified enrichment is with civilian sources, and its Roman roots are regularly reasserted.<sup>229</sup> This study offers an alternative understanding of the history of Stair's scheme of obligations that derives from a European tradition founded on philosophy and religion, both of which were comfortable territory for Stair. Undoubtedly Stair borrowed much from the civil law, even though he often refused to follow its rules. It may be that he married scholastic moral theology, at a structural and conceptual level, with civilian terminology and legal doctrine where he found them acceptable. Perhaps Stair's legacy to Scots law lies in the fact that he was able to bring to the local law some of the riches of the civil law tradition, as well as providing it with a moral and philosophical foundation that would stand the test of time.

<sup>225</sup>Carey Miller, *Corporeal Moveables*, para. 10.08, on the basis that *bad faith* equates to Stair's notion of fraud.

<sup>226</sup>Evans-Jones, *Condictio*, para. 9.33.

<sup>227</sup>It may be closer to negligence, but again only implicitly.

<sup>228</sup>Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark', in W.R. Cornish et al., eds., *Restitution, Past, Present and Future: essays in honour of Gareth Jones*, Oxford, 1998, 233–245, at 233–239.

<sup>229</sup>Niall R. Whitty, 'The Scottish Enrichment Revolution', 6 *Scottish Law and Practice Quarterly* (2001), 167–196, at 167; Robin Evans-Jones, 'Unjustified Enrichment', in Kenneth Reid and Reinhard Zimmermann, eds., *A History of Private Law in Scotland*, vol. 2, *Obligations*, Oxford, 2000, 369–421, at 371.