The Institutes of the Law of Scotland

OLD STUDIES IN SCOTS LAW

Volumes in the series

1. George Joseph Bell, *Principles of the Law of Scotland* (4th edn, 1839) [2010]
2. George Watson, *Bell's Dictionary and Digest of the Law of Scotland* (7th edn, 1890) [2012]
3. William Forbes, *The Institutes of the Law of Scotland* (1722 and 1730) [2012]

OLD STUDIES IN SCOTS LAW

VOLUME 3

The Institutes of the Law of Scotland

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EDINBURGH LEGAL EDUCATION TRUST
2012

Published by
EDINBURGH LEGAL EDUCATION TRUST
School of Law
University of Edinburgh
Old College
South Bridge
Edinburgh EH8 9YL
http://www.law.ed.ac.uk/centreforprivatelaw/oldstudiesinscotslaw.aspx

First published 2012

ISBN 978-0-9556332-4-9

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

Manufactured in Great Britain by MPG Books, Bodmin

INTRODUCTION

History and significance

William Forbes' *The Institutes of the Law of Scotland* began to be published when its first volume, dealing principally with "Private Law", appeared in 1722. Eight years later a second volume, on "Criminal Law" and divided into two parts, came out. Both are included in this single-volume reprint. For reasons to be explained further below, it is possible that a third volume may have been contemplated, which would have dealt with the non-criminal remainder of "Public Law"; but if that was the plan, it was never carried through. By 1730, Forbes was already in his early 60s, and although he did not die until 27 October 1745, he seems to have given up his teaching duties as Professor of Law in Glasgow University before the end of the 1730s. He carried out preparatory work for new editions of the existing volumes before his death, but these plans too never materialised.[1] Instead, the *Institutes* slipped into obscurity, soon overtaken by the far larger institutional works prepared, first, by the Court of Session judge Andrew McDouall, Lord Bankton, published in 1751–53;[2] and then, second, by John Erskine, Professor of Scots Law at Edinburgh University from 1737 to 1765.[3] *Erskine's Institute* was published posthumously, in 1773; but during his lifetime he had produced a work more on the scale of Forbes' *Institutes*, the *Principles of the Law of Scotland*. The first edition was published in 1754 and was an immediate success, displacing Sir George Mackenzie's *Institutions* as the main teaching text of Scots law,[4] going into further editions in 1757 and 1764, and not finally expiring as the main teaching text of Scots law until it reached a 21st and last edition in 1911.

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[1] For full details of Forbes' career, see John W Cairns, "The origins of the Glasgow Law School: the Professors of Civil Law, 1714–61", in Peter Birks (ed), *The Life of the Law: Proceedings of the Tenth British Legal History Conference Oxford 1991* (1993) 151 at 155–83. A useful summary is provided by Michael P Clancy, "Forbes, William (1668x71–1745)", *Oxford Dictionary of National Biography* (2004).

[2] Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights* (1751–53; reprinted by the Stair Society, vols 41–43, 1993–95).

[3] John Erskine, *An Institute of the Law of Scotland* (1773). The 1773 edition is to be reprinted by the Edinburgh Legal Education Trust in 2013 as part of the present series.

[4] The 8th and last edition of Mackenzie's *Institutions of the Law of Scotland* (first published in 1684) appeared in 1758.

Why then should we be interested in Forbes' *Institutes*, when claims for the book's influence on legal development in Scotland must inevitably be rather muted, and it is very unlikely that it will ever be cited as a still-living authority today? There seem to be two major reasons for looking at it. The first is that the book goes some way to filling what would otherwise be a rather large temporal gap in our knowledge of the law between the writings of Stair and Mackenzie towards the end of the seventeenth century and those of Bankton and Erskine in the middle of the eighteenth. The second reason is that Forbes' *Institutes* may make rather more accessible to the reader the content of at least some of his much larger and wholly unpublished work, *A Great Body of the Law of Scotland*. Even although this gigantic seven-volume manuscript must provide the fullest account available of Scots law in the early eighteenth century, it has lain almost unread in Glasgow University Library since 1786.[5] Thanks to the initiative of Dr Ross Anderson of the University's Law School, however, it has recently been digitised by the Library's Special Collections department and made available online in a way that greatly facilitates searching in it, with a comprehensive and hyperlinked contents list.[6] Forbes' *Institutes* gives us, at least in part, a convenient way of seeing in advance and in brief what it is that we are likely to find when we turn to this enormous and as yet almost untapped resource.

Public law, private law, and the Union

In the preface to the first volume of the *Institutes* Forbes explained that the scheme of the *Great Body* was to treat its subject in two parts – private and public law. He continued:[7]

> Out of both these Volumes, when finished, I propounded to draw a comprehensive *Institute of the Law of* Scotland, consisting also of Two Volumes, in the same Order and Method with that of the *Great Body*, for the Use of such as shall Study Law under my Care and Direction in the University of *Glasgow*.

Forbes went on to say that the treatment of private law in the *Great Body* was now "in some Measure finished", and so "The first Volume of the *Relative Institute* doth now come forth to publick View".[8] This, he indicated, would be followed by a second volume, i.e. the one on public law, "in its due time";[9] presumably upon completion of the relevant part of the *Great Body*. Forbes

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[5] D M Walker, *The Scottish Jurists* (1985) 187.

[6] See the Glasgow University Library Special Collections website at http://www.forbes.gla.ac.uk/contents/.

[7] Forbes, *The Institutes of the Law of Scotland* (1722 and 1730) 10. All page references are to the new pagination introduced for the present reprint.

[8] Forbes, *Institutes* (n 7) 10–11.

[9] Forbes, *Institutes* (n 7) 11.

did not provide a contents list for his first volume (although one is provided in this reprint), but a manual comparison with the *Great Body* contents list on the Glasgow University website confirms that the order of the former's treatment of private law does indeed follow the latter's, except where some topic which Forbes probably thought unnecessary for students is omitted in the *Institutes*.[10]

The preface to Forbes' first volume shows that the original project for the *Institutes* was for an even wider coverage than was ultimately achieved when the second volume on criminal law appeared in 1730. The preface to that volume makes no reference to the *Great Body*, but another manual comparison of the contents shows once again the smaller work following the larger in its order of treatment. The *Great Body* goes on after its discussion of criminal law to a third section of some 200 pages, headed "Comprehending the Publick Law", and divided into two parts: the first dealing with "matters relating to the Government, and general policy of the State, and the order thereof", the second with "the administration of justice". The former deals with the Crown and the royal family, Parliament, the Convention of Estates, the Privy Council, the Officers of State and taxation, before turning to four chapters "on commerce" followed by thirteen chapters on "policy concerning things which serve for publick uses". The latter includes a range of topics from fishing to bridges and ferries to, ultimately, the sumptuary laws. It may well be that a useful approach to the production of a full edition of the *Great Body* would be to start with this relatively short and manageable public law section, as the part of the work to which Forbes' *Institutes* provides us with no introductory guidance.

Forbes seems to have been the first Scots legal writer to utilise the Roman law distinction between public and private law. In his "Preliminary Dissertation" to the first volume of the *Institutes* he distinguishes the two as follows:[11]

> The private Law is that, which consists of Matters respecting mainly the Interests and Differences of particular Persons among themselves. The publick Law is that, which primarily regards the Constitution of Church and State, in their Ecclesiastical and Civil Polities, the Punishment of Criminals, and all Disturbers of the publick Tranquillity.

The distinction thus conventionally made is barely discussed further in either the *Institutes* or the *Great Body*, and Forbes' understanding of its

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[10] For example, nothing in the *Institutes* parallels Part 1, Book 3 of the *Great Body* (on precedency and communities or corporations) or Part 2, Book 3, Chapter 3, Title 2 (on "whither pursuits upon forein [*sic*] Writs or Securities be maintained or aided by Exceptions qualified and to be tried and proved according to our Law, or according to the custom and Laws of the place where such Writs or Securities were made").

[11] Forbes, *Institutes* 34–35.

significance, or his reasons for introducing it for the first time as the basis of a general account of Scots law, will have to be teased out of his more specific writings and, perhaps even more important, the context of his own times.[12] It is however worth noting his comment in the preface to the first volume of the *Institutes* that private law "mainly respects private Property".[13]

Forbes had of course lived through the negotiations running up to, and the aftermath of, the 1707 Anglo-Scottish Union. It is in Article XVIII of the Union Agreement of 1707 that the public/private distinction in law begins to manifest itself significantly for the first time in a Scottish setting, with the idea that "publick right" is henceforth malleable to make it the same throughout the new United Kingdom, whereas "private right" is to be changed only where that is for the "evident utility of the subjects within Scotland".[14] There was also a vital contrast here with the traditional Scottish position in discussions of union with England where, since the thirteenth century, the preservation of Scots law as it stood had always been a non-negotiable point on the Scottish side.[15] Now change to Scots law was envisaged, with public law apparently more susceptible to alteration than private law; indeed, the Article itself authorised immediate Anglicisation in that "the Laws concerning Regulation of Trade, Customs, and … Excises … [were to] be the same in Scotland, from and after the Union as in England". All of these, as Forbes' account of the matter in the *Great Body* confirms, would have been seen at the time as matters of public right or law.

As John Cairns and John Ford independently and more or less simultaneously pointed out at the time of the Union's tercentenary, the concepts of public and private right deployed in Article XVIII emerged from the Scottish side of the negotiation process, and were clearly drawn from the Roman law distinction between public and private law.[16] The concept of evident utility likewise had a Roman law root. Professor Cairns summarises the evidence thus:[17]

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[12] Cairns (n 1) 177 notes that a strict division between public and private law could have been derived from the French jurist Domat, "although it should be stressed that Domat's jurisprudence and legal classification have not recognisably influenced those of Forbes".

[13] Forbes, *Institutes* 9.

[14] The Union Agreement is here used as a verbal formula to embrace the Treaty of Union and the Acts of Union by which each Parliament involved gave effect to the Treaty. The text of the Scottish Act of Parliament may be consulted in Records of the Parliaments of Scotland, 1706/10/257 (accessible at http://www.rps.ac.uk/).

[15] H L MacQueen, "*Regiam Majestatem*, Scots law and national identity" (1995) 74 Scottish Historical Review 1 at 4–5, 11; J D Ford, "Four models of Union" 2011 Juridical Review 45 at 46–51.

[16] J W Cairns, "The origins of the Edinburgh Law School: the Union of 1707 and the Regius Chair" (2007) 11 Edinburgh Law Review 300 at 315–16; J D Ford, "The legal provisions in the Acts of Union" (2007) 66 Cambridge Law Journal 106 at 117.

[17] Cairns (n 16) 315–16.

> Near the beginning of the *Digest*, an extract from Ulpian's *Institutes* (D 1.1.1.2) states: "There are two branches of legal study: public and private law." The standard modern translation continues: "Public law [*publicum ius*] is that which respects the establishment of the Roman commonwealth, private [*privatum ius*] that which respects individuals' interests, some matters being of public others of private interest." The Latin "*publicum ius*" and "*privatum ius*" could as readily be translated "public right" and "private right", as in the Article of Union. "Interest" and "interests" are translations of the Latin "*utilitatis*" and "*utilia*". … In the slightly later title of the *Digest* "On Enactments by Emperors", the following passage occurs, again taken from Ulpian, this time from his work on *Fideicommissa* (D 1.4.2): "In determining matters anew, there ought to be some clear evident utility [*evidens utilitas*], so as to justify departing from a rule of law which has seemed fair from time immemorial." Thus the text (the standard translation is adapted slightly) was to the effect that the statutory reforms should only be for the evident utility of the citizenry.

That the distinction was drawn from Roman law did not mean that its effects were completely clear to contemporaries. As Dr Ford shows, it was disputed amongst the Scots whether or not criminal law actually fell within the scope of private rather than public law.[18] Certainly Forbes saw criminal law as public only so far as disturbance of "public tranquillity" and the punishment of criminal acts were matters for the state. But crime might also give rise to civil claims between victim and perpetrator, and in this way fall to private law. The doubt about which side of the divide criminal law fell on may not have been altogether removed by the passage of the Treason Act at Westminster in 1708, in effect making the previous English law also the law in Scotland, since this may have been necessary primarily because the Union had created a single Crown for the newly united kingdom, i.e. the Act related to public law in a necessarily criminal aspect of the subject. Likewise the passage of a Copyright Act in 1709–10 to apply throughout the United Kingdom (the Statute of Anne) may well have been seen as an aspect of public rather than private law, since the rights concerned were similar to patents, that is, essentially grants from the Crown which, even although made to individuals, were primarily for public rather than private benefit.[19]

The effect of the public/private distinction drawn in the 1707 Union was to make public right much more a matter for the United Kingdom as a whole, while private right, or private law, remained as it had been before the Union, and although changeable by Parliament, only against the yardstick of

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[18] Ford (n 16) 108.

[19] See H L MacQueen, "Intellectual property and the common law in Scotland c 1700–c 1850", in C W Ng et al, *The Common Law of Intellectual Property: Essays in Honour of Professor David Vaver* (2010) 21 at 22–23. In the *Great Body*, Forbes describes the royal grant of monopolies in inventions as an aspect of the king's prerogative to go beyond the common law, which was otherwise against monopolies: see vol 3, 15–16 and 127. I have not traced any reference by Forbes to literary property or the Statute of Anne.

"evident utility". The contrast here with public right certainly meant that the law of private rights was not simply to be made the same on each side of the former border. When Article XVIII was debated in the Scottish Parliament in October 1706, "evident utility" seems to have been understood as making change to private rights unlikely or difficult to achieve, even although the text of the Article left unclear how the hands of the new United Kingdom Parliament could be kept tied should there be a desire to test the scope of the concept in any way.[20] Thus, private law, whatever it might be, was from the outset associated with continuing Scottish distinctiveness inside the Union. The perception later articulated by Forbes and quoted above, that private law's chief concern was with private property rights, was probably important too, especially to the land-owning classes. Professor Cairns has lucidly explained how Article XVIII linked to the creation of a Chair of Public Law and the Law of Nature and Nations at Edinburgh University in 1707, and to the idea of *ius publicum* which underlay that project, connected to natural law thought and the study of the conduct of government on grounds of utility and public interest. This too could be tied in with the "evident utility" which alone would allow change in private law.[21]

The Union was an important reason – or so Forbes said – for his proposing the *Great Body* project to the Faculty of Advocates in 1708. In it he wanted to show the similarities and differences between the laws of Scotland, on the one hand, and the Civil, Feudal and English laws on the other. He wrote:[22]

> Since the happy union of the two kingdoms into one monarchy, such a complete body of the law of Scotland, as is proposed, may now be justly reckoned among the Desiderata, or things that are wanting, towards settling and maintaining a fair understanding and correspondence betwixt the judicatures in north and south Britain, and for facilitating the dispatch of justice; in which Judges and persons of all ranks will find their account.

The Faculty responded favourably to the proposal, commenting that the work "would be of universal use, and very satisfying to all British subjects in general and to members of parliament, statesmen, judges and lawyers in particular".[23] Its confidence may have been based on Forbes' prior demonstration of his ability to adapt to the new British context with a study published in 1708 under the title *The Duty and Powers of Justices of Peace, in this part of Great-Britain, called Scotland.*

Despite all the pious references to Britain and Britishness in the interaction between Forbes and the Faculty, however, it is not unlikely

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[20] Cairns (n 16) 314.

[21] Cairns (n 16) 317–26.

[22] J M Pinkerton (ed), *Faculty of Advocates' Minute Book 1661–1712* (Stair Society vol 29, 1976) 277.

[23] Pinkerton (n 22) 276.

that his proposal was actually seen as a useful way of protecting Scots law against insidious change from without, whether from the Westminster Parliament or the judicial House of Lords which was already beginning to assume the appellate jurisdiction over the Court of Session about which the Union Agreement had been so carefully silent.[24] The work on private law was particularly important in this regard, since although formally it was the least exposed to change by the Union, there was little or nothing to protect it beyond the words about "evident utility" in the Union Agreement. It is perhaps no coincidence that Forbes began his writing with private rather than public law, and that he did not wait until he had completed the whole of the *Great Body* before publishing the private law volume of his *Institutes*. Just possibly criminal law came next in his efforts because it too was seen as distinctively Scottish and in need of public statement to fend off any possible uninformed interference from outside the system.

The distinction between private and public law continued to be used through the eighteenth century, most probably more in echo of the Union Agreement than of any significant substantive content or influence from its ultimate Roman law source. Bankton referred directly to the Treaty of Union in dividing the law between private and public right; for him too criminal law was part of public law save in so far as a crime might also found an action of damages by the aggrieved party.[25] Still later on in the eighteenth century Erskine saw "trade and manufactures" along with criminal law and "police" as falling in under the banner of public law, "which hath more immediately in view the public weal, and the preservation and good order of society"; whereas private law was "that which is chiefly intended for ascertaining the civil rights of individuals".[26] Again the essentially domestic character of private law as the law operating between persons in Scotland and governing their property there comes through clearly.

But by the beginning of the nineteenth century the public/private law distinction had dropped out of use as a way of organising general accounts of Scots law: it is not found in the lectures of Baron David Hume, Erskine's successor in the Chair of Scots Law at Edinburgh University between 1786 and 1822,[27] or in the *Principles*[28] or *Commentaries*[29] of

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[24] Appeals from the Court of Session to the British Parliament were anticipated in 1707 and formally began in February 1708. See A J MacLean, "The 1707 Union: Scots law and the House of Lords" (1983) 3 Journal of Legal History 50 at 50–51.

[25] Bankton, *Institute* (n 2) I.1.54–58.

[26] Erskine, *Institute* (n 3) I.1.29.

[27] G C H Paton (ed), *Baron David Hume's Lectures 1786–1822* (Stair Society vols 5, 13, 15, 17–19, 1939–58).

[28] George Joseph Bell, *Principles of the Law of Scotland* (4th edn 1839 (the last by the author); reprinted by the Edinburgh Legal Education Trust as vol 1 of the present series, 2010).

[29] George Joseph Bell, *Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence* (5th edn 1826 (the last by the author)).

Hume's immediate successor, George Joseph Bell, who held the Chair until 1843 and focused most on what he called mercantile jurisprudence.[30] Only in the second half of the twentieth century was the distinction revived, with T B Smith dividing his *Short Commentary on the Law of Scotland* (1962) into a treatment of, first, public law, followed by a much lengthier one of private law; while Forbes' successor, Professor David M Walker, who held the Regius Chair of Law at Glasgow from 1958 to 1990,[31] first published his multi-volume *Principles of Scottish Private Law* in 1970, the fourth and final edition appearing in 1988.

Structure

Forbes identifies the "objects" of private law as persons, their estates and how these are acquired, extinguished, burdened, transmitted and passed on to others, and, finally, the determination of civil disputes on these matters, i.e. in essence, the Roman institutional framework of persons, things and actions. The whole of his volume on private law (and also the equivalent volume of the *Great Body*) is structured around this framework. The institutional scheme of law was set out most influentially in Justinian's *Institutes* and had already been followed generally, although not uncritically, by Stair and Mackenzie. After Forbes it would also be deployed by Bankton, Erskine and, finally, by Baron Hume in his lectures.[32] It was essentially a teaching scheme, and throughout Europe the very word "Institute" carried the meaning of a teaching text. Forbes thus placed himself firmly in this tradition when he wrote in his preface to the private law volume: "I found my self concern'd, in the discharge of my Academical Function, to Reduce and Range the Fundamentals of our Law in such Order, as I conceiv'd most Natural, and adapted to Teaching."[33]

The volume on criminal law is divided into two parts: one on the law defining crimes and their punishments, the other on the administration of criminal justice. In this Forbes essentially follows Mackenzie's *Matters Criminal*.[34] Each of Forbes' parts is further sub-divided. The part on the administration of criminal justice is straightforwardly in two books; as Forbes puts it, one on the criminal courts, and the other on criminal procedure.[35]

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[30] On Bell see now K G C Reid, "From text-book to book of authority: the *Principles* of George Joseph Bell" (2011) 15 Edinburgh Law Review 6.

[31] Walker also held the Glasgow Chair of Jurisprudence from 1954 to 1958.

[32] See generally J W Cairns, "Institutional writings in Scotland reconsidered" (1983) 4 Journal of Legal History 76.

[33] Forbes, *Institutes* 12.

[34] A new edition of *Matters Criminal* by Olivia Robinson was published in 2012 (Stair Society vol 59).

[35] Forbes, *Institutes* 516.

Again the approach is similar to Mackenzie, whether or not he provided an actual model. The arrangement of the part on crimes, offences and punishments is more elaborate. Forbes begins with what may be described as a general section, discussing the nature of a crime, the persons who may be involved in a crime, punishment, the extinction of criminal liability, and the categories of crime. Next he turns to specific crimes, grouped according to the categories identified in the general section. The categories are (i) crimes against God; (ii) crimes against royal authority, government, and the kingdom's peace and welfare; (iii) crimes "that directly touch private Persons, and are committed either against their Bodies, or against their Fame and Honour, or against their Estates and Possessions";[36] and (iv) a miscellany of crimes relating to offices or law-suits, or the execution of law and justice. This again has some similarities to the way in which Mackenzie structured *Matters Criminal*; but Forbes is more systematic overall, and his treatment seems to hang together rather better.[37] Forbes also claims in his preface to the criminal law volume to have surveyed the decisions of the Court of Justiciary "and to excerp what I found to the Purpose".[38] But in fact he seems to make much less reference to specific cases than Mackenzie, with his chief sources being the Acts of Parliament, some references to *Regiam Majestatem*, and occasional citations of Civilian sources. His method is essentially didactic: the law is stated rather than discussed.

In some respects the *Institutes* also lets us see Forbes the teacher. When he began his lecturing in Glasgow in 1714, he used Mackenzie's *Institutions* as his basic text for private law. In his 1722 preface Forbes remarks on how Mackenzie's book "hath hitherto been useful to initiate Persons in the Study of our Law".[39] But he thinks it could be improved upon because the law has changed, some points are skimmed over (especially in public law), and Mackenzie might be wrong on some points. In his 1730 preface Forbes again remarks on the debt owed by law students to Mackenzie's *Matters Criminal*, but notes a need for a new work, "if for no other Reason, at least upon the Account of the great Additions and Alterations in our Law".[40] But the reality may have been more that Forbes published his *Institutes* to promote interest in his hitherto thinly attended Glasgow Scots law classes. If so, his ambition went unrealised.[41]

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[36] Forbes, *Institutes* 514.

[37] On the structure of *Matters Criminal*, see O Robinson, "Law, morality and Sir George Mackenzie", in H L MacQueen (ed), *Miscellany VI* (Stair Society vol 54, 2009) 11; also Cairns (n 1) 177.

[38] Forbes, *Institutes* 512.

[39] Forbes, *Institutes* 11.

[40] Forbes, *Institutes* 11. Forbes also refers to Seton of Pitmedden's *Mutilation and Demembration*, first published in 1699. See further D J Cusine, "Sir Alexander Seton of Pitmedden", in MacQueen (ed), *Miscellany VI* (n 37) 29.

[41] See further Cairns (n 1) 175, 179.

Content

How far can we use Forbes' work to help us fill in the gaps in our knowledge of Scots law between the death of Stair in 1695 and the appearance of Bankton's *Institute* in 1751–53? I have taken a test bore through the *Institutes* into the *Great Body* on three topics where (with David Sellar) I have looked into the doctrinal history of Scots law in some depth – unjustified enrichment, the *ius quaesitum tertio* in contract law, and negligence in delict – to see what we might have added had we looked further into Forbes' contribution.[42] The answer, I fear, is not much. But the investigation served to confirm the considerable originality of Stair's treatment of each of these subjects. The surprise is the limited extent to which Forbes, purportedly a great admirer of Stair, made any use of his supposed hero's insights on these subjects.[43]

On each of the three private law topics mentioned, Stair argued for general principles: in unjustified enrichment that one who gained at the expense of another was bound to restore that gain; in contract that obligation flowed from the agreement or will of the parties, so that a third person upon whom they intended to confer a benefit thereby had an irrevocable right to it; and in delict that one who harmed another through fault was liable to make good that harm. These flowed from principles of natural law, and went beyond the much narrower categories and forms previously recognised in Scots common law and, indeed, in Roman law.[44]

With Forbes we seem thrown back to an earlier period of legal development. On unjustified enrichment (admittedly a heading Stair did not use), Forbes writes in Romanist fashion "of obligations arising from Quasi-contracts" (which too was a heading shunned by Stair).[45] These are "created by the presum'd Consent of two, or more Persons, arising from some Fact or Affair, without any previous Agreement or express Consent". These "Quasi-Contracts are many, according to the great Variety of humane Deeds and

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[42] See our "Unjust enrichment in Scots law", in E J H Schrage (ed), *Unjust Enrichment: The Comparative History of the Law of Restitution* (Comparative Studies in Continental and Anglo-American Legal History No 15, 1995) 289; "Negligence in Scots law", in E J H Schrage (ed), *Negligence: The Comparative Legal History of Torts* (Comparative Studies in Continental and Anglo-American Legal History No 22, 2001) 273 (= K Reid and R Zimmermann (eds) , *A History of Private Law in Scotland* (2000) vol 2, 517); and "Scots law: ius quaesitum tertio, promise and irrevocability", in E J H Schrage (ed), *Ius Quaesitum Tertio* (Comparative Studies in Continental and Anglo-American Legal History No 26, 2008) 357.

[43] For a suggestion that Forbes' praise of Stair was not entirely disinterested, see H L MacQueen, "Stair's later reputation as a jurist: the contribution of William Forbes", in W M Gordon (ed), *Miscellany III* (Stair Society vol 39, 1992) 173.

[44] See generally James Dalrymple, Viscount Stair, *Institutions of the Law of Scotland* (2nd edn 1693 (the last by the author); 6th edn by D M Walker, 1981) I, 7–10.

[45] See generally for this paragraph *Institutes* 211, and *Great Body* 3.4.1.2; noting also P Birks and G McLeod, "The implied contract theory of quasi-contract: civilian opinion current in the century before Blackstone" (1986) 4 Oxford Journal of Legal Studies 46.

Business", and Forbes proceeds to list them, with no very evident order or connection between them. He begins with the Roman *condictiones – causa data causa non secuta*, *sine causa* and *indebite solutum*. *Negotiorum gestio*, average, relief, the brieve of division, and the liabilities of ship-masters, ship-owners, inn- and stable-keepers are all also briefly mentioned before Forbes concludes with the liability of masters for the authorised deeds of their factors. The contrast with Stair's analysis of restitution and recompense, imperfect though that may be, is stark.

It is scarcely possible to draw even such a limited contrast between the two authors' treatments of *ius quaesitum tertio* and negligence, since Forbes mentions neither as independent grounds of liability and so ignores Stair's discussions completely in both the *Institutes* and the *Great Body*. His treatment of contract in each work is almost entirely Roman in structure, making it virtually impossible for him to escape the straitjacket of privity of contract. A contract "is an Engagement betwixt two or more Persons, effectual to force Performance by an Action".[46] Contracts are either real ("perfected by the Intervention of Things given or done"), or verbal, or written, or "perfected by sole Consent".[47] Real contracts are loans, deposit, exchange or excambion, and insurance.[48] Under verbal contracts Forbes treats promises as a form of contract binding without agreement or acceptance by the promisee.[49] This might have been for him, as it certainly was for Stair, the means to consider the possibility of contracting parties creating rights for a third party; but the opportunity was missed, or at any rate not taken. The heading of written contracts gives Forbes the opportunity to expound at some length the legal requirements and effects of writing in obligations in Scotland.[50] The contracts perfected by sole consent are the Roman group: sale, letting and hiring, partnership, and mandate or commission.[51] Forbes then introduces a non-Roman mixed form, the contract "perfect, partly by Writ, partly by Consent". The bill of exchange, on which Forbes had already published a treatise in 1703 with a second edition in 1718, is, however, his only example.[52]

Delict is treated under the heading "Of Obligations arising from Crimes and Offences", and Forbes' brief introductory discussion shows why his contemporaries might have had doubts as to whether criminal law was public or private law.[53] While a criminal offender was liable to public punishment,

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[46] *Institutes* 183. See also *Great Body* 3.4.1.1.
[47] *Institutes* 184; *Great Body* 3.4.1.1 (at p 788).
[48] *Institutes* 185; *Great Body* 3.4.1.1.1.
[49] *Institutes* 191–92; *Great Body* 3.4.1.1.2.
[50] *Institutes* 192–97; *Great Body* 3.4.1.1.3.
[51] *Institutes* 197–207; *Great Body* 3.4.1.1.4.
[52] *Institutes* 207–11; *Great Body* 3.4.1.1.5. See also William Forbes, *A Methodical Treatise concerning Bills of Exchange* (1st edn, 1703; 2nd edn, 1718).
[53] See generally for this paragraph *Institutes* 215–28; *Great Body* 3.4.1.3.

he was also bound "to repair the Loss and Damage of private Persons he hath injured, which he may be compelled to do by a civil Action". The subject-matter of the title was therefore the civil obligation of damages to the injured party, "as the Obligation called Assythment". Assythment dealt with damage caused by killing, maiming or laming; in the case of slaughter, the right of action fell to the wife or children or nearest kindred of the person slain. Also considered in the title is a list of specific wrongs: breach of arrestment, deforcement, breach of lawburrows, ejection, intrusion, molestation, force, fraud, double alienations and usury. There is no mention at all of Stair's general action for damages.

Forbes then was no Stair. But in his own times he was a well-respected figure who held a prominent position in the Scottish legal system, not merely as the first Glasgow University Professor of Law but also as a prolific author and reporter of the decisions of the Court of Session from well before the Union. The chief value of his work is most probably in its representation of orthodoxy and conventional understandings of and approaches to law in Scotland at the time of Union and in the difficult years that followed. It was perhaps this orthodoxy and uncontroversial approach that commended him to the Faculty of Advocates in 1708 as a man most likely to erect a solid edifice – a great body, a *corpus iuris* – of Scots law that could withstand any challenge that might emerge in the uncertain times following the Union. Stair's philosophical system of law, dependent on the dictate of reason, was perhaps more exposed to the possibility of change than the more positivistic writings of an author who saw law as the command of a sovereign power.[54] "A Civil Law," wrote Forbes, "is, what the Sovereign Power in every Nation, whether Monarchical, Aristocratical, or Democratical, hath made for their own peculiar Conveniency, to govern the People united by the Ties of Society, under such Authority."[55] There were, he pointed out, no authorised collections anywhere of the laws of nature and nations that were the dictate of right reason, whereas there were as many collections of civil laws as there were nations.[56] Thus dependence on right reason as the basis of the law, rather than sovereignty, was too risky if property rights and good order were to be maintained. Scots law was a law resting on deep foundations of sovereignty and authority as well as natural law and reason; it had not been given up at the Union, especially in its private branch; and Forbes intended his work to be its definitive statement at a time when, to some at least, it appeared to be under significant threat.

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[54] Stair, *Institutions* I.1.1; Forbes, *Institutes* 20.
[55] *Institutes* 21.
[56] *Institutes* 22.

NOTE ON METHOD OF CITATION

In this reprint the two volumes of Forbes' *Institutes* are reproduced as a single volume and the whole has been repaginated. The index combines the original indexes for the separate volumes and adds the new pagination.

Given the complexity of the original pagination and hierarchy of headings (discussed below), it is suggested that the work be cited by reference to the new pagination: so for example Forbes, *Institutes* 423.

The original pagination, still to be seen in the headers in this reprint, involved three sets of numbering, two for volume I and one for volume II. In addition, the preliminary pages to each volume had their own (Roman) numbering. Volume I proper, on private law, ran from pages 1 to 227 (misprinted as 127) before restarting on page 1 and running to page 260 (500 in this edition). Volume II, on criminal law, ran from pages 1 (now 521) to 373 (now 893).

Forbes divided each volume into parts – four for volume I and two for volume II – and there is also a "Preliminary Dissertation" at the start of volume I. Parts were divided into books, books into titles, and titles, in many cases, into sections divided in turn into numbered paragraphs.[1] Complex as this is, there is the further complexity of subparagraphs, indicated by square brackets, and of unnumbered subheadings which had the effect of causing paragraph numbering to restart. One result is to make it impossible to cite certain pages unambiguously by use of the numbered divisions.[2]

The text has occasional inconsistencies of spelling and capitalisation which are faithfully recorded in the table of contents which follows.

[1] In Part III of volume I, Chapter I has two title IIs, the second presumably a misprint for title III.

[2] Examples would be 288 or 397.