Ideas of Equity

STUDIES IN SCOTS LAW

Series Editor
Kenneth G C Reid

Editorial Board

Alan R Barr
Sandra M Eden
George L Gretton

Volumes in the series

1. Ross Gilbert Anderson, *Assignation* (2008)
2. Andrew J M Steven, *Pledge and Lien* (2008)
3. Craig Anderson, *Possession of Corporeal Moveables* (2015)
4. Jill Robbie, *Private Water Rights* (2015)
5. Daniel J Carr, *Ideas of Equity* (2017)



STUDIES IN SCOTS LAW
VOLUME 5

Ideas of Equity

Daniel J Carr
Lecturer in Private Law,
University of Edinburgh


EDINBURGH LEGAL EDUCATION TRUST
2017

Published by
Edinburgh Legal Education Trust
School of Law
University of Edinburgh
Old College
South Bridge
Edinburgh
EH8 9YL

http://www.centreforprivatelaw.ed.ac.uk/monograph_series

First published 2017

ISBN 978-0-9556332-9-4

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library.

Typeset by Etica Press Ltd, Malvern
Printed and bound by Martins the Printers, Berwick-upon-Tweed

Contents



Preface

This book is an updated version of my doctoral thesis submitted in 2009, and awarded by the University of Cambridge in 2010. As such the text no doubt bears some of the disadvantages and, hopefully, some of the advantages of such a work. The book is about the development of ideas about equity in Scots law and how those ideas influenced the doctrinal development of certain areas of law. Because PhDs are somewhat selfish affairs – the subject matter selected is invariably chosen because it is of interest to the candidate rather than necessarily out of consideration for a wider audience – the areas included in this text are selective. The book does not purport to be a comprehensive explanation of how equity operates across the whole of Scottish private law, let alone the whole of the legal system. What the book does seek to do is explain how *ideas* about equity have been present in the legal system in different ways at different times, and, in turn, how the development of those ideas can tell us something about the way in which the legal system and discrete areas of private law have developed in the past and how they might usefully develop in the future. In that sense the method of the text might be characterised as an exercise in rational reconstruction.

Much (but not all) of the material in chapter 6, concerning fiduciary law, has appeared in an article, 'English Influences on the Historical Development of Fiduciary Duties in Scottish Law' (2014) 18 Edin LR 29; and a small amount of chapter 2 has appeared in my preface to the 2013 reprint of Lord Kames's *Principles of Equity*.

I would like to thank Professor David Ibbetson and Professor Graham Virgo, the former in particular as the primary supervisor, both of whom were a great source of inspiration and assistance as my doctoral supervisors during my time in Cambridge. I am extremely grateful to my examiners, Professor John Ford and the late Lord Rodger of Earlsferry, for their valuable time and for the wisdom and kindness they extended to me during my *viva* and afterwards. I also thank the Arts and Humanities Research Council for providing full funding for my doctorate and the requisite research masters degree which preceded it. My thanks are also due to Professor Neil Walker for allowing me to complete the last stages of the doctorate by employing me as a research assistant on another project. I also thank the many current and former colleagues, friends, and students whose assistance and encouragement have contributed to this book.

Finally, I am grateful to Professor Kenneth Reid for his patience in awaiting the delivery of this book for inclusion in the *Studies in Scots Law* series, and for

his considerable assistance with its preparation for publication. I hope it is a worthy inclusion.

Daniel J Carr
Glasgow
April 2017

Table of Cases

References are to paragraph numbers

Table of Statutes

References are to paragraph numbers





xx

Abbreviations

Bacon, *Learning*	F Bacon, *The Advancement of Learning* (1605, J Devey ed, 1901)
Balfour, *Practicks*	P G B McNeill (ed), *The Practicks of Sir James Balfour of Pittendreich* (Stair Society vols 21–22, 1962–63)
Bankton	Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights: With Observations upon the Agreement or Diversity between them and the Laws of England* (1751–53, reprinted as Stair Society vols 41–43, 1993–95)
Bell, *Commentaries*	George Joseph Bell, *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence* (5th edn, 1826)
Bell, *Principles*	George Joseph Bell, *Principles of the Law of Scotland* (4th edn, 1839, reprinted by the Edinburgh Legal Education Trust in *Old Studies in Scots Law* vol 1, 2010)
Craig, *Jus Feudale*	Thomas Craig, *Jus Feudale* (3rd edn, 1732, Lord Clyde transl, 1934)
Erskine	John Erskine, *An Institute of the Law of Scotland* (8th edn, J B Nicholson ed, 1871, reprinted 1989)
Ferguson	R B Ferguson, 'Sources of Law (Formal)' in *The Laws of Scotland: Stair Memorial Encyclopaedia* (T B Smith ed, vol 22, 1987)
Forbes	William Forbes, *The Institutes of the Law of Scotland* (vol 1, 1722 and vol 2, 1730, reprinted by the Edinburgh Legal Education Trust as a single volume in *Old Studies in Scots Law* vol 3, 2012) (all references are to the revised pagination in the 2012 reprint)
Ford	J D Ford, *Law and Opinion in Scotland during the Seventeenth Century* (2007)
Fraser, *Parent and Child*	Lord Fraser, *A Treatise on the Law of Scotland relative to Parent and Child and Guardian and Ward* (3rd edn, J Clark ed, 1906)
Gloag, *Contract*	W M Gloag, *The Law of Contract* (1914)

Gloag and Henderson	W M Gloag and R C Henderson, *The Law of Scotland* (13th edn, Lord Eassie and H L MacQueen eds, 2012)
Gretton, 'Evolution of the Trust'	G L Gretton, 'Scotland: The Evolution of the Trust' in R Helmholz and R Zimmermann (eds), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (1998)
Gretton, 'Trusts'	G L Gretton, 'Trusts' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1
Grotius, *De Jure*	Hugo Grotius, *De Jure Belli ac Pacis* (F W Kelsey transl, 1925)
Grotius, *Jurisprudence*	Hugo Grotius, *The Jurisprudence of Holland* (R W Lee transl, 1926)
Hallebeek	J Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (1996)
Hope, *Practicks*	Lord Clyde (ed), *Hope's Major Practicks* (Stair Society vols 3–4, 1937–38)
Hume, *Lectures*	G C H Paton (ed), *Baron David Hume's Lectures 1786–1822* (Stair Society, vols 5, 13, 15, 17–19, 1939–58)
Kames, *Principles*	Henry Home, Lord Kames, *Principles of Equity* (3rd edn, 1778, reprinted by the Edinburgh Legal Education Trust in *Old Studies in Scots Law* vol 4, 2013)
Lehmann	W C Lehmann, *Henry Home, Lord Kames, and the Scottish Enlightenment* (1971)
Lobban	M Lobban, 'The Ambition of Lord Kames's Equity' in A Lewis and M Lobban (eds), *Law and History* (2004)
Mackay and Wark, 'Equity'	Æ J G Mackay and J L Wark, 'Equity' in J L Wark (ed), *Encyclopaedia of the Laws of Scotland* vol 6 (1928)
Mackenzie Stuart	A Mackenzie Stuart, *The Law of Trusts* (1932)
MacQueen and Sellar	H L MacQueen and W D H Sellar, 'Unjust Enrichment in Scots Law' in E J H Schrage (ed), *Unjust Enrichment: the Comparative Legal History of the Law of Restitution* (1995)
McLaren, *Wills and Succession*	J McLaren, *The Law of Wills and Succession* (3rd edn, 1894) 2 vols
Menzies	A J P Menzies, *The Law of Scotland Affecting Trustees* (vol 1, 1893; vol 2, 1897)

Orücü	E Örücü, 'Equity in the Scottish Legal System' in A M Rabello (ed), *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (1997)
Reid, 'Patrimony not Equity'	K G C Reid, 'Patrimony not Equity: the Trust in Scotland' in J M Milo and J M Smits (eds), *Trusts in Mixed Legal Systems* (2001)
Smith, *Short Commentary*	T B Smith, *A Short Commentary on the Law of Scotland* (1962)
Smith, *Studies*	T B Smith, *Studies Critical and Comparative* (1962)
Stair	James Dalrymple, Viscount Stair, *Institutions of the Law of Scotland* (ed D M Walker, 1981)
Stair Memorial Encyclopaedia	T B Smith et al (eds), *The Laws of Scotland: Stair Memorial Encyclopaedia* (25 vols, 1987–1996) with cumulative supplements and reissues
Stewart, *Restitution*	W J Stewart, *The Law of Restitution in Scotland* (1992)
Thomson, 'Role of Equity'	J M Thomson, 'The Role of Equity in Scots Law' in S Goldstein (ed), *Equity and Contemporary Legal Developments* (1992)
Trotter	W Trotter, *The Law of Contract in Scotland* (1913)
Walker, *Principles*	D M Walker, *Principles of Scottish Private Law* (4th edn, 1988)
Wallace, *Principles*	George Wallace, *A System of the Principles of the Law of Scotland* (1760)
Whitty, 'Borrowing English Equity'	N R Whitty, 'Borrowing from English Equity and Minority Shareholders' Actions' in E Reid and D L Carey Miller (eds), *A Mixed Legal System in Transition* (2005)



1 Introduction

A. INTELLECTUAL AND METHODOLOGICAL PARAMETERS

1-01. This book is about the historical development of some of the ways in which a concept of 'equity' has been understood in Scots private law; and in attempting to analyse ideas of 'equity' in specific areas of law, it seeks some broader insights into the way in which equity permeates Scots law as a whole. The text considers English law to the extent that it contributes conceptually and practically to Scots law. Indeed, the significance of English law to the historical, and continuing, development of many of the areas touched upon in this text should become clear. However, it is equally true that other areas of Scots law, which can be said to have a discernibly 'equitable' character, have not been much influenced by English law, and this book also considers the development and understanding of internal or native approaches to equity.

1-02. A monograph devoted to the topic of equity in modern Scots law is a unique undertaking,[1] and the areas of law drawn together in this book are so considered for perhaps the first time. It is hoped that the subjects chosen commend themselves to the enquiry as to how multiple understandings of equity have contributed to the development of Scottish private law. The result is not, of course, a practitioner's text, containing answers to the nitty-gritty issues arising in the daily practice of law. Yet it is hoped that the book retains a relevance to the practitioner in the manner in which it attempts to

[1] There are published treatments of equity in Scots law (see chapter 2), and, in 1952, David Walker was awarded a PhD from the University of Edinburgh for a thesis entitled *Equity in Scots Law,* but the present text is the first modern monograph treatment of the subject to be published. The only previous monograph was Lord Kames's *Principles of Equity*, the third and last edition of which was published in 1778: see D J Carr, 'Preface' in Lord Kames, *Principles of Equity* (3rd edn, 2013 reprint).

contextualise and map the law. This attempt to map and contextualise has necessitated a fairly robust effort at legal history. Once more, the purpose of this legal history was not history for sake of history (which is an important and laudable exercise); rather it was undertaken to see how different influences and ideas about equity came to shape some areas of the modern law, and, in turn, how we think about modern Scots law. Ultimately the book is about ideas, and how the law developed in light of those ideas.

1-03. Some of the content of this book might be considered (quite unintentionally) controversial. The spectre of equity is often treated with suspicion or hostility, and, in turn, it can provoke passionate views. Yet, trying to address the apparently underdeveloped and underappreciated understanding of the place of equity in Scottish law was one of the main reasons for writing the thesis which became this book. It was necessary, in my view, to examine a little more closely the disparate understandings of the word with a view to beginning a more detailed rationalisation of the meaning of equity for a Scots lawyer. Thus, the nub of the book is the examination of how historical uses of a concept of equity in different areas of law might assist with understanding what equity means today. Achieving such an understanding requires an examination of the formative influences from which it was wrought. It is against that background that the legal history aspect of the book is located. The central methodology underpinning the book is the importance of doctrine as a legal instrument. It involves an examination of the doctrinal development of superficially disparate areas of private law, which are linked by the importance they accord to some conceptualisation of equity. Yet, this equitable linkage is not the binding tie of a homogenous concept. Rather, it is possible to identify certain areas of law which are characterised by an internally developed or native 'Scottish equity', while in other areas the variant of equity is one associated with ideas imported from, or developed by reference to, English chancery jurisprudence.

1-04. As regards the influence of English law, this book surveys that influence through a comparative law lens. In fact, in many ways the schizophrenic approach to English influence in Scottish law is of importance to the nature of the book itself. On the one hand, the idea that English law should be handled in a purely comparative manner perhaps downplays the reality of the importance of English law as a formative and continuing influence, especially but not only since the Union of 1707, which allows English law to operate as a latent internal source of Scots law. Simultaneously, it is important to recognise that English authority is not one and the same as Scottish authority, for it is palpably not a typical formal, technical or authoritative source of law in Scotland. I have attempted to tread a careful balancing act between these two perspectives, though I leave it to others to judge whether I have done so successfully.

1-05. On the theme of comparative law, it is also to be observed here that there is a tendency in modern Scottish scholarship to make heavy use of comparative material which, it is said, is consistent with a traditional Scottish approach to make use of the experience of other systems.[2] Such an

[2] The trend is not uniquely Scottish: H P Glenn, 'A Transnational Concept of Law' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 839 et seq.

approach has led to good books and research that has enriched the epistemological life of Scots law.[3] This school of comparative law can, in Scotland, be fairly associated with T B Smith, and the intellectual shadow he cast across subsequent scholarship.[4] There are sceptics about (some might say critics of) some elements of Smith's broader approach and how its legacy influenced subsequent intellectual and methodological orientations.[5] This is not the place to evaluate the use to which comparative law is put in Scots law, though it is the place to state that the book is not comparative in the sense just narrated. It does not contain copious citation of analogous approaches in German, French or South African law, though it does utilise authority from the Commonwealth. The reason for this absence is threefold: first, the subject matter of equity is one which appeals more to the Common Law[6] world than the civilian; secondly, it seemed inappropriate to make superficial observations which were not grounded on a full knowledge of how any comparator system operated as a whole;[7] and thirdly, few lawyers, including the present writer, are qualified linguistically or legally to undertake such a task. Therefore, the limited extent to which this book may be described as comparative is the extent to which it considers English law, though that characterisation is not the full story as observed above.

B. OVERVIEW OF THE TEXT

(1) General

1-06. The nature of equitable influence in Scottish law is one which has been the subject of variable levels of understanding and interest. This is unfortunate as there are a number of areas of Scottish law which are highly dependent upon the idea of some kind of equity or equitable influence. This book seeks to examine the doctrinal development of certain areas of law, and the way in which differing conceptions of 'equity' have contributed to their development. The areas which have been selected for examination are the

[3] There have been a number of monographs to emerge from the increased comparative work of Scottish academics: one of the most recent and ambitious is R Zimmermann, D Visser and K G C Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004).

[4] On this influence see E Reid and D L Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005).

[5] D J Osler, 'The Fantasy Men' *Rechtsgeschichte* 10 (2007) 169; Lord Rodger of Earlsferry, '"Say not the struggle naught availeth": the costs and benefits of mixed legal systems' (2003) 78 Tul LR 419; A Rodger, 'Thinking About Scots Law' (1996–97) 1 Edin LR 3.

[6] I have capitalised 'Common Law' here because I use the term to indicate the legal tradition and system of England as opposed to an alternative understanding which is a reference to the body of law created by decisions of courts and judges. The latter understanding of the term is a long recognised source of law in Scotland, and is frequently referred to in contradistinction to statute law. This convention will be used throughout the text.

[7] This is not to decry recent scholarship which has made use of comparative materials; the observation is merely that such a method is inappropriate in the present text.

law of unjustified enrichment, trust law, constructive trust law, and the law relating to fiduciary duties. In addition to examining the development of these areas of law by reference to equity there is necessarily a chapter dealing with the idea of equity as a generalised concept for Scots law. The following paragraphs sketch the content of and conclusions reached in the substantive chapters of the book. That sketch provides insights into the way in which the different chapters and their conclusions come together to illustrate broader conclusions derived from the interaction between those chapters.

(2) Chapter 2: Historical Understandings of Equity

1-07. Chapter 2 of the book provides an overview of the development of the concept of equity in Scottish law. This chapter considers the concept of equity from a Scottish perspective, though there is reference to other systems to the extent that they have influenced the Scottish approach to equity. The chapter is structured to give a broad-brush overview of the meanings of equity for many of the institutional writers, notably their views that equity infused the law in Scotland consistently with the natural law heritage upon which most of them drew heavily. With the passage of time and the weakening of natural law ideas as the dominant normative basis for Scottish legal thinking and writing the conception of equity changed. This can best be seen in the writings of Henry Home, Lord Kames, who set out to give a detailed exposition of the nature of equity in Scottish law. The text is important as both the only monograph devoted to the subject of equity and as an early example of the growing influence of English ideas and approaches to equity.

1-08. With growing English influence in the eighteenth century it is in the nineteenth and twentieth centuries that increasing amounts of English equitable authorities, and the thinking accompanying them, become interspersed with, and sometimes supplant, Scottish authorities in texts and decisions. Yet, in the nineteenth century academic treatises pertaining to the subject of equity are lacking, though that is not the whole story of the legal picture of the time. It seems that in the courts, where the living law operated, the judiciary were more inclined to consider equity to be a powerful source of authority. In a period of rising positivist approaches to law it is striking to see Scottish judges talking so openly of their equitable powers, and the equity jurisdiction of the Court of Session. Although the concept of a separate equity jurisdiction in the English sense was never asserted, there are some dicta which came close and there is clear evidence of an intellectual separation or distinctiveness between equity and the (common) law. During this period the flow of English chancery authority into Scots law is strong, with subsequent implications for the understanding of key areas of private law, the repercussions of which would shake the foundations of obligations and property law later. Furthermore, dicta asserting the undoubted 'equitable jurisdiction' of the Court of Session acted as intellectual conduits through which English chancery jurisprudence could flow into Scots law, and, sometimes, the shared nomenclature allowed or facilitated uncritical borrowing.

1-09. Subsequent sections of the chapter consider how the resurgence in academic writing in the mid-twentieth century challenged such a mode of intellectual acquisition. Equity came to be discussed more frequently once more and, with a notable exception in T B Smith, most academics suggested that the power of equity as a source of law was waning or finished. The demise of equity is partially challenged in this chapter in two ways: the first points to academic writings calling for a newly emboldened equitable doctrine in Scots law, the second notes that in the case reports the idea of equity and equitable concepts are often discernible in judicial pronouncements. Later chapters demonstrate different extents to which such equitable pronouncements and ideas continue to have relevance for different areas of private law.

(3) Chapter 3: Unjustified Enrichment

1-10. This first chapter to consider a specific area of private law examines the doctrinal development of the taxonomy of unjustified enrichment. The approach taken is to portray the historical shaping and development of this area of law, with special emphasis upon the growing importance of equitable considerations. The historical development of unjustified enrichment is traced through the institutional writers, in particular the structural approach taken by Stair which inspired those writers who followed him. Reid's work on the Thomist heritage is endorsed, noting that much of Stair's approach is owed to that precursory school.[8] After examining Stair's intellectual precursors, the chapter sets out his approach to the area of law which the modern law knows as unjustified enrichment: the Three Rs of restitution, recompense and repetition.

1-11. The chapter considers the manner in which subsequent writers followed, borrowed, and altered Stair's Three Rs taxonomy and how it continued, with a few exceptions, to represent the intellectual organisation of the law well into the twentieth century. Stair's theological ideas, which underpinned and gave force to obediential obligations such as the Three Rs, were refined by subsequent writers. With the passage of time and the waning of the natural law school, and the move away from justifying legal norms by reference to theology, subsequent writers refined the theologically based idea of equity to the point that it was eventually replaced by a secular concept of equity. As part of these processes of refinement the writings of Kames and Hume focused upon ideas of equity in their conceptualisation of the law of unjustified enrichment, placing the maxim *nemo debet locupletari ex aliena jactura* squarely front and centre of their treatments.

1-12. Subsequent exploration of the doctrinal development shows these more refined advances in theory made by Kames and Hume were largely ignored in the nineteenth century when the institutional writer Bell reverted

[8] On this see D Reid, 'Thomas Aquinas and Viscount Stair: the Influence of Scholastic Moral Theology on Stair's Account of Restitution and Recompense' (2008) 29 Journal of Legal History 189.

to the Three Rs model, with a concomitant loss of stress on the idea of a broad equitable approach based on the *nemo debet* maxim. In the twentieth century the rise of the term 'unjust(ified) enrichment' to denote an area of obligations, distinct in theory and in form from delict and contract, began to emerge. This process took substantive shape in the well-known case *Cantiere San Rocco*,[9] where the phrase unjust enrichment is deployed by the Law Lords in making their decision. However, some intellectual complacency about the relative merits of Scottish and English law bred neglect and stalled the development of enrichment law until the later twentieth century.

1-13. Two articles by Peter Birks, and events south of the border, galvanised Scots lawyers into examining and reforming the law of unjustified enrichment in the 1990s during the 'enrichment revolution'. However, this was no juridical abiogenesis. In the three revolutionary cases – *Morgan Guaranty*, *Shilliday*, and *Dollar Land*[10] – the Scottish judiciary took a new approach that unshackled the future development of the law, but they did so using existing terminology and ideas, including referring to the role of equity and to equitable considerations. The modern taxonomy suggests a move toward a general enrichment action which is a 'third way' between the extremes of civilian and Common Law models.

1-14. In the revolutionary cases the maxim *nemo debet locupletari ex aliena jactura* was invoked frequently, and it was repeatedly asserted that the maxim was an equitable one. Furthermore, this equitable status was, it seems, not merely a jejune observation. The picture which emerges is that the equitable maxim is *the* normative underpinning of enrichment law – the maxim is the overarching principle from which all aspects of enrichment law ultimately draw their justification. The maxim is incapable of direct application in court for it is too broad a formulation. On the other hand, what has been less clearly laid down is the role of the maxim in developing enrichment law in the future, that is to say, how it is to be used to recognise new grounds of enrichment liability – a role to which it seems to have been assigned.

1-15. Not only has the equitable maxim *nemo debet locupletari aliena jactura* been set up as the normative driver of enrichment law, but it is also a key component of the enunciated test for liability to reverse an unjustified enrichment. Not only is there a role for equity at a foundational level justifying the normative force of the law itself, but there is also the less clearly defined role of equity within an applied action for enrichment. Something of an outstanding question is whether the test to reverse an unjustified enrichment makes equity an ingredient of the action or of the defence, and upon whom any burdens of proof lie. Must the pursuer in an action aver that it would be equitable to order a return of the transfer, or is the invocation of equity to be satisfied by the defender setting up the defence that to return something would be inequitable? Furthermore, if such is the position of equity

[9] *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co* 1923 SC (HL) 105.

[10] *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151; *Shilliday v Smith* 1998 SC 725; *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90.

in the new order, does this equitable test rest latently within the nominate forms of action and defences, or is it a ground which demands the action or defence takes account of equity in such a situation as a free-standing requirement? So, for example, if I wish to defend an action for unjustified enrichment, would my satisfaction of the ingredients of a change of position defence be enough in itself to demonstrate inequity, or would I have to, or have the option to, mount my defence upon the potentially broader ground of 'inequity' alone? Alternatively, can it be said that because an action for enrichment envisages a lack of legal ground that this in itself would satisfy the requirements of equity, or would the pursuer have to make specific averments concerning the equitable merits of the situation? This chapter demonstrates that there are, as yet, no clear answers to these questions and the role of equity in this context could yet be substantial or expansive.

1-16. There are suggestions that the role of equity in this context is greater than may have been previously expected, and there are indications that the newly erected judge-made doctrinal map provides for substantial judicial discretion in the form of this equitable requirement, to the extent that Scots law generally would hold that 'equitable' rights are awarded at the discretion of the court, and the new doctrine of unjustified enrichment would be no different. This being so, it would represent a departure from some interpretations of the old Three Rs structure, especially restitution, which envisaged strict or absolute rights that were not necessarily subject to the discretion of the court.

1-17. Finally, this chapter demonstrates that Scottish law approaches equity in different ways, and the operation of equity in different areas has different objectives, forms, and indeed results. In relation to enrichment law, the usage of the term equity is without reference to English equity or chancery jurisprudence. It is a homegrown conception and application of equity, ostensibly born of Roman law in Latinate maxim, made relevant by its mediation through the institutional heritage of Scottish law. The natural law treatises which take equity as the ingredient which imbues the law with normative force are the true crucibles of this idea of equity.

1-18. Furthermore, the way in which the maxim *nemo debet locupletari aliena jactura* and its equitable heritage have been resurrected latterly is entirely consistent with this approach – the equity of Scottish enrichment law is equity as understood across different jurisdictions. It is the idea of facilitating fair and just results without descending into an unregulated morass of absolute discretion; furthermore, it is also the idea of giving a judge organised and regulated discretion to achieve a broadly just result. It is not the technical equity of the English chancery, but, importantly, nor has it been used to absorb English equitable rules in the area.[11] However, this is but one of the

[11] A parallel may be drawn between this approach and that of Lord Mansfield in *Moses v Macferlan* (1760) 2 Burr 1005 at 1012, 97 ER 676 at 680. See W Swain, '*Moses v Macferlan* (1760)' in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Restitution* (2006).

approaches to equity in Scottish law, and it is to an area with more engagement with English equity that we now turn.

(4) Chapter 4: Trusts

1-19. The introductory remarks to the third chapter have demonstrated how it deals with the doctrinal development of enrichment law, and, more particularly, the manner in which it has taken a distinctively Scottish approach to equity. Enrichment law in Scotland has an equitable dimension which it derives from the natural law heritage of the institutional writers. Yet, the approach to equity in Scots law is not uniform, and the understanding and uses to which equity is put and expressed will vary with the terrain at hand. Chapter 4 shows how another approach to equity was taken in relation to the law on trusts, or, perhaps more accurately, how the Scottish law of trusts' historical development was characterised by reference to concepts of equity at times but ultimately seems to have moved away from equitable reasoning. This highlights a difference between Scottish and English law approaches in this area. While it is clear that English influences were brought to bear upon the Scottish law, the importance of equity has been minimised by subsequent rationalisations. The object of examination in this chapter is really twofold, in the sense that it examines the historical development of the doctrinal structure of the trust in Scots law, as well as considering the development of trust law as a precursor for discussion of the idea of the constructive trust in Scots law. In the case of the former, the chapter seeks to give a broad contextualisation of the varying historical approaches. Again, as a matter of doctrine, the starting point is Stair's approach, which is appropriate due to the methodology of intellectual synthesis that Stair introduced,[12] and because the trust was in its infancy when Stair wrote.

1-20. Stair's concept of the infant trust institution is based upon the nominate contracts of mandate and deposit. It seems that in Scotland the word 'trust' may have been borrowed from England, but that the substantive institution itself relied more upon disparate existing Scottish instruments such as nominate contracts. For most of the seventeenth century the extent to which there was borrowing from English equity, expressly at least, appears negligible. The nominate contract analysis was adopted and continued by subsequent writers, but it came to be supplanted by the erection of a distinct legal institution known as the trust. The distinctive trust took shape in the eighteenth century, and was refined in the nineteenth and twentieth centuries. It is suggested that in the eighteenth century the Unions of the Crowns and Parliaments influenced the development of the trust in Scotland. Yet it would be wrong to say that the trust in Scotland developed purely by absorbing large swathes of English chancery jurisprudence. The Scottish trust of the eighteenth century appears to have developed as a result

[12] One broadly contemporaneous assessment of Stair's work is that of Forbes: W Forbes, *A Journal of the Session* (1714) xxxix–xl.

of soft, almost functionalist, influence from England: it was becoming more commonly employed, possibly by analogy with England, but there is less evidence that the legal mechanisms constituting and regulating the trust instrument itself were being directly inspired by English law authorities and thinking.

1-21. Examination of the nineteenth-century approach to the trust demonstrates the increasing influence of English jurisprudence, but by the same token, the distinctive character of the Scottish trust continues to a demonstrable extent. It becomes more common to see references to English works on trust law, but many of the references to English authority are often to illustrate the point that although a similar result would be reached in Scotland it is not always clear that the two systems reach that same result in the same way. In many respects there is evidence that Scottish law continued with a contractual approach, though, at times, it seems to have moved away from the nominate contract approach to a general contractual theory or briefly flirted with the possibility of juristic personality.

1-22. Problematic interactions between this native contractual theory on the one hand, and understandings based upon English chancery authority and ideas on the other, began to emerge. The idea of an Anglocentric dual ownership began to creep into the Scottish legal consciousness. A contributing factor was no doubt the correct assertion that Scottish law has a concept of equity: potential difficulty arose when that assertion functioned as a lightning rod through which alien conceptualisations of property from English equity were grounded within the apparently civilian Scottish property law. Against that backdrop the chapter examines the increasing influence of English chancery concepts and terminology.

1-23. In the twentieth century judges and lawyers appear to have perceived these different influences and property concepts as problematic and began asserting the distinctive nature of Scottish trust law. Judicial marks were set down at the highest level, though the content and doctrinal underpinning of the Scottish trust remained elusive, and English equity authority continued to be freely cited.

1-24. The final section of chapter 4 identifies and explains the modern patrimonial theory of trust law developed by Gretton and Reid, and now increasingly accepted as authoritative. This theory, which draws heavily upon comparative civilian writings, conceives a trustee to have two separate patrimonies: the private and the trust patrimony. One of the apparent objectives of the patrimonial theory is to detach the Scottish trust from English equity jurisprudence so far as its fundamental basis is concerned, while retaining the ability to make use of many English authorities on particular matters. The doctrinal significance of this change of approach is the move away from theories of contract or property towards the use of the law of persons as the organising principle. The chapter concludes by considering how this new approach, and the manner in which it purports to explain the trust without 'falling into the arms of equity', allowed its

proponents to tidy up such perceived incursions as English equitable ownership theories had made, some of which threatened to denature the wider system of property law.

1-25. It is doubtful to what extent one could describe Scottish trust law as influenced by the Scottish variety of equity, yet the shared nomenclature of equity in Scotland and England meant that aspects of English chancery equity were being freely received at one time. The use of English reports and textbooks as authority for a desired result entailed the proliferation of English equity terminology. But with terminology and borrowed results often came substantive principles and instruments which apply those principles, and so it was that the Scottish trust provided passage, into the broader system of private law, for some English rules and concepts under the seemingly shared banner of equity. These rules were in the process of being received, and were starting to exercise substantive influence on the areas of law. It seems, however, that the patrimonial theory's apparent adoption substantially restricts the role of English equity jurisprudence in explaining the nature of the trust, without interfering with Scottish courts' ability to adopt substantive rules of English law.

(5) Chapter 5: Constructive Trusts

1-26. Chapter 5 assesses the development and increased recognition of the constructive trust in Scottish law. The initial stages of the chapter describe a number of possible precursors of the constructive trust, before considering the emergence of the nominate constructive trust. Because the institutional descriptions were embryonic, there is only limited discussion in the chapter (and the sources it draws upon) of the concept of a constructive trust and its intellectual precursors. It is also necessary at an early juncture to give a brief exposition of the resulting trust as currently understood in Scots law, as it seems to be quite different in principle and structure from the resulting trust of English law, and can be summarised as a trust which comes into existence over the assets of an express trust which has failed.

1-27. There are suggestions of something akin to a constructive trust in Kames's eighteenth-century writings, though the cases he cited as authority appear not to have been decided upon such a basis. It is in nineteenth-century materials that more recognisable references to the constructive trust first appeared, and these references are derived from English influence. The avenues by which this influence entered the Scottish legal consciousness are multiple, be it speeches of English judges in the House of Lords or Scottish textbook writers. English chancery jurisprudence was penetrating Scottish private law, and once more it seems that the language of equity is bound up with the idea of the constructive trust and the manner in which it is received into Scottish law. In the late nineteenth century and early twentieth century the text writers on trusts invariably included a section dealing with the constructive trust. The constructive trust seems to be used as a term to describe a number of quite different mechanisms, such as, for example, what we would now call a resulting trust. What is of considerable interest is the

suggestion in some reports that a constructive trust is an English concept that would be handled by enrichment law in Scotland – sentiments which have proven prescient.[13]

1-28. Early twentieth-century works represent the high-water mark of uncritical citation of English authority illustrating the nature of the constructive trust. The discussions and citations are overwhelmingly influenced by English chancery jurisprudence, and are riddled with language reflecting this use of authority. This theme continues through much of the mid-twentieth-century literature, and it becomes clear that concepts of English chancery jurisprudence are being applied directly and wholesale. What receives less attention is exactly how these concepts work within a wider context of a coherent legal system. That coherence issue is brought into sharp focus by the chapter's discussion of the constructive trust arguments, with dual ownership analyses, which started to appear in cases involving the sale of land and insolvency. This discussion considers the importance that constructive trusts and equity assumed in a debate about the heart and soul of Scottish property law, and concludes with observations about the ultimate rejection of constructive trusts for sellers and the implications for 'equitable ownership'.

1-29. The chapter further considers the critical attacks upon constructive trusts, and the penetrating analysis advanced by Gretton in 1998 that the constructive trust had a very tenuous hold in Scots law, and, to the extent that it did, it should be statutorily abolished. Gretton's sceptical approach frames the discussion of the modern position, which, although initially characterised by some shared academic and judicial scepticism, was succeeded by enthusiasm for the constructive trust amongst pleaders and judges. Far from seeing a decline in English chancery influence the modern trend has been increased influence, such as by virtue of the use of the doctrines of knowing receipt and dishonest assistance. Although such claims might be handled as personal claims for unjustified enrichment, the current approach of the courts suggests that constructive trusts might be applied in some cases.

1-30. The chapter concludes by considering the nature of the constructive trust(s) that seem to be recognised in modern Scots law, in particular whether they are 'proper' trusts with a proprietary or insolvency effect or whether they are personal, and whether they are remedial or institutional. It is tentatively observed that the scope for equity to have a continuing role remains in a dual sense. First, there may be continued resort to English chancery authorities, especially as regards fiduciary liability; second, if the constructive trust is considered to be personal and based upon enrichment or is a remedial one then equity might be relevant to the extent it constitutes an element of the new enrichment law, or it might be a component of a

[13] One may also note that the understanding of the constructive trust in English law is not settled, and that enrichment conceptualisations can also be found in English law: P J Millett, 'Restitution and constructive trusts' (1998) 114 LQR 399; T Etherton, 'Constructive trusts: a new model for equity and unjust enrichment' (2008) 67 CLJ 265.

discretion claimed in relation to the remedial character of the constructive trust. Ultimately this is a policy decision which is framed by the desirability or otherwise of providing insolvency protection to the constituent of a 'constructive trustee'.

(6) Chapter 6: Fiduciary Law

1-31. The final substantive chapter assesses the historical development of fiduciary liability in Scotland, and how understandings of equity, particularly those derived from English chancery rules and constructive trusts, have informed the development of the modern law. This is something of a new topic as there are few investigations of fiduciary law in Scotland. The chapter is concerned with discovering what a fiduciary is in terms of historical treatment, and, perhaps more pressing for those interested in the modern law, with the remedial responses available for breach of fiduciary duty in Scotland.

1-32. The chapter begins by identifying the legal mechanisms which Scots law formerly used to regulate situations which would today be considered as fiduciary. Foremost among such mechanisms is the doctrine known as *auctor in rem suam*, by virtue of which one may not authorise transactions in one's own interest whilst carrying out fiduciary duties.[14] This principle was developed into a more generalised prohibition and set out by the institutional writers, and there have been consistent denials of the right of a fiduciary to profit from his office since then. The rule and concept arguably begin to take on an equitable flavour with Kames, who asserts that the prohibition is one of equity, and the association of the principle with a matter of policy rather than technicality is developed in relation to the duties which ought to be imposed upon one person acting on behalf of another.

1-33. The rule prohibiting those acting for others from behaving as *auctor in rem suam*, which was of civilian origin, becomes overlaid and superseded by increased influence from English chancery jurisprudence, albeit much of that is developed with reference to civilian and Scottish authorities. This development is charted from the introduction of this new stream of authority in a Scottish appeal to the House of Lords in the latter part of the eighteenth century, whereby English chancery authority was cited to their Lordships' house, with the result that the two systems were set upon similar paths of development. Nineteenth-century text writers utilise English chancery authority frequently with regard to such liability, though, interestingly, the *auctor in rem suam* terminology survives. By the turn of the twentieth century the Scottish lawyer would comfortably resort to English chancery jurisprudence in the area on the basis that the two systems were essentially one and the same. It is also revealing that contemporary writings make

[14] The phrase '*auctor in rem suam*' has caused some difficulty as regards meaning; more specifically it has been described, erroneously, as being a prohibition on acting in one's own interest: see Lord Rodger of Earlsferry, 'Only Connect' (2007) JR 163 at 165 n 8.

mention of this shared approach being one which rests upon a shared concept of equity: once more the existence of a form of equity in Scots law was being used as an avenue through which some English chancery doctrines were being absorbed into Scots law.

1-34. The first modern discussions of fiduciary liability noted the intellectual connections between trust law and fiduciary law and often the two were not adequately distinguished. The idea of a generalised fiduciary theory developed with the passage of time throughout the twentieth century and increasingly relied upon English chancery jurisprudence and used equitable terminology. As the authorities and terminology took an increasingly English chancery-inspired course so too did the remedial options and there has, as noted in chapter 5, been increased emphasis upon constructive trusts and accessory liability. The chapter concludes by tentatively outlining some of the features of the modern fiduciary relationship in Scotland, while noting that further work is required to provide a comprehensive and generalised account of modern fiduciary law.

2 Historical Understandings of Equity

A. INTRODUCTION

2-01. There has long been something known as 'equity' in Scots law. That statement is not controversial. Potential controversy arises when attempting to define what exactly is meant by equity and how it operates within the legal system, particularly, so far as this text is concerned, in relation to private law. It is a matter of irrefutable fact that Scots law has not known an institutionally separate body of rules by the name of 'equity' which was administered by a specialised and separate court structure. The historic experience has not been one of two coexistent internal legal systems that periodically struggled for harmony, exclusivity, electivity, supremacy, and, latterly, attempted fusion. This alternative institutional conceptualisation and history of equity is that of English law, a key source of influence upon

Scottish law. Yet, while there were no separate equity courts in Scotland there have been intellectually distinct conceptualisations, at least in relation to some areas of law, which are infused with equitable considerations and underpinned by different jurisprudential considerations.

2-02. It is not entirely satisfactory to analyse the Scottish conception of equity by noting that it is not of the English variety. It is important to point out that there are major institutional differences between the understanding of the terms in the law of England and Scotland – to say otherwise is plainly fallacious. But these differences do not render study of one of these legal systems in the light of the other system invalid or not useful. Indeed, while some of the systemic differences would be difficult to overstate, so different are they in history and structure, that is not to say that substantive rules of English law and thinking have not influenced the substantive rules of the Scottish system. It is beyond doubt that Scots law, for whatever historical reason, for better or for worse, has borrowed terms and ideas from the English chancery jurisprudence. Furthermore, as we will see, that borrowing has arguably increased in recent years.

2-03. Therefore, while acknowledging the long shadow of English equity the real matter for enquiry here is to consider what equity means to Scots law. It is traditionally said that equity in Scots law is woven into the fabric of the law itself. The intrinsic normative force underpinning Scots law means that the law itself is the embodiment of equity. Such a conclusion is natural if one insists upon a unitary system of law. To say that Scots law is without equity would offend the sensibilities by appearing unduly restrictive and incapable of accommodating ideas of desert, justice and fairness.[1]

2-04. Such ideas of desert, justice and fairness lead helpfully to the nub of our enquiry – what is the nature and purpose of equity in Scots law? If it is not an institutionally separate system of rules, born of a need to ameliorate a harsh and inflexible common law system, then what relevance does it have to the study of private law?[2] Equity is often understood to be a byword for discretion: the legally sanctioned manner in which a judge will be left to exercise his discretion at certain times.[3] Equity as discretion is undoubtedly one of the ways in which the idea of equity is applied in Scotland. However,

[1] This consideration seems to underlie Lord Cooper's observation that 'With us law and equity have never been separated, and equity has tended to predominate': Lord Cooper of Culross, *Selected Papers 1922–1954* (1957) 124.

[2] This book concentrates on private law, predominantly from a historical perspective, though equity has a role to play in public as well as private law.

[3] It is also one of the reasons why equity is sometimes looked at on a spectrum ranging from suspicion to hostility in Scots law. It is sometimes thought, quite incorrectly as it happens, that English equity is no more than a decision made by a judge with absolute discretion – famously summarised by Selden as being as arbitrary as 'the length of the Chancellor's foot': J Selden, *Table-Talk* (1689) 18. Arguably more pertinent is the related fear that this perceived discretionary nature of equity means that new property rights can be created by judges. Debate in England tends to be concerned with 'fusion' and the continuing instability of dual common law and equity regimes, which is certainly a different emphasis from the concerns of the Scottish lawyer.

it is not the only way in which the term is important. Equity is also an important latent source of law. It is important briefly to set out what is meant here by a latent source of law. It is not possible to (successfully) walk into court and plead a case solely upon the grounds of 'equity', at least if there is any other recognised type of pre-existing authority.[4] However, because equity is said to be woven into the law, important areas of private law can be organisationally grouped by reference to equity. These rules of law are said to be informed by 'equity' or equitable reasons. This organisational scheme and the substance informing it is more complex than the simple vesting of discretion in a judge, for it is not discretion alone that is signified by those words; rather, some areas of law are said normatively to rest upon an equitable basis.

2-05. This train of thought immediately runs into a major question, at least for some schools of jurisprudence: are not all laws by their very nature in some way normatively justified by a sense of underlying equity? Leaving aside a lengthy discussion of the core basis of legal normativity as a jurisprudential absolute, it is submitted that these 'equitably informed' laws are, in Scots private law at least, conceptually distinct. A unitary system must be capable of self-correction to maintain integrity and validity: it must recognise and accommodate situations whereby an equitable response is required to ameliorate the 'normal' rule which would operate. This is not a separate system of laws; rather, within the single system of law it is recognised that there are certain equitable rules, the nomenclature 'rule' being important. Related to this potential for self-correction is the ability of such equitable laws to facilitate development and accommodate exceptions when necessary or desirable. All these features are related to the greater flexibility that is associated with areas of law which are said to be infused with equitable rules.

2-06. In this book the suggestion is that some legal rules have been fashioned to operate where the law recognises that a certain situation requires flexibility for the reasons outlined above. These equitable foundations form the intellectual framework within which the rules can be seen, and are grounded in policy decisions. In the law of unjustified enrichment the idea of equity is to the fore in the judgments which have substantially recast the taxonomy which we see today.[5] Arguably, stricter rules regarding repetition and restitution have been fused with the broader equitable rules associated with recompense. The emerging move towards a general enrichment action sees the equitable *nemo debet* maxim cited as the underlying justification for the entire area of law: it operates like a normative reservoir from which latent rules and principles developing the law can be drawn. The somewhat under-theorised, in Scotland at least,[6] law regarding the role and nature of fiduciaries

[4] For a list of the recognised authoritative sources of Scots law, see Gloag and Henderson at paras 1.24 ff.

[5] See chapter 3.

[6] A great deal of theoretical work concerning fiduciaries has been undertaken in recent years: see e.g. P Birks (ed), *Privacy and Loyalty* (1997); M Conaglen, *Fiduciary Loyalty* (2010); T Frankel, *Fiduciary Law* (2011); A S Gold and P B Miller (eds), *Philosophical Foundations of Fiduciary Law* (2014).

in Scots law appears to rest upon equitable principles that certain people, acting for others, are barred by law from certain courses of action, and if those people engage in a prohibited course of action, then an equitably inspired rule will deprive them of the benefits they have derived.[7] Likewise the trust, which represents an arrangement which is itself defined by its character of acting for another, is regulated by reference to equitable principles embedded within the law. These areas of law share an equitable underpinning so that the courts are able to proceed flexibly and carefully, but nevertheless within a systemic framework – they are not given pure and unfettered discretion, but there is an element of discretion and, in varying degrees across the areas of law, a supervisory element.

2-07. In reaching this broader conclusion it will be necessary to consider in a little more depth the nature of equity as an institutional concept. In so doing it will become apparent here, and in the following chapters dealing with the specific areas of study, that this concept of equity is somewhat different from that of England. The Scottish equity which this book examines is part of the fabric of a unitary system of law. Nevertheless, as mentioned above, the borrowing from some areas of English equity's substantive rules is palpable. In turn, some elements of English equitable reasoning have also been received. Neither reception is inherently problematic or bad, and, indeed, is surely exemplification of the strengths of a mixed legal system: both the civilian and Common Law (including Equity) traditions are combined in the mix. Scots law shows how civilian and Common Law traditions can be incorporated into a single system, and it may also be described as an early example of 'fusion': a single system of law which contains 'equitable' and 'common law' ideas within a single body of law. So, for example, the idea of duplex dominium, whereby ownership is split into equitable and legal portions held by different people, is probably now considered anathema to Scots law because modern authority recognises only unified ownership.[8] However, some of the functional results commonly attributed to an arrangement of split ownership are achieved in Scottish law, using terms and concepts which are more consistent with a civilian property system. In turn, the modern system is able to continue to make use of equitable authority from England, sometimes retaining linguistic and substantive affinity, without, necessarily, having to strain or disrupt other elements of the native doctrinal law. Fusion, then, in Scots law can be seen as the way that the shared language of equity between Scotland and England can be used to facilitate and assist with the reception of English rules and authority in a sophisticated and workable manner. It is to the historical development of different understandings of equity in Scotland, and the way that they have historically informed doctrinal development of substantive law,[9] that we now turn.

[7] See chapter 6.

[8] See chapter 4.

[9] The present chapter deals with the ordinary equitable jurisdiction within Scots law, though there will be some discussion of the Court of Session's *nobile officium* which allows the court flexibility in procedural matters. For a detailed account of the modern law of the *nobile officium*, see S Thomson, *The Nobile Officium: The Extraordinary Equitable Jurisdiction of the Supreme Courts of Scotland* (2015).

B. HISTORICAL DEVELOPMENT

2-08. The history of equity in Scots law was characterised, until fairly recently, by a lack of detailed analysis, especially as a matter of historiography.[10] There is a smattering of sources dealing with the modern position of equity,[11] yet in the past the nature of equity exercised the mind of Scots lawyers far more. However, at this point, extreme care must be taken when we talk about 'equity', as the term has a host of possible meanings. The way in which equity was discussed in the past may mean a very different thing from what is understood by that term today.

2-09. Ideas of equity, in Scots law, were the subject of learned consideration for hundreds of years, though the role and importance of the ideas changed. Various conceptions of equity were certainly exercising Scottish institutional writers' minds by the time of Craig at least, and he was followed by Stair, Erskine, Bankton and Kames. Varied conceptualisations of 'equity' are also to be found far beyond Scotland, as different formulations of the concept are readily traceable to antiquity, and are associated with great names like Aristotle and Cicero.[12] In England, ideas of equity were developing closer to home, while on the continent the jurists of the *ius commune* were certainly utilising conceptualisations of equity. Yet, one must also be cautious insofar as the term 'equity' is somewhat inadequate in expressing the technical understandings which underlay terms such as *aequitas* and *epikeia*, in classical times and as they were subsequently interpreted.[13] To give a full historical account of these competing influences, and the ideas they inspired, would be impossible in this space.[14] The following account is necessarily selective and can be no more than a summary of the Scottish sources' approaches, though reference may be made to extraneous sources and systems for ideas of equity.[15]

[10] D M Walker, 'Equity in Scots Law' (1954) 66 JR 103 at 103; T B Smith, *A Short Commentary on the Law of Scotland* (1962) 42–43.

[11] The only studies devoted to the concept in any type of depth are: Walker, 'Equity in Scots Law' (n 10); Smith, *A Short Commentary* (n 10); Æ J G Mackay and J L Wark, 'Equity' in J L Wark (ed), *Encyclopaedia of the Laws of Scotland* (1928) vol VI; R B Ferguson, 'Sources of Law (Formal)' in T B Smith (ed), *The Laws of Scotland: Stair Memorial Encyclopaedia* (1987) vol 22; J M Thomson, 'The Role of Equity in Scots Law' in S Goldstein (ed), *Equity and Contemporary Legal Developments* (1992).

[12] See e.g. D H van Zyl, *Justice and Equity in Greek and Roman Legal Thought* (1991) and D H van Zyl, *Justice and Equity in Cicero* (1991).

[13] See C Lefebrve, 'Natural Equity and Canonical Equity' (1963) 8 Nat LF 122; N D O'Donoghue, 'The Law Beyond the Law' (1973) 18 Am J Juris 150; T S Haskett, 'The Medieval Court of Chancery' (1996) 14 Law & Hist Rev 245; F Tudsbery, 'Equity and the Common Law' (1913) 29 LQR 154.

[14] For the fullest historical accounts available from a Scottish perspective, see Walker, 'Equity in Scots Law' (n 10); Mackay and Wark, 'Equity' (n 11); and, somewhat more generally, and comprehensively dealing with the seventeenth century, see Ford.

[15] For accessible introductions to the subject and sources see the following and sources contained therein: J D Heydon, M J Leeming and P G Turner (eds), *Meagher, Gummow & Lehane's Equity* (5th edn, 2015); J McGhee (ed), *Snell's Equity* (33rd edn, 2015); M J F y Tella, *Equity and Law* (2008).

(1) Early Ideas of Equity

(a) Craig and the Interregnum Court

2-10. The manner in which Scots lawyers thought about equity before the time of Stair is difficult to characterise.[16] It is with Craig that we see the earliest considered treatment of equity in a broad sense, that is to say of equity in the context of the normative underpinning of all laws.[17] Here Craig is talking about the origins and respective force to be given to certain sources of law, more particularly the *jus naturale* as the fount of all law in its most original sense, which in turn informed the civilians' law. This first account of the development of equity is equity in a macro sense – that is to say, it is the idea that the very reason for the pursuance of law is its inherent equity, which itself is a typical natural law view.

2-11. In addition to Craig's approach to equity, which is overtly that of a natural lawyer and somewhat different from English approaches at the time, it is worth mentioning the potential influence of contemporary English approaches to equity, as mediated by the interregnum court, which John Ford has demonstrated. Following the subjugation of Scotland by Cromwell, the courts in Scotland were staffed by English judges, along with their Scottish counterparts. This period was a formative one for Stair, who was elevated to the bench alongside English judges. During this period the English judges were informed that Scots law did not observe a procedural dichotomy between a 'common law' and 'equity'. Therefore, they were issued with instructions to apply the local laws 'with equity and good conscience'.[18] This appears to have caused apprehension among some Scots at the time that this concept would prove influential in the manner in which future cases would be decided. Furthermore, against the backdrop of the debates in England about the interaction between equity and law some reformist English judges came to see merits in the unified fusion of the two in Scotland. These same judges sat with Stair, and Ford makes the point that these views probably influenced Stair's approach.[19]

(b) The *Nobile Officium*

2-12. It is appropriate to briefly take notice of the *nobile officium* of the Court of Session. The noble office of the Court of Session is separated by modern

[16] See Ford 177. This section owes much to this pioneering study.

[17] Craig 1.1.5; 1.2.14; 1.8.7. The last of these references shows that natural law is accorded the first position among the sources of Scots law, the golden rule being the biblical imperative of doing unto others as one would have them do unto you: 'Because they spring from instinctive reason and justice, the precepts of the Law of Nature are spoken of as those of good sense and equity...When therefore a controverted question in the Law of Scotland cannot be solved by appealing to the general principles of the Law of Nature or to those of the Law of Nations, recourse must be had to the written law of our country': Ford 177.

[18] See Ford 107.

[19] This is a summary of the role of equity in the 'Interregnum Court' chapter of John Ford's work: Ford ch 2. This chapter repays study not only for the Scots lawyer, but gives a very interesting insight into the contemporary views regarding equity in English law at the time.

commentators from the ordinary equitable jurisdiction of the court, and in this modern sense it represents a procedural mechanism by which equitable relief can be granted. Yet the modern understanding of the *nobile officium* is not one which would be recognised before the nineteenth century.[20] Accordingly, many of the institutional accounts discussing the *nobile officium* are in fact treatments of equity in a far more general sense.[21] For present purposes we may observe that the subsequent discussion of equity among the institutional writers may allude to the use of the *nobile officium* in circumstances which would not necessarily be the case today. The modern nature of the *nobile officium* will be considered below.[22]

(c) Stair

2-13. In Stair's *Institutions* his concept of equity builds upon the skeletal scheme of natural lawyers' equity as described by Craig.[23] Equity to Stair was the most important normative driver of the legal system – in many ways the entirety of law for him was seen through an equitable looking glass. Stair's view has been valuably summed up as follows:

> For Stair the learned laws were not a source of constituted equity but were examples of how natural equity could be constituted. He regarded equity itself as the body of the law, treated the learned laws and the laws of other nations as mere examples of how natural equity could be clothed and adorned with positive laws, and distinguished both natural equity and these foreign laws from the positive laws of Scotland. He encouraged lawyers to begin their consideration of any topic of private law by reflecting on the requirements of natural equity, and to recognise that in turning from law to equity in difficult cases they would be turning to something distinct from constituted law.[24]

2-14. Therefore, perhaps unsurprisingly for a natural lawyer,[25] for Stair 'equity' was of the utmost importance and infused the entirety of the law – it was not merely a latent reservoir from which to draw amelioration of positive law; rather it was the underlying justification upon which all law rested. In considering Stair's approach to equity we can see the culmination of a certain view of equity in the history of Scots law. The view is one which

[20] See Ferguson at paras 426–431.

[21] Ford 481–500.

[22] See below at paras 2-80 ff.

[23] Not only did Stair follow Craig's line with respect to the importance of natural law, but he also adopts and expands upon the idea that the key religious concept is doing unto others as you would have them do unto you: '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': Stair 1.1.6. Hobbes, a contemporary of Stair, explains elements of his understanding of natural law using similar terminology: 'This is that Law of the Gospell; *Whatsoever you require that others should do to you, that do ye to them*. And that Law of all men, *Quod tibi fieri non vis, alteri ne feceris*': T Hobbes, *Leviathan* (1651) 65.

[24] Ford 499.

[25] Ferguson at para 408.

has passed with time, yet it shows that Scots law has considered a concept called 'equity' for a long time, and that that concept has been of great significance to legal thought. It is here that we can see the early way in which a concept of 'equity' was hard-wired into the intellectual heritage of Scots law. But one should not overstate the position. This conception of equity was a normative one which in some ways suffused the law, but more profoundly also represented the axiomatic justification of the law itself.

2-15. Though intellectually and systemically distinct from its English counterpart, Stair's equity was discussed in the context of ameliorating the strictures of positive law, or as it would be in England, common law. But while acknowledging this ameliorative function Stair's view of equity was not confined to mitigating the rigours of positive law:[26]

> For though men's laws be profitable and necessary for the most part, yet being the inventions of frail men, there occur many *casus incogitati*, wherein they serve not, but equity takes place and the limitations and fallancies, extensions and ampliations of human laws are brought from equity. And though equity be taken sometimes for the moderation of the extremity of human laws, yet it doth truly comprehend the whole law of the rational nature; otherwise it could not possibly give remeid to the vigour and extremity of positive law in all cases.

2-16. Crucially there was no separate court system administering this idea of equity, and nor was the concept seen as separate from the law. Indeed, the positive law itself was also imbued with this equity, and therefore it was in this sense that the view of a unitary system comprehending equity and law has been known to Scots law ever since.[27]

(d) Bankton

2-17. Bankton follows Stair's equation of equity as natural law, and states that it is applied to positive law to ameliorate its strictures.[28] Indeed, Bankton's approach seems to assert implicitly that 'equity', as natural law, is an overarching supreme principle of the legal system. Indeed, it is asserted that in cases of conflict the natural law, being the manifestation of God's will, must prevail over positive law.[29] This strong position must have caused Bankton unease, as he goes on to remark that despite this theoretical absolute, a citizen faced with such a conflict should acquiesce to the temporal duty passively, not actively,[30] though, ideally, the best solution for the unfortunate citizen is to leave the realm altogether.[31]

[26] Stair I.I.6.

[27] D M Walker, 'Some Characteristics of Scots Law' (1955) 18 MLR 321 at 328; H L MacQueen, 'Good Faith in the Scots Law of Contract' in A D M Forte (ed), *Good Faith in Contract and Property Law* (1999) 32; E Reid, 'Scotland Report' in V V Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001) 211.

[28] Bankton I.1.24; 1.1.64, though in the latter he suggests that it is only open to the legislature 'to moderate the rigour of them [laws] by the rules of equity in particular instances'.

[29] Bankton I.1.65.

[30] See also T Aquinas, *Summa Theologiæ* (T Gilby trans, 1966) vol XXVIII, at 1a2ae 96 4–6.

[31] Bankton I.1.66. This point is made by Ferguson at para 409.

2-18. In another passage Bankton states that though the natural law, being the command of the divine, is immutable there are exceptions to it. The credence of these exceptions, and therefore the important question of the validity of their authority to derogate from the natural law, is less than clear. The following passage sets out the position which he takes:

> The laws of nature are therefore immutable,[32] being founded in the nature of GOD and man, and our relation to him and one another. Some of them indeed seem to admit of exceptions or dispensations; but truly these are particular laws, proper to certain cases and circumstances. Thus the law of nature in general forbids manslaughter; but then there is another law, which, in the particular case of self-defence, allows of killing the invader. Again, the law enjoins restitution of the thing deposite to the depositor. But there is another law which, upon the proprietor's appearing, commands, that, in competition with the true owner, it ought to be restored to him, and not to the depositor. From these and the like instances, 'tis plain, they do not alter the prescription of the general law to which they are exceptions, but that both the one and the other are immutably just, according to their use and extent.[33]

2-19. From this passage it is unclear whether these exceptions are to be seen as positive law exceptions to the natural law. It may be that the meaning to be imputed is that they began as positive laws which were subsequently 'adopted' by the natural law, or rather, and less forced and more likely, that he considered the exceptions to be discrete special examples of natural law to be overlaid across the broader natural law dictates. Despite this potential rationalisation, the point remains that the passage appears to deprive Bankton's view of the supremacy of natural law of some clarity.

2-20. In any event, the contribution made by Bankton to the historical development of Scottish equity is considerably less problematic at a doctrinal level. It is clear that he equated equity with natural law.[34] Furthermore, it is also clear that he considered natural law to be the highest level of law,[35] even if the manifestation and practicality of his position was less clear.

(e) Erskine

2-21. The synonymity of 'equity' and natural law, as expressly set out by Stair and Bankton, is not as readily discerned in Erskine's work. Yet there can be no doubt that Erskine considered natural law an important source of law.[36] Natural law was, for Erskine, expressly following Grotius, derived from

[32] This view had been around for some time: Gratian, *The Treatise on Laws* (A Thompson trans, 1993) Dist 5 Part 1, Dist 5 C 3. See B Tierney, 'Permissive Natural Law and Property: Gratian to Kant' (2001) 62 Journal of the History of Ideas 381.

[33] Bankton I.1.26.

[34] In so doing, he follows Craig and Stair in placing emphasis upon Matthew 7:12, whereby one should do unto others as one would have them do unto you. Compare J Selden, *Table-Talk* (1689) 18–19.

[35] Bankton 1.1.15.

[36] Erskine I.1.7.

reason. The evaluation of an action by natural law was its 'agreement or disagreement with the rational and social nature of man'.[37]

2-22. Erskine was something of a contractarian in his understanding of natural law,[38] and this comes out in his discussion of how positive law may delimit the natural law.[39] The natural law fell to be divided into two forms – preceptive and concessive.[40] In the case of the preceptive species, the law of nature required or prohibited an action or exercise of a right, whereas the concessive species was a right given to man without an imperative to utilise it.[41] However, like Suarez,[42] Erskine did not take these two forms to be completely separate, and indeed recognised that they could not be entirely separated. Furthermore, by entering society, concessive natural law rights are handed over to the sovereign power, and thereby become positive laws. These positive laws are then capable of alteration with the passage of time, unlike the immutable natural law.

2-23. Therefore, when Erskine sets out his division of obligations into merely natural obligations, merely positive obligations, and mixed obligations, we can see this normative approach applied. Natural obligations bind people by the natural law – 'or equity'[43] – only, and are therefore not enforceable by action under positive law. Civil obligations flow from positive law 'without any foundation in equity', though they may be subject to an equitable exception.[44] Finally, mixed obligations are those which are grounded in equity, but are recognised by positive law – they are born of equity, but acceptance by positive law bestows a positive action for enforcement.[45] These mixed obligations are the manifestation of the concessive natural laws surrendered to society: 'These full or perfect obligations are the only proper ones; for in strict speech he alone is debtor, *a quo invito aliquid exigi potest*.'[46]

(f) Wallace

2-24. It has been said that the Scottish approach to the discovery of the laws of nature, by the eighteenth century at least, rested upon reason.[47] The

[37] Erskine I.1.7.

[38] Erskine I.1.12–13. Erskine cites Pufendorf in particular, without providing a reference, though his use of the word 'writers' suggests that he was relying on more than just Pufendorf.

[39] For Erskine the supreme legislative power was invested jointly in the monarch and the states of the kingdom: Erskine I.1.19.

[40] Erskine I.1.20; Ferguson at para 410.

[41] See generally B Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law 1150–1625* (2001); B Tierney, 'Kant on Property: The Problem of Permissive Law' (2001) 62 Journal of the History of Ideas 301; B Tierney, 'Permissive Natural Law and Property: Gratian to Kant' (2001) 62 Journal of the History of Ideas 381; B Tierney, 'Natural Law and Natural Rights: Old Problems and Recent Approaches' (2002) 64 The Review of Politics 389.

[42] Tierney, *The Idea of Natural Rights* (n 41) 307.

[43] Erskine III.1.4.

[44] Erskine III.1.5.

[45] Erskine III.1.5.

[46] Erskine I.1.20 ('from whom something may be exacted against his will').

[47] This view is of course not confined to Scots law: see A P d'Entrèves, *Natural Law* (2nd rev edn, 1970) 122–23.

significance of Wallace is that while he expounds a traditional model of natural law as equity, based upon the idea of reason, his treatment demonstrates a more secular approach:

> For it is an essential and distinguishing characteristic of every Law of nature, that the evidence of the obligation, under which men lie to observe it, arises immediately from the light of nature. That is, man must be able, by the exercise of those rational faculties, with which he is endowed by nature, without the assistance of divine revelation, to discover both the rule and his obligation to observe it. For, if he cannot make the discovery by the exercise of his natural faculties alone, without the assistance of divine revelation, the rule cannot be said to be a law of nature. It is a positive law.[48]

2-25. This secular view of natural law is not absolute, however, because God gave Man the ability to reason, and, therefore, Man's ability to discover natural law by the exercise of his reason is God-given. However, of most importance to the present enquiry is the fact that, although a secular version of natural law, the concept remains closely bound to the idea of equity. To speak of natural law is the same as speaking of the 'dictates of equity'.[49] Yet the term equity is used in a looser sense elsewhere, where it could be said to refer as much to broad moral considerations as to natural law or equitable obligations.[50] As a matter of the more technical use of the term equity, we can see that legal liability for Wallace may rest in 'Law and in equity'[51], or equity alone can define the legal liability in the situation.[52] This use of the term equity for diverse purposes and with different meanings is symptomatic of the use of the term in Scots law generally. Wallace was following in the natural law tradition of Stair and Bankton, though Wallace's intellectual framework reflects the evolution of broader developments in natural law thinking.

(2) Kames[53]

(a) General

2-26. The first attempt at a systematic exposition of equity, by that name, is by Lord Kames, the Enlightenment man of letters.[54] While Kames's published

[48] Wallace, *Principles* § 19.

[49] Wallace, *Principles* §§ 65, 66, 79 and 714.

[50] Wallace, *Principles* §§ 310, 696 and 778.

[51] Wallace, *Principles* §§ 225, 234 and 644.

[52] Wallace, *Principles* §§ 459, 468, 552, 650, 653, 656, 693, 726 and 739.

[53] See generally the following texts and sources cited therein: M Lobban, 'Editor's Introduction' in Lord Kames, *Principles of Equity* (3rd edn, 2014); D J Carr, 'Preface' in Lord Kames, *Principles of Equity* (3rd edn, 2013 reprint); A Rahmatian, 'Lord Kames and his *Principles of Equity*', in Lord Kames, *Principles of Equity* (3rd edn, 2011 reprint); A Rahmatian, *Lord Kames: Legal and Social Theorist* (2015).

[54] See A E McGuinness, *Henry Home, Lord Kames* (1970) 15 ff; I S Ross, *Lord Kames and the Scotland of his Day* (1972); W C Lehmann, *Henry Home, Lord Kames, and the Scottish Enlightenment* (1971); A F Tytler, *Memoirs of the Life and Writings of the Honourable Henry Home of Kames* (1807); M Lobban, 'The Ambition of Lord Kames's Equity' in A Lewis and M Lobban (eds), *Law and History* (2004) 97 ff.

works extend to discussions of morals, philosophy, and literature, he was a Scots lawyer by profession. His experiences as an advocate, and later as a judge, are testament to his legal ability, and it was that legal ability that formed the bedrock upon which his polymathy was built.[55]

2-27. What then was the contribution of Kames to the history of Scots law? The substantive answer to that question, or at least part of it, lies in the word 'history' – the narrative and experience of history was of great importance to Kames's writing generally, and for law especially.[56] When looking at Kames's legal writing it is important to be conscious of the formative role of historical influences upon his legal theory.[57] To the importance of history as an influence must be added Kames's treatment of law as a scientific endeavour,[58] that is to say that taxonomical structure was highly important[59] and that general principles should be the starting point of any enquiry.[60]

2-28. It is against this epistemological backdrop that one must consider Kames's *Principles of Equity*.[61] The work is immediately distinguished as being devoted entirely to the concept of equity, and is not a classic example of an institutional writing. In saying the work is not institutional what is meant is that it is not structured according to the traditional institutional scheme. However, an 'institutional' writer or work can also mean a work of intrinsic authority, though such authority varies between the writer and different writings.[62] As a matter of authoritative status commentators have been less than clear where the *Principles of Equity* stands.[63] It should be noted that the

[55] 'Emphasis is placed upon Kames's experience as an advocate and judge because it is considered that his training in Scots law gave his mind its characteristic stamp': Ross, *Lord Kames and the Scotland of his Day* vii.

[56] See, e.g., Lord Kames, *Historical Law-Tracts* (3rd edn, 1776) iii. It has been noted that previous institutional writings were not the product of so deep a historical view: Ferguson at para 411; C Innes, *Lectures of Scotch Legal Antiquities* (1872) 6–7, though, as Ferguson acknowledges, MacCormick points out that Stair had some historical compass, but that fuller approaches were left to the generation succeeding him: D N MacCormick, 'The Rational Discipline of Law' 1981 JR 146, 157.

[57] Lobban 98.

[58] See Lehmann 205–07.

[59] 'In an institute of law or of any science, the analyzing it into its constituent parts, and the arranging every article properly, is of supreme importance. One would not conceive, without experience, how greatly accurate distribution contributes to clear conception': Kames, *Principles* vol I, xiii.

[60] Kames was inspired in this approach by Lord Elchies: Tytler, *Memoirs of Henry Home of Kames* (n 54) 39. See also Lord Kames, *Remarkable Decisions of the Court of Session* iii.

[61] The first edition was published in 1760, and the last edition for which Kames was responsible was the third edition, published in 1778. All references here are to the third edition unless otherwise stated.

[62] See G C H Paton, 'Comparison between the Institutions and the other Institutional Writings' in D M Walker (ed), *Stair Tercentenary Studies* (Stair Society vol 33, 1981) 201 ff; A C Black, 'The Institutional Writers 1600–1826' in H McKechnie (ed), *The Sources and Literature of Scots Law* (Stair Society vol 1, 1936) 59–61 (who did not admit Kames to the club).

[63] It was suggested by Walker that 'it is possibly doubtful whether Mackenzie's *Institutions* and Kames's *Equity* are fully entitled to institutional status': D M Walker, *Scottish Private Law* (4th edn, 1988) vol 1 at 26; whereas Whitty noted that 'Although technically that work

judiciary have been more favourably disposed to the work, though by no means unanimous in praise.[64]

2-29. Kames himself was ambivalent about previous institutional writings, and indeed legal education more broadly.[65] In one place he remarked:

> [I]n none of our law-books is there the slightest attempt to separate the chaff from the wheat.[66] Lord Stair, our capital writer on law, was an eminent philosopher; but as he was not educated to the profession of law, his Institutes consist chiefly of the decisions of the Court of Session; which with him are all of equal authority, though not always concordant: nor are works of our later writers much more systematic. Such a mode of writing is infectious: Our law-students, trained to rely upon authority, seldom think of questioning what they read: they husband their reasoning faculty as if it would rust by exercise.[67]

2-30. It was not only Stair who was subjected to criticism – Mackenzie's work is lambasted for following the classic Justinianic scheme of Roman law since, according to Kames, there is 'not the slightest foundation in our law for such a division'.[68] The pugnacity of these comments distorts the point which Kames is making, which is unfortunate as the point has some foundation. The problem which Kames is highlighting is that greater emphasis should be placed upon the normative foundation of the law – the

---

[*Principles of Equity*] has Institutional status, it is not (and was not intended to be) a comprehensive institute of Scots private law': Whitty, 'Borrowing from English Equity' 105. Smith considered the work institutional, though not necessarily as influential as Erskine: T B Smith, *British Justice: The Scottish Contribution* (1961) 14–15.

[64] Thus, on the one hand, we can see Lord Dunedin describe Kames as 'an authority, but a wild one' in UK Parliament, *Gordon Peerage: Speeches delivered by counsel before the Committee for Privileges and Judgments* (1929) 8; while, on the other, in a case where counsel suggested that an English case should not be followed as it rested upon equitable considerations, of which there were no analogous examples in Scotland, the great Lord President Inglis interjected: 'The principles of equity as systematised by Lord Kames I look upon as the equity law of Scotland': *Kennedy v Stewart* (1889) 16 R 421 at 430. See also *Cassels v Lamb* (1885) 12 R 722 at 755 *per* Lord Craighill.

[65] Lehmann 196–97.

[66] Given Kames's agricultural interests it is probably unsurprising that the grain and chaff image was one that he was fond of: Lord Kames, *Sketches of the History of Man* (1774) vol 2, 149, 237 and 462; Lord Kames, *Loose Hints upon Education, Chiefly Concerning the Culture of the Heart* (1781) 197.

[67] Lord Kames, *Elucidations Respecting the Common and Statute Law of Scotland* (1771) vii–viii. Blackie notes that Kames appears to have waited until later in life before feeling able to criticise Stair so stridently: J W G Blackie, 'Stair's Later Reputation as a Jurist' in D M Walker (ed), *Stair Tercentenary Studies* 224–25.

[68] Kames, *Elucidations* (n 67) x. Moreover, while his criticism of Mackenzie was that there was no foundation in Scots law for the Roman scheme, he did not hold back from describing it as 'remarkable even among law-books for defective arrangement': *Principles* vol I, xiv.

enunciation of law is important, but so too is the manner in which one thinks about the law as a system, and the historical grounding of that system.[69]

2-31. Kames viewed the legal system scientifically and was concerned with premises and consequences. Thus, the principles underlying and shaping the law deserve attention, and in that regard the role of reasoning is important. It is not that Kames abrogated an institutional theory of law; rather he wished to have a differently constituted institutional scheme which was dynamic and responsive to change – a classically Enlightenment desire for improvement applied to law, as part of a perceived general progress of all knowledge. Such a scheme would include authority from the past, but such authority would be supplemented by, and ultimately subservient to, law as 'a rational science, its principles unfolded, and its connection with manners and politics'[70] discerned from and governed by reason. Indeed, as evidence that Kames saw potential for a revised institutional scheme one need look no further than the following passage from his *Select Decisions*:

> The law of a country is in perfection when it corresponds to the manners of the people, their circumstances, their government. And as these are seldom stationary, law ought to accompany them in their changes. An institute of law accordingly, however perfect originally, cannot long continue so: A century, or perhaps a shorter time, will introduce innovations…Such collections [collections of reported cases], it is true, are multiplying daily; and it is irksome to think, that the study of law must become more and more laborious, from the necessity of perusing collections without end. This inconvenience, however, seems not incapable of a remedy. What greater service to his country can a Lawyer in high estimation perform, than to bring their substance into a new institute, leaving nothing to the student but to consult the originals when he is not satisfied with his author. This indeed may require a new institute every century or two. But if law-proceedings be carried on, as at present, with accuracy and disinteredness, our law will move with a swift pace toward perfection and render new institutes less and less necessary.[71]

2-32. So, Kames was not implacably opposed to the idea of an 'institutional' work of law,[72] but he was concerned that there should be new institutional

[69] Kames's historical awareness and method has been praised: 'We moderns are hardly enough aware how much the Scotch lawyer is indebted to Henry Home, Lord Kames. His versatile and truly philosophical mind neglected nothing. He enriched the law of Scotland by his collection of remarkable decisions, by his abridgment of Statutes, and by a large body of ingenious speculations and criticisms upon law and legal decisions. I think you will find his opinions sagacious, and for the most part sound. They would have had more weight with the profession if written in more technical language, and if he had thought it worth his while to hide the marks of his early philosophical studies…This most ingenious, most suggestive of our legal writers, perceived all the importance of *our* studies, and in one or two instances he actually dug out an old record and used it': C Innes, *Lectures on Scotch Legal Antiquities* (1872) 10–11. See also P Stein, 'Legal Thought in Eighteenth-Century Scotland' 1957 JR 1, 10.

[70] Kames, *Elucidations* (n 67) xiii.

[71] Kames, *Select Decisions of the Court of Session 1752–1768* (2nd edn, 1779) iii–iv.

[72] Indeed, his *Remarkable Decisions* were originally collected with a view to preparing a new edition of Stair: Lord Kames, *Remarkable Decisions of the Court of Session 1716–1728* (1766) iii. Lobban (at 98) plausibly suggests that Kames may have felt that no such treatment was required.

works that should reflect changes in society.[73] Influenced by his perceptions of the rapidly changing Scotland of his time,[74] Kames was concerned that the law should reflect changes in governance and socio-economic circumstances.[75] That concern may well have manifested itself in his preoccupation with looking at law as part of a broader historical narrative or continuum of organic development. Such an outlook is consistent with Kames's discussion of the structural sources of Scots law – bemoaning an apparently antiquated institutional scheme while at the same time identifying equity as a means of developing a legal framework to recognise and accommodate societal change.[76]

(b) Idea of Equity

2-33. Therefore the essential value of equity, for Kames, lay in its dynamism – that is in its functional institutional role, which was to ensure a legal system kept pace with changing conditions. Equity represented the institutional tool by which legal correlativity to changes in societal attitudes was achieved. In a sense, this was a quasi-legislative understanding, and this is one of the features of the work that has attracted the greatest attention.[77] In this way the judges were to be entrusted with the future development of the law. This was a consistent theme with Kames, and he had suggested as much before.[78] Since he considered that humanity was moving forwards in its civilisation, he saw equity in the image of a plant being tended to maturity and perfection.[79] If equity was the plant, then the soil from which it drew nourishment was the progress of societal attitudes and ethics, which were

[73] P Stein, 'Legal Thought in Eighteenth-Century Scotland' 1957 JR 1, 10.

[74] Lehmann 197–98.

[75] 'Interest in equity as a principle of justice is enhanced in periods of rapid transition, of more intense socio-economic change and, in a certain sense, of crisis': D Carpi (ed), *The Concept of Equity: An Interdisciplinary Assessment* (2007) 11.

[76] Stein, 'Legal Thought in Eighteenth-Century Scotland' (n 73) at 11.

[77] See N Phillipson, *Scottish Whigs and the Reform of the Court of Session 1785–1830* (Stair Society vol 37, 1990) 181–83; Lobban 99–100; D Lieberman, *The Province of Legislation Determined: legal theory in eighteenth-century Britain* (1989) ch 8. Phillipson notes that there was a complex political dynamic behind this development, and John Cairns points out that there was a more general change in attitude to the relative merits of legislation and custom or case law during this period: J W Cairns, 'Ethics and the Science of Legislation: Legislators, Philosophers, and Courts in Eighteenth-Century Scotland', in B S Byrd et al (eds), *Annual Review of Law and Ethics 2000: The Origin and Development of the Moral Sciences in the Seventeenth and Eighteenth Century* (2001) 161–62.

[78] Lord Kames, *The Decisions of the Court of Session from its first Institution to the present Time. Abridged, and Digested under proper Heads, In Form of a Dictionary* (1741) vol I, iii. This collection of decisions marked an important development in making reported cases more accessible: see K G C Reid, 'A Note on Law Reporting', in K G C Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) lv.

[79] Kames, *Principles* vol I, 1.

to be reflected in the progress of the law. The key was the idea of an organically evolving system.[80]

2-34. In accordance with his historical compass, Kames described the development of the common (positive) law which, he said, moved from limited protections to greater breadth as the success of governance by rule of law became apparent.[81] This jurisdictional expansion would reach a natural limit of competence, beyond which it could not proceed while maintaining its integrity. Cases which could not be dealt with by evolution within the positive common law were the preserve of the King and his council,[82] though the increased complexity of the internal relations of the body politic and its constituents meant that these cases increased in number and complexity.[83] In England the pressing business of state meant that the Court of Chancery came into being to handle the King's conscience, whereas in Scotland the comparatively smaller involvement in international affairs meant there was no need for such a move.[84] Accordingly, the jurisdictional schism in England necessitated the erection of the respective names of 'common law' and 'equity', which formed a relationship of mutually symbiotic definition, the former being the domain of the ordinary branch of law dealt with by the courts, the latter being governed '*less* by precise rules, than by *secundum æquum et bonum*, or according to what the judge in conscience thinks is right'.[85]

2-35. In setting out a system for delimiting the extent of equity and common law Kames tells us that in many countries there was no satisfactory delimitation of these constituents of the juridical whole. Yet such boundary disputes could be rectified by careful definitional co-operation between judges of the two 'internal jurisdictions' in legal systems characterised by separate equity jurisdictions – an idea which is at once intuitively pleasing, and historically dubious.[86] In many ways the definition of equity starts from the implicit assertion of a negative:[87]

[80] For a modern echo, see Lord Macmillan, 'Law and Ethics' (1933) 49 SLR 61. As Lord Macmillan identified with prescience, the trend towards the use of law as a social tool makes Kames's work pertinent, at least from a methodological perspective.

[81] Kames, *Principles* vol I, 2–4.

[82] Kames, *Principles* vol I, 5 gives the following, apparently non-exhaustive, examples: 'actions for proving the tenor or contents of a lost writ; extraordinary removings against tenants possessing by lease; the causes of pupils, orphans, and foreigners; complaints against judges and officers of law, and the more atrocious crimes, termed, *Pleas of the crown*.'

[83] Kames, *Principles* vol I, 4.

[84] Kames, *Principles* vol I, 5–6. For an illustration of the early history of the role of the King and Chancellor in Scotland, see D M Walker *Equity in Scots Law* (PhD Thesis University of Edinburgh, 1952) 176 ff.

[85] Kames, *Principles* vol I, 6, citing Bacon, *Learning* B.8.c.3.aph. 32. Kames provides the Latin quotation in his text.

[86] For the English experience, see J Getzler, 'Patterns of Fusion' in P Birks (ed), *The Classification of Obligations* (1997) 175 ff.

[87] Kames, *Principles* vol I, 6–7.

> Thus equity, in its proper sense, comprehends every matter of law that by the common law is left without remedy; and supposing the boundaries of the common law to be ascertained, there can no longer remain any difficulty about the powers of a court of equity. With respect then to the common law, it is evident from the foregoing deduction, that it has not a precise natural boundary, but in some measure is circumscribed by accident and arbitrary practice. The limits accordingly of common law and equity, vary in different countries, and at different times in the same country.

2-36. Once more we can see the importance of history: each country will have had a different formative experience of common or positive law, and hence a different manifestation of equity. And as part of that historical development there is an increasing incorporation of morals into law via equity, so that matters that would have previously been binding in conscience only are given legal force through equity.[88] Equity is the juridical embodiment of the society's progress in its moral self-awareness. Yet, while the effect of equity's institutional role may have been to form a conduit for the application of ethics, this was not the intent or at least the operational function of equity; that is to say, equity was not to be an exercise in arbitrary enforcement of judicial world views.[89] On the contrary, Kames suggests that equity achieved its purpose by virtue of its systemic character, and systems for Kames involved scientific methods of causes, effect, functions and the like. The system of equity, and the rules which framed and defined the system, were themselves constructed by the living experience of society and its courts.[90]

2-37. The obvious problem with Kames's approach is one of extent; for how does one decide which benevolent duties should be assimilated to law through equity? To this question he has an answer:[91]

> It appears now clearly, that a court of equity commences at the limits of the common law, and enforces benevolence in certain circumstances where the law of nature makes it our duty. And thus a court of equity, accompanying the law of nature in its gradual refinements, enforces every natural duty that is not provided for at common law.

2-38. As is clear from this passage, Kames can be viewed as a natural lawyer at least to some degree, and indeed it has been said that 'it would be too much to expect Kames to be able to break completely with the natural law school of legal thinking'.[92] His account of the court's jurisdiction, however, can be criticised as too wide, since there are many obligations which are not the

[88] Kames, *Principles* vol I, 8.

[89] Kames makes that point by quoting Bacon's statement: 'These courts of jurisdiction should not be committed to a single person, but consist of several; and let not their verdict be given in silence, but let the judges produce the reasons of their sentence openly and in full audience of the court; so that what is free in power may yet be limited by regard to fame and reputation': Bacon, *Learning* B.8.c.3.aph.38.

[90] Kames, *Principles* vol I, 9–10.

[91] Kames, *Principles* vol I, 12.

[92] Lehmann 204.

province of courts of law.[93] Indeed in a later passage Kames accepts that many 'natural duties' are beyond the aid of a court of equity.[94] The rationalisation which is given for the enforcement of some natural duties and the exclusion of others is the idea of utility; for, sometimes, providing a remedy for natural duties causes more harm to society than otherwise.[95]

(c) The Role of a 'Court of Equity'

2-39. With the broad macro-definition of equity in place Kames is able to elaborate on what he considers the role of a court of equity to be. For example, such a court is important in rectifying the objective wording of a document to fit the subjective will that underlay its creation.[96] Indeed, this is a minor reflection of the greater remedial and augmentative role of equity with regard to the common law:[97]

> A court of equity, by long and various practice, finding its own strength and utility, and impelled by the principle of justice, boldly undertakes a matter still more arduous, and that is to correct or mitigate the rigour, and what even in a proper sense may be termed the *injustice* of common law. It is not in human foresight to establish any general rule, that, however salutary in the main, may not be oppressive and unjust in its application to some singular cases. Every work of man must partake of the imperfection of its author; sometimes falling short of its purpose, and sometimes going beyond it. If with respect to the former a court of equity be useful, it may be pronounced necessary with respect to the latter; for, in society, it is certainly a greater object to prevent legal oppression, which alarms every individual, than to supply legal defects, scarce regarded by those immediately concerned.

2-40. This passage, heavily inspired by Bacon,[98] is one of the enduring explanations for equity that has come down to the present day. For Kames, the normative justification is to prevent injustice being exacted in the name of formal justice. And an equity jurisdiction derives its force from public utility, for the rigour of the strict law can be opposed to an overarching public interest.[99] The two great principles upon which equity feeds are thus justice and utility.[100]

[93] Ferguson at para 415.

[94] Kames, *Principles* vol I, 23.

[95] Kames, *Principles* vol I, 23. See also the passages at 33–34 where the reason given for selective enforcement is that the development of society is not such as to allow all natural laws to be so enforced, or that some matters are so trifling as to be 'below the dignity of the law'.

[96] Kames, *Principles* vol I, 13.

[97] Kames, *Principles* vol I, 15–16.

[98] Bacon, *Learning* B.8.c.3.aph.35: 'In like manner, the courts of equity should have power as well to abate the rigour of the law as to supply its defects; for if a remedy be afforded to a person neglected by the law, much more to him who is hurt by the law.'

[99] Kames, *Principles* vol I, 18–19.

[100] Kames, *Principles* vol I, 39–40.

2-41. The legal authority reposed in the court of equity to achieve this object is its magisterial power, and in this sense it closely resembles the powers of the praetor of Roman law, which, it is said, were assumed and not given. In a Scottish context this would be the inherent power of the Court of Session.[101] Conscious of traditional criticisms of equity, Kames is at pains to point out that equity must function as a system informed by principles, and not capricious judicial whim (in the absence of angels for judges).[102] In recognising this, Kames also recognises the criticism of equity based upon philosophical circularity: when the rules of equity settle into a system of law, which invariably will ossify, there cannot be infinite tangential systems to provide relief from equity. Kames's common-sense response is that a reasonably flexible system of equity to mitigate the rigour of the common law is as good a substantive institutional safeguard as can be erected.[103] This reflects a balancing act between the desire for a known and clearly stated system of laws resting on principle, and the desire to achieve substantive justice in individual cases, though Kames ultimately accords primacy to certainty in order to prevent judicial caprice.[104] This is an admission that establishing the borders of any equity jurisdiction with finality may be beyond the legal community. For Kames, equity, and common law for that matter, are functional tools to reflect society's values for its better governance through the rule of law. If there is an ongoing tension between, on the one hand, a form of law which is imbued with less formality but the flexibility to accommodate change, and on the other hand, the attempted imposition of rules to provide some systemic rationalisation and control of that flexible system, then that tension may well be an acceptable price.

2-42. As for Scotland, Kames says this:[105]

> In England, where the courts of equity and common law are distinct, the boundary betwixt equity and common law, where the legislature doth not interpose, will remain always the same.[[106]] But in Scotland, and other countries where equity and common law are united in one court, the boundary varies imperceptibly. For what originally is a rule in equity, loses its character when, gathering strength by practice, it is considered as common law. Thus the *actio negotiorum gestorum*, retention, salvage, &c. are in Scotland scarce now considered as depending on principles of equity. But by the cultivation of society, and practice of law, nicer and nicer cases in equity being daily evolved, our notions of equity are preserved alive; and the additions made to that fund, supply what is withdrawn from it and transferred to common law.

[101] Kames, *Principles* vol I, 19.

[102] Kames, *Principles* vol I, 20.

[103] Kames, *Principles* vol I, 21.

[104] Kames, *Principles* vol I, 21–22. Citing Bacon, *Learning* B.8.c.3.aph.46.

[105] Kames, *Principles* vol I, 27.

[106] This, of course, was written long before the Judicature Act 1873 and modern discussions of 'fusion'.

2-43. Hence, law and equity are, in Scotland, a single jurisdiction, handled by a single court:[107] the Court of Session, as successor to the Privy Council.[108] Furthermore, in the continued theme of historical movement and usage, Kames explains that legal instruments which may at first have been admitted as equitable doctrines are subsequently embedded into the common law once their usage is established. Unfortunately, how to discern the moment at which a doctrine crosses from the equitable reservoir of creativity into the body of the common law is not revealed, though it seems connected to usage and the development of rules regulating the instrument, or perhaps even the passage of time.

(d) Reception

2-44. The *Principles of Equity* was not overtly written as a standard book on Scots law, and its somewhat general and philosophical stance has led to criticism. For example:[109]

> As a rule, however, Kames was regarded as too little influenced by 'law-notions', and too ready to be guided by what seemed to him to be the equity of the case…In his legal writings Kames is generally thought to have failed to distinguish clearly between law as it actually was, and as he thought it to be.

No doubt this narrative fitted neatly with the contemporary criticisms that Kames was too metaphysical[110] and, especially in later periods, reflected the growing strength of a positivist view of law. But, as noted above,[111] while the *Principles of Equity* is not an 'Institute' of the law of Scotland,[112] that does not mean that the work is not 'institutional'[113] in the sense of carrying formal legal authority.[114] Kames's aim was both broader and deeper than stating

[107] Kames deals at some length with the question whether it is better to have a unified system of law and equity, or to have it dealt with in separate courts: *Principles* vol I, 27–30. See also his well-known correspondence on the matter with Lord Hardwicke: Tytler, *Memoirs of Henry Home of Kames* (n 54) vol I, 237 ff.

[108] Kames, *Principles* vol I, 30–31.

[109] F P Walton, 'Humours of Hailes' (1894) 6 JR 223 at 231–32.

[110] See D J Carr, 'Preface' in Lord Kames, *Principles of Equity* (3rd edn, 2013 reprint) xxxv.

[111] Text to n 65.

[112] Lobban 98.

[113] See above at n 65. In *Whitehead & Morton v Cullen* (1861) 23 D 265 at 274 Lords Ivory, Deas and Ardmillan state that Lord Elchies, who is clearly not institutional, was a 'greater lawyer' than Kames. In *Diggens v Gordon* (1865) 3 M 609 at 612, and in *Fowler v Brown* 1916 SC 597 at 599 n 1, Kames is described as an 'institutional writer' in the arguments.

[114] What exactly is meant by the classification 'institutional writer', or more accurately 'institutional work' (for not all of a writer's works need be institutional) can be unclear; furthermore, such clarity as there is seems to be fading with the passage of time. See generally: J Cairns, 'Institutional writings in Scotland reconsidered' (1983) 4 J of Legal History 76; A C Black, 'The Institutional writers 1600–1826', in H McKechnie (ed), *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society vol 1, 1936); Smith, *Short Commentary* 32–33; E Marshall, *General Principles of Scots Law* (7th edn, 1999) paras 3.40–3.47; D M Walker, *The Scottish Legal System* (8th edn, 2001) 475–77; Gloag and Henderson, para 1.51; R M White, I D Willock and H L MacQueen, *The Scottish Legal System* (5th edn, 2013) para 5.22.

existing rules. The problem for subsequent lawyers is that the text does not always distinguish clearly between the existing and the aspirational.[115]

2-45. An underestimated achievement of the *Principles* is how it met one of its purposes as conceived by Kames[116] – that a lay person could, and perhaps to some extent still can, pick it up and glimpse the philosophical and historical narrative of equity as a concept in Scotland and beyond. One of the text's most enduring contributions is that it is a rhetorical discussion of fundamental principles, with illustrations of instances of the law; in a sense, therefore, its strongest feature is the way it facilitates the process of thinking. As a conventionally authoritative source of Scottish law the work has proven less successful.[117]

2-46. So far as the book contributed to Scottish legal thinking about equity, the text continued the long tradition of natural law writing in Scotland which considered equity, though it does innovate upon that tradition in many respects. An important development is the fact that equity has become not only the underlying normative force of the natural law; instead it has moved from having something of a passive justificatory role towards a more active constitutive role, whereby it is generating legal rules as well as justifying them. Similarly, the text is an early example of an approach of duality whereby there is an intellectual distinction drawn between common law and equity which emerges from the natural law tradition, but is a more complex innovation upon the traditional distinction between natural and positive law. It is perhaps unsurprising that such a text would emerge in the century following the Union in 1707.

C. MODERN IDEAS OF EQUITY

(1) Nineteenth Century

2-47. Walker suggested that by the nineteenth century the idea of equity as a source of law had fallen into neglect: equitable influences were recognised as the gestational origin of certain instruments, but the idea of equity as an active part of the legal system was over.[118] This, he reasoned, in substantially the same way as Kames, was because that which might once have been considered equitable in origin had now been absorbed by the common law. While it is no doubt true that academic writings of the time do not, in general, talk about the nature of equity in Scots law, it does not necessarily follow that the subject was completely neglected. Ferguson plausibly suggests that diminished interest in equity was a logical consequence of the rise of

[115] P Stein, 'Actio de Effusis Vel Dejectis and the Concept of Quasi-Delict in Scots Law' (1955) 4 ICLQ 356 at 360.

[116] 'I dedicate my work to every lover of science; having endeavoured to explain the subject in a manner that requires in the reader no particular knowledge of municipal law': Kames, *Principles* vol I, 39.

[117] This is broadly the same conclusion reached by Lobban: Lobban 120–21.

[118] D M Walker, 'Equity in Scots Law' (1954) 66 JR 103 at 116.

positivism, and a different attitude to precedent.[119] While the theory is attractive, it is not necessarily the full picture, since it does not seem to fully take account of the case law of the period. Commentators may not have been discussing equity as often as before,[120] but the idea of equity seems to have been alive and well in the courts.

2-48. Of course, by this stage of the law's development the close embrace of natural law and equity had been substantially diminished, if not broken entirely. The manner in which equity was understood had changed: the idea of God's natural law sustained and continued by equity was no longer an accepted view. But the term and some concept of equity remained; what seems to have happened was that the understanding of equity had developed along secular lines towards a more dualist approach, with affinities to Kames's ideas and English law, with a justificatory, creative and ameliorative character. Thus, there are a number of judicial pronouncements suggesting that equity was still an important factor in the judicial mind. In one case something like a distinctive equitable rule or equitable system seems to be understood by the court as it considered whether points of equity could be put before a jury, or whether such powers of equity were reserved to the court.[121] In another case, the Lord President (Inglis) remarked during argument about the use of English precedent that 'The principles of equity as systematised by Lord Kames I look upon as the equity law of Scotland.'[122] A remark uttered during argument is no systematic treatise on equity, though it certainly goes far towards the endorsement of one. In *Cassels v Lamb* there is a revealing statement from Lord Fraser:

> The saying has often been printed, that with the hardships of the case Judges have nothing to do, but must apply the law as they find it. To a great extent this remark is true; but to a great extent it is also inaccurate and misleading. The whole of our rules of equity proceed upon a contrary assumption, and one-half of our law would be blotted out if it were not so. Equitable considerations are allowed to come into play,–to control, to mitigate, and sometimes altogether to evade a legal rule which carries with it intolerable hardship, and when the right too rigid hardens into wrong.[123]

2-49. As general as these remarks are they suggest a continued vigour for the idea of equity as a source of law and suggest that the ascendancy of positivism was at least incomplete. One judge's views do not constitute a fully reasoned system of equity, but the point being made here is that an idea of equity, especially amongst the judiciary, may have been more influential than some commentators have suggested. It is interesting that it should be

[119] Ferguson at para 417.

[120] The entry for 'Equity' in G Watson (ed), *Bell's Dictionary and Digest of the Law of Scotland* (7th edn, 1890) 402 is an example of strong positivist thinking, and indeed it rails against the use of the term 'equity' as a subjectivist's cloak.

[121] *Forrest v Barr & Henderson* (1869) 8 M 187.

[122] *Kennedy v Stewart* (1889) 16 R 421 at 430.

[123] *Cassels v Lamb* (1885) 12 R 722 at 757. The same judge remarks (at 770) that the court has two jurisdictions: 'either as a Court of law or equity'.

judges who are making favourable reference to ideas of equity, while academic commentators were apparently not doing so at the same time. Although the academics may have thought that equity was diminished, it seems that judges, attracted perhaps to its alleged cover for their subjectivity, or simply in order to assert some scope for discretion or flexibility in decision-making, took a different view.[124] Nevertheless, there was no detailed treatise setting out how equity was to be understood in Scots law during the period.

(2) Twentieth Century

(a) Early Twentieth Century

2-50. Doctrinal analytical interest in equity was rekindled in the middle of the twentieth century, around the time of a general resurgence in Scottish legal scholarship.[125] The attentions of Walker and Smith yielded differing attitudes to the current status, and, indeed, potential future uses of equity in Scots law. It was also during the course of the twentieth century that the current orthodoxy of the nature of equity in Scots law came to be developed, though this orthodoxy is perhaps less entrenched than some might argue.

2-51. The understanding of equity in the early twentieth century appeared to be a fairly settled one. In 1928 the leading reference encyclopaedia, and hence a reasonable touchstone of the prevalent orthodoxy, contained an introductory discussion of equity written by Mackay and Wark,[126] though the scope of the chapter was obviously broader than the mere *jus proprium* of Scots law. Indeed, the discussion provides an examination of the approach to equity in Scots, English, 'Continental' and Roman law,[127] reflecting the various formant systems for Scottish law. Equity is to be understood as denoting a trichotomy of concepts: (1) the principles and fundamental normative essence which underlies all law; (2) that constituent of general jurisprudence, or law as a whole, which supplements and corrects existing laws of a state, from whichever authority they may arise; and (3) the institutional manifestation of judicial discretion which can be bestowed, or

[124] This has been alluded to before, and in relation to the nineteenth century: Mackay and Wark, 'Equity' at para 579.

[125] There were some works which dealt with equity in the intervening period, such as Mackay and Wark, 'Equity'.

[126] Aeneas James George Mackay (1839–1911) and John Lean Wark, Lord Wark (1877–1943). An advocate, Mackay wrote widely on history, law, and legal procedure and succeeded Cosmo Innes as Professor of Constitutional Law and History at Edinburgh University before returning to practice as an advocate-depute and later as Sheriff of Fife and Kinross: see A H Millar (revd N Wells), 'Mackay, Aeneas James George (1839–1911)', in *Oxford Dictionary of National Biography* (2004). Wark, also an advocate, was Sheriff of Argyll and general editor of the *Encyclopaedia of the Laws of Scotland* when he updated Mackay's entry on 'Equity' for publication in 1928. (He was appointed as a Senator of the College of Justice in 1933.) Mackay's original entry on 'Equity' had appeared in J Chisholm (ed), *Green's Encyclopaedia of the Law of Scotland* (1897) vol V, and J Chisholm (ed), *Green's Encyclopaedia of the Law of Scotland* (2nd edn, 1911) vol V.

[127] Mackay and Wark, 'Equity' at paras 546–548.

claimed, by judges in reaching decisions.[128] Of these three understandings of equity the second was most pronounced in, though not necessarily limited to, the separate equitable jurisdictions of the Roman Praetor and English Chancellor.[129] This Aristotelian understanding of equity was more pronounced in these historical contexts, yet other systems of law, including Scots law, have deployed equitable powers in the administration of justice.[130]

2-52. Having dealt with the general concept of equity in a manner which appears overarching in its intention, the rest of the treatment is split into sections on Roman,[131] English and Scottish equity – the former two being included due to their having 'materially affected' the latter. The treatment is overtly Aristotelian in its frame of reference: that great balancing act between the need for corrective equity, and the spectre of undiluted discretion.[132] As regards Scots law, the unitary administration of law and equity is emphasised in a discussion pointing out the natural law approaches of Stair and Erskine,[133] though this discussion is heavily bound to the idea of the *nobile officium*.[134] Indeed, the reasons given for the lack of a separate court of equity are manifold:

> The absence of a separate Court of equity in Scotland was not due to one, but to many, causes: (1) the adoption from the first of much of the equity of the Roman law, both civil and canon; (2) the acceptance of these equities as subsidiary to the native customs and statutes; (3) the Chancellor himself being a member of the Court of Session when first instituted; (4) the education of leading Scottish lawyers in the sixteenth and seventeenth and first half of the eighteenth centuries abroad at the Universities of France and the Low Countries, who brought back with them the developed equity taught by the professors of the civil law, and the works of the civilians; (5) the tendency of the Scottish intellect to study mental philosophy; finally (6) the circumstances that, when Roman law began to be less quoted in the Court and chiefly cultivated for educational purposes, the English equity decisions began to be quoted. While there was no separate Court of equity in Scotland, the Court of Session always paid attention, though in different degrees at different times, to equitable considerations. Scotland thus gained the benefit of using a large body of equity decisions without the disadvantage of separate jurisdiction.[135]

2-53. With such a menagerie of influences it is difficult to evaluate the relative weight to be given to each consideration. Equally, it is arguable that to assume that the lack of an equitable jurisdiction requires explanation is to take the wrong starting point – Rome and England stand substantially unique. However, it does seem that the various factors identified all plausibly

[128] Mackay and Wark, 'Equity' at para 546.

[129] Mackay and Wark, 'Equity' at para 547.

[130] Mackay and Wark, 'Equity' at para 547.

[131] The approach to the content of 'Roman equity' is interestingly put: 'The three sources of equity in Roman law may perhaps be called the historical (*Jus Gentium*), the philosophical (*Jus Naturale*), and the practical (*Jus Praetorium*)': Mackay and Wark, 'Equity' at para 560.

[132] Mackay and Wark, 'Equity' at para 550.

[133] Mackay and Wark, 'Equity' at para 576.

[134] Mackay and Wark, 'Equity' at paras 574–576.

[135] Mackay and Wark, 'Equity' at para 577.

contributed to the current Scottish approach, though some are more tenuous than others. It also demonstrates the comparative approach which seems to be of long standing in Scots law generally, and applies to equity particularly. The rules worked out by experience in legal systems with a separate equitable jurisdiction, which can create and refine doctrines, can be imported into Scottish law. Scottish law inducts external 'equitable' principles, yet, though they may be spoken of as equitable in origin, they form part of a unitary system of law when assimilated into Scottish law. So, as a supplement to Kames's[136] theory concerning internally developed equitable doctrines which are subsequently absorbed by the common law, external 'equitable' rules can be adopted by Scottish law.

(b) Walker

2-54. The intellectual structure of Mackay and Wark's treatment of equity can be seen as strongly influencing the approach of David Walker, who himself undertook the most extensive treatment of equity in Scots law since the time of Kames.[137] Walker is keen to assert the importance of equity, though, unsurprisingly, he does not go so far as to suggest separate jurisdictions or espouse a mirror image of English equity. Indeed, Walker is keen to demonstrate that while there is no separate jurisdiction for equity it is a 'basic principle underlying various branches of the law…In fact it might be said that Scotland has never known equity, but has long had equity in her legal system.'[138] Walker's treatment is similar to that of Mackay and Wark, discussing the Roman and the Common Law approaches to equity, though Walker's treatment contains a much broader citation of sources and authority.[139]

2-55. Walker's central theme is that equity is built into the fabric of Scottish law, adopting similar arguments to Mackay and Wark concerning the formative influences of Scottish equity, including the intriguing assertion that a Scottish predilection to philosophical acumen wrought the classic characterisation of Scots law as principle driven, which is said to have assisted in the assimilation of equitable thought.[140] This may be characterised as something of a 'genius of Scots law' theory, which is backed by the argument that historical Scottish procedure allowed greater flexibility to such a degree that a separate equity jurisdiction would be superfluous.

[136] It would be charitable to say that Kames's *Principles of Equity* is given an ambivalent review, and among the discussion is the somewhat damning observation that 'The Principles of Kames failed in precision, and his book has never been deemed a great authority', though, it is conceded that Scottish judges were more receptive to the work: Mackay and Wark, 'Equity' at para 579.

[137] Walker submitted a doctoral thesis on the subject at the University of Edinburgh in 1952, though the published fruit of the endeavour is D M Walker, 'Equity in Scots Law' (1954) 66 JR 103. See also D M Walker, 'Some Characteristics of Scots Law' (1955) 18 MLR 326.

[138] Walker, 'Equity in Scots Law' at 105.

[139] Walker, 'Equity in Scots Law' at 110–113.

[140] Walker, 'Equity in Scots Law' at 124; Mackay and Wark, 'Equity' at para 577.

Although Scotland avoided the disadvantages of the jurisdictional dichotomy the unitary approach meant equity in Scotland was much weaker, which meant equity was neglected and lacked robust theoretical underpinning and coherence.[141] Cinderella status meant that it is much easier to see if a rule in English law is equitable in origin than it is in Scots law. Walker's argument is that the Court of Session deals with equity and law, fused into a single system, and that single system contains equitable influence from 'Roman equity', and to a far lesser extent 'English equity'. But, says Walker, Scottish equity is unique and, following Kames, equitable principles springing from 'natural justice' naturally become fused into the common law. The development of equity is, for Walker, the living past: while the law may be suffused with these equitable principles of the past, the rise of legislation and the 'settling' of law and equity means that the creative role of equity is over.[142] However, Walker asserts that equitable principles, latent and patent, should be properly recognised and retained. This seems to suggest that there will be no room for a new institution like the trust, but that there is sufficient flexibility to allow for some judicial innovation.

(c) Smith

2-56. Another notable twentieth-century discussion of equity in the law of Scotland was that of 'T B' Smith. Smith is sometimes characterised as a doughty defender of the civilian tradition of Scots law, often at the expense of the Common Law tradition. Some have described his civilian vision of Scots law as 'never anything more than a fantasy',[143] whereas others have described him as 'one of the giants of the history of Scots law'.[144] The same T B Smith, who was often critical of the Common Law tradition in favour of civilian tradition, was a keen proponent of developing the nature and role of equity in Scots law, an approach that might seem contrary to Scottish sensibilities,[145] and understandings of equity from the civilian tradition.[146]

2-57. Perhaps conscious of such scepticism about equity's role, Smith considered the importance of Kames's and Walker's work on the subject before asserting that the Court of Session has always been a court of law and

[141] Walker, 'Equity in Scots Law' at 124–25.

[142] Walker, 'Equity in Scots Law' at 147. He cites Roscoe Pound's *Outlines of Lectures on Jurisprudence* (5th edn, 1943) 42, for the proposition 'We have gone beyond the stage of equity and are passing from the maturity to the socialisation of law.'

[143] Lord Rodger of Earlsferry, '"Say not the struggle naught availeth": the costs and benefits of mixed legal systems' (2003) 78 Tulane LR 419 at 422.

[144] G L Gretton, 'The Rational and the National: Thomas Broun Smith' in E Reid and D L Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005) 43.

[145] As he himself pointed out: Smith, *Short Commentary* 42–43.

[146] Such paradoxes are considered in Reid and Carey Miller (eds), *A Mixed Legal System in Transition*.

equity.[147] Furthermore, while the two may be seen as fused together, they are also capable of being seen as separate – especially the role of natural law in creating new equitable doctrines to ameliorate the rigour of the common law.[148] Indeed, this amounts to an endorsement, expressly so in fact,[149] of Kames's suggestion that doctrines born of equity grow up into the common law, a view endorsed by Walker;[150] though, in fairness to Smith, he is somewhat more guarded in his expression, suggesting that the Scottish trust is the only freestanding institution so created by equity, and that the proper extent of equitable development beyond the *nobile officium* has been modifying existing doctrines and principles.[151] The main driver for equitable influence for Smith would be the *nobile officium*, though he concedes that its invocation had been limited to following existing precedents, and had ossified in a manner similar to the English chancery jurisdiction.[152]

2-58. A mild internal tension characterises the discussion of equity by Smith – on the one hand it is suggested that equity, as a formal source of law, is not accorded as much attention as it deserves, while in another place he is pleased that no distinction between law and equity had been introduced as a result of the appellate jurisdiction of the House of Lords.[153] However, the objection appears to be to the idea of a clearly defined jurisdictional dichotomy, and not an objection to a dynamic equity as a self-standing source of law:

> Lord Justice Denning has in England called for the development of 'a New Equity,' to redress the rigidity of the present legal system. Clearer recognition that equity is still a valid, valuable and unexhausted source of Scots law is also, it is submitted, much to be desired. There are chapters of Scots law, such as error in contract, which have become so confused through the interaction of English common law influences upon fundamental Roman doctrines that only legislation or a bold resort to equitable principles by the Court of Session can establish rational and just solutions of the many problems involved. Similarly, the principles of bona fides which are latent in the Scottish law of contract, could with advantage be resuscitated to deal with problems of the twentieth century.[154]

2-59. Smith's suggestion that the mischief caused by the infiltration of English influences may be remedied by an assertion of equity is perhaps surprising. But it seems clear that he distinguished between Scottish and English equity, and that he was advocating a distinctive approach. Notwithstanding that important caveat, his appeal to some kind of equity to modernise and bring

[147] Smith, *Short Commentary* 43.
[148] Smith, *Short Commentary* 43.
[149] Smith, *Short Commentary* 43.
[150] Walker, 'Equity in Scots Law' (n 137) at 125.
[151] Smith, *Short Commentary* 44–45.
[152] Smith, *Short Commentary* 45.
[153] Smith, *Short Commentary* 43–44. Lord Eldon was apparently of the opinion that the severe pressure of judicial business in the House of Lords, much of which was caused by cases coming from Scotland, would not be alleviated unless a jurisdictional distinction between law and equity was adopted in Scotland: A S Turbeville, 'The House of Lords as a Court of Law 1784–1837' (1936) 52 LQR 189 at 205–06.
[154] Smith, *Short Commentary* 46.

flexibility to doctrinal changes remains powerful. Arguably his view was prescient and has subsequently come to pass in some areas of private law, such as the law of unjustified enrichment. These views amount to a thinly veiled call for judicial activism and are perhaps not surprising from so dynamic a scholar as Smith; importantly for this work, his view is consistent with previous thinking that saw using equity as a justifiable tool for developing the law and correcting or ameliorating perceived problems. When Smith wrote the landscape and sources of Scots law were very different – there was not as much academic doctrinal analysis as there is today.[155] Furthermore, the creation of the Scottish Parliament has provided a legislature that can renew, develop or refurbish areas of private law if it wishes. This constitutional state of affairs differs hugely from the situation during Smith's time when Parliamentary time at Westminster was limited. In the modern context it is harder to justify an expansive creative role for equity, and judicial attitudes vary.[156]

(d) Late Twentieth Century

2-60. In the latter period of the twentieth century, the academic considerations of equity were consistent with the accounts from Smith and Walker. It appears that the Scottish understanding of equity had become settled and that novel substantive comment was unnecessary. The sense that

[155] Gretton notes that Smith himself had a substantial role in facilitating this change by virtue of his involvement with the founding of the *Stair Memorial Encyclopaedia* and the Scottish Universities Law Institute: Gretton, 'The Rational and the National', in Reid and Carey Miller, *A Mixed Legal System in Transition* (n 144) at 31.

[156] A recent dissenting opinion (in an English case) by one of the two current Scottish Justices of the Supreme Court, joined by the President of the Supreme Court, suggests limited openness towards such development in some cases but also questions judge-made laws' efficacy (and, presumably, legitimacy) in other cases: 'There is often much to be said for the courts developing the common law to achieve what appears to be a just result in a particular type of case, even though it involves departing from established common law principles. Indeed, it can be said with force that that precisely reflects the genius of the common law, namely its ability to develop and adapt with the benefit of experience. However, in some types of case, it is better for the courts to accept that common law principle precludes a fair result, and to say so, on the basis that it is then up to Parliament (often with the assistance of the Law Commission) to sort the law out. In particular, the courts need to recognise that, unlike Parliament, they cannot legislate in the public interest for special cases, and they risk sowing confusion in the common law if they attempt to do so. When the issue is potentially wide ranging with significant and unforeseeable (especially known unknown) implications, judges may be well advised to conclude that the legislature should be better able than the courts to deal with the matter in a comprehensive and coherent way. It can fairly be said that the problem for the courts in taking such a course is that the judges cannot be sure whether Parliament will act to remedy what the courts may regard as an injustice. The answer to that may be for the courts to make it clear that they are giving Parliament the opportunity to legislate, and, if it does not do so, the courts may then reconsider their reluctance to develop the common law. For the courts to develop the law on a case by case basis, pragmatically but without any clear basis in principle, as each decision leads to a new set of problems requiring resolution at the highest level, as has happened in relation to mesothelioma claims, is not satisfactory either in terms of legal certainty or in terms of public time and money': *International Energy Group Ltd*

one gets was that the star of equity was considered to have faded, and Thomson observed that in Scotland 'equity has passed the age of child-bearing'.[157] In reaching this conclusion Thomson examined a number of areas of private law where equitable factors may have been considered, and further highlighted areas of law that are in England dealt with under the aegis of equity, but in Scotland are not. Furthermore, he explained that equitable considerations would not threaten the strict distinction between real and personal rights.

2-61. The limitations upon equity's role were explained by the triumph of the positivism and statutory law:

> It is surely the function of Parliament and not the Courts to determine where the balance between the general public interest and the interests of the individual should be drawn. In these circumstances, the scope of equity in modern Scots law will become increasingly insignificant as a source of law.[158]

Therefore Thomson, and others, suggested that the triumph of positivism, or at least the emasculation of the judiciary in using equitable reasoning to develop the law, was a settled view of the legal system by the late 1980s–1990s. Equitable influences may once have normatively underpinned some areas of the law, albeit within a unitary jurisdictional model, but, as an instrument for the future development of the law, the role of equity was, aside from the restricted procedural *nobile officium*, substantially at an end.[159]

2-62. Scepticism concerning equity, in academic writing, was high in the early twenty-first century. It was noted that there was 'no institutional or doctrinal separation between the rules of law and equity in the Scots courts or in Scots law'.[160] Such an assertion reflects the high point of scepticism

---

v Zurich Insurance plc [2015] UKSC 33, [2015] 2 WLR 1471 at paras 209–210 *per* Lord Neuberger of Abbotsbury (PSC) and Lord Reed (JSC); their Lordships were also concerned (at para 207) that '[I]t may well be argued, this court is invoking a new and wide general equitable power, which is, to put it at its lowest, close to inconsistent with an express contractual term, in order to reconstitute a contractual relationship so as to achieve what it regards as a fair result in a purely commercial context.'

[157] Thomson, 'Role of Equity' 923. In England, equity has been said not to be past the age of child-bearing: *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 at para 89 *per* Lord Nicholls of Birkenhead; *Murphy v Murphy* [1999] 1 WLR 282 at 291 *per* Neuberger J; *Mardorf Peach & Co Ltd v Attica Sea Carriers Corpn of Liberia (The Laconia)* [1977] AC 850 at 874E–F *per* Lord Simon of Glaisdale; *Eves v Eves* [1975] 1 WLR 1338 at 1341 *per* Lord Denning MR; *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1224 *per* Lord Hodson; *Simpson's Motor Sales (London) Ltd v Hendon Corporation* [1964] AC 1088 at 1126–27 *per* Lord Evershed. See R Evershed, 'Equity is not to be Presumed to be Past the age of Child-Bearing' (1953–55) 1 Sydney L Rev 1; D W M Waters 'Where is Equity Going? Remedying Unconscionable Conduct' (1988) 18 UW Aust L Rev 3.

[158] Thomson, 'Role of Equity' 923.

[159] E Attwooll, 'Scotland: A Multi-dimensional Jigsaw' in E Örücü, E Attwooll and S Coyle (eds), *Studies in Legal Systems: Mixed and Mixing* (1996) 27; E Reid, 'Scotland Report' in V V Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001) 211, 220.

[160] Reid, 'Scotland Report 1' at 220.

which had been reached concerning the Scottish concept of equity – not only was there no jurisdictional distinction, but there was no intellectual separation at a doctrinal level either. Other writings accepted an enduring recognition of an equitable flavour to the law, invariably expressed as 'overarching'.[161]

2-63. But not all academic contributions have taken as sceptical a view of the extent and nature of equity. Orücü's contribution to the debate, made from a comparative perspective, accentuated the policy potential for the use of equity in Scots law and suggested that reports of the demise of equity had been greatly exaggerated.[162] The duality of the traditions which have contributed to the conceptualisation and understanding of equity in Scots law are recognised by Orücü: the idea of equity being infused into the law, as an evolutionary or historical process associated with natural law, sits alongside a more anglocentric view of an ameliorative and adjectival equity that carries connotations of an intellectual or doctrinal duality, if not a jurisdictional one. Orücü explained that equity in Scots law is not restricted to the *nobile officium*, as it is sometimes suggested, and that it is an important means by which the law might be developed:

> Equity above all means that which is fair, reasonable, and naturally just. It is part of Scottish common law. Judges are expected to pay heed to equitable considerations and to pursue a just and equitable course and reach fair and reasonable solutions. Yet, an appeal to equity cannot by itself prevail in the face of a clear or fixed rule of law...Views such as 'The creative function of equity in Scots law is ended' and 'the scope of equity in modern Scots law will become increasingly insignificant as a source of law' are negative. Not only that, but they are also detrimental to the development of the law and its flexibility to respond to social needs. Neither do they reflect modern tendencies in the Civilian tradition to which Scots law should look within the wider European framework. They do not encourage judges to perform their true function. It is ignorant to say that there is no equity in Scots law by using the English law as a touchstone, and it is shortsighted to say that equity is dead in Scots law, as to hold this opinion would be detrimental to the development of Scots law as a thriving European legal system.[163]

2-64. For Orücü equity in modern Scots law can legitimately be used as a policy device to develop areas of the law, particularly in areas where clearly fixed rules are absent, and to do so would be consistent with the civilian tradition. This stentorian defence of a 'Scottish equity' within a civilian tradition expressly adopts and echoes the views of Sir Thomas Broun Smith.[164] The frank policy-based justification for developing equity is coupled with a model for application and its normative underpinning:

> There is a widening scope for equity and a growing use of it in Continental Europe. Just a quick glance at the new Dutch code is enough to see how legal systems

[161] R Leslie, 'Scotland Report 2' in Palmer (ed), *Mixed Jurisdictions Worldwide* (n 159) at 246–47.

[162] Örücü 383.

[163] Örücü 393.

[164] Örücü 394.

> regarded the equitable role of its judges as vital for the law of the next century. Scotland should not fall behind. Should she do so, this would also be an indication that the ties with its former roots are further damaged and the shift towards the Common Law becomes more pronounced. Levy-Ullmann's predictions that Scots law has the potential of being a future model for European legal systems, should not be forgotten. One of the ways to achieve this is to keep equity alive – not equity as an institution but equity as a source of law, as a way of handling other sources of law and as a part and product of the Civilian mode of thought. It might be preferable to keep sitting on the fence with one foot firmly on the civilian ground then (sic) to fall on the other side.[165]

2-65. As with Smith, it is something of a twist to the traditional narrative of Scottish scepticism about equity that a strong advocate of developing the role and importance of equity in Scots law comes from an avowedly civilian perspective. The suggestion that Scots law should nurture and protect a distinctive understanding of equity in order to achieve policy goals by reference to comparative neo-civilianism is an intriguing one. In the past the main proponents of the equitable influence upon Scots law would probably have been considered to be 'anglicisers'.

2-66. Therefore, assumptions about an extremely settled and limited role for equity in Scots law began to be challenged. In the Court of Session one Lord Ordinary observed that 'an equitable jurisdiction was not exclusive to the Court of Chancery: the Court of Session also possesses such a jurisdiction'.[166] The brevity of this observation means that undue weight cannot be placed upon it, but it perhaps suggests, as in the past, that judges are more open to equitable concepts than academic writings. Indeed, an examination of case law suggests that recourse to equity and equitable reasoning was not as inappropriate or rare as might have been suggested. In cases like *Sharp v Thomson*[167] and *Smith v Bank of Scotland*[168] terms such as 'beneficial interest' (which appeared to hint at a duality between legal and equitable estates)[169] and an apparent theory of good faith emerged. Debate about developing equitable concepts in the context of dynamic, if not always express, policy and doctrinal innovations was not confined to the judiciary.[170]

2-67. In turn, other writers sought to push back against equity, though the very fact that such a debate has been revived shows much in itself. Whitty,

[165] Örücü 394.

[166] *Anderson v Hogg* 2000 SLT 634 at 643 *per* the Lord Ordinary (Reed).

[167] *Sharp v Thomson* 1997 SC (HL) 66.

[168] *Smith v Bank of Scotland* 1997 SC (HL) 111. See S Eden, 'Cautionary Tales – the Continued Development of *Smith v Bank of Scotland*' (2003) 7 Edin LR 107.

[169] See chapter 4.

[170] See e.g. J Scoular, 'The Revival of Equitable Doctrine in Scots Law – a Space for Gender Concerns?' in S Scott-Hunt and H Lim (eds), *Feminist Perspectives on Equity and Trusts* (2001). The author notes the 'ethereal' existence of equity in Scotland, and that the subject may be ripe to accommodate more legal realism, more particularly the adjustment of classical legal doctrines to accord with modern realities of power, especially as regards women.

apparently having been spurred into action by the *dictum* of Lord Reed in *Anderson v Hogg*,[171] envisages a limited role for equity in Scots law:

> First, Scots private law is and always has been unitary; English law is and always has been dual. Second, in Scots legal usage, 'equity' is normally broadly synonymous with natural law, reason or natural justice, and 'equitable jurisdiction' normally denotes judicial discretionary powers, both operating within the domain of the common law; in English law, by contrast, the concept of Equity has reference to a very large and distinctive body of technical rules, remedies and doctrine supplementing the common law. Third, in Scots private law the better view is that equity is not a formal source of law; in English law there is no doubt that Equity is a formal source. Fourth, there is a theory that rules in equity (i.e. rules created by the court's equitable jurisdiction) ripen into common law rules in Scots law, but retain their equitable character permanently in English law. Fifth, the theory of English law that Equity intervenes to give effect to the conscience of the court has not been received in Scots law and is prima facie not reconcilable with the Scottish principle that the remedy is subordinate to the right.[172]

2-68. It is Whitty's contention that broad discussions of the nature of equity in Scots law are apt to mislead, and furthermore, to the extent that they might not be misleading the expansion of the role of equity in Scots law is undesirable. The suggestion that it is 'trite law'[173] that Scots private law is unitary, as regards jurisdiction, is correct; furthermore, there is little to argue with in Whitty's assertion that Scottish conceptions of equity are different from those in England. Whitty sees the role of equity in Scots law not as a primary one; rather, it is better to see it as a Dworkinian 'weak discretion' for a judge in a particular case. But Whitty concedes that from the exercise of discretion 'rule-building' can occur, and that process is a manifestation of a greater recent propensity to judicial activism characterised by the movement away from rules to discretion.[174]

2-69. Slightly more problematic is the assertion that equity is not a formal source of law.[175] The use of the word problematic is deliberate, as it is by no means easier to assert that equity is a formal source of law, than it is to say that it is not. Of course, much here depends upon one's definition of a formal source of law, though it seems that the importance of tangible rules which are recognised as legal norms would be the least that is required. The nature of equity in Scots law does not admit of easy analysis on those terms – it would be difficult to point to a clear set of 'equitable rules'; nor, indeed, would a pursuer be well advised to base her case solely upon the ground of equity. However, as clear as these assertions are, equity is a distinct intellectual component of the legal system and can form the basis for decisions, and, in

[171] *Anderson v Hogg* 2000 SLT 634 at 643 *per* the Lord Ordinary (Reed).

[172] Whitty, 'Borrowing from English Equity' 101–02.

[173] Whitty, 'Borrowing from English Equity' 102–03.

[174] Whitty, 'Borrowing from English Equity' 105. This should be read alongside the important article by the same author: 'From Rules to Discretion: Changes in the Fabric of Scots Private Law' (2003) 7 Edin LR 281.

[175] Whitty, 'Borrowing from English Equity' 105.

that sense at least, it is a source of law. Furthermore, as Whitty noted, the 'rule-building' which can occur by grouping, analysing and assimilating decisions taken on an equitable basis suggests equity can represent a source of law, and the fact that rules so developed are treated differently – as 'equitable' – in terms of judicial discretion suggests an intellectual distinctiveness that can justify description as a distinctive source of law.

2-70. Whitty does accept that equity has some influence upon private law but only in a secondary and supplementary role, like that of public policy for example.[176] This is something of a downplaying of the role of equity, and it will be suggested below and in the following chapters that there is a movement towards equity representing a form of organising role, albeit that might be characterised as a secondary one.[177] Furthermore, the increased usage of English chancery authority suggests that some of the deeper reasoning processes and the more abstract understandings of equity underpinning them might be gaining a foothold in Scottish private law.

D. THE ROLE OF EQUITY TODAY

(1) Contextual Overview

2-71. The understanding of equity in Scots law has changed over time, often reflecting changing fashions in jurisprudence and legal theory. The early ideas of equity in Scots law relied quite heavily upon the institutional writers' accounts, which themselves tracked changes in legal thinking. There is no separation of equity and law in a technical or jurisdictional sense as in England: the law itself is suffused by this idea of equity. The way in which the institutional writers mediated this legacy was consistent with the natural law heritage that fed into, and was the normative basis for, much of the historical development of the Scottish legal system and tradition. Nineteenth-century ideas of equity appear to have been characterised by little academic commentary, possibly reflecting the development and rise of positivism in that century, though there appears to have been quite clear judicial use of the terminology of equity.

2-72. Similarly, by the nineteenth century some of the traditional natural law framework for the Scottish approach to equity began to be challenged, and a more dualist and anglicised understanding of equity began to appear, no doubt due to the greatly increased influence of English law in Scotland generally. It is readily apparent that the Scottish courts were inclined to borrow, sometimes apparently uncritically, from English chancery jurisprudence in particular. Nevertheless, it is important to be mindful of the fact that many 'equitable principles' of Scottish law are entirely 'homegrown', and have, or at least had at their inception, nothing to do with English equity jurisprudence. Kames's and Walker's explanations that equitable doctrines were absorbed with the passage of time by the general

[176] Whitty, 'Borrowing from English Equity' 105.
[177] See chapter 3.

law, which itself was developed and illuminated by the suffusion of this equity, are plausible.[178] Whitty's explanation of 'rule-building' is similar. However, it is important to bear in mind that some of these 'equitable' concepts that have been absorbed and strengthened by the law *are* treated differently, whether that is because, for example, they are considered to be amenable to judicial discretion or because they are more open to judicial development.

2-73. In addition to these 'homegrown' rules of equity there are rules which, even if not entirely (or accurately) transposed from English law, have been developed from English chancery authorities. In some cases a 'homegrown' principle has been interpreted by looking through an English chancery looking glass, while in others a (laudable) desire to adopt a particularly efficacious or attractive rule of English chancery has led to attempts to fit such a rule into some analogous and existing Scottish law category. The shared linguistic affinity of the word 'equity' has often inspired and facilitated such exercises in legal borrowing. A spectrum of such attempts at comparative borrowing resembles that of any legal system which partakes in comparative law: there have been successful imports into existing categories at one end of the spectrum, there have been some devices which have been roughly adopted and required some tweaking or bedding down in the middle, and there have been a few difficult cases where an apparently alien rule has prompted problems and litigation. An important element behind the development of such borrowing seems to be a shared linguistic, and, due to this very process, increasingly substantive idea of equity and shared specific equitable rules and reasoning processes and justifications. This phenomenon explains repeated judicial pronouncements at the very highest level that a Scottish court deals with equity and law.[179] That is not necessarily the same as saying that 'the law is equity' and 'equity is the law', and there is often more than a suggestion of an intellectual separation between law and equity.

2-74. One of the modern understandings of equity and equitable ideas in Scotland is, therefore, one that takes account of what is a comparative law exercise in tracing how English chancery rules have been adopted by Scottish judges, and, in turn, by Scottish law, historically and what that means for today's law. Examining how such developments have occurred in some areas of private law is one of the main exercises this book seeks to undertake. Accordingly, the final section of this chapter is devoted to modern judicial

[178] D M Walker, *Equity in Scots Law* (PhD Thesis University of Edinburgh 1952) 202–28.

[179] *Western Bank of Scotland v Addie* (1867) 5 M (HL) 80 at 88 *per* the Lord Chancellor (Chelmsford). See also similar comments in *Muir v City of Glasgow Bank* (1879) 6 R (HL) 21 at 23 *per* the Lord Chancellor (Cairns); *Clydebank Engineering & Shipbuilding Co v Don Jose Ramos Yzquierdo Y Castaneda* (1904) 7 F (HL) 77 at 78 *per* the Lord Chancellor (Halsbury); *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461 at 476 *per* the Lord Chancellor (Cranworth); *Carmichael v Carmichael's Exrx* 1920 SC (HL) 195 at 198 *per* Lord Dunedin; *Dawsons Ltd v Bonnin* 1922 SC (HL) 156 at 161–62 *per* Viscount Haldane; *Spence v Crawford* 1939 SC (HL) 52 at 71 *per* Lord Thankerton; *B S Lyle Ltd v Rosher* [1959] 1 WLR 8 at 14–15 *per* the Lord Chancellor (Kilmuir) and at 21 *per* Lord Reid.

approaches to equity because it is the judiciary's views about equity that are the most important. Judges decide how equity will be applied in their court, especially the discretionary dimension of equity, and they decide whether and how to apply domestically developed equitable rules or those derived from English chancery authority.[180]

(2) Judicial Approaches

2-75. In this examination of Scottish equity there will be no mass recitation of cases that have been decided upon equitable principles, or have involved the use of the word equity. The distinct areas of private law discussed in this book – fiduciary duties,[181] unjustified enrichment,[182] trusts,[183] and constructive trusts[184] – have been chosen in order to demonstrate that the concept of equity can be applied by judges in different areas of law in different ways. Here we consider the broader way in which judges appear to consider the idea of equity at an overarching systemic level. The extent to which judges are conscious of an overarching systemic view of equity is often not fully appreciated or acknowledged. In turn, occasionally judges have been tempted to appeal to a normatively attractive, and somewhat nebulous, generic or philosophical concept of equity, which can prove a convenient legal justification for an essentially discretionary decision.

2-76. In turn, any suggestion that equity is for all intents and purposes diminished in Scotland seems premature and evidence from cases suggests that equity, from a judicial perspective, can be a powerful and useful tool, whether that is as a means to reach a new decision or interpretation of a native equitable rule, or whether it involves invoking an equitable jurisdiction to utilise English chancery jurisprudence. A good example of judges confronted with a difficult case which, in turn, led to an envious look at English equity jurisprudence, is *Lord Advocate v The Scotsman Publications Ltd*.[185] Breach of confidence in English law is a creature of equity; therefore, in their reasoning, the judges make reference to the fact that the Court of Session has an equitable jurisdiction.[186] At least one judge on the bench that day was not prepared to leave the matter so lightly put:

> It is abundantly clear from the large number of English cases cited to us that the English courts are not powerless to grant injunctions to prevent publication or

[180] Advocates' and solicitors' pleadings and their citation of authority are also very important, and their habits and citation conventions will often have a substantial effect in directing a judge's attention, but (perhaps rather unfairly) in our system it is ultimately the judge's reported judgment that is determinative and recognised by posterity.

[181] See chapter 6.

[182] See chapter 3.

[183] See chapter 4.

[184] See chapter 5.

[185] *Lord Advocate v The Scotsman Publications Ltd* 1988 SLT 490.

[186] At 503 *per* the Lord Justice-Clerk (Ross). It is also noted that English and Scots law on this matter are said to be the same.

> further publication of confidential information by third parties and that they now regard this power as an equitable one (see e.g. *Att. Gen. v. Jonathan Cape Ltd*., per Lord Widgery C.J. at p. 769). Equity has always been part of the common law of Scotland, and our law is not so sterile as to be incapable of providing a remedy to prevent the publication of information which the court is satisfied will be prejudicial to national security.[187]

2-77. It is not necessary to consider his Lordship's meaning when discussing the English approach. What is important is how the opinion interprets the rule of English chancery jurisprudence with a view to adoption, and then explains and justifies how that rule can be adopted or replicated by the equity law of Scotland. When adopting a rule which is equitable in England it is apposite to assert that Scotland has a form of equity, and, more interesting, that that equity is not 'so sterile as to be incapable of providing a remedy'.[188] This is a fine example of when the judiciary might be open to borrowing an equitable rule from English law, and how it might be justified by reference to an apparently dynamic and vibrant understanding of Scottish equity.[189]

2-78. Another important aspect of the modern idea of equity that is, at the least, consistent with English chancery reasoning, is the idea that equitable 'rights' can be more limited in the way in which they can be exercised. Absolute rights such as those conferred by contract or by a property interest do not require the claimant to act in any particular way, and are not ordinarily amenable to judicial discretion. This is not so as regards a claimant seeking to assert an equitable interest. An example of this feature of equitable rights can be seen in relation to unjustified enrichment, where, due to the frequently asserted 'equitable' nature of an enrichment action, it is a matter of some controversy to what extent the claim is discretionary.[190] This distinction between an equitable right and an absolute right is brought out in an opinion of Lord President Hope dealing with division and sale, in a passage pregnant with connotations of maxims of equity:

> That the individual's right of action may be barred by contract is not in dispute in this case, and in my opinion there is no longer any room for doubt on this point. But if the correct view is that the right is an absolute one it must follow that it cannot be qualified by considerations of equity. The absolute nature of the remedy excludes any defence which is founded on such principles and which is therefore, in effect, at the discretion of the court. The pursuers' motive for its exercise is irrelevant, and questions as to whether it is fair or unfair in all the circumstances for it to be resorted to have no place. Nor, in my opinion, is there

[187] At 508 *per* Lord Dunpark.

[188] It might be that judges will acknowledge the ability to so recognise such a right but decline to do so: *Sharp v Thomson* 1995 SC 455 at 486 *per* Lord Sutherland.

[189] The Lord Ordinary was less impressed by such equitable argument: *Lord Advocate v The Scotsman Publications Ltd* at 498 *per* the Lord Ordinary (Coulsfield). In the House of Lords it was noted that the substance of the law of England and Scotland were the same, but that they may rest upon different juridical bases, though there is no elaboration beyond this: *Lord Advocate v The Scotsman Publications Ltd* 1989 SC (HL) 122 at 164 *per* Lord Keith of Kinkel.

[190] See chapter 3.

> room for questions of good or bad faith. It is well settled that a person who seeks to invoke an equitable doctrine such as that of recompense cannot do so if he is in bad faith. As Lord Cameron said in *Trade Development Bank v. Warriner & Mason (Scotland) Ltd.* 1980 S.C. 74 at p. 104, 'Equity requires good faith on the part of him who invokes it.' But if the right is absolute, such as a right acquired by contract, it can be exercised at any time without question at the pleasure of the party in whom it is vested and he can insist that it should receive effect.[191]

2-79. This passage highlights the idea that there is, to some extent at least, an intellectual separation between absolute rights and equitable 'rights'. This is a recognition of an intellectual distinctiveness and duality at some level,[192] and has at least some affinity with the approach of English chancery law: there are two types or classifications of rules which generate distinct rights which have different standards for their exercise and enforcement.[193] Those rights and rules which are of an equitable nature or heritage are subject to limitations akin to English law's maxims of equity, which appear to be similarly directed at ideas of conscionability. There are many areas of law which can be said to rest upon equitable principles, and, as demonstrated by the tenor of the opinion in *Lord Advocate v The Scotsman*, there may be more examples of equitable rights in the future. If the judiciary recognise a new equitable right (by borrowing or otherwise) or innovate upon an existing equitable rule, then, whether it is characterised as judicial legislation or not, they also ensure that it will be characterised as equitable and so subject to greater judicial discretion and oversight than would be the case with an absolute right. Accordingly, the judiciary are not only the ultimate arbiters of recognising a new or innovative equitable right, but they would also retain discretion and control over the features and development of any such right.

(3) The Nobile Officium[194]

2-80. The previous discussion in this chapter dealt with the ordinary equitable jurisdiction of the Court of Session. It is, however, important to note that beyond the substantive equity present within Scots law, there is also an inherent power vested within the Court of Session to provide procedural remedies and relief. This power is known as the *nobile officium*. The *nobile officium*, or the 'noble office' of the Court of Session, is the

[191] *Upper Crathes Fishings Ltd v Bailey's Exrs* 1991 SC 30 at 37 *per* the Lord President (Hope).

[192] See e.g. the statement 'In Scotland, the courts administer an equitable as well as a common law jurisdiction without having two branches of jurisdiction. There is no freestanding equitable jurisdiction to render unenforceable as penalties stipulations operative as a result of events which do not entail a breach of contract. Such an innovation would, if desirable, require legislation': *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, [2015] 3 WLR 1373 at para 242 *per* Lord Hodge JSC; see also at para 252.

[193] See also the idea of the 'intervention' of equity: *The Advice Centre for Mortgages Ltd v McNicoll* [2006] CSOH 58, 2006 SLT 591 at para 45 *per* the Lord Ordinary (Drummond Young).

[194] See now S Thomson, *The Nobile Officium* (2015).

extraordinary equitable jurisdiction[195] vested in the court. It is a specialised branch of the equitable jurisdiction, and is mainly procedural in its approach.[196] The collegiate nature of the Court of Session meant that the power was originally exercised by the Court as a whole, and was not competent to an individual member[197] of the Court.[198] When the court ceased to sit *en banc* the power was exercised solely by the Inner House, though statute later made certain aspects competent to the Outer House.[199] It is also said that the *nobile officium* will not be used in a manner which contradicts an Act of Parliament.[200] The precise parameters of the extent of the *nobile officium* are difficult to set out. It seems reasonably clear that the judiciary consider it to represent a mainly procedural device, that is to say, it is there to provide relief from the want of some obviously required legal mechanism.

E. CONCLUSIONS

2-81. Equity in Scots law is somewhat opaque, partly because there are multiple senses in which the term is used. It is clear that equitable rules have a place in Scottish law, and furthermore that they are intellectually distinguished from absolute rules of law. What is less clear is to what extent new equitable remedies, or indeed rights, will be recognised by the courts. The dynamism and effectiveness of equity as a current source of law is not clearly defined, and it may be that the way in which the term equity is used is a convenient retrospective justification for on-the-spot judicial law-making. There is clearly potential for judicial activism (if there was the appetite for it, which is far from clear) or development of the law,[201] perhaps on the basis of overt or covert policy lines, below the cloak of equity. Any cloaking effect would be all the more effective due to the somewhat will-o'-the-wisp nature of Scottish equity, at least in modern times. The influence of different sources and systems means that the traditionally natural law approach of the institutional writers was later augmented by elements of

[195] This is distinguished from the ordinary equitable jurisdiction of the court: *O'Connor v Erskine* (1905) 13 SLT 531, (1906) 22 Sh Ct Rep 58. It has also been stated that it is sometimes unimportant to distinguish between the two, which is problematic: *Brown v Hamilton DC* 1983 SC (HL) 1 at 10 *per* the Lord Justice-Clerk (Wheatley) and at 25 *per* Lord Dunpark; *Angus's Exr v Batchan's Trs* 1949 SC 335 at 352 *per* Lord Mackay.

[196] *London & Clydeside Estates Ltd v Aberdeen DC* 1980 SC (HL) 1 at 45 *per* Lord Keith of Kinkel.

[197] An important exception to this was the Lord Ordinary on the Bills during vacation: *Barton v London Midland & Scottish Railway Co* 1932 SC 113 at 119–20 *per* Lord Ormidale.

[198] *MacTavish v Reid's Trs* (1904) 12 SLT 404 at 407 *per* the Lord Ordinary (Kyllachy).

[199] *Innes, Chambers & Co v T D McNeill & Son* 1917 1 SLT 89 at 91 *per* the Lord Ordinary (Anderson); *James Dunbar & Co v Scottish County Investment Co* 1920 SC 210 at 217 *per* Lord Salvesen; *Curran v Curran* 1957 SLT (Notes) 47; *Viscountess Ossington's Trs, Petrs* 1965 SC 410.

[200] *Pringle, Petr* 1991 SLT 330.

[201] Characterisations as one or the other will vary from person to person, and both terms are somewhat loaded.

English influence, partially as a result of Kames's work. In turn, equity can be seen to operate in different areas of law in different ways. Unjustified enrichment law was developed by reference to natural law, and is today an example of a 'native' equitable doctrine that still utilises equitable concepts. On the other hand, the trust seems to have developed, initially, as an obligation but later came to be influenced by English authorities for a time. Similarly, the relatively recent development of a generalised approach to fiduciary duties and the constructive trust has proceeded by reference to English equity and has resulted in the adoption of a number of its chancery devices. To the operation of equity and equitable rules in those different contexts we now turn.

3 Unjustified Enrichment

A. INTRODUCTION

3-01. That unjustified enrichment in Scots law has been the subject of considerable development in recent years is well known. The traditional

taxonomic approach to this area of law was characterised, perhaps somewhat simplistically,[1] as the 'three Rs' – restitution, repetition, and recompense. This structure has been the subject of dynamic recategorisation by academic writings and a number of important cases to the extent that it has been described as the 'Scottish Enrichment Revolution'.[2] Nevertheless, it remains unclear to what extent this 'revolution' has altered the substantive law underlying the conceptual recategorisation. This chapter sketches the development of the law of unjustified enrichment in Scots law, with particular reference to the importance of the 'equitable' reasoning which has traditionally been described as underpinning enrichment law.

3-02. In seeking to sketch this development of the law, the chapter outlines how the 'three Rs' approach was derived from Stair's categorisation of obediential obligations. Some historical narrative will be necessary, before setting out how the law has changed and the position today. The historical narrative begins by considering the development of restitution within the natural law tradition, beginning with the development of restitution as a juridical concept by Aquinas. Following a brief description of the Thomist approach, the chapter considers the role played by the Spanish scholastics in fusing this theologically driven approach with the civilian legal tradition, itself fused by the Justinianic compilers against the background of the famous maxim of Pomponius: *Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem*.[3] In turn, the interpretation of the scholastics by Grotius is considered, as is its potential influence upon Stair and his institutional account of restitution.

3-03. Thereafter, the substantive classification of obligations, set out by Stair, will be looked at with reference to his precursors. It will then be necessary to chart the development of Stair's foundational scheme by subsequent institutional writers, before examining the intellectual indolence which set in for a period after the institutional writers. Following on from this, twentieth-century literature will be examined closely to take account of the taxonomic and conceptual move towards reframing the law away from a structure based upon the traditional 'three Rs', and the seminal articles written by Peter Birks in the 1980s which set the scene for a fresh era of organisational innovation and development. The appearance of detailed scholarly monographs on enrichment law in the 1990s coincided with, and perhaps played a part in, the aforementioned 'enrichment revolution' which occurred in the late 1990s. The cases which formed the basis of the enrichment revolution are analysed against the background of the intellectual taxonomy it reordered and its subsequent interpretations in case law and writings, with

[1] See W D H Sellar, '*Shilliday v Smith*: Unjust Enrichment through the Looking Glass?' (2001) 5 Edin LR 80.

[2] N R Whitty, 'The Scottish Enrichment Revolution' (2001) 6 SLPQ 167.

[3] D.12.6.14: '[I]t is only in accordance with natural equity that no one should profit pecuniarily by the injury of another.' See also D.50.17.206: '*Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem*', which can be translated as 'It is but just, and in accordance with the Law of Nations that no one, by the commission of an injury, can be enriched at the expense of another.' Translations from S P Scott, *The Civil Law* (1932, vols IV and XI).

a particular focus on the importance attached to the concept of equity within these developments.

3-04. This chapter will ultimately endorse Dot Reid's suggestion[4] that the institutions of restitution, recompense, and repetition, which were first systematically expounded by Stair, were derived from the Spanish scholastics' interpretation of Thomist theory. These precursors formed the base from which Stair's analysis proceeded, but subsequent developments moved away from the approach taken by Stair and began to separate the treatment of the respective actions into different intellectual categories, and the overall scheme became confused, causing tension and ambiguity later. It will be argued that the natural law heritage of Scots law coupled with the emphasis upon Pomponius's maxim have been instrumental in the characterisation of unjustified enrichment in Scots law as 'equitable'.

B. THE THREE RS: HISTORICAL DEVELOPMENT

(1) Introduction

3-05. As is often the case in Scots law, the beginning of the enquiry will be Stair, and in particular his classification of the 'three Rs' within his categories of 'Obediential obligations'.[5] That is not to say that the idea of the 'three Rs' arrived suddenly in 1681. It is to say that Stair's work was the first reasoned attempt to fuse disparate sources and terms into a reasoned body of law with an express normative underpinning. Some terms and maxims relating to what we would today recognise as unjustified enrichment were present before Stair's work. Thus, for example, the maxim *nemo debet cum alterius jactura locupletari*[6] can be spotted in a thirteenth-century canon law case, which was heard before Papal Judges Delegate.[7] The collectors of 'Practicks' in Scotland, the precursors to the institutional writers, use the term 'restitution' with some frequency.[8] Therefore, it is clear that terms such as restitution were

[4] D Reid, 'Thomas Aquinas and Viscount Stair: the Influence of Scholastic Moral Theology on Stair's Account of Restitution and Recompense' (2008) 29 Journal of Legal History 189.

[5] MacQueen and Sellar 289. Stair divided his treatment of obligations according 'to the principle or original from whence they flow, as in obligations obediential, and by engagement, or natural and conventional': Stair I.3.2. Obediential obligations were thus 'put upon men by the will of God, not by their own will, and so are most part natural, as introduced by the law of nature, before any addition made thereto by engagement, and are such as we are bound to perform solely by our obedience to God': Stair I.3.3. Conventional obligations were constituted by the will, engagement or consent of men.

[6] Of course, it is a derivative of Pomponius's famous maxim: '*Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem*'; cf D.50.17.206. Hallebeek notes that the maxim also occurs in the Liber Sextus: V.12.48 *Locupletari non debet aliquis, cum alterius injuria vel jactura*. See Hallebeek 22 n 8.

[7] Lord Cooper, *Select Scottish Cases of the Thirteenth Century* (1944) Case No 62.

[8] G Dolezalek (ed), *Sinclair's Practicks* (1996) < http://www.uni-leipzig.de/~jurarom/scotland/dat/sinclair.htm> cases 101 & 407; Hope, *Practicks*; Balfour, *Practicks*. The terminology was also present as far back as the Regiam Majestatem: J E du Plessis, *Compulsion and Restitution* (2004) 25–33. See also D Reid, 'Thomas Aquinas and Viscount Stair' (n 4).

being used in the legal vocabulary of the day; what is less clear is whether they could be seen as obligations, real rights, or were even descriptive of remedies.[9]

3-06. In framing his synthesising work, Stair drew on a wide range of sources to forge a structured account of Scots law which was illuminated by civilian, canonical and native sources. The importance of natural law theories from Aquinas received by Stair, possibly via Grotius, from the Spanish scholastics is an area of some importance and will be examined before considering how Stair's account was developed by those who came after him. It now falls to examine Stair's synthesis of these collections to form a coherent *corpus iuris*, and to seek to understand what these terms came to mean later.

(2) Aquinas, Spanish Scholasticism and Grotius: Inspiration for Stair?

(a) Generally

3-07. It is intended to give a broad sketch of the influence of natural law thinking on private law, more particularly on the idea of 'restitution' in Scots private law. The enquiry will commence with a general introduction to natural law thinking. This will necessarily be a dynamic introduction, as the character of natural law has never been sedentary; rather, natural law represents an organic school of thought, which has evolved through time. Therefore, it will be necessary to provide some background about the earliest ideas of natural law, beginning, as is conventional, with Thomas Aquinas. Thereafter, there will be discussion of aspects of Spanish scholasticism, which in turn filters into later Northern European jurisprudence. The later Northern European jurisprudence is contemporaneous with the beginnings of serious Scottish legal scholarship. In this way, we may shed light on the normative underpinning of the private law doctrine of restitution, which utilises natural law reasoning and ideas about equity, while recognising, against this backdrop of equitable influence, there was no clear distinction drawn between modern categories of property and obligations.

(b) St Thomas Aquinas

3-08. Aquinas sought to adopt the rational reasoning which was manifested in Aristotelian philosophy and imbue it with a theological aspect.[10] The work was influenced by diverse sources, and to some extent had a legal quality, but it is also apparent that the legal aspect was not Aquinas's main purpose.[11] On the other hand, a theory pertaining to legal redress can be discerned from Aquinas's work.[12] In this regard there are clear potential

[9] It has been noted by Hallebeek that the 'idea of restitution governed the entire law of property and obligations': Hallebeek 5.

[10] A J Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction* (1997) 84–89.

[11] T Aquinas, *Summa Theologiae* (1966) vol 28, xxv.

[12] See Hallebeek 9–10.

implications for a study of restitution, since the nature of restitution is a means by which redress is sought against unjustified enrichment, or recovery of a thing by means of a *vindicatio*.

3-09. Taking these precepts, Aquinas built upon the Aristotelian approach by introducing a more juridical flavour, or at least using phrases more familiar to the lawyers of the time.[13] Aquinas follows Aristotle in saying that there are two forms of justice: on the one hand the interaction between individuals is concerned with commutative justice; on the other hand, distributive justice is concerned with the apportionment of shares to individuals from the common stock of society.[14] For present purposes we shall attempt to look at the approach to restitution taken by Aquinas. The overarching principle is inequality, or unevenness (*inaequalitas*) which triggers an obligation to dispense a patrimonial component to remedy the imbalance – this is the domain of commutative justice.[15]

3-10. This underlying idea creates a binary division of bases upon which an obligation to make restitution can be placed. The first situation is where a party has taken a *res* from the patrimony of another, which gives rise to a duty of restitution, irrespective of whether the taker has been, or remains, enriched. This is the restitution *ratione acceptionis*:[16] the duty to make restitution is triggered by the injurious action of acceptance or taking of the thing.[17] This requirement to provide restitution is derived from divine law and may be supplemented by penalties imposed by human law.[18] The second situation is more orientated towards the subsistence of the property of another in the patrimony of the person under the duty to give restitution. This may be termed restitution *ratione rei*, which differs from the *ratione acceptionis* insofar

[13] Hallebeek 11–12.

[14] Aquinas, *Summa Theologiæ* vol 37 2a2ae 61, I.

[15] Aquinas, *Summa Theologiæ* vol 37 2a2ae 62, I: '*Dicendum quod restituere nihil aliud esse videtur quam iterate aliquem statuere in possessionem vel dominium rei suæ; et ita in restitutione attenditur æqualitas justitiæ secundum recompensationem rei ad rem, quod pertinet ad justitiam commutativam.*' [To make restitution appears nothing else than to re-establish a person in possession of our dominion over a thing which is his. Consequently we mark there the equality or balance of justice according to the recompense of the thing for thing, which is the concern of commutative justice.] See Hallebeek 10–15.

[16] Hallebeek 13.

[17] Aquinas, *Summa Theologiæ* vol 37 2a2ae 62, 6. Hallebeek (at 13) summarises the position: 'Restitution *ratione rei* is based merely on the "having" of a certain thing which belongs to another (a fact). If so, there is an obligation to restore it as long as one has possession of it. Restitution *ratione acceptionis* is based merely on the "receiving" of a certain thing (an act). Having said this, Aquinas goes into several ways in which something can be received. He then distinguishes two different ways, namely against the owner's will or with the owner's consent. Receipt against the owner's will constitutes theft and robbery. In such cases there is an obligation to make restitution because of the possession of another's property (*ratione rei*) and also because of the taking of another's property (*ratione acceptionis*). The latter implies that even in cases where the thief had lost possession or was in no way benefited by the theft, restitution still has to be performed.'

[18] G Dolezalek, 'The Moral Theologians' Doctrine of Restitution and its Juridification in the Sixteenth and Seventeenth Centuries' 1992 Acta Juridica 104 at 111.

as the obligation to make restitution does not flow from the action which causes the inequality; rather it arises from the fact of holding the property itself.[19] Therefore, if the holder of a thing is aware that it is stolen,[20] has made a gain by receiving more than a contractually stipulated amount, or has retained something deposited with him without juridical cause, then he will be liable to the duty of restitution. The key idea is the simple statement, remarkably close to what appears in Stair later: restitution is 'nothing else but restoring someone to the possession or ownership of his goods'.[21]

(c) The Spanish Scholastics and Grotius[22]

3-11. The Thomist[23] description of restitution was taken up, and developed, by the Spanish scholastics who were responsible for much of the continued use of Aquinas. This description of restitution was a far cry from a developed understanding of an enrichment action, yet it represented a development from the individual instances which a classic civilian lawyer would have utilised in similar factual situations. Simplistically put, the civilian approach to an 'enrichment' situation would be to seek which nominate action would be prestable; this is to be contrasted with the canonical approach, based upon a moral transgression which is to be reversed by the broad theological idea of restitution.[24] The one looks to practically hammered-out actions, such as the *condictiones* and the *rei vindicatio*; the other, to the moral and religious commandment: thou shalt not steal. It was the Spanish scholastics[25] who attempted to fuse these two approaches together, which ultimately culminated in the approach taken by Grotius.[26]

[19] Aquinas, *Summa Theologiæ* vol 37 2a2ae 62, 6.

[20] Whether the holding of the goods is by the original thief, or by someone who knowingly received them as stolen: Dolezalek, 'The Moral Theologians' (n 18) 112.

[21] Aquinas, *Summa Theologiæ* vol 37 62, 1.

[22] Much of this section relies heavily upon the work of Feenstra and Hallebeek: R Feenstra, 'L'Influence de la Scolastique Espagnole sur Grotius en Droit Privé: Quelques Expériences Dans des Questions de Fond et de Forme, Concernant Notamment les Doctrines de l'Erreur et de l'Enrichissement Sans Cause' in R Feenstra, *Fata Iuris Romani* (1974); R Feenstra, 'Grotius' Doctrine of Unjust Enrichment as a Source of Obligation: Its Origin and Its Influence in Roman-Dutch Law' and J Hallebeek, 'Developments in Mediaeval Roman Law', both in E J H Schrage (ed), *Unjust Enrichment: the Comparative Legal History of the Law of Restitution* (1995), and J Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism*.

[23] Thomism is used here to refer broadly to the natural law and scholastic traditions that developed from the writings of Thomas Aquinas. The literature on Aquinas is massive, but for an introduction to his potential influence on later scholars and private law see, e.g.: J Gordley, 'The Moral Foundations of Private Law' (2002) 47 Am J of Juris 1.

[24] Hallebeek 45.

[25] The 'Spanish scholastics' refers to an influential group of scholars associated with the University of Salamanca whose Thomist-inspired interpretations of theology were infused with legal thinking and doctrine. The most important for present purposes are Francisco de Vitoria (1485–1546), Domingo de Soto (1494–1560), Luis de Molina (1535–1600) and Francisco Suarez (1548–1617).

[26] R Feenstra, 'Grotius' Doctrine of Unjust Enrichment' (n 22) 197 ff.

3-12. Therefore, the Spanish scholastics were confronted with the theological tradition of restitution on the one hand, while on the other, the civilian tradition contained disparate nominate actions and instruments which operated in similar factual areas.[27] The scholastics took Aquinas's two-fold formulation of restitution – *ratione acceptionis* and *ratione rei* – and used it as an organising principle into which they could repose institutions of the Roman law.[28] An important aspect of this process was to rationalise the tensions between the axiomatic approach to enrichment law that was taken by the two traditions – namely the broad theological imperative to return something, which was to be contrasted with the civilian demarcation between ownership and possession.[29] According to Hallebeek, the Spanish scholastics took these Roman concepts, blurred the distinction between obligation and real action for the return of a thing, and so created a broad and residual category of obligation which fed the scholastic concept of restitution – the prohibition against becoming unjustly enriched.[30]

3-13. These approaches directly influenced the achievement of Grotius in this area, which was to move towards a new idea of unjustified enrichment as an area of law generating obligations. This he did in his two leading texts, the *Inleidinge tot de Hollandsche Rechtsgeleerdheid* (1631),[31] and *De Jure Belli ac Pacis* (1625).[32] While the *De Jure Belli ac Pacis* was written later[33] and contains a more developed theory of natural law, the *Inleidinge* has a more in-depth account of unjust enrichment. So while on the one hand *De Jure* does talk about the natural law and the duty to return things which belong to others,[34] it is in the *Inleidinge* that we see the most nuanced approach. Therefore, in the *Inleidinge* one may observe scholastic influence, such as the dual organisation of obligations according to 'personal right, namely contract and inequality'.[35] This is followed by a new category of 'Obligation from Enrichment'[36] which resembles the modern idea of enrichment – that is derivation of an advantage without legal title, with equity given a prominent role. This can be seen in the following passage: 'This obligation comes nearest to the law of nature, for after the division of property amongst men, equity does not permit that one man should be enriched at another man's expense.'[37] This is, of course, a development on the idea of the Thomist-scholastic train of thought – the legally unjustified use of a thing may be held to violate commutative justice

[27] Hallebeek 50.

[28] Hallebeek 52.

[29] Hallebeek 81.

[30] Hallebeek 84–85.

[31] Grotius, *Jurisprudence*.

[32] Grotius, *De Jure*.

[33] *De Jure Belli ac Pacis* was published before the *Inleidinge*, but the *Inleidinge* was written some years before its eventual publication and before *De Jure Belli ac Pacis*: see e.g. J W Wessels, *History of the Roman-Dutch Law* (1908) 268–69.

[34] Grotius, *De Jure*, Prolegomena 8, 12.

[35] Grotius, *Jurisprudence*, vol I, III.1.9. See further Hallebeek 89–90; H Grotius, *The Introduction to Dutch Jurisprudence of Hugo Grotius* (AFS Maasdorp trans, 1903) Schorer's notes 304.

[36] Grotius, *Jurisprudence*, vol I, III.30.

[37] Grotius, *Jurisprudence*, vol I, III.30.3.

and promote inequality.[38] It is against this background that Stair's treatment must be considered.

(3) Stair: The Three Rs

(a) General

3-14. The classification of obligations by Stair, which owes a great deal to natural law,[39] takes a binary division at its highest point.[40] The division is made by virtue of the origin from which the obligations 'flow':[41] there are obligations which are obediential,[42] as distinct from those which are conventional or natural.[43]

3-15. In addition to this primary division of obligations, the category of obediential obligation is the subject of further division into the following categories: 'Restitution', 'Recompense' and 'Reparation'.[44] Broadly speaking, restitution[45] concerns the recovery of a certain *res* which is in the possession of another, whereas 'recompense'[46] can be used to recover an *incertum* or is available to recover a pecuniary sum for services rendered. The third category of 'reparation'[47] is the forerunner of the modern law of delictual liability and negligence, and as such protects against 'delinquences and damages'.

(b) Restitution

3-16. The category of restitution is of considerable interest, not solely as a matter of taxonomic classification but also as offering an insight into the understanding of the law of property, and obligations, at a time where differentiation was not clearly observed.[48] Furthermore, it is linked to Stair's broader view of equity, as the obligation is said to be a 'natural or obediential' obligation,[49] which for Stair can be directly equated with his understanding of the term 'equity'.[50] Thus, for Stair, the term 'restitution' appeared to apply broadly to what we would now call matters of property;[51] however, the

[38] J Gordley, 'The Principle against Unjustified Enrichment' in K Luig, H Schack, and H Wiedemann (eds), *Gedächtnisschrift für Alexander Lüderitz* (2000) 424.

[39] Stair I.3.3.

[40] Having rejected the Roman division: Stair I.3.2.

[41] Stair I.3.2.

[42] On the distinction between obediential and conventional obligations see above at n 5.

[43] Stair I.3.2.

[44] It is important to note here that the 'three Rs' approach of enrichment law which was alluded to earlier, and which will be considered again below, which grew out of this classification included 'repetition', a category which Stair did not himself use.

[45] Stair I.7.

[46] Stair I.8.

[47] Stair I.9.

[48] Stair I.7.2–15.

[49] Stair I.7.1.

[50] Stair I.1.18–19.

[51] R Evans-Jones, *Unjustified Enrichment* (2003) vol 1; K G C Reid, 'Unjustified Enrichment and Property Law' 1994 JR 167 at 168–70.

discussion is lightly laced with suggestions of enrichment-based obligations. Thus, Stair mentions the *condictiones* in the context of the failure of a 'cause' of transfer, and refutes Grotius's emphasis on quasi-contract.[52] It is not to be assumed, however, that the inclusion of *condictiones* in this context means Stair conceives of an unjust enrichment idea. The emphasis is firmly on the recovery of a person's thing from another, and smacks of Aquinas's restitution *ratione rei*.[53] The discussion of the *condictiones* is accorded only a small amount of space,[54] and its inclusion appears to be almost by way of analogy to show specific situations in which the Romans would allow restitution under these terms, and as such to exemplify how restitution would function. The fact that the *condictiones* – today associated with the idea of unjust enrichment – overlap with Thomist restitution *ratione rei* does not mean that Stair would recognise unjust enrichment as a component of his view of restitution.

3-17. The conflation of property and obligation under the general head of restitution is not peculiar to Stair as we have seen above.[55] It is within the historical canon law that the beginnings of a theory of restitution as a legal instrument are to be found. Looming large within this tradition is the work of Thomas Aquinas, which was then developed by later scholastic jurists. The core basis of restitution was religious, more particularly the Seventh Commandment: 'Thou shalt not steal.'[56] This was taken by theologians and used to suggest that patrimonial benefits received without due cause must be returned.[57] Thus, while Stair is the starting point in Scots law, it is requisite to a full understanding of his system to be at least aware of these influences. It is another question, which cannot be fully answered here, to pinpoint exactly which influences Stair adopted. It remains an open question whether Stair had sufficient understanding of Dutch to allow him direct access to Grotius's *Inleidinge*.[58] In any event, even if that were not so, it remains the case that he did have access to – and indeed used – *De Jure Belli ac Pacis*.[59]

[52] Stair I.7.2. The reference is to Grotius, *De Jure* I.2.10; the earlier *Inleidinge* (Grotius, *Jurisprudence*) does not utilise the quasi-contract approach. See generally P Birks and G Macleod, 'The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century before Blackstone' (1986) 6 OJLS 46.

[53] Stair I.7.1–6; Hallebeek 12–13.

[54] It is only in Stair I.7.7–9 that the *condictiones* appear.

[55] Dolezalek, 'The Moral Theologians' (n 18) 106.

[56] *Exodus* 20:15. See Dolezalek, 'The Moral Theologians' (n 18) 107; Hallebeek 21.

[57] Dolezalek, 'The Moral Theologians' (n 18) 106.

[58] See W M Gordon, 'Stair, Grotius and the Sources of Stair's Institutions' in J A Ankum, J E Spruit, and F B J Wubbe (eds), *Satura Roberto Feenstra: Sexagesimum Quintum Annum Aetatis Complenti Ab Alumnis Collegis Amicis Oblata* (1985) 571 (= W M Gordon, *Roman Law, Scots Law and Legal History* (2007) 255); R Feenstra and C J D Waal (eds), *Seventeenth Century Leyden Law Professors and their Influence on the Development of the Civil Law: A Study of Bronchorst, Vinnius and Voet* (1975) 84; A L M Wilson, 'Stair and the *Inleydinge* of Grotius' (2010) 14 Edin LR 259; A L M Wilson, *The Sources and method of the Institutions of the Law of Scotland by Sir James Dalrymple, 1st Viscount Stair, with specific reference to the law of obligations* (PhD, University of Edinburgh, 2011) 131 ff.

[59] Gordon, 'Stair, Grotius and the Sources of Stair's Institutions' (n 58).

3-18. Nonetheless, it is clear that Stair's treatment is not a straight copy of Grotius's work and ideas. The approach of Stair is arguably more conservative, and has a closer affinity to the later scholastics with their idea of restitution, rather than a new world of 'enrichment'. This view is also advanced by Hutton, who suggests that Stair was more permeable to the Spanish scholastics[60] than Grotius, and consulted them directly, as well as through Grotius.[61] An indication of this is brought out by the greater emphasis on biblical authority which pervades Stair's work,[62] and the normative underpinning of restitution as the 'command of God, and that obedience we owe thereto by the law written in our hearts'.[63]

3-19. Furthermore, the title on restitution contains a theological marker in the form of a reference to Deuteronomy: God commands one 'To bring again unto their brother that which went astray, and if he were not near, to keep it till he sought after it, and then restore it; and to do so with all things not lost by him.'[64] It is clear that Stair received inspiration from the line of thought stretching from Grotius and the scholastics, right back to Aquinas. What is less clear is exactly which sources were most heavily drawn upon and ultimately contributed to Stair's treatment of the subject. The important matter for present purposes is to see equitable principles being used as a macro-justification of the category of obediential obligation. This is because for Stair the duty to restore arose from the law of God, the natural law, which in time, and with the rise of a more secular perspective in the eighteenth and nineteenth centuries, came to be represented by the more acceptable term 'equitable'. It should also be emphasised that the idea of restitution at this stage is not as strongly flavoured with natural law and equity as recompense – this would come much later when the Rs were unified during the enrichment revolution.

(c) Recompense

3-20. Stair's definition of recompense is both simple and wide: 'The obligation of remuneration or recompense is that bond of the law of nature, obliging to do one good deed for another'.[65] In this context Stair discusses *negotiorum gestio*, the act of being enriched by another's means, and the *actio de in rem verso*.[66] The natural obligation of recompense is therefore another reference to Stair's approach to equity, and indeed he cites Pomponius's maxim '*Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem*.'[67] It appears strikingly

[60] Especially, Suárez, Vitoria, and Molina.

[61] G M Hutton, 'Stair Philosophical Precursors' in D M Walker (ed), *Stair Tercentenary Studies* (Stair Society vol 33, 1981) 87.

[62] Stair refers, at I.7.3, to a biblical conceptualisation of the duty of restitution in Deuteronomy 22:1–3.

[63] Stair I.7.1.

[64] Deuteronomy 22:1–3.

[65] Stair I.8.1.

[66] Stair I.8.6–7.

[67] Stair I.8.6; D 12.6.14.

similar to the Thomist idea of restitution *ratione acceptionis*,[68] which was characterised by the act of receiving, lawfully or otherwise.[69] The application to both the lawful and the unlawful appears to have led Stair to organise lawful aspects of *ratione acceptionis* under the head of recompense, while the unlawful are classified within reparation.

3-21. Thus, as regards recompense, the duty to do a good deed towards another is a natural obligation based upon some form of moral debt which the recipient incurs by accepting another's good deed. This illustrates the underlying idea of a distinction between restitution *ratione rei* and *acceptionis*, because for the former and Stair's restitution the mere fact one holds the thing triggers the obligation to make restitution, whereas, in the case of the latter and recompense, there is a need to accept the thing. Therefore, the acceptance, or obligation of gratitude, seems to correspond to the restitution *ratione acceptionis* approach – the obligation does not flow from the retention of a benefit but from the action of receiving a gift.

3-22. Stair's consideration of enrichment by another's means seems ostensibly to concern unjust enrichment; however, it is capable of sustaining a different reading.[70] The section does talk of enrichment, but this is not conclusive beyond the weight of linguistic affinity. The key is the meaning of the idea that one should not profit from another's loss. While it is tempting to say that this means the section is talking about an unjust quality to an enrichment received, it is better to see the discussion as viewing the act of acceptance as morally unjust, and hence as giving rise to the obligation of recompense:

> The other obligation of recompense is for that whereby we are enriched by another's means, without purpose of donation, which is only presumed in few cases...This remuneration is a most natural obligation; as Cicero *l. 3, de officiis*, saith, 'That it is against nature for a man upon another's damage to increase his profit;' and again, 'Justice suffers not, that with the spoil of others we should augment our own riches;' and therefore, this is a common exception in all positive laws, that every one should be liable *in quantum locupletior factus est*.[71]

3-23. Therefore, where someone is enriched without donative intent, Stair's emphasis is not on the lack of legal cause being unjust, as in modern enrichment law, but rather on the act of accepting as unjust and contrary to nature. This is borne out by examples concerning pupils and minors. It has been shown that in Roman law contracts undertaken by minors were not

[68] Hallebeek 13.

[69] As opposed to restitution *ratione rei* which arose by the mere having of a thing: Hallebeek 12.

[70] Stair I.8.6.

[71] Stair I.8.6. The fact that these maxims were in general currency can be exemplified by the arguments of a case reported by Stair: '[the decision] is not to be decided by any subtility of the civil Roman law, but according to equity and reason, the common law of mankind, whereof these are two clear rules; *nemo debet lucrari ex alterius damno*; and in mutual onerous contracts the interpretation is to be made so, that both parties' interests should be equal': *Barclay v Liddel* (1671) Mor 16591 at 16592.

void but 'limping':[72] that is, the minor could sue on the contract, but the other party could not, so that recovery was required. Stair also explains that pupils and minors are said to be unable to oblige themselves by contract, but by 'receiving' that which is another's they are liable to recompense.[73] The consent of the other party has been given, and in that sense the transfer is not unjust or lacking legal cause; however, the acceptance of the benefit by the minor triggers an obligation to make recompense, not dissimilar to that of restitution *ratione acceptionis*. It is from these concepts that the forerunners of the idea of equitable liability, as the driver of unjustified enrichment, arise.

(d) Reparation

3-24. The third R which Stair deals with is reparation which appears to be readily traceable within the Thomist tradition, alongside restitution and recompense. The idea of restitution *ratione acceptionis* contained dual elements of receiving which were illicit or unlawful; indeed, as well as passively receiving them in nefarious ways, the doctrine extended to the taking of the goods as a violation of the Seventh Commandment.[74] Thus, one way in which an obligation to make restitution *ratione acceptionis* arose was where there had been acts which were contrary to the transferor's will.[75] This restitution under the canon law was prestable in the result of both loss of ownership and possession, with the *actio spolii*.[76]

3-25. Therefore, the final category of Thomist restitution, the delictually analogous aspect of restitution *ratione acceptionis*, appears to provide a neat basis for Stair's third, and final, limb of obediential obligations. The obligation is said to flow from the authority and will of God, and by the law of nature.[77] Delinquencies violate the law of God, and someone 'doing evil to his neighbour, and taking away from him that which is his, ought to repair to him, and to be liable to divine justice, which is that certification which God put upon his natural law'.[78] The aim of reparation is to impose 'the obligation of repairing his damage, putting him in as good a position as he was in before injury'.[79] That view of reparation need not, however, rest upon a conception based upon enrichment. There are two analytically distinct

[72] A Rodger, 'Recovering Payments under Void Contracts in Scots Law' in W Swadling and G Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (2000) 1.

[73] 'So pupils, though they cannot oblige themselves by contract, yet if they receive that which is another's, they are liable to recompence *in quantum locupletiores facti*, *l. sed mihi 3.ff commodati* [D.13,6,3], *l. 5. ff. de auct. tut.* [D.26,8,5]. Minors also, though by positive law they are not liable for what they borrow, and receive, and mispend, yet they are liable *in quantum locupletiores facti sint*': Stair I.8.6.

[74] Hallebeek 12–13 and 21–22.

[75] Hallebeek 15.

[76] Hallebeek 25–26.

[77] Stair I.9.1.

[78] Stair I.9.1.

[79] Stair I.9.2.

reasons for allowing delictual recovery: 'the pursuer has lost' and 'the defender should be liable'.[80] A similar distinction is made by Stair when he states that punishment, pain and penalty are a matter for God, and the commutative justice approach of recovery of loss is what is open to men.[81] In relation to damage to goods and possession, the reparation will be:

> …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 the most exact; or, where that cannot be, by giving the like value, or that which is nearest to make up the damage, according to the desire of the damnified. And if none be found fitter, reparation must be made in money, which is the common token of exchange and hath in it the value of every thing estimable.[82]

3-26. Therefore, there is a general action importing the right to recover a thing in the state it would be had the damage not occurred, or, failing that, there will be a monetary remedy given. As regards personal injury, since the concept of reparation is also predicated upon the idea of deprivation, the injury or death of someone is viewed from the perspective of the taking away or diminishing of something. Accordingly, the loss occasioned by the 'life of any being taken away' may result in the deceased's dependants receiving a remedy. These approaches are consistent with the manner in which later scholastics grouped delictual actions within the category of restitution *ratione acceptionis*.[83]

3-27. The next matter of interest is the possessory action of spuilzie contained within the section on reparation. The action arises if there has been a taking of a thing without the consent of the owner or of law.[84] Furthermore, to spuilzie a thing causes a *vitium reale* to attach, and allows the dispossessed[85] to recover from third parties.[86] The same principles apply to the equivalent actions relating to land, notably intrusion and ejection.[87]

(e) Restitution and Recompense: Why have both?

3-28. A question looms large from Stair's writings: what purpose is served by having two distinct heads under which modern notions of unjustified enrichment could be redressed? In many ways this is to ask an irrelevant question: Stair did not think in terms of a general idea of unjustified enrichment. What then did he envisage? MacQueen and Sellar see Stair's idea of recompense as a residual general action for unjustified enrichment, when a specific example of restitution is not in play.[88] Birks suggests that the

[80] See the account in J Gordley, *Foundations of Private Law* (2006) 183–84.
[81] Stair I.9.2.
[82] Stair I.9.4.
[83] Hallebeek 52–53.
[84] Hallebeek 15 and 25–26.
[85] Stair I.9.17.
[86] Stair I.9.16.
[87] Stair I.9.25.
[88] MacQueen and Sellar 289.

internal division rests upon the fact that restitution concerns goods, while recompense deals with services: 'a *facere* as opposed to a *dare*'.[89] This approach may be described as a 'benefits based' approach – the selection of the appropriate 'R' depends on the nature of the benefit received.[90] Evans-Jones, who takes a 'neo-civilian'[91] approach with a predilection towards a Germanic taxonomy,[92] is of opinion that the selection of the 'R' in question depends on the nature of the benefit conferred: is recovery of a *certum* or *incertum* sought?

3-29. The view advanced here is that Stair was following the Thomist line, and accordingly sought to classify the existing authorities in Scots law according to the Thomist scheme of restitution.[93] This scheme envisaged restitution being divided into two forms: restitution *ratione rei*, and restitution *ratione acceptionis*.[94] The *ratione rei* restitution depended solely on having the goods of another, which ties in with the treatment of restitution as being overwhelmingly concerned with the return of a thing possessed which belongs to another.[95] The idea of restitution *ratione acceptionis* is split into the dual heads of recompense and reparation, on the basis that the one concerns the reversal of an action which is legal, or at least not unlawful, whereas the other deals in delinquencies. In restitution the having of the thing generates the obligation, whereas with recompense there is a conscious decision to accept, or at least such a decision is attributed by law.

3-30. However, the inclusion of the *condictiones* as examples of when the obligation to make restitution, in the *ratione rei* sense, arose, coupled with the inclusion in the treatment of recompense of other civilian terms which later came to be seen as examples of unjust enrichment, left the way open for subsequent development. This proceeded by way of identifying the civilian enrichment elements of restitution and recompense, which in turn fostered the idea that these two 'Rs' concerned elements of an organising influence of unjust enrichment, itself grounded in a broad natural law equitable conceptualisation. The development of reparation appears to have taken a different path by virtue of the lack of the civilian enrichment terms, coupled with the distinction that factual events triggering reparation were positive wrongs, often illegal and involving the taking away of a thing, rather than merely having it, or retaining it in a morally unpalatable manner.

[89] P Birks, 'Six Questions in Search of a Subject – Unjust Enrichment in a Crisis of Identity' (1985) 30 JR 227 at 233–34.

[90] Birks (n 89) 235–37. See E M Clive, *Draft Rules on Unjustified Enrichment and Commentary* (1996).

[91] The same epithet is bestowed upon Whitty by Stewart: 'Niall Whitty's neo-civilian writing was singled out for special mention by the Lord President', in W J Stewart, *The Law of Restitution in Scotland: Supplement* (1995) 1 n 4. Stewart's early-Birksian (essentially unjust factor based) analysis was not so mentioned by the Lord President.

[92] R Evans-Jones, 'Unjustified Enrichment' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 2, 393.

[93] D Reid, 'Thomas Aquinas and Viscount Stair' (n 4).

[94] Hallebeek 12–13.

[95] Stair I.7.2.

(4) Post-Stair Development of the Three Rs

(a) Forbes

3-31. The published contribution made to Scots law by William Forbes is difficult to evaluate.[96] Forbes's *The Institutes of the Law of Scotland* (1722 and 1730)[97] is rarely referred to as an 'institutional' work.[98] On the other hand, it is important as a yardstick to measure the development of the form and substance of the law.

3-32. Forbes does not follow Stair in rejecting 'Quasi-Contract' as the foundation of liability.[99] The treatment is basic and unoriginal, possibly explaining one of the reasons that it 'slipped into obscurity'.[100] However, the content of the text is illuminating in some respects. It follows the previous conflations of natural law and equity: 'Natural obligations are those which flow from mere natural Equity'.[101] Quasi-contracts, writes Forbes, arise from the presumed consent of the parties, and the subsequent treatment gives descriptions of nominate actions such as the *condictio causa data causa non secuta*, *indebite solutum*, and various others.[102] In addition to this, Forbes mentions two actions for restitution, though not so called, which require the return of things – the first requires return if received for an unjust cause, the second for merely having the custody of something belonging to another.[103] While this division echoes the divisions of restitution, the treatment is not imbued with the broad equitable natural law basis found in Stair. Indeed, the treatment is classically Roman insofar as it consists of disparate nominate actions organised under the broad term of 'quasi-contract'. There is no approach based upon the scholastically interpreted natural law, nor is there any evidence of the recompense approach of Stair, or any broader enrichment action.[104]

(b) Bankton

3-33. The approach taken by Bankton is somewhat different in terms of underlying philosophy. In his general discussion of obligations he

[96] See J W Cairns, 'Origins of the Glasgow Law School: The Professors of civil law, 1714–61' in P Birks (ed), *The Life of the Law* (1991); H L MacQueen, 'Introduction' in Forbes.

[97] I have used the 2012 reprint produced by the Edinburgh Legal Education Trust in its Old Studies in Scots Law series in order to take advantage of its more useful pagination. Therefore all page references are to the modern pagination of that reprint.

[98] In addition to his *Institutes* Forbes also wrote the more substantial but unpublished *A Great Body of the Law of Scotland* which is now available online: http://www.forbes.gla.ac.uk/contents/.

[99] Forbes 211.

[100] H L MacQueen, 'Introduction' in Forbes v.

[101] Forbes 179.

[102] Forbes 212 ff.

[103] Forbes 212.

[104] Forbes's treatment of the subject (at 899) in the unpublished *A Great Body of the Law* appears conceptually similar to that set out in his *Institutes*: 'A Quasi-Contract is an improper obligation created by the presumed consent of two or more persons, arising from some fact or affair without any previous agreement or express consent' and such obligations are 'founded in Equity and the Law of Nature': http://www.forbes.gla.ac.uk/page/?id=forbes-3-0169.

distinguishes between civil and natural obligations; however, he does not retain Stair's distinction between conventional and obediential obligations. Importantly, he moves towards classifying matters which straddle restitution and recompense as matters of quasi-contract, presumably on the basis of civilian authority.[105] This is an important indication of how the future development of the law will take shape, since the categories carved out by Stair are now having their constituent parts organised by reference to a different and broader principle of classification – the distinction between civil and natural obligations.[106]

3-34. However, the practical structure of the three Rs survives, following Stair's classification, which may represent the beginning of internal tensions in the law. Restitution[107] remains ostensibly the same, though there are more examples which appear, possibly as a result of the development of increased trade, especially in maritime matters, and the attempt at comparison with English law, which is of course an avowed aim of Bankton's text. The Union with England also explains the inclusion of some new statutes, and may also explain the extended examples in restitution which are then compared with English equivalents.[108] Restitution also deals with the *condictiones*, following Stair.[109]

3-35. In Bankton's discussion of recompense the idea of gift is to the fore.[110] This represents a change of emphasis from Stair, though recompense remains explicitly a natural obligation. No longer are we concerned with one good deed for another; indeed, Bankton states that while a gift may trigger an obligation in nature, it will not be enforced at law.[111] It seems that the reciprocal moral duties of a Christian community are being replaced by the emerging commercial world, which has become too complicated to allow courts to begin to enquire into transactions.[112] Certainly Bankton objects to coercive enforcement of this natural obligation:

> There is nothing more praise-worthy, than a grateful sense of a gift in the receiver, evidenced by a remuneration, if the party is able. But, on the other hand, the giver cannot in law demand it; nor is it commendable to gift with such views: for a donation, with a prospect of an equivalent, is no gift in the intention of the giver, but rather the effect of a sordid mercenary disposition, which ought not to be encouraged. For this reason, and because, if complaints of ingratitude were indulged by law, all the tribunals of a nation would scarce be sufficient to determine them; the natural obligation to gratitude is not enforced by civil sanction.[113]

[105] Bankton I.4.25.
[106] Bankton I.8.1.
[107] Bankton I.8.1.
[108] Bankton I.8.1–24. Observations on the Law of England.
[109] Bankton I.8.21.
[110] Bankton I.9.1–2.
[111] Bankton I.9.1.
[112] Bankton I.9.1.
[113] Bankton I.9.1.

3-36. Here is a change of mindset. While for Stair it would be quite natural to expect to receive reciprocation of a good deed, it is now the case that such transfers are seen as gifts: in other words, the rise of more autonomous and liberal ideas means that binding someone by unilateral action is not in favour. Yet, some reciprocation is retained by way of the idea of a revocation of the gift, the discussion of which is heavily laced with Roman authority,[114] though revocation in Scots law is said to be dealt with by the 'rules of equity and natural reason'.[115] The changed philosophy makes a long narration of exceptions necessary.[116]

3-37. *Negotiorum gestio* is analysed by Bankton in much the same way as it had been by Stair, and it is classified as an example of quasi-contract.[117] What is different is that for Bankton it is one of a number of things coming under quasi-contract which permeate both restitution and recompense. This is brought out further by the discussion of recompense for gain made out of another's loss, described as a most natural obligation, where there is a reference to Pomponius's maxim.[118] The general rule is stated that:

> It is a most natural obligation that one should recompence another, so far as he hath profited by the other's loss...This will universally hold, where one hath gain by the deed of another, which was not intended for donation; it being an inviolable rule in law and in equity, that *Nemo debet locupletior fieri cum alterius jactura*.[119]

The examples given follow Stair's broadly, though there is more detailed discussion of imposed liability for improvements made to the enriched party's property.[120]

(c) Wallace

3-38. George Wallace was a contemporary of Bankton, but his contribution to Scots law is all but forgotten, let alone considered institutional. That contribution is primarily found in his work *A System of the Principles of the Law of Scotland*,[121] which was published in 1760. What is immediately apparent is the departure, like Forbes, from the idea of the three Rs, at least as the organising division of treatment. Further, in the general description of obligations there is no adoption of the dichotomy between conventional and

[114] Bankton I.9.4–6.

[115] Bankton I.9.4.

[116] Bankton I.9.7–23.

[117] Bankton I.9.24.

[118] Bankton I.9.41. The initial reference is to D.12.6.14 '*Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem*'; yet, later in the same section he refers to the maxim '*nemo debet locupletior fieri cum alterius jactura*' citing L. 306. *Ff. de reg juris*, which is a reference to D.50.17.206.

[119] Bankton I.9.41.

[120] Bankton I.9.42–43.

[121] Wallace, *Principles*. This was billed as the first of two volumes, but the second volume never appeared.

obediential obligations.[122] However, the scheme retains a closer fidelity to Stair in some ways than Bankton.

3-39. Thus, restitution is organised in such a manner that it retains its emphasis upon a supervening realisation that one must restore a thing to its owner.[123] The *condictiones* are entirely self-standing as relating to situations in which the things have been voluntarily transferred by the owner,[124] but there is no sense in which they are seen as organised on the basis of unjust enrichment. However, recompense has been noticeably affected by Bankton's new emphasis upon gift, and it is here substituted for donation.[125] Furthermore, the tone of the passage seems to confirm the idea that gifts should not command a legally enforceable counter-duty, by reference to the complexity of society. Finally, the increasing slide away of reparation can be discerned, since it is no longer given the prominence it received under Stair, nor is it wired to restitution. The discussion of spuilzie appears broadly similar, with the insertion of the maxim *spoliatus ante omnia est restituendus* and reassertion of the *vitium reale*.[126] The significance of Wallace's work is the continuance of Stair's essential scheme, based upon overarching natural obligations which are obediential. The treatment is in some ways more fragmentary,[127] and with differences in emphasis, and it certainly subsumes recompense within the idea of donation. However, most important is the central role accorded to the continuing idea that restitution is based upon natural law, and the use of the term equity is frequent:

> Besides, the obligation to make restitution, and the action which the law gives in order to get it, are founded on equity alone. By consequence restitution cannot be demanded in any of those cases, in which it would be iniquitous to get it. But it would be iniquitous, law therefore does not allow one to get restitution of any thing which he has paid, when he was bound by a natural obligation to pay it; for a natural obligation is one, which is founded on equity.[128]

(d) Erskine

3-40. Erskine's brief section on the obligation to make restitution is substantively similar to Stair's,[129] albeit that it lacks the normative underpinning, yet the terminology of obediential, or natural obligations is retained.[130] The treatment also contains a sprinkling of references to the

[122] Wallace, *Principles* §§ 149 ff.
[123] Wallace, *Principles* §§ 623 and 639.
[124] Wallace, *Principles* § 639.
[125] Wallace, *Principles* § 664 ff.
[126] Bankton I.10.126 and 130.
[127] Therefore, Pomponius's maxim from D.12.6.14 makes an appearance, but hidden away within the *negotiorum gestio* discussion, and there is little evidence of it being viewed as an organising principle: Wallace, *Principles* § 688.
[128] Wallace, *Principles* § 653.
[129] Erskine III.1.10.
[130] Erskine III.1.9.

condictiones, though they are grouped under a quasi-contract heading.[131] In defining recompense Erskine is also concise, and follows Stair closely, and does not adopt Bankton's emphasis on gift.[132] There is also something of a break with tradition in that *negotiorum gestio* and the *Lex Rhodia* are banished from the discussion.[133] Finally, reparation is explicitly said to constitute an obediential obligation.[134]

3-41. Overall, Erskine's treatment is close to Stair's, and has no trace of an idea of unjustified enrichment, though the acceptance of a quasi-contractual analysis alongside his discussion of obediential or natural obligations betrays an internal tension and inconsistency. The extremely brief and somewhat arid style serve to mask the scheme of Thomist influence underlying Stair, even though the substantive legal points made differ very little. This may be taken to illustrate the strength of the natural law school approach, and the idea of the law resting upon equitable principles – indeed restitution is said to be a natural obligation,[135] and recompense is said to be 'strongly founded in natural equity'.[136]

(e) Bell

3-42. The approach to the subject taken by Bell in the fourth edition of his *Principles of the Law of Scotland*,[137] the last he prepared himself, is to be distinguished from a new taxonomy imposed in the fifth edition edited by Shaw.[138] In the fourth edition Bell talks of obligations which are 'Independent of Convention',[139] echoing Stair's distinction between conventional and obediential obligations. In the general part, he distances himself from Roman categories, and instead refers to the actions of restitution, recompense, and reparation of injuries.[140]

3-43. The 'doctrine of restitution' is said to give an action against one in possession of the goods of another, or someone who has, as a result of error, received payment from another.[141] This is a continuation of previous definitions, though the emphasis on payments made in error is more pronounced than in earlier writers' works. Thereafter, there is discussion of specific aspects of restitution, such as cases of theft[142] and the exception for

[131] Erskine III.1.10 and III.3.51.
[132] Erskine III.1.11.
[133] Erskine III.1.11.
[134] Erskine III.1.12.
[135] Erskine III.1.10.
[136] Erskine III.1.11. See also the very equitable language surrounding the *indebiti solutio* at III.3.54.
[137] G J Bell, *Principles of the Law of Scotland* (4th edn, 1839).
[138] G J Bell, *Principles of the Law of Scotland* (5th edn, P Shaw ed, 1860).
[139] Bell, *Principles* 206.
[140] Bell, *Principles* § 525.
[141] Bell, *Principles* § 526.
[142] English influence is obvious, as Bell feels the need to dispose of the 'market overt rule' in Scots law: Bell, *Principles* § 527.

money,[143] the sale by a lawful possessor, and the failure of consideration reversed by analogy to the *condictio causa data causa non secuta*.[144] Next comes the *condictio indebiti*, which has now become important enough to merit its own section and heading.[145] Indeed, in the fifth edition of the work the *condictio indebiti* is removed from restitution altogether. Thus, where once stood § 531 '*Condictio Indebiti*', we now find § 531 'Repetition'. The substantive differences between the editions are almost non-existent, beyond a tiny number of more explicit headings and divisions in the paragraphs – the form changes, but the substance is unaltered.[146] The editor responsible for this change, Patrick Shaw, had carried out a similar change in his *A Treatise on the Law of Obligations and Contracts*[147] in 1847, and subsequently in his *Principles of the Law of Scotland contained in Lord Stair's Institutions*.[148] One is left with the impression of a sustained effort at taxonomical change on the part of Shaw, but the answer to the question whether these efforts were for reasons of organisation, conceptual innovation, or both, remains elusive.

3-44. For Dolezalek, Shaw's change is an attempt to imitate the *Code civil*'s *répétition de l'indu*.[149] For Evans-Jones, the new category of 'repetition' was to allow 'enrichment' cases to be extracted from the broad explanation of restitution.[150] Another possibility is that the number of cases on the *condictio indebiti* may have suggested that it ought to have its own category outside restitution, though it should also be borne in mind that the *condictio indebiti* is available for the return of things, as well as money.[151] There is also the fact that the term *repetitio* means a claim for repayment, and appears to be tied to the idea of money in some sources.[152] It may be that the reorganisation was intended to apply to cases involving the repayment of money, and failed to take account of the fact that the development of the *condictio indebiti* within restitution included more than money. The reason behind Shaw's editorial decision remains difficult to explain without speculating, especially given the lack of any substantial change in the treatment.[153]

[143] Bell, *Principles* § 528.

[144] Bell, *Principles* § 530.

[145] Bell, *Principles* § 531–37.

[146] G J Bell, *Principles of the Law of Scotland* (5th edn, P Shaw ed, 1860) §§ 531–37.

[147] P Shaw, *A Treatise on the Law of Obligations and Contracts* (1847) § 201.

[148] P Shaw, *Principles of the Law of Scotland contained in Lord Stair's Institutions* (1863).

[149] G Dolezalek: Unpublished paper given at a conference held on 11 March 1996 at the University of Aberdeen; cited in R Evans-Jones, 'Unjustified Enrichment' (n 92) 377.

[150] Evans-Jones, 'Unjustified Enrichment' (n 92) 377.

[151] A point that appears to be accepted in Scots law: Stair I.7.10; Bankton I.8.23; *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151 at 155H *per* the Lord President (Hope). Cf Erskine III.3.54; Hume, *Lectures*, vol III, 172; J E du Plessis, *Compulsion and Restitution* (Stair Society vol 51, 2004) 48–49.

[152] Hallebeek 24. In Scotland the term is used by Balfour to describe 'an actioun for repetitioun' in a situation which today we would look upon as one concerned with the *condictio causa data causa non secuta*: Balfour, *Practicks* vol I, 98. See also *Hay and Low v Williamson* (1780) Mor 2492 at 2492.

[153] Shaw also made changes to Bell's discussion of trusts in the sixth edition of his *Commentaries* – the treatment is rearranged, but the substantive text survives: G J Bell *Commentaries on the Law of Scotland* (6th edn, P Shaw ed, 1858).

3-45. With regard to recompense, in the fourth edition of the *Principles* Bell writes that 'Where one has gained by the lawful act of another, done without any intention of donation, he is bound to recompense or indemnify to the extent of the gain.'[154] Thereafter, Bell moves on to discuss meliorations by the *bona fide* possessor,[155] and the remuneration for services.[156] Also, the *negotiorum gestio* is included under the heading of recompense, before the *Lex Rhodia*.[157] The fifth edition is different, the general definition being subsumed under the head 'Meliorations'.[158] Furthermore, and importantly, the structure is changed again. *Negotiorum gestio* is plucked from the section headed recompense and given its own section,[159] although the substance of the treatment is unchanged. This suggests a breaking up of the three Rs idea, with a proliferation of more individual instances. Indeed, it seems unsurprising that the major changes of structure involve the two best-known individual instances, even if only one is renamed.

3-46. Furthermore, it is perhaps unsurprising that Bell's use of the terms 'equity' or 'equitable principles' is less central than in prior works, as by and large the sun had by then set upon the natural law tradition. Characterised by its practical answers to specific cases and concision in the expression of rules, Bell's work was written with a different object from that of some of his more philosophically-minded predecessors. However, that is not to say that residual aspects of the concept of equity did not endure. For example, we find within the discussion of the *condictio indebiti* the following observation: 'As restitution is grounded in equity, it has no place if the transference or payment have proceeded on a natural obligation; for that is binding in equity, as a bar, although it would not have grounded a demand at law.'[160]

(5) A General Principle against Unjustified Enrichment?

(a) Kames

3-47. Following the discussion of the development of the three Rs by the institutional writers, above, it is right to mention Kames's approach which, characteristically, is quite different. The main substance of his contribution is to be found in his *Principles of Equity*.[161] The discussion proceeds by reference to the role of equity in Scots law, and more precisely by reference to its role in protecting individuals from harm, and enforcing the natural duty of

[154] Bell, *Principles* 209.
[155] Bell, *Principles* § 538.
[156] Bell, *Principles* § 539.
[157] Bell, *Principles* § 540.
[158] Bell, *Principles* (5th edn) § 538.
[159] Bell, *Principles* (5th edn) § 540–41.
[160] Bell, *Principles* § 532. The passage remains unchanged through the fourth to tenth editions.
[161] Lord Kames, *Principles of Equity* (1760); *Principles of Equity* (2nd edn, 1767); *Principles of Equity* (3rd edn, 1778). References in the following footnotes will make use of all three editions to show the approach that emerged in 1760 while taking account of developments in Kames's thought.

benevolence. Reparation is dealt with under the heading of protecting the individual from harm: thus equity will first seek to enforce the reparation of stolen goods, and thereafter the restoration of the wronged party to the state prior to the offending act, if necessary by monetary reparation.[162]

3-48. This is followed by a discussion of the 'Natural Duty of Benevolence,'[163] which, it becomes apparent, is the territory traditionally occupied by recompense.[164] An interesting two-fold division is made between (1) allowing a gain by A to be used to make up the loss of B, and (2) when a non-gainer must make up the loss incurred by another.[165] With the natural duty of benevolence as an underlying basis, a further sub-division occurs within the category of a gain being used to ameliorate a loss. Thus, there are connections based upon personal relations[166] that will trigger such liability; on the other hand, in the absence of a personal connection, there is the maxim *quod nemo debet locupletari aliena jactura*.[167] As regards the latter, because the maxim is too broad to represent the law any liability will depend upon showing a very intimate relation of gain and loss, beyond that of normal commercial competition.[168] This leads to discussion of the *bona fide* possessor, and of the situation when someone by way of a 'fictitious' mandate may be liable to the person treated with, if a gain on behalf of the person so acting can be shown.[169] This, Kames observes, is similar to 'the action *de in rem verso*, the name of which we borrow from the Romans'.[170] There are also cases where a personal connection of some quality will make the loss–gain relation less important.[171] Put another way, because the *nemo debet locupletari* maxim alone is too broad it is necessary to show two interrelated types of connection: (1) a relevant legal connection between the individual receiving the gain and the person who has sustained the loss, and (2) a factual causal connection

[162] Kames, *Principles* (1760) 4–5; *Principles* (2nd edn) 77; Kames, *Principles* vol I, 95–96.

[163] The discussion of recompense under the head of 'Natural duty of Benevolence' harks back to Stair's discussion of 'one good deed for another': Stair I.8.1.

[164] Kames, *Principles* (1760) 9 ff; *Principles* (2nd edn) 83; Kames, *Principles* vol I, 108ff.

[165] Kames, *Principles* (1760) 20. In later editions Kames distinguishes between three situations: (1) where a loss is made up from someone's gain; (2) when someone 'who is not, properly speaking' a loser can partake of another's gain, and (3) where someone who is a loser can seek recompence from someone who has not made a gain: Kames, *Principles* (2nd edn) 95; Kames, *Principles* vol I, 137.

[166] Kames's understanding of the relevant 'connections' which naturally ground duties based upon benevolence is not precisely delimited, but it certainly encompasses blood relations and others with whom some form of personal or status relationship subsists: see Kames, *Principles* vol I, 8 ff.

[167] Kames, *Principles* (1760) 20–25; *Principles* (2nd edn) 95–97; Kames, *Principles* vol I, 137–40.

[168] Kames, *Principles* (1760) 25ff; *Principles* (2nd edn) 97ff; Kames, *Principles* vol I, 140ff.

[169] Kames, *Principles* (1760) 28; *Principles* (2nd edn) 100; Kames, *Principles* vol I, 147–48.

[170] Kames, *Principles* (1760) 29; *Principles* (2nd edn) 100; Kames, *Principles* vol I, 148.

[171] Kames, *Principles* (1760) 29. In later editions some of the cases where such a connection is important are discussed in the new section (see n 165) recognising that there can be situations where although there is no loss there might be recovery of a gain, which, as Kames notes, could not be covered by the *nemo debet locupletari aliena jactura* maxim because of the absence of a loss: *Principles* (2nd edn) 108; Kames, *Principles* vol I, 168ff.

between the gain and the loss. For example, a merchant who makes a gain because a competitor's goods are destroyed by an external force has no liability even though one might say that there is a factual causal connection between the loss and the gain: there is no relevant personal or legal connection between the two merchants. On the other hand, even when there is the closest of personal connections – Kames cites the relationship between parent and child in the abstract to make this point – the gainer will not be liable to make up the loss if there is no causal connection between the gain and the loss. But because the two are interrelated, it seems that Kames envisages a less strict requirement to demonstrate the factual causal connection between a gain and a loss in proportion to the strength of the personal relationship.

3-49. The other half of the sub-division is where a non-gainer is bound to repair another's loss.[172] This equitable relief is said to arise from civil law along the lines of an implied mandate or quasi-contract,[173] whereby the spender for another will have a good claim for 'retribution'.[174] Thus we are in territory akin to *negotiorum gestio*,[175] but that device is an example of a broader principle. If a recipient profits, then there may be recovery by way of the *nemo debet* maxim; if there is no profit, recovery may occur provided the outlay was for benefit of the recipient – because the spender should not bear the risk.[176] However, if there is a gain but the gestor does not act for the benefit of the recipient, there will be no action because a wrong cannot ground a claim in equity.[177] It is evident the category is wider than the traditional idea of *negotiorum gestio*: another example given by Kames is of the master of a ship ransoming cargo to a privateer.[178]

3-50. Kames's discussion of payment of another's debt changes in the different editions. In the first edition, Kames suggests that *condictio indebiti* is not available against the payee because the debt was extinguished but the payer can recover from the true debtor by virtue of the principle *quod nemo debet*

[172] Kames, *Principles* (1760) 34; *Principles* (2nd edn) 113; Kames, *Principles* vol I, 179. See the influence on Hume: Hume, *Lectures*, vol III, 175.

[173] Kames, *Principles* (1760) 35. It is important to note here that in later editions Kames was obviously aware of the difficulties with the quasi-contract analysis and inserted a lengthy footnote explaining that the civil law's use of such terminology explained its continued use, but that 'it seems a wide stretch in equity to give to a supposition the effects of a real contract; especially without any evidence that the person who undertakes the management [he is talking about the example of *negotiorum gestio*] would have been my choice. But I have endeavoured to make out in the text, that this claim for recompence has a solid foundation in justice, and in human nature, without necessity of recurring to the strained supposition of a contract': *Principles* (2nd edn) 115 n(a); Kames, *Principles* vol I, 182 n(a). Crucially, therefore, Kames is disclaiming an artificial quasi-contractual approach and setting the obligation up as distinct (as had Stair) from contract and notions of will or consent, instead resting the obligation upon principles of 'justice', 'utility', 'the moral sense' and 'human nature'.

[174] Kames, *Principles* (1760) 34; *Principles* (2nd edn) 114; Kames, *Principles* vol I, 180.

[175] Kames, *Principles* (1760) 35; *Principles* (2nd edn) 114; Kames, *Principles* vol I, 180.

[176] Kames, *Principles* (1760) 35; *Principles* (2nd edn) 114; Kames, *Principles* vol I, 180–81.

[177] Kames, *Principles* (1760) 35–36; *Principles* (2nd edn) 115; Kames, *Principles* vol I, 182–83.

[178] Kames, *Principles* (1760) 36; *Principles* (2nd edn) 115; Kames, *Principles* vol I, 184–85.

locupletari aliena jactura.[179] In the second edition, Kames states that the debt is not extinguished, and, consequently, the creditor holds the payment '*sine justa causa*', so that a *condictio indebiti* lies against him.[180] A further change introduced by the second edition is devoting a separate section to reparation in the general introduction,[181] where reparation is said to remedy crimes and wrongs, and appears to be moving further away from the other Rs.

3-51. Therefore, with the work of Kames we can see an important landmark as his *Principles of Equity* demonstrates the emergence of a generalised theory of unjustified enrichment,[182] though it was not so named. Crucial to this generalised theory was the conceptual foundation of an equitable concept of benevolence, which in turn facilitated the recovery of things, or the making good of losses incurred. That equitable concept can lay claim to be the first generalised theory of enrichment liability for Scots law. It is significant that it was conceived in a book about equity. Kames's general approach also utilised the *nemo debet* maxim while eschewing any quasi-contract basis, two important features which would be of importance in the later development of the law.

(b) Hume

3-52. The approach to the three Rs taken by Hume must be gleaned from his published lectures, delivered in the year 1821–22 in his last year as Professor of Scots law at the University of Edinburgh.[183] In previous years the lectures were not necessarily delivered in the exact order that they appear in the published version.[184] In Hume's treatment of obligations there are three important chapters – Chapter XIV 'Obligations ex Delicto'; Chapter XV 'Obligations Quasi ex Contractu', and finally Chapter XVI 'Obligations Quasi ex Delicto'. Ostensibly, the method of order is not based on the three Rs, but one can see the imprint of their influence. By this point reparation has been replaced by delict and quasi-delict, and restitution and recompense are included under the idea of quasi-contract. It also appears that the treatment owes much to both Stair and Kames.[185]

[179] Kames, *Principles* (1760) 92. See its use as the ground to recover a partially performed contract: *Principles* (2nd edn) 162. This is new, and reflects the move of the maxim out of recompense in Stair into broader categories.

[180] Kames, *Principles* (2nd edn) 144–45. See also the similar treatment in Kames, *Principles* vol I, 307–08, with the addition of something resembling a personal bar dimension in situations involving the insolvency of the true debtor (explained further in *Principles* vol I, 190–93). The change of approach to the payments of such debts introduced in the second edition may have been linked to the decision in *Moses v Macferlan* (1760) 2 Burr 1005, 97 ER 676 – see on the potential cross-fertilisation, MacQueen and Sellar 314–16.

[181] Kames, *Principles* (2nd edn) 25 ff.

[182] See MacQueen and Sellar 289 and 298ff.

[183] Hume, *Lectures*, vol III, v.

[184] Hume, *Lectures*, vol III, v–vi.

[185] Hume, *Lectures*, vol III, 179. See MacQueen and Sellar 299ff.

3-53. Dealing with obligations *quasi ex contractu*, Hume makes the fundamental move towards bringing restitution and recompense together by reference to an idea of enrichment, and indeed their equitable pedigree causes the obligations to be 'inferred against the obligant, either upon grounds of Equity in the case, or for expedient reasons,–reasons of public advantage and convenience'.[186] Therefore, a central place is given to the 'equitable' maxim *quod nemo debet locupletari aliena jactura* and it is explicitly said that Stair uses this duty to ground the 'natural duty of Restitution'.[187] The maxim is carefully refined by stating that the gain must not be merely incidental, and must flow from a loss sustained by the pursuer.[188]

3-54. Following this central role given to the equitable maxim of Pomponius, Hume uses the maxim as an organising principle. To that extent, the discussion of restitution, recompense, *negotiorum gestio*, the *lex Rhodia*, and the natural duty of benevolence are all tied to the maxim. The discussion of these separate areas of law seems to be an acknowledgement of the traditional institutional structure, which in turn allows Hume's student audience to see how the somewhat abstract maxim would operate in certain fact situations covered by a perhaps more familiar Scottish legal term such as 'restitution'. The key point, however, is that all these different terms represent individual instances of the broader concept embodied by the maxim *quod nemo debet locupletari aliena jactura*.

3-55. Accordingly, with Hume the emphasis is different from the traditional institutional scheme based upon different 'Rs', even if that tradition did refer to Pomponius's maxim. In Hume's approach, which owes much to that of Kames, we can see the broad maxim of Pomponius being used as an organising principle. In following the example set by Kames there is a definite increase in the emphasis placed upon the idea of the *nemo debet* maxim as underpinning the area generally. Furthermore, it is from this idea that a markedly equitable flavour begins to pervade this area of the law, with repeated emphasis on the idea of an equitable duty. This appears to represent the maturation of the latent equitable approach which gestated in the Thomistic tradition of Stair, and, by the time of Hume, had come to be refined and applied as a normative justification.

C. MOVING TOWARDS MODERN TAXONOMICAL APPROACHES

(1) *Cantiere San Rocco*

3-56. The dominance of the idea of the three Rs endured throughout the nineteenth century, and indeed for much of the twentieth century. The first treatment which commands attention is Trotter's *The Law of Contract in Scotland*

[186] Hume, *Lectures*, vol III, 165.

[187] Hume, *Lectures*, vol III, 165. Stair speaks of the maxim in relation to recompense only: I.8.6.

[188] Hume, *Lectures*, vol III, 166–68.

(1913),[189] where the relevant discussion occurs in the chapter on 'Quasi Contracts'. Trotter states that quasi-contract is Roman in origin, and that situations 'analogous to contract' are a source of obligation.[190] The main matter of importance is the inclusion under this head of *negotiorum gestio*, *indebiti solutio*,[191] restitution, recompense and general average.[192] Interestingly, we see one of the earliest mentions of unjust enrichment as an alternative description for recompense: 'recompense or the unjust enrichment of one person at another's expense'.[193] However, as regards the *condictio indebiti* there is no suggestion of unjust enrichment, nor is there with regard to restitution.[194] In a rather fragmentary definition, restitution is said to be available if a thing has been stolen,[195] 'obtained by mistake', or if there is 'total' failure of consideration (by way of the *condictio causa data causa non secuta*).[196] The discussion of recompense is of a 'general duty[197] to recompense another who has, without the intention of donation, conferred some gain upon him, provided the other party has sustained a loss or incurred expense'.[198] This comes close to the attention paid to this idea by Kames, and latterly Hume. Overall, Trotter's importance appears to lie in the tentative inclusion of the words 'unjust enrichment', though at this stage associated only with recompense.

3-57. An in-depth discussion of our subject appears in Gloag's *The Law of Contract*, the first edition of which was published in 1914.[199] The analysis proceeds along the traditional lines of the three Rs. Restitution and recompense are split up and, in the chapter on 'Onerous and Gratuitous Contracts', the *condictio causa data causa non secuta* is said to give rise to restitution in the event of failure of consideration.[200] There is also explicit adoption of the well-known dictum of Lord President Inglis in *Watson v Shankland*,[201] which is quoted at length. For present purposes, leaving aside

[189] Trotter.

[190] Trotter 378.

[191] This could be substituted with 'repetition' as that is essentially the matter discussed: Trotter 379–80.

[192] Trotter 378–82.

[193] Trotter 378.

[194] Trotter 380.

[195] It is given in terms of property law: Trotter 380.

[196] Trotter 380. Although it sounds like English law's contractual doctrine of consideration there is no citation of English authority.

[197] Based upon the *nemo debet locupletari ex aliena jactura* equitable doctrine: Trotter 381.

[198] Trotter 381.

[199] W M Gloag, *The Law of Contract* (1914).

[200] Gloag, *Contract* 70.

[201] 'There is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this – that if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance, on the ground of failure of consideration. In the Roman system the demand for repayment took the form of a *condictio causa data causa non secuta*, or a *condictio sine causa*, or a *condictio indebiti*, according to the particular circumstances. In our own practice these remedies are represented by the action of restitution and the action of

the much contested intricacies of the *condictio causa data causa non secuta*,[202] we may observe that Gloag adopts Lord President Inglis's statement that the *condictiones* of Roman law are represented in Scots law by restitution and repetition.[203] There is no mention of unjust enrichment. Gloag then deals with the *condictio indebiti*, again without reference to the idea of unjustified enrichment, and it is worth noting that no mention is made of *nemo debet locupletari aliena jactura* in the entire chapter.[204]

3-58. Of interest is the fact that restitution and repetition, with the *condictiones* as the Roman equivalents, are discussed in relation to 'Onerous and Gratuitous Contracts', where they are treated, when not concerning property,[205] as relating to unwinding contracts. Given that the subject of the book is contract this may be unsurprising. On the other hand, a chapter is devoted to 'Quasi-Contract and Implied Obligations' and discusses recompense and the *negotiorum gestio*. The definition of recompense by Bell is given, but then rejected as too broad, following *Edinburgh and District Tramways Co Ltd v Courtenay*;[206] therefore Gloag refers to Stair[207] and the *nemo debet* maxim itself.[208] Yet he is careful to say that the maxim is a general principle of equity, not a fixed rule of automatic operation if one can show a connection between gain and loss. The closest we get to the idea of unjust enrichment is when Gloag states that a claim of recompense will need to show that the defender has been 'enriched' – there is no prefix of unjust.[209] By this time the author is clearly pointing out that the normative justification which underpins the law in the area is a general principle of equity.

3-59. *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co*[210] developed the structure and doctrinal nature of the law insofar as the idea of unjustified

repetition. And in all systems of jurisprudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts.

'If a person contract to build me a house, and stipulate that I shall advance him a certain portion of the price before he begins to bring his materials to the ground, or to perform any part of the work, the money so advanced may certainly be recovered back if he never performs any part, or any available part, of his contract. No doubt, if he perform a part and then fail in completing the contract, I shall be bound in equity to allow him credit to the extent to which I am *lucratus* by his materials and labour, but no further; and if I am not *lucratus* at all, I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been': *Watson v Shankland* (1871) 10 M 142 at 152, affd (1872) 11 M (HL) 51.

[202] See *Stork Technical Services (RBG) Ltd v Ross's Exr* [2015] CSOH 10A, 2015 SLT 160 and the authorities and sources discussed by the Lord Ordinary (Tyre).

[203] *Watson v Shankland* (1871) 10 M 142 at 152–53, affd (1872) 11 M (HL) 51.

[204] Gloag, *Contract* 73–76.

[205] Gloag, *Contract* 248.

[206] *Edinburgh and District Tramways Co Ltd v Courtenay* 1909 SC 99.

[207] Stair I.8.3.

[208] Gloag, *Contract* 248–49.

[209] Gloag, *Contract* 270.

[210] The spelling of the parties in the case varies according to the law report: *Cantiare San Rocco v Clyde Shipbuilding Co* [1924] AC 226 and *Cantiere San Rocco v Clyde Shipbuilding Co* 1923 SC (HL) 105. As will be noted below, these are the least of the discrepancies between the reports.

enrichment was associated in some sense with the *condictiones*.[211] The facts were simple. The parties entered into an agreement for the sale of marine engines. The purchasers and pursuers, an Austrian firm, were to pay the price in instalments. The pursuers made the first payment, and the defenders drew plans and ordered material, but did not start work on the engines. Before work began the contract was frustrated due to the outbreak of war between Britain and the Austro-Hungarian Empire. The action, brought after the war, was to recover the payment made by the pursuers. The action was successful in the Outer House.[212] The Lord Ordinary (Hunter) distinguished the English coronation cases, and held that the pursuers should be able to recover in a detailed judgment. A majority in the Inner House held that the pursuers should not be able to recover since the payment had been made under a subsisting contract.[213] In his dissent Lord Mackenzie made a telling observation: 'My opinion is, however, based on this, that *condictio causa data causa non secuta* is but a particular example of the general rule of equity, that no one should be enriched without sufficient consideration.'[214] This was an early forerunner of the way in which the law would come to be understood later, as we shall see.

3-60. The case was appealed, and the House of Lords reversed the decision of the Inner House.[215] At this point one must proceed with caution, because the two sets of 'official' law reports differ markedly in their records of what was said, and, in turn, what the basis of the decision was. In Session Cases we are told that an action of 'repetition'[216] was prestable, whereas in Appeal Cases it is 'restitution'[217] which was relevant in a situation where there was a lack of counter-performance.

3-61. The arguments by the appellants' counsel (Condie Sandeman DF and Normand[218]) also differ according to the report read. In Appeal Cases it is recorded that restitution in Scots law is based on the maxim *nemo debet locupletior fieri damno alieno*,[219] whereas in Session Cases we hear nothing of the

[211] *Cantiere San Rocco v Clyde Shipbuilding Co* 1923 SC (HL) 105 at 117 *per* Lord Shaw of Dunfermline.

[212] The Lord Ordinary's judgment is included in the report of the Inner House decision: *Cantiere San Rocco v Clyde Shipbuilding Co* 1922 SC 723.

[213] At 732 *per* the Lord President (Clyde), at 738 *per* Lord Skerrington, and at 740 *per* Lord Cullen.

[214] At 737.

[215] *Cantiere San Rocco v Clyde Shipbuilding Co* 1923 SC (HL) 105.

[216] That is the term used, as opposed to restitution: 1923 SC (HL) 105 at 105.

[217] [1924] AC 226 at 228–29.

[218] Lord Rodger suggests that the argument in the case was in fact from the 'the scholarly Mr *Normand*': A Rodger, 'The Use of the Civil Law in Scottish Courts' in D L Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (1997) 227. Further, he suggests (at 228) that the citation of Roby by Lord Shaw of Dunfermline may have had more to do with political familiarity than inherent legal appropriateness.

[219] [1924] AC 226 at 228. While this maxim often appeared in the institutional writers' discussions of recompense, it seems not to be seen in connection with restitution. But see *Sinclair v Brougham* [1914] AC 398 at 431–35 *per* Lord Dunedin.

nemo debet argument, but the *condictio causa data causa non secuta* is mentioned.[220] This met with the reply from the respondents' counsel (Macmillan KC, MacKinnon KC,[221] and Macfarlane) that the case involved partial failure of consideration, and that the loss should lie where it fell.

3-62. The House, in coming to the decision that the pursuers should succeed, raises the idea of unjust enrichment and appears to proceed from the assumption of a Roman basis for the doctrine of restitution. After discussing Roman law, and the *condictio causa data causa non secuta*, Lord Shaw states unequivocally: 'The last clause[[222]] is also, in my view of the principle of the law of Scotland, correct. Unjust enrichment, i.e., enrichment by reason of the thing being received and the consideration and return failing – the principle of preventing that underlies as a reason the doctrine of restitution.'[223]

3-63. Therefore, at least by the time of this case, the *nemo debet* maxim is being used to justify the doctrine of restitution, which is probably not the justification envisaged by Stair. Further, the phrase 'unjust enrichment' appears for the first time in connection with the *condictiones*, which represents a further development towards differentiating the real and personal aspects of restitution. The apparent adoption of enrichment ideas in *Cantiere*, however, made little mark on the second edition of Gloag's *Contract*,[224] which appeared in 1929, and the treatment of restitution and repetition remains bereft of enrichment language.[225] The decision is noted in connection with the idea of failure of consideration, but beyond this the taxonomy remains unchanged.[226] Therefore, the idea of an organising enrichment principle or justification underlying restitution and the *condictiones* appears to stall after *Cantiere*.

3-64. To what extent the *Cantiere* case was beneficial for the development of the law is open to some doubt. Leaving aside questions as to the substantive legal decision,[227] the wider effect of the decision has been questioned.[228] While

[220] 1923 SC (HL) 105 at 107.

[221] Interestingly, MacKinnon KC was of the English bar, but by arrangement between counsel and with the consent of the House, he delivered the leading argument, which may explain why the arguments were weighted towards English law and authorities.

[222] The 'last clause' to which Lord Shaw refers is part of a sentence in Roby's work where he explains that liability to return something transferred for a purpose which has subsequently failed will not lie where the recipient 'has not, in fact, been enriched by the transfer'.

[223] 1923 SC (HL) 105 at 117; [1924] AC 226 at 252. The punctuation of this passage varies between the two reports – evidently the Session Cases' reporter preferred more commas.

[224] W M Gloag, *The Law of Contract* (2nd edn, 1929).

[225] Gloag, *Contract* 57–65.

[226] The second edition brings few changes to the taxonomic treatment of recompense, though there is a new section pointing out that it is subsidiary to contract, following the decision in *Boyd & Forrest v Glasgow and South-Western Railway* 1914 SC 472, revsd 1915 SC (HL) 20: *Contract* (2nd edn, 1929) 321.

[227] W W Buckland, '*Casus* and Frustration in Roman and Common Law' (1932–33) 66 Harv Law Rev 1281.

[228] N R Whitty, 'Rationality, Nationality and the Taxonomy of Unjustified Enrichment' in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 659.

the English experience in relation to failure of consideration was no doubt unfortunate,[229] *Cantiere* appears to have hampered Scots law due to a feeling of complacency or superiority. In turn, it is no exaggeration to say that following the *Cantiere* case, there was no further meaningful development of the law of unjustified enrichment[230] before Birks's articles in the 1980s.[231]

(2) Smith and Walker

3-65. The next treatise to be considered appeared some 30 years later in the form of T B Smith's *A Short Commentary on the Law of Scotland*.[232] The title which Smith assigns to the area is 'Obligations *Ex Lege*', within which he places 'Quasi-Contract' and 'Strict Liability without Personal Fault'. As regards quasi-contract, Smith is evidently unhappy with the nomenclature, as he quickly asserts: though similarity with contract exists in terms of performance, there is no consent involved, express or implied.[233] Interestingly, he details the 'principal heads' as restitution and recompense, thus spurning repetition. Key, however, is the centrality of equity to the treatment of both restitution and recompense. With regard to restitution Smith cites Erskine's view that it is a natural duty, and observes that the specialised category of restitution known as repetition rests upon equity.[234] A similar assertion is made with regard to recompense.[235]

[229] English law on the restoral of benefits following failure of consideration was characterised for a time by conflicting decisions, arguably because of the difficulties caused by the lack of developed law of restitution or unjust enrichment. The cases felt to be unsatisfactory were well-known decisions of the Court of Appeal: *Krell v Henry* [1903] 2 KB 740 and *Chandler v Webster* [1904] 1 KB 493. The dissatisfaction culminated in the overruling of *Chandler* by the House of Lords in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, followed shortly thereafter by the enactment of the Law Reform (Frustrated Contracts) Act 1943. See generally D J Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 284 ff.

[230] That is not to say that there were no cases in the period, just that they did not advance the intellectual classification or organisation of the substantive law, particularly in a way which recognised a general concept of 'unjustified enrichment'. One case of some importance was *Varney (Scotland) Ltd v Lanark Town Council* 1974 SC 245 which held that recompense – 'unjust(ified) enrichment' was not mentioned – was an action subordinated to any other legal claim, which betrays something of the historic dichotomy between natural and positive law: 'Recompense is an equitable doctrine. That being so, it becomes a sort of court of last resort, recourse to which can be had only when no other legal remedy is or has been available. If a legal remedy is available at the time when the action which gives rise to the claim for recompense has to be taken, then normally that legal remedy should be pursued to the exclusion of a claim for recompense' (at 252–53 *per* the Lord Justice-Clerk (Wheatley)).

[231] P Birks, 'Six Questions in Search of a Subject – Unjust Enrichment in a Crisis of Identity' (1985) 30 JR 227; P Birks, 'Restitution: A view of Scots Law' (1985) 38 CLP 57.

[232] T B Smith, *A Short Commentary on the Law of Scotland* (1962).

[233] Smith, *Short Commentary* 623.

[234] Smith, *Short Commentary* 626.

[235] Smith, *Short Commentary* 627.

3-66. Smith also takes notice of Dawson's work in elucidating the historical European development of the principle of unjust enrichment,[236] before making a characteristic call to arms, when he identifies the fund of ideas from the European development as 'part of the patrimony of Scots law as a civilian system, and must be drawn on further in the development of the Scots law of unjustified enrichment'.[237] This is something of a watershed moment, as Smith talks of unjustified enrichment in a unitary sense as the explanatory and organising idea for a separate part of the law of obligations; indeed, even the use of the term unjustified enrichment is significant. Smith also calls for greater attention to be paid to the *actio de in rem verso*, and for a move away from focusing on Pothier,[238] perhaps suggesting something of a move towards utilisation of the action *in rem verso* to retrieve and reinvigorate unjustified enrichment as was done in post-codification French law by way of the famous *Boudier* decision.[239]

3-67. Smith's account of restitution is traditional but with incisive analysis. The distinction between the property and obligatory aspects of restitution is drawn and made clear in terms of *jura in re* or *personam*.[240] The familiar examples of failure of consideration are given, as are the *condictiones*; however, repetition is classified as a 'special aspect of the obligation of restitution'.[241] Recompense is said to be equitable, and must involve the causal relation of loss and gain; furthermore, Smith is careful to distinguish between recompense and implied contract, and discusses the mirror distinction in recovery by *quantum meruit* or *lucratus*.[242] In some ways Smith stands aside from the crusade he advocates, because after he calls for a comprehensive study to allow the branch of law to become more systematic, he then reverts to the three Rs. As one might expect of Smith's treatment, the sense is of a cosmopolitan and outward-looking approach to enrichment law, coupled with a desire to see proper analysis brought to bear on the area, while all the while talking in terms of the 'equitable' nature of many of the component parts which make up his idea of unjustified enrichment.

3-68. A shorter period of time elapsed before the next significant contribution appeared, from David Walker. The remarkable published output of Walker, and the sheer longevity of his publishing career, mean that his thoughts are found in a number of works,[243] and usefully serve here as the last discussion of the law in this area before the new generation and the 'enrichment revolution'. In *Civil Remedies* Walker asserts from the outset that the chapter on 'Claims for Restitution' is concerned with unjustified enrichment: 'A claim

[236] Smith, *Short Commentary* 624. See J P Dawson, *Unjust Enrichment: A Comparative Analysis* (1951).

[237] Smith, *Short Commentary* 624.

[238] Smith, *Short Commentary* 624.

[239] *Patureau-Miran v Boudier* Cass Req, 15 June 1892 S.1893.1.28.

[240] Smith, *Short Commentary* 624–25.

[241] Smith, *Short Commentary* 626.

[242] Smith, *Short Commentary* 631.

[243] D M Walker, *The Law of Civil Remedies in Scotland* (1974); Walker, *Principles* vol II; D M Walker, *The Law of Contracts and Related Obligations in Scotland* (3rd edn, 1995).

for restitution arises where the law deems it just and equitable that one party should make some payment or transfer some thing to another because, if he is not required to do so, he will reap an unjustified benefit at the expense of the other, infringing the principle *nemo ex aliena jactura locupletior fieri debet*.'[244] Here we see an underlying principle of unjustified enrichment, identified as the *nemo ex aliena* maxim, and, once again, that this area of law is said to be 'equitable'. This explanation and organisation is reinforced by Walker's rather poetic identification of the foundations as lying not in contract, 'but solely on equity, on the unfairness and unreasonableness of allowing one person to reap the benefit of another's outlay or effort without liability to restore the balance'.[245]

3-69. Yet, significantly, Walker continues to make the familiar division between the three Rs, ostensibly on the basis that each is used to recover different benefits bestowed.[246] As regards restitution it is said that those in possession of a thing, without legal justification, must return it, which appears to identify the lack of legal basis as the test for when enrichment will be unjust.[247] To some extent there is overlap between criminal law and possessory remedies in the section; however, it can be difficult to mark clear boundaries between these areas.[248] Repetition is described as being solely concerned with money, and Walker's account is largely a discussion of the *condictio indebiti*, alongside a passing reference to the *condictio causa data causa non secuta*.[249] Recompense receives slightly unorthodox treatment,[250] in that much is made of the alleged fact that 'Error is essential to a successful claim of recompense.'[251] It was not entirely settled what the correct law was at the time Walker was writing,[252] and there was authority for Walker's argument.[253] The substantive elements of any recompense claim are said to

[244] Walker, *Civil Remedies* 285. See further Walker, *Principles* vol II, 503–04. Later, Walker adopted the term 'Unjust Enrichment' as the underlying principle: Walker, *Contracts* at para 35.1, but he moved the maxim to the section on Recompense: para 35.8. Many of these views can be traced even earlier to Walker's doctoral thesis: *Equity in Scots Law* (unpublished PhD Thesis University of Edinburgh 1952) 416–18.

[245] Walker, *Civil Remedies* (n 243) 285.

[246] Walker, *Civil Remedies* (n 243) 285.

[247] See *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1996 SC 331 at 348–49 *per* Lord Cullen, and *Shilliday v Smith* 1998 SC 725 at 727D *per* the Lord President (Rodger).

[248] See Walker, *Principles* vol II, 505–07; Walker, *Contracts* 585–86.

[249] Walker, *Civil Remedies* (n 243) 288–89; Walker, *Principles* vol II, 507–09.

[250] For essentially the same treatment, but more clearly structured; see Walker, *Principles* vol II, 509–13.

[251] Walker, *Civil Remedies* (n 243) 289, citing *Rankin v Wither* (1886) 13 R 903.

[252] The need for a demonstrable error with respect to recompense had been raised in *Varney (Scotland) Ltd v Lanark Town Council* 1974 SC 245, as had the significance of the related distinction between errors of fact and law, but the court was not required to reach a decision on either point.

[253] See also *Soues v Mill and Others* (1903) 11 SLT 98 at 100 *per* the Lord Ordinary (Kyllachy) and *Lawrence Building Co Ltd v Lanark County Council* 1978 SC 30 at 53 *per* Lord Cameron. It is probably now settled that error is not necessary: *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SC 151 at 170H–I *per* Lord Clyde.

lie in the fact that expenditure or outlays have caused a loss, which is directly correlative to the gain of another.[254] There is likewise mention of the subsidiarity of recompense to a functioning contract, and the distinction between *quantum meruit* and *lucratus*.[255]

3-70. The overall impression of the accounts given by Smith and Walker is that while they followed the traditional taxonomy, they were both conscious of the need for some development of the law in this area. Typically, Smith may be said to have been more flamboyant in his call for comparative insights and a civilian redraft, whereas Walker offered a detailed narration of the authorities along traditional lines, with incremental identification of underlying principles as they emerged. Neither approach quite achieved a breakthrough in advancing the classification of the various actions around a central concept of unjustified enrichment, but both, in their way, provided some academic precursors for that development.

(3) From Birks to Stewart: A Brave New World?

(a) Birks

3-71. The law of unjust enrichment was galvanised by two articles written by Peter Birks in the 1980s.[256] The articles did not attempt to state what Scots law was, or indeed should be; they did, however, have the effect of rekindling intellectual interest in an area which had been somewhat neglected. Birks sought, in his *Juridical Review* article, to pose six questions of importance for the future development of the law. It was also his aim to ensure that Scots law was aware that it had escaped the 'pernicious heresy' of equating unjustified enrichment with contract in some way – this, he argued, had been understood since Stair.[257] The context for these remarks was the publication of Walker's *The Law of Contracts and Related Obligations in Scotland*,[258] the title of which Birks was critical of: unjust enrichment, mislabelled as 'quasi-contract', ought not to be included in a book entitled contract, especially when it was not clear whether reparation for wrongs was to be discussed.[259] Characteristically, Birks was also concerned that the terminology being used should be appropriate: thus 'quasi-contract' was to be disposed of, as was 'restitution' when being used as an overarching organisational term for the area of law, in favour of unjustified enrichment. Birks's reasoning chimed in with a traditional viewpoint of the practice and structure of Scots law: that it was concerned in the first place with rights, not with remedies. The term

[254] Walker, *Civil Remedies* (n 243) 289; Walker, *Contracts* (n 243) at paras 35.8–35.11.

[255] Walker, *Civil Remedies* (n 243) 289–90.

[256] P Birks, 'Six Questions in Search of a Subject – Unjust Enrichment in a Crisis of Identity' (1985) 30 JR 227; and P Birks, 'Restitution: A view of Scots Law' (1985) 38 CLP 57.

[257] Birks, 'Six Questions' (n 256) 229. See also Birks, 'Restitution' (n 256) and P Birks and G Macleod, 'The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century before Blackstone' (1986) 6 OJLS 46.

[258] D M Walker, *The Law of Contracts and Related Obligations in Scotland* (2nd edn, 1985).

[259] Birks, 'Six Questions' (n 256) 228–30.

unjust enrichment refers to the event which triggers the right (analogous to contract or delict), whereas restitution concentrates on the content of the obligation triggered and is therefore more concerned with a remedy.[260]

3-72. As regards the internal division within the law of unjust enrichment between restitution and recompense, Birks was critical of the idea of recompense as a residual category of enrichment. The division should, he thought, be enunciated as the furnishing of *facere* (services) as opposed to a *dare* (thing). This is what is known as the benefits-based approach.[261] Birks was also critical of what he saw as the use of a mysterious shroud of Latin: 'the shortest way of cutting Scots law off from the forms of legal thought inherited from Roman law would be to present that intensely rational body of knowledge as though it were an inscrutable mystery.'[262] Therefore, redefining the law in the vernacular would be immensely helpful for clarity in its development.

3-73. Birks's stated purpose was to prevent unjust enrichment being dragged back into too cosy a juxtaposition with contract: 'The place for the law of unjust enrichment is not, as in so many English textbooks, in the last chapter of a work on contract. That miserable position is the legacy of "quasi-contract", one term of the civil law not worthy to have been received.'[263] Furthermore, Birks's influence upon Scottish law in this area was not confined to his works addressing Scottish law directly; his influential 'unjust factors' thesis (which he subsequently abandoned) heavily influenced the approach adopted in the first monograph on Scots enrichment law, by W J Stewart.[264] According to Birks's then theory the 'unjust' aspect of the law of unjust enrichment was represented by identifiable unjust factors – such as mistake, undue influence and compulsion.[265] Although he subsequently moved away from these views,[266] they remain influential and have been much discussed judicially and academically.[267]

(b) Stewart

3-74. The first book devoted entirely to the topic of unjustified enrichment in Scotland appeared in 1992, though the title of the book was, somewhat anglocentrically and following Walker, *The Law of Restitution in Scotland*. The

[260] Birks, 'Six Questions' (n 256) 232–33.
[261] Birks, 'Six Questions' (n 256) 234–35.
[262] Birks, 'Six Questions' (n 256) 239.
[263] Birks, 'Six Questions' (n 256) 252.
[264] Stewart, *Restitution*.
[265] P Birks, *An Introduction to the Law of Restitution* (1985, revd edn 1989).
[266] P Birks, *Unjust Enrichment* (2nd edn, 2005).
[267] See e.g. *Deutsche Morgan Grenfell Group plc v Inland Revenue Comrs* [2006] UKHL 49, [2007] 1 AC 558 at para 21 ff *per* Lord Hoffmann, and at para 97 *per* Lord Walker of Gestingthorpe; *FII Group Test Claimants v Revenue and Customs Comrs* [2012] UKSC 12, [2012] 2 AC 337 at para 81 *per* Lord Walker of Gestingthorpe; C Mitchell, P Mitchell and S Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment* (8th edn, 2011) at paras 1-01 ff and the authorities and sources cited there.

author was W J Stewart. Stewart's work was a pioneering one, and while there are those who disagree with his views, and the law seems to have developed along different intellectual paths, few would deny that by tackling the subject head-on for the first time his text has value. The structure of the monograph is somewhat conservative in that it follows the three Rs to some extent. Indeed, the overall structure is reminiscent of a Walkerian approach, for there is a 'General Part' which discusses the nature of 'Unjust'[268] and 'Enrichment'.[269] In some respects this 'General Part' serves to avoid some of the problems of the benefits-based approach.

3-75. The special part is essentially a continuation of the restitution/recompense distinction. Restitution is dealt with under the dual titles of 'Personal and Property Claims'[270] on the one hand, and 'Personal Claims: The *Condictiones*'[271] on the other. Thereafter, there is discussion of 'Recompense'.[272] Finally, the rear is brought up by chapters on '*Negotiorum Gestio*',[273] 'Miscellaneous Restitutionary Obligations',[274] and 'Prescription, Jurisdiction and Conflict of Laws'.[275]

3-76. Stewart's test is essentially an attempt to synthesise Scots law with an interpretation of the Birksian view of English law.[276] The separation between recompense and restitution is predicated upon the conferral of a *certum* or *incertum*,[277] while some aspects of Birks's unjust factors are moulded in such a way as to create more generalised grounds of action, within which the specific claims may be found. Therefore, the general part has a section on 'Mistake',[278] which in turn demonstrates the role of mistake as a unitary concept, as opposed to its micro-existence in repetition or recompense.[279]

3-77. One of the main objections to Stewart's scheme is its adherence to some anglocentric ideas of enrichment law which do not readily fit with the development of Scottish law, especially with regard to 'unjust factors'.[280]

[268] Stewart, *Restitution* 65–92.

[269] Stewart, *Restitution* 29–64.

[270] Stewart, *Restitution* 93–116. This chapter is in fact devoted to illustrating instances of property law, which are to be distinguished from his 'restitutionary' obligations.

[271] Stewart, *Restitution* 117–45.

[272] Stewart, *Restitution* 146–66.

[273] Stewart, *Restitution* 167–75.

[274] Stewart, *Restitution* 176–200.

[275] Stewart, *Restitution* 201–11.

[276] Of course, Birks subsequently moved away from such an analysis: cf Birks, *Restitution* (n 265) and Birks, *Enrichment* (n 266).

[277] Evans-Jones, 'Unjustified Enrichment' (n 92) 389.

[278] Stewart, *Restitution* 67–73.

[279] Evans-Jones, 'Unjustified Enrichment' (n 92) 390.

[280] E.g., see N R Whitty 'Some Trends and Issues in Scots Enrichment Law' (1994) 30 JR 125 at 132–34 where Whitty points out that Stewart holds 'anglicising, assimilationist' Birksian views, and further 'that Scots enrichment law cannot be spatchcocked into Professor Birks's taxonomy without undue and unnecessary distortion'. But cf P Birks, 'The Foundation of Legal Rationality in Scotland' in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995) 94 n 38; R Evans-Jones, 'Unjustified Enrichment' (n 92) 390–91.

There are potential problems with the idea of 'unjust factors' if one subscribes to the idea that Scots law's civilian roots lie in an equitable model of unjustified enrichment. The problem is essentially that Scots law works on the lack of legal cause model as opposed to the unjust factor approach. In other words, the emphasis is on the defender: what legal basis does the defender have to retain the benefit in question, rather than the alternative question, what has the pursuer done to warrant recovery?

(4) Revolution: The Holy Trinity of Cases[281]

(a) Morgan Guaranty

3-78. Following Birks's writings about Scottish and English law, Stewart's maiden foray into writing about the area, and developments in English cases,[282] there was considerably increased academic interest in unjustified enrichment. There was a great deal of academic activity in England too, which also affected Scots lawyers. It was almost inevitable that the chance to decide a leading case for Scotland would arise and, following the decision in *Hazell v Hammersmith and Fulham London Borough Council*,[283] the opportunity came in relation to a swaps agreement in *Morgan Guaranty Trust Company of New York v Lothian Regional Council*.[284]

3-79. The pursuer bank M and defender local council L entered into a 'swaps agreement', whereby certain moneys were to be exchanged on certain dates. The transfers were to reflect interest on a notional sum of money. Following the English decision in *Hazell v Hammersmith and Fulham LBC*,[285] where it was held that swap agreements were *ultra vires* of a local authority, payments under the agreement ceased. The pursuer bank raised an action for recovery of the sums paid to the defender on the basis of the *condictio indebiti*, and errors of law. The Lord Ordinary held that such sums were not recoverable, because an error of law in the interpretation of a statute could not provide the basis of the *condictio* following *Glasgow Corporation v Lord Advocate*[286] and *Taylor v Wilson's Trs*.[287] In the reclaiming motion, accepting that the agreement was *ultra vires*, it was argued that these cases were wrongly decided, insofar as they held that an error of law would not ground the *condictio indebiti*; and in the alternative, that an action for recompense would also be open to the bank.

[281] *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151; *Shilliday v Smith* 1998 SC 725, and, as something of a rubber-stamping exercise, *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90.

[282] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; *Woolwich Equitable Building Society v Inland Revenue Comrs* [1993] AC 70; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669; *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349.

[283] *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1. This case decided that a form of investment, a so-called 'swaps contract', which a number of local authorities had entered into, was *ultra vires* and therefore void.

[284] *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151.

[285] [1992] 2 AC 1.

[286] *Glasgow Corporation v Lord Advocate* 1959 SC 203.

[287] *Taylor v Wilson's Trs* 1974 SLT 298.

3-80. The court rejected the error of law rule comprehensively, relying upon a case of some antiquity.[288] Furthermore, the court clarified many aspects of the *condictio indebiti*, especially in relation to error. Of even greater importance was the broad-brush reasoning the court employed in arriving at its decision. The Lord President (Hope) sought to distinguish the claim for recompense from the *condictio indebiti*. In so doing a number of important taxonomical marks were set down, the most important of which was that restitution, repetition and recompense are all means to an end insofar as they reverse an unjustified enrichment, based upon the maxim *nemo debet locupletari aliena jactura*.[289] The different *condictiones* form grounds of action, while the particular 'R' in question is a remedy, selected on the basis of the nature of the thing sought – so a claim for money would be an action seeking the remedy of repetition.[290]

3-81. At this point mention should be made of another case of some importance which is often overlooked in the academic literature. This neglect is perhaps understandable given that the case was decided after *Morgan Guaranty*, but before *Shilliday*. In *Fife Scottish Omnibus Ltd v Tay Bridge Joint Board*[291] Lord Prosser said this:

> Against that background, I would only make certain broad comments. First, it can of course be said that the principle underlying all remedies for unjustified enrichment is one of equity or fairness. That is one reason why I would not wish to embark upon issues of taxonomy: I regard it as very improbable that there is any taxonomy of fairness; and if there is none, I find it hard to envisage a taxonomy of unjustified enrichment, or of remedies when it occurs. Secondly, however, that general point does not to my mind mean that in cases where a remedy is sought for allegedly unjustified enrichment, there are no known categories, or principles, or rules, or that everything becomes a matter of mere ad hoc discretion…In addition, however, fourthly, as a reflection of the fact that all remedies for unjustified enrichment have their roots in equity and fairness, it appears to me that in principle the courts will always be willing to consider specific averments of individual features of a given case, which are alleged by a defender to make it inequitable in that particular case (notwithstanding that it falls within a category of case which in general, as a matter of fairness, demands a remedy) for repayment or any similar remedy to be allowed.

3-82. In the aftermath of the *Morgan* case it is very interesting to see comments such as these being made, albeit *obiter*, in a decision of an Extra Division of the Inner House. The most important aspect for present purposes is the clear assertion at the very end of the twentieth century of the continuing importance of equity to the concept of unjustified enrichment. In addition to this, it seems clear that this view sees equity as more than an underlying justificatory factor or organising concept – it seems to assert that there is,

[288] *Stirling v Earl of Lauderdale* (1733) Mor 2930; *Morgan Guaranty Trust Company* (n 284) at 164 *per* the Lord President (Hope).

[289] At 155 *per* the Lord President (Hope).

[290] At 155 *per* the Lord President (Hope).

[291] *Fife Scottish Omnibus Ltd v Tay Bridge Joint Board* 1997 GWD 23-1180, available in full transcript at www.lexisnexis.com.

ultimately, a degree of discretion present in every case involving enrichment law.

(b) Shilliday

3-83. In *Shilliday v Smith*[292] the new taxonomical approach was fleshed out in an important opinion by Lord President Rodger. The pursuer and defender formed a romantic relationship, and lived together in a cottage owned by the pursuer. Thereafter, the defender purchased a house that required repair, and the question of marriage was discussed. The couple became engaged, and the pursuer made payments towards the repairs of the defender's house, presumably with the intention of making it the matrimonial home. In due course, the relationship came to an end. The pursuer sought to recover the payments made for materials and labour expended in the repair process.

3-84. In a closely reasoned decision Lord President Rodger identified two distinct claims at work.[293] His Lordship enunciated the following propositions: (1) the pursuer had made various advances in contemplation of the marriage, and these were to be valued as the cost of the materials and repairs; (2) the action was properly one of recompense, since the pursuer sought payment of a sum of money to reverse the enrichment of the defender at her expense, which was as a result of her paying for the repairs and materials;[294] (3) the second element of the claim was to reverse the payment by the pursuer to the defender of money, which he then used to pay for repairs, which fell to be seen as an action for repetition;[295] (4) both claims fell under the head of the *condictio causa data causa non secuta*;[296] (5) the basis for the reversal of any transfer was grounded in an obligation imposed by law, and there was accordingly no need to show a specific contract to which the transfer could be linked: it was sufficient that the sums were advanced in contemplation of a marriage which subsequently failed to materialise.[297]

3-85. At the outset of the opinion, the general principle of unjust enrichment is invoked as the underlying basis of the pursuer's case.[298] The principle is then adopted as that stated by Lord Cullen in an earlier case,[299] notably that:

> [A] person may be said to be unjustly enriched at another's expense when he has obtained a legal benefit from the other's acting or expenditure, without there

[292] *Shilliday v Smith* 1998 SC 725. See P Hellwege, 'Rationalising the Scottish law of Unjustified Enrichment' (2000) 11 *S*tellenbosch Law Review 50. This was described as 'by far the best commentary' on the case by Lord Rodger who gave the leading opinion in Shilliday: A Rodger 'Developing the Law Today; National and International Influences' [2002] Tydskrif vir die Suid-Afrikaanse reg 1, 5 n16.

[293] At 729B–C.

[294] At 728E–G and 729B.

[295] At 728H and 729B.

[296] At 728I.

[297] At 730C–D.

[298] At 727A–B.

[299] *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1996 SC 331 at 348–49 *per* Lord Cullen.

> being a legal ground which would justify him in retaining that benefit. The significance of one person being unjustly enriched at the expense of another is that in general terms it constitutes an event which triggers a right in that other person to have the enrichment reversed.[300]

3-86. If this formulation is not already a general enrichment action, it is at least a strong underlying principle. Furthermore, the Lord President's analysis talks in Birksian terms of the enrichment 'triggering' the right to have the enrichment reversed. In addition to this, the Lord President also states that the three Rs are remedies rather than actions, and that their division is benefits-based: 'So repetition, restitution, reduction and recompense are simply examples of remedies which the courts grant to reverse an unjust enrichment, depending on the way the particular enrichment has arisen'.[301] This is a departure of sorts, since it was traditionally understood that the Rs were actions or claims of some sort in their own right.[302] However, it appears that what has been fashioned is a workable taxonomy, which straddles the line between the Common Law and the civilian approaches.

3-87. Essentially, this is a move from the old taxonomy, which consisted of repetition (used to recover payments, and grounded on the *condictiones indebiti, sine causa, ob turpem vel iniustam causam, causa data causa non secuta,* and miscellaneous innominate claims); restitution (which was to recover things other than money, with the same underlying *condictiones*, and miscellaneous claims); and, finally, recompense, a generalised action incorporating the equitable maxim *nemo debet*, the *actio de in rem verso*, and other innominate claims, crucially not involving the *condictiones*.[303] The new order is different. At the highest point is the overarching principle against unjust enrichment, exemplified by the *nemo debet* maxim. The principle has been said not to be a general enrichment action, and could perhaps better be described as a not yet entirely drained reservoir out of which future *condictiones* or claims may emerge. The principle is also consistently said to be an equitable one, and, as we have seen, it seems that the judiciary consider this equitable character to be important in deciding cases.

3-88. Beneath the overarching principle are the *condictiones*. These, however, are not so much actions, as guiding labels for the factual content of an action which can be raised under the general principle. Thus they will inform the pleader to what extent there has been an example of unjustified enrichment. Therefore, to plead such a case the court in *Shilliday* stated that:

> [A]nyone contemplating bringing an action must then determine how the court is to reverse the defender's enrichment if it decides in the pursuer's favour.

[300] *Shilliday v Smith* at 727D.

[301] At 728B–C. This may impact upon other areas of law, for example what nomenclature is to be used in cases such as *Macleod v Kerr* 1965 SC 253 and *Morrisson v Robertson* 1908 SC 332.

[302] W D H Sellar, 'Shilliday v Smith: Unjust Enrichment through the Looking Glass?' (2006) 10 Edin LR 80.

[303] See Whitty, 'Rationality, Nationality and the Taxonomy of Unjustified Enrichment' (n 228) 685.

> This will depend on the particular circumstances. The person framing the pleadings must consider how the defender's enrichment has come about and then search among the usual range of remedies to find a remedy or combination of remedies which will achieve his purpose of having that enrichment reversed.[304]

3-89. Hand-in-hand with this view is the idea that the Rs are not actions but remedies awarded depending on the nature of the object sought in the action. Thus, the *condictiones* now apply to claims seeking restitution, repetition, recompense and, apparently, reduction.[305] Of course, before this, recompense was not involved with the *condictiones*. Now they represent the guiding factual situations, which raises the interesting question whether there will be new ones. It seems likely that there will indeed be new factual claims for unjust enrichment to be addressed outwith the existing nominate *condictiones*. What is far less likely is that they will be framed in Latin as a '*condictio*' especially when it would seem that the *condictio sine causa* has the potential to cover all situations that a general principle would admit. This being the case, is the *condictio sine causa* really a general enrichment action within a general principle against unjust enrichment? Possibly.[306] The development of the law around that question is awaited.

3-90. For D P Visser:

> *Shilliday v Smith* shows…that it is possible to fashion a classificatory system, which is capable of bridging the civilian and Common Law approaches. The message that it sends is that, when confronted with systems as different as the English

[304] *Shilliday v Smith* 1998 SC 725 at 727 *per* the Lord President (Rodger).

[305] The appearance of this fourth 'R' appears in Lord Rodger's judgment in *Shilliday v Smith* at 727–28. It applies, for example, to cases where there is an unjustified transfer of heritable property, which has passed ownership by registration. In this situation, it will be necessary to have the defender's title reduced to reverse the enrichment: see *McSorley v Drennan* [2012] CSIH 59, 2013 SLT 505 at para 12. The fact that a number of possible remedies beyond the traditional 'Rs' can be used to reverse unjust enrichment can be seen from an extract from an Outer House decision: 'There is in my opinion no reason in principle why the unjustified enrichment consequent upon the retention and misappropriation of the cheque for £285,000 might not be reversed by an order for conveyance of the property which was bought with the proceeds of the cheque. In a market with rapid inflation in property prices there might indeed be good reason favourably to consider such a remedy and I would not regard the circumstance that the defenders chose to borrow on security of the property, applying the borrowing to the purchase price and using the balance of the proceeds of the cheque for other purposes as necessarily preventing such a course being followed. On the other hand, where, as here, the initial enrichment was the result of the appropriation of a sum of money I think one must find some good reason (beyond the likely insolvency of the defenders) for reversing the enrichment other than by ordering a payment of money': *McGraddie v McGraddie* [2010] CSOH 60, 2010 GWD 21-404 at para 10 *per* the Lord Ordinary (Brodie). The Inner House allowed a reclaiming motion in *McGraddie*, but the Lord Ordinary's decision on unjust enrichment was undisturbed: [2012] CSIH 23, 2012 GWD 15-310 at paras 54 ff; the UK Supreme Court then allowed an appeal against the decision of the Inner House, and the Lord Ordinary's conclusions about unjustified enrichment and remedies were not criticised: [2013] UKSC 58, 2014 SC (UKSC) 12.

[306] See, e.g., the tenor of the comments in *Mactaggart & Mickel Homes Ltd v Hunter* [2010] CSOH 130, 2010 GWD 33-683 at para 99 *per* the Lord Ordinary (Hodge).

unjust factor[307] approach and the German Wilburg/von Caemerer taxonomy, one does not have to choose either one, but may take a third way.[308]

Is that correct? It certainly seems so. A very basic summary is this: while Scots law follows the somewhat dry and abstract idea of lack of a legal basis as the underlying general principle, it has retained the *condictiones* as factual markers, not dissimilar to unjust factors, which can be better understood. In this way is some form of happy medium reached? Purists on both sides would probably object. The neo-civilian would point out that such an approach leaves sleeper agents in the fabric of the law, such as the requirement for error in the *condictio indebiti*. This will form a juridical vortex which will slowly drag Scots law into the idea of unjust factors.[309] The fan of the unjust factor may reply that the *condictio sine causa* is really a Trojan horse for an abstract theory of enrichment without legal basis, dressed up as an unjust factor.

(c) Dollar Land

3-91. Whatever the true import of the decision in *Shilliday*, the Lord President's approach was confirmed in the House of Lords in *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd*.[310] There the taxonomical basis put in place by Lord Rodger received judicial approval, and, furthermore, emphasis was placed on the idea of a unitary approach to enrichment. This unitary approach was used to banish the idea of a benefits-based approach to enrichment: Lord Hope placed the idea of a unified approach to enrichment law firmly at the centre of the future development of the law. The benefits-based approach was the subject of criticism, and the maxim *nemo debet locupletari aliena jactura* was made the primary ground of action.[311] Following this last of the trinity of cases, it now falls to consider to what extent these changes have been adopted by scholars and later cases. To what extent, and in what manner, has this rebranded equity been adopted by text-writers and subsequent case law?

D. POST-REVOLUTION

3-92. The dust has begun to settle after the 'revolution' in the taxonomy of unjustified enrichment. Academic reception of the reorganisation has been

[307] It should of course be noted that unjust factors do not command universal support, and there is at least a question mark over how long they will survive as a basis for the development of the law.

[308] Unpublished paper, quoted in N R Whitty, 'The Scottish Enrichment Revolution' (2001) 6 SLPQ 167 at 185.

[309] See Whitty, 'Rationality, Nationality and the Taxonomy of Unjustified Enrichment' (n 228) 698–99.

[310] *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90 at 98–99 *per* Lord Hope of Craighead.

[311] At 98 *per* Lord Hope of Craighead.

positive domestically and from commentators in other jurisdictions. The judiciary have also appeared keen to embrace the new orthodoxy,[312] while at the same time acknowledging that the law remains in a state of development.[313] However, within this apparently happy consensus there remain fault lines, many of which open across the idea of equity, and its importance to the concept of unjustified enrichment.

3-93. One view is that placing emphasis upon equity is really another way in which an unjust factor flavour can be grafted onto Scottish law. Alternatively, sight may be lost of the, apparently triumphant, introduction of the absence of legal cause as the important ingredient in rendering an enrichment unjustified. Indeed, some commentators have openly questioned subsequent enrichment decisions as showing insufficient fidelity to this new orthodoxy. It is suggested that such criticisms might have value in the abstract, but that the very strong vein of authority which places equitable principles at the heart of Scottish enrichment law means that some form of equitable character will be retained.

3-94. Throughout the twentieth century and into the twenty-first it has been repeatedly stated that enrichment actions, or their nominate precursors, were founded in equity.[314] In the revolutionary trilogy of cases, each case did, in some way, acknowledge the equitable nature of the area of law. In *Morgan Guaranty* the manner in which equity had been utilised in the past with regard to the application of the *condictio indebiti* was the subject of criticism, though it was explicitly retained as a key factor as to whether repetition should be ordered, albeit that the onus to show that such repetition would be iniquitous rests with the defender.[315] Indeed, in discussing the taxonomy extant at the time, or rather in criticising undue attachment to that taxonomy, it was observed: 'But in an area of law where fine analysis or distinction between forms of action may well be dangerous and the overriding consideration is

[312] See e.g. *The Centre for Maritime and Industrial Safety Technology Ltd v Ineos Manufacturing Scotland Ltd* [2015] CSOH 104, 2015 GWD 25-435 at para 32 *per* the Lord Ordinary (Tyre); *Esposito v Barile* 2011 Fam LR 67 at paras 16–17 *per* Sheriff Way; *Macadam v Grandison* [2008] CSOH 53 at para 35 *per* the Lord Ordinary (Hodge); *Robertson Construction Central Ltd v Glasgow Metro LLP* [2009] CSOH 71, 2009 GWD 19-304 at para 18 *per* the Lord Ordinary (Hodge); *Mactaggart & Mickel Homes Ltd v Hunter* (n 306) at paras 98–99 *per* the Lord Ordinary (Hodge).

[313] *Biffa Waste Services Ltd v Patersons of Greenoakhill* [2015] CSOH 137, 2015 GWD 34-548 at para 29 *per* the Lord Ordinary (Woolman).

[314] E.g. *Varney (Scotland) Ltd v Lanark Town Council* 1974 SC 245; *Zemhunt (Holdings) Ltd v Control Securities* 1991 SLT 653; see also Lord Morison's opinion in the Inner House at 1992 SC 58; *Grant v Grant's Exrs* 1994 SLT 163; *Mackays Stores Ltd v Topward Ltd* [2008] CSOH 51; *Friends Provident Life & Pensions Ltd v McGuinness* [2005] CSOH 72; *Forbes v Brands Development (World-Wide) Ltd* 20 July 2004, Aberdeen Sh Ct; *McKenzie v Nutter* 2007 SLT (Sh Ct) 17; *Satchwell v McIntosh* 2006 SLT (Sh Ct) 117; *Virdee v Stewart* [2011] CSOH 50, 2011 GWD 12-271 at para 27 *per* the Lord Ordinary (Smith).

[315] *Morgan Guaranty Trust v Lothian District Council* 1995 SC 151 at 166 *per* the Lord President (Hope).

one of equity these labels should be recognised simply for what they are.'[316] These *dicta* demonstrate that the understanding of the importance of considerations of equity is determinative of the legal result, as well as constitutive of the rules themselves. We have already seen that similar sentiments were expressed in *Fife Scottish Omnibus Ltd v Tay Bridge Joint Board*,[317] decided immediately after *Morgan Guaranty*.

3-95. In *Shilliday* too we can see the use of the concept of equity, though it is accorded a far smaller role. In Lord President Rodger's seminal exposition of the taxonomy of unjustified enrichment there is not a single reference to equity or equitable considerations, though the concept of 'unjustified enrichment' is given a central position as the organising principle and normative driver which is illustrated by the *condictiones*, and redressed by the remedies of the three Rs. However, another member of the court re-asserted the traditional emphasis upon the equitable nature of enrichment law in Scotland:

> The governing equitable principle is that a party ought not to be permitted to remain enriched in respect of a benefit in property or money which he has no legal rights to retain against the party from whom it derived. There are many situations where the law has confirmed that unjust enrichment can arise and there has been a tendency to categorise them. However, this process should not deflect from the underlying equitable foundation of claims based on such categories…The simple equitable formulation of the rules arising from unjust enrichment would perhaps be: 'Is it right that a person should be entitled to retain a valuable benefit in circumstances where the person who conferred it had no intention that he should keep it?' The need to regard the equitable basis of a right to recompense as the paramount consideration rather than getting entrapped in the process of labelling was recognised by both Lord President Hope and Lord Clyde [in *Morgan Guaranty*].[318]

3-96. Therefore, while much of the taxonomical organisation achieved by *Shilliday* is contained within Lord President Rodger's equity-free opinion,[319] we may discern the rugged endurance of the broader equitable considerations of the Scottish tradition. Indeed, it seems important when reading the *Shilliday* case to bear in mind the broad equitable approaches set out in *Morgan Guaranty*, especially since that case is approvingly referred to in *Shilliday* as setting out the idea that a general concept of unjustified enrichment informs the use of the three Rs as remedies.[320]

[316] At 169 *per* Lord Clyde. See also the same judge's statement (at 172) that 'Where the matter is essentially one of equity, there may well be more harm than advantage in attempting any detailed codification.'

[317] *Fife Scottish Omnibus Ltd v Tay Bridge Joint Board* 1997 GWD 23-1180

[318] *Shilliday v Smith* 1998 SC 725 at 734 *per* Lord Caplan.

[319] Cf his dissenting judgment in *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1996 SC 331 at 353, especially the statement: 'the pursuers must show that the defenders have been enriched at their expense, that there is no legal justification for the enrichment and that it would be equitable to compel the defenders to redress the enrichment'.

[320] *Shilliday v Smith* at 728 *per* the Lord President (Rodger).

3-97. Accordingly, the final case in the revolution trilogy, which approved the approach in *Shilliday*, and is of the highest authority as a decision of the House of Lords, confirms that the equitable considerations suggested in *Morgan Guaranty* are to be kept firmly in view. In *Dollar Land*[321] one can see Lord Hope referring back to his judgment in *Morgan Guaranty* when he states that the overriding consideration in all the nominate categorisations is to 'redress an unjustified enrichment upon the broad equitable principle *nemo debet locupletari aliena jactura*'.[322] It is also interesting to note that, somewhat differently from the approach in *Morgan Guaranty*, the onus is now placed upon the pursuer to demonstrate that it would be equitable to compel the defender to redress the enrichment.[323]

3-98. Furthermore, the taxonomy as set out in *Shilliday* is capable of a number of interpretations, one of which is to say that it is not a huge watershed at all. In considering these points one must take account of subsequent case law. Was there, then, really a revolution? If so, to what extent is it to be seen as ushering in an abstract Germanic world of absence of legal cause? And to what extent is there an enduring quality of equitable subjectivity which ultimately translates into discretion?

3-99. The answer to this question depends upon the, as yet unclear, answer to another question – namely to what extent did the *Shilliday* case recast the law of unjustified enrichment. It seems clear that much of the terminological furniture has been moved around, though it is somewhat less clear how profound a difference to the substantive law this rebranding has made.[324] The decision in *Transco plc v Glasgow City Council*,[325] which stated that aspects of the previous law, relating to the subsidiary nature of a recompense claim,[326] endured post-revolution has been the subject of criticism on the basis that it did not take account of the taxonomical changes introduced by the three revolution cases.[327] One of the reasons given by the Lord Ordinary for

[321] The judgments in the Inner House in this case are also instructive in the manner in which equity is discussed frequently, and indeed clearly as a determinative factor for liability: *Dollar Land (Cumbernauld) Ltd v CIN Properties* 1996 SC 331.

[322] *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90 at 98.

[323] *Dollar Land* at 99 *per* Lord Hope of Craighead.

[324] See e.g. *Chartered Brands Ltd v Elmwood Design Ltd*, 15 May 2009, Edinburgh Sh Ct, unreported, at para 135 *per* Sheriff Crowe.

[325] *Transco plc v Glasgow City Council* 2005 SLT 958.

[326] The law on this narrower point concerning the interaction between enrichment and contract law, and the subsidiarity of enrichment claims, remains somewhat unclear but it seems enrichment claims are not barred but might only be allowed exceptionally if there is a contractual claim: *Biffa Waste Services Ltd v Patersons of Greenoakhill* [2015] CSOH 137, 2015 GWD 34-548 at para 29 *per* the Lord Ordinary (Woolman); *The Centre for Maritime and Industrial Safety Technology Ltd v Ineos Manufacturing Scotland Ltd* [2015] CSOH 104, 2015 GWD 25-435 at para 33 *per* the Lord Ordinary (Tyre). However, compare *Esposito v Barile* 2011 Fam LR 67 at para 20 *per* Sheriff Way. A related point is that where the defender/recipient has a contractual entitlement to the benefit it will normally justify the enrichment: see e.g. *Jones v Muir* 2015 GWD 11-183.

[327] *Transco plc v Glasgow City Council* 2005 SLT 958; N R Whitty, '*Transco plc v Glasgow City Council:* Developing Enrichment Law after *Shilliday*' (2006) 10 Edin LR 116. However,

maintaining this continued view was that abandoning it might cause 'inequitable results'.[328] Another case has placed a perhaps even greater emphasis upon the importance of the idea of equity, and again has been subjected to criticism.[329] This Outer House decision represents a high point for the importance of equity to the subject, though the dynamic changes in this area of law mean that the position remains unsettled. Indeed, it was observed *obiter* in the House of Lords that:

> ... 'The money in question was paid in error under a mistake of fact. It was therefore reclaimable, unless (the pursuer's remedy being equitable) there was an equitable defence to repetition.' The use of the word 'equitable' in this context must, of course, be understood in the light of the fact that in Scotland equitable principles are part of the common law. But it shows that, in principle, the right of recovery must be accompanied by appropriate defences to prevent unfairness. Protecting the stability of closed transactions is the paradigm case for such a defence.[330]

3-100. While clearly *obiter*, as any observation upon Scottish law in an English appeal will be, it is submitted that this is yet another example of the enduring importance of equitable ideas to the enrichment mindset. Furthermore, while Lord Hope states that the meaning of equity here is not to be confused with an English chancery conceptualisation, it is clear that the idea of equity is deeply rooted within Scots enrichment law, and indeed it appears to be here to stay.[331] The great debate for the future is to delimit the manner in which this equitable requirement interacts with the absence of legal cause as the factor which renders an enrichment reversible. This question can be most crudely reflected in the use of 'unjust' or 'unjustified' as the nomenclature for the law in the area – 'unjust' carries the connotations of equity; 'unjustified' is more readily associated with the drier, more abstract, absence of legal cause. The big question is how will the judges approach the matter. It seems reasonable to suggest that they are more inclined to give weight to the equitable stance when confronted by concrete cases than some more abstractly-minded practitioners and academics may wish.

---

compare the more 'post-revolutionary' approach taken by the same Lord Ordinary in *Macadam v Grandison* [2008] CSOH 53 at para 35 *per* the Lord Ordinary (Hodge); and *Robertson Construction Central Ltd v Glasgow Metro LLP* [2009] CSOH 71, 2009 GWD 19-304 at para 18 *per* the Lord Ordinary (Hodge).

[328] *Transco plc v Glasgow City Council* at para 13 *per* the Lord Ordinary (Hodge).

[329] *Mackays Stores Ltd v Topward Ltd* [2008] CSOH 51; R Evans-Jones, 'Equity and the condictio indebiti' (2008) 12 Edin LR 429.

[330] *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Comrs* [2007] UKHL 34, [2008] 1 AC 561 at para 24 *per* Lord Hope of Craighead. The quotation is from *Credit Lyonnais v George Stevenson & Co Ltd* (1901) 9 SLT 93 at 95 *per* the Lord Ordinary (Kyllachy).

[331] See e.g. a collection of recent cases highlighting the equitable nature of enrichment law: *Stork Technical Services (RBG) Ltd v Ross's Exr* [2015] CSOH 10A, 2015 SLT 160 at para 36 *per* the Lord Ordinary (Tyre); *Lyon & Turnbull Ltd v Sabine* [2012] CSOH 178, 2012 GWD 39-764 at para 24 *per* the Lord Ordinary (Brodie); *Thomson v Mooney* [2012] CSOH 177, 2012 GWD 39-769 at para 9 *per* the Lord Ordinary (Drummond Young).

E. CONCLUSION

3-101. This chapter explores the equitable character of Scots enrichment law. In attempting to do so it has been necessary to give an overview of the development of unjustified enrichment in Scots law more generally. In the course of this chapter it was concluded that Stair was influenced by some, as yet undetermined, combination of Spanish scholasticism and Grotius. The result was something of an amalgam of what are now considered real and personal actions. Furthermore, this amalgam sat alongside the broad and equitable idea of recompense, which some have seen as a potential general enrichment action for its time. This division of obligations was incrementally developed by subsequent institutional writers, with some such as Kames and Hume getting closer to a unitary concept of unjustified enrichment than others.

3-102. Thereafter, there was relative stagnation in the area, at least as far as doctrinal ideas were concerned. It took two highly influential articles by Peter Birks in the late 1980s to challenge the orthodoxy of enrichment law in Scotland, and to ask serious questions about the structure and substance of the law, noting Stair's ideas about restitution and the *actio ad exhibendum*. These writings prompted the first monograph on the subject, by W J Stewart, which was avowedly Birksian, and appeared to be set upon guiding Scots law towards unjust factors and along an English path of development.

3-103. However, others were of a different opinion, foremost among them Niall Whitty, and they sought out a more civilian approach to be distinguished from, and to some extent to counter, the approach taken by Stewart in his work. As the Scottish Law Commission began to make preliminary investigations into the area, the 'revolution' cases were decided in the Court of Session and House of Lords and allowed the development of an organisational theory of enrichment law. In *Morgan Guaranty*[332] the court embraced civilian authority, though without creating a complete taxonomy to carry the law forwards. It was in *Shilliday*[333] that the court was able to forge a new taxonomy, which could bridge something of the perceived gap between the civilian and Common Law traditions.

3-104. But as the white heat of the taxonomical revolution fades it seems that some features of the *ancien régime* have endured. The durability of equity as of prime importance to enrichment law in Scotland is undeniable – though there is ample room for disagreement as to what this really means. It is difficult to predict with certainty the way in which the courts will use the idea of equity in the future. This book is concerned with the way 'equity' has been used in the intellectual history of different areas of private law. Sometimes certain English chancery-inspired ideas of equity have fed into Scottish practice and precedent, often as a result of the fact that Scottish law recognises something called 'equity'. But equity in the context of enrichment law is not of the English chancery variety. Furthermore, there is no clear evidence that Scottish

[332] *Morgan Guaranty Trust v Lothian District Council* 1995 SC 151.
[333] *Shilliday v Smith* 1998 SC 725.

enrichment law has ever been subjected to, or adorned with, English chancery instruments by virtue of the shared use of the word equity. The continued insistence that enrichment law is ultimately equitable[334] is one which is arguably as 'civilian' as alternative approaches which seek to remove any suggestion of the equitable nature of Scots enrichment law.

3-105. In Scotland there are no separate jurisdictions. Law is equity and equity is the law. When it is said that enrichment law rests upon that great brocard, *nemo debet locupletari non factus est*, this is consistent with the historical development of Scottish natural law jurisprudence which subsequently secularised but retained the equitable dimension. In an enrichment situation, the broad maxim of equity is refined through various juridical techniques; the law will not allow you to keep that thing because as a matter of law it considers such a result to be inequitable.

3-106. Of course, equity is too broad a concept to determine legal liability on its own. Yet this idea of equity, which is said to underpin the whole law, is not devoid of content. The idea itself feeds into the law, as does equity to all law in Scotland, and is refined by the rules of law it inspires. In Scotland, equity informs and underpins the law – this much we have exhaustively learned. The new taxonomy of unjustified enrichment provides the modern framework within which equity will continue to have a role.

3-107. It is the absence of legal cause that renders an act of enrichment unjustified, its retention impermissible in law, and the previous actions represented by the *condictiones* show prefabricated situations where such a legal cause will be absent. The list of such situations, however, is not closed. There can, and no doubt will, be new examples in the future. The 'lack of legal cause' formulation, however, is ultimately a means by which the law designates something to be actionably inequitable with reference to the fundamental *nemo debet* maxim. It is the idea of inequitable results according to the broad underlying maxim that the law seeks to prevent using the tool of the absence of legal cause. Indeed, equity might have still greater weight when it comes to consider new grounds and actions beyond the *condictiones* and recognised actions. The problems discussed above concerning the meaning of equity for the new taxonomy remain unresolved, though perhaps overstated. The ultimate policy decision at the heart of enrichment law, in Scotland at least, has for a long time been preventing inequitable results, following a tradition of natural justice.

3-108. If the right derived from an enrichment situation is equitable, which it is, then the manner in which it is exercised is subject to the equitable controls of the court, which may mean discretion.[335] Furthermore, the courts will be

[334] Not a new concept: 'The fact remains that the only satisfactory ground on which unjustified enrichment can be said to exist is that of the moral idea of natural justice': H C Gutteridge and R J A David, 'The Doctrine of Unjustified Enrichment' (1933–34) 5 CLJ 204 at 211.

[335] See *Stork Technical Services (RBG) Ltd v Ross's Exr* at para 36 *per* the Lord Ordinary (Tyre); *Lyon & Turnbull Ltd v Sabine* at para 24 *per* the Lord Ordinary (Brodie); *Thomson v Mooney* at para 9 *per* the Lord Ordinary (Drummond Young).

alert to the importance of accommodating equitable considerations within the defences which will be available to a claim in unjustified enrichment. It is less clear to what extent it can be said, and indeed would be necessary to say, that in order to raise an enrichment action the pursuer would need to demonstrate the equity of her particular case.[336] The question has practical implications for onuses of proof and other questions of procedure. This is the mischief which many commentators fear – in order to vindicate a right to the redress or restoration of an enrichment the courts may splice equitable requirements into the requirements of the claim and insist upon some form of specification. In other words, the averments of the claim would be required to show some inherent equity, and could prompt a balancing of the equities exercise which is no more than the discretionary exercise of fairness. That approach also risks removing much of the significance of terming such rights as part of the law of obligations if the exercise is merely discretionary. Such a mischief seems unlikely – the absence of legal cause seems to have been adopted as the clear demarcation of the inequity which the law will reverse, and it will not generally be necessary for a pursuer to demonstrate every time why it is 'equitable' to recover the benefit/gain she seeks to recover. It seems that the requirements of equity will be achieved through the medium of defences, but the matter is not entirely clear.

3-109. That view receives support from a passage from the opinion of the Lord Ordinary (Macfadyen) in *Compagnie Commerciale Andre SA v Artibell Shipping Co Ltd*:[337]

> I accept the submission of senior counsel for the pursuers that in *Dollar Land*…Lord Hope was not dealing with the *onus* of proof, and that once a *prima facie* case of enrichment and of lack of justification for it has been made out, it is for the defender to raise any factor on which he wishes to found as pointing to the inequity of ordering him to redress the enrichment (*Morgan Guaranty*, in the passages cited in para [19] above), but I take the view that, as is commonly said in cases decided after proof, matters of *onus* are seldom significant at that stage. The issues as to whether any enrichment was unjustified and as to where the equities lie must in my view be decided by reference to the totality of the circumstances before the court.[338]

Lord Macfadyen's opinion has been adopted both academically[339] and judicially.[340] Yet quite apart from any question as to its status as an

[336] There appears to be some emerging consensus that the equitable exercise will occur as something akin to a defence and that it is not an element of the ordinary onus of proof upon the pursuer when setting out her case, based upon a passage from the opinion of the Lord Ordinary (Macfadyen) in *Compagnie Commerciale Andre SA v Artibell Shipping Co Ltd* 2001 SC 653 at 668I–669A. This is discussed further in para 3-109 below.

[337] *Compagnie Commerciale Andre SA v Artibell Shipping Co Ltd* 2001 SC 653.

[338] At 668I–669B.

[339] Gloag and Henderson para 24.01: 'The fourth matter mentioned (the equity of the court compelling redress) is not an element in the cause of action (that is, a requirement which has to be proved affirmatively by the pursuer); rather demonstration of inequity is a defence.'

[340] *McVicar v Keeper of the Registers of Scotland* [2014] CSOH 61, 2014 GWD 13-227 at para 10 *per* the Lord Ordinary (Doherty); *Corrie v Craig* 2013 GWD 1-55 at para 16 *per* Sheriff Brown.

authority,[341] there is perhaps some doubt about what exactly Lord Macfadyen's opinion means in terms of technical procedure for the respective parties. The difficulty of authority is that there is House of Lords[342] and Inner House[343] authority to the effect that the equitable element of the claim is for the pursuer to demonstrate,[344] whereas there is only Inner House authority (albeit a Full Bench),[345] ultimately relied upon in Lord Macfadyen's opinion,

[341] It can be important in areas of law which are still developing and the subject of considerable academic discussion and input, such as unjustified enrichment, to bear in mind the current state of the authorities as the guide to 'what the law of Scotland is rather than what it ought to be': see *Stork Technical Services (RBG) Ltd v Ross's Exr* [2015] CSOH 10A, 2015 SLT 160 at para 35 *per* the Lord Ordinary (Tyre). Similar sentiments have been expressed in the context of English enrichment law by the Court of Appeal: *Investment Trust Companies (in liquidation) v HM Revenue and Customs Comrs* [2015] EWCA Civ 82, [2015] STC 1280 at para 47 *per* Patten LJ.

[342] *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90 at 99E *per* Lord Hope of Craighead: 'the pursuers must show that the defenders have been enriched at their expense, that there is no legal justification for the enrichment and that it would be equitable to compel the defenders to redress the enrichment.'

[343] *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1996 SC 331 at 353D *per* Lord Rodger: 'the pursuers must show that the defenders have been enriched at their expense, that there is no legal justification for the enrichment and that it would be equitable to compel the defenders to redress the enrichment.' Therefore, Lord Hope's speech in the House of Lords adopted Lord Rodger's (dissenting) opinion on this matter word for word.

[344] A related but different and broader question concerns the precision necessary in terms of the pursuer's pleadings in the new era of a generalised approach to enrichment law. It seems some degree of specificity will be necessary: *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90 at 92I *per* Lord Jauncey of Tullichettle: 'DLC accepted that mere enrichment to the landlord is not enough; that enrichment must be unjust or, in other words, disproportionate in all the circumstances to the consequences to the landlord of the breach…They [DLC, the pursuers] must show not only that CIN [the defenders] were enriched, but that they were unjustly enriched.' If the onus is on the pursuer to demonstrate the 'unjustness' of the enrichment, even if that is conceptualised as demonstrating an absence of legal cause, it might in reality come close to placing the onus on the pursuer to show something like iniquity, particularly given the difficulty of demonstrating a negative.

[345] *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151 at 165D–166B *per* the Lord President (Hope): in particular, where he stated 'I consider, however, that, once the pursuer has averred the necessary ingredients to show that *prima facie* he is entitled to the remedy, it is for the defender to raise the issues which may lead to a decision that the remedy should be refused on grounds of equity.' Note also the less often cited opinion of Lord Clyde in the same case which is (very slightly) more ambivalent: 'As regards any question of *onus*, while some support can be found for the view that it is for the pursuer to aver that his mistake is excusable, I am not persuaded that that correctly reflects the position in the principle of the law which allows a claim to be made for repayment where the money was paid under the mistaken belief that it was due but leaves the granting of that repayment to be governed by equitable considerations relating to the circumstances of each case. Excusability is not an essential ingredient in the principle but may be an element in the decision to grant a remedy in particular circumstances. While I would hesitate to law (sic) down any absolute principle on the specific requirements of pleading so far as excusability is concerned, because cases might occur where the circumstances in which the payment was made might require the pursuer to explain why it was equitable in such a context that he should be repaid, it seems to me that almost always the *onus* will technically lie on the defender.' For completeness it should

and the Outer House[346] and shrieval[347] decisions following it, which suggest that it is a matter 'for the defender to raise'. Therefore it is at least open to question whether the issue is settled, particularly as a general touchstone for the whole of enrichment law.[348] Even if, as a matter of authority, it is accepted that Lord Macfadyen's opinion is correct and represents the law

---

be noted that in the same case Lord Cullen at 175I–176A, states: 'I do not consider that it is for the pursuer, if he is to make out a relevant case, to make averments in regard to all the factors which may conceivably be relied upon on either side of the case. The resolution of an action of repetition depends upon assessment of a number of factors, the scope of which cannot be predetermined. No doubt the pursuer has to aver that he made the payment on the erroneous understanding that it was due and for that purpose he has to set out averments as to the nature of that error, how it arose and how it accounted for his making the payments. The need for greater particularisation will depend on the extent to which these matters are peculiarly within his knowledge, according to the circumstances of the particular case.'

[346] *McVicar v Keeper of the Registers of Scotland* [2014] CSOH 61, 2014 GWD 13-227 at para 10 *per* the Lord Ordinary (Doherty).

[347] *Corrie v Craig* 2013 GWD 1-55 at para 16 *per* Sheriff Brown.

[348] A related point on the question of precedent would be that Lord President Hope's comments (at n 345) about the onus of proof should be contextualised: when he stated 'once the pursuer has averred the necessary ingredients' it is at least open to question whether he meant by that simply the need to demonstrate an absence of legal basis for the enrichment. The development of the law to the level of abstraction that enrichment was unjustified due to an absence of legal basis occurred after *Morgan Guaranty*, notably in Lord Cullen's opinion in *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1996 SC 331 at 348–49, which was subsequently endorsed and adopted by Lord President Rodger in *Shilliday v Smith* 1998 SC 725 at 727D. Indeed, Lord President Hope in *Morgan Guaranty* was discussing the *condictio indebiti* specifically, and proceeded on the basis that error was necessary, and so the pursuer would already have needed to demonstrate some form of error to have 'averred the necessary ingredients' that would be sufficient to require the defenders to need to show something inequitable about any redress to prevent recovery. The importance of a pursuer's averment of an active mistake in the background to the *onus* reasoning in *Morgan Guaranty* is brought out more clearly in the opinions of Lords Cullen and Clyde (see also n 345). With the reorganisation of enrichment law towards a generalised concept of unjustified enrichment, with absence of legal basis as the basis of the 'unjustified' element, it is at least open to question whether Lord Hope's opinion in *Morgan Guaranty* is as general and decisive an authority as is sometimes suggested, especially outwith the traditional and well-trodden forms of action such as those (previously) represented by the *condictiones*. Indeed, the contrary line of authority, which suggests the 'equitable' onus is on the defender, consists of cases decided *after* the introduction of Lord Cullen's absence of basis approach in *Dollar Land*, and adopted by Lord Rodger in *Shilliday*. A further (remote) possibility is that Lord President Hope's comments in *Morgan Guaranty* concerning 'the necessary ingredients' was not a reference to the particularities of the *condictio indebiti* as it was then understood and conceptualised; but, if that it is so, the alternative meaning of 'once the pursuer has averred the necessary ingredients to show that *prima facie* he is entitled to a remedy' would be a generality of two possible degrees (1) referring to known and understood actions such as the *condictiones* for restitution, repetition, and the then understood rules and basis recompense; or (2) referring directly to the 'broad equitable principle *nemo debet locupletari aliena jactura*'. If the former then it remains the case that the pursuer would have had to demonstrate the known elements of those actions beyond an absence of legal cause; if the latter then the pursuer would be required to make averments which would amount to setting out equitable grounds to seek redress.

there may remain questions about the exact meaning, in procedural terms, of the statement that deciding 'where the equities lie' must be 'by reference to the totality of the circumstances before the court'.

4 Trusts

A. INTRODUCTION

4-01. The trust is a well-established legal institution in the law of Scotland. However, despite its long history, aspects of the nature of the trust remain somewhat unclear and controversial. Not least among these controversies is the nature of the right of the beneficiary under the trust, which must merely be alluded to by way of introduction here. Yet, perhaps even more controversial is the idea of a 'constructive trust'. In many ways it has become mixed up in, if not come to embody, the potentially most important debate about Scottish property law for a generation.[1] This debate is characterised

[1] Scottish Law Commission, *Discussion Paper on Sharp v Thomson* (SLC DP No 114, 2001) at para 1.5.

by whispers of English equity jurisprudence on the one hand, and civilian conceptualisations of *dominium* or ownership on the other.

4-02. A leading example of this creeping influence of English chancery ideas is the concept of dual ownership, and the creation of property rights without a public or abstract juridical act. The partial reception of such terminology has placed some of the central characteristics of the trust squarely upon one of the great fault lines of the debate on the nature of Scots law, even down to the fundamental and vexed question of the difference between a civilian and Common Law system. Furthermore, these considerations prompt questions about the characteristics of what is meant by the 'trust' in constructive trust. Some would like to see the (proprietary) constructive trust extirpated from Scottish jurisprudence, but, even if that were desirable, it is probably past the eleventh hour for the case law to take that step. The focus here is to consider the nature of the constructive trust now recognised in Scots law, and some of the situations in which it can arise.

4-03. Inevitably much of the literature discussed here will be from the Common Law world, and the present writer is acutely aware of the differences between the intellectual heritages underpinning both traditions, but examining those systems' debates about the constructive trust and their experiences of difficulties are helpful for thinking about Scottish law. Indeed, it is helpful to be acquainted with both the Scottish and English equity heritages to fully understand some of the controversies and problems which have arisen in this area of Scots law.

4-04. In analysing the development of the trust the emphasis will be to show that the trust, as understood and conceived in Scotland, is not now an equitable institution. This may give rise to the question why is there discussion of the trust at all then? One reason for considering trust jurisprudence is this: the aim of this book is to consider Scottish equity which has been influenced by English law in various ways over the centuries, including by way of English chancery jurisprudence. Furthermore, the book is also an account of the historical development of doctrinal areas of law by reference to conceptions of equity. While it seems that today the juridical nature of the Scottish trust does not rest upon a split between equitable and legal ownership, there have, nonetheless, been periods of development where use of English equity concepts were influential. Therefore a complete account of the trust in Scotland today needs to take account of that fact, and, as we shall see, there are enduring consequences of that influence in the modern law. Equitable ownership appears to have been rejected as the fundamental conceptual basis of the trust, but the historic influence of English chancery and the ongoing use of English chancery authority make understanding them important when considering Scottish trust law and related subjects such as the constructive trust, accessory liability, and fiduciary law. In order to so understand those areas of law properly it is important to consider the nature of the express trust. In so doing it will become apparent that the term and conceptualisation of equity in this area of Scottish law were important entry points for the English chancery jurisprudence, even if the understandings of the two systems' forms of equity were different.

B. HISTORICAL OVERVIEW

(1) Introduction

4-05. The development of the Scots approach to the trust may be summarised, admittedly somewhat crudely, as having evolved across four historical stages of development. The first stage was a 'pre-institutional approach', characterised by a number of different instruments operating in specific areas of law, especially succession, tutory and heritage. The second was the 'institutional', whereby the trust was understood contractually by reference to the nominate contracts of deposit and mandate. Thirdly, and potentially as a result of the influence of English chancery jurisprudence, the idea of a trust came to be understood in a more proprietary sense, and conceptualisations of the trust came to be laced with the terminology 'equitable',[2] though there continued to be at least a nominal link to contractual ideas, even if the emphasis became more one of a generalised idea of contractual obligation, rather than the previously identified nominate contracts.[3] The fourth, and final, stage may be said to have begun as a 'critical school', in that there was much concern about what a trust was not, normally predicated upon distinguishing it from English chancery jurisprudence and equitable ownership theory. This culminated with the patrimonial theory pioneered in Scotland by Gretton and Reid, who are expressly influenced by Lépaulle.[4]

(2) Insolvency Regimes and the Trust

4-06. To understand the development of the nature of the trust in Scottish law it is important to first consider the broader insolvency regime within which it operated. The potential for using trusts as a means of eluding claims of creditors was recognised by statute at the end of the seventeenth century,[5] and had been a concern for some time before in relation to trusts and similar devices.[6] The statute essentially required some form of written execution of

[2] D Oswald Dykes, *McLaren on Wills and Succession: Supplementary Volume* (1934) 201.

[3] Which would be consistent with the development of the idea of freedom of contract: P S Atiyah, *The Rise and Fall of Freedom of Contract* (1979). However, despite the citation of English authority, it would appear that most discussions proceeded on the understanding that the historical development was distinct: see C R A Howden, *Trusts, Trustees and the Trust Acts in Scotland* (1893) 3.

[4] P Lépaulle, *Traité Théorique et Pratique des Trusts* (1932), and P Lépaulle, 'The Strange Destiny of Trusts' in R Pound (ed), *Perspectives of Law: Essays for Austin Wakeman Scott* (1964). See L Smith, 'Trust and Patrimony' (2008) 38 *Revue générale de droit* 379.

[5] Act anent blank bonds and trusts APS 1696 c 25.

[6] See e.g. D Masson (ed), *The Register of the Privy Council of Scotland 1619–22* (1895) 6–7 and 119; D Masson (ed), *The Register of the Privy Council of Scotland 1622–1625* (1896) 3 and 539 where the Privy Council investigated if someone had 'maid over some pairt of his estait in truist to confident personis in fraudem creditorum'; D Masson (ed), *The Register of the Privy Council of Scotland 1625-–27* (1899) 98–99 and 255 where King James ordered the Privy Council to conduct a 'tryall of informationis maid to his Majestie be the creditouris of James Arnot, who, alledging that the said James, haveing made over some pairt of his estait in trust

a trust, or an unconditionally sworn oath. It seems likely that Bell is correct in his observation that by making it more difficult to prove a trust, and hence more difficult to recover one's things, the measure was politically motivated within the rebellious context of the time.[7] In addition to the statutory intervention with regard to the proof of trust, it is also at this time we see the first substantial insolvency statute.[8] The statute provides for the cutting down of subsequent transfers of property by the bankrupt,[9] though other procedures also existed to allow creditors to seek a judicial sale of property.[10] When taken together, the effect of the two statutes was to render trusts that were not attested by writing or oath to be susceptible to reduction by the truster's creditors.[11] Further, the process called sequestration existed in the early eighteenth century whereby an independent party would manage a disputed thing for the duration of the dispute.[12] This process of sequestration was gradually developed to form a central plank of the insolvency regime.[13] Therefore, in a modern sequestration the debtor has his estate[14] vested in a trustee for the purpose of satisfying the creditors' claims.[15]

4-07. Commensurate with the development of the insolvency regime is the development of trust jurisprudence in relation to insolvency and analogous situations.[16] Since the seventeenth century it has been accepted that trust estates are immune from the claims of creditors seeking to do diligence.[17] It is important to note that the immunity was not based upon a proprietary conception but upon a fixed custom that had developed.[18] It is with the decision in *Gordon v Cheyne*[19] in 1824 that we see the insolvency protection comes to be associated with a split ownership conceptualisation, and the idea that the trustee takes *tantum et tale*. By the time of the decision in *Heritable Reversionary Co Ltd v Millar*[20] any trust property held by a trustee, even if the

to confident personis in fraudem creditorum'; and the Privy Council concluded 'no pairt of his estait was entrusted be him to any persone in prejudice of his creditouris'.

[7] Bell, *Commentaries* vol II, 186 n 2.

[8] Act for declaring notour bankruptcy APS 1696 c 5.

[9] See also APS 1621 c 18.

[10] Act concerning the sale of bankrupts' lands APS 1681 c 17; Act anent the sale of bankrupts' land APS 1690 c 20. See Erskine II.12.59–60.

[11] See Bankton I.10.76–85.

[12] Forbes 189; Bankton I.15.15–17.

[13] 23 Geo III c 18; 33 Geo III c 74; 54 Geo III c 137; Bankruptcy (Scotland) Act 1839; Bankruptcy (Scotland) Act 1856; Bankruptcy (Scotland) Act 1913.

[14] There are exceptions.

[15] *Caldwell v Hamilton* 1919 SC (HL) 100 at 107 *per* Lord Dunedin. The law's development may be traced through the Bankruptcy (Scotland) Act 1839, Bankruptcy (Scotland) Act 1856, Bankruptcy (Scotland) Act 1913, Bankruptcy (Scotland) Act 1985 to the present-day position in the Bankruptcy (Scotland) Act 2016, s 88(1)(c).

[16] Gretton, 'Trusts' 499–500.

[17] *Mackenzie v Watson* (1678) Mor 10188; *Livingston v Creditors of Grange* (1644) Mor 10200.

[18] *Mackenzie v Watson* (1678) Mor 10188.

[19] *Gordon v Cheyne* 5 February 1824 FC.

[20] *Heritable Reversionary Co Ltd v Millar* (1892) 19 R (HL) 43.

trust was latent, was immune from personal creditors of the trustee.[21] The rule which is frequently advanced is that those seeking to do diligence must take the property *tantum et tale*. Accordingly, trust property in the hands of a trustee will not be subject to claims of the trustee's creditors unless the debts were incurred with respect to the trust.[22]

4-08. The development of the insolvency protection for trust property has therefore evolved over many years. Thus, the institutional understanding of the trust, which relied heavily upon the law of contract, recognised forms of protection against creditors. As the insolvency regime developed a unitary approach to land and moveables the trust became more proprietary in nature with a conceptualisation based upon split ownership. The split ownership conceptualisation strongly suggests that is why the trust latterly developed a strong immunity in insolvency[23] as well as from claims of individual creditors. The fact that such immunity was developed from this proprietary conceptualisation meant that the academic attempts to relocate trusts within the law of persons was in large part dictated by the need to explain how a trust with a personal right in the beneficiary would still be protected from the insolvency of the trustee. It is this symbiosis of development between trust law and insolvency law that dominates much of the conceptualisation of the trust, and to a large extent explains the importance of defining the constructive trust as a true trust or a remedy for unjustified enrichment.

C. EARLY DEVELOPMENT

4-09. It is difficult to state with confidence the nature of the trust, if one can talk about the idea of a trust at all, in the period before the seventeenth century.[24] It seems clear that the concept of the trust arrived comparatively late, by that name at least, into Scottish law.[25] On the other hand, it is also the case that Scottish law had institutions which were carrying out much of the work which trust law would later come to handle.[26] This is a key aspect of the story of the early development – the disparate actual and potential legal institutions which could have provided a basis for the trust. In the

[21] Gretton, 'Trusts' 500.

[22] *Stewart v Forbes* (1888) 15 R 383.

[23] Indeed, this is the explicit reasoning given by Lord Watson in *Heritable Reversionary Co Ltd v Millar* (1892) 19 R (HL) 43.

[24] One concern for the authorities at this time was the use of the trust or trust-like devices by Catholics to evade the anti-Catholic legislation in force, as can be seen from this pronouncement from the Privy Council justifying a measure to confiscate heritable property because 'Papism' was enduring due to 'the connivance and oversight givin unto thame to reteane the possessioun of thair awin lands, rents and livings ather directlie in thair awin persouns or covertlie in the persouns of thair freinds and weill willers to thair use and behoove'. This formulation also suggests that the ownership of the trust property is in the trustee, but it is difficult to place too much weight upon the wording.

[25] Gretton, 'Trusts' 486.

[26] See J Irvine Smith, 'Succession' in G C H Paton (ed), *An Introduction to Scottish Legal History* (Stair Society vol 20, 1958) 218; Gretton, 'Evolution of the Trust'.

present section an introduction to the formative influences upon Scottish trust law is provided, though the central theme will be the absence of a central idea of a trust in Scotland.

4-10. The disparate institutions which are often said to have constituted sources of Scottish trust law are as follows: deposit, mandate, *fideicommissum*, entails, executors, and tutors. It is clear that the concept of deposit was important for, as we shall see, it features in the institutional accounts of the nature of a trust. The point is well made by Gretton that it is a short step to see why, for reasons of convenience in administration, the concept of a mandate came to be grafted onto the deposit to form a trust-like instrument.[27] With respect to *fideicommissum*, and its vulgar relative the entail, it is difficult to say with certainty the extent of its influence – it is clear that it is a concept with which Scottish lawyers were familiar, and it appears that it had some role in the genesis of the trust.[28] The importance of the law of succession, and more particularly that of the office of the executor, is another potential source of trust-like devices, and has no doubt proved influential with respect to the development of the trust.[29]

4-11. Furthermore, the law relating to heritable property also appears to have informed the development of the trust. The point was not lost on Lord McLaren,[30] who observed that Craig discusses the idea of a trust in a heritable context,[31] and it is said by McLaren to be close to the definition which Coke had given for English law. It is certainly clear that Craig discusses *fideicommissum*, and the section which Lord McLaren referred to is translated by Lord Clyde as 'Conditions Involving trust'.[32] Further, the treatment explicitly states that the English law, with regard to a trustee breaching the purpose of the trust, would apply in Scotland too, though with less severity.[33] In addition to this, an earlier passage from Craig states that someone holding as a *fideicommisary*,[34] translated by Clyde as trustee, is incapable of alienating such property, as they are not truly the owner of that property.[35] Accordingly, it seems clear that some of the mechanisms which Craig is talking about seem recognisable to us as trust-like; however, the terminology which Craig is

[27] Gretton, 'Evolution of the Trust' 515; Gretton, 'Trusts' 489.

[28] See Gretton, 'Trusts' 490–91; Smith, *Studies* 203–06.

[29] See Irvine Smith, 'Succession' (n 26) 218; A E Anton, 'Medieval Scottish Executors and the Courts Spiritual' (1955) 67 JR 129.

[30] McLaren, *Wills and Succession*, vol II at para 1507.

[31] Craig 2.5.9. Somewhat intriguingly, McLaren (at para 1509) also quotes Pothier's *Traité de Substitutions* without a specific reference, but the quote is accurate: see R J Pothier, *Oeuvres de R-J Pothier* (A Dupin new ed, 1831) vol V, 67. Note also C D Farran, *The Principles of Scots and English Land Law* (1958) 124, who notes Craig's mention of trusts of land, though he refers to Craig 2.5.3.

[32] Craig 2.5.9.

[33] Craig 2.5.9.

[34] See T Craig, *Jus Feudale* (3rd edn, 1732) 2.5.9.

[35] Craig 2.5.9. Craig refers to Inst 2.23.1, which concerns 'de fideicommissariis hereditatibus', translated by Moyle, 'of Trust Inheritances': J B Moyle, *The Institutes of Justinian* (5th edn, 1955 reprint) 94.

using is not that of trust, and therefore Clyde's translation must, to that extent at least, be treated with caution.

4-12. This list of potential formative influences is far from exhaustive. For example, it is likely that public trusts and public offices contributed to the development of the trust. Nevertheless, this brief discussion of the different precursor institutions allows us to proceed to consider the unified concept of the trust in a more informed way. It will also be readily apparent that these specific institutions owe precious little, if anything, to English equity jurisprudence even though it seems that the influence of English law more generally was manifest in the period. What each institution has in common is a management role with respect to the interests of another – whether that flows from the office, or obligations associated with the holding of the property. It was the institutional writers who took the terminology of 'trust' and attempted to provide a rational normative explanation, and indeed to contextualise the concept within the broader system of private law.

D. RETROSPECTIVE JUSTIFICATION: INSTITUTIONAL CONTRACTUAL SCHEMATA

(1) Stair: Initial Contractual Rationalisation

4-13. The idea of the 'trust' as a nominate legal category arrives in the seventeenth century,[36] though it is a reasonable supposition that there were innominate, or differently named, instruments carrying out the same or similar purposes before this.[37] Most accounts are clear that the Scots law of trusts is quite distinct from the English history,[38] and while English influences were more heavily felt later, it would appear that any influence in Scotland before the eighteenth and nineteenth centuries was by no means decisive.[39] For the purpose of analysing the institutional approaches, we will begin with

[36] Gretton, 'Trusts' 486; Gretton, 'Evolution of the Trust' 509.

[37] Gretton, 'Trusts' 486–91; Smith, *Studies* 200–07.

[38] 'The history of the origin and development of the law of trusts in Scotland is not at all the same as the history of the origin and development of the law of trusts in England': *Camille & Henry Dreyfus Foundation v Inland Revenue Comrs* [1956] AC 39 at 47 *per* Lord Normand. Compare the more controversial 'The doctrine of trusts has the same origin and rests on the same principles both in Scots and English law, and it is desirable that it should be developed to the same extent in both systems of jurisprudence', in *Fleeming v Howden* (1868) 6 M (HL) 113 at 121 *per* Lord Westbury. In the same case his Lordship also stated (again at 121) that, as a matter of Scots law, 'an obligation to do an act with respect to property creates a trust'. Gretton points out that 'Happily that remark has always been treated with the respect which it deserves': 'Constructive Trusts I' (1998) 1 Edin LR 281 at 285. Cf Menzies vol I, 1 who adopted this statement as his opening definition of the trust, which is consistent with the contractual approach that he took to the subject, and maintained this view in his second edition in the face of doubts about Lord Westbury's dictum: A J P Menzies, *The Law of Scotland Affecting Trustees* (2nd edn, 1913) 1–2.

[39] The pre-Stair influences appear eclectic: T B Smith, *British Justice: The Scottish Contribution* (1961) 188–89.

Stair, whose description of a trust we find in the section dealing with deposit, where he states quite clearly that:

> Trust is also a kind of depositation, whereby the thing intrusted is in the custody of the person intrusted, to the behoof of the intruster, and the property of the thing intrusted, be it land or moveables, is in the person of the intrusted, else it is not proper trust: so if it be transmitted to singular successors, acquiring *bona fide*, they are secure, and the trustee is only liable personally upon the trust.[40]

4-14. This formula has had an important influence on the development of the law, especially the emphasis on the location of the 'custody' and the 'property' of the thing 'intrusted'. Beyond the importance of the, admittedly limited, features of the trust being set out is the perhaps more fundamental point that Stair is talking about something called a trust. The pre-supposition inherent in this discussion is important – the category of a trust is something which is known to Stair – what he is doing is trying to provide an explanation for a pre-existing idea. Stair makes clear that the 'property' of the thing intrusted is in the trustee; in turn the orthodoxy of today's law is that for a trust to exist there must be ownership of the trust estate in the trustee, and this passage from Stair is the early authority for this proposition.

4-15. It seems that Gretton is correct in suggesting that the concept of deposit was developed and expanded in this direction, while at the same time these developments were being augmented by appropriation of mandate features.[41] Stair's treatment is a snapshot of a stage in the process of synthesising the disparate trust-like devices into a single institution.[42] However, traditional discussions which muse over the intricacies of the mandate and custody influences, while no doubt important, also threaten to overshadow the importance of the trust development in relation to heritable property.

4-16. Therefore, with Stair we see the first principled attempts to discuss the trust, though it is important to remember that the very use of the term trust suggests a familiarity, which would be shared by lawyers of his day, with the concept of a trust. An examination of the case law of the period not only confirms the term, but also key definitional characteristics. Gretton identifies the seventeenth century as the formative century for the trust,[43] and the small number of new authorities which I have unearthed confirm that conclusion.[44]

[40] Stair I.13.7.

[41] Gretton, 'Evolution of the Trust' 514–16. This is foreshadowed by Stair's brief statement: 'Trust is also amongst mandates or commissions, though it may be referred to depositation, seeing the right is in custody of the person intrusted', in Stair I.12.17. The potential influence of the civil law *fideicommissum* is more difficult to gauge, though it certainly appears throughout Stair in close proximity to discussions about trusts: Stair IV.6.2–3.

[42] Indeed, by the time that Stair wrote there was definitely something known as a trust appearing in cases and other official sources: see e.g. a detailed example in P Hume Brown (ed), *The Register of the Privy Council of Scotland 1633–35* (1904) 628 ff. The significance of Stair's account is the attempt to rationalise and contextualise the emerging legal institution.

[43] Gretton, 'Trusts' 490–92.

[44] See the references above at nn 6 and 42, and Hume Brown (ed), *The Register of the Privy Council of Scotland 1633–35* at 649, where a supplicant asks the Privy Council to take action because 'his friends who were entrusted with his estate in his absence had upon a false surmise

Furthermore, it is during this period that the emergence of insolvency protection becomes palpable.[45]

(2) Continued Adherence to a Contract Model: Bankton and Erskine

4-17. In the eighteenth century the trust as we know it today is brought into sharper focus. In the treatments of Bankton and Erskine the intellectual debt to Stair is apparent. Bankton's perception and analysis of the institution of a trust follows the intellectual cartography set out by Stair. The importance of the nominate contract of mandate to the idea of trust is noted,[46] to the point that the terms 'trustee' and 'mandatory' are used interchangeably. On the other hand, the account which is given by Erskine places greater emphasis on the alternative contract suggested by Stair, the contract of deposit.[47] The embrace between the two concepts is so close that while talking of deposit generally Erskine states, 'He who intrusts is called *the depositor*, and the trustee the *depositary*.'[48] Yet, Erskine also talks of the concept of mandate as being closely linked, or indeed subsumed within the broader concept of trusts.[49] Therefore both Erskine and Bankton in their approaches to classification follow Stair closely.

4-18. The approach taken by the institutional writers appears open to the following charge: much of the confusion concerning the trust's legal nature hinges on attempts by the institutional writers to define the trust only by reference to the Roman law.[50] Practical problems with such an approach are clear, in relation to land at least, such as Menzies's much later observation

---

of his imprisonment abused the trust reposed in them and converted the same to their own use'; Hume Brown (ed), *The Register of the Privy Council of Scotland 1635–37* (1905) at 205, where an unfortunate 'having, by his affection to his friends and imprudent management of his estate, brought himself under great engagements for fear of the rigour of his creditors, quietly conveyed his jewels, great sums of money, some bonds and other things belonging to him to some of his most trusty friends within the sheriffdom and town of Aberdene to be kept by them for his behoof and the supply of his necessities'; and Hume Brown (ed), *The Register of the Privy Council of Scotland 1661–64* (1908) at 200, where money collected by a public officer was 'deposited the money in trust with Duncan Campbell, late bailie of Kintyre, who, in a most fraudulent manner, has converted the same to his own private use'.

[45] *Livingston v Forrester* (1664) Mor 10200; *Mackenzie v Watson* (1678) Mor 10188; Gretton, 'Trusts' 499–500. Gretton notes that the issue of insolvency protection remained disputed with regard to latent trusts until the well-known case *Heritable Reversionary Co Ltd v Millar* (1892) 19 R (HL) 43 settled the matter in the affirmative. See now the Bankruptcy (Scotland) Act 2016, s 88(1)(c).

[46] Bankton I.18.12–15. See also IV.24.28, where a declarator of trust is discussed with the observation: 'Declarators of trust are, in some sense, declarators of redemption; for thereby the trust-right is redeemed out of the hands of the trustee.'

[47] Erskine III.1.32.

[48] Erskine III.1.26.

[49] Erskine III.3.35.

[50] C D Farran, *The Principles of Scots and English Land Law* (1958) 125. See also R Burgess, 'Thoughts on the Origins of the Trust in Scots Law' (1974) JR 196 at 197.

that one cannot deposit land.[51] One should, therefore, keep in mind the potential for a different stream of thought coming through in relation to trusts from the law of heritable property, in which feudal ideas were still present until the beginning of the twenty-first century. It is well to remember that the idea of a unified Scots law of property with principles of general application, to the extent that it prevails, is a very new creature that has been able to blend both feudal and civilian traditions.

E. A MORE PROPRIETARY APPROACH?

(1) Moving Away from Nominate Contracts

4-19. The academic treatments of Stair, Erskine and Bankton are so similar that they usefully highlight the originality of approach to the subject taken by Forbes[52] by moving beyond discussing nominate Roman contracts. In his work 'Trust' is given its own chapter, interestingly now in the property law section. The trust is defined thus: 'Trust is the stating a Thing or Right for some End, in the Person of one so far, as that it can hardly be recovered from him, unless he be faithful, and answer the Confidence reposed in him, by restoring what is committed to him, or disposing thereof as the Truster desires.'[53] This definition contains many of the ingredients of a modern trust, the idea of fiduciary management and the vesting of property in another to be applied according to specified purposes. The somewhat cryptic description of stating something in a person appears to refer to the transfer of property, or something very near to that, from the truster to the trustee.

4-20. The deposit and mandate approach to the trust began to fall from favour, and to be replaced by varying theories involving an often somewhat vague discussion of the three-way relationship of truster, trustee and beneficiary; contract; a list of essential features somewhat bereft of taxonomic analysis; and even a suggestion involving quasi-contract. Yet, among these discussions based upon contractual notions of a more general form, consistent with the changing shape of contract law generally, the creep of proprietary concepts and consequences was increasing. Throughout the nineteenth century the proprietary ideas which would attach to trust law, initially as regards the result of immunity from creditors for example, would be reflected by increased use of English chancery jurisprudence. However, it is also of significance that the English classification of the trust was far from settled, and that these early attempts at classification also involved attempts to use Roman categorisation of a trust.[54] Indeed, not only are there flirtations with

[51] Menzies, vol I, 10; Menzies, *The Law of Scotland Affecting Trustees* (2nd edn, 1913) 23.

[52] W Forbes, *The Institutes of the Law of Scotland*.

[53] Forbes 308. The equivalent passage (at 1331) in the unpublished *A Great Body of the Law of Scotland* is the same: http://www.forbes.gla.ac.uk/page/?id=forbes-4-0387.

[54] M McNair, 'The Conceptual Basis of Trusts in the Later Seventeenth and Early Eighteenth Centuries' in R Helmholz and R Zimmermann (eds), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (1998) 213–17.

the use of *fideicommissum* and *usufructus*, but also with the idea of deposit.[55] McNair describes the deposit approach as a 'radical departure in the theorisation both of equity and trusts'.[56] Thus English law was engaged in similar conceptualising and organisation of its trust concept around a similar time and facing a similar choice to Scots law between a contractual and proprietary approach to trusts. It is hard to say to what extent, if at all, these developments were causally interlinked.

(2) Proprietary Conceptions

4-21. As we have seen, the nominate contract proved an important formative classification for the trust, at least so far as the institutional writers of the sixteenth and seventeenth centuries were concerned. Yet, with Forbes we saw that the idea of a trust was capable of being distinguished from the nominate contract approach and accorded its own treatment. In the nineteenth century the concept of the trust was developed by text writers in such a way that it came to be viewed as a separate institution. This newly freestanding institution came to be increasingly associated with the law of property or succession. With this shift in doctrinal conception came the important affirmation of the property law consequences attendant upon it – most importantly the immunity of the trust estate from creditors.

(a) Bell

4-22. In the last edition of the *Commentaries on the Law of Scotland* which Bell was responsible for[57] it is possible to see how the trust concept has matured. The text is primarily concerned with debt, and the subjects or estates to which a debt can attach, and so Bell discusses the 'Settlement of Estates in Trust' in this context. The trust for Bell is a highly versatile device, which is integral for the sophisticated transfer of property in certain circumstances.[58] The very flexibility of the trust makes it particularly suitable for this task, and its nature is summarised thus:

> It is the object of trusts, as applicable to lands and other feudal subjects, that in the person of the trustee there shall be vested a legal estate, so limited, and yet so complete, that while the conditions annexed to it, or implied in its constitution, create a separate estate or interest, which forms a burden or condition on the trustee's right; the active powers of administration or of transference, for the accomplishment of the intended purposes, are in the trustee at once unembarrassed and free, and capable of being exercised with perfect safety to those in whom the radical interest resides.[59]

[55] McNair, 'Basis of Trusts' (n 54) 216. See Anon, *A Treatise of Equity* (1737) 52; W Blackstone, *Commentaries on the Laws of England* (1768) III, 432; F W Sanders, *An Essay on Uses and Trusts* (2nd edn, 1799) 9–10.

[56] McNair, 'Basis of Trusts' (n 54) 216.

[57] G J Bell, *Commentaries on the Law of Scotland* (5th edn, 1826).

[58] Bell, *Commentaries* vol I, 31.

[59] Bell, *Commentaries* vol I, 30–31.

4-23. Yet, although the importance of the subject has undoubtedly increased, the old formulation of the nominate contracts of mandate and deposit is recited.[60] It is interesting that although the trust has developed as a property law concept, the mandate limb of the definition remains 'a point of chief importance to be observed'.[61] The reason is that the trust should not be looked at through the prism of the beneficiary's interest; rather, the prime importance is the connection between the truster and trustee, which harks back to the mandate point.[62] Accordingly, the manner in which the trust is constituted begins with the appointment of the trustee, and the nature of the estate in the trustee is of fundamental importance as regards the development of the property law characteristics of the trust.[63] In tracing the development of this concept of a separate estate in the trustee, the sources utilised by Bell are telling:

> Estates were of old, in Scotland, vested in trust, chiefly in the disastrous days of rebellion and civil war; when, before engaging in any dangerous enterprise, a land-owner made over his estate to a confidential friend, to be restored after the danger was over. In this use of trusts, the parties necessarily confided in the honour and fidelity of the trustee; the secret compact could not be disclosed, and that equity on which the Praetorian jurisprudence in Rome interfered to enforce the duties of persons similarly intrusted, (though for very different purposes), afforded the only ground of judicial interposition with us…The progress was much the same in England; the confusions during the wars of York and Lancaster having given rise to frequent use of trusts in that country. There the statute of 27. Henry VIII. called the Statute of Uses, had at one time nearly established the legal estate of the Cestui que use, and brought the whole of this department of jurisprudence under the administration of courts of law. But it was found necessary to have recourse to equity; and in this way, the jurisdiction in trusts forms a great branch of that of the Court of Chancery. In Scotland, without any general statute to declare the legal estate of the truster, the gradual operation of our combined system of law and equity, with the aid of our public records, has led to the establishment of a safe, clear, and regular system of trusts; in which the rights of all parties may be vested in the trustee, as in deposit, with perfect security to those interested, and resting upon rules which guide the determinations of our courts with the same precision and uniformity as in other cases.[64]

4-24. This passage discloses not only an acquaintance with the English doctrinal development, but also an attempt to show that similar results are achieved in Scots law. It seems clear that Bell is not saying that the two systems are the same; indeed, he explicitly describes the composite nature of law and equity in Scotland. Furthermore, this unification of law and equity means that the ownership of the trust property can be solely in the trustee. The safeguards which are provided by separate ownership in the law of England will be provided in Scotland by way of conveyancing practice. In other words, for Bell, the nature of the trust is dependent upon the way in

[60] Bell, *Commentaries* vol I, 31.
[61] Bell, *Commentaries* vol I, 31.
[62] Bell, *Commentaries* vol I, 31.
[63] And this is explicitly linked to the contract of deposit: Bell, *Commentaries* vol I, 31.
[64] Bell, *Commentaries* vol I, 32–33.

which it is constituted. What Bell terms a 'proper trust' is one which Stair would recognise, and is said to be merely personal.[65] In addition to this, there are two forms of trust which can be achieved using different conveyancing techniques, though both require registration, and as such should perhaps be considered more properly as conveyancing devices.[66] The importance of the identification of an asset, or estate, to which debt can attach is readily apparent here, as the further discussion again and again emphasises the need for vesting in the trustee.[67]

4-25. Although the approach taken by Bell continues to be ostensibly based upon the mandate and deposit theory, it is clear that it has moved in a far more proprietary direction. The emphasis upon the separation of estates, which is sometimes confusing to the extent that it suggests a proprietary estate separate from that of the trustee, and the consequent immunity from creditors and other sources suggests a greater proprietary importance. Bell appears to be proceeding on the basis of trusts of land, and therefore the separate estate theory accords with feudal theory, and the requirements of registration further underlie the proprietary effects.

(b) Nineteenth-Century Writers

4-26. In setting, or reflecting, a more proprietary course, Bell was followed through the nineteenth century by other writers. By the end of the nineteenth century the sixth, and last, edition of Lorimer's *Handbook* adopted the idea of a separate estate,[68] whereas Hill Burton pointed out that the transference of property was the fundamental aspect of trust, or rather it was this which distinguished it from mandate.[69] One may also note, however, that the discussion proceeded on the basis that a trust was a contract, and indeed from Erskine's characterisation of the trust as a species of deposit. This greater emphasis on proprietary attributes in connection with trust, and indeed comparisons with English law and its equitable approaches, was likely to prompt further development. A good touchstone for these developments can be observed in successive editions of Erskine's *Principles*.

4-27. In the last edition of the *Principles* that Erskine himself prepared, there is little or no mention of the trust, and it does not appear in the discussions of

[65] Bell, *Commentaries* vol I, 34.

[66] Bell, *Commentaries* vol I, 34. Indeed, conveyancing devices had been used to give proprietary effect to trusts long ago: J Steuart, *Dirleton's Doubts and Questions on the Law of Scotland* (2nd edn, 1762) 441.

[67] Bell, *Commentaries* vol I, 34–35. Note that in the subsequent edition of the *Commentaries*, that of Patrick Shaw, we see the arrangement of this title altered, though with only minor amendments to content (6th edn, P Shaw ed, 1858) III.8.1 ff. The changes wrought in this edition were reversed in the seventh edition (1870) by J McLaren.

[68] J Lorimer, *A Handbook of the Law of Scotland* (6th edn, 1894) 228–29.

[69] J Hill Burton, *Manual of the Law of Scotland* (2nd edn, 1847) 231. See also W Kinniburgh Morton, *Manual of the Law of Scotland* (1896) 448: 'A trust may be created in any manner which results in the investiture of the trustee, that is, the *transference* of the trust property to him, and in *proving* the purposes for which the property is to be held' (emphasis in original).

mandate and deposit.[70] However, the continued use of the book as the leading student text ensured that by the time of Guthrie Smith's 'new edition' of 1860,[71] it was decided that the text should contain a new section pertaining to trusts. This treatment relies upon Erskine's definition, in his *Institute*,[72] that a trust is of the nature of deposit, before it goes on to discuss various aspects of the nature of trust. In a number of the following editions the scheme remains unchanged. This changes with Rankine's editorship of the eighteenth edition of 1890.[73] The reliance upon Erskine's statement pertaining to deposit is not only omitted: rather, we are told that to attempt a Roman categorisation of trusts is impossible.[74] Not only are the nominate contracts in some sense swept away, but the approach of Bell, that is to say the proprietary idea of the conveyance, is advanced:

> Thus, a trust is not an amalgam of deposit and mandate, as has been suggested, for a depositary may not, while a trustee or mandatary must, deal with the thing in question. A trust is an interest created by the conveyance of property, made or assumed to be made, by one party (the truster) to another (the trustee) in order that the latter may carry out the directions, express or implied, of the former respecting its management and disposal.[75]

4-28. Observing these editorial decisions and changes we can use the evolving text as an indicative microcosm to track the changing conceptualisation of the trust across Scots law in the period. The nominate contract approach has been superseded by a proprietary approach, whereby the contract is closely bound up with the concept of transfer. However, not only has the proprietary dimension become more pronounced, but so too has the equity influence from English law:

> That which is carried to trustees by the conveyance is conveniently described by an English term as the *legal estate* – a fee limited by the trust purposes as inherent conditions. The beneficiaries – the persons for whose benefit these trust purposes are conceived – have what is known, by copying again the English nomenclature, as the *equitable estate* – a *jus crediti* in the wider sense, involving not only a right to call on the trustees in certain circumstances to denude, but also a *jus in re* or *jus ad rem*, according as the beneficiaries have a right *ex facie* of the trustee's title to demand specific conveyance, or have no such right.[76]

4-29. With the arrival of these proprietary approaches to the law of trusts and the increased conceptual importance of a transfer the nature and organisational conception of it within the law more generally was evolving. Nominate contractual ideas used to explain the trust, however, remained doctrinally influential and later treatments oscillated somewhat between contractual and proprietary approaches. Further, the greater emphasis upon

[70] J Erskine, *The Principles of the Law of Scotland* (3rd edn, 1764).
[71] J Erskine, *The Principles of the Law of Scotland* (new edition, J Guthrie Smith ed, 1860).
[72] Erskine, III.1.32.
[73] J Erskine, *The Principles of the Law of Scotland* (18th edn, J Rankine ed, 1890).
[74] Erskine, *Principles* (18th edn) at III.XA.1.
[75] Erskine, *Principles* (18th edn) at III.XA.1.
[76] Erskine, *Principles* (18th edn) at III.XA.2.

proprietary concepts meant that there was more scope for potentially destabilising doctrines, such as the dual ownership theory, from English chancery jurisprudence to be received by Scots law.

(3) Menzies: a General Contractual Approach

4-30. A general contractual theory was advanced most strongly by Menzies,[77] who seems inclined to move away from the nominate contracts that mandate and deposit represent, and instead rather see the trust as contractually based, but not constrained by the features of the two nominate contracts rejected.[78] Not only this, however, but Menzies's approach appears to reject, somewhat mysteriously, the three-fold relationship of truster, trustee and beneficiary. Instead, what is said to be the position is that the constitution of the trust provides the trustee with a contractual right prestable against the truster, which is then assigned to the beneficiary, thus meaning there is only ever a two-party contractual scheme at any one time. This was expressly based upon English authority in the second edition.[79] At this stage one may note Farran's suggestion that 'Menzies – one of Scotland's leading writers on trustees[80] – by no means adopts the English position.'[81] Whether Menzies was mistaken or correct as to the English position, he certainly justifies his contractual theory of Scots law on the basis that this is the theory in England.[82] Indeed, Farran lauds this approach as distinctly Scottish by following ideas of contract and states that 'while this view of the relationship has been generally accepted in Scotland, it has by no means passed unchallenged'.[83] However, this 'generally accepted approach' was, as Farran himself points out, ultimately rejected.[84]

[77] Though not without some judicial antecedent: 'In Scotland the law of trusts has always been treated as part of the general law of contracts, and the obligations upon the trustee, and the rights of the truster and the beneficiaries as against him, have been given effect to on the grounds of contracts': *Gordon v Gordon's Trs* (1866) 4 M 501 at 535 *per* Lord Barcaple.

[78] Menzies, vol I, 10–11; A J P Menzies, *The Law of Scotland Affecting Trustees* (2nd edn, 1913) 24–25.

[79] Menzies, *Trustees* (2nd edn) 25 n 1. The footnote in the second edition is a reaction to Lord President Dunedin's opinion in *Allen v McCombie's Trs* 1909 SC 710 at 716–17, where his Lordship was sceptical about the suggestion that trusts involved only contracts, particularly breach of trust, and himself invoked the English approach. Menzies suggested that this was not true and cited contrary English jurisprudence.

[80] In the text 'based' upon Farran's book this appellation is removed: C F Kolbert and N A M MacKay, *History of Scots and English Land Law* (1977) 156. It is not clear if the removal was a stylistic or substantive editorial decision.

[81] C D Farran, *The Principles of Scots and English Land Law* (1958) 126.

[82] Indeed, one commentator suggests of Menzies's monograph in general: 'Menzies is almost overlaid with English precedents, and many of the most doubtful help to Scottish lawyers': G W Wilton, 'Trust Law' (1933) 45 JR 295 at 295.

[83] In support of this 'general acceptance' Farran cites McLaren, *Wills and Succession* 826.

[84] *Allen v McCombie's Trs* 1909 SC 710 at 716–17 *per* the Lord President (Dunedin).

(4) Proprietary Developments

4-31. In *Allen v McCombie's Trs*,[85] the court concluded that the nature of a trust could not be ascribed to contract: Lord Dunedin stated that a trust is to be classified in its own right and was not a bare contract. Furthermore, the court discussed the influence of English chancery jurisprudence, noting that some of its principles and rules had almost unbeknownst to Scots lawyers developed in Scots law. This may be said to mark the beginning of the end for the pure contract classification of the trust, whether it be the narrower nominate Roman contracts envisioned by the institutional writers, or whether one is talking about the nascent more generalised contract approach which can be ascribed to Menzies.[86] The literature comes increasingly to rely upon the idea of the dual ownership of English law, to the point that Farran could say: 'The trust and the equitable estate are among the most important legal conceptions that English law has evolved. Scotland has come – we hope – gracefully to recognise that fact. She no longer seeks to take advantage of the practical convenience of the trust while pretending that it is really only some Roman *obligatio*.'[87] While one may disagree with some of the passage, not least its tone, there is some truth to it. Empty recitals of deposit and mandate mantra were no longer appropriate, and there was a definite shift towards the adoption of English equitable language and concepts.

4-32. The move towards the use of split ownership to explain the juridical underpinning of the trust began in earnest in the early-twentieth century.[88] In previous writings the influence of this quintessentially English concept had begun to make an appearance, and while the sheer fact of such inclusion is itself indicative, the frequency with which terminology associated with dual ownership was used appears to have been sporadic and rarely fully explained. Therefore, in Menzies there is a peppering of such terms that is less easy to discern than in McLaren, though they make some appearances there too. The first text in which we can see sustained anglocentric reasoning,

[85] *Allen v McCombie's Trs* 1909 SC 710.

[86] A strongly contractual analysis (perhaps building on Menzies's broadly contemporaneous account) can also be found in C R A Howden, 'Trust' in J Chisholm (ed), *Greens Encyclopaedia of the Law of Scotland* (1899) vol XII, 326 ff, and is retained in the second edition: C R A Howden, 'Trust' in J Chisholm (ed), *Greens Encyclopaedia of the Law of Scotland* (2nd edn, 1914) vol XII, 270 ff.

[87] Farran, *Scots and English Land Law* (n 81) 128. In the subsequent text based upon Farran's the authors add another paragraph highlighting the strong influence of English trust law on the Scottish during the nineteenth century: Kolbert and MacKay, *History of Scots and English Land Law* (1977) 159.

[88] Though it appeared sporadically beforehand: see W A Wilson and A G M Duncan, *Trusts, Trustees and Executors* (2nd edn, 1995) at para 1.42. It would also be fair to say that the idea of split ownership was almost entirely rejected by the beginning of the twenty-first century: see *Sharp v Thomson* 1995 SC 455 at 479–81 *per* the Lord President (Hope); *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 at para 46 *per* Lord Hope of Craighead. The idea had been criticised much earlier however: *McMillan v Campbell* (1834) 7 W & S 441 at 447–48 (argument), and at 450 ff *per* Lord Wynford; *Inland Revenue v Clark's Trs* 1939 SC 11 at 21–22 *per* the Lord President (Normand) and at 26 *per* Lord Moncrieff.

Mackenzie Stuart's *The Law of Trusts* published in 1932, opens with a quote from an English chancery decision[89] before going on to state:

> [A] trust may be defined as the legal relationship which arises when estate is owned by two persons at the same time, the one being under an obligation to use his ownership for the benefit of the other. The person who constitutes this relationship arising from duplicate ownership is the truster. The owner who is under an obligation to use his ownership for the benefit of the other is a trustee; and his ownership is trust ownership. The person for whose benefit this ownership is used is the beneficiary; he has the beneficial ownership. The interest vested in a trustee is purely formal; he has, as trustee, the legal title to the estate but no beneficial ownership; that belongs to the other, the beneficiary or beneficial owner, who has merely a right to vindicate his interest by an action *in personam* against the trustee.[90]

4-33. It would be difficult to take a more classical English chancery dual ownership line than this, at least in the context of Scots law where one must make at least a cursory nod towards some Scottish authority. Mackenzie Stuart does just that by trying to rationalise existing Scottish ideas and materials, and ends up suggesting that the trust is '*sui generis*' as a matter of legal classification. Furthermore, he suggests that '[a] trust exists independently of the truster and the trustee; if the trust is left for any reason without a trustee to carry it on, it does not come to an end. The right attaches, moreover, to the trustee only in that capacity and not to him as an individual. It is something separate from his individual rights of property.'[91] Thus, although the opening gambit of the work seems to suggest a heavily English chancery inspired dual ownership basis as the normative underpinning of the trust, the subsequent discussion moves more towards an approach closer to the law of persons when arguing that the trust is *sui generis*.[92] Although imprecise, the description comes near, in some respects, to the idea of dual patrimonies or separate legal personality for the trust itself.

F. DISTINCTIVENESS ASSERTED

(1) Judicial Murmurs

4-34. The idea of the trust as some form of mandate and deposit was one which pervaded the law for a long time, though ultimately only to have its shortcomings exposed.[93] Following on from the increasingly explicit adoption of English chancery jurisprudence, as part of a move towards a proprietary

[89] *In Re Williams* [1897] 2 Ch 12 at 18 *per* Lindley LJ.

[90] Mackenzie Stuart 1 [footnote omitted].

[91] Mackenzie Stuart 2.

[92] Similar sentiments are expressed at the end of the nineteenth century in a book review of Menzies: W Hunter (1893) 5 JR 179.

[93] See Erskine III.1.32; Bankton I.18.12; 1.15.8; III.1.27; IV.15.3; G J Bell, *Commentaries on the Law of Scotland* (7th edn, 1870) vol I, 31; *Cuningham v Montgomerie* (1879) 6 R 1333; *Croskery v Gilmour's Trs* (1890) 17 R 697 at 700 *per* the Lord President (Inglis). C R A Howden, *Trusts, Trustees and the Trust Acts in Scotland* (1893) 1–3.

approach to fill the *lacunae* left by rejecting mandate and deposit, something of a backlash began to appear, which, somewhat unusually in terms of doctrinal legal development, began in the courts. In 1955 Lord Normand in the House of Lords stated: 'The history of the origin and development of the law of trusts in Scotland is not at all the same as the history of the origin and development of the law of trusts in England.'[94] Such statements, which do not entirely deny English influence but are careful to assert a distinct development, have been repeatedly made subsequently[95] at the highest level. Lord Reid expressed similar sentiments when he stated: 'On such a matter we cannot seek enlightenment from the law of England, because the origin of trusts in Scotland is very different from its origin in England. Trusts were well known in Scotland by the seventeenth century, but I need not explore the early history.'[96]

4-35. These two speeches from the House of Lords are clearly important, though one should be careful not to press that importance too hard. It is one thing to say the development was different, but the Scottish trust's development has been influenced by some English ideas. Therefore, it is important to consider the academic literature after these strident but somewhat bare judicial pronouncements to consider how those English authorities are utilised and treated.

(2) Smith and Walker

4-36. Smith was keen to distinguish the development of trusts in the two jurisdictions, or at the very least was keen to record that the Scots trust has a different history.[97] The sentiment is echoed by Walker,[98] where he rejects the mandate/deposit analysis. In so doing, Walker also appears[99] to reject a split ownership analysis, preferring to rely on the idea of ownership in the

[94] *Camille & Henry Dreyfus Foundation v Inland Revenue Comrs* [1956] AC 39 at 47.

[95] Differences between the law of trusts had been alluded to before this: e.g. *Lumsden v Buchanan* (1865) 4 Macq 950 at 961 *per* Lord Cranworth and at 969 *per* Lord Kingsdown.

[96] *Allan's Trs v Lord Advocate* 1971 SC (HL) 45 at 53 *per* Lord Reid; this element of Lord Reid's speech was expressly adopted in *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 at para 44 *per* Lord Hope of Craighead and at para 85 *per* Lord Rodger of Earlsferry.

[97] Smith, *Studies* 198–99. Indeed, this assertion has become something of a theme, and is forcefully put in similar terms in the *Stair Memorial Encyclopaedia*: Lord Ross et al, 'Trusts, Trustees and Judicial Factors', vol 24 at para 1.

[98] Walker, *Principles*, vol IV, 3.

[99] The passage is ambiguous: 'The principle of the trust is that the ownership of certain property is legally vested in one or more persons, but, though nominal owners, they are not absolute or beneficial owners and are obliged, by the terms of the trust under which they have acquired ownership, to hold the property for certain purposes defined by the trust and to administer it for the benefit of others, the beneficiaries designated by the trust, which purposes are a qualification of the nominal owners' rights and constitute a burden on the property preferable to all claims by and through them, and subject also to a reversionary right remaining with the truster, his heirs and assignees, so far as the estate, is not exhausted by the purposes': Walker, *Principles*, vol IV, 3.

trustee as of the greatest importance, limited by personal duties.[100] However, Walker's definition of a trust does include terminology referring to 'beneficial owners' and 'nominal owners', though it would appear that he considers such terminology to be of distinctly Scottish usage and so does not, or should not, import dual ownership. This approach may be distinguished from Smith's definition[101] which does not adopt such language, but rather emphasises the placing of property in the hands of another, and the subsequent duties upon that person, and it highlights that in carrying out its purpose a trust draws on a number of different legal instruments from different areas of law.[102] Indeed, in his main work, *A Short Commentary on the Law of Scotland*,[103] Smith was careful to state that the specialities of the trust meant it could not be categorised as part of the law of property or obligations, and was *sui generis*.[104] While prepared to acknowledge the influence and sometime usefulness of English chancery jurisprudence, Smith was keen to emphasise the different conceptual basis of the two systems:

> English equity jurisprudence has at times provided useful guidance to the solution of problems resting on general equitable principles. It must be stressed, however, that no good and much harm can result from seeking to graft onto Scots law the characteristically English dichotomy of 'legal' and 'equitable' ownership. Confusion enough has already been caused to Scots lawyers by the uncritical extension to Scotland of essentially English doctrines of trust.[105]

4-37. In his second edition, Walker's text is unchanged aside from the insertion of an important sentence: 'Trust is in fact a triangular relationship, quite *sui generis*, and giving rise to obligations independently of other grounds of obligation.'[106] What prompted this addition is unclear, as the way of looking at trust like a triangular relationship is not a new one. It might be that the inclusion was prompted by an acceptance of Smith's assertion to that effect or the appearance the year before of Wilson and Duncan's text on trusts.[107] Perhaps Walker was simply unhappy with the apparent lack of definition he had given previously after disposing of the contractual theories.

[100] Walker, *Principles*, vol IV, 3.

[101] Smith, *Studies* 221.

[102] Smith, *Studies* 220–21.

[103] T B Smith, *A Short Commentary on the Law of Scotland* (1962).

[104] Smith, *Short Commentary* 547. In reaching that conclusion Smith is following Mackenzie Stuart, whose son is thanked on the same page for assistance and it is noted he is preparing the second edition of his father's book on trusts: see footnote to p 547.

[105] Smith, *Short Commentary* 549.

[106] D M Walker, *Principles of Scottish Private Law* (2nd edn, 1975) vol II, 1773; retained in Walker, *Principles*, vol IV, 3.

[107] W A Wilson and A G M Duncan, *Trusts, Trustees and Executors* (1975). However, examination of this text points to no particular predilection in such a direction; the emphasis of this work is on the fiduciary character of the trust – which owes much to Smith, and therefore may have prompted an attempt to move towards this position.

(3) Wilson and Duncan

4-38. Wilson and Duncan's *Trusts, Trustees and Executors*[108] was the first substantial monograph devoted to the subject for some years. Wilson and Duncan provide a practical introduction to the 'Nature of a Trust' by way of an analysis of areas of law which the trust may correctly or erroneously be said to touch.[109] Having set out in some detail these areas, Wilson and Duncan make to define the institution of the trust in Scots law. The definition is preceded by an acknowledgement of the difficulties inherent in such a task, before disposing of the definitions that had gone before and rejecting English definitions.[110] The American Law Institute's Restatement is favourably cited with a view to concentrating upon the fiduciary duties of the trustee: 'a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it'.[111] Thereafter, the definition which Wilson and Duncan finally settle on is the following:

> A trust then is a legal relationship in which property is vested in one person, the trustee, who is under a fiduciary obligation to apply the property to some extent for the benefit of another person, the beneficiary, the obligation being a qualification of the trustee's proprietary right and preferable to all claims of the trustee or his creditors.[112]

4-39. The definition encapsulates two of the key aspects of a trust – the idea of the fiduciary character of the trustee's role, and in turn the fact that this fiduciary role is related to the vesting of ownership in the trustee. The trust's operative effect in the law of property is important as regards insolvency and has proven a persistent challenge to its development, as noted by Wilson and Duncan:

> In their anxiety to stress that the beneficiary does not have a right of ownership, Scottish judges have displayed a regrettable tendency to assert that the beneficiary has merely a personal right or *jus crediti*…The beneficiary's right, as McLaren argued, must be something more than a personal right or *jus crediti*, because the trust estate does not pass to the trustee in the trustee's

[108] W A Wilson and A G M Duncan, *Trusts, Trustees and Executors* (1975).

[109] Wilson and Duncan, *Trusts, Trustees and Executors* 3–17; structurally and substantially little altered in the second edition (1995) at paras 1.01–1.53.

[110] Wilson and Duncan, *Trusts, Trustees and Executors* 17–18; (2nd edn, 1995) 19–20.

[111] American Law Institute, *Restatement of the Law (Second) Trust* (1959) § 2. In the third restatement this wording has been replaced with 'A trust…is a fidudiary relationship with respect to property, arising from a manifestation of an intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee': American Law Institute, *Restatement (Third) of Trusts* (2003). See also A W Scott, W F Fratcher and M L Ascher, *Scott and Ascher on Trusts* (4th edn, 2006) vol I, § 2.1.3 ff.

[112] Wilson and Duncan, *Trusts, Trustees and Executors* 18; (2nd edn, 1995) 20.

> sequestration. McLaren suggested *jus ad rem* as a right lying between a *jus crediti* and a *jus in re* but this nomenclature has not been generally accepted.[113]

This analysis must be given consideration since it has been frequently stated that there is nothing more than a personal right in the beneficiary, but at the same time there are undoubted effects in insolvency.

4-40. The *jus ad rem* analysis is controversial, not least because Scots law is loath to admit such a right in general terms,[114] yet even were it to acknowledge such a right the nature of it has thus far proved elusive.[115] Perhaps the most perceptive analysis came from an English judge in the House of Lords:

> I must confess that upon this subject I think there is a great deal of doubt and obscurity, from the want of anything definitely explaining the distinction between *jus ad rem* and *jus crediti*, because I think I find that these words have been used in many cases interchangeably, without any clear distinction of the one from the other; but there may be this practical distinction, that the *jus ad rem* is a right which the person possessing it may make a complete right by his own act, or by some act which he may compel another, without a suit, to perform; whereas, the *jus crediti* may be defined to be a right which the holder of it cannot make available, if it is resisted, without a suit, to compel persons to do something else in order to make the right perfect.[116]

4-41. It is not surprising that his Lordship found difficulty in the meaning of the term.[117] The analysis that a *jus ad rem* is a right to the completion or perfection of a real right[118] is acceptable. Ultimately, however, it remains a personal right with no insolvency protection or priority unless one departs from the fundamental division of real and personal rights. In any event, it was clear by this stage that the assets of a trust would not fall within the statutory sequestration procedure following the personal insolvency of the trustee.[119] Statute provides that trust assets do not form part of the sequestrated estate, so the beneficiary's right does not need to be a real right

[113] W A Wilson, 'The Trust in Scots Law' in W A Wilson (ed), *Trusts and Trust-Like Devices* (1981) 239.

[114] *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 at para 19 *per* Lord Hope of Craighead; *Sharp v Thomson* 1995 SC 455 at 461–65 *per* Lord Hope of Craighead.

[115] Some commentators appear to use the term as merely a personal right to a real right, yet the quality of the right is strictly personal: Erskine III.1.2; G C H Paton (ed), *Baron David Hume's Lectures 1786-1822* (Stair Society vol 17, 1955) vol IV, 182–83; *Pettigrew v Harton* 1956 SC 67 at 76–77 *per* Lord Mackintosh. Others appear content to note the difficulty in the definition of such a category: W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable* (1897) 33.

[116] *Edmond v Gordon* (1858) 3 Macq 116 at 122–23 *per* Lord Cranworth. See also the rather more curt statement that 'The suggestion that the right is in the nature of a *jus ad rem* does not mean very much': *Johnston v MacFarlane's Trs* 1986 SC 298 at 307–08 *per* the Lord Justice-Clerk (Ross).

[117] See P Van Warmelo, 'Real Rights' (1959) Acta Juridica 84 at 84–86; A Pretto-Sakmann, *Boundaries of Personal Property* (2005).

[118] See Van Warmelo, 'Real Rights' (n 117) 95; W N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916–17) 26 Yale LJ 710 at 734–38.

[119] *Heritable Reversionary Co Ltd v Millar* (1892) 19 R (HL) 43. The rule is now statutory: Bankruptcy (Scotland) Act 2016, s 88(1)(c).

because the trust property is not subject to the trustee's personal bankruptcy at all. But that statutory exclusion of trust property from the sequestrated estate does not explain the protection extended to trust property from creditors' diligence or other insolvency processes, nor does it explain fully how that exempt estate is held.

4-42. The *Stair Memorial Encyclopaedia*'s definition is less concerned with the fiduciary character of the trustee than that of Wilson and Duncan:

> For practical purposes, 'trust' may be defined as a legal relationship in which the legal title to property is transferred to a person (the trustee) who does not acquire an unlimited right to property, but who holds it subject to an obligation to apply it in accordance with the directions, express or implied, of the person who constituted the trust (the truster) for the benefit of certain persons (the beneficiaries). This shows that three persons must be involved in any trust, namely truster, trustee and beneficiary.[120]

4-43. This definition makes no mention of the idea of a trustee as a fiduciary, nor does it suggest that the duties under which the trustee operates are fiduciary in any sense. Rather, it appears to suggest that the limitations upon the trustee are property law based. In other words, the emphasis is upon a limitation on the ownership of the trustee, and the limitation is said to be that of an obligation to administer the trust in accordance with the trust purposes. The term 'obligation' is of course sufficiently open textured to cover contractual and delictual obligations, yet it is unclear what obligations are in mind and whether it encompasses fiduciary obligations and to what extent. Arguably the omission of the mention of potential fiduciary obligations is noteworthy, especially given the central position which it was given by the leading text of the time.[121]

4-44. In the early 1990s a new textbook intended for students, Norrie and Scobbie's *Trusts*, appeared which was devoted to the subject. Norrie and Scobbie's definition of a trust emphasised the tripartite relationship of a trust, and the fact that there must be a transfer of ownership for purposes.[122] This is further developed by adopting the definition given by McLaren that a trust is an 'interest created by the transfer of property to a trustee, in order that he may carry out the truster's directions respecting its management and disposal'.[123] That definition reflects the proprietary and title-based approach which Bell took, and that was reflected to some extent by the *Stair Memorial Encyclopaedia* too.

4-45. Norrie and Scobbie go on to explain some further characteristics of a trust, including the importance of the transfer of property and the setting of trust purposes.[124] More pertinently for present purposes, in amongst

[120] Lord Ross et al, 'Trusts, Trustees and Judicial Factors' in *Stair Memorial Encyclopaedia*, vol 24 at para 9.

[121] Wilson and Duncan, *Trusts, Trustees and Executors* 18.

[122] K M Norrie and E M Scobbie, *Trusts* (1991) 1.

[123] McLaren, *Wills and Succession*, vol II, at para 1510.

[124] Norrie and Scobbie, *Trusts* 1–3.

explanations rejecting the institutional and contractual theories a novel approach is advanced which foreshadows later developments within the law: 'The trust is a legal institution separate from and independent of all others. It is not itself a legal person, but the trustees acquire a new legal personality, separate from their own.'[125] This is a very interesting and potentially important statement, in that the idea of a different legal personality within the same person had not been mentioned in this context before.[126]

4-46. Norrie and Scobbie's reference to a novel and separate legal personality for the trustee is an important precursor for the more refined patrimonial theory which would be advanced by Gretton and Reid, and marks the initial move away from a trust law associated with property law in favour of an approach that is grounded within the law of persons. Norrie and Scobbie also point out that the trust does indeed have a number of different legal mechanisms to constitute it, but which when combined create the unique trust; furthermore, they explicitly note the extent and importance of the fiduciary nature of a trust.[127] Finally, the importance of the transfer of ownership is once again noted, as is the unique character of the beneficiary's right as personal, but with more powerful effects.[128] It is a 'personal plus' right, or 'enhanced personal right'.[129] Norrie and Scobbie's text is important as the treatment to begin to draw together all the various facets and elements of the trust in order that it could be properly integrated into the fabric of Scots private law – obligations, property, fiduciary obligations, and, crucially, by drawing attention to the law of personality.

(4) The Late Twentieth/Early Twenty-first Century Approach: The Rise of Patrimony

4-47. At the beginning of the 1990s the analysis of the trust had developed considerably from the somewhat confused doctrinal approach at the beginning of the century. The contractual theory was finally rejected comprehensively, judicially initially, and then after something of a false start, by text writers. Indeed, the critical analysis which began to blow through Scots law from the 1960s onwards was felt in the field of trust law too. A

[125] Norrie and Scobbie, *Trusts* 3. There is high authority that a trust does not have a separate legal personality in Scots law: *Muir v City of Glasgow Bank* (1879) 6 R (HL) 21 at 33 *per* Lord Penzance, at 38 *per* Lord O'Hagan, at 39 *per* Lord Selborne, and at 43 *per* Lord Blackburn; *Steel v Fraser* [2006] HCJAC 51, 2006 SCCR 411 at paras 7–8. Cf *Muir v City of Glasgow Bank* (1878) 6 R 392 at 405ff *per* Lord Deas; *Lumsden v Buchanan* (1865) 4 Macq 950 at 961 *per* Lord Cranworth.

[126] Though others had come close: 'A trust exists independently of the truster and the trustee; if the trust is left for any reason without a trustee to carry it on, it does not come to an end. The right attaches, moreover to the trustee only in that capacity and not to him as an individual. It is something separate from his individual rights of property': Mackenzie Stuart 2.

[127] Norrie and Scobbie, *Trusts* 3.

[128] Norrie and Scobbie, *Trusts* 3–4.

[129] G L Gretton, 'Constructive Trusts: I' (1998) 1 Edin LR 281 at 287.

long process of refining the juridical nature of the trust, alongside critical appraisal of English chancery influence, took hold and flourished. After that period of refinement the trust in the 1990s stood upon the threshold of being understood more completely, and, perhaps more importantly, more cohesively within the structure of Scots law. However, a fully reasoned general theory of the basis of the Scottish trust was still elusive until the dual patrimonial theory was proposed. The patrimonial theory shifts the focus of the law of trusts away from property law concepts, and, instead, utilises the law of persons as a definitional and explanatory basis.

4-48. The patrimonial theory was chiefly proposed and developed by Gretton and Reid, who, in presenting their theory on the international stage[130] as well as domestically, were keen to emphasise that a trust can exist in a civilian property law system, and is not dependent on a dual ownership system of equity.[131] In many respects the theory is one which builds upon Smith's scepticism in relation to the purportedly orthodox global view that the trust is an entirely English affair and must therefore be based upon the bedrock of a functioning separate equity jurisdiction.[132] Gretton identifies the crucial features of a trust as compared with other legal mechanisms, and rejects theories involving mere contract or agency, while Reid is at pains to show the right of a beneficiary to be one that is really personal in Scots law.[133] Reid also explains that the rights of a beneficiary in English law would be classified as personal rights by a Scottish lawyer.[134] So an important element of Gretton and Reid's theory of patrimony for Scots law, and beyond, is that it both explains key internal features of the law of trusts and how it fits within the private law of Scotland, and, secondly, it further explains at a deeper and wider level that the classically understood English approach to a trust using binary ownership is but one way to conceptualise the trust while retaining key features such as protecting the beneficiaries from the insolvency of the trustee.

4-49. Thus Gretton suggests an alternative analysis to *duplex dominium* which is said to represent the underlying theory upon which Scots trust law is built: the idea of a 'special patrimony'. Gretton gives a brief introduction to the idea of a patrimony, which historically has made little appearance in legal literature in English.[135] A patrimony is the sum of a person's assets and liabilities, at least those that are recognised as such by the private law. The

[130] See K G C Reid and H Watanabe, '"Principles of European Trust Law" and "Draft Directive on Protective Funds"' (2012) The Quarterly Review of Corporation Law and Society 113 at 115.

[131] G L Gretton, 'Trusts Without Equity' 49 (2000) ICLQ 599; Reid, 'Patrimony not Equity'; G L Gretton, 'Trust and Patrimony' in H L MacQueen (ed), *Scots Law into the 21st Century: Essays in Honour of W A Wilson* (1996).

[132] See T B Smith, *Studies Critical and Comparative* (1962) 198.

[133] Reid, 'Patrimony not Equity' (n 131) 21–22.

[134] Referring to *Webb v Webb* [1994] ECR I-717 (Case C-294/92) where the European Court of Justice held that the beneficiary's right in English law is classified as a personal right as a matter of European law.

[135] Gretton, 'Trusts Without Equity' (n 131) 608–09.

normal rule is that a person has only a single patrimony: one person = one patrimony; but the civilian tradition also recognises the idea of a special patrimony such as the property from a marriage, in other words a 'matrimony'.[136]

4-50. Each patrimony is separated from the other, but the special patrimony operates what is known in Scots law as real subrogation and is broadly equivalent to tracing in English law. The essence of real subrogation is that when something leaves the patrimony in exchange for another thing, the replacement thing automatically becomes a part of the same patrimony. In this sense it is like a ring-fenced floating charge, in that there is a body of assets which experiences changes in its constituent parts, yet in the case of exchange the new parts are automatically absorbed into the whole of the special patrimony – they do not become part of the personal patrimony of the trustee. Arguably this stretches the specificity principle of property law somewhat. However, it is another speciality of the trust.

4-51. Gretton suggests that the Scottish trust is an example of a special patrimony, explicitly recognising his debt to Lépaulle, who first made the connection between patrimonial theory and trusts.[137] The special patrimony explains the way in which the beneficiary is protected in the event of the trustee's insolvency. If the trustee becomes insolvent then the beneficiary's personal right is untouched by the insolvency, not because it trumps any other creditor, but because the trust property and special patrimony are never subject to the insolvency.[138] Furthermore, patrimony is said to explain the way in which a trust will not fail due to the lack of a trustee, in that if all the trustees die the trust continues and more trustees can be appointed.[139] Therefore the theoretical underpinning of the trust is not predominantly the law of obligations or property – what underlies the trust and bestows its most interesting features is the patrimonial theory which is a matter for the law of persons.[140] This distinctive Scottish approach to patrimonial theory, whereby the trustee is the owner of trust property held in a separate/special patrimony, has been influential in Europe,[141] and may perhaps spread

[136] Gretton, 'Trusts Without Equity' (n 131) 610.

[137] Lépaulle, *Traité Théorique et Pratique des Trusts* (1932), and Lépaulle, 'The Strange Destiny of Trusts' (n 4). It is correct to say that they were influenced by Lépaulle, but although Lépaulle ultimately suggested that trusts should be given a separate legal personality neither Gretton nor Reid suggest legal personality should be accorded to a trust in their writings. That approach is consistent with high authority that a trust does not have legal personality: see n 125 above.

[138] Reid, 'Patrimony not Equity' (n 131) 23.

[139] Reid, 'Patrimony not Equity' (n 131) 24.

[140] Gretton, 'Trusts Without Equity' (n 131) 614–15.

[141] See S C J J Kortmann et al (eds), *Towards an EU Directive on Protected Funds* (2009) 9–10 and Art 3(1) and (2): '(1) In a protected fund, assets are owned by an administrator for the benefit of one or more beneficiaries. (2) The assets of a protected fund form a patrimony separate from the private patrimony of the person who is administrator and from the patrimony of any other protected fund held by that person'; D J Hayton, S C J J Kortmann, H L E Verhagen, *Principles of European Trust Law* (1999) Art 1(1): 'In a trust, a person called the

further.[142] A measure of the increasing international interest in patrimonial theory for trusts is the appearance of a detailed comparative volume on patrimony in the law of trusts edited by Valsan in 2015, and the detailed critical papers contained therein.[143]

(5) The Patrimonial Theory – Academic Theory to Accepted Law?

(a) Academic Consensus?

4-52. The influence of the academic jurist in Scotland is a topic that has attracted some attention.[144] Patrimonial theory provides a case study to evaluate a claim that academic work can influence the way in which we think about the entire conceptual basis and taxonomic shape of an area of law.[145] Other academics adopted Gretton and Reid's patrimonial analysis as a central point of reference. Paisley and De Waal wrote in a collection of essays on the affinities between Scottish and South African law of the central importance of separate estates or patrimonies to the understanding of trust law in the respective jurisdictions.[146] The tenor of Paisley and De Waal's discussion strongly suggests that their view of the patrimonial theory is that it represents the (then) current state of the law. It is not an aspirational treatment of the subject.[147]

4-53. In the most recent edition of Gloag and Henderson's *The Law of Scotland* the patrimonial theory is accorded a central place in the explanation of the trustee's interest in the trust property:

"trustee" owns assets segregated from his private patrimony and must deal with those assets (the "trust fund") for the benefit of another person called the "beneficiary" or for the furtherance of a purpose.'

[142] See L Smith, 'The re-imagined trust', in L Smith (ed), *Re-imagining the Trust: Trusts in Civil Law* (2012) 265–66: 'The Scottish approach is winning converts. Lusina Ho's text proposes that the Chinese trust, created by legislation in 2001, is best understood in this way. The trust property is held in its proper patrimony, so insulating it from the claims of other creditors.'

[143] R Valsan (ed), *Trusts and Patrimonies* (2015).

[144] See K G C Reid, 'The Third Branch of the Profession: The Rise of the Academic Lawyer in Scotland', in H L MacQueen (ed), *Scots Law into the 21st Century: Essays in Honour of W A Wilson* (1996); E Reid, 'The impact of institutions and professions in Scotland', in P Mitchell (ed), *The Impact of Institutions and Professions on Legal Development* (2012).

[145] Another would be the law of unjustified enrichment, discussed earlier in this book in chapter 3.

[146] M J de Waal and R R M Paisley, 'Trusts' in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 837–39.

[147] Compare the older treatment by Blackie which is more cautious about the patrimonial theory, perhaps because it was written before the more substantial articles by Gretton and Reid: J W G Blackie, 'Le trust écossais: un cas unique?' in M Cantin Cumyn (ed), *Trusts v Fiducie in a business context* (1999).

> [T]he property is owned by the trustee under the fiduciary obligation to use it for the behoof of the beneficiaries. Such property can be regarded as being in a patrimony separate from the trustee's private patrimony. Where the trustee sells property in the trust patrimony the proceeds of sale and any property bought with such proceeds are part of that patrimony. This is the principle of real subrogation. The fruits of property in the trust patrimony likewise fall into that patrimony, and so, are trust property. Property in the trust patrimony is not attachable by any diligence of the trustee's personal creditors, nor does it form part of the trustee's sequestrated estate. But such property is attachable for debts incurred by the trustee on trust business and may be sequestrated.[148]

Gloag and Henderson is a useful barometer of the development of Scottish private law. The inclusion of the patrimonial theory is a manifestation of the heavy academic support for it. In turn, the text is often the first source that a busy practitioner will consult and therefore the theory is now well positioned to catch the attention of the practising lawyer. It seems, therefore, that the patrimonial concept is now well positioned within Scottish law's canonical literature.

(b) Scottish Law Commission: Presumptive Support

4-54. The Scottish Law Commission has been quite enthusiastic about embracing the idea of patrimony. In its Discussion Paper No 133, *The Nature and Constitution of Trusts* (2006)[149] the Commission took the opportunity to consider the basic conceptual elements of the trust in Scotland. The Commission noted the uncertainty relating to the nature of the trust:

> [W]e realised that our review [of trust law generally] had proceeded on the basis that the concept of a trust in Scotland was not controversial and that it was not necessary to ask fundamental questions in relation to the juridical nature or constitution of the trust. We are now convinced that this is not the case. Elementary matters such as when a trust is formed or the juridical nature of a beneficiary's rights have not been settled by recent judicial authority. Indeed, it may be many years before a suitable case arises in which these issues can be debated. In these circumstances, we believe that there is merit in taking the opportunity to raise some of these questions in a discussion paper. As a result, this discussion paper is more theoretical than the others hitherto published. But we feel that clarifying the juridical nature of the trust will help us to proceed in a more principled way when in later discussion papers we grapple with such difficult issues as the contractual and delictual liability of trustees to third parties.[150]

The Commission further opined that 'There is little doubt that the dual patrimony theory provides a convincing and satisfying explanation of the nature of a trust in Scots law.'[151] Accordingly, the Commission asked as part

[148] Gloag and Henderson para 41.03 (footnotes omitted).

[149] The commissioners at the time were Lord Eassie, Professors Gretton, Maher and Thomson, and Mr Colin Tyre QC.

[150] Scottish Law Commission, *Discussion Paper on the Nature and Constitution of Trusts* (SLC DP 133, 2006) 1.

[151] SLC DP 133, 2006, para 2.25.

of its discussion paper 'Do you agree with our provisional view that the dual patrimony theory on the nature of a trust in Scots law should be placed on a statutory footing?'[152] One can read this in two ways – either as declaratory or as innovative. However, when the Commission discussion paper was written there were no judicial pronouncements in favour of the patrimonial theory. Yet, by 2011 the Commission suggested that it did not intend to implement the proposals to give statutory recognition to the patrimonial theory, because the common law had 'generally been satisfactory in setting out the essential structure and legal effects of a trust'.[153] It is arguable to what extent this statement represented the state of the common law in 2011, but, as we shall see in a moment, that perhaps no longer matters.

4-55. In 2014 two cases adopted the patrimonial theory as the point of departure for analysis of the trust in Scotland.[154] In 2014 the Scottish Law Commission maintained the opinion that 'the rights and obligations involved in a trust is best described through the dual patrimony theory',[155] yet the Commission also finally concluded, in line with the signaled change of heart in 2011, that it no longer felt that it was necessary to put the conceptual basis of the trust upon a statutory footing.[156] As in 2011 the Commission reached the conclusion that the patrimonial theory 'is undoubtedly reflected in the existing common law'.[157] That claim is stronger after the 2014 decisions, but two points might be made about the *Ted Jacob* decision, which is the more authoritative of the two: (1) that discussion of the patrimonial theory is clearly *obiter*; (2) the judge who discusses the theory, Lord Drummond Young, was chairman of the Scottish Law Commission which prepared the Report approving the patrimonial theory, and was the lead commissioner. It is, therefore, at least questionable to what extent the common law has authoritatively adopted the patrimonial theory. Indeed, while there appears to be some consensus emerging around the idea of the patrimonial theory there are other recent cases which point in a different direction. The courts have continued to adopt a proprietary split ownership approach to the nature of the trust in other cases: 'The details of the trust settlements are immaterial for present purposes. It is sufficient to record that the legal ownership of the estate assets remains with the trustees acting thereunder

[152] SLC DP 133, 2006, para 2.28.

[153] Scottish Law Commission, *Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law* (SLC DP 148, 2011) at paras 1.09–1.10.

[154] *Glasgow City Council v Board of Managers of Springboig St John's School* [2014] CSOH 76, 2014 GWD 16-287 at para 16 *per* the Lord Ordinary (Malcolm); *Ted Jacob Engineering Group Inc v RMJM* [2014] CSIH 18, 2014 SC 579 at para 90 *per* Lord Drummond Young. The theory had been mentioned in the pleadings of earlier cases but not judicially adopted or approved: *Joint Liquidators of the Scottish Coal Co Ltd* 2014 SC 372 at para 67; *Royal Insurance (UK) Ltd v Amec Construction Scotland Ltd* 2008 SC 201 at para 12.

[155] Scottish Law Commission, *Report on Trust Law* (SLC No 239, 2014) at para 2.1.

[156] SLC No 239, 2014 at para 3.4.

[157] SLC No 239, 2014 at para 3.4.

as bare trustees for the beneficial owners.'[158] One cannot place too much emphasis upon one case. Yet, after years of apparent attempts to expunge such 'alien' terminology from the law, it demonstrates that this proprietary approach, with its attendant problems, endures.

4-56. Nevertheless, the most recent pronouncement on the conceptual basis of the trust in Scotland, *Advocate General for Scotland v Murray Group Holdings Ltd*,[159] adopts the patrimonial theory in the Opinion of the court delivered by Lord Drummond Young:

> The basic legal concepts of Scots and English law, in this case the trust, the contract and the loan, are broadly similar. No doubt the theoretical nature of a trust is different, being based on the notion of legal estate and equitable interest in England, whereas in Scotland it is based on the notion of dual patrimonies of the trustee. Nevertheless the practical results are similar, and the institution of the trust fulfils similar functions in both jurisdictions.[160]

G. CONCLUSIONS

4-57. The trust in Scotland has developed through the four broadly sketched stages of development outlined above. From initially scattered innominate rules and institutions the word and idea of a 'trust' emerged which were subsequently identified, rationalised and classified within the institutional writers' schemata according to their ideas of nominate contracts. Afterwards a third stage of development saw the rise of a property law based approach to the trust, contemporaneous with increased English influence, which probably accounts for the split ownership explanations that began to appear in the authorities and literature. Within this third stage there was some ongoing tension between residual contractual approaches, which were to some extent generalised, and the emerging dual ownership property law approach. The fourth stage of development might be described as the critical period when the proprietary understandings were challenged and the new patrimonial theory was developed. The latter approach utilises the law of persons and is probably accepted as the strongest explanatory footing for the trust going forwards.

4-58. In turn, the development of trust jurisprudence by reference to equity has waxed and waned over the development of the trust. The initial innominate and contractual approaches did not rely upon an English

[158] *HM Revenue and Customs Comrs v Bute* [2009] CSIH 42, 2009 SC 561 at para 1 (Opinion of the court). A possible explanation for the language used in this case might be the specialised rules of interpretation adopted by Scottish courts when dealing with tax matters: see e.g. *Special Commissioners of Income Tax v Pemsel* [1891] AC 531; *Inland Revenue v Glasgow Police Athletic Association* 1953 SC (HL) 13; *Guild v Inland Revenue Comrs* 1992 SC (HL) 71.

[159] *Advocate General for Scotland v Murray Group Holdings Ltd* [2015] CSIH 77, 2015 SLT 765.

[160] At para 50. See also *Shenken v Phoenix Life Ltd* [2015] CSOH 96, 2015 GWD 23-419 at para 20 *per* the Lord Ordinary (Tyre).

chancery inspired understanding of dual ownership, though arguably would have been subject to elements of the 'natural law' understanding of equity in Scotland. Trust law's proprietary period was characterised by an understanding of equity very close to that of English chancery practice that demonstrates another form and understanding of equity, different from that considered in the last chapter in relation to unjustified enrichment, which has also played a part in the development of Scottish private law. That development of trust law in terms of equitable and legal ownership became problematic for a number of reasons, and, it seems, has ultimately been rejected in favour of an analysis based upon the law of persons.

4-59. It is against this backdrop of the history of the conceptualisation of the Scottish trust that the analysis of the constructive trust must be considered. The constructive trust as a matter of Scots law is controversial, and some may even suggest that it is not even really a trust, rather that it is (or should be) considered a nominate enrichment remedy.

5 Constructive Trusts

A. INTRODUCTION

5-01. The constructive trust in Scots law is a rare and strange beast. One commentator has recommended that the constructive trust should be abolished by way of legislative intervention.[1] Yet, for all the perceived problems associated with the constructive trust, and given acceptance of its existence by even its strongest critics, it is desirable to investigate it. The juridical nature of the constructive trust is not entirely clear. On the one hand it can be understood as a 'trust' in the same way as a 'normal' express trust, and, in turn, subject to the same rules and exhibiting the same features;

[1] G L Gretton, 'Constructive Trusts: I' (1997) Edin LR 281 at 281–82.

in particular it would have powerful consequences in insolvency law. An alternative analysis of the constructive trust in Scotland is that it is not really a 'trust' at all; rather, it is better to think of a constructive trust as a personal obligation to account or redress unjustified enrichment.

5-02. Making reference to broader debates about the nature of the constructive trust across the Common Law world assists with analysing the nature of the constructive trust in Scotland. So while this chapter concentrates on Scottish law, there will be some references to other Commonwealth jurisdictions and some of the big doctrinal questions facing those countries, such as, for example, the question whether the constructive trust is 'institutional' or 'remedial'. Undertaking such doctrinal analysis will demonstrate the influence which ideas about equity have had in informing the meaning of the constructive trust. That equitable influence can be characterised as coming from two distinct intellectual paths which inform the Scottish constructive trust, which are of broader systemic significance. The first classificatory option is that the constructive trust is in fact a type of trust, with its proprietary implications – this approach necessitates a consideration of the manner in which English equitable approaches to dual ownership have been received into Scots law. Alternatively, the constructive trust can be seen to represent an enrichment or accounting remedy, which, in turn, is likely to be personal in nature, but will not necessarily be so.

5-03. The constructive trust of Scots law developed late, and its growth has been stunted. This is unsurprising – given the flexible structure of obligations, wired into Scots law since Stair, there was no need for an all-pervasive constructive trust in the same way as there was in English law.[2] Yet, with the movement from a rhetorical and natural law understanding of equity with Stair, to a more substantive and English chancery inspired form with Kames, the language of equity in relation to constructive trusts began to creep into Scottish law. As discussed in the previous chapter, the related development of the trust institution generally appears to move towards a proprietary approach in the eighteenth and nineteenth centuries. However, the foothold secured by this equitable and proprietary form of constructive trust was not a strong one, possibly reflecting the ambivalent status of dual ownership approaches more broadly across Scots law, and it appears that modern trends point marginally more towards classifying the constructive trust as an enrichment remedy. Yet, as noted above in the chapter on enrichment law, such a characterisation would retain a close association with *some* concept of equity, whether it be by an understanding of unjustified enrichment suffused with natural law equity on the one hand, or, on the other hand, if the 'enrichment' approach followed is actually borrowing from the English equitable concepts of knowing receipt and dishonest (formerly knowing) assistance.

[2] For the contrary position in England see D J Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 276–77.

5-04. The constructive trust also provides a useful demonstration of the way in which equity developed across Scottish law more broadly. For Stair equity was essentially a rhetorical device which was used to provide a normative justification for law, and natural law in particular, whereas Kames's approach developed an intellectually binary almost English chancery approach to equity. Although Kames's approach did not itself move far from the substance of Stair's conceptualisation of equity, when the existing trust concept, with its insolvency protection, became intertwined with Kames's anglocentric structure it began to import substantive legal effects, often based upon English chancery jurisprudence. However, the fact that there are obligations based tools available to carry out the work of the 'constructive trust' suggests that it is something of a superfluity in Scottish law. The key issue is whether the situations where constructive trusts are said to arise actually bestow proprietary protection in insolvency, and, if so, whether that should be the case.

B. RESULTING TRUSTS

5-05. In anticipation of the discussion of the constructive trust, reference must be made to the 'resulting trust'. It is necessary to explain the meaning of the term in Scots law, as the doctrine can be analytically confused with that of the constructive trust.[3] The term 'resulting trust' is most frequently used to describe the residual funds of an express trust whose purpose has failed in some way, or indeed been fully discharged.[4] Thus Lord President Clyde stated:

> The principle appealed to is, I think, a sound one. It is that, if the purpose of a trust or bequest can be shown to be incapable of receiving any practical effect (and this may be the result of the inadequacy of the funds limited to its execution), the trust or bequest fails, and the trust, if as here there is a trust, becomes a resulting one for the truster or his heirs-at-law.[5]

5-06. So, if a truster places funds in the hands of trustees to be administered for the benefit of a beneficiary, and that beneficiary dies with residual funds still in the hands of the trustees, then the funds are held by the trustees on a 'resulting trust' that falls to be transferred to the original truster or his

[3] See, e.g., A Dewar Gibb, *A Preface to Scots Law* (4th edn, 1964) 28.

[4] *Pursell v Elder* (1865) 3 M (HL) 59 at 65 *per* the Lord Chancellor (Westbury); *Wilson v Lindsay* (1878) 5 R 539 at 540n; *Fleming v Fraser's Trs* (1879) 6 R 588 at 598 *per* Lord Young; *Strachan's Trs v Williamson* (1889) 16 R 735 at 740 *per* Lord Young; *Campbell's Trs v Campbell* (1891) 18 R 992 at 1006 *per* Lord Young; *Wylie's Trs v Boyd* (1891) 18 R 1121 at 1129 *per* Lord Kinnear; *Edmond v Mearn* (1897) 5 SLT 114 at 115 *per* the Lord Ordinary (Low); *Smoke v Anderson's Exr* (1898) 25 R 493 at 495 *per* Lord Young; *Dawson v Smart* (1903) 5 F (HL) 24 at 27 *per* Lord Davey; *Burgh of Ayr v Shaw* (1904) 12 SLT 126 at 129 *per* the Lord Ordinary (Low); *Ness v Mill's Trs* 1923 SC 344 at 353 *per* the Lord President (Clyde); *Donaldson's Trs v HM Advocate* 1938 SLT 106 at 108 *per* the Lord Ordinary (Russell); *Davidson's Trs v Arnott* 1951 SC 42 at 44 *per* the Lord Ordinary (Sorn); *Cuthbert's Trs v Cuthbert* 1958 SC 629 at 634 *per* the Lord Ordinary (Guthrie); *Barclay's Tr v Inland Revenue Comrs* 1975 SC (HL) 1 at 20 *per* Viscount Dilhorne; *Haig v Lord Advocate* 1976 SLT (Notes) 16 at 17.

[5] *Ness v Mill's Trs* 1923 SC 344 at 353.

successors. The question here is whether this 'resulting trust' is in fact a new trust, or, rather, is merely an existing express trust that becomes the subject of judicial reapportionment, or even a radical right.[6] The interaction between the term radical right and resulting trust is important. It has been suggested that the familial relation, between the doctrines of radical right and the resulting trust, is not that of twins, but somewhat alike.[7] It has also been judicially observed that the Scottish radical right[8] is the equivalent of the English resulting trust.[9] The basic doctrine of the radical right, as applicable to trust law, is that when a truster creates a trust he will retain a proprietary interest of some variety. However, it is not clear that such a radical right will be uniformly, if necessarily at all, retained in all types of trust. Furthermore, allowing for the retention of such a right rather contributes to the idea of developing split ownership conceptualisations such as those which arose in the nineteenth-century development of trust and property law. The topic is a problematic one, and is beyond the scope of the present text.[10]

C. HISTORY OF CONSTRUCTIVE TRUSTS

(1) Tentative Beginnings

(a) Wallace

5-07. The constructive trust is a newcomer to Scots law, in that the earliest alleged examples that have been identified are to be found in the late-eighteenth century,[11] yet even those have been said not to be, truly, constructive trusts.[12] There are, however, some whispers of the idea of a constructive trust from earlier in the eighteenth century. In his *Institute of the Law of Scotland* Bankton makes reference, in his section considering English law, to a trust that can be implied in certain circumstances.[13] Another text from the middle of the eighteenth century, Wallace's *System of Principles*,[14] provides another example of what, to modern eyes, looks like a gestational constructive trust. Initially Wallace describes what was, by then, a well-established rule: a tutor cannot act as *auctor in rem suam* in relation to the

[6] *Barclay's Tr v Inland Revenue Comrs* 1975 SC (HL) 1 at 24 *per* Lord Kilbrandon.

[7] *Haldane's Trs v Lord Advocate* 1954 SC 156 at 177 *per* Lord Mackay.

[8] The only modern treatment of the concept is G L Gretton, 'Radical Rights and Radical Wrongs' (1986) JR 51 and 192.

[9] *Coats's Trs v Inland Revenue* 1965 SC (HL) 45 at 72 *per* Lord Donovan. This would explain the use made of the term 'resulting trust' by Lord Russell of Killowen in *Tennant v Lord Advocate* 1939 SC (HL) 1 at 5, and, indeed, why the term 'resulting trust' is found in the rubric of the Appeal Cases report, but in neither the Session Cases nor Scots Law Times reports.

[10] See G L Gretton, 'Radical Rights and Radical Wrongs' 1986 JR 51 and 192.

[11] Cf R Burgess, 'The Unconstructive Trust' 1977 JR 200 at 200–01.

[12] Gretton, 'Constructive Trusts: I' (n 1) 293–94; Burgess, 'The Unconstructive Trust' (n 11) 201.

[13] Bankton I.9.14.

[14] G Wallace, *A System of the Principles of the Law of Scotland* (1760).

property and rights of his pupil.[15] However, he then goes on to describe the result of a tutor acting in a manner contrary to this maxim:

> Since a tutor is bound to manage for the utility of his pupil, and cannot either turn his administration to his own profit or to be *auctor in rem suam*, it must follow, that he cannot acquire any right affecting the estate of his pupil; and that every right affecting it, tho it should seem to have been acquired by him for his own behoof and to himself, is presumed to have been really acquired for the behoof of his pupil. The benefit of it must therefore, inure to the pupil… He is presumed in all cases to mean to have acquired as trustee for the behoof of his pupil. Consequently, the benefit of every deed by him must accrue to the pupil…; and the tutor is bound either to divest himself of it, or to do any other thing which may be necessary for conveying it to his pupil.[16]

5-08. In this passage one can discern the precursor of fiduciary liability, though of course that term is not used. What is made clear is that anything which is obtained by the tutor [fiduciary] is held on behalf of the pupil. Furthermore, while Wallace cites some familiar *auctor in rem suam* authority from Scotland, the factual nexus and language sound rather like *Keech v Sandford*,[17] a decision from English equity jurisprudence. In that case, the trustee renewed a lease held on behalf of an infant, but did so in his own name. According to Lord Chancellor King, the trustee held the renewed lease on trust for the infant, and he decreed that the trustee must assign it to the infant.[18] The affinity of Wallace's approach in terms of language and result is uncanny.

5-09. Further, although it may be putting too much weight upon the wording of the passage, the last sentence is capable of supporting the idea that the thing is either owned by the pupil already and merely needs to be physically given over, or, alternatively, that there is a necessity to make the thing over to the pupil in law as well. An interpretation in favour of the former view is more consonant with the English conception of a trust, in that it would suggest some form of beneficial ownership conceptualisation. As regards the alternative, which seems the more likely given the word 'divest', this would accord more with the traditional Scottish emphasis upon full ownership located with the trustee. The fluctuating nature of the trust concept generally during this period makes any firm conclusions difficult, and the situation would be easier to characterise if the 'trustee' were insolvent. This leads us to consider the work of Kames, where this possibility is canvassed, and an equitable ownership approach gains further traction.

(b) Kames

5-10. In his *Principles of Equity*[19] we have seen[20] that Kames seeks to explain ways in which 'equity' operates in Scots law, and he comments on a case of

[15] Wallace, *Principles* § 454.
[16] Wallace, *Principles* § 455.
[17] *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223.
[18] *Keech v Sandford* (1726) Sel Cas T King 61 at 62; 25 ER 223 at 223–34.
[19] Kames, *Principles*.
[20] See chapter 2, at paras 2-26 ff.

some potential importance insofar as precursors of the constructive trust are concerned. However, before considering what Kames had to say, it is important to set out the facts of the case. In *Street v Hume*[21] S had sent skins to L, L being S's factor, to sell to H, which L duly did, taking a bond in his name, payable to himself and at no point mentioning S. L died bankrupt. S sought to recover his money, and was naturally keen that the bond should not form part of the bankrupt estate open to other creditors. S argued that the debt was not 'in *bonis*' of L, and that it was merely in his custody and management, not his property. The court upheld this view, saying the goods were not in *bonis* of L, nor were they confirmable as such, and therefore they belonged to S. The term constructive trust is not used, and the case may be capable of alternative explanation as an early example of agency law, especially given the presence of a factor, and the close affinity between mandate and trust at the time.[22]

5-11. However, whatever may have been the basis upon which the case was decided, what is of more interest, and less problematic in terms of characterisation or classification, is Kames's own interpretation of the case and the approach which he derived from it:

> A factor having sold his constituent's goods, took the obligation for the price in his own name, without mentioning his constituent. The factor having died bankrupt, the question arose, Whether the sum in this obligation was to be deemed part of his moveable estate affectable by his creditors; or whether he was to be deemed a nominal creditor only, and a trustee for his constituent. The common law, regarding the words only, considers the obligation as belonging to the deceased factor: but equity takes under consideration the circumstances of the case, which prove that the obligation was intended to be taken *factorio nomine*, or ought to have been so intended; and that the factor's creditors are in equity barred from attaching a subject which he was bound to convey to his constituent.[23]

Is this constructive trust reasoning, without the name being used? The ratio of the case appears to proceed on the basis that L never had any title to the property, and therefore the property was never in him. The approach taken by Kames suggests otherwise. The explanation is somewhat cryptic, though it appears to be heading towards the idea of a constructive trust. Here we have the idea of equity coming down to section off property, in the hands of a fiduciary, from the claims of creditors. Indeed, the mention of the fact that he would be bound to convey the property to S is somewhat reminiscent of comments made in relation to the transfer of heritage in *Sharp v Thomson*,[24] but the difference here is that there is a potential fiduciary dimension, which is not present in the typical example of a sale. Yet there is a major problem with the idea of a constructive trust in this case. If the decision is avowedly based upon the fact that ownership never transferred to the factor he cannot be a constructive trustee, as a cardinal feature of a trust is that ownership of

[21] *Street v Hume* (1669) Mor 15122.

[22] The report of the case is Stair's (1 Stair 616) who, as was noted in the chapter on trusts, considered trusts and mandate to be closely linked.

[23] Kames, *Principles* vol II, 19–20.

[24] *Sharp v Thomson* 1997 SC (HL) 66 at 70–71 *per* Lord Jauncey of Tullichettle.

the trust subjects must be vested in the trustee. Of course, this depends on one's approach to ownership, and it appears that Kames's analysis proceeds upon a split ownership approach, in that the factor has something akin to bare legal title, whereas S could be seen to have some form of ownership interest. The presence of the phrase *in bonis* should also put us on alert with regard to some form of move towards split ownership. The phrase appears to refer to a form of ownership, so that in cases where a purported transfer has been attempted, but not perfected, the subject will continue to be *in bonis* of the transferor.[25] The term is probably derived from Roman law.[26]

5-12. Therefore, the case itself is a little unclear in its reasoning whichever way one looks at it. However, for present purposes we may suggest that, against a more general backdrop of his attempts to create a dual approach to ownership, Kames is here adopting a device somewhat akin to the English constructive trust, which of course would tie in with his interest in equity. Furthermore, we may note that immediately after giving such an explanation, Kames goes on to say:

> A employs B as his factor to sell cloth. B sells on credit, and before the money is paid dies bankrupt. This money shall be paid to A, and not to the administrator of B: for a factor *is in effect a trustee* only for his principal.[27]

This proposition is vouched for by English authority.[28] The use of the word trustee is significant, especially given the proximity to the Scottish case cited above; there is definitely the suggestion of proprietary trust consequences in the air, and the trusts seem to be imposed by law. Ownership is the key once more: Kames seems to be saying that the factor is not the owner, yet by the same token we are again seeing insolvency being eluded and are told that the factor is 'in effect a trustee'. Indeed, as regards insolvency and general trust jurisprudence, or rather an executory or testamentary trust, we are given a clear early authority that money held on the basis of the executory will not pass to the executor's general creditors.[29]

5-13. Kames then points[30] to the case of *Boylstoun v Robertson*[31] where the facts were as follows. Boylstoun (B), a London merchant, employed someone called Makelwood (M) in Halifax to purchase cloth, and B gave money to M for that purpose. M duly hired someone called Palmer (P) to purchase the cloth in Glasgow; P purchased some cloth and left it 'in the hands of' someone called Robertson (R). M's creditor's arrested the linen in R's hands and a competition arose between the creditors and B. B claimed the cloth was his,

[25] See e.g., *Bells v Wilkie* (1662) 1 Stair 97; *Forsyth v Patoun* (1663) 1 Stair 180; *Halyburtoun v Roxburgh* (1663) 1 Stair 195.

[26] W W Buckland, *A Textbook of Roman Law* (3rd rev edn, P Stein ed, 1963) 191.

[27] Kames, *Principles* vol II, 20 (my emphasis).

[28] *Burdett v Willett* (1708) 2 Vernon 638.

[29] Kames, *Principles* vol II, 20–21. The case cited is *Baird v Creditors of Murray* (1744) Mor 7737, which, along with Stair III.8.71, is also cited as an authority for the operation of *surrogatum* as well as the insolvency protection associated with a trust.

[30] Kames, *Principles* vol II, 22.

[31] *Boylstoun v Robertson* (1672) Mor 15125.

not M's, because it had been purchased for B's use and with B's money. Witnesses to the sale of the cloth deponed that the bonds given in payment by P designed him as M's servant and 'that he bought and received the cloth in the name and for the use of'[32] M. The evidence from M and P had a different emphasis: M deponed that she was employed by B, and that she had sent B's money to P accordingly; P himself deponed that he had purchased the cloth for the use of B. The decision of the Court was that:

> [B]y the testimonies of the witnesses, it being proved that the cloth was bought and received by Palmer, servitor to Makelwood, in her name and for her use, that the property of the cloth was thereby stated in the person of Makelwood, and not in the person of Boylstoun, albeit she had a mandate or trust from him, which is but a personal obligement; but property or dominion is only constituted by possession, and Boylstoun had got no possession of the linen cloth, either by himself or by any in his name to his use.[33]

This seems a robust decision from a unitary ownership perspective: ownership in law came to M, and therefore her creditors were able to take it into the insolvency pot. The report, which is Stair's, records that the cloth was bought by P in M's name, and so ownership was in M, and not in B 'albeit she had a mandate or trust from him, which is but a personal obligement'.[34] It is striking that the report em'phasises that the obligation flowing from a mandate or trust is merely a personal one, and it is also consistent with Stair's treatment of trust in his *Institutions* as a form of mandate.[35]

5-14. However, Kames was unhappy with the decision, and his analysis smacks of English equity jurisprudence:

> This was acting as a court of common law. The property no doubt vested in Makelwood, because the goods were sold and delivered to her for her own behoof: but that circumstance is far from being decisive in point of equity. It ought to have been considered, that though the transference of property be ruled by the will of the vender, yet that it depends on the will of the purchaser whether to accept delivery for his own behoof or for behoof of another. Here it clearly appeared, that Makelwood bought the goods for behoof of Boylstoun; and that in effect she was trustee only in the subject: the legal right was indeed in her, but the equitable right clearly in Boylstoun. It ought to have been considered further, that Makelwood having laid out Boylstoun's money in purchasing the cloth, was bound in justice to deliver it to Boylstoun; and therefore, that he in equity ought to have been preferred to her creditors, even though she had been guilty of making the purchase for her own behoof.[36]

These comments, when taken alongside the reported decision set out above, provide a useful snapshot of the changing conception of the trust from an institution of obligations, towards a proprietary one: from Stair's mandate/trust as a mere 'personal obligement', to the gloss which Kames lays upon the decision, citing a proprietary approach using English law's split

[32] At 15125.
[33] At 15125. This case is difficult to reconcile with *Street v Hume* (1669) Mor 15122.
[34] *Boylstoun v Robertson* (1672) Mor 15125.
[35] See chapter 4, paras 4-13 ff.
[36] Kames, *Principles* vol II, 22–23.

ownership conceptualisation. While of course these are the personal views of Kames, and the case itself decided otherwise, it shows an early potential entry point for the idea of a constructive trust into Scots law in the writings of an influential jurist and serving judge of the Court of Session.[37]

(2) A More Recognisable Constructive Trust?

(a) Nineteenth Century

5-15. By the nineteenth century the constructive trust was firmly recognised, or at least the idea of a constructive trust was firmly rooted in the literature. Indeed, not only was the idea firmly rooted, but so too was the term 'constructive trust', though in most cases the term was blithely stated, without any explanation about its juridical nature. Nevertheless, it would appear that English chancery jurisprudence was highly influential, if not directly received. In Forsyth's *The Principles and Practice of the Law of Trusts and Trustees in Scotland* (1844)[38] the author gives a somewhat unclear description of the consequences of a trustee acting as *auctor in rem suam* – he must 'communicate eases'.[39] In a footnote he discusses the English law approach in the like circumstances – which is to erect a constructive trust.[40] Whatever was meant by Forsyth, subsequent writers did not always carefully distinguish between English and Scottish law. By the time of Howden's[41] treatment of the subject, in 1893, he explained that if a trustee under an express trust endeavours to make a profit for himself, 'A *Constructive Trust* is raised by the Court, acting as a Court of Equity, in all such cases.'[42]

5-16. Lord Westbury's troubling statement concerning trusts – '[a]n obligation to do an act with respect to property creates a trust'[43] – was similarly treated as an authoritative statement of Scottish law by Howden. That said, there were contemporary cases speaking in terms of a constructive trust.[44] Howden describes a heritable creditor as some kind of a constructive

[37] That said, Kames's authority and reception amongst Scottish lawyers has always been somewhat ambivalent: see D J Carr, 'Introduction', in Lord Kames, *Principles of Equity* (3rd edn, Old Studies in Scots Law, 2013).

[38] C Forsyth, *The Principles and Practice of the Law of Trusts and Trustees in Scotland* (1844).

[39] Forsyth, *Trusts and Trustees* at 113.

[40] Forsyth, *Trusts and Trustees* at 113 n 2.

[41] Charles R A Howden, educated at Edinburgh Academy and Edinburgh University, was an advocate (called 1886), lecturer in international private law at Edinburgh University (1900–17), and sheriff-substitute for Inverness, Elgin and Nairn at Elgin (1917–36).

[42] C R A Howden, *Trusts, Trustees and the Trust Acts in Scotland* (1893) 34. Howden's later treatment of trusts in *Green's Encyclopaedia of the Law of Scotland*, published in 1899, is considered below at paras 5-29 ff, because it was published near the turn of the century and formed the basis for the trusts entry in the two later versions of the encyclopaedia: J Chisholm (ed), *Greens Encyclopaedia of the Law of Scotland* (2nd edn, 1914) vol XII and J L Wark (ed), *Encyclopaedia of the Laws of Scotland* (1933) vol XV.

[43] *Fleeming v Howden* (1868) 6 M (HL) 113 at 121.

[44] For criticism of the characterisation of cases as such, see Gretton, 'Constructive Trusts: I' (n 1) at 293–95.

trustee for the debtor and other creditors.[45] Similarly, he draws heavily upon an English case as a justification for the assertion that a constructive trustee must have complete control over the trust property/estate.[46] This rather suggests that Howden understood that to be properly so-called the constructive trustee must be said to own the property, or be in a position to call for the property to be vested in him – some inchoate real right perhaps.[47] That understanding points towards a 'proper' trust, and possibly with split proprietary basis.

(b) McLaren

5-17. In McLaren's more comprehensive work '[a] constructive trust is said to be raised where a person clothed with a fiduciary character gains some profit or advantage by availing himself of his position as trustee.'[48] It is intriguing to see that he cites Lewin as the authority for this proposition, demonstrating the influence of English authority in this area.[49] McLaren's approach also sows the seeds for the view that the first case of constructive trust in Scots law was the *York Buildings Co* case,[50] citing Lord Thurlow's speech where he stated that 'no man can be a trustee for another, but by contract; but it is equally clear, that under circumstances, a man may be liable to all the consequences in his own person which a trustee would become liable to by contract'.[51]

5-18. McLaren suggests that this creates a 'principle of putting a quasi-fiduciary construction on illegal purchases by trustees'.[52] The meaning of this phrase is somewhat elusive, especially given the fact that a trustee is a fiduciary, so in what sense, when he acts for his own benefit in relation to

[45] Howden (n 42) at 35.

[46] Howden (n 42) at 36.

[47] Howden cites *Re Barney* [1892] 2 Ch 265 which is concerned with the liability to account of a trustee *de son tort*, a form of constructive trustee.

[48] McLaren, *Wills and Succession* vol II at para 1926. The passage is found in each of the preceding editions with slightly different wording: J McLaren, *A Treatise on the Law of Trusts and Trust Settlements* (1863) vol I, 200; J McLaren, *The Law of Scotland in relation to Wills and Succession* (2nd edn, 1868) vol II at para 1598.

[49] In the first edition, of 1863, McLaren adopts Lewin's definition here and in the body of the text, while citing in a footnote 'Lewin, Tr. Chap IX', which must be a reference to the third edition of Thomas Lewin's *A Practical Treatise on the Law of Trusts and Trustees* (3rd edn, 1857). Although the fourth edition of Lewin had been published in 1861, some two years before McLaren's first edition of 1863, constructive trusts were considered in chapter 10 of the fourth edition.

[50] *York Buildings Co v Mackenzie* (1795) 3 Pat 378.

[51] At 393 *per* Lord Thurlow. See Gretton, 'Constructive Trusts: I' (n 1) at 293.

[52] McLaren, *Trusts and Trust Settlements* (n 48) vol I, 201. The phrase is maintained in the later editions, though with telling changes such as the removal of the word 'illegal' and insertion, and then omission again, of 'in their own names': McLaren, *Wills and Succession* (2nd edn) vol II at para 1601: 'The principle of putting a quasi-fiduciary construction on purchases by trustees in their own names'; McLaren, *Wills and Succession* vol II, para 1929: 'The principle of putting a quasi-fiduciary construction on purchases by trustees'.

property held under an existing trust, he then becomes a 'quasi-fiduciary' is somewhat problematic. It seems to suggest that McLaren would not confer full equivalence to an express trustee in such a situation, and this conclusion is strengthened by his observation that the term 'constructive trust' 'is merely another name for the duty of restitution, which may be enforced against a party acquiring property by an illegal title'.[53] As problematic as the idea of someone already a trustee holding property as a constructive trustee (proper) is, it was clearly the way in which the contemporary English sources were proceeding,[54] so it is perhaps unsurprising that Scottish sources would mirror their approach.

5-19. It seems unclear what is added by the imposition of a constructive trust in addition to the express trust. In such situations it has also been stated that such property, that is newly acquired property, is held by the trustee on behalf of the beneficiary,[55] buttressed by a statement by Lord President Boyle that a purchase of property by a trustee in this way does not mean that 'such a purchase creates what may be termed a *labes realis*, or amounts to an absolute nullity'.[56] This seems correct, given that the trustee is not barred in strict law from so acquiring such property, yet it is not clear what assistance this lends to the idea of the 'quasi-fiduciary construction', nor indeed how this fits into saying there is a constructive trust. Yet, many of the authorities talk of trustees when they mean what we would today term a fiduciary, which is less problematic because it makes sense (if one is committed to imposing a constructive trust in that situation) to say that a fiduciary who is not a trustee who makes a profit from his office holds the property on constructive trust if that fiduciary was not the owner of the trust fund (as a trustee would be) in the first place.

5-20. In relation to the renewal of leases, McLaren points out that in Scots law, though not as developed as the law on the matter in England at the time, it was said that a trustee renewing a lease as tenant in his own name would be held to have done so on behalf of the beneficiary.[57] Yet, for it to be a trust the trustee must have the ownership of the lease. All this said, what is clear is that should the lessee/trustee assign the lease to a bona fide onerous third party, then the 'principles recognised in the case of purchases by trustees'[58] will be given effect – that is to say, the assignee will be secure against the

[53] McLaren, *Trusts and Trust Settlements* (n 48) vol I, 17. See also McLaren, *Wills and Succession* (2nd edn) vol II at para 1456; McLaren, *Wills and Succession* vol II, para 1517.

[54] See Ibbetson, *Historical Introduction* (n 2) 281–82.

[55] *Laird v Laird* (1858) 20 D 972 at 980–81 *per* the Lord President (McNeill).

[56] *Fraser v Hankey* (1847) 9 D 415 at 423.

[57] McLaren, *Trusts and Trust Settlements* (n 48) vol I, 202; McLaren, *Wills and Succession* (2nd edn) vol II, para 1603; McLaren, *Wills and Succession* vol II, para 1931. He will also be bound to account for any profits made from the renewed lease, citing *Keech v Sandford* (1726) Sel Cas T King 61, 25 ER 223.

[58] McLaren, *Wills and Succession* (2nd edn) (n 48) vol 2, para 1605; McLaren, *Wills and Succession* vol II, para 1934. The substance of the passage in the first edition is the same but it does not include the phrase quoted: McLaren, *Trusts and Trust Settlements* (n 48) vol I, 204.

beneficiary. It may be that if the lease were a registered lease, the fact of registration would make a difference.[59]

5-21. It is also said that the principle of the constructive trust is not limited to 'proper trusts', and therefore extends to 'tutors and *quasi*-trustees', which is another way of saying that it is a generalised rule which applies to individuals and offices which we would today describe as fiduciary – therefore it applies to tutors, curators, interdictors, executors, assignees in security, or a factor acting under the authority of the trust.[60] In these situations then the issue of a constructive trust would be more crucial, since it cannot be explained as merely the continuation of the existing express trust over the assets because not all of those offices and actors would have ownership of the assets in the same way that the trustee has initial ownership of the trust property. McLaren's idea of the constructive trust seems to be reasonably expansive but it is far from clear to what extent he considered the constructive trust to be a proper trust with proprietary effect and some of his uses of the term constructive trust could be explained differently as other legal rules or institutions.[61]

(3) Consolidation in the Twentieth Century?

(a) Menzies

5-22. By the early twentieth century the constructive trust had a pretty solid grounding in the literature, though critical discussion of the nature of the concept was non-existent for much of the century. That process of consolidation of the concept appears to have utilised a growing tendency towards splitting ownership, which, in turn, was consistent with the distinction drawn by Kames between 'common law' and 'equity'. Demonstrating his acceptance of the constructive trust, Menzies gives examples of the circumstances in which a constructive trust can arise. The first is 'where an express trustee comes to hold property which he has acquired *qua* trustee, other than that expressly conveyed to him'.[62] This is as difficult a conceptualisation for Menzies as it was for McLaren's work: it is hard to see what is added by stating that anything the trustee subsequently obtains on behalf of the trust estate, while acting as trustee, he will hold in a constructive trust. Surely any assets so acquired are simply assets of the existing trust? The matter is more ticklish than it may first appear – if the constructive trust is a proprietary concept, and so requires an act of perfection for a transfer such as delivery, then the earlier suggestion that all assets

[59] McLaren, *Trusts and Trust Settlements* (n 48) vol I, 204; McLaren, *Wills and Succession* (2nd edn) vol II, para 1605; McLaren, *Wills and Succession* vol II, para 1934.

[60] McLaren, *Trusts and Trust Settlements* (n 48) vol I, 204–05; McLaren, *Wills and Succession* (2nd edn) vol II, para 1606; McLaren, *Wills and Succession* vol II, para 1935.

[61] This appears to be the case in English law at the time: Ibbetson, *Historical Introduction* (n 2) 281 ff.

[62] Menzies vol II at para 1271; although somewhat altered stylistically the passage is to substantively the same effect in the second edition: 2nd revd edn, 1913 at para 1271.

acquired form part of the existing trust is perhaps not entirely self-evident. In unorthodox or unusual situations involving acquisition by a trustee it is perhaps more tenable to suggest there is a new 'constructive' trust over any property which has not been acquired by the trust by conventional transfer, though its juridical nature would be different and conceptually difficult as it would be predicated upon the non-ownership of the trustee. Further, the historical development of the constructive trust in English law, from which Scots law borrowed heavily, was characterised by the very broad use of the term in the absence of alternative instruments.[63] Matters then become substantially trickier when one tries to locate when and in what circumstances such a trust would arise in the absence of an act of perfection – does such a 'constructive trust' arise purely from law as a policy matter, or is there a need for some form of implication of will.[64] In either event, the choice then resolves into erecting a freestanding 'constructive trust', with a separate trust estate and different, presumably very limited, purposes on the one hand, or, alternatively, the newly acquired subjects are constructively subsumed within the existing trust estate.

5-23. Under the heading where this type of 'constructive trust' is discussed,[65] Menzies explains that the rule is that 'all accretion through the trust title is accretion to the trust estate, that the trustee shall not from his position as such acquire any personal advantage, but that whatever advantage or benefit accrues to him through his position, shall accrue to him as trustee only'.[66] Further, a constructive trust arises where a piece of property, which is part of a trust estate, is transferred to a third party who takes the property either gratuitously, or with knowledge of the breach of trust which constitutes the transfer.[67] The authorities which Menzies gives for this proposition are mainly English, which exemplifies the growing tendency towards using English chancery jurisprudence. In that vein, it is unclear what relevance some of the Scottish authorities cited by Menzies have to the concept of constructive trust, though it is interesting to see that in some of them the situation is said to be covered by enrichment law in Scotland, rather than by recourse to the constructive trust.[68] Menzies's account also appears to mark the beginning of a distinction being drawn between two streams of authority concerning a constructive trust: (1) where a trustee or fiduciary takes advantage of his office to make a profit or take property for himself, and (2) where a third party is made a constructive trustee by virtue of their receipt of 'trust' property.

[63] D W M Waters, *The Constructive Trust* (1964) 37.

[64] It may be that a personal bar issue could be utilised here, though the leading modern treatment is sceptical: E C Reid and J W G Blackie, *Personal Bar* (2006) 143 n 11 and 151.

[65] 'Accretion through the Trust Title – "Constructive Trust"', in Menzies vol I at para 439; A J P Menzies, *The Law of Scotland Affecting Trustees* (2nd revd edn, 1913) at para 439.

[66] Menzies vol I, para 439; Menzies, *Trusts* (2nd revd edn) at para 439.

[67] Menzies vol II, para 1271; Menzies, *Trusts* (2nd revd edn) at para 1271.

[68] *New Mining and Exploring Syndicate Ltd v Chalmers* 1910 2 SLT 438 at 442 *per* the Lord Ordinary (Skerrington). Note also *Laird v Laird* (1858) 20 D 972 at 985–86 *per* Lord Curriehill; *Morrison v School Board of St Andrews* 1917 1 SLT 72 at 75 *per* Lord Hunter.

5-24. A third example of a constructive trust is given by Menzies in the second edition, which did not appear in the first: 'where a sum of money in the hands of the owner becomes payable to the express trustee, the owner is a constructive trustee of that sum'.[69] This is startling to modern eyes – the effect of this would be to give an insolvency preference to an express trustee to obtain money which he has only a personal right to; likewise, it seems unlikely that the 'owner' will owe a fiduciary duty in such a case, at least in most situations. If, however, one considers that when a sum of money becomes 'payable' some form of proprietary or ownership interest had passed to the trustee, along the lines of English chancery jurisprudence, such as an equitable assignment for example, or if one accepts a split ownership model, then it is perhaps less startling.

5-25. There are, however, hints that Menzies's account of the constructive trust is distinguishable in important respects from the express trust. By the second edition, Menzies speaks of the constructive trustee as a 'bare trustee', and appears to say that the duty of the constructive trustee extends no further than a duty to account.[70] One could say that this forms the purposes of the trust, if trust it is, as well as the nature of the duty of the trustee in that trust, the 'truster' of course being the law itself; or, it may be that it is more correctly understood to be an account predicated upon a purely personal conceptualisation of the nature of the constructive trust. If trust property ends up in the hands of a third party, that third party having given value, then the third party is not a constructive trustee.[71] This should be unsurprising, as it is not clear on what grounds the recipient would have ever been a constructive trustee; more pertinently, however, there will be no action prestable against that recipient as a matter of property law either, that is to say there is no *vindicatio*.

5-26. If the transfer is gratuitous, the receiver is a constructive trustee according to Menzies. This is illustrated by the distinction in result between two cases where clients have paid money to a stockbroker, who then placed the money in the bank. In one the broker had a credit in his account, and therefore the beneficiaries were able to recover as the banker was 'a mere depositary';[72] whereas, in the case where the broker's account was overdrawn, it was held there could be no recovery, as the money paid in had been applied to reduce a debt to the bank, and therefore because the bank was in good faith, there could be no recovery.[73] The crux of the contention on Menzies's part is that the stockbroker is 'really a trustee' for the client.[74]

[69] Menzies, *Trustees* (2nd revd edn) at para 1271.

[70] Menzies, *Trustees* (2nd revd edn) at para 1272.

[71] Menzies vol II, para 1273; Menzies, *Trustees* (2nd revd edn) at para 1273.

[72] Citing *Re Strachan* (1876) 4 Ch D 123. The case itself seems to make no such technical point; rather it appears to be decided as a simple case of tracing trust property: see *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721.

[73] *Thomson v Clydesdale Bank* (1893) 20 R (HL) 59 at 61 *per* Lord Watson; Menzies vol II, para 1273; Menzies, *Trustees* (2nd revd edn) at para 1273.

[74] Citing *McAdam v Martin* (1872) 11 M 33; *Hoffard v Gowans* 1909 1 SLT 153.

5-27. In Scots law the idea of 'tracing' is often known by the term 'subrogation',[75] and it is with that term that Menzies discusses the manner in which trust property can be followed, even if its character should change. The discussion makes heavy use of English authority, using the leading English cases for enunciating the general principle.[76] As it happens, it appears to be a quite sophisticated discussion of the law at that time from a Common Law perspective; indeed there is a rare citation of an American case on the matter.[77]

5-28. Menzies's treatise demonstrates that not only was the concept of a constructive trust familiar to a Scottish lawyer, but that one writer at least wished to expand its role – that is if he was not advocating full-scale adoption of the English jurisprudence in the area, if that had not already occurred. Indeed, it was presumably as a matter of demand from the legal profession that Menzies penned his work in such a way that where there were gaps in trust law – and in relation to the constructive trust, the position in Scots law was not far from a yawning chasm – he would utilise English authority. Therefore, while it may be that Menzies was a little too enthusiastic in both his categorisation of situations as involving a constructive trust, and the reception of English authority, the work remains comprehensive in its coverage, which was something new in the area. What it demonstrates is that English chancery jurisprudence was flowing directly into Scots law at this time: the split ownership concept, facilitated by Kames, and increasingly associated with trust law, was well enough established to provide a conduit through which such chancery jurisprudence could be received.

(b) Howden

5-29. Howden's discussion of the constructive trust in *Green's Encyclopaedia of the Law of Scotland*[78] also relies heavily on an 'equitable', very likely English chancery inspired, conceptualisation: 'A constructive trust is held to arise wherever anyone obtains or holds property to which he is not equitably entitled for his own absolute use.'[79] This definition is so broad that it potentially catches a multitude of holdings by legal actors, especially since

[75] Historically, many of the materials also speak of surrogatum, and that term was still in use in the nineteenth century: G Watson (ed), *Bell's Dictionary and Digest of the Law of Scotland* (7th edn, 1890) 1057.

[76] *Taylor v Plumer* (n 72) at 573–74 and 725 *per* the Lord Chief Justice (Ellenborough); *Re Hallet's Estate* (1880) 13 Ch D 696; *Patten v Bond* (1889) 60 LT 583; *Re Strachan* (1876) 4 Ch D 123; *Pennell v Deffell* (1853) 4 De GM & G 372; S Broadhurst, 'Following Property in the Hands of an Agent' (1898) 14 LQR 272.

[77] Menzies vol II, para 1290; Menzies, *Trustees* (2nd revd edn) at para 1290.

[78] C R A Howden, 'Trust' in J Chisholm (ed), *Greens Encyclopaedia of the Law of Scotland* (1899) vol XII. Note also that writer's monograph: C R A Howden, *Trusts, Trustees and the Trust Acts in Scotland* (1893).

[79] Howden, 'Trust' (n 78) vol XII, 338. The passage in unchanged in later editions: C R A Howden, 'Trust' in J Chisholm (ed), *Greens Encyclopaedia of the Law of Scotland* (2nd edn, 1914) vol XII, 288; J L Wark (ed), *Encyclopaedia of the Laws of Scotland* (1933) vol XV, 187. Such a broad definition is very similar to that given by Hill for English law: J Hill, *Practical Treatise on the Law Relating to Trustees* (1845) 116.

there is no apparent restriction to fiduciaries. On this construction, it would seem that a pledgee or even a depositee is a constructive trustee – this cannot be right as a matter of Scots law.[80] The examples given to illustrate the definition cast further shadow on the matter: it is correct that in some circumstances today a heritable security holder may become a constructive trustee of excess proceeds after enforcing a standard security by sale,[81] but Howden's argument for suggesting that a security holder is a constructive trustee seems based around the (admittedly related, but somewhat different) duty to take account of the interests of other creditors.[82] Likewise, describing liferenters as constructive trustees[83] seems problematic; though one might see how one could view them as some form of *sui generis* express trustee, the point is doubtful due to the need for ownership on the part of the trustee, unless one accepts that a liferenter is in some way an 'owner',[84] which in turn is splitting ownership.[85]

[80] Similar difficulties with the line between deposit and fiduciary arrangements were being felt in England around this time: D W M Waters, *The Constructive Trust* (1964) 304–05.

[81] Indeed, now any surplus left after the sale of the subjects in satisfaction of the secured debt is held on constructive trust by statute: Conveyancing and Feudal Reform (Scotland) Act 1970, s 27.

[82] In fairness to Howden the decision which he relies upon gives some credence to his analysis in the Opinion of the consulted judges: *Beveridge v Wilson* (1829) 7 S 279 at 281: 'Our opinion therefore, is that by law the heritable creditor, whose right is constituted by infeftment in the way and manner here done, cannot be deprived of his right to sell. Still, however, it is a right subject to control. He is but an encumbrancer; and subordinate rights may be lawfully created by the common debtor, to which the creditor must pay a certain regard, provided they do not injure his own rights. Further, he is, to a certain degree, trustee for the common debtor, and of course for his representatives; and therefore, when he exercises his right, he must do so in a way beneficial, and not hurtful, to those concerned. If he acted nimiously, the Court would certainly interfere in the exercise of this right of sale. Now, in the present case, although neither the common debtor, nor the trustee, his legal representative, can de jure deprive the creditor of his right of selling, yet if they can point out to the creditor that, by his adopting a certain mode of sale no ways injurious to him, the highest possible price at the least possible expense may be obtained, it seems reasonable that the court, ex equitate, may so direct.' The difficulty with such an analysis, at least for the modern law, is that by the court's own reasoning the security holder is 'but an encumbrancer', whereas a trustee is the owner of trust property. Today the court might well have described the security holder as a fiduciary rather than a trustee.

[83] Howden, 'Trust' (n 78) vol XII, 338; *Green's Encyclopaedia* (2nd edn) (n 79) vol XII, 288; *Encyclopaedia* (1933) (n 79) vol XV, 187.

[84] This view has been moved away from in recent years, but in the past there were a number of authorities which considered the right of a liferenter to be some form of ownership: '[a liferenter's right is one] much resembling property, which constitutes the liferenter *interim dominus*, or proprietor for life.' Erskine II.9.41. Cited with approval in *Inland Revenue v Wemyss* 1924 SC 284 at 293 *per* the Lord President (Clyde) and *De Robeck v Inland Revenue* 1928 SC (HL) 34 at 40 *per* Lord Dunedin, though perhaps the fact that the cases were tax cases concerned with a broader interpretation of 'ownership' is worth noting. See also the seven judge decision in *Buyers' Trs and Nunan* 1981 SC 313 at 316, where the court states that 'It is a well settled doctrine in the law of Scotland that the right of liferent and the right of fee are separate estates'.

[85] Though the interaction between *usufructus* and trust law can be considerable: W M J Dobie, *Manual of the Law of Liferent and Fee in Scotland* (1941) 3. There is also considerable

5-30. Howden explains that a trustee, or indeed any fiduciary, who makes a profit by virtue of that office is a constructive trustee for that profit – the bar on acting as *auctor in rem suam*.[86] This is another common assertion, though the *caveat* expressed above about applying the theory to express trustees is once more stated here. Indeed, it is said that in such a situation 'there will be an obligation upon the trustee to reconvey'.[87] This raises a question about where the property is vested, and indeed to whom and how any 'reconveyance' is to be made. It is necessary for any trust in Scots law that ownership of trust property be vested in the trustee; even if one accepts divided ownership, it would be necessary for 'legal' ownership to be vested in the trustee. Yet, the obligation on the trustee to reconvey does not appear to mandate a transfer to the beneficiary, to himself as trustee, or to the original transferor. If Howden is correct his approach remains important even if one accepts the patrimony theory, in that it assumes the trustee can transfer property to himself by passing property from one patrimony to the other.

(c) Mackenzie Stuart

5-31. Mackenzie Stuart[88] devoted a single paragraph, with a single footnote,[89] to the constructive trust. That paragraph notes that the constructive trust may arise in a number of ways, though the general rule given is where someone in a fiduciary position appropriates profits for himself through his position, thus rendering any profit to be held as a constructive trustee.[90] The reference to McLaren is unsurprising, given that this is McLaren's definition as derived from Lewin.[91] Further, while it is clear that the initial comments refer to a trustee in an express trust, there is recognition that the idea would apply in other fiduciary relationships. This is important, given, as already noted, the operation of this idea in relation to an express trustee should probably be characterised as a result of the express trust, where the need for the imposition of a 'fresh' or 'new' constructive trust is somewhat unclear.[92] The primary characteristic of such a trust is the obligation to account, or in modern terms, the obligation to 'disgorge'.[93] This appears to be a matter of

pedigree in English law historically: G Gilbert, *The Law of Uses and Trusts* (1734) 3; M Bacon, *A New Abridgment of the Law* (1766) vol V, 344. See on this M McNair, 'The Conceptual Basis of Trusts in the 17th and 18th Centuries' in R Helmholz and R Zimmermann (eds), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (1998) 215–16; S Herman, 'Utilitas Ecclesiae: The Canonical Conception of the Trust' (1995–96) 70 Tul LR 2239.

[86] Howden, 'Trust' (n 78) vol XII, 338–39; *Green's Encyclopaedia* (2nd edn) (n 79) vol XII, 288–89; *Encyclopaedia* (1933) (n 79) vol XV, 187–88.

[87] Howden, 'Trust' (n 78) vol XII, 339; *Green's Encyclopaedia* (2nd edn) (n 79) vol XII, 289; *Encyclopaedia* (1933) (n 79) vol XV, 188.

[88] Mackenzie Stuart 37–38.

[89] The reference is to McLaren, *Wills and Succession*.

[90] Mackenzie Stuart 37.

[91] See above at n 49.

[92] Indeed, Mackenzie Stuart actually says this himself later: Mackenzie Stuart 167.

[93] Mackenzie Stuart 38. The terminology of being under an obligation to account in the circumstances was already well established in case law: *Laird v Laird* (1858) 20 D 972 at 980 *per* the Lord President (McNeill).

some consensus by this time, that it is of the nature of the constructive trust, in whatever form it may have arisen, that the purposes of the trust and duties incumbent upon the trustee are one and the same – notably to employ the subjects of the constructive trust for the beneficiaries.

(d) Dewar Gibb and Smith

5-32. In the 1960s the academic analysis of the constructive trust did not feature many innovations but some subtle new trends emerge. For example, Dewar Gibb stated that if a trustee acting as *auctor in rem suam* should 'inadvertently make a profit out of his trusteeship he becomes constructively a trustee, and must account for it to the trust'.[94] The word inadvertently explains that the liability is essentially strict, as borne out by the strong assertion that 'The thing is simply forbidden.'[95] It might also suggest an analysis which draws the distinction between the inadvertent acquisition of goods being dealt with by a constructive trust, proprietary or enrichment based, whereas a deliberate breach of trust would be dealt with by the law of wrongs.[96]

5-33. T B Smith noted the existence of a 'constructive trust' in Scots law, and though he makes little comment on its substance, he does observe that situations which English law handles with the constructive trust and tracing would, in many cases, be dealt with by restitution in Scots law.[97] However, he does note that: 'The scope of fiduciary duty has been elaborated very much as in England, and trust property can be "traced" to a similar extent though not necessarily on the same theoretical basis. The doctrines of "resulting" and "constructive" trusts have been received in the Scottish law of private trusts.'[98] So Smith expressly recognised that Scottish law directly 'received' its doctrines of resulting and constructive trusts from English chancery jurisprudence. This reception occurred through the texts dealing with trust law in Scotland, which not only used English chancery jurisprudence's broad approach to trusts imposed by law,[99] but in so doing adopted and developed a more generalised conceptualisation of the splitting of ownership into beneficial and legal estates.

[94] A Dewar Gibb, *A Preface to Scots Law* (4th edn, 1964) 31.

[95] A Dewar Gibb, *A Preface to Scots Law* (4th edn, 1964) 31.

[96] On the problems of the law of wrongs in this area see J W G Blackie, 'Enrichment and Wrongs in Scots Law' 1992 Acta Juridica 23; J W G Blackie, 'Enrichment, Wrongs and the Invasion of Rights in Scots Law' 1997 Acta Juridica 284; J W G Blackie and I Farlam, 'Enrichment by Act of the Party Enriched' in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective* (2004).

[97] T B Smith, *British Justice: The Scottish Contribution* (1961) 187.

[98] Smith, *The Scottish Contribution* 190.

[99] The prime candidate here for the broadest approach to these questions must be Howden: 'Trust' (n 78) vol XII, which itself appears to flow from J Hill, *Practical Treatise on the Law Relating to Trustees* (1845) 116.

5-34. Smith's ideas were elaborated upon in a number of texts.[100] Smith noted that the terminology of the constructive trust had been brought into Scots law through contact with English chancery jurisprudence.[101] However, he went on to say that the 'ideas, however, have a longer history'.[102] This is illustrated by reference to the older Scottish concept[103] that those in a fiduciary position could not profit from their office.[104] This is true, though one should hesitate before ascribing the situations as on all fours with the constructive trust. Some of these situations could equally be characterised as situations where enrichment law, delict, or even a separate law of fiduciary obligations was applicable. The point is that insolvency is the key to identifying the true nature of a constructive trust.

5-35. The definition and structure which Smith set out for identifying when a constructive trust would arise would be adopted in academic works up until 1991, and is discussed to this day. According to Smith's view:

> Constructive trusts arise in various ways. Whenever a person occupying a fiduciary position gains some personal advantage – though not actually part of the trust estate – through his position as trustee, he is a constructive trustee of the profit so made, and must communicate it to the beneficiaries; and likewise if a stranger to the trust acquires property of the trust in circumstances which do not justify him in retaining it, he holds such property on a constructive trust for behoof of the beneficiaries. A partner or agent or director of a company who acquires any personal pecuniary advantage through his relationship to his principal, must account therefor. There is a presumption, which is absolute, that the profit belongs to the fiduciary not as an individual but as a trustee.[105]

5-36. Smith's structure for the constructive trust makes more clear the distinction between these two ways in which a constructive trust could arise. The first is predicated on the person of the misbehaving fiduciary in relation to their duties; whereas the second focuses upon the trust property itself drawing a stranger not justified 'in retaining the property'[106] into the position of being a constructive trustee. The structure proved popular, though proprietary effects remained unclear.

[100] Smith, *Studies*; Smith, *The Scottish Contribution* (n 97); T B Smith, *The British Commonwealth: Scotland, the Development of its Laws and Constitution* (1962); Smith, *Short Commentary*. The overlap in content between these texts is significant.

[101] Smith, *Studies* 211.

[102] Smith, *Studies* 211.

[103] The development of this matter will be dealt with in the next chapter considering fiduciary liability.

[104] See above. Smith, *Studies* 211.

[105] Smith, *The British Commonwealth* (n 100) vol 11, 584.

[106] This sounds very much like the civilian attitude to the ground for the reversal of unjustified enrichment, but it also sounds like the principle of knowing receipt found in English law and discussed below.

(e) Walker, and Wilson and Duncan

5-37. Walker's *Principles of Scottish Private Law*[107] follows previous approaches by stating that if a person in a fiduciary position obtains personal benefit from that position, then he is deemed by the law to hold the benefit as trustee for the beneficiaries. The examples of the lease-renewing partner and the property-buying trustee are given.[108] In Wilson and Duncan's text on *Trusts, Trustees and Executors*[109] there is a section devoted to the constructive trust which is the most comprehensive since Menzies. The constructive trust is said to be one created by consequences and not by consent,[110] and to be divisible into two distinct categories. These are said to be: first, 'where a person in a fiduciary position gains an advantage by virtue of that position';[111] and secondly, 'where a person who is a stranger to an existing trust is to his knowledge in possession of property belonging to the trust'.[112]

5-38. In relation to a trustee[113] making an advantage or profit for himself, Wilson and Duncan provides a list of situations in which the trustee will be said to hold the property on a constructive trust. The list is somewhat familiar and predictable: the trustee making a profit from his management of trust property in his ownership;[114] where the trustee uses trust funds to make a profit in trade; and where the trustee acquires part of the trust property or a debt due to the trust.[115] Wilson and Duncan quite correctly notes this is an aspect of the duty not to act as *auctor in rem suam*, and therefore treats the broader topic elsewhere, and the term constructive trust is not used in that chapter.[116] It is not clear that the constructive trust is always, if indeed ever, the remedy in these situations,[117] and by highlighting this remedial issue

[107] D M Walker, *Principles of Scottish Private Law* (1970) vol II.

[108] Walker, *Principles* vol II, 1598. There is no change to the passage at all in the following editions: (2nd edn, 1975) vol II, 1780; (3rd edn, 1983) vol IV, 9–10; Walker, *Principles*, vol IV, 10.

[109] W A Wilson and A G M Duncan, *Trusts, Trustees and Executors* (1975).

[110] Wilson and Duncan, *Trusts, Trustees and Executors* 77. Wilson and Duncan cites Lord Thurlow's *dictum* in the *York Buildings* case as an authority for this proposition. cf G L Gretton, 'Constructive Trusts I' (n 1) 292–93.

[111] It is made clear that this first limb applies to all fiduciaries, though the terms 'trustee' and 'fiduciary' are used (which is unsurprising given the focus of the text is on trusts and trustees): Wilson and Duncan, *Trusts, Trustees and Executors* 78–79.

[112] Wilson and Duncan, *Trusts, Trustees and Executors* 78. One should note that the same division is made earlier by Smith: *The British Commonwealth* (n 100) vol 11, 584.

[113] By which, for the reasons outlined above (see n 111), he should be taken to mean fiduciary.

[114] Of course, the trustee will always be the owner of anything considered to be property of an express trust, for which he is the trustee.

[115] Wilson and Duncan, *Trusts, Trustees and Executors* 78–79.

[116] Wilson and Duncan, *Trusts, Trustees and Executors* 361–71.

[117] Indeed, see *Ross v Davy* 1996 SCLR 369 at 381 *per* the Lord Ordinary (Penrose) where the remedies postulated are repetition, accounting, and, most interestingly, for present purposes, 'disgorgement of benefit accruing from the wrong than compensation to the victim for loss suffered as a result of the wrong.'. See further the remedial scheme outlined in *Sarris*

Wilson and Duncan could be attempting to move the *auctor in rem suam* rules away from the possible proprietary and insolvency consequences of recognising a constructive trust.

5-39. As regards the possibility of a constructive trust arising in the hands of a third party, it is stated that the recipient must be in bad faith, or a gratuitous alienee, in his receipt of trust property.[118] This proposition is vouched for by entirely English authority,[119] and citation of Menzies.[120] An examination of the paragraph cited in Menzies reveals that the authorities relied on, which employ a constructive trust concept, are based on English (and New Zealand) law,[121] whereas the Scottish cases cited provide no obvious assistance in showing the presence of a constructive trust.[122] Therefore Wilson and Duncan's authorities in this regard are somewhat inconclusive, though the fact that *Soar v Ashwell*[123] is given as the main plank of authority means that it ought to be considered.

5-40. In *Soar v Ashwell* the trustees of a testamentary trust entrusted a solicitor with the trust fund so that he could invest it on their behalf. The solicitor invested the fund, alongside funds from other trusts, on an equitable mortgage by deposit of title deeds, in his own name. The mortgage was paid off and in January 1879 the money invested was transferred to the solicitor, who, in turn, retained some of the funds. In 1891 the surviving trustee sought to recover the funds retained by the solicitor's personal representatives (the solicitor having died in November 1879). An important question was whether the trustee's claim was cut off by the passage of time, and the answer to that question depended in large part on how the solicitor's obligation was classified. If the solicitor was merely a constructive trustee the claim would be time barred; if, however, the solicitor was more properly characterised as an express trustee then the claim would not be so barred. The decision in the case was to find the solicitor not to be a constructive trustee, but rather that he was in fact an express trustee – indeed it was on this very characterisation that the case turned.[124] This was because the solicitor had received money from the trustees in a fiduciary capacity himself, and was in

v Clark 1995 SLT 44 at 49 *per* the Lord Justice-Clerk (Ross) if a trustee has acted as *auctor in rem suam* – none of them seems to adopt a constructive trust analysis, which had been expressly pleaded in the Outer House: *Sarris v Clark* at 44. See also *Clark v Clark's Exrs* 1989 SC 84 and *Inglis v Inglis* 1983 SC 8 at 15 *per* the Lord Justice-Clerk (Wheatley) where it is observed that the law on *auctor in rem suam* is the same in Scots and English law. The *auctor in rem suam* rule is discussed in more detail in chapter 6.

[118] Wilson and Duncan, *Trusts, Trustees and Executors* 79.

[119] *Soar v Ashwell* [1893] 2 QB 390; *Re Eyre Williams* [1923] 2 Ch 533; *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567; *Russell v Wakefield Works Co* (1875) LR 20 Eq 474; *Moxham v Grant* [1899] 1 QB 88.

[120] A J P Menzies, *The Law of Scotland Affecting Trustees* (2nd edn, 1913) at para 1279.

[121] *Union Bank v Murray-Aynsley* [1898] AC 693; *Re Gross* (1871) LR 6 Ch App 632.

[122] *Taylor v Forbes* (1830) 4 W & S 444; *MacGowan v Robb* (1864) 2 M 943.

[123] *Soar v Ashwell* [1893] 2 QB 390.

[124] If the trust had fallen to be regarded as a constructive trust then the Statute of Limitations would have been fatal to any right to recover.

fact a trustee on that basis. In his judgment Lord Esher MR explained that an express trust arises '[i]f there is created in expressed terms, whether written or verbal, a trust, and a person is in terms nominated to be the trustee of that trust, a Court of Equity, upon proof of such facts, will not allow him to vouch a Statute of Limitations against a breach of that trust. Such a trust is in equity called an express trust.'[125] Whereas, on the other hand:

> If the breach of the legal relation relied on, whether such breach be by way of tort or contract, makes, in the view of a Court of Equity, the defendant a trustee for the plaintiff, the Court of Equity treats the defendant as a trustee become so by construction, and the trust is called a constructive trust; and against the breach which by construction creates the trust the Court of Equity allows Statutes of Limitation to be vouched.[126]

Soar v Ashwell was an important development in a longstanding process of defining properly the different categorisations of 'trustee', particularly for the purposes of the Statutes of Limitations.[127] This was necessary because of the expansive manner in which constructive trusts had been described in English law, which in turn potentially opened the way for a multitude of claims without time limitation.

5-41. Looking at the case from a Scottish perspective, it is not clear that this would be a situation in which a constructive trust would arise. If a trustee deposited money with a solicitor to invest, it is not clear that this would represent a situation involving a constructive or express trust.[128] This is because it is not absolutely clear[129] if all breaches of fiduciary duty give rise to a constructive trust or indeed if such a constructive trust would be proprietary. The situation could be one in which an enrichment remedy would be equally appropriate. Hence the *Soar v Ashwell* case is not an entirely reliable authority for saying that the mere receipt of trust property renders the recipient a constructive trustee in Scottish law.

5-42. Wilson and Duncan's second category of constructive trust thus seems to lack an authoritative basis in Scottish authority of the time. Gretton is highly critical[130] of the rule regarding a stranger taking trust property *mala*

[125] *Soar v Ashwell* at 393.

[126] *Soar v Ashwell* at 393.

[127] D M W Waters, *The Constructive Trust* (1964) 294–96. For a flavour of the background to these attempts to properly define these forms of 'trusteeship' see Ibbetson, *Historical Introduction* (n 2) 281 ff; in particular, his observation (at 281) that '[i]t is hard to avoid the conclusion that the judges had little clear idea what they were doing. Common law, undoubtedly, was in a mess. So too was Equity. At the beginning of the nineteenth century there was reason to believe that the Court of Chancery would develop a jurisdiction overlapping significantly with that at Common law, if it had not done so already. These claims were coming to be accommodated within the language of trusts: all equitable claims relating to property, other than those based on express trusts, could be brought together under the blanket heading of constructive trusts.'

[128] Much of the position is now regulated by statute: Solicitors (Scotland) Act 1980, s 42.

[129] Though the tenor of recent authority strongly suggests that there would be a constructive trust imposed in such circumstances: see below at paras 5-67 ff.

[130] Gretton, 'Constructive Trusts I' (n 1) at 300–01.

fide, or gratuitously. In addition to making important comments about the imprecision of language used, Gretton explains that the *mala fide* onerous transferee will normally be protected by statute.[131] Furthermore, in the matter of a donee receiving property, this is said to be simply a matter of having the title of transferee reduced.[132]

5-43. Wilson and Duncan's text deserves much praise for highlighting that the mere fact that one is a fiduciary should not necessarily be read as a proxy for being a trustee, constructive or otherwise.[133] This is useful since many of the areas which Menzies had treated as examples of a constructive trust, or constructive trustee, are now described as incidents of a fiduciary relationship – in other words the imposition of certain duties to others arising by virtue of an office is not necessarily bound up with being a trustee or the creation of a trust. When one starts to use the term trust, other factors such as the purposes and the assets of the trust come into play, not to mention the insolvency preference. Fiduciary duties are well embedded in Scots law, but the constructive trust is less so, perhaps not only because it is probably to be defined essentially as a remedy, but also because it is a remedy that is (or was historically) at least partially tautologous. The tautology arises from the fact that Scotland has long had a robust law of unjustified enrichment capable of doing much of the work of a constructive trust, albeit by means of personal rights; the special feature of the constructive trust, its insolvency protection, is a matter which has been (historically at least) contested, which may explain the precarious nature of the constructive trust, or at least its recognition as a type of 'normal trust' which provides insolvency protection when property has been received by a third party. The situation where a non-trustee fiduciary makes a profit from her office seems more firmly established as constructive trust, and, probably, with insolvency protection.

(f) Norrie and Scobbie

5-44. The next text devoted to trusts was to appear in the early 1990s. In *Trusts*[134] the authors, Norrie and Scobbie, accept the Wilsonian binary approach on the basis that it has been accepted by the courts.[135] This treatment is the first given of the constructive trust from the point of view that it is a 'trust' in the full sense of the word – that is to say, they discuss the 'purposes' of the trust and the trustees' duties. The purpose is described as the duty to account, and while the duties are less than those on an express trustee no further elaboration is given beyond the prohibition against the trustee becoming *auctor in rem suam*.[136]

[131] Trusts (Scotland) Act 1961, s 2. Gretton, 'Constructive Trusts I' (n 1) at 300.
[132] Gretton, 'Constructive Trusts I' (n 1) at 300.
[133] See also Burgess, 'The Unconstructive Trust' (n 11) at 204.
[134] K M Norrie and E M Scobbie, *Trusts* (1991).
[135] See e.g. *Black v Brown* 1994 SLT (Sh Ct) 50.
[136] Norrie and Scobbie, *Trusts* 54.

5-45. Returning to the two different ways in which a constructive trust may arise, Norrie and Scobbie's description of the constructive trust in the third party stranger is hesitant: 'It could be argued that this does not really constitute a trust except when the holder of the property in some way obtains title to the property, for trusteeship is essentially a proprietorial office. However the law does impose a trust-like obligation to restore the property to the trust in this sort of situation.'[137] It is perhaps a little unclear whether the authors consider this to be a proprietary constructive trust with insolvency protection or simply an obligation, but it appears to be the former. If ownership has passed to the recipient – if it has not passed then simple vindication would be appropriate – then it will be rectified by one of a number of possible remedies, including a 'proper' constructive trust (if it exists in this situation), an action of reduction, or an enrichment remedy.

5-46. Norrie and Scobbie's description of the profit made by a fiduciary is consistent with previous treatments, including the problematic idea of the express trustee (as opposed to a fiduciary who does not own the trust fund) who acts for himself raising another trust which is beholden to the existing trust, for which he is a trustee too.[138] The English courts are also said to be more 'imaginative' than Scottish courts in their use of the constructive trust.[139] Indeed, the authors are clear in their support for the development of the constructive trust to provide equitable remedies where the law will provide no other. The situation highlighted is the case of cohabiting couples, more specifically the manner in which the family home is owned.[140] This is not the place to go into a detailed discussion of this idea. However, one may observe that the jurisprudence on the matter in the Common Law world has moved quickly since then, as indeed have potential Scottish solutions.[141]

(g) Wilson and Duncan's Second Edition

5-47. With the appearance of a second edition of Wilson and Duncan's *Trusts, Trustees and Executors*,[142] a number of small but important editorial changes were made. Looming large among them was the impact of the seminal case of *Sharp v Thomson*.[143] However, before dealing with the large controversy which attached to that case, changes were made to the discussion of the

[137] Norrie and Scobbie, *Trusts* 54.

[138] Norrie and Scobbie, *Trusts* 55.

[139] Norrie and Scobbie, *Trusts* 56.

[140] Norrie and Scobbie, *Trusts* 57.

[141] On the subject in Scotland see, K M Norrie, 'Proprietary Rights of Cohabitants' 1995 JR 209; Gretton, 'Constructive Trusts I' (n 1) at 312–16. The decision reached in *Shilliday v Smith* 1998 SC 725 is a prime example of how the Scots law of unjustified enrichment would deal with such a case; and the statutory provisions of the Family Law (Scotland) Act 2006 are similarly of potential relevance in the modern law: see *Gow v Grant* [2012] UKSC 29, 2014 SC (UKSC) 1. Authorities on constructive trusts in this area are now voluminous in England, the leading cases being *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 and *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.

[142] W A Wilson and A G M Duncan, *Trusts, Trustees and Executors* (2nd edn, 1995).

[143] *Sharp v Thomson* 1997 SC (HL) 66; 1995 SC 455; 1994 SC 503. The case had only reached the stage of the Inner House having passed judgment when the book was published.

category of the 'stranger to an existing trust' coming into possession of trust property gratuitously or in bad faith. There are two new paragraphs, each discussing a case decided since the publication of the first edition.[144] In the first paragraph *Huisman v Soepboer*[145] is the subject of discussion. The case involved a joint venture, whereby H, S and K entered into an arrangement to buy and sell a farm, with the profits to be split among them. It was agreed that S would take the farm in his own name, and then re-sell it; however, S's company, for which he was the sole director, actually took the title to the farm.[146] When a dispute arose later, the Lord Ordinary (Penrose) allowed the case to go to proof, but in so doing stated the following:

> It was pointed out that the case was that there was a joint venture and that, if the first defender had taken the title in his own name, he would have done so on a fiduciary basis, on behalf of the joint venture. In fact the second defenders had acquired title, but the first defender was their only director and they acquired the title in the knowledge that it was subject to the joint venture agreement. Their acquisition was not, therefore, in good faith. Where a partner handed over partnership property to another who did not take it in good faith both were liable…In my view, these submissions are well-founded. There are ample averments that the second defenders took the title in the knowledge that it was subject to the conditions of the joint venture. It is clear, in particular from the opinions in *Soar* [*v Ashwell*] *supra*. that in such a case there may be a constructive trust and the constructive trustee may be liable jointly and severally with the partner.[147]

5-48. It is unclear in what sense a constructive trust is to be gleaned from such circumstances, nor indeed is it really clear that it would be necessary. There appears to be no insolvency present, and the approach seems to mix up the two Smith/Wilson and Duncan grounds for a constructive trust with each other. The first ground, regarding the fiduciary taking advantage of his position, applies to all fiduciaries.[148] The second ground speaks only of an express trust's property coming into the hands of the recipient in the requisite circumstance, and is not said to apply to all fiduciaries.[149] The Lord Ordinary's approach could be interpreted as saying that property held or administered under any fiduciary relation, which is then transferred to a gratuitous/bad faith recipient, will become held by the recipient on a constructive trust. If that were so it was arguably an expansion of the doctrine as understood in Scotland at that time.[150] A narrower reading would be to say that a joint

[144] Wilson and Duncan, *Trusts, Trustees and Executors* (2nd edn) at paras 6-67–6-68.

[145] *Huisman v Soepboer* 1994 SLT 682.

[146] On developments in this area in English law, see T Etherton, 'Constructive Trusts and Proprietary Estoppel' [2009] Conv 104.

[147] *Huisman v Soepboer* at 683.

[148] Wilson and Duncan, *Trusts, Trustees and Executors* (2nd edn) at para 6-64.

[149] Wilson and Duncan, *Trusts, Trustees and Executors* (2nd edn) at para 6-65 ff; cf para 6-64 where the first limb is expressly applied to fiduciaries generally. The difference is explained by the fact that not all fiduciaries will own the constituent's property as a trustee does.

[150] It seems clear now that the courts consider the doctrine applicable to fiduciaries beyond express trustees, and that 'in a question with a stranger to the fiduciary relationship, a pre-existing proprietary interest in the claimant can be dispensed with': *Commonwealth Oil & Gas Co Ltd v Baxter* [2009] CSIH 75, 2010 SC 156 at para 18 *per* the Lord President (Hamilton).

venture or partnership is especially close to some form of mutual trusteeship – certainly it is a situation more akin to a trust than other fiduciary offices – and that that justifies the decision.

5-49. There is certainly no orthodox express trust,[151] though perhaps the Lord Ordinary is thinking of the joint venture as a form of one. In either event, the doctrine of the recipient cannot operate anyway – the property in question was never owned by a trust, or even the joint venture, in the first place. The company took the original title as far as the actors in the case are concerned – it received the title from whoever was originally selling the farm. Therefore, to say that the company took the title from a trust is not correct in relation to the pursuer in that case.[152] Gretton states the Lord Ordinary was mistaken in his language, and that the action was simply one for debt.[153]

5-50. The second new case in the section[154] regarding strangers to the trust is *Raymond Harrison & Co's Tr v North West Securities Ltd*,[155] though the case held that a constructive trust did not exist. A entered into 'livestock agreements' with finance company B, in which A agreed to take the cattle from B on hire, with an option to purchase later. The ownership of the cattle was to remain with B. A breached the agreement by selling some cattle through agency C; whereupon, agency C issued a cheque for the price of the cattle and some other items sold at the same time. This cheque was then endorsed by one of A's partners in favour of company D, in exchange for which D issued two cheques to A. One of these two cheques was in favour of B, who presented it for payment, and the payment was met. Then A was sequestrated. The pursuer in the case was the trustee in sequestration, who was seeking declarator that the cheque cashed by B constituted an unfair preference.[156] B's defence was one, among other things, of saying that the cheque was held by A in favour of B as constructive trustee; that A had no right to the cattle, nor the cheque representing the cattle, and therefore the sale of the cattle was illegal, and so the trustee in sequestration should not be allowed to retain an advantage so obtained.

5-51. Following this somewhat complicated factual nexus, the Lord Ordinary (Clyde) dismissed the claim that a constructive trust could arise in such circumstances, and found that the cheque constituted an unfair preference. In coming to his conclusions on the narrow point concerning the constructive trust the Lord Ordinary said:

> I am not however persuaded that there was any constructive trust over the cattle or the proceeds of that sale. I do not consider that any trust is to be spelled out of the contract conditions of the livestock agreement. The lessee held the cattle for himself and for his own use and benefit. The circumstances do not fall within any of those recognised for the constitution of a constructive trust (see Wilson & Duncan, Trusts, Trustees & Executors, pp. 77 et seq.). Neither the terms of the

[151] Gretton, 'Constructive Trusts I' (n 1) at 300.
[152] Gretton, 'Constructive Trusts I' (n 1) at 300–01.
[153] Gretton, 'Constructive Trusts I' (n 1) at 300.
[154] Wilson and Duncan, *Trusts, Trustees and Executors* (2nd edn, 1995) at para 6-68.
[155] *Raymond Harrison & Co's Tr v North West Securities Ltd* 1989 SLT 718.
[156] Bankruptcy (Scotland) Act 1985, s 36.

> contract nor the relationship of the parties seem to me to support the conclusion that the firm held the cheque in any constructive trust for the defenders. The relationship between the firm and the defenders was governed by the contract of hire and I see no room for implying from the terms of that contract, or for adding by some implication from the circumstances of the relationship, some kind of fiduciary characteristic analogous to trust or agency such that the defenders could claim the proceeds of sale had they fallen to the bankrupt's estate, or such as could constitute a defence to a claim of unfair preference.[157]

5-52. The guidance to be gleaned from this passage is significant. The Lord Ordinary's reasoning would make any future attempt to show a constructive trust in a commercial context difficult. Indeed, a great deal of emphasis is placed upon the nature of the holding of the cattle by A. The holding was for A's 'own use and benefit', and therefore could not be said to be on behalf of B, nor did the express terms of the contract give rise to an express trust. Indeed, the contract of hire itself regulated the relationship between A and B, and so there was to be no imputation of fiduciary content to the relationship. Therefore, the test set, while seemingly acknowledging that Wilson and Duncans's identified situations constitute a *numerus clausus*, is two-fold – is there support for the constructive trust in the contract[158] or in the relationship between the parties? In both cases here the answer was no.

5-53. New paragraphs[159] are inserted in the second edition of Wilson and Duncan's chapter discussing the potential for a constructive trust arising in the context of the sale of heritable property. In order to understand the new insertions some background about transfer of heritable property is necessary. There are three stages in the transfer of heritable property: (1) conclusion of the missives (contractual agreement); (2) the delivery of the disposition (whereby a deed is granted by the owner disponing the property to the buyer), and, finally, (3) registration (whereupon the real right of ownership is created, giving the buyer ownership). In a series of cases the status of a delivered disposition became a hotly disputed topic. It was suggested that the delivery of the disposition to the buyer meant, or should mean,[160] that the seller was to be considered to hold the property on constructive trust for the buyer. In this way, in the event of the seller becoming insolvent, the insolvency would not catch the heritable property due to a trust's effects in insolvency situations.

[157] *Raymond Harrison & Co's Tr* at 722 *per* the Lord Ordinary (Clyde).

[158] At first blush this seems problematic insofar as a trust gleaned from the terms of the contract will be an express, or perhaps implied, trust. However, it seems that what Lord Clyde meant by this was that he looked to the contract to discover the nature of the manner in which A held the cattle. In other words, did the wording of the contract create a sufficient nexus of fiduciary relation between the parties?

[159] Wilson and Duncan, *Trusts, Trustees and Executors* (2nd edn) paras 6-76–7-68.

[160] Burgess, 'The Unconstructive Trust' (n 11) at 207–20; A R Wilson, 'The Constructive Trust in Scots Law' 1993 JR 99.

(h) Sharp v Thomson

5-54. The 'mischief'[161] began, in modern times, with the comments made in *Gibson v Hunter Home Designs Ltd*,[162] where the Lord President (Emslie) was thought to have suggested that upon delivery of the disposition the buyer had some form of right of property,[163] and then, therefore, that there could be a constructive trust.[164] The next major case on the issue was *Sharp v Thomson*,[165] which sparked the most important debate about Scottish property law for a generation.[166] The facts of the case were quite simple. T concluded missives (a contract) with A Co for the purchase of a house, and T then paid the purchase price and took possession of the subjects. Crucially, the payment was not met with delivery of a disposition until the day before the floating charge attached. Therefore there was no registration of the disposition – the traditional point at which the transferor is divested of ownership and the transferee becomes owner – until eleven days after the floating charge attached.

5-55. T Co had borrowed money from bank C, and this loan was secured by way of floating charge, which 'floats' over the company property, including things which enter and leave the patrimony of the company. When a receiver is appointed the charge 'attaches' to 'the property then subject to the charge; and such attachment has effect as if the charge was a fixed security over the property to which it has attached'.[167] Therefore, the entire case turned on whether the delivery of the disposition meant that the house, for which T Co had paid, was taken out of the reach of the floating charge's attachment.

5-56. The decision became the hub of much controversy and debate.[168] In the Court of Session, both the Lord Ordinary[169] and First Division[170] held that the house was still subject to the floating charge. The reasoning was simple – transfer of land was achieved at the point of registration, and the delivery of a disposition, while allowing some things, did not divest the seller of ownership. Crucially, it was also said that ownership could not be split into equitable and legal estates for different purposes.[171] In the House of Lords,

[161] N R Whitty, '*Sharp v Thomson*, Identifying the Mischief' 1995 SLT (News) 79.

[162] *Gibson v Hunter Home Designs Ltd* 1976 SC 23.

[163] At 27 *per* the Lord President (Emslie). One should note that the Lord President then went on to say there was no constructive trust, citing two decisions of the House of Lords which seem to go against the view subsequently attributed to him about a trust arising.

[164] Burgess, 'The Unconstructive Trust' (n 11) 208.

[165] *Sharp v Thomson* 1997 SC (HL) 66.

[166] Scottish Law Commission, *Discussion Paper on Sharp v Thomson* (SLC DP 114, 2001).

[167] Insolvency Act 1986, s 53(7).

[168] See SLC DP No 114, 2001 at para 1.5.

[169] *Sharp v Thomson* 1994 SC 503.

[170] *Sharp v Thomson* 1995 SC 455.

[171] *Sharp v Thomson* at 469F–G *per* the Lord President (Hope): 'Scots law, following Roman law, is unititular, which means that only one title of ownership is recognised in any one thing at any one time. Although this title can be shared, as in the case of common property, only one person can be the owner in competition with others about ownership. There is no opportunity for fragmentation of the concept of ownership, as the transfer of ownership one to the other

the decision of the Inner House was reversed.[172] Their Lordships noted the apparent inequity of the result in the case, before going on to say that the house was no longer part of the 'property' of T Co for the purpose of the floating charge legislation.[173] Interestingly, the House of Lords said that the purchasers had the 'beneficial interest' in the heritable property, or at least the transferors no longer had a beneficial interest in the subjects, and this therefore took the property beyond the floating charge – what appears an ostensibly split ownership approach.

5-57. It was not long before the controversy in *Sharp* was revisited. In *Burnett's Tr v Grainger*[174] in similar factual circumstances, but in relation to personal bankruptcy rather than receivership,[175] the sheriff court followed the decision in *Sharp*.[176] On appeal, however, the Inner House reversed the shrieval judgment,[177] expressly distinguishing the case from *Sharp* and suggesting that *Sharp* was a special interpretation of a specific statute.[178] Somewhat unusually, there is the implicit, and, indeed, sometimes explicit suggestion, that the Court considered the decision of the House of Lords in *Sharp*, more especially Lord Jauncey's opinion, to be erroneous.[179] The decision was appealed to the House of Lords, where *Sharp* was distinguished with sufficient finality to render it an authority on its own facts essentially.[180]

occurs in a single moment which, in the case of heritable property, is that of recording the disposition in the appropriate register.' Lord Sutherland's opinion is similar on this point to that of the Lord President, noting, at 485F, that 'the right of property in the estate of a trust is vested in the trustees to the exclusion of any competing right of property, and the right of the beneficiary is merely a right *in personam* against the trustees to enforce their performance of the trust.' Though compare Lord Coulsfield's remarks at two passages of his opinion, at 502G–I and 505H–I, where he stated (1) 'it seems to me that it has always been evident that there is some difficulty in reconciling the concept of a trust with the principle of unity of ownership. That difficulty has manifested itself in, for example, attempts to explain a trust as a combination of the contracts of mandate and deposit, an explanation which is manifestly inadequate,…It further seems to me that notwithstanding decisions such as *Inland Revenue v Clark's Trs*, in practice most lawyers dealing with trusts in Scotland do so on the assumption that the trustee enjoys a legal estate or legal title and the beneficiary an equitable or beneficial title, very much as those concepts are understood in English law', and (2) 'it seems to me that, although weight should be given to arguments that the purity of Scots law, as a system based on the civil law, should be maintained and the unitary conception of ownership preserved, these arguments should not be overemphasised or treated as in themselves decisive.'

[172] *Sharp v Thomson* 1997 SC (HL) 66.

[173] At 76–77 *per* Lord Jauncey of Tullichettle and at 82 *per* Lord Clyde. See also SLC DP No 114, 2001 at paras 1.7–1.8. Much of the rest of the Scottish Law Commission's proposals in the Discussion Paper were overtaken by events, notably the decision in *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19. Furthermore, some proposals were enacted: Bankruptcy and Diligence etc (Scotland) Act 2007 (asp 3). See also Scottish Law Commission, *Report on Sharp v Thomson* (SLC 208, 2007).

[174] *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19.

[175] Bankruptcy (Scotland) Act 1985, s 31(1).

[176] *Burnett's Tr v Grainger* 2000 SLT (Sh Ct) 116.

[177] *Burnett's Tr v Grainger* 2002 SC 580.

[178] At paras 23–27 *per* Lord Coulsfield.

[179] At para 25 *per* Lord Coulsfield and at para 36 *per* Lord MacLean.

[180] *Burnett's Tr v Grainger* 2004 SC (HL) 19.

5-58. Throughout this sequence of cases there was a latent argument about the possibility of a constructive trust, though the persistence of the argument is perhaps puzzling given the consistency of judicial rebuffs. The constructive trust that was argued for was one arising upon delivery of the disposition to the transferee: from that moment the transferor's ownership of the property was, it was argued, to be as a mere constructive trustee for the buyer. The explanations proffered for that type of constructive trust leaned towards distinguishing between legal and equitable ownership. The idea stems originally from an argument made by counsel in *Gibson*[181] that 'as from the date of entry when the price was paid the whole beneficial interest in the subjects of sale had passed to the purchaser and the seller thereafter held the right and title to the subjects as trustee for the purchaser in whose favour he was bound to denude'.[182] This argument was firmly rejected as 'without substance' by the Lord President in *Gibson*, who specifically drew attention to two House of Lords decisions distinguishing between a personal obligation to convey, and the constitution of a trust.[183]

5-59. However, the decision in *Gibson* was to be cited subsequently as an authority for the proposition that a trust would exist in such circumstances.[184] At first instance in *Sharp* the constructive trust once again reared its head in the context of a dispute about the legal effect of delivery of a disposition. The argument was comprehensively rejected by the Lord Ordinary (Penrose), who pointed out that a personal obligation in relation to property does not necessarily a trust make.[185] The argument for the constructive trust fared no better on appeal to the Inner House.[186] The argument was refined to suggest that *dicta* suggesting no trust arose in the circumstances were concerned with the position after conclusion of the missives but before delivery of the disposition, and that, therefore, in relation to the position after delivery of the disposition, there was no reason why a constructive trust should be barred.[187]

5-60. The Lord President rejected the submission that the authorities[188] suggested that a constructive trust would arise in such circumstances, and observed that:

[181] *Gibson v Hunter Home Designs Ltd* 1976 SC 23.

[182] At 27 *per* the Lord President (Emslie).

[183] At 28 *per* the Lord President (Emslie): the cases were *Heritable Reversionary Co Ltd v Millar* (1892) 19 R (HL) 43; *Bank of Scotland v Liquidators of Hutchison Main & Co Ltd* 1914 SC (HL) 1.

[184] *Sharp v Thomson* 1994 SC 503 at 537–38 *per* the Lord Ordinary (Penrose).

[185] At 536.

[186] *Sharp v Thomson* 1995 SC 455.

[187] At 479 *per* the Lord President (Hope).

[188] One authority in particular, *Stevenson v Wilson* 1907 SC 445, was expressly distinguished by the Lord President. In *Stevenson* a buyer paid a seller for a transfer of shares but the transfer was never completed (by registration) and so the seller remained the named owner of the shares on the register: a situation similar to that in *Sharp v Thomson*. In *Stevenson* the court's decision suggested that the seller was indeed a constructive trustee, but some of the details are somewhat ambiguous. The Lord President in *Sharp* distinguished the case, noting of

> The mere fact that a person has come under a contractual obligation to convey property to another is not, of itself, sufficient to create a trust over it. What are required are other circumstances, which are not referable to the parties' contract, sufficient to create fiduciary duties in favour of the party to whom the property is to be conveyed. The position is different in England where, as can be seen from various *dicta* mentioned by Russell J in *Musselwhite v C H Musselwhite & Son Ltd*[189] at pp 985-86, the vendor becomes, from the moment the contract is entered into, a trustee of the property for the purchaser. That doctrine is not part of Scots law, as is plain from the decision in *Gibson*.[190]

5-61. The point is made rather loud and clear in this passage – as a matter of Scots law,[191] a seller of property, heritable or moveable, who has completed a contract of sale, yet remains vested in title to the subjects of that contract, will not be a constructive trustee by virtue of the contractual obligation's existence alone.[192] There must be fiduciary duties present, inferred from the surrounding circumstances, and 'not referable to the parties' contract'. A constructive trust arises from circumstances, not from contractual provision alone. Also, as regards the idea of a constructive trust in this specific context, it has been pointed out that an approach based on the bare delivery of a disposition would be inconsistent:

> There are, in any event, in my opinion, a number of difficulties associated with the view that a trust of heritable property arises on delivery of the disposition. The purpose of the disposition is directly contradictory of the fundamental basis of trust, namely that the infeft proprietor should hold for a third party. The delivery of the disposition as designed to put the disponee in a position to effect, by recording or registration, the total divestiture of the disponer and not in any way to qualify his infeftment with any right in favour of a third party.[193]

Stevenson: 'It is not clear why the court was willing to adhere to Lord Salvesen's decision to grant declarator in terms of the second conclusion to the effect that the shares were held in trust for the purchaser's behoof…In my opinion the case cannot be regarded as authority for the view that a constructive trust arises in all cases of sale following delivery or constructive delivery of the property to the purchaser, pending the completion of the steps which are required to transfer the real right. Where, as in this case [i.e. *Sharp*], the transaction has proceeded upon the ordinary course provided for by the contract, the matter rests throughout entirely upon personal obligation and there is no room for holding that there is, by implication, a constructive trust': *Sharp v Thomson* 1995 SC 455 at 480–81 *per* the Lord President (Hope).

[189] *Musselwhite v C H Musselwhite & Son Ltd* [1962] Ch 964.

[190] *Sharp v Thomson* 1995 SC 455 at 480 *per* the Lord President (Hope).

[191] Lord Hope suggested that such a constructive trust might have arisen in England, but the exact nature of such a 'constructive trust' is coming under increased scrutiny there and in other Commonwealth jurisdictions: see P G Turner, 'Understanding the Constructive Trust between Vendor and Purchaser' (2012) 128 LQR 582, and a recent decision of the UK Supreme Court: *Mortgage Business plc v O'Shaughnessy* [2014] UKSC 52, [2015] AC 385 at paras 60 ff *per* Lord Collins.

[192] This has been reiterated in recent authority: *Ross v Morley* [2013] CSOH 175, 2013 GWD 38-728 at para 14 *per* the Lord Ordinary (Doherty): 'It is plain on the authorities that in the case of an ordinary arm's length agreement to transfer property the person contractually obliged to transfer it does not hold the property as a constructive trustee for the other contracting party.'

[193] *Sharp v Thomson* 1994 SC 503 at 537 *per* the Lord Ordinary (Penrose).

This is to be distinguished from the express provision for a trust in a deed, which is then a matter of express trusts, which is apparently valid, provided the requirements are met.[194] When *Sharp* reached the House of Lords the idea of a constructive trust was not discussed in much depth, with only a slightly mysterious statement by Lord Clyde that 'It is sufficient to observe that whatever meaning is to be given to the expression "constructive trust", nothing can be said in the present case to have been delivered to the seller so as to enable the concept of trust to apply.'[195] Here is perhaps a suggestion that Lord Clyde considers many things that are called constructive trusts are often nothing to do with trust law at all.

(i) Burnett's Trustee v Grainger

5-62. The argument in favour of recognising a constructive trust in the context of the delivered disposition was not canvassed in either the sheriff court, or the Court of Session, in *Burnett's Trustee*.[196] However, in the House of Lords like a *deus ex machina* the concept emerged in some speeches. It had been conceded by counsel for the appellant that the delivery of a disposition would not cause a trust to arise over the subjects of the disposition, and no analogies were drawn from English law – two concessions expressly approved of by Lord Hope.[197] However, Lord Hope felt the need to 'reply' to observations made by Lord Hobhouse in the appeal, though neither side had addressed arguments on the constructive trust point.[198] On the matter of the constructive trust there can be few clearer passages than this:

> The first and most important point that has to be made is that according to the law of Scotland a trust, in the present context, has to be created expressly. Scots law does not accept that a constructive or remedial trust can arise from a contract of sale, nor does it recognise the concept of equitable ownership…So a person has to do two things if he wishes to establish a trust of his own property in favour of a third party. He must effect delivery of the trust property to a trustee or, if he himself is to be the sole trustee, he must do something which is the equivalent of delivery.[199]

D. MODERN IDEAS AND THE FUTURE

(1) Gretton

5-63. The taxonomical difficulties, inconsistent treatment, and relatively sparse frequency of appearance in case law, have led some commentators to question the existence of the constructive trust in Scots law. In a leading

[194] *Burnett's Tr v Grainger* 2004 SC (HL) 19 at para 48 *per* Lord Hope of Craighead and at para 7 *per* Lord Hoffmann.

[195] At 85 *per* Lord Clyde.

[196] *Burnett's Tr v Grainger* 2004 SC (HL) 19.

[197] At para 44.

[198] At paras 57–65 *per* Lord Hobhouse.

[199] At paras 46–48 *per* Lord Hope of Craighead.

treatment of the subject, Gretton states that at one point he seriously doubted the existence of the constructive trust.[200] While often hostile to constructive trusts, to the point that he advocates their statutory abolition, he accepts they have a limited foothold in Scots law. In this regard, Gretton cites three cases as involving constructive trusts, and further states that if pushed he may say there is only one reported case of a genuine constructive trust in the law reports.[201] The two other potentially constructive trust cases both involved monies held by a solicitor on behalf of clients, and upon the sequestration of the solicitor the funds were taken out of the sequestrated funds and 'traced'.[202]

5-64. The only 'true' example of a constructive trust according to Gretton is *Sutman International Inc v Herbage*.[203] In the case S were incorporated in the Cayman Islands, and the liquidator L sought declarator that S were the true beneficial owners of certain heritable property disponed in 1984 to H and W. L also sought decree ordaining H and W, and H's trustee in sequestration T, to execute a disposition of the subjects in favour of L. H and W were S's only directors. H drew three cheques on S's bank account in 1983, entered two of them in S's ledger and, with W's connivance, applied the funds, £269,000, to purchase heritage in H and W's own names. It was argued that by using the money from the company to purchase heritage for themselves, H and W held the heritage on constructive trust for S. It was held that the pleadings were relevantly stated, and thus if the facts were proven decree would be granted in favour of the finding of a constructive trust that would operate in an insolvency situation.[204] Thus it seems that the court imposed a proprietary constructive trust for unconscionable conduct, and this is borne out by the Lord Ordinary's observations:

> I am of opinion that the pursuers have set out averments which *prima facie*, if proved, entitle them to the remedy they seek[205]. From their averments it appears that the first defender, with the knowledge of the second defender, appropriated substantial funds of Sutman and applied them in the purchase of heritable property in the names of the first and second defenders absolutely. Against the background of the law as to the proper application of company assets, the pursuers are, in my opinion entitled to treat these averments as founding more than a mere speculation that the assets of Sutman have been misapplied. I accept that they are sufficient to instruct the inference that such misapplication has occurred, in the absence of any good explanation to the contrary, and accordingly that the pursuers are the true beneficial owners of the subjects.[206]

[200] Gretton, 'Constructive Trusts I' (n 1) at 285.

[201] Gretton, 'Constructive Trusts I' (n 1) at 302–03.

[202] *Macadam v Martin's Tr* (1872) 11 M 33; *Jopp v Johnston's Tr* (1904) 4 F 1028.

[203] *Sutman International Inc v Herbage* 1991 GWD 30-1772.

[204] For an in-depth discussion of the English law of constructive trusts in a Scottish court, see *Compagnie Commerciale Andre SA v Artibell Shipping Co Ltd* 2001 SC 653.

[205] The Lord Ordinary mentions the constructive trust in his opinion, and states that the remedy being pursued was 'decree of declarator that they [Sutman] are the true beneficial owners of certain heritable subjects'.

[206] *Sutman International Inc v Herbage* (n 203) *per* the Lord Ordinary (Cullen). The case is not reported fully in the law reports, but it is available on LexisNexis.

The case is a clear Outer House authority in favour of a conceptualisation of a constructive trust that is proprietary in the sense of English chancery jurisprudence being imposed in an insolvency situation when a fiduciary has misapplied assets for his own benefit.

(2) Attitude of the Courts in the 1990s: the Emergence of Doubts

5-65. Following the acceptance of a proprietary constructive trust in *Sutman* two decisions emerged which suggested some judicial scepticism about constructive trusts. In *The Mortgage Corporation v Mitchells Robertson*[207] MC sought to lend money to B, and to do so advanced money to their own solicitors MR. MR were given the money on the basis that they would not pass the money to B's solicitor, D2, until a first ranking standard security was obtained in favour of MC. MR delivered a cheque to D2 on the understanding it would be undelivered before delivery of the first ranking security documentation. Unfortunately, D2 passed the money to B, without obtaining the security, and B subsequently 'dissipated' the funds. MC were not able to obtain a first ranking security, nor were they able to recover the money from B. Thus MC raised an action against MR in negligence, but for present purposes the important fact is that they also sought recovery from D2. It was argued that because D2 took the funds from MR in the knowledge they held it under a 'trust', they therefore held it as a constructive trustee. The Lord Ordinary was blunt in his observations:

> I confess an almost instinctive abhorrence of the notion of constructive trusts in the law of Scotland, being concerned substantially with rights, be they real or personal, not subject to, with certain exceptions, overriding equitable considerations. I consider the Lord President in *Sharp* expresses little confidence in them, but I have to recognise not least under reference to the Stair Memorial Encyclopaedia on the Laws of Scotland, Vol 24, para 30, that the animal is identifiable within the law of Scotland in circumstances where a third party, either gratuitously or with knowledge of breach of trust, acquires property belonging to a trust. However I am further concerned that to apply this notion in the context of what was otherwise a normal solicitor transaction is introducing a foreign body…At this stage of relevancy therefore I cannot assert that the pursuers will fail to prove that the money was taken by the second and fourth defenders in the knowledge that it was being held in trust by the solicitor from whom they were receiving it. That would seem to fit the definition of a constructive trust.[208]

5-66. Despite his Lordship's evident distaste for the idea, the constructive trust was certainly in play. Furthermore, it is another example of a third party taking trust property in bad faith. A standard enrichment claim might not have been as effective as a trust as D2 were no longer enriched having passed the money to B. There are problems with the constructive trust analysis too however. The original trust from which the money was taken, that is to say the legal quality imputed to the manner in which MR held the

[207] *The Mortgage Corporation v Mitchells Robertson* 1997 SLT 1305.

[208] At 1310 *per* the Lord Ordinary (Johnston). See also *Bank of Scotland v Macleod Paxton Woolard & Co* 1998 SLT 258 at 274 *per* the Lord Ordinary (Coulsfield).

money, might be described as a constructive trust as well.[209] While there appears no obvious objection to this, given that as solicitors they might be expected to know that such a holding by MR was under a constructive trust, in other cases it might not be so clear-cut to demonstrate knowledge on behalf of the third party transferee of the constructive trust, though that is an evidential point.

(3) Judicial Attitudes in the 2000s

(a) Early 2000s

5-67. Three cases in which mention is made of a constructive trust once again involve the invocation of constructive trust terminology without direct argument. However, the approach to pleading the constructive trust is beginning to become more sophisticated, and the decisions are tantalising, especially since they appear to demonstrate a continuing affinity to English chancery jurisprudence. In *Devron Potatoes Ltd v Gordon & Innes Ltd & Others*[210] D grew potatoes which were marketed by their sales agent G. D raised an action against G, G's receiver, and G's bank. The claim stated that monies held in a 'growers'' account were not G's property, and that G's bank, in using these monies to set off against other accounts held by G, had acted in bad faith and was accordingly to make recompense. The bank in turn argued that these averments were irrelevant as the account was never said to have been held in trust by either G or the bank, and that the bank had no knowledge of any such agreement between D and G. The Lord Ordinary noted that the issues were 'novel' as regards Scots law, and held 'with some hesitation' that D's claim was not irrelevant and could proceed to proof, though it was subsequently settled. In reaching this decision the Lord Ordinary was heavily influenced by a case from Northern Ireland, *Clark v Ulster Bank Ltd*,[211] most especially by the idea that when a bank is put on notice that funds are 'only held by the payer in a fiduciary capacity', then the bank may not use those funds to set off against other accounts. Furthermore, the decision is specifically distinguished from the *Style Financial Services*[212] case, which did not involve fraud on the part of the payer, and so contortions regarding the nature of the bank's good faith or otherwise were not in point. Arguments based upon constructive trust were not pressed by counsel.

5-68. In *J S Cruickshank (Farmers) Ltd v Gordon & Innes Ltd (In Receivership)*[213] one can see the potential for constructive trust and enrichment ideas to come together once more. G acted as sales agents for potato growers including J, and G were considered to be the agents of J. Furthermore, G maintained a

[209] *Macadam v Martin's Tr* (1872) 11 M 33; *Jopp v Johnston's Tr* (1904) 4 F 1028.

[210] *Devron Potatoes Ltd v Gordon & Innes Ltd & Others* 2003 SCLR 103.

[211] *Clark v Ulster Bank Ltd* [1950] NI 132.

[212] *Style Financial Services Ltd v Bank of Scotland* 1996 SLT 421.

[213] *J S Cruickshank (Farmers) Ltd v Gordon & Innes Ltd (In Receivership)* [2007] CSOH 113. The case bears many similarities to *Devron Potatoes Ltd v Gordon & Innes Ltd & Others* 2003 SCLR 103.

separate growers' account with their bank, which was subsequently used by the bank to set off against other accounts held by G. Indeed, the case is in many respects a re-run of the *Devron* case.[214] A key plank of the pursuers' submissions was that:

> In intromitting with the monies in the growers' account the bank did not act in good faith. It knew enough to be aware of the fiduciary nature of G & I's activities. The bank had unjustly enriched itself and so should repay the relevant share of the funds to the pursuers. Alternatively the bank holds the monies as a constructive trustee for the growers, and should account therefor to the growers.[215]

5-69. This is a significant arrangement of pleadings, though it should be noted that the constructive trust claim is an alternative claim. The bank's arguments were strongly put as well, once more attempting to rely upon the *Style Financial* case, and also attempting to show that the bank's actions needed to be 'close to dishonesty', such as where there had been express notice given of a trust relationship, in order to bring a claim based upon unjustified enrichment or a constructive trust.[216] On this point the bank relied upon *Bank of Scotland v Macleod Paxton Woolard & Co*[217] and *Royal Brunei Airlines v Tan*,[218] once more emphasising the need for the bank to have been dishonest or for some other improbity to be shown. Of particular note was the submission that the 'Constructive trust cannot provide a separate or alternative route to recovery if the pursuers' averments are otherwise irrelevant. Subsequently, for the pursuers Mr Armstrong made a similar submission.'[219] This is an intriguing concession by both parties, and while one cannot read too much into what may have been considered a procedural expedient, it perhaps suggests that the failure of a claim predicated upon recompense and unjust enrichment would also bar a claim for a constructive trust, which in turn might be a suggestion that the two are to be considered synonymous, at least so far as third party recipient constructive trusts are concerned.

5-70. The Lord Ordinary drew a careful distinction between cases where the deposit or withdrawal of money had constituted a wrong on the part of the payer, and the present case where the deposits were not wrongful – the account was being used in the way envisaged by J and G. The case is one in which the bank acted to take money to which it was not entitled, and on this basis he suggested that the pursuer's claim rested on the *condictio sine causa*.[220] An account that is to be beyond the reach of such a bank need not be one that is expressly a trust account, which might suggest an expansive approach moving towards accommodating a constructive trust type idea where there is a fiduciary relation. For this the authority relied on is English.[221]

[214] *J S Cruickshank (Farmers) Ltd* at para 2 *per* the Lord Ordinary (Malcolm).
[215] At para 6 *per* the Lord Ordinary (Malcolm).
[216] See *J S Cruickshank (Farmers) Ltd* at paras 6 and 11.
[217] *Bank of Scotland v Macleod Paxton Woolard & Co* 1998 SLT 258.
[218] *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 392G *per* Lord Nicholls of Birkenhead.
[219] *J S Cruickshank (Farmers) Ltd* at para 11 *per* the Lord Ordinary (Malcolm).
[220] *J S Cruickshank (Farmers) Ltd* at para 16 *per* the Lord Ordinary (Malcolm).
[221] *Re Gross* (1871) LR 6 Ch App 632.

5-71. The Lord Ordinary also adopted an important line of English authority:

> In Scots law I consider that such cases are most naturally considered and determined in the context of unjust enrichment, where the key feature is wrongful taking, which may or may not involve dishonesty or dishonourable conduct. All of this is consistent with recent English authority in which a distinction has been drawn between (a) a bank assisting in wrongdoing, and (b) a bank appropriating monies which it should not have taken. In the latter case dishonesty is not a pre-requisite to an obligation on the bank to reimburse the true owner. In *Royal Brunei Airlines*[222] at 386 F Lord Nicholls commented that 'Recipient liability is restitution-based: accessory liability is not.' In *BCCI v Akindele*[223], Nourse LJ discussed whether a banker's knowledge of the interest of the claimant in the funds was such as to make it 'unconscionable' that the bank should retain the monies for its own purposes. In that context, it was not essential to prove impropriety on the part of the bank.[224]

5-72. It is interesting to see the nascent approaches of the Scottish courts to the 'knowing receipt' and 'knowing or dishonest assistance' jurisprudence most famously illustrated in the English case of *Barnes v Addy*.[225] It would appear that the expansive nature of unjustified enrichment is being used to allow assimilation of English chancery authority to justify reaching similar results. Arguably it is apposite to use unjustified enrichment reasoning as the entry point for such chancery authority if there is an inherent requirement that recovery of enrichment is 'equitable',[226] which in turn fits in with suggestions that there must be bad faith involved.

5-73. In *Royal Brunei Airlines v Tan*, a decision of the Privy Council, Lord Nicholls explains that the recipient limb of *Barnes*, otherwise known as 'knowing receipt', is based upon restitution with a gains based remedy,[227] whereas accessory liability, or 'knowing assistance' is not and normally entails compensatory remedies.[228] Lord Nicholls also rejected the idea of strict liability in the case of an accessory to a breach of a fiduciary obligation, so that dishonesty on the part of the accessory would be required.[229] This is to be contrasted with the approach in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele*[230] which, as a matter of English law, held that while for recipient liability there need not necessarily be dishonesty, liability

[222] *Royal Brunei Airlines v Tan* [1995] 2 AC 378.

[223] *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437.

[224] *J S Cruickshank (Farmers) Ltd* at para 20 *per* the Lord Ordinary (Malcolm).

[225] *Barnes v Addy* (1874) LR Ch App 244.

[226] See chapter 3.

[227] Cf *Farah Constructions Pty Ltd v Say-Dee Ltd* [2007] HCA 22, (2007) 81 ALJR 1107 at para 132.

[228] *Royal Brunei Airlines v Tan* at 386F. On the development of the terminology in the area see *Farah Constructions Pty Ltd v Say-Dee Ltd* at para 112. See also Ibbetson, *Historical Introduction* (n 2) 180, who states that 'knowing receipt' and 'knowing assistance' are analytically distinct.

[229] *Royal Brunei Airlines v Tan* at 387D–F. Compare the decision reached in *Farah Constructions Pty Ltd v Say-Dee Ltd*.

[230] *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437.

would only attach if the retention of the benefit was unconscionable.[231] These views should be considered against the backdrop of *Farah Constructions Pty Ltd*[232] where the High Court of Australia came out strongly against the idea of *Barnes* recipient liability being based upon unjust enrichment, and hence strict and subject only to the change of position defence.[233]

5-74. Returning to the bases of liability as a matter of Scots law it appears implicit in *J S Cruickshank* that the court considers the ground of liability to be of the recipient kind, and that it is, in fact, unjust enrichment where the 'key feature is wrongful taking, which may or may not involve dishonesty or dishonourable conduct'.[234] Thus liability appears to be strict but the addition of the 'wrongful taking' seems to preserve some requirement of inequitable conduct, which may well fit into the potential equitable nature of enrichment law. The objections raised in *Farah* by the Australian court are not necessarily pertinent to Scots law – the civilian absence of basis ground for enrichment means that a 'vitiating factor' is not necessary for liability, and this may be what is in mind when the generic *condictio sine causa* is mentioned,[235] though the equitable nature of enrichment law in Scotland may mean that liability will not be strict.

(b) Commonwealth Oil & Gas Co Ltd v Baxter

5-75. Therefore, it would appear that the limbs of *Barnes* are starting to be applied in Scots law, but what remains unclear is the extent to which they are being varied in order to fit with native jurisprudence. The potential for intellectual complication is furthered when it is considered that the idea of fiduciary obligations in Scots law is somewhat underdeveloped and therefore appears to be treated as on all fours with English jurisprudence. These difficulties can be seen in the decision in *Commonwealth Oil & Gas Co Ltd v Baxter and Eurasia Energy Ltd*.[236] In April 2004 Baxter, the first defender, was (re)appointed a director of Commonwealth Oil and Gas Co Ltd (COGCL) (the pursuers), albeit with no specific management duties or executive functions. In February 2005 Baxter offered to assist with developing opportunities for COGCL, as he had in the past. He specifically asked what sorts of project the company was interested in, to which the response was onshore projects. At no point did Baxter mention his involvement in a potential offshore project

[231] At 455E *per* Nourse LJ. This analysis was not disputed in *City Index Ltd v Gawler* [2007] EWCA Civ 1382 at para 8 *per* Carnwath LJ, with whom Mummery LJ concurred, but Arden LJ explicitly disagreed at para 62.

[232] *Farah Constructions Pty Ltd v Say-Dee Ltd* [2007] HCA 22, (2007) 81 ALJR 1107.

[233] At paras 136–158.

[234] *J S Cruickshank (Farmers) Ltd* at para 19 *per* the Lord Ordinary (Malcolm).

[235] At para 16 *per* the Lord Ordinary (Malcolm).

[236] *Commonwealth Oil & Gas Co Ltd v Baxter* [2009] CSIH 75, 2010 SC 156; [2007] CSOH 198, 2008 GWD 9-159. See D J Carr, 'Equity Rising? *Commonwealth Oil & Gas Co Ltd v Baxter*' (2010) 14 Edin LR 273; N R Whitty, 'The "no profit from another's fraud" rule and the "knowing receipt' muddle" (2013) 17 Edin LR 37.

in Azerbaijan as director, president, executive officer and substantial shareholder in Eurasia Energy Ltd (EEL) (the second defender). This did not represent, from Baxter's perspective, any conflict of interest – as far as he was concerned, the company was not interested in offshore projects. In November 2005 a Memorandum of Understanding between the State Oil Company of the Azerbaijan Republic (SOCAR) and EEL was executed, giving EEL the exclusive right to negotiate exploitation rights with SOCAR. It was accepted in evidence that the conclusion of the Memorandum had been achieved by Baxter using personal contacts and knowledge obtained independently of his role as a director of COGCL. On 9 December Baxter informed COGCL of the conclusion of the Memorandum, resigning his directorship of that company shortly thereafter. COGCL raised an action against Baxter and EEL.

5-76. The original summons framed by the pursuers sought declarator that EEL held the Memorandum of Understanding, and any profits derived under it, on constructive trust on behalf COGCL.[237] In that form the case went to the proof before answer,[238] suggesting that the averments were at least relevant. Following the proof, however, COGCL dropped the conclusions for an accounting and for a declarator of a constructive trust on the part of EEL because no profit was in fact derived under the Memorandum.[239]

5-77. Thus, the opportunity for some useful authority concerning the existence, and possible nature, of the constructive trust was not followed to its conclusion at first instance.[240] The court still had to decide whether Baxter had breached his fiduciary duty to COGCL and whether EEL was liable for reparation on the basis of 'knowing assistance'. Counsel's arguments were characterised by the free use of English chancery and Commonwealth authority regarding fiduciary duties and liabilities. These submissions are reflected in the Lord Ordinary's opinion which contains one of the most detailed discussions of fiduciary duties in modern Scots law. The general principle against a fiduciary, more particularly a director, being allowed to enter agreements which conflict, or could conflict, with the interests of those represented, is the starting point.[241] The Lord Ordinary explained that the rule against a fiduciary making a profit from his position of trust is a specific instance[242] of the broader rule of fiduciary liability that interest and duty

[237] *Commonwealth Oil & Gas Co Ltd v Baxter* at para 2 *per* the Lord Ordinary (Reed).

[238] At para 5 *per* the Lord Ordinary (Reed).

[239] At para 6 *per* the Lord Ordinary (Reed).

[240] See below for the different emphasis in the appellate decision.

[241] *Commonwealth Oil & Gas Co Ltd* at para 167 *per* the Lord Ordinary (Reed), citing not only the *locus classicus Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461 at 471–72 *per* the Lord Chancellor (Cranworth), but also *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223; *The York Buildings Co v Mackenzie* (1795) 3 Pat App 378; D.18.1.34.7; *Hamilton v Wright* (1842) 1 Bell's App Cas 574; and *Boardman v Phipps* [1967] 2 AC 46 at 123–25 *per* Lord Upjohn.

[242] *Commonwealth Oil & Gas Co Ltd* at para 171 *per* the Lord Ordinary (Reed). The broad normative obligation, or 'core liability', has been identified as that of loyalty: see e.g. *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91 at paras 41–43 *per* Arden LJ; *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18 *per* Millett LJ.

must not be placed in contradictory positions,[243] which is applicable to directors of a company too.[244]

5-78. With regard to the specific question whether EEL was also liable to COGCL for its part in Baxter's breach of fiduciary duty, in other words whether there was accessory liability by virtue of 'knowing receipt' or 'knowing assistance', the plea in law was framed in language seeking reparation for loss, injury and damage caused by fiduciary breaches by Baxter, which in turn meant that the opportunity provided to EEL gave rise to an action akin to that of 'knowing receipt'.[245] The Lord Ordinary noted that the language of the pleadings reflected that which was used as shorthand for the limbs of liability from *Barnes*, before noting that Menzies suggested that it represented Scots law.[246] But these pleadings were also said to be somewhat erroneous, as the liability of EEL was actually concerned with the second limb of *Barnes*, that is to say 'knowing assistance'. EEL could not be liable for 'knowing receipt' as it was proven that they never received anything pursuant to the Memorandum of Understanding. The Lord Ordinary ends up essentially reframing the pleadings on behalf of COGCL, and is non-committal on the question of what the conceptual underpinning of the first limb of *Barnes* would be in Scots law, merely saying that it is not 'being liable to restore property held in trust, or liable by reason of unjust enrichment.'[247] The Lord Ordinary's careful choice of words suggests that he considered that the Scottish approach to the knowing receipt limb of *Barnes* could well be based upon enrichment principles.

5-79. With respect to liability for knowing assistance,[248] a lengthy quotation of Lord Nicholls's opinion in *Royal Brunei* is set out, with Lord Nicholls's rejection of strict liability being adopted as 'equally persuasive from the perspective of Scots law'.[249] However, despite providing an extremely useful and detailed consideration of the differing conceptual approaches which Scots law may take to accessory liability for dishonest assistance generally, and the related nature of the requisite dishonesty or bad faith necessary in

[243] *Commonwealth Oil & Gas Co Ltd* at para 170 *per* the Lord Ordinary (Reed). Citing *Boardman v Phipps* [1967] 2 AC 46 and *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.

[244] *Commonwealth Oil & Gas Co Ltd* at paras 174–179 *per* the Lord Ordinary (Reed).

[245] At para 193 *per* the Lord Ordinary (Reed).

[246] At para 193 *per* the Lord Ordinary (Reed).

[247] At para 193 *per* the Lord Ordinary (Reed).

[248] The phrase 'knowing assistance' has been used thus far to be consistent with the pleadings in *Commonwealth Oil & Gas Co Ltd*; however, the principle is now better known as 'dishonest assistance' which better captures the different form of liability and the mental attributes necessary in the third party actor: see for dishonest assistance *Royal Brunei Airlines v Tan* [1995] 2 AC 378; *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164; *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476; *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11 at para 9 *per* Lord Mance. On the requisite state of mind of the third party in a knowing receipt claim see *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at 455A–F *per* Nourse LJ; *Arthur v A-G of the Turks and Caicos Islands* [2012] UKPC 30 at para 33 *per* Sir Terence Etherton.

[249] *Commonwealth Oil & Gas Co Ltd* at para 195 *per* the Lord Ordinary (Reed).

different circumstances, the Lord Ordinary leaves the matter of the conceptual basis open.[250] The essential choice open to the law is whether to consider such accessory liability ('dishonest assistance') as a species of delictual liability,[251] and, thus, probably, part of the law of obligations and concerned predominantly with reparation, damages and making good loss;[252] or, alternatively, to consider dishonest assistance a self-contained principle which is derived from the law of trusts, with potentially different mental requirements and measures of recovery.[253]

5-80. The pursuer's appeal against the Lord Ordinary's decision in *Commonwealth Oil* was dismissed by the First Division of the Inner House,[254] but the members of the court had a number of interesting things to say about fiduciary obligations,[255] constructive trusts, and the operation of knowing receipt in Scots law.[256] The court held, following the Lord Ordinary,[257] and in accordance with well-known authority, that Baxter was a fiduciary who owed a duty of loyalty to COGCL as a director, and that his activities had breached those fiduciary duties.[258] More interestingly, for present purposes,

[250] *Commonwealth Oil & Gas Co Ltd* at para 197 *per* the Lord Ordinary (Reed). One should note that the normative underpinning in English law has also been subject to much discussion: P Sales, 'The Tort of Conspiracy and Civil Secondary Liability' [1990] CLJ 491; S Elliott and C Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 MLR 16.

[251] A closely related discussion of accessory liability in delict in relation to fraud has been discussed judicially and academically recently: see *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP* [2014] CSIH 79; 2015 SC 187, and the discussion of the decision in E Reid, 'Accession to Delinquence: *Frank Houlgate Investment Co Ltd (FHI) v Biggart Baillie LLP*' (2013) 17 Edin LR 388.

[252] Though note the recent decision of the Court of Appeal in *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499 at para 93 that 'an account of profits is available against one who dishonestly assists a fiduciary to breach his fiduciary obligations, even if that breach does not involve a misapplication of trust property' – i.e. it is not receipt based, though such a remedy is discretionary and some causal connection between the assistance and profit to be given up must be shown.

[253] Limitation periods are also an important element of any distinction: see *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189. Similar considerations would apply in Scotland: if knowing receipt and dishonest assistance (whether so named or otherwise) are conceptualised as part of the law of obligations (reparation or enrichment law) then they will negatively prescribe according to the relevant provisions of the Prescription and Limitation (Scotland) Act 1973. If, however, they are taken to be a part of the law of trusts, then, potentially, such obligations might be imprescriptible: Prescription and Limitation (Scotland) Act 1973, sch 3(e) or (f).

[254] *Commonwealth Oil & Gas Co Ltd v Baxter* [2009] CSIH 75, 2010 SC 156.

[255] On fiduciary law generally see chapter 6.

[256] See Carr, 'Equity Rising?' (n 236); Whitty, 'The "no profit from another's fraud" rule (n 236).

[257] Apart from on one point, which was not central to the outcome of the reclaiming motion, where the court was doubtful about the extent to which a fiduciary owes a *prescriptive*, rather than a *proscriptive*, duty of disclosure: see *Commonwealth Oil & Gas Co Ltd* at para 82 *per* Lord Nimmo Smith.

[258] *Commonwealth Oil & Gas Co Ltd* at paras 11–14 *per* the Lord President (Hamilton), and at paras 81–82 *per* Lord Nimmo Smith.

was the fact that the court accepted that knowing receipt was a part of Scots law, though it held that it was inapplicable on the facts because there was no property to be received.[259] The Lord President's opinion suggested that authority on knowing receipt was 'sparse', but that it was 'clear that its foundation lies in the law of trusts'.[260] Indeed, the Lord President approved a passage from the leading case in England[261] that a claim for knowing receipt would be to 'enforce a constructive trust' as 'consistent with Scots law'.[262] A difficulty with this language is that it is not entirely clear if the constructive trust envisaged by the Lord President would be considered to be a proper trust, or at least one with proprietary and insolvency effects.[263] The statement that 'knowing receipt appears to me, primarily at least, a restitutionary remedy'[264] might suggest the Lord President considers the remedy to be concerned with unjustified enrichment, but the term 'restitution' can be used in both an enrichment or proprietary sense. Furthermore, the use of the term 'remedy', and the context of the paragraph discussing damages as an alternative remedy, suggest that the comment is more concerned with the measure of recovery rather than the basis of such recovery. Lord Nimmo Smith also accepted the possibility of a constructive trust:

> It appears to me to be clear from the authorities quoted above that knowing receipt depends in the first place on the prior existence of an asset which is subject to a trust in favour of a beneficiary. It is the disposal of that asset, in breach of fiduciary duty, and receipt of that asset by the recipient in knowledge of that breach, which together give rise to a constructive trust over that asset in the hands of the recipient.[265]

5-81. Lord Nimmo Smith's opinion suggests that in these circumstances the person who has knowingly received trust property will be a constructive trustee.[266] The court does not make clear what it means by a constructive trust in this situation: whether this constructive trust is a proper trust with proprietary effect or whether it is actually a (somewhat unhelpful) way of saying that the knowing recipient is personally accountable to any beneficiary is important. In England the proper categorisation of knowing receipt has been the subject of considerable interest recently,[267] and authority

[259] *Commonwealth Oil & Gas Co Ltd* at paras 94–96 *per* Lord Nimmo Smith. See *El-Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at 700G *per* Hoffmann LJ; *Arthur v A-G of the Turks and Caicos Islands* [2012] UKPC 30 at para 32 *per* Sir Terence Etherton.

[260] *Commonwealth Oil & Gas Co Ltd* at para 16 *per* the Lord President (Hamilton).

[261] *El-Ajou v Dollar Land Holdings plc* at 700G *per* Hoffmann LJ.

[262] *Commonwealth Oil & Gas Co Ltd* at para 17 *per* the Lord President (Hamilton).

[263] It might, if it is considered to be a trust, also be a remedy which can never negatively prescribe: see n 253 above.

[264] *Commonwealth Oil & Gas Co Ltd* at para 20 *per* the Lord President (Hamilton).

[265] At para 94 *per* Lord Nimmo Smith.

[266] The Lord President's approval of Hoffmann LJ's remarks, in *El-Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at 700G, amounts to saying the same thing, though more subtly: *Commonwealth Oil & Gas Co Ltd* at para 17 *per* the Lord President (Hamilton).

[267] S Elliott and C Mitchell, 'Remedies for dishonest assistance' (2004) 67 MLR 16; C Mitchell, 'Dishonest assistance, knowing receipt, and the law of limitation' (2008) 72 Conv 226. See also *Farah Constructions Pty Ltd v Say-Dee Ltd* [2007] HCA 22, (2007) 81 ALJR 1007.

has been moving towards considering it as a personal claim – whether it is conceived as some kind of equitable wrong or duty to account on the one hand, or as based upon unjust enrichment and therefore strict liability on the other.[268] There is a view that knowing receipt can be considered to be a proprietary concept, the idea being that receipt of trust property can make someone a proper (constructive) trustee so long as there is no *bona fide* purchaser defence – i.e., a view similar to some of the discussion around one of the veins of authority for the constructive trust in Scots law discussed earlier – but it is not currently favoured. The view can be criticised as conflating the legally separate proprietary doctrines which can arise in similar fact situations, and sometimes in addition to the personal liability, but which are conceptually different from a personal liability triggered by the fact of receipt of relevant property in the appropriate circumstances. A leading authority is awaited to rationalise and fully explain the law in this area in England, and there are differing approaches in different Commonwealth jurisdictions.[269] Nevertheless, the courts in Scotland have begun to take their own line on these matters.

5-82. Although the decision in *Commonwealth Oil & Gas Co Ltd* left a number of open questions about the nature of the constructive trust and knowing receipt in Scots law, obiter comments in a subsequent decision of the Inner House suggest that the constructive trust, and, perhaps, knowing receipt too, are now to be considered a firmly established feature of Scottish law:

> If funds have been transferred in breach of fiduciary duty, it is now established in Scots law that a recipient who takes the funds in the knowledge that they have been transferred to him in breach of fiduciary duty is not only liable to pay those funds to the person truly entitled to them but is also a constructive trustee of those funds…The underlying principle is derived from the law of trusts, but it applies equally to funds paid in breach of fiduciary duty by a company director. Cases on the constructive trust are sparse in Scots law, but the concept is clearly recognised…a person who profits from a breach of fiduciary duty will be liable to account for the amount of such profit, at least if it is received either in knowledge of the breach of fiduciary duty or gratuitously. In such a case the basis of the action to recover such profit will be restitutionary in nature…on the basis of the cases that I have cited and the authorities referred to in those cases I am of opinion that the constructive trust undoubtedly exists in Scots law.[270]

5-83. These obiter comments reflect something of a change of judicial perceptions towards the constructive trust in Scottish law from those noted

[268] Lord Nicholls of Birkenhead, 'Knowing receipt: the need for a new landmark', in W Cornish et al (eds), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones* (1998); R Walker, 'Dishonesty and unconscionable conduct in commercial life – some reflections on accessory liability and knowing receipt' (2005) 27 Sydney LR 187; M Bryan, 'The liability of the recipient: restitution at common law or wrongdoing in equity?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (2005) 327; G Virgo, 'The role of fault in the law of restitution', in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (2006) 83.

[269] Cf *Bofinger v Kingsway Group Ltd* [2009] HCA 44, (2009) 239 CLR 269 at paras 45 ff.

[270] *Ted Jacob Engineering Group Inc v RMJM* [2014] CSIH 18, 2014 SC 579 at paras 98–99 *per* Lord Drummond Young. See D J Carr, 'Equity Stalling?' (2014) 18 Edin LR 388.

earlier, and it would be difficult to deny the existence of the constructive trust in Scotland now, especially in situations where there has been a breach of a fiduciary duty. The exact nature of this species of constructive trust is perhaps still somewhat uncertain. On one reading of Lord Drummond Young's opinion it might be thought that a proper trust with proprietary elements is envisaged: 'a recipient who takes the funds in the knowledge that they have been transferred to him in breach of fiduciary duty *is not only liable to pay* those funds to the person truly entitled to them *but is also a constructive trustee* of those funds'.[271] There is a distinct suggestion that 'liability to pay' on the part of the recipient is considered a separate matter from the character of constructive trusteeship. The presence of the words 'entitled to them' after 'liable to pay those funds' might refer to tracing or following, in which case the 'constructive trust' mentioned might be considered a personal obligation to account or as a 'proper trust'; on the other hand, the liability to pay could be construed as the personal obligation to pay and that the separate 'constructive trust' is something distinct from that personal obligation, perhaps something like a proper trust with a proprietary nature.

5-84. Alternatively, references to a restitutionary basis by the Lord President in *Commonwealth Oil* and by Lord Drummond Young in *Ted Jacob* suggest that it might not be a 'proper trust' at all. Instead, to call the recipient a constructive trustee simply means that she is personally liable for that receipt and that there is no proprietary implication of a separate trust estate (or patrimony) with insolvency protection, or all the incidents associated with trusteeship. The fact that Lord Drummond Young suggested that functional equivalents to knowing receipt and dishonest assistance – 'with such variations as are necessary to reflect the fact that Scots law does not recognise anything akin to the English concept of an equitable interest'[272] – represented Scots law, perhaps suggests personal liability based upon delictual or enrichment law principles, or even a form of obligation considered to be part of the law of trusts. If that is the true meaning of these Scottish authorities it would, unsurprisingly, be consistent with the change in emphasis in the English authorities. If that is the case then it raises questions about the continued efficacy and helpfulness of using the terminology of constructive trust, and it is perhaps telling that English authority is not only moving away from a classical analysis of constructive trusteeship,[273] but is also abandoning use of the terminology:[274]

> It is unreal to refer to a person who receives property dishonestly as a 'trustee', i.e. a person in whom trust is reposed, given that the trust is said to arise simply as a result of dishonest receipt. Nobody involved, whether the dishonest receiver,

[271] *Ted Jacob Engineering Group* at para 98 (my emphasis).

[272] *Ted Jacob Engineering Group* at para 100 *per* Lord Drummond Young.

[273] See *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 at para 31 *per* Lord Sumption, paras 57–64 and 90 *per* Lord Neuberger PSC. Note, however, that this does not necessarily rule out all proprietary remedies in English law: see para 31 *per* Lord Sumption.

[274] The terminological point is well made by Lord Sumption at para 7: '[T]here are few areas in which the law has been so completely obscured by confused categorisation and terminology as the law relating to constructive trustees.'

the person who passed the property to him, or the claimant, has ever placed any relevant trust and confidence in the recipient.[275]

5-85. However, a final possibility, and the one which is also probably most likely Lord Drummond Young's understanding, is that the constructive trust he was describing (i.e. one imposed on a recipient from a fiduciary in breach of duty, as opposed to one imposed upon a fiduciary acting for her own gain) is proprietary *and* restitutionary. That conceptualisation is based upon his Lordship's comments later which seem to state that a constructive trust is a remedy imposed at the court's discretion, possibly to reverse unjust enrichment.[276] This approach is similar to the one taken in North America, and is something of a novel approach so far as Scottish (and English) law is concerned, and so some context is required.

(4) Remedial or Institutional Constructive Trust?

5-86. One question about the nature of a jurisdiction's approach to the constructive trust is whether it is considered to be a remedial or institutional constructive trust, and there are different approaches to this question across the Commonwealth.[277] The institutional theory is that the constructive trust is a legal institution raised by the law in certain circumstances: the court's finding that there is such a constructive trust is merely declaratory – the court has no discretion and is simply recognising an established property interest. The remedial theory is that a constructive trust is a discretionary remedy, fashioned and created by the court, and latterly characterised as being for the reversal of unjust enrichment.[278] Traditionally the approach in England,[279] and at one point in Australia,[280] has been to see the constructive

[275] *Williams v Central Bank of Nigeria* at para 64 *per* Lord Neuberger of Abbotsbury PSC; see also his remark, at para 57, that: 'A number of clear and considered judicial observations over the past two centuries seem to me to make it clear that a knowing recipient is not a trustee.'

[276] *Ted Jacob Engineering Group* at para 102 *per* Lord Drummond Young.

[277] See e.g. *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 287 ALR 22 at para 667 (Australia); *Soulos v Korkontzilas* [1997] 2 SCR 217 (Canada). The existence of a remedial constructive trust has been recognised in New Zealand at the highest level; however, whether it is a proprietary remedy available to reverse enrichment in an insolvency context is 'a matter of unresolved controversy': *Strategic Finance Ltd v Bridgman* [2013] NZCA 257 at para 122.

[278] See *Papamichael v National Westminster Bank plc* [2003] EWHC 164 (Comm), [2003] 1 Lloyd's Rep 341 at 371–72 *per* Judge Chambers QC.

[279] A J Oakley *Constructive Trusts* (3rd edn, 1997) 22–28; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250 at para 47 *per* Lord Neuberger PSC; *FHR European Ventures LLP v Mankarious* [2014] Ch 1 at para 76 *per* Etherton C; *Crossco No 4 Unlimited v Jolan Ltd* [2012] 1 P & CR 16 at para 84 *per* Etherton LJ; *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453 at para 37 *per* Lord Neuberger of Abbotsbury MR; [2007] 2 All ER (Comm) 993 at para 128 *per* Rimer J; *Dubey v Revenue and Customs Comrs* [2006] EWHC 3272 (Ch) at para 38 *per* Mann J; *Papamichael v National Westminster Bank plc* (n 278) at 371–72 *per* Judge Chambers QC; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669; P Birks, 'Trusts Raised to Reverse Unjust Enrichment: the *Westdeutsche Case*' [1996] RLR 3; L Smith, 'Constructive Trusts and Constructive Trustees' [1999] 58 CLJ 294.

[280] M Cope, *Constructive Trusts* (1992) 12–49; *Baumgartner v Baumgartner* (1987) 164 CLR

trust as, at least in part, institutional. In Canada[281] and the United States[282] the remedial constructive trust has been adopted as a discretionary remedy which the court may choose to impose.

5-87. Hood concludes that the constructive trust is viewed in Britain as institutional, though there are (limited) inroads being made into this position in England by the remedial analysis.[283] On the basis of the limited authorities available it is not clear if Scots law recognises a remedial or an institutional constructive trust. It appears that there is no reported case in which the question has been judicially considered as a matter of central importance,[284] but there are indications from two of the leading cases on constructive trusts. In *Sutman*[285] the pursuers sought a 'decree of declarator that they are the true and beneficial owners' of the property alleged to be held in constructive trust, which strongly suggests an institutional approach to the constructive trust – the pleading proceeds on the basis that the trust has already been created by the law, and the court's authority is sought only to recognise that fact. In *Ted Jacob* the obiter comments of Lord Drummond Young point in an entirely different direction:[286]

> While the concept has never been the subject of detailed analysis in any Scottish case, the references to it treat it as a form of remedy of an essentially restitutionary nature. The advantage over straightforward restitution is that the rights of the beneficiary of a constructive trust will normally prevail in the

137; *Muschinski v Dodds* (1985) 160 CLR 583 at 612–13 *per* Deane J; P O'Connor, 'Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust' (1995–96) 20 Melb U L Rev 735. The remedial constructive trust appears now to be recognised in Australia: *Jones v Southall & Bourke Pty Ltd* [2004] FCA 539 at para 62; *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 287 ALR 22 at para 667.

[281] *Soulos v Korkontzilas* (1997) 146 DLR (4th) 214, [1997] 2 SCR 217; *Sorochan v Sorochan* (1986) 29 DLR (4th) 1, [1986] 2 SCR 38; *Pettkus v Becker* (1980) 117 DLR (3d) 257; *Rathwell v Rathwell* (1978) 83 DLR (3d) 289; *Deglman v Guaranty Trust Co of Canada and Constantineau* [1954] 3 DLR 785; D W M Waters, *Law of Trusts in Canada* (1984) 377–97; D W M Waters, 'The Reception of Equity in the Supreme Court of Canada (1875–2000)' (2001) 80 Can Bar Rev 620, 664–74; R Chambers, 'Constructive Trusts in Canada' (1999) 37 Alta L Rev 173; D W M Waters, 'The Nature of the Remedial Constructive Trust' in P B H Birks (ed), *The Frontiers of Liability* (1994) 169–72; J L Dewar, 'The Development of the Remedial Constructive Trust' (1982) 60 Can Bar Rev 265 at 280.

[282] See American Law Institute, *Restatement of the Law of Restitution, Quasi Contracts and Constructive Trusts* (1937) § 160, as explained in W A Seavey and A W Scott, *Notes on Certain Important Sections of Restatement of Restitution* (1937) 198. For the current incarnation of the *Restatement* see American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011) § 55.

[283] P Hood, 'What is so Special about being a Fiduciary?' (2000) 4 Edin LR 308 at 317.

[284] In *Burnett's Tr v Grainger* it was stated that 'Scots law does not recognise constructive or remedial trusts', but it does not seem to be drawing a distinction between an institutional and a remedial constructive trust: [2004] UKHL 8, 2004 SC (HL) 19 at para 46 *per* Lord Hope of Craighead and at para 56 *per* Lord Hobhouse.

[285] *Sutman International Inc v Herbage* 1991 GWD 30-1772.

[286] *Ted Jacob Engineering Group Inc v RMJM* [2014] CSIH 18, 2014 SC 579 at para 102 *per* Lord Drummond Young.

> insolvency of the constructive trustee. It is clear that the function of a constructive trust is remedial. The English case law in this area is confusing, but in the United States it is well established that the constructive trust is a form of remedy. In Scots law, as a form of restitutionary remedy, it will be equitable in nature, the word 'equitable' having its usual meaning in Scots law rather than the very technical English meaning. The importance of that is that the remedy can be refused in any case where it would produce a result that is essentially unfair; that is a matter that lies within the discretion of the court that is asked to grant the remedy.

Therefore, there are two competing strands of authority. There is authority from the Outer House which is more directly on point, while the obiter comments of Lord Drummond Young were made in a higher court and are much clearer in stating that the constructive trust is a remedy imposed at the court's discretion. One way to rationalise the distinct strands of authority is to say that a constructive trust imposed upon a fiduciary who has breached his duty and acted for himself (the situation in *Sutman*) is considered an institutional constructive trust.[287] The fiduciary's malfeasance automatically creates a trust. On the other hand, the constructive trust which is imposed upon a recipient who knowingly receives property from a fiduciary (the situation in *Ted Jacob*) might be a remedial constructive trust which is a discretionary remedy imposed at the pleasure of the court to reverse an enrichment or on broader grounds of inequity.

5-88. The remedial constructive trust from North American jurisprudence is expressly a discretionary remedy to prevent unjust enrichment. In Scotland the law of unjustified enrichment has undergone a thorough rebranding exercise in recent years, with a move towards a general enrichment action.[288] This enrichment revolution reorganised the old 'three Rs' taxonomy so that the Rs – restitution, repetition, and recompense – were now said to be remedies, and, furthermore, they were joined by a new fourth 'R', the remedy of reduction.[289] Therefore, it was said that 'The person framing the pleadings must consider how the defender's enrichment has come about and then search among the usual range of remedies to find a remedy or combination of remedies which will achieve its purpose of having that enrichment reversed.'[290] In the present context the question is whether Lord Drummond Young's 'restitutionary' constructive trust can be said to fall within the 'usual range' of remedies which might be used to reverse unjustified enrichment. Furthermore, in both *Commonwealth Oil* and *Ted Jacob* the opinions noted that these constructive trusts were part of the law of trusts, which, if they are remedial and discretionary, suggests that their scope is not confined to unjustified enrichment principles.

[287] This type of constructive trust will be discussed again in chapter 6 dealing with fiduciary liability in Scotland.

[288] See chapter 3.

[289] *Shilliday v Smith* 1998 SC 725 at 728 *per* the Lord President (Rodger).

[290] *Shilliday v Smith* at 727 *per* the Lord President (Rodger).

5-89. This is an important question, and one to which there is not an easy answer. If the constructive trust is said to exist as a proprietary remedy, which the court will impose upon policy grounds as a remedy for unjustified enrichment, this would represent a novel development for Scottish law. Lord Drummond Young noted that 'as a form of restitutionary remedy, it will be equitable in nature, the word "equitable" having its usual meaning in Scots law rather than the very technical English meaning.'[291] It seems clear that this idea of the constructive trust need not rest upon dual ownership (or for that matter the patrimonial theory) or the technicalities of English chancery law, but, nevertheless, equity is important. As was noted earlier in this book[292] there is an inherent 'equitable' requirement in enrichment actions, even if it might not be entirely clear upon whom the onus falls to show how that 'equity' falls. Therefore, the equitable nature of such constructive trusts imposed to facilitate restitution in situations analogous to enrichment seems consistent with this. Furthermore, in both *Commonwealth Oil* and *Ted Jacob* the opinions noted that these constructive trusts were part of the law of trusts, which, if they are remedial and discretionary, suggests that their scope is not confined to unjustified enrichment principles. So it might be that rules about demonstrating what is 'equitable' in a standard enrichment case will not be applied in exactly the same way as the rules to determine whether it is equitable to impose a constructive trust. More tentatively, it might be that these remedial constructive trusts are not confined to providing remedies for actions based upon unjustified enrichment or accessory liability for receipt of property transferred in breach of fiduciary duty.

5-90. If the imposition of such a remedial discretionary constructive trust is available as a remedy for unjustified enrichment actions generally, it would necessarily follow that an area of the law of obligations would be transformed into one which bestowed insolvency protection. Arguably this might blur the traditionally strict distinction between personal and real rights,[293] and the details of what would count as relevant equitable considerations would become important and allow considerable discretion on the part of the court, which is not necessarily a bad thing. Academic commentators are split on the matter, with some suggesting that the recognition of the remedial constructive trust would be wholly incompatible with the idea of a *numerus clausus* of real rights.[294] Hood argues for a remedial constructive trust, although he would limit the imposition to fiduciary relationships where the fiduciary has acted as *auctor in rem suam*.[295] There are also potential difficulties with the principle of *paritas creditorum*.

[291] *Ted Jacob Engineering Group* at para 102 *per* Lord Drummond Young.

[292] See chapter 3.

[293] See K G C Reid, 'Obligations and Property: Exploring the Border' 1997 Acta Juridica 225.

[294] N R Whitty, 'Rationality, Nationality and Taxonomy' in D Johnston and R Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 665–66.

[295] P Hood, 'What is so Special about being a Fiduciary?' (2000) 4 Edin LR 308 at 322–33.

[296] See chapter 4.

E. CONCLUSIONS

5-91. The doctrinal history of the Scottish trust shows the varying degrees of influence which English chancery jurisprudence has had. This influence, in turn, meant that many ideas and rules from English authorities were feeding into the Scottish jurisprudence, and creating rules and authorities for Scottish trust law, and beyond, but without there necessarily being a coherent or principled basis for the rules being received. In this way the approaches to other areas of private law came to be influenced by this way of thinking about English chancery inspired Scottish law. Because, for a long time, the Scottish trust was operating by reference to changeable normative underpinnings, the nature and classification of the constructive trust has been similarly dynamic. Initially, the constructive trust bore a striking resemblance to the constructive trust of English law, and indeed in some respects appeared to rely upon the intellectual techniques of its chancery jurisprudence. However, the fact that the constructive trust was more necessary for English law to, at least partially, make up for an underdeveloped enrichment law and to give the Court of Chancery jurisdiction, seems to have been recognised in that many Scottish authorities discussing the constructive trust did consider it a means by which enrichment would be reversed. Nevertheless, many conceptualisations of the constructive trust reflected English chancery jurisprudence, including, at times, the idea of ownership split into beneficial and legal title.

5-92. As trust jurisprudence has been developed in recent years the doctrinal theory and conceptual underpinning of the trust moved away from a divided ownership model associated with English chancery, and, more recently, it has been refined further to take account of the patrimonial theory.[296] The new approach departed from the underlying principles of the English chancery influences such as dual ownership, and in so doing influenced the approach to fiduciary liability and constructive trusts. As 'general' trust law moved away from some English chancery inspired ideas it became more problematic to consider the constructive trust to be a true trust. Similarly, developments in English law and the Commonwealth with respect to accessory liability, and the rationalisation of enrichment law in Scotland and England, were also important influences on a changing concept of the constructive trust.

5-93. Following the enrichment revolution of *Shilliday*, and the dicta in *Ted Jacob*, it is now open to question whether the remedies which can be used to reverse unjustified enrichment could include a constructive trust. The present state of the law seems capable of being rationalised in a way that states that a constructive trust over property obtained by a fiduciary for his own benefit is an institutional constructive trust, whereas the constructive trust imposed upon a knowing recipient of property from a fiduciary in breach of his fiduciary duties is a remedial constructive trust. Authority on all these matters concerning these constructive trusts, especially the specifics, is

slender. If the court were to allow a constructive trust as a remedy it would be proprietary, as there is no good reason to use 'constructive trust' simply as a synonym for a personal obligation to redress unjustified enrichment. Such a trust would be remedial and as such it would be subject to greater control by the discretion of the court, and that remedial discretion might be characterised by an equitable flavour which complements the broad equitable basis of an unjustified enrichment action which would ground the remedy. While it is far from clear that the courts will impose such remedial constructive trusts in enrichment situations which do not involve fiduciaries, it now seems, despite some academic and judicial scepticism, that they can impose such a remedy where someone has knowingly received property from a fiduciary who has breached their fiduciary obligations. A further question might be whether there is an institutional and remedial distinction as outlined above, and, if so, whether that is an appropriate distinction to maintain. Ultimately the main question is a policy one for the courts to decide by weighing the principle of *paritas creditorum* against the equity of imposing a discretionary remedy to provide insolvency protection in individual cases or certain classes of case. Once the law, by way of the courts' decisions, answers that policy question the true nature and extent of the modern constructive trust in Scotland will emerge.

6. Fiduciary Law

A. INTRODUCTION

6-01. In 1985 Sir Anthony Mason noted that: 'The fiduciary relationship is a concept in search of a principle.'[1] More than twenty-five years later the search for a principle continues,[2] though in recent years a number of important theories have been advanced to explain the underlying theory. A lack of clarity surrounding a conceptual basis poses continuing difficulties for the identification of rules that apply the elusive fiduciary concept. Yet there remains enduring disagreement among the judges and academics of the Common Law world about the fundamental nature and function of fiduciary law.[3] That is understandable given the Common Law family is not a single entity: commonality is not uniformity.[4] Indeed, jurisprudential divergences

[1] A Mason, 'Themes and Prospects', in P D Finn (ed), *Essays in Equity* (1985) 246.

[2] L Hoyano, 'The Flight to the Fiduciary Haven', in P Birks (ed), *Privacy and Loyalty* (1997) 169 at 170.

[3] M Conaglen, *Fiduciary Loyalty* (2010) 24–26; J Edelman, 'Four fiduciary puzzles' in E Bant and M Harding (eds), *Exploring Private Law* (2010) 299.

[4] The flexible plurality of 'common laws' generally is superbly illustrated by Glenn: H P Glenn, *On Common Laws* (2005).

can provide rich opportunities for evolution and cross-fertilisation. Debates across the Common Law world that foster new theories explaining the nature of fiduciary liability provide valuable guidance for the development of fiduciary liability in Scotland.

6-02. In considering Scottish fiduciary law it is important to have regard to the historical development. It is equally important to consider events in England in particular because the two systems share common elements of development, and there is a shared heritage in this area of law. Caution is required in weighing the interrelated development of the two systems, however. The historical development is undoubtedly one of close association but there are differences between the two systems – to have a shared development presumes that there are separate entities, each of which has something to share. From the perspective of the Scottish legal system, therefore, it should always be borne in mind that it is for one legal system to evaluate critically the merits and fit of a legal rule emanating from another system.[5]

6-03. With these general precepts in mind the purpose of this chapter is to consider the historical development of the doctrinal structure of fiduciary law in Scotland. Therefore the chapter necessarily uses a mixture of text writers and important cases to illustrate in broad brush the development of the fiduciary concept. As with many areas of law it is useful to consider the historical development of doctrine in a manner that allows us to understand the present structure of the law, so that in turn we might more adequately be prepared to tackle the task of considering its broader interstitial fit in the system of private law today. That is not to say that historical understanding is a substitute for considering the modern law – it is not. Law should, and indeed must, if it is to retain relevance and respect, be an organically dynamic institution that responds to the needs of its time. Acquaintance with an account of the past reveals the evolutionary processes that constitute the continuum of a doctrinal category's past evolution.[6] An analysis according to these terms has been lacking in the literature on Scottish fiduciary law. This chapter seeks to give what appears to be the first, if tentative, treatment of the historical development of fiduciary law in Scotland.[7]

[5] On inter-systemic recognition, see N Jansen, 'The development of legal doctrine in Europe: extracontractual liability for fault', in N Jansen (ed), *The Development and Making of Legal Doctrine* (2010) 1 at 1.

[6] A point encapsulated crisply by Ibbetson: 'The real difficulty with doctrinal legal history is that its primary focus is ideas rather than facts or events', in D Ibbetson, 'Historical Research in Law', in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 863 at 874. Much depends on the purpose with which one approaches legal history: difficulty often gestates possibility.

[7] A version of this chapter was published as D J Carr, 'English Influences on the Historical Development of Fiduciary Duties in Scottish Law' (2014) 18 Edin LR 29. There is a single article regarding modern fiduciary law: P Hood, 'What is so Special about being a Fiduciary?' (2000) 4 Edin LR 308. There is also now a substantial discussion of fiduciary law, with a particular focus on agency, in L J Macgregor, *The Law of Agency in Scotland* (2013) ch 6.

6-04. A broader exercise is to conceptualise historically a 'tradition' at a systemic level.[8] In modern Scottish academic writings there is frequent reference to the, or perhaps a, 'civilian tradition'.[9] The 'civilian tradition' is of course, in these works, a component of the broader 'Scottish legal tradition' which contains other influences. A monograph or article on the 'Common Law tradition' in Scotland has, however, yet to appear.[10] This may be because it has a greater, perhaps even a residual or default, presence. It would be an interesting tale. Historically grounding these constituent traditions does not entail the erection of a frozen interpretation of the past alone; rather, any understanding of these traditions and their interface will be a dynamic one that is pregnant with possibilities for realigning thinking about the future. That task, with its attendant opportunity, can be similarly applied to the narrower examination of fiduciary law.[11]

6-05. This chapter suggests that the historical development of fiduciary liability grew from a distinctive Scottish basis, and then subsequent substantively similar rules to those regulating fiduciary liability in English law were grafted onto the Scottish law creating a shared collection of ideas and concepts. This confluence of ideas came about through the shared space inhabited by the legal systems within the United Kingdom.[12] The effective rules in English and Scottish law came to rest upon similar moral or policy objectives as a result of each system employing formulations of equity that formed an apparently common linguistic point of entry. Yet those formulations of equity are institutionally distinct, and hence the normative doctrinal core in Scotland potentially differs from the structural framework in English law. One of the reasons for a continuing different doctrinal approach is the complicated nature of equity in Scotland, compared to England where it has built solid institutional structures. These shared institutional spaces and moral imperatives were thus fused in a slightly uneasy fashion in Scotland. An examination of the historically distinct doctrinal framework opens up the possibility of a different scope for, and

[8] On the systemic significance, see N Walker, 'Out of Place and Out of Time: Law's Fading Co-Ordinates' (2010) 14 Edin LR 13 at 20–21.

[9] E.g. R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995); N R Whitty, 'The Civilian Tradition and Debates on Scots Law' (1996) Tydskrif vir die Suid-Afrikaanse Reg 227; D L Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law* (1997).

[10] There are many texts about the 'Common Law tradition' generally: e.g. J H Baker, *The Common Law Tradition: Lawyers, Books and the Law* (2000); H P Glenn, *Legal Traditions of the World* (2nd edn, 2004); J W Head, *Great Legal Traditions: Civil Law, Common Law, and Chinese Law in Historical and Operational Perspective* (2011).

[11] On the concept of a 'tradition' see Glenn, *Legal Traditions* (n 10) ch 1.

[12] A similar story appears to explain the development of the law in South Africa, another 'mixed' legal system: 'The principles which govern the actions of a person who occupies a position of trust towards another were adopted in South Africa from the equitable remedy of English law. The Roman and Roman-Dutch law provided equivalent relief. In *Transvaal Cold Storage Co Ltd v Palmer*…the sources were considered and the conclusion was expressed that the extension and refinement of the Civil Law by English courts was a development of sound doctrine suited to "modern conditions": *Phillips v Fieldstone Africa (Pty) Ltd* [2003] ZASCA 137, 2004 (3) SA 465 (SCA) at para 30 *per* Heher JA.

approach to, substantial rules regulating fiduciaries in Scotland, and indeed different remedial responses today.

B. HISTORICAL DEVELOPMENT

(1) An Overview of Doctrinal Challenges

6-06. The idea of a class of persons with special rules of liability called fiduciaries is a comparatively new one for Scottish law. While in the past there were a number of separate legal mechanisms which produced results which today we would recognise as being directed towards the protection of those dealing with fiduciaries, the idea of a commonality of office-based obligations, that can be used to classify different office-holders as 'fiduciaries', is relatively new. Not only is it rather new, but much of the flesh of the rules is borrowed from English equity. It is frequently stated that the principles of fiduciary liability are one and the same in Scottish and English law, even by Scottish judges.[13]

6-07. Yet, while it might appear, at first sight, that the law in Scotland and England is the same here, the picture is more complicated notwithstanding repeated judicial assertions that the two are the same. Such assertions would in the ordinary course of things be conclusive. There is, however, a problem that cannot be ignored. The structure of the English law relating to fiduciaries is heavily bound up with the enduring intellectual, and formerly institutional, separation of equity jurisprudence. The Scottish courts in contrast have, traditionally at least, been reluctant to adopt remedial responses that mirror those in England,[14] though this appears to be changing to some extent.[15] It is often an eminently defensible position to say that this is because the remedies for breaches of fiduciary duty in English law require nominate equitable remedies, some of which are not readily discoverable in Scottish law. This

[13] *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461 at 474 *per* the Lord Chancellor (Cranworth), pointing out the civilian heritage (D.18.1.34.7) and at 477 *per* Lord Brougham; *Scottish Pacific Coast Mining Co Ltd v Falkner, Bell & Co* (1888) 15 R 290 at 300 *per* Lord Mure; *Dougan v MacPherson* (1902) 4 F (HL) 7 at 9 *per* Lord MacNaghten, and at 10 *per* Lord Shand; *Aberdeen Town Council v Aberdeen University* (1877) 2 App Cas 544 at 554–55 *per* Lord O'Hagan (in the Law Reports his apposite citation of Stair 1.6.17 is reported but it is curiously omitted from Rettie's report), and at 558 *per* Lord Gordon (who also states, a little incongruously given his comments in *McPherson v Watt* below, that the Scottish law rests upon the civil law, and that Scottish authority preceded English rules); (1877) 4 R (HL) 48 at 54–55 *per* Lord O'Hagan, and at 56 *per* Lord Gordon; *McPherson v Watt* (1877) 3 App Cas 254 at 270 *per* Lord Blackburn, and at 277 *per* Lord Gordon (who notes that the Scottish rules are based upon English authority); (1877) 5 R (HL) 9 at 20 *per* Lord Blackburn, and at 25 *per* Lord Gordon.

[14] A recent exception is *Commonwealth Oil & Gas Co v Baxter* [2009] CSIH 75, 2010 SC 156. See D J Carr, 'Equity Rising?: *Commonwealth Oil & Gas Co v Baxter*' (2010) 14 Edin LR 273; N R Whitty, 'The "No Profit from Another's Fraud" Rule and the "Knowing Receipt" Muddle' (2013) 17 Edin LR 37. Recent Outer House authority questions the comprehensiveness of the decision: *Park's of Hamilton (Holdings) Ltd v Campbell* [2011] CSOH 38 at para 23 per the Lord Ordinary (Hodge).

[15] See chapter 5.

chapter seeks to examine the way in which Scottish equity has operated in the area, and indeed how English chancery jurisprudence came to inform and shape the Scottish approach to fiduciary liability.

6-08. So what, then, is the meaning of the term 'fiduciary' in Scottish law? It is an idea that is comparatively underdeveloped in academic writings,[16] and indeed in reported cases. Some of the older sources identify obligations and remedies that, today, we might describe as fiduciary.[17] These early conceptualisations of fiduciary obligations included the important rule that certain individuals – such as those acting as tutors or curators – could not act as *auctor in rem suam*.[18] These early views of what would now be described as fiduciary obligations were not necessarily commensurate with the idea of trusts, at least not what we would now identify as a trust; yet, in later times the concept of fiduciary obligations came to be seen as heavily associated with trust jurisprudence,[19] and, indeed, English equity jurisprudence.[20] It is not clear to what extent the disparate older sources are consistent with the more dominant and recent nominate 'fiduciary' materials. It must be correct to say that later enunciated rules supersede and replace the older disparate rules, when not compatible. One can argue, however, that the later nominate 'fiduciary' rules slot into a broader doctrinal framework, within which the older rules developed, and in turn justify an examination of older rules alongside the newer nominate 'fiduciary' rules.

[16] R Candlish-Henderson, 'Trusts in Scottish Law' (1949) 31 J of Comparative Legislation and International Law (3d series) 36, 38.

[17] The term 'fiduciary' is elusive in early Scottish sources, but some early examples of the term include *Thomson v Elies* (1675) Mor 9118, 9119; *Kincardin v Kincardin* 29th November 1681 Harcarse 162; T Craig, *Scotland's Sovereignty Asserted* (G Ridpath trans, 1695) 248. As regards contemporary English sources, see E Coles, *An English Dictionary* (1677) which describes a 'Fiduciary' as 'trusty, also a feofee in a trust'; whereas to 'fiduciate' is to 'commit a trust, or make condition of trust'; which is a straight copy of E Phillips, *The New World of English Words* (1658). For a discussion of the use of the word fiduciary in English law see Sir Thomas Smith's criticism of Littleton: T Smith, *De Republica Anglorum* (1583) 111–13. Thereafter it is only in the eighteenth century that the term becomes more frequently utilised in Scottish law: see e.g. Bankton III.8.1 and 77; Erskine III.8.76; *Farquhar v Paton* (1709) Mor 3833; *Ker v Creditors of Scot* (1712) Mor 2715; *Answers for Helen Chessels* (25th April 1772 MSS Bodleian Library ECCO) 13; *Information for Anna Ker* (28th January 1728 MSS Bodleian Library ECCO) 3; W Forbes, *A Journal of the Session* (1714) 624. There is also the 'fiduciary fiar', which may well be akin to a constructive trustee, or something very close to it: *Creditors of Frog v Frog's Children* (1735) Mor 4262; *Petition of Earl of Fife* (21st June 1794 MSS Bodleian Library ECCO) 32–34; see G L Gretton, 'Constructive Trusts I' (1996–97) 1 Edin LR 281 at 310; R Burgess, *Perpetuities in Scots Law* (1979) 123 ff.

[18] J Trayner, *Latin Phrases and Maxims* (1861) 32–33. See also E Vinter, *A Treatise on the History and Law of Fiduciary Relationship* (3rd edn, 1955) 3.

[19] J Rankine (ed), *Erskine's Principles of the Law of Scotland* (20th edn, 1903) I.7.11.

[20] See S Halifax, *An Analysis of the Roman Civil Law* (1774) 43, for an analogy between trusts and uses and the Roman fiduciary settlements.

(2) *Auctor in rem suam*

6-09. The initial rules that carried out a role similar to that of modern fiduciary law were disparate and attached to different offices. The clearest examples of that early Scottish approach can be seen in relation to curators and tutors, whereby a broad application of the '*auctor in rem suam*' principle is used to stipulate that a tutor or curator cannot act in a way which is incompatible with the interests of his pupil.[21] Some of the earliest appearances of the idea are in the sixteenth century. Accordingly, we see it mentioned by Balfour in the context of curators,[22] and Craig states in relation to interdictors:

> They [interdictors] are therefore as much disabled, in law and justice, from acquiring his property from him as are tutors and curators from acquiring the property of their wards (Nov 72). Rather might it be said that if tutors and curators cannot turn their office to their own advantage – as Justinian so admirably says (Inst 1.21.3) – far less can the friends at whose instance the interdicted person was deprived of the management of his own property, and placed under supervision, be allowed to use their consents for the purpose of acquiring his property for themselves. It is a principle which knows no exception that no man can make the law to suit himself or be the author of his own rights (D 2.2.10).[23]

6-10. The idea of a prohibition against a tutor or curator being *auctor in rem suam*, in the narrow technical or broader policy sense, was successively repeated and elaborated in the seventeenth and eighteenth centuries. We can see Hope,[24] Mackenzie,[25] Stair,[26] Erskine,[27] Bankton,[28] Kames,[29] Forbes,[30]

[21] The technical meaning of *auctor in rem suam* is that a person may not 'authorise' himself in a transaction with another as that would be akin to authorising himself: see Lord Rodger of Earlsferry, 'Only Connect' (2007) JR 163 at 165 n 8. In Scottish law the term appears to have been bastardised pretty early on to move beyond that technical meaning and mean that a tutor could not 'act' in a way that benefitted his own interest. A notable exception is Forbes: 'Nor can any Tutor or Curator be Author *in Rem suam*, by authorizing the Minor to do any Deed tending directly to the Authorizer's Advantage': Forbes 50. One is reminded of Zimmermann's observation in relation to English law: 'Often, of course, the Roman impulses led to rather un-Roman results': R Zimmermann, 'Roman Law and the Harmonization of Private Law in Europe', in A Hartkamp et al (eds), *Towards a European Civil Code* (4th revd edn, 2011) 27 at 47.

[22] Balfour, *Practicks* vol I, 124.

[23] Craig, *Jus Feudale* I.15.24; *Lord Sanquhar v Crichton* (1583) Mor 16233, where it is stated '*Tutor in rem suam auctor fieri non potest*.'

[24] Hope, *Practicks* vol I, 4.10.3, 4.10.29, and 4.10.30.

[25] G Mackenzie, *Observations on the Acts of Parliament* (1686) 286 and 465.

[26] Stair I.6.17.

[27] Erskine I.6.23, I.7.19 and 58.

[28] Bankton I.7.39 and 57.

[29] Kames, *Principles* vol I, 87.

[30] Forbes 50. In the unpublished *A Great Body of the Law of Scotland*, Forbes states (at 163) that the tutor of a minor is to 'carefully manage the Minor's Estate as if it were his own, and at the same time forbear impropriating or imbeziling it as belonging to another'. Forbes also cites Seneca's consolatory letter to his exiled mother to explain a tutor or curator's duty: 'you [Seneca's mother] managed our inheritances with such care that they might have been your own, with such scrupulousness that they might have been a stranger's; you were as sparing in the use of our influence as if you were using a stranger's property, and from our elections

Wallace[31] and case law[32] referring to the prohibition placed upon tutors or curators from so acting in their own interest. The early development of this rule is clear but basic, and appears to represent a distinct indigenous approach, though clearly and expressly[33] associated with the perceived rule of Roman law. The references to the *Institutes*, *Digest*[34] and indeed even the *Novels*, show the extent to which the rule is being developed and received from Roman law.[35] Therefore, the treatments of Stair, Erskine and Bankton are rather succinct in stating the rule, but Wallace and Kames are more elaborate in their approach to the operation of the doctrine, and to whom it should be applied.

(3) Kames

6-11. It is perhaps telling that, by the eighteenth century, the account given by Kames stands as an aspect of 'equity' stepping in to render ineffectual items that are lawful 'by common law'.[36] Kames states that certain relations,[37] which today we would describe as fiduciary, are founded upon benevolence and a concomitant 'disinterest'.[38] Disinterest in this context is not a reference to an actor's attention to affairs, but rather to the impartiality that should be the hallmark of an actor's administration of the affairs of another, whom they represent. Thus, there are certain matters which as a matter of 'common law' a trustee cannot be allowed to do, such as taking payment to undertake the articles of a trust.[39] Yet this is not the end of the matter. The passage which Kames lays down as the position in equity is worthy of quotation in full:

> Equity goes farther: it prohibits a trustee from making any profit by his management directly or indirectly. An act of this nature may in itself be innocent;

---

to office nothing accrued to you except your pleasure and expense. Never did your fondness look to self-interest': L A Seneca, *Moral Essays* (J W Basore trans, 1928–1935) vol II, 12.14.

[31] Wallace, *Principles* § 454.

[32] *Ludquhairn v Haddo* (1632) Mor 9503; *Murray v Murray* (1710) Mor 9504; *Corsan v McGowan* (1736) Mor 9504.

[33] Stair I.6.4.

[34] The rule set down in the Digest is of general application, and it is clearly recognisable today: 'A tutor cannot buy a thing belonging to his ward; this rule extends to other persons with similar responsibilities, that is, curators, procurators, and those who conduct another's affairs': D.18.1.34.7.

[35] The language of the marginal title for *Lord Sanquhar v Crichton* (1583) Mor 16233 is indicative: '*Tutor in rem suam auctor fieri non potest*'. In fact the case report itself cites a rather fuller statement: '*nam de jure tutor in rem suam vel in eo negotio quod ad se principaliter pertinet auctor fieri non debet*'.

[36] Lord Kames, *Principles of Equity* (1760) 175; *Principles* (2nd edn) 255; Kames, *Principles* vol II, 86; cf Craig, *Jus Feudale* I.15.24.

[37] He mentions guardian and infant, and trustee and beneficiary, yet they are examples only.

[38] Kames, *Principles of Equity* (1760) 175–76; *Principles* (2nd edn) 255; Kames, *Principles* vol II, 86.

[39] Kames, *Principles of Equity* (1760) 176; *Principles* (2nd edn, 1767) 255; Kames, *Principles* vol II, 86–87.

> but it is poisonous with respect to consequences; for if a trustee be permitted, even in the most plausible circumstances, to make profit, he will soon lose sight of his duty, and direct his management chiefly for making profit to himself. It is solely on this foundation that a tutor is barred from purchasing a debt due by his pupil, or a right affecting his estate. The same temptation to fraudulent practice[40] concludes also against a trustee who has a salary, or is paid for his labour.[41]

6-12. For Kames the doctrine is by now one based firmly upon policy considerations – notably to prevent those with responsibility for the interests of others from losing sight of that fact. Of course, when he states here that equity steps in, what he means is that equity as a driver of the law compels the law to intervene. Therefore, 'equity' steps in to make such actions ineffectual, thus removing the temptation from such persons to indulge in actions contrary to their duty to another. The emphasis, however, is not on the interest of the other; rather, it is upon not neglecting the duty in oneself. This is an important point, especially given later ideas of the arduous and important nature of fiduciary duty – the idea is that one is under a greater duty by virtue of a personal relation with another.

6-13. Furthermore, the underlying basis of fiduciary duties not to use an office of responsibility for one's own profit is applied as a principle to the following nominate cases: guardian and infant; trustee and beneficiary; advocate and client; members of the College of Justice barred from purchasing land subject of a law suit; 'factor' on a bankrupt's estate not allowed to purchase the bankrupt's debts; and, finally, if private factors and agents purchase debts due by their constituents, then the debts will be extinguished as purchased for the behoof of the constituents, and no claim will be sustained but for the transacted sum.[42] It seems, therefore, that Kames envisaged a generalised approach to fiduciary obligations.[43]

(4) Wallace

6-14. The somewhat neglected work of George Wallace, *A System of the Principles of the Law of Scotland*,[44] appeared in the same year as Kames's *Principles of Equity*.

[40] In the third edition the stronger formulation 'temptation to fraudulent practice' replaces that of the first and second editions, which talked of 'hazard and mischief': compare Kames, *Principles* vol II, 87 with Kames, *Principles of Equity* (1760) 176 and *Principles* (2nd edn) 255.

[41] Kames, *Principles of Equity* (1760) 176; *Principles* (2nd edn) 255; Kames, *Principles* vol II, 87. This is the text of the passage as it appears in the third edition, the last Kames prepared himself; only the punctuation is altered between the first and second editions. The wording of the passage is changed in the third edition, and it is arguably stricter by substituting the phrase 'a tutor is barred from purchasing a debt' for the phrase 'a tutor is barred from making profit, by purchasing debts'. Furthermore, the words 'even in the most plausible circumstances' are a new addition in the third edition, and, in turn, further suggest a stricter view developing.

[42] Kames, *Principles* vol II, 88.

[43] The other reference made by Kames is to an English case concerning the payment of a bond to a matchmaker to procure a marriage as tending to ruin persons of fortune and quality: Kames, *Principles* vol II, 88–89.

[44] Wallace, *Principles*.

In the *System of the Principles* a detailed account of a tutor's office and role is given, and we are told that tutors are 'bound to manage the affairs of their pupils with fidelity, and to make their utility the measure of their conduct'.[45] This is very close to what subsequently became known as fiduciary duties. The more narrow point about the tutor not being allowed to use his position in pursuit of his own interest is masterfully described:

> Their office is neither mercenary nor lucrative. Therefore, they cannot turn their administration to their own profit, so as to make gain by it *l. 58. P. ff. eod*… For the same reason, a tutor cannot be *auctor in rem suam*; that is, he cannot do anything in the administration of his trust, or authorise his pupil to do anything, which is directly and principally promotive of his own interest, *l.* I. *p. l.* 7. *P. ff. de auctor. Et confen. Tut. Et curat.* C. *March 1583, Lord Sanquhar. – St. 7th Dec. 1666, M'Kenzie. – 25th July 1667, M'Kenzie.* Hence a tutor cannot do any thing by which it is directly and principally intended to bring his pupil under an obligation to him… In the same manner, if any action at Law is brought either by a tutor against his pupil, or by the pupil against his tutor, the tutor cannot authorise his pupil in it… In these cases, and in all others of the same kind, Law apprehends, that tutors would prefer their own interest to that of their pupils. To hinder them, therefore, from dealing doubly, it deprives them of the right of authorising their pupils in them; lest they should be tempted to do unjustly by them.[46]

6-15. Once more the idea is that of a policy prohibition against allowing a tutor to be placed in a situation whereby there may be a conflict of interest, where the law assumes the tutor would act for himself first. There is an interesting suggestion that a tutor could not buy the goods of a pupil not only because of the 'fiduciary' conflict of interest, but also because of the more technical contractual doctrine that one cannot be buyer and seller in the same transaction – *confusio*.[47] Therefore, we can see here quite a clear idea of the *auctor in rem suam* rule, and indeed there is a reasonably detailed discussion of the effects of a tutor receiving property in those circumstances.[48] The same rules are specifically said to apply to curators,[49] and in this sense some idea of a general fiduciary approach is evident.[50] Indeed, while it may not be as clearly enunciated as Kames's approach, Wallace envisages a class of person who has 'the management of the affairs of others',[51] to which the same special rules of a higher standard of performance apply.[52] The case law of the eighteenth century also contains numerous references to a fiduciary,[53] and

[45] Wallace, *Principles* § 435.

[46] Wallace, *Principles* § 454.

[47] Wallace, *Principles* § 454.

[48] Wallace, *Principles* § 455.

[49] Wallace, *Principles* § 509.

[50] Wallace also identifies the interdictor as subject to the *auctor in rem suam* rule: *Principles* § 588.

[51] Wallace, *Principles* § 668.

[52] Wallace, *Principles* § 687–88 suggests that the *gestor* in *negotiorum gestio* is subject to the same rules.

[53] *Legatars of Hannah v Guthrie* (1738) Mor 3837 at 3838; *Cathcart v Schaw* (1755) Mor 15399 at 15400; *Farquhar v Paton* (1709) Mor 3833 at 3833; *Mackenzie of Rosehaugh v Mountstewart* (1707–1710) Mor 14903 at 14907; *Elphinston v Paton* (1710) Mor 3835 at 3835; *Craigends v Cunninghamhead* (1712) 2 Fountainhall 754.

more often than not to the fiduciary fee,[54] as well as to the longstanding rules against being *auctor in rem suam*.[55]

(5) Bankton

6-16. According to Bankton, a curator is not empowered to authorise any transaction between the minor and curator.[56] Likewise, an interdictor 'cannot consent to deeds in their own favour, and so be *auctores in rem suam*'.[57] Any tutor who acquires rights or property is presumed to do so 'for the pupil's behoof', and such rights will have to be transferred to the pupil.[58] Although Bankton's account suggests a generalised approach by virtue of its organisation, it is more doctrinal, and less theoretical and discursive, than those of Kames and Wallace.

(6) *The York Buildings Co v Mackenzie*[59]

6-17. By the latter stages of the eighteenth century the more generalised approaches of Wallace and Kames were in the ascendant, particularly the approach taken by Kames and his development of this area of law with reference to equity. In this way we can trace the manner in which English chancery authority became locked into the Scottish approach. Indeed, we can follow a series of links which led up to the seminal decision in *The York Buildings Co v Mackenzie*.[60] In *Parkhill v Chalmers*[61] the *auctor in rem suam* rule was discussed, and, for the first time, the pleadings made serious use of English chancery authority.[62] The report of the pursuer's argument[63] contains the following passage:

[54] *Creditors of Frog v Frog's Children* (1735) Mor 4262; *Newlands v Newlands* (1794) Mor 4289; *Mure v Mure* (1786) Mor 4288; *Wellwood v Wellwood* (1791) Mor 15463; *Melvill v Creditors of Smiton* (1794) Mor 14327.

[55] *Crawford v Hepburn* (1767) Mor 16208; *Bee v Biggar* (1745) Mor 6008; *Cochran v Cochran* (1732) Mor 16339.

[56] Bankton I.7.57.

[57] Bankton I.7.131.

[58] Bankton I.7.39.

[59] See D Murray, *The York Buildings Company: A Chapter in Scottish History* (1883, repr 1973).

[60] *The York Buildings Co v Mackenzie* (1795) 3 Paton 378, (1795) 8 Bro PC 42 (HL), 3 ER 432.

[61] *Parkhill v Chalmers* (1771) Mor 16365, affd (1773) 2 Paton 291.

[62] The cases cited are *Carter v Horne* (1728) 1 Eq Rep 7, 21 ER 832; *Palmer v Young* (1684) 1 Vern 276, 23 ER 468, and *Keech v Sandford* (1726) Sel Cas T King 61, 25 ER 223. However, the pleadings only cite digests of *Carter* and *Keech* in *A General Abridgment of Cases in Equity* (4th edn, 1756) vol I, 7, and vol II, 741. The first reference is to *Carter v Horne* and the case is named (albeit misspelt), but the latter reference to the digest of *Keech v Sandford* does not name the case. It is perhaps a little odd that *Keech*, which is now the best-known case on the subject from the period, is not named in the report.

> … the same equitable doctrine [as the *auctor in rem suam rule*] prevailed in England. Laws of this description were held to be of the nature of a trust; and the benefit of course communicated to those for whose behoof it was presumed the trust had been undertaken… Upon the same principle, a person acting as trustee was bound to communicate the benefit of any ease or lucrative transaction he had entered into with respect to his constituent's debts.[64]

6-18. This last sentence includes a reference to the case of *Crawford v Hepburn*[65] which is interesting because not only is the case authority for the proposition for which it is cited, regarding the communication of eases, but also because it is reported by Kames. In his report, Kames appends a commentary approving of the case, and refers to a passage from *Principles of Equity* considered above,[66] which in turn refers to *A General Abridgment of Cases in Equity*[67] in a footnote.[68] In *Parkhill v Chalmers* the authorities listed in support of the pursuer's submissions on English law also include references to *A General Abridgment of Cases in Equity*, albeit to different cases.[69] It may be that diligent counsel followed up Kames's footnote in *Principles of Equity*, and then looked further afield, though this is speculative. Another coincidence, if it may be called that, is that *Parkhill v Chalmers*[70] was appealed to the House of Lords. Though the appeal was dismissed, we may note that counsel for the appellant before the House was one E Thurlow. This same E Thurlow would later become Lord Thurlow, and give the first reported speech in *The York Buildings Co* case.

[63] It should be noted that the pursuer was unsuccessful in the action, seemingly on the basis that the pursuer claiming under the *auctor in rem suam* rule had come of age and therefore the tutor was not accountable for profits obtained after the pursuer's minority.

[64] *Parkhill v Chalmers* (1771) Mor 16365. This is in fact very similar to what Stair himself said: Stair I.6.17.

[65] *Crawford v Hepburn* (1767) Mor 16208.

[66] See text at n 41, cited in *Crawford v Hepburn* at 16209. The reference in *Crawford* is to the second edition of the *Principles of Equity*, published the same year as the decision in 1767.

[67] *A General Abridgment of Cases in Equity* was a collection of case digests of decisions concerning equity. When Kames wrote the first edition of the *Principles of Equity*, in 1760, the *General Abridgment of Cases in Equity* was in its fourth edition, though still compiled anonymously by 'a Gentleman of the Middle Temple': Anon, *A General Abridgment of Cases in Equity* (4th edn, 1756) vol I, ii.

[68] Kames, *Principles of Equity* (1760) 176; *Principles* (2nd edn, 1767) 255; Kames, *Principles* vol II, 88. The reference is to the digest of a case where a bond payable to someone arranging a marriage was disallowed on the basis that: 'such Bonds to Match-makers are of dangerous Consequence, and tend to the Betraying and Ruining Persons of Fortune and Quality, and are not to be countenanced in Equity; and that Marriage ought to be procured by the Mediation of Friends and Relations; and that such Bonds would be of Evil example to Executors, Guardians, Trustees, Servants and others who have the Care of Children. *Hall* and *Potter*, *Show. P. C.* 76', in Anon, *A General Abridgment of Cases in Equity* (4th edn, 1756) vol I, 89. The case is reported in full here: *Hall v Potter* (1695) Show PC 76, 1 ER 52.

[69] The references to cases digested in the *Abridgment* are to the following cases: *Carter v Horne* (4th edn) vol I, 7 and *Keech v Sandford* (4th edn) vol II, 741. See n 62 above.

[70] *Parkhill v Chalmers* (1771) Mor 16365, affd (1773) 2 Paton 291.

6-19. So it was that, at the very close of the eighteenth century, one of the leading cases on *auctor in rem suam* or no profit rule in Scottish law was decided in the House of Lords, thus inaugurating a blending of Scottish and English approaches. In *The York Buildings Co*[71] the House of Lords reversed a decision of the Court of Session concerning the ability of an agent of the creditors of a bankrupt to purchase property belonging to the bankrupt. The case called in the Court of Session on three occasions. On the first occasion the agent was assoilzied *in toto*, by a slim majority of votes;[72] on the second occasion, there was again dissent on the bench, and, again by a slim majority, it was held that as common agent the defender was legally incapacitated from purchasing the property, though there was some dispute as to the generality of this rule.[73] On the third occasion, the case was essentially reargued, with particular attention being paid to the reasons barring an agent from purchasing at auction – covering the technical problem of contracting with oneself, and the policy arguments.[74] The court held in favour of the agent.

6-20. The arguments in the House of Lords were very detailed, and contained liberal amounts of English authority alongside civilian authority.[75] It was agreed that an agent is legally incapax in this situation by virtue of the law of nature; that is to say, it is natural law that a man cannot serve two masters.[76] This rests upon the idea that if a person is entrusted with the interests of others, he cannot engage in a business in which he has an interest, as human frailty will always tend towards self-interest at the expense of those who have entrusted him; therefore the law's response is to incapacitate the entrusted.[77] These propositions are not backed by Scottish authority; instead the cases cited are the well-known English decisions in *Keech v*

[71] *The York Buildings Co v Mackenzie* (1795) 3 Paton 378.

[72] *York Buildings Co* at nn 379–87.

[73] *York Buildings Co* (1795) 3 Paton 37 at nn 387–88, (1795) 8 Bro PC 42 at 58, 3 ER 432 at 442.

[74] *York Buildings Co* (1795) 3 Paton 37 at n 389, (1795) 8 Bro PC 42 at 59–63, 3 ER 432 at 443–45.

[75] The account of the pleadings in Brown's report is much fuller than that in Paton's report. In particular, the report by Brown contains more detail about the English authorities cited, whereas Paton mentions only two English cases: *Keech v Sandford* (1726) Sel Cas T King 61, 25 ER 223, and *Whelpdale v Cookson* (1747) 1 Ves Sen 9, 27 ER 856. More surprising, perhaps, is that Paton's report does not reproduce *any* of the civilian authorities cited to the court, though it does state 'The same principle was recognized in the Roman law; and the law of Scotland stands on the same footing': *The York Buildings Co v Mackenzie* at 390. A kind interpretation might be that the reporter assumed that a Scottish audience would need no schooling in the civilian authority, but it would be useful to highlight the latest English authorities; the curious effect today is that someone reading the 'Scottish' report might think that only English authorities were cited in the House of Lords. On the other hand, Paton's report reproduces the speeches made by the judges in the House of Lords, whereas Brown's report does not. English and civilian authority were cited to the Court of Session: *The York Buildings Co v Mackenzie* (1793) Mor 13367 at 13367–68.

[76] *The York Buildings Co v Mackenzie* (1795) 8 Bro PC 42 at 63, 3 ER 432 at 446.

[77] *The York Buildings Co v Mackenzie* (1795) 8 Bro PC 42 at 63, 3 ER 432 at 446.

Sandford,[78] and *Whelpdale v Cookson*,[79] which suggests a merging of the English and Scottish authority.

6-21. That is given further credence by the pursuer's pleading that the principle laid down by *Keech v Sandford* is a general one, which attaches to those in whom a trust has been reposed, or, put another way, those in whom some nature of confidence has been placed.[80] Indeed, the principle is said not to rest upon the *auctor in rem suam* rule in the technical sense, but rather on the view that the two interests under the contract must be at arm's length and distinct.[81] The pursuer's pleading, relying upon *jus commune*[82] authority, states that:

> This conflict of interest is the rock, for shunning which, the disability under consideration has obtained its force by making that person, who has the one part entrusted to him, incapable of acting on the other side, that he may not be seduced by temptation and opportunity from the duty of his trust. And the principle of the thing, rightly understood, necessarily concludes the respondent's case to fall within the rule of disability which Lord King and Lord Hardwicke hold up as never to be relaxed or departed from in any case to the nature and circumstance of which the rule applies. It is upon the same principle that the general doctrine of the law of Scotland stands with regard to all the acts of tutors and guardians, factors, trustees, and all who are akin to a trust by any connection or character of their office. And the analogy of the law of England appears perfectly to agree in the same doctrine.[83]

6-22. The arguments recounted above were preferred by the House of Lords, which issued an interlocutor whereby the purchase was avoided, and the agent was required to refund all profits, less improvements made.[84] Lord Thurlow's speech is clear:

> [I]t is exceedingly manifest that the common agent did take upon himself the employment of carrying on the sale to the utmost advantage for the benefit of the creditors, and also for the benefit of a reversion for those who were entitled to it. All the gentlemen seem to admit that this was his duty, and taking it to be so, one side said, *That* being your situation, it is utterly impossible for you to maintain (perform?) that duty in such a manner to derive an advantage to yourself. This seems to be a principle so exceedingly plain, that it is in its own nature indisputable, for there can be no confidence placed, unless men will do the duty they owe to their constituents, or be considered to be faithfully executing it, if you apply a contrary rule. The common agent has, in point of fact, gained an

[78] *Keech v Sandford* (1726) Sel Cas T King 61, 25 ER 223.

[79] *Whelpdale v Cookson* (1747) 1 Ves Sen 9, 27 ER 856.

[80] The term confidence is not used in a technical sense in this chapter: it is unclear what the nature of breach of confidence is in Scottish law, and consequently the overlap with fiduciary law is not clear. For the approaches in other Common Law jurisdictions see M Conaglen, *Fiduciary Loyalty* (2010) 241 ff.

[81] See also *Wells v Middleton* (1784) 1 Cox Eq Cas 112; *Crowe v Ballard* (1790) 3 Bro CC 117 at 120, 29 ER 443 at 445 per the Lord Chancellor (Thurlow); *Mackreth v Fox* (1791) 4 Bro PC 258, 2 ER 175, (1788) 2 Bro CC 400, 29 ER 224, 2 Cox 320, 30 ER 148.

[82] *The York Buildings Co v Mackenzie* (1795) 8 Bro PC 42 at 66–67, 3 ER 432 at 447–48.

[83] (1795) 8 Bro PC 42 at 66, 3 ER 432 at 447.

[84] (1795) 8 Bro PC 42 at 70, 3 ER 432 at 450.

> advantage by it. I take it to be sufficient to support this ground of equity, that he had such a duty, and that, in the execution of it, he did gain an advantage, and that advantage he so gained, was to the prejudice of those in whose behalf he should have been exercising his duty. It seems to be enough to prove, in point of conscience, he ought to be compelled to set the matter right.[85]

6-23. An important aspect of this case is the use of English chancery jurisprudence in both pleading and decision.[86] This also marks a beginning of the conflation of ideas applicable to the law of trusts with some idea of a generalised fiduciary duty, which is again directly mediated through the connection with English chancery jurisprudence. It is interesting to see the manner in which *Keech* appears to have been received into Scottish law, especially given the fact that, as an English authority, its initial status appears to have been somewhat marginal.[87] Both Getzler and Cretney point out that the case law prior to *Keech* does not seem to have adopted so strong a rule,[88] which accords with Blackie's analysis of the Scottish approach.[89] Yet, the argument in *The York Buildings Co* certainly used Scottish sources, and in fact utilised detailed pleadings from the *jus commune*, which were said to be of universal application due to their natural and equitable basis. There seems little doubt that the decision in *The York Buildings Co* case represented a consolidation of the broader approach heralded by *Keech*, and, with regard to Scottish law, represented the fulfilment of increased contact with English chancery ideas through the academic writings of Kames and the institutional influence of the House of Lords.

(7) Hume

6-24. In Hume's lectures we find a convenient bridge between the eighteenth- and nineteenth-century approaches to the *auctor in rem suam* rule, and indeed an insight into the development set in motion by the increased English influence. Hume asserts that *tutor in rem suam auctor fieri nequit* is a 'salutary' maxim received from Roman law into Scottish law, which is 'well founded technically' and of 'obvious expediency'.[90] Two distinct points are being made: the first limb of the prohibition, resting upon a 'technicality' of the law, refers to an inability to contract with oneself, whereas with the second limb of prohibition the term 'expediency' refers to the traditional policy against such transactions on the grounds of immorality.[91]

[85] (1795) 3 Paton 378 at 393. The parenthetical '(perform?)' is in the original report.

[86] See e.g. (1795) 3 Paton 378 at 394: 'The ground of equity I mean to state was this, that whoever comes into a Court of equity to ask for reparation for wrongs done, ought to come prepared to show the justice of his case.'

[87] J Getzler, 'Rumford Market and the Genesis of Fiduciary Obligations', in A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (2006) 577 at 587.

[88] Getzler, 'Rumford Market' at 582, 586; S Cretney, 'The Rationale of *Keech* v *Sandford*' (1969) 33 Conveyancer (NS) 161.

[89] J W G Blackie, 'Enrichment and Wrongs in Scots Law' 1992 Acta Juridica 23.

[90] Hume, *Lectures*, vol I, 275.

[91] Hume, *Lectures*, vol I, 275–76. See above at para 6-15.

6-25. The second limb is that which is fiduciary in nature, as can be seen from the statement that:

> [W]e account it unbecoming that, even by transaction with a third party, the tutor should come to draw any profit out of his ward's estate; for he is bound as far as in him lies to improve and disencumber that estate. On all such occasions he is presumed, therefore, to contract in the character of agent for his ward, and with the purpose of communicating the benefit, if such arises, to him.[92]

This is an interesting solution to the problem of a fiduciary[93] who receives a benefit by virtue of his office: rather than saying it is held by the tutor on a constructive trust for the ward, it would rather appear that upon agency principles the benefit is seen to transfer directly to the estate of the ward. This is perhaps significant, given that there appears to have been substantial affinities, in the early law, between agency and trust jurisprudence.

(8) Bell

6-26. Although Bell's statement that a tutor cannot be *auctor in rem suam* is concise, it is telling that the reader is informed that it is 'a rule which in England has been carried further than hitherto in Scotland, and on principles recognised in both'.[94] Here we can see the pulling together of English[95] and Scottish authority, though it may also refer to the idea that the remedial tools of English law are more extensive. The English authorities cited are not limited to guardians.[96] The English approach is summed up by Lord Chancellor Erskine in the case which Bell cites as demonstrating the shared principle:

> The principle, upon which a transaction is set aside upon the relation between the parties, as between Guardian and Ward, has been extended to the case, where all accounts were previously settled; and the connection was at an end: the transaction appearing to have grown out of the influence, arising from the relation. In *Lady Sanderson's Case* (*Sanderson* v. *Closse*, cited in 12 *Ves*. 372, in *Morse v Royal*. *Newman* v. *Payne*, 2 *Ves*. *Jun*. 199; and the note, 204) all these cases were considered; and Lord *Hardwicke* would not permit the transaction to stand, even after all the relation had ceased; as it took place under undue influence. So, independent of all fraud, an attorney shall not take a gift from his client, while the relation subsists; though the transaction may be, not only free from fraud, but the most moral in its nature. The judgment in *Wells* v. *Middleton* (cited 9 *Ves*. 294, in *Hatch* v. *Hatch*; 12 *Ves*. 272, in *Morse* v. *Royal*) went wholly beside any thing, that could affect moral character.[97]

[92] Hume, *Lectures*, vol I, 276.

[93] There is a suggestion that Hume considered the maxim to apply to factors at least; therefore it may have been seen as of general application: Hume, *Lectures*, vol I, 276 n 2.

[94] Bell, *Principles* § 2084; see also § 2093 in relation to curators.

[95] *Wright v Proud* (1806) 13 Ves 136, 33 ER 246; *Hylton v Hylton* (1754) 2 Ves Sen 548, 28 ER 349; *Liles v Terry* [1895] 2 QB 685.

[96] *Ex parte Reynolds* (1800) 5 Ves Jun 707, 31 ER 816; *Ex parte Lacey* (1802) 6 Ves Jun 626 at 628–30, 31 ER 1228 at 1229–30 per Lord Chancellor Eldon; *Lister v Lister* (1802) 6 Ves 631, 31 ER 1231.

[97] *Wright v Proud* (1806) 13 Ves Jun 136 at 138, 33 ER 246 at 246–47. See also *Hatch v Hatch* (1804) 9 Ves 292, 32 ER 615; *Huguenin v Baseley* (1807) 14 Ves 273, 33 ER 526. Of course see

6-27. Bell was correct to identify the shared principle and the Scottish and English authorities follow a similar path by moving away from an absolute prohibition towards a relaxation of the rules.[98] Judicial attitudes to the strictness of the rule fluctuated in England and Scotland for much of the nineteenth century. So, for example, while a gift would apparently stand good if the giver were to be adequately advised,[99] other decisions suggested that any flow of value to the fiduciary would not have been allowed in either Scottish or English law:[100] 'Trustees cannot be *auctores in rem suam*, that is to say, they are personally disqualified from contracting in any way with the trust estate.'[101] This explanation places emphasis upon the technical prohibition against transacting with the trust estate, but the policy limb of the rule is also present.

(9) *Aberdeen Railway Co v Blaikie Bros*[102]

6-28. The Scottish and English decisions of the nineteenth century continued to mirror each other, to the point that one might say with confidence that the motivations underlying the applicable rules were the same in each system, and thus the same factual circumstances would generate apparently

---

now: *Barron v Willis* [1900] 2 Ch 121 at 131 *per* Lindley MR; *Wright v Carter* [1903] 1 Ch 27; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] AC 773. For an example of the cross-fertilisation of the Scottish and English law in this area, see *Newgate Stud Co v Penfold* [2004] EWHC 2993 (Ch), [2008] 1 BCLC 46 at paras 234 and 237 *per* David Richards J: 'The applicability of the self-dealing rule to transactions involving the wives of fiduciaries has been decided or considered in a number of authorities, most of which are not English. A clear view was taken by the Court of Session nearly 90 years ago in *Burrell v Burrell's Trs* 1915 SC 333 that the strict rule did not automatically apply to a dealing with a fiduciary's wife… In my judgment the decision of the Court of Session in *Burrell v Burrell's Trs* represents the law in England as well as Scotland. Not only would it be undesirable if the law on a subject of common application differed in the two jurisdictions, and not only has it been applied in Australia, but it is in my view right in principle.'

[98] In *Campbell v Walker* (1800) 5 Ves Jun 678 at 681 Arden MR stated that the rule against a trustee purchasing was never an absolute, on this point adopting the observations of the Lord Chancellor (Loughborough) in *Whichcote v Lawrence* (1798) 3 Ves Jun 740 at 750, 30 ER 1248 at 1253.

[99] *Rhodes v Bate* (1866) LR 1 Ch 252 at 257 *per* Turner LJ.

[100] *Keech v Sandford* (1726) Sel Cas T King 61, 25 ER 223; *Ex parte James* (1803) 8 Ves Jun 337, 32 ER 337; *Addis v Clement* (1728) 2 P Wms 456, 24 ER 811; *Whelpdale v Cookson* (1747) 1 Ves Sen 9, 27 ER 856; *Blewett v Millett* (1774) 7 Bro PC 367, 3 ER 238; *Whichcote v Lawrence* (1798) 3 Ves Jun 740 at 750, 30 ER 1248 at 1253 *per* Lord Chancellor (Loughborough) (citing *The York Buildings Co v Mackenzie* (1795) 3 Paton 378, (1795) 8 Bro PC 42 (HL), 3 ER 432. Cf *Lesley's Case* (1680) 2 Freeman 53.

[101] The words 'cannot be *auctores in rem suam*' first appear in the seventh edition, edited by Guthrie, and remain in the tenth edition: G J Bell, *Principles of the Law of Scotland* (7th edn, 1876) § 1998; (10th edn, 1899) § 1998. Bell himself simply noted: 'Trustees cannot be purchasers at a sale of the trust-estate': Bell, *Principles* § 1998. Although Bell had referred to *auctor in rem suam* in relation to tutors and curators – see n 94 above – its application to trustees, arguably reflecting a generalisation of the maxim, was Guthrie's editorial decision.

[102] *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461.

similar rules. The reason for this was the two-way flow of authority between England and Scotland in the later eighteenth and early nineteenth centuries. *The York Buildings Co*[103] became a leading case in both jurisdictions, and had proceeded on the basis of pleadings containing both Common Law and civilian authority. The fusion of authority reached maturity in *Aberdeen Railway Co v Blaikie Bros*,[104] where the Lord Chancellor (Cranworth) remarked in argument, 'I have doubts whether there is any real difference on this point between civil law and the law of this country.'[105] In his speech itself the Lord Chancellor made reference to English,[106] Scottish,[107] and civilian authority,[108] when he set down what remains one of the leading expositions of this area of law:

> A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.[109]

6-29. Lord Cranworth's use of the phrase 'universal application' is not a rhetorical flourish: he states that 'the doctrine rests on such obvious principles of good sense that it is difficult to suppose there can be any system in which it would not be found',[110] and he makes it explicit that the rule applies in both England and Scotland.[111] The decision in *Aberdeen Railway Co v Blaikie Bros* authoritatively decided that law in this area would be treated in the same way in both jurisdictions. Indeed, the cases in this period might really be said to be concerned with the consolidation of the fundamental principles, and of exceptions to them, which had been worked out in the eighteenth century.[112] It is also noticeable, though space prohibits further discussion

[103] (1795) 3 Paton 378, (1795) 8 Bro PC 42 (HL), 3 ER 432.

[104] *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461.

[105] At 463. It is slightly unclear to which country he refers when he says 'this country'.

[106] At 472, citing *Keech* (n 100); *Whelpdale* (n 100); *Ex parte James* (n 100).

[107] At 474, citing *The York Buildings Co* (n 103).

[108] A 474, citing D.18.1.34.7.

[109] At 471.

[110] At 475.

[111] At 473–74, see also Lord Brougham's speech at 477–78. Even the reporter's note (at 481, n (a)) demonstrates the coming together of the authority in both jurisdictions.

[112] *Gibson v Jeyes* (1801) 6 Ves 266, 31 ER 1044; *Ex parte Hughes* (1802) 6 Ves 617, 31 ER 1223; *Ex parte Bennett* (1805) 10 Ves Jun 381, 32 ER 893; *Morse v Royal* (1806) 12 Ves 355 at 371–74, 33 ER 134 at 140–41 *per* the Lord Chancellor (Erskine); *Howard v Ducane* (1823) Turn & R 80, 37 ER 1025; *Grover v Hugell* (1827) 3 Russ 428 at 432, 38 ER 636 at 638 *per* Sir J Leach MR; *Hunter v Atkins* (1834) 3 My & K 113, 40 ER 43; *Greenlaw v King* (1840) 3 Beav 49 at 61, 49 ER 19 at 24; *Home v Pringle* (1841) 2 Rob 384; *Hamilton v Wright* (1842) 1 Bell's App Cas 574; *Edwards v Meyrick* (1842) 2 Hare 60, 67 ER 25; *Cullen v Brodie* (1846) 8 D 511; *Bon-Accord Marine Assurance Co v Souter's Trs* (1850) 12 D 1010; *Ommanney v Smith* (1854) 16 D 721; *Fegan v Thomson* (1855) 17 D 1146; *Manson v Baillie* (1855) 2 Macq 80; *Lord Gray, Petr* (1856)

here, that there was some overlap between fiduciary relations arising from an office, the law of breach of confidence, and the manner in which undue influence was used by the courts.[113] The next stage of development was to be with respect to the generalisation of the fiduciary concept.

C. GENERALISATION OF THE TERM 'FIDUCIARY'

(1) Fraser

6-30. The approach to the subject taken by Lord Fraser in his *Parent and Child*[114] is instructive as it demonstrates the generalisation of the fiduciary idea beyond trust texts, and it predates the generalised approaches that emerge in the trust texts a little later, and which are considered in the next section. Indeed, while the account is predicated upon an explanation of the venerable rule against a tutor being *auctor in rem suam*, the following statement is of wider instruction:

> It is as the representative and trustee of the pupil that the tutor appears in all the transactions of his office. A principle applicable to all offices of trust of this kind, and more especially of guardianship, is this, that the person acting with such deputed power shall not abuse the confidence placed in him by enriching himself at the constituent's expense, by using the knowledge he has acquired to make advantageous transactions for himself with the means of those for whom he acts; that he shall not be seller and purchaser – the granter of the obligation, and the creditor under it – the donor and the donee; in short, that he shall not be *auctor in rem suam*. This rule simply means this, that the tutor shall not, either directly or *per ambages*, be a party to any deed whereby an obligation is constituted in his own favour against the pupil.[115]

---

19 D 1; *Denton v Donner* (1856) 23 Beav 285, 53 ER 112; *Savery v King* (1856) 5 HLC 627 at 655, 10 ER 1046 at 1058; *Davies v Davies* (1863) 4 Giff 417, 66 ER 769; *Tate v Williamson* (1866) 2 Ch App 55 at 61; *Guest v Smythe* (1869–70) LR 5 Ch App 551; *Dicconson v Talbot* (1870–71) LR 6 Ch App 32; *Pisani v A-G for Gibraltar* (1873–74) LR 5 PC 516 at 536; *Delves v Delves* (1875) LR 20 Eq 77; *Erlanger v The New Sombrero Phosphate Company* (1878) 3 App Cas 1218; *De Cordova v De Cordova* (1878–79) LR 4 App Cas 692 at 703; *Plowright v Lambert* (1885) 52 LT 646; *Boswell v Coaks (No 1)* (1886) LR 11 App Cas 232; *In Re Postlethwaite* (1887) LR 35 Ch D 722; *Farrar v Farrar* (1889) LR 40 Ch D 395 at 409–10 and 415; *Salomon v Salomon* [1897] AC 22; *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 441 *per* Rigby LJ.

[113] *Hoghton v Hoghton* (1852) 15 Beav 278, 51 ER 545; *Chambers v Crabbe* (1865) 34 Beav 457, 55 ER 712; *Potts v Surr* (1865) 34 Beav 543, 55 ER 745; *Turner v Collins* (1871–72) LR 7 Ch App 329; *Bainbrigge v Browne* (1881) 18 Ch D 188; *Luddy's Tr v Peard* (1886) LR 33 Ch D 500; *Hoblyn v Hoblyn* (1889) LR 41 Ch D 200; *Liles v Terry* [1895] 2 QB 679 at 683 per Lord Esher MR. See also the infamous *Allcard v Skinner* (1887) LR 36 Ch D 145, accepted as Scottish law by Gloag: W M Gloag, *The Law of Contract* (2nd edn, 1929) 528.

[114] P Fraser, *A Treatise on the Law of Scotland as Applicable to the Personal Domestic Relations* (1846); H Cowan (ed), *A Treatise on the Law of Scotland Relative to Parent and Child and Guardian and Ward* (2nd edn, 1866); J Clark (ed), *Fraser's Parent and Child* (3rd edn, 1906).

[115] Fraser, *Parent and Child* 372; the passage appears in the previous editions, albeit with slightly altered punctuation in the first edition: P Fraser, *Domestic Relations* (n 114) vol 2, 139, and Cowan, *Parent and Child* (n 114) 279.

6-31. The importance of this passage is two-fold. First, the idea of a general principle is evident, as we are informed that the principle is applicable to all offices of trust of this kind, which is not a reference to a 'trust' in the sense of the legal institution; rather, the understanding appears to be to fix the higher duty of fidelity of a trustee onto others – what we would today call a fiduciary. Secondly, the wording 'shall not abuse the confidence placed in him by enriching himself at the constituent's expense' is rather striking, and places one in mind of the great maxim of enrichment law: *nemo debet locupletari aliena jactura*.[116]

6-32. Between the publication of the first (1846) and third (1906) editions of Fraser's text a number of important decisions were laid down by the Court of Session,[117] and accordingly long quotations from these decisions are reproduced in the second and third editions. Therefore, the general principle is stated, and vouched for with ample contemporary authority, that the rules on the matter come from the law of tutors and curators, notably the *auctor in rem suam* rule.[118] Fraser also quotes approvingly this judicial assertion (from the Court of Session):

> This principle is recognised, and has always been so, in Scotland as well as in England; nor is there any difference in its equitable application and effects in the two countries. It applies to the case of trustee, tutor, judicial factor, commissioner, agent; in fact, wherever the trust character exists the duty attaches, and the necessary effects of this principle are enforced.[119]

6-33. Once more the law relating to fiduciaries is said to be common to both systems, and while it may be open to question whether the development before the eighteenth century was so choreographed, it seems settled by the nineteenth century. Furthermore, we can note the infiltration of the term 'equitable' in the passage. This seems to betray the increased closeness in the use of Scottish and English authorities in the matter, more particularly the idea of trust jurisprudence. The inexorable rise of the fashionable trust jurisprudence appears to have penetrated the Scottish scene. That both systems have equity has perhaps allowed English law, in this area, to assert its influence.

6-34. The remainder of Fraser's account is concerned with the exceptions and subsidiary rules that had grown up around the *auctor in rem suam* rule. The different nuances and facets arising from the general fiduciary relation are said to include the following: the tutor cannot transfer any of the pupil's estate to himself, nor purchase it, even at auction;[120] there can be no loan made either

[116] The maxim is well established in Scots law: e.g. Stair I.8.6; Erskine I.7.33; Kames, *Principles* vol I, 140 ff; *Reps of Innes v Duke of Gordon* (1827) 6 S 279 at 299.

[117] *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461; *Cochrane v Black* (1855) 17 D 321; *Perston v Perston's Trs* (1868) 1 M 245.

[118] Fraser, *Parent and Child* 373. See Lord Cooper of Culross, *Selected Papers 1922–1954* (1957) 288–89.

[119] Fraser, *Parent and Child* 378; *Laird v Laird* (1855) 17 D 984.

[120] Fraser, *Parent and Child* 375; citing Stair I.6.17; Bankton I.7.39; Erskine I.7.19; D.18.34.7.

way between pupil and tutor;[121] a trustee using a beneficiary's fund in furtherance of his own trade must account for profits;[122] a trustee must account for profits generally;[123] the tutor cannot take a lease from the pupil;[124] rights, gifts, and any emolument obtained by the tutor are presumed to accrue to the pupil;[125] a deed granted by a quorum of tutors 'in favour of a co-tutor who does not concur in it – in implement of obligations arising in favour of the co-tutor against the pupil independent of the tutory – will be valid, although it may afterwards be reduced on the head of lesion'.[126] From this account of the specific uses of some of the fiduciary aspects of the tutor relation, it may be observed that the Scottish rules appear more severe than those of England at this time.

(2) Trust Law Texts

6-35. The idea of a general law, or rather general principles, relating to a group of persons in whom confidence or trust had been reposed had developed towards maturity through the eighteenth and nineteenth centuries. The leading trust law texts all considered the rule that a trustee could not allow his own interests to compete with those of the trust and the beneficiaries. Forsyth noted the multiple limbs of the prohibition: a trustee is prevented from 'deriving personal benefit from the trust-property, or doing any thing to place his own interest in competition with that of the trust'.[127] Further, a trustee could not purchase the trust property for himself on the basis of *The York Buildings Co* case;[128] Forsyth considered the rule in that case to be an innovation on English law, and provided a sophisticated discussion of English authorities.[129]

6-36. McLaren's discussion differs from Forsyth's by reverting to the phrase *auctor in rem suam* for his sidenote.[130] McLaren explains that it is important that a trustee must 'maintain a disinterested position in all transactions into which he may enter'[131] because if he did enter a transaction where he had 'a conflicting personal interest, it is obvious that the safety and probable success of this mode of carrying out the settlor's intentions would be materially impaired, and the confidence of the public in the security of trust settlements

[121] Fraser, *Parent and Child* 376, citing Erskine I.7.19; D.26.7.7.4; D.26.7.54; C.5.56.1; *Elphinstone v Robertson* 28th May 1814 FC.

[122] Fraser, *Parent and Child* 376, citing *Cochrane v Black* (1855) 17 D 321, (1857) 19 D 1019.

[123] Fraser, *Parent and Child* 377–80.

[124] Fraser, *Parent and Child* 380–81.

[125] Fraser, *Parent and Child* 383–85.

[126] Fraser, *Parent and Child* 387.

[127] Forsyth, *The principles and practice of the law of trusts and trustees in Scotland* (1844) 116.

[128] Forsyth, *Trusts and trustees in Scotland* 117.

[129] Forsyth, *Trusts and trustees in Scotland* 117–18.

[130] J McLaren, *A treatise on the law of trusts and trust settlements* (1863) vol I, 213. The passage survives in substantially the same form in the third edition: McLaren, *Wills and Succession* vol II at para 1632.

[131] McLaren, *Trusts* (n 130) vol I, 213–14; McLaren, *Wills and Succession* vol II at para 1632.

proportionately lessened'.[132] This represents a broader policy justification for the rule – the need to maintain public confidence. McLaren's citation of Lewin as well as Forsyth[133] demonstrates the continuing influence of English materials,[134] though he notes that the 'germ of the principle' is to be found in the *Digest*.[135] Perhaps most interestingly for present purposes is that McLaren states that the principle is of general application beyond trusts:

> Looking to the whole scope of the opinions in this leading decision[[136]], as well as to the question actually decided, we think that the statement of the principle might be even further generalized. Of *all* engagements, in which the trustee (or other functionary having a delegated duty to perform) enters as an individual, into stipulations with himself in his fiduciary character – it may be predicated, that he has a personal interest 'conflicting, or which may conflict, with that of the trust.' Hence we deduce the more general rule, that trustees cannot enter into any transaction in which they have a personal interest.[137]

6-37. McLaren, therefore, builds upon the account of Forsyth, and in so doing develops a more generalised account of fiduciary law from within the law of trusts.[138] Nascent glimpses of a generalised idea of rules relating to fiduciaries are therefore beginning to emerge in the mid-nineteenth-century texts dealing with trust law. Writing in the later nineteenth century, Menzies's account[139] is detailed and follows civilian, Scottish, English, and even some American authority.[140] The assertion that the law will not allow a trustee to stand in a position where 'his duty and his interest may conflict; for it is presumed that in such a position he will sacrifice his duty to his interest' was well established and orthodox.[141] Much more interesting is the continuation of the theme of generalisation:

> The principle is quite general, however, and though the examples are mostly drawn from the conduct of trustees for sale, these must be understood to be illustrative authority for the general rule. 'The inability to contract,' says Lord Cranworth, C., 'depends not on the subject matter of the agreement, but on the fiduciary character of the contracting party'.[142]

[132] McLaren, *Trusts* (n 130) vol I, 214; McLaren, *Wills and Succession* vol II at para 1632.

[133] McLaren, *Trusts* (n 130) vol I, 214; McLaren, *Wills and Succession* vol II at para 1633.

[134] McLaren states explicitly that the rules are the same in England and Scotland, and decisions of the courts should be treated as 'mutually available for illustration or authority': *Trusts* (n 130) vol I, 214; McLaren, *Wills and Succession* vol II at para 1633.

[135] McLaren, *Trusts* (n 130) vol I, 214; McLaren, *Wills and Succession* vol II at para 1633.

[136] The decision McLaren is referring to is *The York Buildings Co v Mackenzie* (1795) 3 Paton 378, (1795) 8 Bro PC 42 (HL), 3 ER 432; see above at paras 6-17 ff.

[137]McLaren, *Trusts* (n 130) vol I, 214–15; McLaren, *Wills and Succession* vol II at para 1633.

[138] McLaren's work appeared after Fraser, discussed in the previous section, who also adopted a generalised approach to fiduciaries, but Fraser detached his account from the law of trusts to some extent.

[139] Menzies at paras 451–477, and A J P Menzies, *The law of Scotland affecting trustees* (2nd edn, 1913) at paras 451–477.

[140] The American case cited is *Buell v Buckingham* (1864) 85 Am Dec 516 at 522–23 *per* Dillon J.

[141] Menzies at para 451; Menzies, *Trustees* (2nd edn) (n 139) at para 451.

[142] Menzies at para 453; Menzies, *Trustees* (2nd edn) (n 139) at para 453.

6-38. Doctrinal writings and case law are, therefore, beginning to coalesce around the generalisation of the fiduciary concept. Furthermore, it is around this time that legislative provisions start to reflect a growing generalisation, albeit still associated with trusts. The Trusts (Scotland) Amendment Act 1884 provided that the meaning of a trust, for the purposes of the then existing trust legislation,[143] was to 'mean and include any trust constituted by any deed or other writing, or by private or local Act of Parliament, or by resolution of any corporation or public or ecclesiastical body, and the appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise.'[144] This trend towards generalisation under the auspices of trust jurisprudence, and its often close association with English authority and equitable jurisprudence, is continued in the early twentieth-century encyclopaedic entries,[145] and, as we shall see, with Gloag's account which builds upon this backdrop of generalisation.

(3) Gloag

6-39. A general law of fiduciary obligations was probably in its infancy in the eighteenth century, whereas in the nineteenth century the infant grew through childhood into an eager and robust teenager: self-aware, but not yet mature. In the early twentieth century the law of fiduciary obligations underwent significant development, and this can be seen in Gloag's *The Law of Contract*.[146] Also of interest is the place in which the law of the fiduciary was examined – in a monograph on contract law. Yet, as Gloag recognised, 'The subject belongs rather to the law of trust than of contract; only a statement of the leading principles is attempted.'[147] This statement is itself telling – the continued intellectual association of fiduciary liability with trust jurisprudence seems to be indicative of the influence of English chancery jurisprudence, or at least of the idea that the roles of a fiduciary and trustee are very similar.[148]

6-40. In any event, it is here that we find the first Scottish source examining 'fiduciaries' as a named group in a chapter entitled 'Contracts by Parties in Fiduciary Relations'.[149] While the chapter is in some ways just a list of offices which carry differing fiduciary relations, there are some general principles

[143] Trusts (Scotland) Act 1861 (24 & 25 Vict, c 84), and Trusts (Scotland) Act 1863 (26 & 27 Vict, c 115).

[144] Trusts (Scotland) Amendment Act 1884, s 2. Similarly, a trustee is defined to include tutors, curators, and judicial factors. The current legislative provision, section 2 of the Trusts (Scotland) Act 1921, retains the definition with some minor additions.

[145] C R A Howden, 'Trustee', in J Chisholm (ed), *Green's Encyclopædia of the Law of Scotland* (2nd edn, 1914) vol XII, 299 at 300; C R A Howden and G R Thomson, 'Trustee', in J L Wark (ed), *Encyclopædia of the Laws of Scotland* (1933) vol XV, at para 424.

[146] W M Gloag, *The Law of Contract* (1919); Gloag, *Contract* (2nd edn, 1929).

[147] Gloag, *Contract* 572 n 1; *Contract* (2nd edn) 508 n 1.

[148] Gloag's approach here reflects that of the authors that he cites: McLaren, Menzies and Lewin.

[149] Gloag, *Contract* ch 27; *Contract* (2nd edn) ch 31.

set out, and the offices are placed together under one organising principle of the fiduciary, which to Gloag is evidently closely connected with trust jurisprudence.

6-41. Gloag states that the *auctor in rem suam* rule rests upon the idea of a trustee's office as a gratuitous one, and the prevention of conflict between personal interests and fiduciary duties[150] (thus the policy aspect). As regards the technical law, we see shades of the 'contracting with oneself' idea in that we are told 'a contract is voidable if the parties to it are in substance a trustee on the one side and the trust estate on the other'.[151] At first sight this seems similar to the idea of preventing someone contracting with himself, but one must note that the contract is said to be voidable, and not void. In rudimentary contractual theory a voidable contract is one that subsists validly until set aside, whereas the technical rule against contracting with oneself is really a matter of contract being void. The key word here is 'substance'. Gloag recognised that not all situations that might be characterised as involving an instance of *auctor in rem suam* will necessarily render a contract voidable:

> A contract between trustee and trust estate, though not illegal, is voidable even although no advantage may have been taken by the trustee, and though the transaction is perfectly fair. The principle is that a trustee must not enter into any transaction where his duties as trustee and his interests as an individual may come into conflict.[152]

The key aspect is that there can be no substantive or apparent conflict between interest and duty, as evidenced by the fact that honesty and fairness are not valid defences.[153]

6-42. For Gloag, if the contract is not voidable, then any profits from holding the office of trustee, derived from contracting with the trust estate or otherwise, are held under a constructive trust.[154] These principles are said to extend generally 'though with modifications, to all persons holding a fiduciary position',[155] which therefore encompasses: a *curator bonis*; trustees in bankruptcy; trustees in a private trust for creditors; common agents in a judicial sale; company directors; and in some respects partners, agents, and promoters of companies.[156] As regards company directors, Gloag points out that it is 'misleading to treat an office invariably undertaken as a means of earning money [director] as in all respects the same as one *prima facie* gratuitous [trustee]'.[157] Indeed, while stating that the authority of *Aberdeen*

[150] Gloag, *Contract* 572; *Contract* (2nd edn) 508.

[151] Gloag, *Contract* 572; *Contract* (2nd edn) 508.

[152] Gloag, *Contract* (2nd edn) 509. The first edition has a (long) quotation from Lord Cranworth's speech in *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461 at 471, in place of the second sentence, but the sentiment is the same: Gloag, *Contract* 573.

[153] Gloag, *Contract* 573; *Contract* (2nd edn) 510.

[154] Gloag, *Contract* 572; *Contract* (2nd edn) 508.

[155] Gloag, *Contract* 572; *Contract* (2nd edn) 508.

[156] Gloag, *Contract* 572; *Contract* (2nd edn) 508. A debtor granting security is not a fiduciary for the creditor: *Bank of Scotland v Liquidators of Hutchison Main & Co Ltd* 1914 SC (HL) 1.

[157] Gloag, *Contract* 581; *Contract* (2nd edn) 514.

Railway Co v Blaikie,[158] decided on 'principles of trust law' concerning conflict of fiduciary duty and personal interest, was 'beyond question', Gloag also observed that the principle was not likely to be extended.[159] This statement seems to rest upon a subsequent case, and perhaps from a sense of commercial efficacy.[160] It was earlier mentioned that Gloag placed some importance on the distinction between trustees and directors on the basis of the gratuitous nature of the office – one is, in reality, concerned with earning money, while the other is *prima facie* gratuitous. Nevertheless, there are shared fiduciary principles that apply to both, such as the rule that directors cannot charge for work done unless so authorised in the articles of association.[161] The authority cited for this proposition is quite clear in its import:

> It is clearly the law that where a party holds a fiduciary position, whether as a director of a company or one of a body of trustees, no matter how he is appointed, unless there is some express provision in the contract under which he acts that he shall receive remuneration, he must do the work gratuitously.[162]

6-43. The grounds that mark out an office for consideration as a fiduciary one are seen by Gloag as diverse in some respects, but unified by a sentiment of trust and confidence and the need to prevent conflicts of interest.[163] Therefore, trustees are fiduciaries by virtue of their gratuitous nature; a company director is by analogy akin to a trustee in this respect; a promoter is said to be imbued with a statutory 'confidence';[164] the partners in a firm are joined together by an 'exuberant trust', with many of the fiduciary incidents of such a relation embodied in statute;[165] whereas an agent is different still, as the rule that an agent's profit beyond his remuneration is for the benefit of the principal rests upon both trust and contractual principles.[166] Thus, it is said, an agent's making a secret profit is a breach of contract, but the extent of the agent's liability is not the principal's loss but the agent's gain;[167] yet, there can be no tracing of the money received by the agent, nor will the wronged principal rank as a 'beneficiary' as opposed to mere creditor.[168]

[158] *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461.

[159] Gloag, *Contract* 582; *Contract* (2nd edn) 515.

[160] The case cited is *Paterson v Portobello Town Hall Co* (1866) 4 M 726.

[161] Gloag, *Contract* 582–83; *Contract* (2nd edn) 515. See the contemporary J A Lillie, 'Company', in J L Wark (ed), *Encyclopaedia of the Laws of Scotland* (1927) vol IV, paras 218 ff.

[162] *McNaughten v Brunton* (1882) 10 R 111 at 113 *per* the Lord President (Inglis).

[163] This is not a technical formulation like that found in many areas of contract law which are not concerned with fiduciaries, such as, for example, the law of employment, which is not a fiduciary relationship in itself.

[164] Gloag, *Contract* 585; *Contract* (2nd edn) 517.

[165] Gloag, *Contract* 586–87; *Contract* (2nd edn) 518–19.

[166] Gloag, *Contract* (2nd edn) 520–21. This is an intriguing change from the first edition: 'The rule rests on principles of trust, not of contract': Gloag, *Contract* 589. There is no textual explanation for this change.

[167] *Ronaldson v Drummond & Reid* (1881) 8 R 956.

[168] Gloag, *Contract* (2nd edn) 521. This represents another change from the first edition, though this time the insertion of a reference to a case, the well-known decision in *Lister v*

6-44. To the instances of fiduciary office stated above, there should be added the law agent and those in a confidential relationship.[169] Law agents' fiduciary duties to clients are twofold: first as regards the management of their professional relationship; secondly, when law agents come forward to contract with clients ostensibly as third parties.[170] There is no absolute rule against the latter, though gifts are always revocable, but the transaction is open to detailed scrutiny, and requires full disclosure to the client.[171] The confidential relationship category is one that we today recognise as undue influence: that is where a party may exert dominant influence over another, if such influence was exerted, or there was a failure of full disclosure, then the contract is open to reduction.[172]

6-45. In the early twentieth century, then, Gloag took the diverse legal functions attaching to various legal offices and treated them within a single chapter relating to fiduciary liability. The organising principle is the idea of trust and confidence, and it is explicitly stated that the trust institution is important to the working of these institutions.[173] However, too much weight should not be placed on the chapter as showing a general law of fiduciaries. There are acknowledged differences in the rules applying to the different types of fiduciary, and the consequences of the actions of these fiduciaries can differ. It is also not always clear whether liability rests upon contractual rules, trust rules, or indeed delictual rules dealing with reparation. This loose association of offices beneath a very general concept characterises the treatment of the fiduciary in Scottish law since the time of Gloag.

D. MODERNISATION OF THE GENERAL APPROACH

6-46. At the end of the twentieth century the structure of the academic consideration of fiduciary duties remained much the same as had been set out by Gloag in 1929. In the leading monograph on trust law the chapter dealing with fiduciary duties reverts to the title '*Auctor in rem suam*'.[174] The

---

Stubbs (1890) 45 Ch D 1, explains the change (though not why it was omitted from the first edition): Gloag, *Contract* 589. See also G J Bell, *Commentaries on the Law of Scotland* (7th edn, 1870) I, 533; *Pender v Henderson* (1864) 2 M 1429.

[169] Gloag, *Contract* 593–96; *Contract* (2nd edn) 524–25. Gloag also refers to uneducated persons as a form of fiduciary, though this appears to be a latent form of contractual good faith in very specific circumstances: Gloag, *Contract* 599–600; *Contract* (2nd edn) at 529–30.

[170] Gloag, *Contract* 593; *Contract* (2nd edn) 524.

[171] Gloag, *Contract* 594; *Contract* (2nd edn) 524. See Begg's detailed discussion for the particular position of the law agent around this time: J H Begg, *A Treatise on the Law of Scotland relating to Law Agents* (2nd edn, 1883) ch 21. Although the equivalent chapter in the first edition of 1873 contains similar sentiments, it is of a different era. For the modern rules see Law Society of Scotland, *The Law Society of Scotland Practice Rules* (2011) rules B1.2, B1.4, and B1.8.

[172] Gloag, *Contract* 596; *Contract* (2nd edn) 526, n 113.

[173] T B Smith, *Studies Critical and Comparative* (1962) 199–200.

[174] W A Wilson and A G M Duncan, *Trusts, Trustees and Executors* (2nd edn, 1995) ch 26.

authors, Wilson and Duncan, state that the rule prohibits a trustee from entering a transaction which sets his personal interest against the interests his fiduciary duty protects.[175] The importance of equity to the account is manifest from the content of the judicial pronouncements quoted.[176] However, also notable by its appearance as a normative justification is the fact that the trustee is imbued with knowledge of affairs beyond that of third parties, which knowledge could be turned to his profit.[177] Finally, it is further noted that fairness is irrelevant in deciding the question whether a fiduciary should be entitled to keep any benefit obtained: stripping the fiduciary of any such benefit merely requires an objection by the interested party.[178]

6-47. In the *Stair Memorial Encyclopaedia* the discussion of fiduciary relations is within the article dealing with trusts, and takes as its title 'Fiduciary Duties of Trustees and Others; *Auctor in Rem Suam*'.[179] The section lays down in standard terms the principle against having the interests of the fiduciary conflict with his duties by that office, though it is noticeable that the use of English authority is extensive.[180] The consequences of a breach of fiduciary duty are said to be threefold. First, a fiduciary is a constructive trustee of any property that he obtains as a result of the breach of duty, and of any profit or other advantage that he derives from the breach, and the incidents of the constructive trust so arising are those of an ordinary trust. Second, the fiduciary is liable to account to his beneficiary for the profit obtained from the breach. This duty to account is personal only, and will not be invoked if the constructive trust can be enforced, yet is important if the property subject to the constructive trust has been dissipated. Third, a breach of fiduciary duty is a breach of trust, which, in turn, renders the fiduciary liable for any loss sustained by the beneficiary.[181]

6-48. This is a detailed account of the consequences of breaching a fiduciary duty. It is of some note that we are told that there are personal and real

[175] Wilson and Duncan, *Trusts* at para 26-01.

[176] *Dale v Inland Revenue Comrs* [1954] AC 11 at 26 *per* Lord Normand; *Wright v Morgan* [1926] AC 788 at 797 *per* Lord Dunedin.

[177] Wilson and Duncan, *Trusts* at para 26-02. The decisions cited are *Hamilton v Wright* (1842) 1 Bell's App Cas 574 at 591 *per* Lord Brougham; *Hall's Trs v McArthur* 1918 SC 646 at 651 *per* Lord Johnston.

[178] Wilson and Duncan, *Trusts* at para 26-03, citing *Hamilton v Wright* (n 177) at 590 *per* Lord Brougham; *Ex parte James* (1803) 8 Ves Jun 337, 32 ER 337 at 345 *per* the Lord Chancellor (Eldon); *Elias v Black* (1856) 18 D 1225 at 1230 *per* the Lord President (McNeill); *Wright v Morgan* [1926] AC 788 at 798 *per* Lord Dunedin. More generally see E C Reid and J W G Blackie, *Personal Bar* (2006) para 9-27.

[179] Lord Ross et al, 'Trusts, Trustees and Judicial Factors', *Stair Memorial Encyclopaedia* (1989) vol 24, para 170.

[180] Ross, 'Trusts' (n 179) para 170. This refers to the standard Scottish authorities of *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461; *Huntington Copper and Sulphur Co Ltd v Henderson* (1877) 4 R 294 at 299 *per* Lord Young; *Aitken v Hunter* (1871) 9 M 756 at 762 *per* Lord Neaves; before going on to cite the following standard English authorities: *Bray v Ford* [1896] AC 44 at 51 *per* Lord Herschell; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Boardman v Phipps* [1967] 2 AC 46.

[181] Ross, 'Trusts' (n 179) at para 171.

remedies associated with such a breach of duty. The primary remedy is that of a constructive trust, but there is also a personal duty to account that is separate and subsidiary; aside from the gain-based remedies, there is also a remedy based upon the fiduciary's loss. Unfortunately, there is no further elaboration on when the different remedies are appropriate. The lack of authority cited for these rather important propositions arouses suspicion, and, as we shall see, such authority as is cited later is at least dubious.

6-49. The idea of general principles applicable to fiduciary relations can be seen from the fact that it is only after the general part above that a list of fiduciary persons is given. The list of fiduciary relations is said to apply to the following offices: trustees; tutors; curators; judicial factors; partners; company directors; agents and employees to some extent; company promoters; recipients of confidential information; and lastly, '*ad hoc*' fiduciary relationships such as self-appointed agents and vitious intromitters.[182] To this list there can be added the *gestor* in a *negotiorum gestio*, and certain types of representative for adults lacking capacity.[183]

6-50. Before leaving the account given in the *Stair Memorial Encyclopaedia*, it is worth returning to the consequences ascribed to a breach of a fiduciary duty. In the later passages dealing with this issue, the authors are careful to restate that a constructive trust arises over any profit or property obtained from the fiduciary office. Furthermore, the fiduciary can seek a declarator of trust with regard to that property or profit.[184] Therefore, not only are we said to be dealing with a 'constructive trust' in a truly proprietary sense, which would, in turn, avail against third parties, unless they take in good faith for value,[185] but, further, it will be prestable in a bankruptcy situation;[186] but it would appear that the fiduciary can find himself fixed with the full office of a trustee, presumably with all its attendant duties. As an aside, this appears not to be the law in England,[187] where the nature of a constructive trustee's duties is, in many respects, opaque.[188]

6-51. Intriguingly, the authors also suggest that the (then) English rule that secret commissions taken by agents and directors do not give rise to a constructive trust should not be followed in Scottish law.[189] It is perhaps surprising to find a Scottish text advocating a broader conception of the

[182] Ross, 'Trusts' (n 179) at para 172.

[183] See A D Ward, *Adult Incapacity* (2003) at paras 4-31–4-38.

[184] Ross, 'Trusts' (n 179) at para 186.

[185] *Redfearn v Somervail* (1813) 1 Dow 50.

[186] Ross, 'Trusts' (n 179) para 186 n 2, citing *Heritable Reversionary Co Ltd v Millar* (1892) 19 R (HL) 43.

[187] *Lonrho plc v Fayed (No 2)* [1992] 1 WLR 1 at 12 *per* Millett J: 'It is a mistake to suppose that in every situation in which a constructive trust arises the legal owner is necessarily subject to all the fiduciary obligations and disabilities of an express trustee.'

[188] See J E Martin, *Hanbury and Martin's Modern Equity* (19th edn, 2012) at para 12-004.

[189] Ross, 'Trusts' (n 179) at para 188. The English decisions behind the rule complained of were *Metropolitan Bank v Heiron* (1880) 5 Ex D 319 and *Lister v Stubbs* (1890) 45 Ch D 1.

constructive trust, and its real effect, in Scotland rather than in England[190]. However, that account of the law seems, ultimately,[191] to have been vindicated as regards Scottish[192] and English[193] law. The sense one is left with is that the policy argument holds more sway here than that of technical law, and indeed one might say that it was ever thus – there are numerous statements that the rule is an equitable one. It is not necessarily surprising that some may consider the policy more important than following the technical distinctions of English law. This is certainly the sense of the passage 'Constructive trusteeship is imposed because of the fiduciary relationship, not because of the particular source of the property that the fiduciary receives in consequence.'[194]

[190] The decisions were never universally acclaimed however: R M Goode, 'Ownership and Obligation in Commercial Transactions' (1987) 103 LQR 433. The text also notes the close connection between agency and constructive trust, and where an agent obtains in his own name, this is said to be on constructive trust: *Bank of Scotland v Liquidators of Hutchison Main & Co Ltd* 1914 SC (HL) 1 at 15 *per* Lord Shaw of Dunfermline. The text goes further, stating: 'It is difficult to see why the same rule should not be applied to all property acquired by an agent in consequence of the fiduciary relationship': Ross, 'Trusts' (n 179) at para 188.

[191] The English decisions behind the rule complained of were *Metropolitan Bank v Heiron* (n 189) and *Lister v Stubbs* (n 189). After the entry in the *Stair Memorial Encyclopaedia* was written the Privy Council decided that constructive trusts would arise in these circumstances in *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324. The Court of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch 453, led by Lord Neuberger of Abbotsbury MR (as he then was), followed the decisions in *Heiron* and *Lister*. The decision in *Sinclair* was not met with universal approval and courts in Australia and Jersey refused to follow it: see *Federal Republic of Brazil v Durant International Corpn* [2012] JRC 211 and *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 287 ALR 22. Thereafter, the decision in *Sinclair* was followed by the English Court of Appeal in *FHR European Ventures LLP v Mankarious* [2014] Ch 1, but with some apprehension: see Sir Terence Etherton C's judgment at para 116. Finally, the Supreme Court, led by Lord Neuberger of Abbotsbury PSC who appeared to have changed his mind since *Sinclair*, decided that a constructive trust *does* arise when an agent obtains a secret profit and overruled the decisions in *Heiron*, *Lister*, and *Sinclair* in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250. See generally P Watts, '*Tyrell v Bank of London* – an inside look at an inside job' (2013) 129 LQR 527; R Hedlund, 'Secret commissions and constructive trusts: yet again!' [2013] JBL 747; R Chambers, 'Constructive trusts and breach of fiduciary duty' [2013] Conv 241; J Edelman, 'Two fundamental questions for the law of trusts' (2013) 129 LQR 66; P Millett, 'Bribes and secret commissions again' (2012) 71 CLJ 583; T Molloy, 'Trading with their principal's capital: bribes and other unauthorized profit taking by fiduciaries' (2012) 18 Trusts and Trustees 925; W Swadling, 'Constructive trusts and breach of fiduciary duty' (2012) 18 Trusts and Trustees 985; J E Penner, 'The difficult doctrinal basis for the fiduciary's proprietary liability to account for bribes' (2012) 18 Trusts and Trustees 1000; D Hayton, 'Proprietary liability for secret profits' (2011) 127 LQR 487; R Goode, 'Proprietary liability for secret profits – a reply' (2011) 127 LQR 493. I am grateful to Niall Whitty and Laura Macgregor for drawing a number of these articles to my attention.

[192] See chapter 5, paras 5-82 ff and Lord Hodge, 'Property Law, Fiduciary Obligations and the Constructive Trust' in F McCarthy, J Chalmers and S Bogle (eds), *Essays in Conveyancing and Property Law* (2015) 97.

[193] *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 191). See W Gummow, 'Bribes and constructive trusts' (2015) 131 LQR 21.

[194] Ross, 'Trusts' (n 179) para 188.

6-52. The most recent attempt to state general principles of fiduciary obligation is to be found in Gloag and Henderson: 'A fiduciary obligation is one under which as a matter of law a party (the fiduciary) is bound to prefer to his own interests those of another (the principal), for whose benefit he is exercising particular powers or undertaking particular transactions.'[195] It is further noted that the list of fiduciaries is not fixed and the necessary ingredient for fiduciary status is being entrusted with powers or interests relating to another, and a fiduciary's duties can be circumscribed by the informed consent of the constituent.[196]

E. FIDUCIARY DUTIES AND REMEDIES IN THE MODERN LAW

6-53. It will be apparent that there is very little analysis of what exactly a fiduciary is in modern Scottish law, especially when one considers the extent of similar analyses in other jurisdictions. While Scottish law accepts the idea of fiduciary relationships, the living experience and development of the fiduciary concept from day to day in the courts rely heavily upon English authority. Yet, throughout the foregoing analysis of the literature pertaining to fiduciary duties, it appears never to have been set out what exactly the basis of fiduciary liability is, and what remedial consequences such a relationship will have. The following section discusses the modern law and some elements of fiduciary liability, such as the remedial consequences of breach,[197] but it is necessarily tentative because there are not many Scottish materials, and because the dominant concern of this book has been the influence of equitable thinking on the historical development of ideas down to the modern day. I intend to return to the modern basis for fiduciary liability in future research.

6-54. Scots law recognises a class of people known as fiduciaries. Such persons are normally accounted as such by virtue of the fact they have some variety of 'trust'[198] reposed in them or because they hold an office which is associated with fiduciary obligations,[199] such an office often being invested with some element of trust, confidence, good faith and dependence[200] on the part of the fiduciary's constituent.[201] Putting this matter more broadly, if someone is charged to regulate their own actions of legal significance in the interest of

[195] Gloag and Henderson para 3.03.

[196] Gloag and Henderson para 3.03.

[197] See chapter 5 for discussion of this point.

[198] In the lay sense of that term, though it is easy to see how technical meanings of trust can become enmeshed into discussions pertaining to fiduciary liability.

[199] See *Advocate General for Scotland v Murray Group Holdings Ltd* [2015] CSIH 77, 2015 SLT 765 at para 86.

[200] *Park's of Hamilton (Holdings) Ltd v Campbell* [2014] CSIH 36, 2014 SC 726 at para 26 *per* Lady Dorrian, and at para 39 *per* Lord Drummond Young.

[201] I use the term 'constituent' to refer to the person whose affairs and interests the fiduciary is acting for.

another person, then they will often be accounted a fiduciary.[202] In Scottish law this concept can be summed up in the simple sentence: 'The principle is that a person who is charged with the duty of attending to the interest of another shall not bring his own interest into competition with his duty.'[203] It has been observed that there is no closed list of fiduciaries or fiduciary offices, and therefore the nexus of fiduciary relations will be necessarily context-specific.[204]

6-55. Fiduciary duties appear to arise *ex lege*,[205] or at least the constitution of a fiduciary relationship cannot be achieved by a contractual or promissory undertaking alone. One may choose to undertake an office or position to which fiduciary obligations may attach, but the nature and extent of the fiduciary obligations associated with that office seem, at least as a default, to be determined by the law.[206] Not all incidents and obligations of the office will necessarily be fiduciary,[207] and it will be context-specific whether and to what extent a particular office and its holder are subject to fiduciary obligations.[208] Thus, for example, in a recent case the Inner House's reasoning seems to proceed, at least in part, on the basis of a default expectation of the obligations and duties associated with a type of office.[209] Whilst it seems that

[202] See *Ness Training Ltd v Triage Central Ltd* 2002 SLT 675 at paras 21–22.

[203] *Huntington Copper and Sulphur Co Ltd v Henderson* (1877) 4 R 294 at 299 *per* the Lord Ordinary (Young); see also *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461 at 471–73 *per* the Lord Chancellor (Cranworth).

[204] *Park's of Hamilton* (n 200) at para 27 *per* the Lord Ordinary (Hodge); *Advocate General for Scotland v Murray Group Holdings Ltd* (n 199) at para 83.

[205] Some fiduciary duties are imposed by statute; the most well known are probably those of a company director: Companies Act 2006, ss 171–178. Although the duties are statutory the appropriate remedy for a director's breach of these duties is discerned in accordance with the 'corresponding common law rule or equitable principle': s 178. One of the specialties of such statutory 'fiduciary' duties of directors is, because they are imposed by statute, they are not as amenable to exclusion as other common law fiduciary duties: see e.g. *Customer Systems plc v Ranson* [2012] EWCA Civ 841, [2012] IRLR 769 at para 20 *per* Lewison LJ.

[206] See e.g. *Samsung Semiconductor Europe Ltd v Docherty* [2011] CSOH 32, 2011 SLT 806 at para 30 *per* the Lord Ordinary (Glennie): 'Fiduciary obligations arise out of the relationship between the parties, without there being any necessity to attach the label "fiduciary" to the relationship at the time…the defender was aware that his reports and recommendations would be taken into account by his superiors. In those circumstances I do not think it necessary to ask whether the defender was consciously assuming fiduciary duties – the fiduciary duties flow from that fact and the other facts to which I have referred.'

[207] *Cawdor v Cawdor* [2007] CSIH 3, 2007 SC 285 at para 20 *per* the Lord President (Hamilton).

[208] *Commonwealth Oil & Gas Co Ltd v Baxter* [2009] CSIH 75, 2010 SC 156 at para 12 *per* the Lord President (Hamilton).

[209] 'In the present case we are of the opinion that the duties of a protector will be fiduciary in every case where there is no express declaration to the contrary. With some of the subtrusts the appointment of a protector is expressly declared to be fiduciary; in others nothing is said. In all those cases we are of the opinion that the appointment is fiduciary in nature; that follows from the essential nature of a protector's responsibilities, which are intended to secure the enforcement of the trust purposes, including the rights of the beneficiaries': *Advocate General for Scotland v Murray Group Holdings Ltd* (n 199) at para 86. One caveat that might caution against placing too much weight on the case as authority for a model of default fiduciary

fiduciary obligations arise *ex lege* it is not the case that all *ex lege* obligations will be fiduciary. Furthermore, although it seems that contract or promise will not be enough to constitute a fiduciary relationship without some further element, it is possible for fiduciary obligations to arise within a factual context where there are contractual or other obligations – conventional obligations are not entirely constitutive, but nor are they a complete bar to the existence of fiduciary obligations. A contractual stipulation that X is a fiduciary for Y will not itself be determinative, but it will be highly relevant to the exercise of determining whether, in all circumstances, a fiduciary obligation exists. Similarly, it seems possible to exclude elements of fiduciary obligations by way of contract or other legally relevant agreements. If a fiduciary relationship could be constituted purely by contract (or other form of obligation) alone then the distinction between a contractual obligation and a fiduciary one would be illusory; the powerful remedial possibilities associated with a breach of fiduciary duty – a personal action for accounting or a proprietary action with insolvency protection based upon a constructive trust – at least suggest that there is and ought to be some distinction between a conventional obligation and a fiduciary one. Furthermore, similar considerations relating to the need to distinguish between conventional and fiduciary obligations apply to the law of prescription.[210] There is, therefore, something of a conceptual tension and challenge for the future study of fiduciary law in Scotland to reconcile the suggestion in the authorities of an apparently *ex lege* or office-based approach with an objective dimension on the one hand, and the undeniable importance of the context of a particular case, including the factual and legal relationships between the apparent fiduciary and her constituents with subjective and objective elements, on the other hand.[211]

6-56. Although fiduciary obligations appear to arise by force of law to some degree, it is not clear what precise legal basis underlies them.[212] There are many judicial pronouncements that the law in Scotland and England is the

---

obligations associated with an office is the court's use of the phrase 'in the present case', but it seems clear that the office model can only be a default one at its highest, and the specific circumstances of the case will always be relevant in any event.

[210] See Prescription and Limitation (Scotland) Act 1973, sch 3(e); *Cawdor v Cawdor* (n 207) at para 20 *per* the Lord President (Hamilton); *Dryburgh v Scotts Media Tax Ltd* [2011] CSOH 147, 2011 GWD 31-658 at paras 120–123 *per* the Lord Ordinary (Glennie). A reclaiming motion in *Dryburgh* was allowed by the Inner House. However, the reclaimers did not challenge the Lord Ordinary's decision with respect to schedule 3 of the 1973 Act: [2014] CSIH 45 at para 13. See generally D Johnston, *Prescription and Limitation* (2nd edn, 2012) paras 3.23 ff.

[211] This is a matter for future study and, as noted earlier, not the main thrust of this text. Comparative research into Commonwealth jurisdictions' approaches will be useful for this endeavour.

[212] This is not unique to Scotland: M Conaglen, 'The Nature and Function of Fiduciary Liability' (2005) 121 LQR 452.

same,[213] though it can be difficult[214] to see how this can be so given the close association of fiduciary obligations in England with a separate chancery jurisdiction. It might be more correct to say that the substantive rules and policy objectives underpinning them are the same, but that the conceptual basis could be different. In Scotland, as in England, the primary and central justification and obligation is of fidelity to the interest of the constituent, and it seems that all other obligations flow from this primary obligation. The fiduciary cannot act in such a way as to conflict with the interest of his constituent, nor indeed can he place himself in a position where such a result is a possibility even if it is not actually realised.[215] The position is altered if the constituent consents to such behaviour[216] on the part of the fiduciary, and such consent can be implied and inferred from the circumstances.[217] So while it is clear, for example, that there are circumstances in which it will be possible for a trustee to deal with his beneficiary, the court will take a very stringent view as regards disclosure of information by the fiduciary[218] and the extent to which the apparent consent was properly informed.[219]

6-57. Furthermore, a fiduciary is not generally entitled to remuneration for her activities without specific authorisation.[220] It is, however, settled in

[213] *Keith v Davidson Chalmers* 2004 SC 287; *Ness Training Ltd v Triage Central Ltd* 2002 SLT 675; *Connolly v Brown* [2006] CSOH 187, 2007 SLT 778.

[214] The word difficult is used here because it is far from accepted in England, and in other systems, what the conceptual basis of fiduciary obligations is – some of those theories would fit Scottish law concepts, while others might be more problematic. For an excellent introduction to the current state of fiduciary theory, see A S Gold and P B Millar (eds), *Philosophical Foundations of Fiduciary Law* (2014).

[215] *Bray v Ford* [1896] AC 44 at 51 *per* Lord Herschell. For some of the voluminous Scottish case law see: *Inglis v Inglis* 1983 SC 8 at 16 *per* Lord Hunter; *Johnston v MacFarlane's Trs* 1986 SC 298; *Park's of Hamilton (Holdings) Ltd v Campbell* (n 200) at paras 34 ff *per* Lord Drummond Young; *Dryburgh v Scotts Media Tax Ltd* [2014] CSIH 45 at para 17 *per* Lord Drummond Young.

[216] Consent or authorisation releasing an individual or officeholder from a specific fiduciary obligation does not necessarily offer protection with respect to other fiduciary duties owed by that person: *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald (No 2)* [1995] BCC 1000.

[217] *Sarris v Clark* 1995 SLT 44; *Johnston v MacFarlane's Trs* (n 215) at 305–06 *per* the Lord Justice-Clerk (Ross); *Advocate General for Scotland v Murray Group Holdings Ltd* (n 199) at para 89. The importance of context to fiduciary law generally applies equally to the examination of any purported consent and the extent of the fiduciary's duties relative to properly procuring that consent: see e.g. *Ireland Alloys Ltd v Dingwall* 1999 SLT 267.

[218] It is a matter of some doubt whether a fiduciary's duties in this context, and in general, are merely proscriptive (as is the traditional understanding) prohibiting action or whether the fiduciary lies under active or prescriptive duties requiring positive action: compare the sceptical opinions in *Commonwealth Oil & Gas Co Ltd v Baxter* [2009] CSIH 75, 2010 SC 156 at para 14 *per* the Lord President (Hamilton) and at para 82 *per* Lord Nimmo Smith, with somewhat more enthusiastic comments from the Court of Appeal: *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91 at paras 38–44 *per* Arden LJ.

[219] *Dougan v Macpherson* (1902) 4 F (HL) 7, [1902] AC 197; *Park's of Hamilton (Holdings) Ltd v Campbell* [2014] CSIH 36, 2014 at paras 28–29 *per* Lady Dorrian, and at para 38 *per* Lord Drummond Young; [2011] CSOH 38 at paras 21 ff *per* the Lord Ordinary (Hodge); *Gillespie Investments Ltd v Gillespie* [2010] CSOH 113 at para 50 *per* the Lord Ordinary (Hodge).

[220] 'Now, it is clearly the law that where a party holds a fiduciary position, whether as a director of a company, or one of a body of trustees, no matter how he is appointed, unless

England (and elsewhere in the Commonwealth) that an 'equitable allowance' might be made for the fiduciary, although such an award relies upon the court exercising its (very wide) discretion – which is an application of the broader equitable and discretionary nature of the calculation exercise the courts employ to ascertain the amount to be repaid by a profiting fiduciary – against the backdrop of the policy underlying, and substance of, the law's prohibition against unauthorised payments to fiduciaries.[221] Given the similarity of the substantive rules on fiduciary duties in Scotland and England it seems likely that the Scottish courts have a similar power,[222] though, once again, the broad 'equity' basis and terminology employed in the English decisions is a matter of note. A similar, but not identical,[223] result might be reached by virtue of the statutory relief provisions[224] for officers of a company

there is some express provision in the contract under which he acts that he shall receive remuneration, he must do the work gratuitously': *McNaughten v Brunton* (1882) 10 R 111 at 113 *per* the Lord President (Inglis); '[T]he office of trustee, which, unless otherwise provided for by the trust, must be performed gratuitously': *Home v Pringle* (1841) 2 Rob 384 at 432–33 *per* the Lord Chancellor (Cottenham). The rule, like many fiduciary rules in Scotland, was originally developed for tutors and curators and later generalised to encompass trustees and other fiduciaries, and has been applied for some time in Scottish law: see e.g. Erskine I.7.15; *Scot v Strachan* (1736) Mor 13433; *Johnston's Trs* (1738) Mor 13407; *MacDonald v Muir* (1780) Mor 13437; *Ommanney v Smith* (1854) 16 D 721; *Fegan v Thomson* (1855) 17 D 1146; *Scott v Handyside's Trs* (1868) 6 M 753; *Aitken v Hunter* (1871) 9 M 756; *Henderson v Watson* 1939 SC 711. Modern authorities are abundant: see *Guinness plc v Saunders* [1990] 2 AC 663; *Tayplan Ltd (In Administration) v Smith* [2011] CSIH 8, [2012] BCC 523 at paras 25–30; *Park's of Hamilton (Holdings) Ltd v Campbell* [2014] CSIH 36, 2014 SC 726 at para 34 *per* Lord Drummond Young.

[221] See e.g. *Phipps v Boardman* [1964] 1 WLR 993 at 1018 *per* Wilberforce J; *Boardman v Phipps* [1967] 2 AC 46 at 104E–G *per* Lord Cohen, and at 112D *per* Lord Hodson; *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428 at 459A–B *per* Dunn LJ, and 467B–469B *per* Fox LJ, and 472H–473B *per* Waller LJ; *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 561–62; *Medcalf v Mardell* Court of Appeal, Civil Division, 2 March 2000 (unreported) at paras 83–84 (holding that such an allowance was not appropriate to circumvent a partnership's contractual arrangements for division of profits); *Badfinger Music v Evans* [2002] EMLR 2 at paras 37–49 *per* Lord Goldsmith QC; *Patel v Brent LBC* [2003] EWHC 3081 (Ch), [2004] 1 P & CR at para 29 *per* Sir Andrew Morritt VC; *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] All ER (D) 503 at para 88 *per* Arden LJ; *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at paras 38 ff *per* Elias CJ (dissenting on the application of the law to the facts) and paras 103 ff *per* Tipping J; *Cobbetts LLP v Hodge* [2009] EWHC 786 (Ch) at paras 113–118 *per* Floyd J; *Imageview Management Ltd v Jack* [2009] EWCA Civ 63, [2009] 2 All ER 666 at paras 54–60 *per* Jacob LJ.

[222] See for Scottish authority suggesting the ability of courts to allow, or at least not disturb, some form of emolument for fiduciaries in similar situations: *Home v Pringle* (1841) 2 Rob 384 at 437–38 *per* the Lord Chancellor (Cottenham); *Gordon v Howden* (1853) 15 D 378 at 379 *per* the Lord President (McNeill).

[223] The statute requires the officer to have acted 'honestly', amongst other things, whereas that is not a prerequisite of a claim at common law for the general equitable allowance discussed here.

[224] Companies Act 2006, s 1157(1): 'If in proceedings for negligence, default, breach of duty or breach of trust against – (a) an officer of a company, or (b) a person employed by a company as auditor (whether he is or is not an officer of the company), it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those

who have breached a fiduciary (or other named) duty.[225] A similar argument might be made about section 32(1)[226] of the Trusts (Scotland) Act 1921,[227] though it should be noted that, despite linguistic affinities, there are differences between these statutory provisions.[228] It is unclear whether such statutory relief mechanisms, and their often arduous requirements,[229] displace, or coexist with, an essentially entirely discretionary common law power to make 'an equitable allowance'. If it is a case of coexistence it seems likely that the courts would be mindful of the relevant statutory provisions and only allow equitable relief at common law in analogous or exceptional circumstances, for otherwise the more stringent statutory reliefs might be rendered redundant.

6-58. In many ways the really important question about fiduciary liability is not so much the precise conceptualisation of the fiduciary's obligations and liability but the content of the obligations and the remedy which the court will afford for their breach. Does the court afford a proprietary or a personal remedy? It seems clear that unjustified enrichment, with its inbuilt equitable nature,[230] could be used as an effective tool to recover money obtained in breach of fiduciary duties; likewise there is a personal obligation to account which would amount to disgorgement – i.e. the fiduciary must give up any profits made from the breach without the causal limitations of the constituent needing to show any loss or impoverishment. But these personal remedies would afford no insolvency protection. Case law suggests that, as a matter of policy, proprietary remedies ought to be available against

connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit.'

[225] See *McGivney Construction Ltd v Kaminski* [2015] CSOH 107, 2015 GWD 27-462 at paras 60–64 *per* the Lord Ordinary (Woolman); *Gillespie Investments Ltd v Gillespie* [2010] CSOH 113 at paras 54–55 *per* the Lord Ordinary (Hodge).

[226] Section 31 of the same Act might also serve a related function, but it is limited to situations where the beneficiary has consented in writing to a breach of trust, and it seems confined to an indemnity.

[227] Trusts (Scotland) Act 1921, s 32(1): 'If it appears to the court that a trustee is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, then the court may relieve the trustee either wholly or partly from personal liability for the same.' See *Clarke v Clarke's Trs* 1925 SC 693 at 709–10 *per* the Lord President (Clyde) and at 713 *per* Lord Cullen; *Clark's Judicial Factor v Clark's Exrs* [2015] CSOH 53, 2015 GWD 17-295 at paras 126–131 *per* the Lord Ordinary (Burns).

[228] See e.g. the interpretation of the essentially identical section 61 of the Trustee Act 1925 in *Santander UK v RA Legal Solicitors* [2014] EWCA Civ 183, [2014] PNLR 20 at paras 19 ff *per* Briggs LJ.

[229] Despite being more arduous to plead than the apparently almost unfettered discretion of the common law equitable allowance the statutory provisions are themselves discretionary, albeit with more structure. They are, therefore, not particularly reliable from the perspective of a fiduciary who will often seek an insurance policy to protect against some forms of personal liability: see *Governors of Dollar Academy Trust v Lord Advocate* 1995 SLT 596 at 600–02 *per* the Lord President (Hope).

[230] See chapter 3, at paras 3-93 ff.

a fiduciary who breaches her fiduciary duties: the form given to that policy decision in recent cases has been the recognition of a constructive trust.[231]

6-59. It seems likely that both the personal[232] and proprietary remedies will continue to be informed by equitable considerations, and the latter, in particular, will be developed in accordance with rules from English chancery jurisprudence. Furthermore, if, as suggested above, the imposition of fiduciary obligations arises *ex lege*, albeit taking into account any contractual or other contextual factors, then the determinative criteria for fiduciary status and recognition of someone as a fiduciary, and the attendant proprietary protection afforded to their constituent, remain within the control of the court. Ultimately the matter seems to boil down to the court's discretion, particularly at the peripheries, to recognise someone as a fiduciary. If, as seems to be the law currently,[233] the constructive trust imposed on a fiduciary for breach of fiduciary duty[234] is 'institutional' and not 'remedial', then the recognition of that person as a fiduciary is the important element of the court's decision. If she is deemed a fiduciary, then any profit she makes in breach of her duties will automatically fall into a constructive trust. On the other hand, if the constructive trust in this situation is remedial it will be possible for a court to recognise someone as a fiduciary, but also to retain discretion as to whether a constructive trust should be imposed.

[231] See chapter 5, at paras 5-82 ff.

[232] A recent decision has confirmed that damages are an available remedy for breach of a fiduciary duty, in addition to the better known remedy of accounting, despite some contrary authority: *Park's of Hamilton (Holdings) Ltd v Campbell* [2014] CSIH 36, 2014 SC 726 at para 44 *per* Lord Drummond Young.

[233] See chapter 5, paras 5-86 ff.

[234] As distinguished from the third party recipient constructive trust.

7 Conclusion

7-01. It is hoped that this book has achieved its objective of shining some light upon the historical development of the different understandings of equity in Scotland, and how those understandings have influenced certain areas of the law. The nature of these different forms of equity and the different formative influences make it difficult to assert a simple single conclusion. This is acceptable because, as laudable a goal as simplicity is, it is not always possible and the sometimes untidy reality of the law is that results can be disparate and disorderly to the point of vexation. What this book demonstrates is that the historical development of equitable reasoning in Scots law explains many of the features of the current doctrinal approach in certain areas of law. But those, and other, areas of law do not always utilise equitable reasoning and thinking in the same way, and there is scope for much more research.

7-02. The overarching theme of this book is the analysis of how different notions of equity developed historically and how they might continue to inform the development of the law. Utilising a historical methodology should have demonstrated that equity has been a central component of Scottish private law since at least the days of the institutional writers. That distinctively Scottish equity understood by the institutional writers – which they considered to be the very essence of the law itself – remains central to understanding the structure and substance of many areas of Scottish private law today. Such natural lawyers' equity as infuses the law both latently and overtly is not, however, the only understanding of equity that has contributed to the historical development and formation of Scots law. The distinctive bi-jurisdictional equity of English law has influenced the development of Scottish private law in various respects. Despite some flirtations with such a bi-jurisdictional approach, the law in Scotland has never known an institutionally separate equitable jurisdiction. Nevertheless, the existence of an accepted Scottish variety of equity acted, at least in part, as a conduit through which English chancery jurisprudence could flow into private law. No doubt other elements of English law's influence upon Scottish law generally have also been important, but the shared terminology of equity has specifically facilitated such cross-fertilisation. Ineluctably, however, with such influence came terminologies, rules and principles. Concepts and legal institutions were adopted as freestanding alien imports or were varied and grafted onto the indigenous law. Borrowing law from another system is no disgrace or inherently objectionable – indeed borrowing from *both* the civilian and Common Law traditions is normally considered a feature and strength of Scots law. This book shows that opinions about borrowing

English chancery rules have been mixed, but it is clear that the borrowing process has occurred and continues to occur, and that in many, though not all, cases the process is useful. These different processes and understandings of equity mean that the picture is complicated and diverse.

7-03. Consequently, this book seeks to show that there are differing conceptions of equity that can be found at work within Scottish private law. There are areas of private law that are said to have an equitable heritage, with the practical result that they can be seen to be open to greater judicial control and are subject to the discretionary powers of the court. A prime example of such an area of law is the law of unjustified enrichment: the doctrine and taxonomical organisation were associated with equitable considerations as the law developed historically. This equitable association continues in the modern law, albeit it remains somewhat unclear precisely how that equitable dimension will ultimately be defined.

7-04. In addition to enrichment law's historical development along traditional 'native' equitable lines, English chancery inspired jurisprudence has influenced Scottish private law in different ways. The chapter analysing the trust demonstrates how conceptualisations akin to the duality of English equity influences waxed and waned throughout the development of the institution. Until the eighteenth century such influence appears to have been minimal, but thereafter in the nineteenth and early twentieth centuries an increased use of English authorities suffused academic writings and judicial decisions. Arguably this influence introduced mechanisms – notably dual ownership concepts – that proved to be unstable in the context of Scottish private law, and prompted a critical reaction that ultimately led to efforts to purge such influences. Here the influence of English equity jurisprudence is demonstrable in the historical account of trust law's development, though modern authority appears to be moving away from that heritage in favour of the patrimonial theory developed by academics using the law of persons.

7-05. On the other hand, there is arguably a different understanding of the role of equity in relation to the constructive trust and fiduciary liability, at least so far as the use of English authority and concepts is concerned. The concept of fiduciary duties was developed early in Scottish law and has now come to be very closely attuned to English chancery jurisprudence, and the constructive trust seems to have been substantially imported from English chancery jurisprudence. The precise conceptual or normative bases of both areas of law are somewhat obscure. There are questions about the precise nature of the constructive trusts, such as whether they are 'proper' trusts and whether they are remedial or institutional. Fiduciary duties are similarly under-theorised, though it is frequently asserted that the rules pertaining to fiduciary liability in Scotland are the same as those of England. And because the crux of fiduciary status is often the remedial implication associated with it the chosen approach to constructive trusts is important. What is certain is that English chancery authorities are used heavily in reported decisions on both areas of law.

7-06. Finally, there may be a latent comparative law conclusion that highlights the way Scottish law conceptualises its equitable heritage. The multitude of understandings of equity and equitable conceptions which subsist in Scots law can appear chaotic, but they also demonstrate that Scots law can successfully assimilate English chancery jurisprudence so long as the process is careful and considered. That process is one of harmonisation of laws between two different legal systems, which, in turn, like any comparative harmonisation of law, can be expected to be complex, challenging, and requiring some doctrinal compromise or creativity but is ultimately worthwhile insofar as the best rules of the two systems can be developed and followed. If a conceptualisation of equity allows such an approach it can be characterised as a beneficial and important dimension of the vigour and health of the legal system as a whole .



Index

Writers are indexed if they are mentioned in the body of the text. Location references are to paragraph numbers, with 'n' denoting a footnote to the paragraph.

F