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# Before Bell: The Roots of Error in the Scots Law of Contract

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## A. INTRODUCTION

The effect of error on contracts is a favourite topic in many legal systems. Scotland is no exception,<sup>1</sup> the literature providing extensive discussion of George Joseph Bell's analysis<sup>2</sup> and of the case law since. The period before Bell, however, has received less attention,<sup>3</sup> and advantage has yet to be taken of recent research which corrects the tendency to view European legal development as a monolithic process.<sup>4</sup>

Examination of the earlier materials in light of this research reveals an attitude to error which is quite different from that in modern European systems. While the Scottish approach was rooted in the Roman law texts and the *ius commune* tradition, it does not bear the marks of scholastic and natural law influences which are central to the treatment of error in Continental systems today. This suggests that it is wrong to characterise error in Scots law as a battleground between the Common Law and a single Civilian view. Differences with France and Germany are not necessarily indicative of English influence, and the choice may not be as stark as T B Smith's famous preference for "the stake with Stair" over "glory with Gloag" makes it seem.<sup>5</sup>

Until the late nineteenth or early twentieth century, lawyers in Scotland tended to understand contract formation in terms of subjective consensus. Except where it described voidness for initial impossibility (usually due to the absence of an object of sale), error was merely one of the ways in which absence of consensus was explained. Error was a bit like forgery. Lawyers often talk about forgery but in most cases the fact that a document has been forged is not the really important point. The important point is that the person whose signature has been forged has not signed the document. For that reason, a doctrine of forgery is unnecessary: the results are generated by the normal rules on consent. The same was true of error.

1 J J Gow, "Mistake and error" (1952) 1 ICLQ 472; J J Gow, "Some observations on error" (1953) 65 JR 221; J J Gow, "*Culpa in docendo*" (1954) 66 JR 253; P Stein, *Fault in the Formation of Contract in Roman and Scots Law* (1958); T B Smith, *A Short Commentary on the Law of Scotland* (1962) 808-833; J M Thomson, "The effect of error in the Scots law of contract" 1978 Acta Juridica 135; W W McBryde, "Error", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 2, 72; W W McBryde, *The Law of Contract in Scotland*, 3<sup>rd</sup> edn (2007) paras 15-01 ff; W M Gloag and R C Henderson, *The Law of Scotland*, 12<sup>th</sup> edn, by Lord Coulsfield, H L MacQueen et al (2007) paras 6.21-6.32; M Hogg, "The continuing confused saga of contract and error" (2009) 13 EdinLR 286.

2 G J Bell, *Principles of the Law of Scotland*, 4<sup>th</sup> edn (1839) § 11. This was the last edition by Bell himself, and the edition whose account of error was endorsed by Lord Watson in *Stewart v Kennedy* (No 2) (1890) 17 R (HL) 25 at 28-29.

3 The early period is discussed by McBryde, "Error" (n 1) at 72-76.

4 J Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991) and M J Schermaier, *Die Bestimmung des wesentlichen Irrtums* (2000) are the most significant works for present purposes.

5 Smith, *Short Commentary* (n 1) 817.

## B. STAIR'S APPROACH

Recent scholarship has tempered the view that Stair created a law of contract without reference to earlier native materials.<sup>6</sup> Nonetheless his account remains the starting point for any discussion of error. Although the topic was mentioned in earlier Scottish materials,<sup>7</sup> Stair's major influence in these matters was clearly European.

### (1) The *ius commune* background<sup>8</sup>

Broadly speaking, the European background may be said to be composed of two strands.<sup>9</sup> The first was rooted in the efforts of the *ius commune* jurists to rationalise the *Digest* texts on error in sale with the aid of Aristotle's theory of categories.<sup>10</sup> In Roman law,<sup>11</sup> sale was concluded by subjective consensus on certain matters which were later classified as *essentialia* or *substantialia negotii*.<sup>12</sup> These were distinguished from terms which the law would imply (*naturalia negotii*) and those which might be described as optional extras (*accidentalialia negotii*).<sup>13</sup> Without agreement on the *substantialia* there could be no sale. The classical Roman law of error and the influence of Aristotelian philosophy on it remain a matter of controversy.<sup>14</sup> However, it is clear that most of the cases of

6 G Lubbe, "Formation of contract", in Reid & Zimmermann (eds), *History* (n 1) vol 2, 1 at 1.

7 W W McBryde, "Error" (n 1) at 74. The earliest case I have found which discusses error in the relevant sense is *Hay v Cockburn* (1697) Mor 13328.

8 Here the term *ius commune* is used to denote mediaeval and early modern writers in the Roman law (as opposed to the canonist or natural law) tradition.

9 For the second strand, see B.(2) below. The multifarious nature of the *ius commune* means that any brief account will inevitably be an oversimplification. For a more nuanced treatment, see Schermaier, *Die Bestimmung des wesentlichen Irrtums* (n 4) and W Ernst, "Irrtum: Ein Streifzug durch die Dogmengeschichte", in R Zimmermann (ed), *Störungen der Willensbildung bei Vertragschluss* (2007) 1.

10 Mediated through scholastic thinking; see Schermaier, *Die Bestimmung des wesentlichen Irrtums* (n 4) 54-55.

11 For present purposes, the content of the *Digest* texts is more important than the classical law so modern interpolation criticism can be ignored.

12 R Zimmermann, *The Law of Obligations* (1990) 234 and authorities cited there. Other contracts, such as lease and mandate, had different *substantialia negotii*.

13 The distinction between *substantialia* and *accidentalialia negotii* was used by Azo, *Summa Codicis* (undated, reprinted in *Corpus Glossatorum Juris Civilis* vol 2 (1966)) on C 4.54 n° 1. But the classic statement came from Baldus, *Commentaria in Digestum* (1599, reprinted in *Commentaria omnia von Baldus de Ubaldus* (2004)) on D 18.1.72pr. See Gordley, *Philosophical Origins* (n 4) 61-65. Stair was aware of Baldus' work, quoting the latter's comment on D 45.1.10 in his inaugural oration before the Faculty of Advocates, reprinted in "Scotstartvet's Trew Relation" (1916) 13 *Scottish Historical Review* 380 at 389.

14 See M Kaser, *Das römische Privatrecht* (1971) vol 1, 238 n 25; Gordley, *Philosophical Origins* (n 4) 57-58; M J Schermaier, *Materia: Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht* (1992) 105-162 esp 138-154; J D Harke, *Si error aliquis intervenit – Irrtum im klassischen*

relevant error identified in the *Digest* (*error in pretio* (price), *corpore* (object), *persona* (parties) and *negotia* (type of contract<sup>15</sup>))<sup>16</sup> fit comfortably within the *substantialia* of sale.<sup>17</sup>

The fact that the contract was formed by subjective consensus has important consequences for our understanding of these instances of error.<sup>18</sup> First, common error in these matters was impossible because the parties' common intention constituted and defined the contract.<sup>19</sup> So if both thought the price was *x*, the price was indeed *x*; if both intended to contract regarding a certain object, that was the object of their contract; if both thought they were agreeing a sale, that is what they agreed. As the contract had no existence beyond the parties' common intention, it followed that the common intention could not be incorrect.

Secondly, unilateral error would mean dissensus: one party intended to sell while the other intended to hire; one intended to sell *x* while the other intended to buy *y*; A made an offer to B which was accepted by C. In the absence of an objective approach to contracts, unilateral error amounted to a failure to agree all that was required for a valid sale. Error, where relevant and possible, was merely the real-world explanation for the legally relevant fact: the absence of the necessary consensus. In the major *Digest* text on error in sale, error and dissensus appear to be equated.<sup>20</sup> An incidental consequence is that the natural paradigm for error was unilateral rather than common.

One category of error accepted in the Roman texts appears to present problems for this analysis.<sup>21</sup> Error about what an object was made of (*error in*

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*römischen Vertragsrecht* (2005) and the review thereof by M J Schermaier in (2008) 125 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung)* 826; H H Jakobs, "D.18.1.11 nach Überwindung der Interpolationistik" (2008) 125 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung)* 375.

15 E.g. where one party thought it was a lease and the other thought it was a sale.

16 F de Zulueta, *The Roman Law of Sale* (1945) 25; Zimmermann, *Obligations* (n 12) 589-592.

17 Odofredus, a contemporary of Accursius, appears to have been the first to make the connection between the categories of relevant error and the *substantialia negotii* in the context of Civil Law: Schermaier, *Die Bestimmung des wesentlichen Irrtums* (n 4) 51.

18 The significance and understanding of consensus in classical Roman law is contested but this at least is the traditional view. See further D Daube, "Societas as a consensual contract" (1938) 6 *CLJ* 381 at 395-399; F Schulz, *Classical Roman Law* (1951) 528; Kaser, *Das römische Privatrecht* (n 14) vol 1, 237-238; Zimmermann, *Obligations* (n 12) 563-565; M J Schermaier, "'Nichtrömisches' in römischen Irrtumsrecht", in P Pichonnaz (ed), *Autour du droit des contrats: Contributions de droit romain en l'honneur de Felix Wubbe* (2009) 49 esp at 78-80; C Cascione, *Consensus* (2003); Harke, *Si error aliqui intervenit* (n 14) 28, 32, 348. My knowledge of Cascione is restricted to the review by P Pichonnaz in (2007) 124 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung)* 504.

19 Discounting the rather unlikely case when both parties have the same incorrect belief about the identity of one party.

20 D 18.1.9 (Ulpian).

21 Error regarding the sex or virginity of a slave is also mentioned (D 18.1.11.1 (Ulpian)) but this was clearly of little relevance to Stair.

*substantia* or *materia*) was fatal to a contract. To modern eyes, such an error does not affect any of the *substantialia negotii*. Further, the fact that an object is made of bronze rather than gold or a liquid is vinegar rather than wine is an external reality, independent of the parties' minds. This raises the possibility of common error, which makes the result difficult to explain in terms of dissensus. These issues have exercised generations of Roman lawyers and this is not the place to revisit them in detail.<sup>22</sup> However, examination of the major *Digest* text on the point illustrates that, like the other cases, the effect of *error in substantia* is explicable in terms of another rule:<sup>23</sup>

The next question is whether there is a good sale when there is no mistake over the identity [*corpore*] of the thing but there is over its substance: Suppose that vinegar is sold as wine, copper as gold or lead, or something else similar to silver as silver. Marcellus, in the sixth book of his *Digest*, writes that there is a sale because there is agreement on the thing [*in corpus consensus est*] despite the mistake over its substance. I [Ulpian] would agree in the case of the wine, because the essence [*ousia*] is much the same, that is, if the wine has gone sour; if it be not sour wine, however, but was vinegar from the beginning such as brewed vinegar, then it emerges that one thing has been sold for another. But in the other cases, I think that there is no sale by reason of the error over the material.

According to Ulpian, *error in substantia* is relevant because it affects the essence or *ousia* of the object. The latter term was central to Aristotle's metaphysics and theory of categories<sup>24</sup> where it was used to denote those characteristics which define an object's identity so that object *x* is no longer object *x* if one of its essential characteristics is changed.<sup>25</sup> Classical Roman lawyers may not have understood the text in this way,<sup>26</sup> but Aristotle so dominated later mediaeval thought that it is very likely that *ius commune* writers did.<sup>27</sup>

This approach amounts to treating *error in substantia* as an extension of *error in corpore*. The characteristics which an object is believed to possess become part of the way that the object is defined. Thus unilateral error regarding them can create dissensus as to the object of sale.

In the case of common error there is no dissensus, but there is another fundamental problem with the contract: the object of sale the parties had in mind does not exist and the contract is therefore void for impossibility. It is as if they

22 For a summary, see Schermaier, *Materia* (n 14) 109-138 and 155-162; Harke, *Si error aliquis intervenit* (n 14) 18; Schermaier (n 18).

23 D 18.1.9.2 (Ulpian) (transl ed A Watson, 1985).

24 See S M Cohen, "Aristotle's metaphysics", and H Robinson, "Substance", in *The Stanford Encyclopedia of Philosophy* (available at <http://plato.stanford.edu/>).

25 Gordley, *Philosophical Origins* (n 4) 57-61.

26 The major modern treatment is Schermaier, *Materia* (n 14) 131-162.

27 See Gow, "*Culpa in docendo*" (n 1) at 258 attributing this view to Stair and Erskine.

had pointed to an orange (both believing it to be an apple) and agreed to buy and sell “this apple”. Such an agreement simply does not make sense.<sup>28</sup>

These reasons are technical rather than protective. The determining factor is not that the buyer has been unfairly prejudiced: it is that there has been no agreement or that there is no object of sale. This seems consistent with the distinction drawn between wine which has gone sour and brewed vinegar. If the rule had been deliberately designed to protect the buyer, it would be strange to make its application turn on a question which is likely to be a matter of indifference to him.

Arguably, some of the *ius commune* reasoning was a perversion rather than an application of Aristotelian thinking.<sup>29</sup> That does not, however, change the fact that this thinking allowed the examples of relevant error to be understood as describing either the absence of consensus or the absence of a comprehensibly defined object of sale. Error itself seems, therefore, to have been a contextual or explanatory rather than an analytical category.

## (2) The scholastic-natural law background

The second strand of European development had its roots in Aquinas’ doctrine of responsibility and flowed through scholastic canonists into natural law writings. There was some interaction between the two strands: most notably, the distinction between *substantialia* and *accidentalia negotii* appears to have been first developed by scholastics.<sup>30</sup> However, error played a fundamentally different, and much more important, role in scholastic and natural law thinking.

### (a) Aquinas

Aquinas’ scheme is concerned with whether an actor can be held responsible for his conduct.<sup>31</sup> He argues that responsibility for conduct depends on that conduct being voluntary and that voluntariness requires knowledge.<sup>32</sup> Ignorance which

28 A similar analysis has been presented to explain classical treatment of *error in substantia*. It is particularly associated with the so-called *Identifikationstheorie*, most famously expounded by J G Wolf, *Error im römischen Vertragsrecht* (1961), which assumes a strictly objective approach to contracts, but it has also been used by those who would invoke subjective dissensus as an explanation of other cases: Kaser, *Römischen Privatrecht* (n 14) vol 1, 238; J A C Thomas, *Textbook of Roman Law* (1976) 232. Thomas disapproves of the term “dissensus” (229) but he explains the other errors in terms of the absence of consensus, using the latter term in its conventional sense.

29 Gordley, *Philosophical Origins* (n 4) 58-59; Schermaier, *Die Bestimmung des wesentlichen Irrtums* (n 4) 44.

30 Schermaier, *Die Bestimmung des wesentlichen Irrtums* (n 4) 54-55. See eg T Aquinas, *Summa Theologica* I-II qu 7 art 1.

31 E.g. Aquinas, *Summa Theologica* I-II qu 6 art 2 obj 3 and reply.

32 *Summa Theologica* I-II qu 6 art 1.

is not itself blameworthy and which “is the cause of the man’s willing what he would not will otherwise” renders conduct involuntary and therefore exempts from blame or responsibility.<sup>33</sup>

Aquinas characterises the “circumstances of an act” as accidents of that act (as opposed to being part of its substance).<sup>34</sup> Ignorance of such circumstances could render conduct involuntary because circumstances, while “they are extrinsic to the act, nevertheless are in a kind of contact with it, by being related to it”. The most important circumstance is the motive for the act.<sup>35</sup> An error which bears on motivation can render the act involuntary and thus free the actor from responsibility. This focus on motive is one of the key differences between the scholastic-natural law strand and the *ius commune* strand.

The conduct Aquinas has in mind is fundamentally different from the typical context of error in the *ius commune*, the contract of sale. Rather than subjective consensus, which has no existence outside the minds of the parties, Aquinas’ focus is on acts with an external aspect, such as shooting an arrow.<sup>36</sup> There is no doubt that the arrow was shot. The question is whether the archer is accountable for the conduct. In such cases, error affects responsibility for conduct. In the *ius commune* model, on the other hand, it bears on the constitution of the act, on whether the act has taken place.

If this model is to provide a complete account of error in contract – that is, one which covers the situations described in terms of error in the *ius commune* – then error must be separated from questions of constitution. Therefore, at the first stage of analysis, contract formation must be considered in objective terms.<sup>37</sup> That makes the existence of the contract a fact external to the parties’ minds. When this step is taken a number of other possibilities arise.

First, one of the parties can actually be wrong about the price, the object or whether the contract is of sale or of hire. Such errors are no longer simple differences of opinion leading to dissensus.

Secondly, error can lead to voidability rather than voidness. On the old model a contract has no existence beyond the shared will of the parties. Therefore, if there is no common intent, there is nothing which could be enforced. Consequently, voidability for error, which countenances effect being given despite dissensus, is unworkable. Objective assessment of the formation of contracts avoids that

33 *Summa Theologica* qu 6 art 8 (transl Fathers of the English Dominican Province, 1920, available at <http://www.newadvent.org/summa/>).

34 *Summa Theologica* I-II qu 7 art 1 resp.

35 *Summa Theologica* I-II qu 7 art 4 resp.

36 *Summa Theologica* I-II qu 6 art 8 resp.

37 E.g., O Palandt, *Bürgerliches Gesetzbuch*, 67<sup>th</sup> edn, by P Bassenge et al (2008) § 119 Rn 7.



problem because it gives the contract an existence independent of the parties' minds.

Thirdly, the effect of error becomes a matter of legal policy rather than legal logic. On the one hand, this allows the range of relevant errors to be extended beyond the *substantialia* to other cases where it is felt that a party does not deserve to be held to his bargain. Conversely, parties who are undeserving (those whose error was inexcusable) or who have no interest (the non-erring party in cases of unilateral error) can be denied the right to invoke the error.

This thinking was utilised by those who required that error be *iustus* and by those who gave the erring party the option of rescission rather than simply declaring the contract null.<sup>38</sup> It also opened the door for error to be treated alongside the other vices of consent: fraud, and force and fear.<sup>39</sup>

On such a model, cases of error are not explicable in terms of the technical requirements for the conclusion of contracts; rather they are driven by whether a party deserves protection from the consequences of error. On this basis, error can take on an independent, creative role.

#### (b) *Grotius*

While it had a long pedigree before Grotius, the scholastic-natural law strand was confined to the fringes of legal scholarship. Major proponents such as Vascius, Molina and Lessius were primarily theologians and, while the approach influenced humanism, the "law of reason" and the *usus modernus pandectarum*, lawyers continued to draw heavily on the Roman texts and categories.<sup>40</sup> The continuing influence of the *ius commune* strand is clear in the works of Cujas,<sup>41</sup> Blasius Altimarius<sup>42</sup> and even Lessius.<sup>43</sup> Grotius, however, rejected the Roman

38 Molinaeus was the first to take this step in his commentary on the Code, C 4.44, originally delivered as lectures in Tübingen and published on his return to France: Schermaier, *Die Bestimmung des wesentlichen Irrtums* (n 4) 90; P Arabeyre et al (eds), *Dictionnaire historique des jurists français XIII<sup>e</sup>-XX<sup>e</sup> siècle*, 2<sup>nd</sup> edn (2008) 276; G Meyer, *Charles Dumoulin: ein führender französischer Rechtsgelehrter* (1956) 21.

39 We see this in Donellus and Lessius. The tendency among the legists was to treat error as an aspect of sale, and to discuss fraud and force together, following the pattern of the *Digest*: Schermaier, *Die Bestimmung des wesentlichen Irrtums* (n 4) 102, 136, 173-174.

40 Schermaier, *Die Bestimmung des wesentlichen Irrtums* (n 4) 83-88, 144-149, 152-171.

41 J Cujas, *Opera omnia* (1758) vol vii, cols 696-698; Schermaier, *Die Bestimmung des wesentlichen Irrtums* (n 4) 99-102. Cujas did seek to unify *substantia*, *materia* and *qualitas* and thus to argue for the relevance of error regarding *qualitas*.

42 B Altimarius, *Tractatus de nullitatibus contractuum, quasi contractuum & distractuum* (1720) rubr I qu IX s IV no 19 ff.

43 Schermaier, *Die Bestimmung des wesentlichen Irrtums* (n 4) 138-139.

approach outright, particularly the notion of *error circa substantiam*,<sup>44</sup> and adopted what Schermaier characterises as the “legal application of Thomas Aquinas’ general theory of responsibility”.<sup>45</sup> On this view, the sole criterion for deciding the relevance of error was whether the promisor would have so promised had he known the truth.<sup>46</sup> Its basis was a supposed tacit condition that the promise was only binding if the facts were as the promisor thought them to be. Like Aquinas, Grotius took account of fault but he did so by imposing a duty of compensation on the party in inexcusable error rather than by holding him to his promise.<sup>47</sup>

As noted above, the scholastic analysis assumed an identifiable contract to which effect could be given. However, its advocates had rather neglected cases where there was subjective dissensus and thus apparently no contract. This problem was addressed by Grotius. He explained that, while juridical acts<sup>48</sup> require a mental act, this can only be discerned by external indications. These indications, however, reflect intention with “probable” rather than “mathematical” certainty. The needs of “human society” demand that the risk of divergence be borne by the speaker rather than the audience, so that “whatever has been indicated is considered as true (*pro vero habetur*) in respect to him who has indicated it”. Grotius’ doctrine of error was premised on an objectivist approach to contract formation hitherto unknown in the *ius commune*.<sup>49</sup>

Grotius dealt with contract formation in the context of promising and by reference to abandonment of possession, both of which are essentially unilateral acts. Even if acceptance was required for a binding promise,<sup>50</sup> the paradigm remained that one party defined the content of the promise and the other accepted it. In that, it prefigured the now familiar account of contract formation by offer and acceptance.

Today this account so dominates our thinking that consensus is taken as synonymous with an offer met by acceptance, other forms agreement being mere

44 Which in the translation of F W Kelsey (1925) is given as “errors which affect the substance of the matter”.

45 H Grotius, *De iuri belli ac pacis* (1646) 2.11.6, Schermaier, *Die Bestimmung des wesentlichen Irrtums* (n 4) 174.

46 Grotius built his account of contracts on his account of promises and thus did not deal with formation in his discussion of contracts (2.12).

47 *De iuri belli ac pacis* 2.11.6.

48 *De iuri belli ac pacis* 2.4.3. Grotius’ term is *iuris effectus*, translated by Kelsey as “actions at law”. The context is abandonment of possession but his discussion of derivative acquisition (2.6.1-2) and promises (2.11.4) depends on this account.

49 H Coing, *Europäisches Privatrecht* vol 1 (1985) 406; Zimmermann, *Obligations* (n 12) 613.

50 As Grotius thought: *De iuri belli ac pacis* 2.11.14.

footnotes or afterthoughts.<sup>51</sup> In Roman law and for much of the *ius commune* tradition, however, consensus was thought of as a single, common will.<sup>52</sup> Such a common will only makes sense on a subjective model of contract formation because the point of objectivity is that it avoids looking into parties' minds. Some equivalent must therefore be found. The main equivalents are a single deed signed by both parties or an offer met by an acceptance. Focus on these, rather than on a meeting of minds, can be regarded as an indicator of a move towards an objective approach to contract formation.<sup>53</sup>

While Grotius' account proved too extreme to be deployed in full in any modern system, it was the first comprehensive statement of error as an independent doctrine rather than as a side effect of the rules of formation. As such, it opened the door for a wider range of relevant errors and the possibility of voidability rather than voidness as a consequence of error. These ideas had a major impact on later Civilian development<sup>54</sup> and these Grotian features are the aspects of the Civilian approach stressed by T B Smith in his account of the Scots law of error.<sup>55</sup>

### (3) Stair as Grotius' disciple?

Where does Stair fit in? His account of the origin of voluntary obligations is reminiscent of Grotius' discussion in *De iure belli ac pacis*.<sup>56</sup> He echoes the latter's explanation of creation of voluntary obligations in terms of alienation of freedom.<sup>57</sup> Similarly, Stair's identification of three "acts in the will" resembles Grotius' identification of three "modes of speech".<sup>58</sup> Further, there are some suggestions that Stair, like Grotius, took an objective approach to formation of contracts.<sup>59</sup> So in his account of the conclusion of contracts Stair discusses

51 E.g. R Black, "Obligations", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 15 (1995) para 619; W D H Sellar, "Promise", in Reid & Zimmermann, *History* (n 1) vol 2, 252 at 272; §§ 145-157 BGB.

52 Daube (n 18) at 395-399; Schermaier, *Die Bestimmung des wesentlichen Irrtums* (n 4) 291-296; M J Schermaier, "Die Willenserklärung (vor §§ 116 ff)", in M Schmoeckel, J Rückert and R Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB* vol 1 (2003) 401 at 404-406. See also *Oxford English Dictionary*, 2<sup>nd</sup> edn (1989) sv "consent"; C T Lewis and C Short, *A Latin Dictionary* (1879) sv "consentio".

53 Note, for instance, the shift in emphasis in F Pollock, *Principles of Contract* 1-2 between the 1<sup>st</sup> edn (1876) and the 9<sup>th</sup> edn (1921).

54 Evident, for instance, in art 1117 *Code civil* and § 119 BGB.

55 Smith, *Short Commentary* (n 1) 808-837 esp 814-818.

56 See G MacCormack, "Grotius and Stair on promises" (1977) 22 *Am J Juris* 160.

57 James Dalrymple, Viscount Stair, *The Institutions of the Law of Scotland*, 6<sup>th</sup> edn, by D M Walker (1981) 1.10.1. Compare Grotius, *De iuri belli ac pacis* 2.11.1.

58 Stair, *Institutions* 1.10.2; Grotius, *De iuri belli ac pacis* 2.11.2-4.

59 Lubbe (n 6) at 17.

offer and acceptance.<sup>60</sup> And in considering the need for intention to create legal relations, he stresses the need to interpret statements in light of their context and continues:<sup>61</sup>

yet because it [the intention] is inward and unknown, it must be taken by the words or other signs, so if the words be clearly obligatory and serious, no pretence that there was no purpose to oblige will take place.

This seems close to Grotius' argument for objective interpretation. Later, Stair observes that "the act of contracting . . . must be of purpose to oblige, either really or presumptively".<sup>62</sup>

However, other aspects of Stair's treatment indicate that he understood contract formation in terms of subjective consensus. He argues that "Conventional obligations do arise from our will and consent; for, as in the beginning hath been shown, the will is the only faculty constituting rights".<sup>63</sup> Where Grotius' three acts are external "modes of speech", Stair's are internal "acts of the will". "Paction" (Stair's generic term for contractual agreement) is described as "consent in [the parties'] wills".<sup>64</sup>

Further, discussion of both offers and intention to create legal relations can be read in a manner consistent with a subjective approach. Stair distinguishes<sup>65</sup>

betwixt promise, pollicitation or offer, paction and contract, the difference among which is this, that the obligatory act of the will is sometimes absolute and pure, and sometimes conditional, wherein the condition relates either unto the obligation itself, or to the performance.

Offer is placed alongside promise and contract as a juridical act. It is not merely a component of or a synonym for contractual consensus.

Stair does go on to say that "an offer accepted is a contract, because it is the deed of two, the offerer and the acceptor" but he also compares an unaccepted offer to mandate.<sup>66</sup> His purpose is to show that an offer lapses with the death of the offerer but the parallel is instructive. Mandate confers on the mandant the power to bind the mandant to contracts, bypassing the normal requirements of consensus.<sup>67</sup> Stair could have understood offer in a similar way: conferring on the offeree a power to create a contractual relationship between himself and the

60 Stair, *Institutions* 1.10.3.

61 1.10.6.

62 1.10.13.

63 1.10.1.

64 1.10.6.

65 1.10.3.

66 1.10.6.

67 1.12.17.

offerer. Understood in this way, offer and acceptance do not bear on his basic model of consensus any more than mandate and thus cannot be relied on to show that Stair took an objective approach to the assessment of consensus.

Stair's discussion of intention to create legal relations can also be interpreted in a manner consistent with a subjective approach. This reading is based on what might be called "evidential objectivism". On this model, as a matter of substantive law, the subjective will of the parties governs the agreement but a combination of judicial scepticism and restrictions on proof makes it difficult to establish that something other than the objective meaning of a statement was intended.<sup>68</sup>

Stair observes that "no pretence" of an absence of intention to oblige will be accepted if the words are "clearly obligatory and serious". As an assertion of the truth is not a pretence, Stair's assumption must be that the words did in fact reflect the intent of the speaker. This approach may be contrasted with that of Grotius. Unlike Stair, Grotius seems willing to countenance a divergence between intention and expression. He holds the speaker to the latter, but his motivation is protection of the hearer rather than scepticism about whether something else was really intended.<sup>69</sup>

Evidential objectivism is also reflected in Stair's gloss on the maxim *plus valere quod agitur quam quod simulate concipitur*:<sup>70</sup> "more respect is to be had to what appears *by the writ*, to have been the interest and design of the parties, than to what the style appears".<sup>71</sup> Were it not for the words in italics, Stair's gloss would be unexceptional.<sup>72</sup> Similar expressions are found in other *ius commune* discussions of the topic.<sup>73</sup> The maxim was understood as dictating that effect be given to the true intention of the parties rather than to the formal expression. Stair reflects

68 For a similar construct in a very different context, see *Jamieson v HM Advocate* 1994 JC 88 at 92 per Lord Justice-General Hope. Nor is the technique unique to Scotland: see H Coing, "Simulatio und Fraus in der Lehre des Bartolus und Baldus", in *Festschrift Paul Koschaker* (1939) vol 3, 402 at 406.

69 Grotius, *De iuri belli ac pacis* 2.4.3.

70 C 4.22, translated by S P Scott (1932) as "What has actually been done has more force than what has been simulated and expressed in words" which is very close to the literal meaning. The sense in which the maxim was understood in the *ius commune* is perhaps better captured by Bankton's paraphrase "That deeds are regarded as they are in Reality, and not according to their appearance": see Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights (1751-1753)*; reprinted by the Stair Society, vols 41-43, 1993-1995) 1.10.68. For the *ius commune* background see Zimmermann, *Obligations* (n 12) 646-650.

71 Stair, *Institutions* (n 57) 4.42.21 (emphasis added). The 2<sup>nd</sup> edition of 1693 has "to what the Stile bears" rather than "to what the style appears". The variation does not affect the sense of the passage.

72 Although it is surprising that Stair invokes the maxim in his discussion of interpretation but not in his discussion of simulation at 1.9.12.

73 See references in M D Blecher, "Simulated transactions in the later Civil Law" (1974) 91 SALJ 358; G Wesener, "Das Scheingeschäft in der spätmittelalterlichen Jurisprudenz, im *usus modernus* und im Naturrecht", in G Baumgärtel et al (eds), *Festschrift für H Hübner zum 70 Geburtstag* (1984) 337.

this general approach but he does so subject to a major evidential restriction: true intention may only be gleaned from the deed itself.<sup>74</sup>

Concern with problems of proof is also evident in Stair's discussion of error as a defence in Book IV of the *Institutions*. He observes that "the exception upon error is seldom relevant, because it depends upon the knowledge of the person erring, which he can hardly prove".<sup>75</sup> The implication seems to be that, were it not for problems of proof, error would be relevant much more often. This theoretically wide field of application is restricted by procedural and practical matters rather than substantive rules. Proof of error was made particularly difficult because, until 1853, a party to an action was not a competent witness on his own behalf.<sup>76</sup>

The effect of evidential objectivism is similar to that of substantive objectivism. The difference between being bound to what you said because the court does not believe that you meant something else and being bound because it does not matter that you meant something else is not especially large. Evidential objectivism allowed certain practical results to be reached without the need for a reworking of the conceptual foundations of contract law. As such, it could protect substantive rules which required subjective consensus from the practical objections to which they would otherwise be vulnerable.

It might be objected that Grotius' approach to juridical acts might also be better understood in terms of evidential objectivism, particularly given his use of the words *pro vero habetur*, and the fact that the reliance theory and its Continental cousin the *Erklärungstheorie* (declaration theory) did not gather serious steam until the nineteenth century. If this is the case, Stair's subjectivist approach could not be used to discount the natural law influence on his treatment of error. However, as argued above, Grotius takes the possibility of divergence between intent and expression much more seriously than Stair, analyses voluntary obligations in terms of modes of speech rather than acts of will, and explains his approach in terms of "human society". This seems to place him much closer to modern substantive objectivism than Stair.

#### (4) Error in Stair

Further doubt is cast on Grotius' influence on Stair by examination of the passages in the *Institutions* where error is addressed directly.

<sup>74</sup> Cf A Favre, *Codex Fabrianus* (1610) 4.17 esp *Definitio IV*.

<sup>75</sup> Stair, *Institutions* (n 57) 4.40.24.

<sup>76</sup> Stair, *Institutions* (n 57) 4.43.7; Law of Evidence (Scotland) Act 1853 s 3.

Discussing consent in contract Stair argues that “These [*sic*] who err in the substantials of what is done, contract not”.<sup>77</sup> In doing so, he adopts the *ius commune* terminology rejected by Grotius, but he does not expand further. Instead, he refers the reader back to his earlier treatment of fraud.<sup>78</sup> There, Stair gives a reasonably extensive account of error. He does so by contrasting it with “circumvention”, which he defines, broadly, as “the act of fraud, whereby a person is induced to a deed or obligation by deceit”.

Both error and circumvention require some mistake: as Stair stresses, circumvention can only be said to cause a contract if the other party is deceived. But the differences are more important than the similarities. To discuss these properly, it is necessary to set out the key passage at length. Having noted that a plea of fraud will be ineffective if the victim found out about it before acting and decided to continue regardless, Stair continues:<sup>79</sup>

So neither doth error nor mistake, though it be the cause of the obligation or deed, and be very prejudicial to the erring party. And though, if it had been fraudulently induced by the other party, it would have been sufficient; yet not being so, there is no circumvention: and the deed is valid, unless the error be in the substantials of the deed, and then there is no true consent, and the deed is null; as if one married Sempronia, supposing she were Maevia, the marriage hath no further progress (but by subsequent consent) and it is void. But if he married Sempronia, supposing her to be a virgin, rich or well-natured, which were the inductives to his consent, though he be mistaken therein, seeing it is not in the substantials, the contract is valid. But if the error or mistake, which gave the cause to the contract, were by machination, project or endeavour, of any other than the party errant, it would be circumvention.

For Stair, the range of potentially relevant errors is narrower where the plea is error in the substantials rather than error induced by circumvention. However, the distinction between the two classes is not simply based on the seriousness of the error. Stair states quite explicitly that an error may be “very prejudicial to the erring party” but nonetheless irrelevant. This suggests that nullity for error is not simply a rule for the protection of the erring party. With circumvention, on the other hand, protection from the consequences of the other party’s deceit drives the rule and so any error regarding a motivating factor is relevant.

Stair invokes the example of *error in persona* in marriage. Here there is no “true consent” and as a result the marriage is “void”. In the case posited, there was no consent at all: the groom agreed to marry Maevia, Sempronia agreed to marry the groom and, as far as we know, Maevia did not agree to marry anyone.

<sup>77</sup> Stair, *Institutions* (n 57) 1.10.13.

<sup>78</sup> 1.9.9.

<sup>79</sup> 1.9.9.

This situation is contrasted with error regarding the “inductives to his consent”. These are relevant for fraud but not for error. Stair’s language here reflects a fundamental distinction: in the case of error there was no consent; in the case of circumvention, there is consent (otherwise there could be no “inductives” to it).

The distinction between absence of consent (error) and real but defective consent (circumvention) is also reflected in Stair’s discussion of their respective consequences. As noted above, where there is error in the substantials the contract does not come into existence: the deed or obligation is “null” and “void” because those who err in the substantials “contract not”.<sup>80</sup> On the other hand, where fraud is pled, the injured party has the option of either “annulling the contract” or claiming damages.<sup>81</sup> The option and the idea of annulment seem to imply that the contract subsists in the interim.

Later, discussing the capacity of oaths to prevent reduction, Stair contrasts “fear such as stupifieth, and takes away the act or reason” and also “deceit . . . *in substanstialibus*” with cases where the fear or fraud does no more than motivate the act.<sup>82</sup> In the former cases “there is nothing done” and so the oath cannot exclude the plea while in the latter cases “the deed is in itself valid, though annullable by fear or fraud, which are excluded by the oath”.

The factors which, in Stair’s account, distinguish circumvention from error in the substantials are similar to those which mark out the natural law approach from that of the *ius commune*: the range of relevant mistakes depends, not on a predefined class of errors in the substantials, but on what motivated the contracting party to act; the result is not a mere technical consequence but a protective measure; and invalidity is not a matter of logical necessity but of policy choice.<sup>83</sup>

This impression is fortified by the discussion of the distinction between error and circumvention as defences in Book IV.<sup>84</sup> Once again Stair uses *error in persona* as his example, this time by reference to the biblical account of Jacob’s marriage to Leah when he expected to marry her sister Rachel.<sup>85</sup> Three things are clear from Stair’s analysis: were it not for Jacob’s ratification of the marriage, Leah would not have been his wife; error, as well as circumvention, would have been a plea open to him; and Jacob’s error was “by his own fault”. Taken together,

80 1.10.13.

81 1.9.14.

82 1.17.14.

83 Admittedly, the routes to the last point differ markedly. A contract is conceivable despite error, in natural law theory, because of Grotius’ objective approach to juridical acts; it is conceivable despite circumvention, in Stair’s account, because there is real, albeit defective, consent.

84 Stair, *Institutions* (n 57) 4.40.24.

85 Genesis 29: 15-30.



these propositions suggest that Stair did not consider error to be affected by the fault of the party in error or by the fact that the error was unilateral. It is perhaps worthy of note that Stair did not feel the need to stress that unilateral error was relevant. Given his essentially subjective approach to the conclusion of contract, it seems likely that he thought the point obvious.

In this section, Stair also addresses a case of error as to the extent of the subjects sold:<sup>86</sup>

if one should sell a barony, and the enumeration of the lands should include distant lands, that were never united in the barony, nor in the rental by which it was sold, if the seller were pursued to perfect the bargain, or on the warrandice, he would have the exception of *errore lapsus*.

The case appears to be one of clerical error in a contract of sale by including in the description lands which are not part of the barony being sold. On discovery of this fact, the buyer was sued for breach of warrandice but escaped on the basis of error. The fact that the lands had never belonged to the barony would if anything make the error less excusable. However, Stair's emphasis on this factor may be explicable on another basis. If the lands had never been part of the barony, it is unlikely that either party believed them to be so. If neither party believed them to be part of the barony and they were not included in the rental which was used to transfer the object of sale, it seems rather unlikely that the parties had intended to include them in the sale. The best explanation for their inclusion in the contract of sale might therefore be clerical error. This would be important if Stair had the understanding of contractual formation suggested: substantive rules which focussed on subjective consensus coupled with significant evidential barriers to establishing that something other than the objective expression was actually intended. The facts presented were, perhaps, sufficiently extreme to overcome these barriers.

Further, the case posited tells us something important about how Stair thought about error. If error is a vice of consent, like fraud or force and fear, it should allow the party in error to strike the contract down, but it is difficult to see why it should enable him to modify it. Vices of consent are ways of saying "I did not agree properly" not ways of saying "*we* actually agreed this".<sup>87</sup> However, the latter is what Stair suggests here. The contract of sale is not set aside completely; the

<sup>86</sup> Stair, *Institutions* (n 57) 4.40.24. In this context "rental" refers to a breakdown of all feu and rental income to which ownership of the lands gave right. It was sometimes incorporated into conveyancing documents. Sale by rental was contrasted with a slump bargain (where there was no such specific description). See J Burns, *Conveyancing Practice*, 3<sup>rd</sup> edn (1926) 343. The passage is not included in the 4<sup>th</sup> and final edition (by F MacRitchie, 1957).

<sup>87</sup> See *Gillespie v Russel* (1856) 18 D 677 at 685 per Lord Curriehill.

seller merely escapes a plea for breach of warrandice. The result makes perfect sense, however, if error is a way of directing attention to what the parties had really agreed. On that view, they had never intended to contract regarding the extra lands so there was no reason why the seller should have any obligations regarding them.

It might be argued that Stair's repeated reference to *error in persona*, and to marriage as an example of it, indicate a canon law and thus a scholastic influence. The textual basis for *error in persona* in sale in the *Corpus Iuris Civilis* is certainly weaker than for the other classic cases of error.<sup>88</sup> Schermaier goes so far as to suggest that it was not properly recognised in the *ius commune* tradition until the humanist period and that when it appeared it was a borrowing from canon law.<sup>89</sup> However, he also acknowledges that *error in persona* was discussed alongside the other classic cases by some of the post-glossators.<sup>90</sup> Further, although the issue would rarely arise in the typical case of sale (where the buyer and seller are both present), the rules of contractual constitution and the fact that an obligation was considered as a bond between two particular individuals surely demand that it be relevant. Like the distinction between *substantialia* and *accidentalialia*, *error in persona* may have been first articulated clearly by scholastic scholars but it accords equally with the *ius commune* tradition. Stair's use of it cannot, therefore, be taken to commit him to the scholastic-natural law view of other issues.

Considered as a whole, Stair's analysis of contracts seems to take a subjective approach to contract formation, to distinguish sharply between fraud and error in terms of both the range of relevant mistakes and the effect of the defect, to reject a protective rationale for nullity for error, and to ignore whether the error was unilateral or bilateral and whether it was excusable. Together with his use of the term "error in the substantialia", this seems to place Stair firmly in the *ius commune* tradition, treating error in the substantialia as merely the real-world trigger for other rules of contract law.

Against this view, it might be argued that Stair treats error as a defect in a deed and a plea in its own right. However, he does the same with forgery<sup>91</sup> and no one would suggest that the ultimate reason that a forged deed has no effect is that it is forged. Rather, it has no effect because the normal requirements for constitution of such deeds have not been fulfilled. Forgery is the explanation for failure not the cause.

88 De Zulueta, *Sale* (n 16) 25; Zimmermann, *Obligations* (n 12) 592.

89 Schermaier, *Die Bestimmung des wesentlichen Irrtums* (n 4) 398.

90 Schermaier, *Die Bestimmung des wesentlichen Irrtums* (n 4) 70, 74.

91 Stair, *Institutions* (n 57) 4.40.39.

### C. FROM STAIR TO BELL

The general approach to the conclusion of contracts in Scotland in the period between Stair and Bell is consistent with Stair's approach. Emphasis continued to be placed on consent *tout court* rather than directly on offer meeting acceptance.<sup>92</sup> The objective meaning of deeds continued, as a general rule, to be favoured by means of excluding parole evidence and pleas inconsistent with the plain meaning of the deed,<sup>93</sup> and the arguments used to justify exclusion continued to be based on scepticism rather than irrelevance.<sup>94</sup> However, exceptions were made in some cases, particularly where the mistake was patent.<sup>95</sup>

As the nineteenth century progressed, a substantive objectivism began to emerge in place of the evidential approach. In *Earl of Minto v Elliott*, for instance, Lord Craigie contrasted "what has actually been done" with "our conjectures of what may have been intended".<sup>96</sup> Such observations were, however, no more than initial stirrings. The other judges in the case placed much more emphasis on the actual intention of the granter, despite the fact that the case involved a tailzie and so was subject to strict interpretation.

#### (1) Bankton

Bankton's approach is essentially the same as Stair's. He contrasts "error in the substantial" with error "in some extrinsic circumstance". The former is said to "vitiating" the contract and to "relieve the party in error" because "it excludes all consent" while the latter "is not regarded, unless it is induced fraudulently by the other party".<sup>97</sup> He offers no elaboration on the meaning of "error in the substantial" beyond the classic example of one thing being sold for another.<sup>98</sup> The contrast drawn between mistakes relevant for circumvention and for error is very similar to Stair's. Bankton seems to have had unilateral error in mind because he speaks about relief of "the party in error".

92 Bankton, *Institute* (n 70) 1.11.20, 1.19.1; J Erskine, *An Institute of the Law of Scotland* (1773) 3.3.1; Baron David Hume, *Lectures 1786-1822* vol II (ed G C H Paton, Stair Society vol 13, 1949) 3.

93 Bankton, *Institute* (n 70) 1.11.54, 4.45.155; *Duke of Hamilton v Douglas* (1762) Mor 4358 (appealed on a different point: (1779) 2 Pat App 449); *MacLagan v Dickson* (1832) 11 S 165.

94 Counsel in *Duke of Hamilton v Douglas* argued that "It would be of the most dangerous consequence to allow a witness to *explain away* the legal import of a settlement": (1762) Mor 4358 at 4372 (emphasis added).

95 *Wauchope v Hamilton* (1711) Mor 5712; *Cochran v Bryson* (1713) Mor 11627 (explained in E Clive, "Interpretation", in Reid & Zimmermann (eds), *History* (n 1) 47 at 53); *Coutts & Co v Allan & Co* (1758) Mor 11549; *Inglis v Cunningham* (1826) 4 Murr 73.

96 14 Feb 1823 FC at 154.

97 Bankton, *Institute* (n 70) 1.23.63. See also 1.11.67.

98 Cf "aliud pro alio venisse videtur" in D 18.1.9.2 (Ulpian).

Bankton also discusses error in his treatment of sale: “Consent being requisite in all contracts, an error in the substance of the thing sold annuls the sale, but not where it is in accidental qualities only”.<sup>99</sup> In the latter case, Bankton holds that the sale is valid but the buyer can claim diminution of the price and, if the seller knew of the defect, damages as well. In the former case, the buyer simply recovers the price paid regardless of his level of loss or the culpability of the seller. Where the error relates to one of the accidentals, the level recovered might be less (in the case of a minor defect) or more (in the case of a knowing seller and consequential losses) than the price paid.

The thinking in cases where the error relates to the accidental qualities appears to assume the validity of the contract of sale and to pay attention both to the harm suffered by the party in error and to the culpability of the other party. Where there is *error in substantia*, on the other hand, no attention is paid to fault or loss. The difference makes sense if nullity for error is merely a reflection of the requirements for formation of contract. It is much less sensible if error is an independent doctrine: why penalise the buyer because his defect was in a substantial rather than an accidental quality?

## (2) Erskine

Erskine devotes much less attention to error and the structure of his approach is rather different. This is not surprising since Erskine’s model was Mackenzie, who did not address error directly, while Bankton’s was Stair. Like Stair and Bankton, Erskine discusses “error in the essentials” (as he calls it) in the context of consent.<sup>100</sup> He uses the classic examples: *error in persona* and *error in substantia* in sale. Erskine’s presentation of *error in substantia* ties it very closely to error as to the identity of the object of sale: “as if one contracting to sell a piece of gold plate, should deliver to the purchaser one of brass”.

Thus far Erskine’s attitude is fairly conservative. However, he departs from the distinction, found in Stair and Bankton, between the effect of error and of fraud on contracts. Erskine suggests that the defrauded party “is justly said not to have contracted, but to be deceived”.<sup>101</sup> He deals with force and fear in the same section, suggesting that it too gives rise to nullity. This presentation of error, force and fraud as a triumvirate of vices of consent is common in European

99 1.19.6. Bankton’s approach was followed in *MacLean v MacNeill* 23 June 1757 FC.

100 Erskine, *Institute* (n 92) 3.1.16.

101 3.1.16. Later, he does recognise that *bona fide* purchasers are not vulnerable on account of the fraud of their authors but this is explained in terms of special rules protecting the faith of the records and freedom of commerce in moveables and bills of exchange: 3.5.10.

systems today.<sup>102</sup> However, while modern systems tend to treat all three vices as giving rise to their equivalent of voidability, Erskine treats them as giving rise to voidness. He seems to suggest that there is no true consent when it has been fraudulently induced. His attitude to error may not, therefore, have been substantially different from that of Stair or Bankton, although his attitude to fraud certainly was. Fraud has been brought to the level of error, rather than the other way around. This view is bolstered by the fact that, in his discussion of the particular grounds of reduction, he mentions interdictions, inhibitions, the law of deathbed, and minority, force and fear and fraud, but says nothing of error.<sup>103</sup>

### (3) Three cases

Stair, Bankton and Erskine all discuss error without reference to case law. The eighteenth century did, however, see some relevant cases.

#### (a) *Dunlop v Crookshanks*

Error is not mentioned at all in *Dunlop v Crookshanks*<sup>104</sup> but the case was to prove important in the discussion of *error in persona* by both Bell and M P Brown.<sup>105</sup> It concerned the sale of spirits by Dunlop to Forbes, a bankrupt merchant. Forbes' order was fraudulent on two grounds: that he was insolvent when he made it<sup>106</sup> and that he placed the order on behalf of himself and Crookshanks "in Company".<sup>107</sup> Crookshanks and Forbes had previously ordered goods from Dunlop together but Crookshanks knew nothing of this order. Forbes also ordered a second set of goods on his own behalf. All of the goods were then sold on. The truth about Forbes' circumstances emerged and an array of actions for payment, arrestments, multiplepointings, and actions of reduction was unleashed.

There was particular dispute as to whether Dunlop was able to recover the goods he had sold. A distinction was drawn between the two orders. In the first, the court held that ownership had not transferred because Dunlop had intended to transfer "not to William Forbes alone, but to William Forbes and William

102 Reflected, for instance, in art 1109 *Code civil* and §§ 119-124 BGB. See also C von Bar, E Clive and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (2009) II.-7:201-II.-7:207.

103 Erskine, *Institute* (n 92) 4.1.25.

104 (1752) Mor 4879; Elchies, "Fraud" nos 25 and 26.

105 M P Brown, *A Treatise on the Law of Sale* (1821) §§ 221-222; Bell, *Principles* (n 2) § 11.

106 *Dunlop* is one of several cases which illustrate Scottish adherence to the broader *ius commune* principle that it is fraudulent to buy goods when you know yourself to be irrecoverably insolvent.

107 That is, as partners.

Crookshanks in Company”. Since the latter had refused the goods, ownership remained with Dunlop. The offer to transfer had not been accepted by the person to whom it was made.<sup>108</sup> As for the second order, there was general agreement that, despite the fraud, “the property would nevertheless be transferred” and that a *bona fide* purchaser was therefore protected.<sup>109</sup> The first order parallels Stair’s example of *error in persona* and the court shared Stair’s view of the difference in effect between fraud and error. The decision was made by reference to the principles of consensus without specific reference to error.

The case is further evidence for the view that decisions on error were based on the technical requirements for conclusion of contract and transfer rather than on a desire to protect party in error. Since Dunlop was a merchant and had been willing to conclude a second contract with Forbes alone, it would have been very difficult to argue that, had he known the truth, he would not also have concluded the first contract with Forbes alone.<sup>110</sup> On a scholastic-natural law analysis, this would suggest that he did not deserve protection. Such reasoning is irrelevant to an analysis which simply focuses on the presence or absence of the requisite agreement.

(b) *Sword v Sinclairs*

The best known eighteenth-century case on error is *Sword v Sinclairs*.<sup>111</sup> The defenders wrote to their agent, instructing him to sell tea at 2s 8d or more per pound. The agent duly contracted with the pursuer for the sale of 600lb at 2s 8d. However, the defenders had intended to write 3s 8d in their instructions to the agent and they refused to perform, alleging an *error in pretio*. The pursuer replied that the Civil Law authorities were really about the absence of *consensus in idem* and that there could be no question of the absence of consensus in this case. The Lords found for the defenders.

No record of the court’s reasoning is preserved, leaving the field open for a variety of suggested *rationes*.<sup>112</sup> Lord Dunpark<sup>113</sup> and Professor McBryde<sup>114</sup>

108 This analysis is clear from the Lords’ interlocutor recorded by Kilkerran (Mor 4879 at 4880). Lord Elchies also held this view but he seems to have had the impression that his judicial colleagues based their decision regarding the first sale on fraud rather than failure to agree to the transfer: see Elchies, “Fraud” no 25.

109 (1752) Mor 4879 at 4881.

110 At the very least, there is no evidence that the court required him to demonstrate this fact.

111 (1771) Mor 14241.

112 The various analyses are summarised in W W McBryde, “A note on *Sword v Sinclair* and the law of error” 1997 JR 281.

113 *Steel v Bradley (Homes) Ltd* 1972 SC 48 at 55.

114 McBryde (n 112).

have cast doubt on the assumption that the case rested on unilateral error preventing consensus.<sup>115</sup> They suggest that the vitiating factor was bad faith on the part of the buyer who, being a professional in the field, must have known that error lay behind the offer. But while the obviousness of the error was important, the buyer – assuming a subjective theory of consensus tempered by evidential objectivism – was not being penalised for bad faith directly. Rather, the implausibly low price convinced the court that the offer as written was not what the seller had intended.<sup>116</sup> This position is supported by two earlier cases, *Wauchop v Hamilton*<sup>117</sup> and *Coutts & Co v Allan & Co*,<sup>118</sup> in which the court refused to bind a party to a written deed where the expression was clearly erroneous. In the former case, the Lords referred to writing the term “northwest” when “northeast” had been intended as an *error in calculo* and invoked the maxim *plus valere quod agitur quam quod simulate concipitur*.

The Session Papers for *Sword* show that, as well as describing their mistake as an *error in pretio*, the defenders characterised their statement of the price as an *error in calculo*.<sup>119</sup> If *Sword* is read so as to be consistent with *Wauchop*, then *error in calculo* is not a mistake in the mental process of calculating the price (that is, the motive for the offer of the price). Rather it is, in Gloag’s words, “a slip of the tongue or the pen”, a failure of expression.<sup>120</sup> In *Sword*, the defective expression concerned the price and thus there was an *error in calculo* and *in pretio*. The result of this was dissensus as to the price: the seller intended to sell at 3s 8d and the buyer to buy at 2s 8d.

This analysis is supported by the result in *Coutts & Co*. A contract was enforced on the terms which the parties were taken to have intended although they wrote something else. As discussed above, if writing the wrong thing is error and error is a vice of consent, akin to fraud, then this result cannot be accounted for. A contract could be struck down but its terms could not be reformed. Taken together, the cases suggest a subjective approach to the conclusion and content of contracts rather than an initially objective approach tempered by error as a vice of consent.

115 Bell, *Principles* (n 2) §§ 11, 92; W M Gloag, *The Law of Contract*, 2<sup>nd</sup> edn (1929) 438.

116 It is perhaps noteworthy that the main objection anticipated in the seller’s petition is not good faith but scepticism: “But the pursuer will say, How does it appear that there was any error in this case? and what evidence have your Lordships that Mess Sinclair, when they wrote 2s 8d meant 3s 8d? or, in short that there was any mistake in the matter?” In fact, the mistake was not disputed but good faith was averred by the buyer. This did not do him any good. See *Session Papers*: Campbell Collection vol 21 nos 6, 7 and Arniston Collection vol 104 no 7.

117 (1711) Mor 5712.

118 (1758) Mor 11549.

119 *Session Papers*: Campbell Collection vol 21 no 6 at 8.

120 Gloag, *Contract* (n 115) 437.

(c) *Forbes v Forbes*

One case casts significant doubt on this approach. In *Forbes v Forbes*<sup>121</sup> a widow granted certain restrictions to her entitlements under a marriage contract in return for an agreement by her husband's heir not to challenge grants made to her daughters. In fact, the heir had no right to challenge the grants anyway. Lady Forbes successfully challenged her deed of restriction, arguing that it had been obtained by "surprize, and upon fundamental error; and by fraud and imposition". The decision appears to have turned on "fundamental error" since no evidence of fraud or imposition seems to have been produced.

The case is significant because Lady Forbes' error did not concern what she was doing but her reasons for doing it. It implies a doctrine of error which covers errors beyond the content of the contract and which cannot therefore be explained on the basis of the rules on formation. The decision is also surprising because the deed of restriction looks like a transaction in the formal sense of the term,<sup>122</sup> and by the mid-eighteenth century it was uncontroversial that errors concerning the motives or circumstances of such a settlement were not sufficient to set it aside.<sup>123</sup> *Forbes* appears to have had little impact, however, perhaps because it was not reported until Paton published the second volume of his edition of House of Lords appeals in 1851.

In 1833, the House of Lords refused to allow a trustee in sequestration to reduce a bond in very similar circumstances. The bond had been granted to induce a security-holder to desist from sale of part of the bankrupt's estate. There was, however, a problem with the sasine taken on the security, so the creditor would have had no preference for the proceeds of the sale.<sup>124</sup> It is difficult to gather a clear *ratio* from the case: the only speech with reasons in the House of Lords is Lord Wynford's dissent. The result, however, is consistent with the traditional Scottish approach. Even if the sasine was null, the security-holder had a mandate to sell the property although he had no preference for the price. The trustee gave the bond to induce the security-holder to desist from exercising this mandate. The error might have affected the trustee's decision but it did not prevent the agreement of the requisite elements and therefore the transaction was valid.

121 (1765) 2 Pat App 84. The background can be found at (1755) Mor 3277, (1756) 2 Pat App 8 and (1760) 2 Pat App 36.

122 I. e. a mutual discharge of potential rights.

123 Stair, *Institutions* (n 57) 1.17.2; *Stewart v Stewart* (1839) Macl & R 401 at 432-434 per Lord Cottenham LC.

124 *Grieve v Wilson* (1833) 6 W & S 543.



#### (4) Hume

In his lectures at Edinburgh University, Hume did not address contract in general but his treatment of sale contains the most extensive discussion of error prior to Bell. He is also the first to cite Scottish cases. Bell attended Hume's lectures in 1787-1788.<sup>125</sup>

Having established that the "essence" of sale is consent about the object and price,<sup>126</sup> and discussed the degree of precision with which the object and price must be identified, Hume proceeds to ask if "the consent of the parties upon these is a true and genuine and fair consent".<sup>127</sup> He expands, suggesting that it is not so where the "parties are disabled by liquor" or the consent is "proceeding upon substantial error" or "procured by fraud and imposition" and that "the effect of any of these things is to utterly invalidate the contract". Here Hume seems to follow Erskine in suggesting that both fraud and error lead to voidness.<sup>128</sup> However, Hume's approach seems, at first sight, to imply an attitude closer to Grotius. He looks for consent first and then addresses his mind to questions of fraud and error. Error seems to be treated as a vice of consent.

Despite this, an examination of the rest of Hume's discussion shows adherence to the traditional approach. His discussion of contractual writings, for instance, focuses on what the parties "truly intended".<sup>129</sup> As noted, error is presented as giving rise to nullity and he considers the classic cases of substantial error, all of which strike directly at the *substantialia* of sale: *error in persona*, *error in pretio* and error regarding the object sold. The examples that he gives of the first two are clear cases of dissensus.<sup>130</sup> Hume gives a more extensive account of these cases than any of his Scottish predecessors. In particular, he reflects Continental attempts to refine the notion of *error in substantia*, most famously articulated by Pothier.<sup>131</sup>

The apparent contradictions in the *Digest* texts on *error in substantia* had provoked debate about its nature for many years.<sup>132</sup> The breakdown of the hegemony of Aristotelian metaphysics as a result of the Renaissance and the

125 Some caution is needed, since the Stair Society edition of Hume's lectures is based on the lectures as delivered in 1821-1822. There may have been some development in Hume's thought since the course of lectures which Bell heard in the first full session after Hume's appointment as Professor of Scots Law: see D M Walker, *The Scottish Jurists* (1985) 337.

126 Hume, *Lectures* vol II (n 92) 3.

127 Hume, *Lectures* vol II (n 92) 7.

128 But see 17 where Hume discusses the effect of fraud and departs expressly from Erskine's position.

129 Vol II, 22.

130 Vol II, 8.

131 R J Pothier, *Traité des obligations*, in M Siffrein (ed), *Oeuvres de Pothier* vol 1 (1821) § 18; Schermaier, *Die Bestimmung des wesentlichen Irrtums* (n 4) 390-391.

132 Schermaier, *Die Bestimmung des wesentlichen Irrtums* (n 4) 390.

Enlightenment presented further problems.<sup>133</sup> It was no longer possible simply to refer to the distinction between essential and accidental characteristics as if this were a matter of metaphysical fact. Hume fills the gap by looking to the parties' intentions. His examples are an estate sold with a villa which turns out not to include the land the villa is on, a ship which turns out to have been wrecked at the time of sale, and a superiority purchased because it carried a right to vote which did not carry such a right.<sup>134</sup>

These cases might look like error in motive and evidence of a protective rationale. We should bear in mind, however, that Hume's rationale is very similar to Ulpian's: "Though he get the individual stipulated *corpus*, yet he does not get the sort of commodity or description of subject which alone he meant to buy".<sup>135</sup> The language is that of intention rather than motive. Further, his errors must relate to some characteristic of the object of sale rather than an external factor<sup>136</sup> and "the point in which the error lies [must] be such as enters the bargain of the parties – such which serves as the medium of contracting between them".<sup>137</sup> If a characteristic "enters the bargain", it must do so either as a condition, which would be sufficient to prevent any obligation in and of itself, or as part of the definition of the object of sale, in which case the reasoning set out in relation to common *error in substantia* in the *ius commune* applies.<sup>138</sup> Hume discusses cases where the object of sale has been destroyed at the time of contracting alongside cases regarding characteristics which an object is thought to have but does not.<sup>139</sup> What links these cases is the non-existence of the object of sale that the parties have in mind. Of course, the requirement that the relevant characteristic be part of the bargain between the parties makes unilateral error impossible.

### (5) Brown

M P Brown's *Treatise on the Law of Sale* was published in 1821, four years before the discussion of error which would eventually form §11 of Bell's *Principles* first appeared in the fifth edition of the same author's *Commentaries*.<sup>140</sup> Brown

133 Hume's education was supervised by his more famous uncle (Walker, *Scottish Jurists* (n 125) 316) so he was more acutely aware of this than most.

134 Hume, *Lectures* vol II (n 92) 8-10. The last example is perhaps a little surprising, given *MacLean v MacNeill* 23 June 1757 FC.

135 Hume, *Lectures* vol II (n 92) 8.

136 As is clear from his discussion at 11 of silence as to facts which affect the price.

137 Hume, *Lectures* vol II (n 92) 10.

138 See text at nn 21-29 above.

139 Hume, *Lectures* vol II (n 92) 8-9.

140 G J Bell, *Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence*, 5<sup>th</sup> edn (1826) vol I, 294-295.

prefigures Bell's treatment by using English cases to illustrate the Scots law of error and by referring to Pothier. As with Bell, the latter clearly exerted a much more significant influence than the former.<sup>141</sup>

(a) *Error as dissensus*

Several aspects of Brown's treatment suggest that where error matters, it matters because it operates to prevent consent and thus that the rules on consent are what really do the work. First, Brown's account of consent is strongly subjective. He uses Pothier's description of consent: "the concurrence of the will of the vendor to sell the thing in question to the vendee at a certain price, and the will of the vendee to purchase the said thing at the said price".<sup>142</sup> Brown also endorses Pothier's position on revocation of offers.<sup>143</sup> The French jurist posited a case where an offer is made by letter, after which a second letter is sent, revoking the offer. In the interval between the delivery of the two letters, the offeree writes to the offerer accepting the offer. According to Pothier, there was no contract: the offerer's will to contract did not persist until the offer was accepted and therefore there was no concurrence of wills.<sup>144</sup> He and Brown recognised the need to compensate the offeree for any loss suffered but did so on the basis of a general equitable duty rather than by invoking the validity of the contract.

Secondly, Brown's consideration of error is integral to his assessment of consent rather than being applied *ex post* to consent which has already been established. He deals with instances of error in the course of discussion of the elements which must be agreed for a valid sale.<sup>145</sup> Fraud, on the other hand, is treated much later in his work alongside force and fear as a ground for setting contracts aside.<sup>146</sup> Brown makes it clear that, while there is no consent in cases of relevant error, in cases of fraud there is real, albeit defective consent. The

141 Pothier also exercised a significant influence on English law in this area: see C MacMillan, *Mistakes in Contract Law* (2010) ch 5. Pothier's general approach to error is much closer to the traditional *ius commune* view than to the scholastic-natural law treatment: MacMillan, *Mistakes* 101-104.

142 Brown, *Sale* (n 105) § 211; R J Pothier, *Traité du contrat de vente*, in M Siffrein (ed), *Oeuvres de Pothier* vol 3 (1821) § 31.

143 Brown, *Sale* (n 105) § 212.

144 Pothier, *Vente* (n 142) § 32.

145 Brown, *Sale* (n 105) §§ 214-224; Pothier, *Vente* (n 142) §§ 34-37. Brown does have some difficulty integrating *error in persona* into this scheme. It is rather implausibly handled under error relating to the thing sold. The reason for this may be that Brown's structure is borrowed from *Traité du contrat de vente* and Pothier only addresses *error in persona* in the *Traité des obligations*. There *error in persona* is addressed immediately after *error in substantia*.

146 Brown, *Sale* (n 105) §§ 554-560, 577-615.

point emerges in his treatment *Dunlop v Crookshanks*,<sup>147</sup> his example of *error in persona*. Brown stresses the distinction, drawn by Lord Elchies, between this case and cases of fraud. As Brown puts it, “Error renders a contract *essentially null*: fraud merely renders it *voidable*”.<sup>148</sup> Brown uses the contrast to explain why error in a prior contract could be pled against an onerous *bona fide* successor while fraud could not.<sup>149</sup>

Thirdly, the specific classes of error discussed are those familiar in the *ius commune* tradition: *error in corpore*, *in negotii*, *in pretio* and *in substantia*. In the last of these Brown uses the traditional Aristotelian distinction between essential and accidental qualities, and groups *error in corpore* and *in substantia* together as examples of failure to agree on the object of sale. The *numerus clausus* of relevant errors contrasts sharply with the approach in cases of fraud, where the “but for” test used in Stair’s treatment of fraud and in Grotius’ treatment of error is employed.

(b) *Pothier and error in persona*

Thus far, Brown follows the approach of those who had gone before him. However, in one point Brown’s approach differs from that of his predecessors. *Error in persona* had long been central to discussion of error in Scotland. Brown repeats the rule<sup>150</sup> but endorses Pothier’s distinction between cases where the identity of the counterparty mattered and cases where it did not. *Error in persona* only affected validity in the former case. Thus, a loan, a gift or a contract to have a picture painted would be null if the lender, donor or commissioner was mistaken as to the identity of the counterparty but error would not have the same effect in a cash sale.<sup>151</sup>

Pothier explains the latter result in the following terms:<sup>152</sup>

ce n’est pas précisément et personnellement à Pierre qu’il a voulu vendre ce livre, mais à la personne qui lui donneroit le prix qu’il demandoit, quelle qu’elle fût; et par conséquent il est vrai de dire que c’est à moi, qui étois cette personne, qu’il a voulu vendre son livre.

147 (1752) Mor 4879, discussed at C.(3)(a) above.

148 Brown, *Sale* (n 105) § 221.

149 *Sale* §§ 221, 599-602. Brown appears to have regarded a *iusta causa traditionis* as necessary for a valid transfer. Elchies’ and Kilkerran’s reports of *Dunlop* are less clear on this point.

150 At some cost to his overall structure: see Brown, *Sale* (n 105) § 220.

151 Pothier, *Obligations* (n 131) § 19, quoted by Brown, *Sale* (n 105) § 220.

152 Pothier, *Obligations* (n 131) § 19. This is translated by W D Evans (1806) as follows: “it was not precisely and personally to *Peter* that he wanted to sell the book, but to any body who was willing to give the price of it, [and] it may be truly affirmed of me, that I was the person to whom he intended to sell his book”.

Pothier's reasoning here can be understood by reference to the distinction between *error in persona* and *error in nomine* (error regarding the name of a person or thing). Since Roman times, the latter had been regarded as irrelevant.<sup>153</sup> If you intend to buy an orange, it does not matter that you think oranges are called apples. Similarly, it does not matter that the seller believes the person standing in front of him is called Pierre (when in fact he is called Robert) if the seller really intends to contract with the person in front of him.

The distinction between this case, and the case where the seller intended to contract with Pierre (whom he believed to be standing in front of him), is clear enough in theory but can be difficult in practice since names are often the main mechanism for identification. These problems would, of course, be exacerbated by the procedural restrictions on methods of proof which applied in Scotland until 1853. Against that background, a party's interest in the identity of his counterparty is a useful guide to his true intentions. The distinction between the two cases operates at a procedural rather than a substantive level.

It is possible, however, to read Pothier's distinction in another way, and to see it as a substantive criterion rather than an evidential guide. On this reading, Pothier echoes concerns in the natural law and scholastic traditions about whether relief for error is deserved. If a party would have been just as happy to contract with anyone else, he is thought not to deserve protection from his error since he has not been prejudiced by it. Error as to identity is irrelevant because belief about the identity of the counterparty did not motivate the decision to contract.

The evidential view seems preferable for two reasons. Since Pothier rejects the relevance of error in motive in the next section of his work,<sup>154</sup> it is unlikely that he was seeking to incorporate a motive-based criterion into his consideration of *error in persona*. Further, in his discussion of the painting case, he imposes a non-contractual duty of compensation on the party in error. This technique is similar to his approach to revocation of offers and it shows a tendency to stick to a strictly subjective approach to consensus and to correct unwanted results with equitable, extra-contractual duties. The fact that one party does not deserve protection does not affect Pothier's analysis of the contract, but it does make him impose a duty to compensate.

153 D 18.1.9.1 (Ulpian).

154 Pothier, *Obligations* (n 131) § 20.

Brown illustrates Pothier's two classes of *error in persona* with *Dunlop v Crookshanks*<sup>155</sup> and the English case of *Mitchell v Lapage*.<sup>156</sup> He summarises them thus:<sup>157</sup>

[In *Dunlop*] it appeared that the error in the name of the vendee was a material circumstance, and that the vendor would have suffered a loss if it had been held that there was a valid contract . . . [In *Mitchell*] it appeared, on the other hand, that the error in the name was immaterial, and therefore it was held, in conformity with Pothier's rule, that the validity of the contract was not affected by it, unless the party founding upon the error could shew that he had suffered any prejudice in consequence.

This account is rather surprising for two reasons. In *Dunlop*, there is no direct discussion of error or its materiality.<sup>158</sup> Instead the focus is directly on the fact that the seller had intended to sell to one person while another purported to buy. This was discernable from the letters and the differing treatment of the two sales. There was no need to have recourse to questions of materiality. If *Dunlop* is relevant, however, it pushes us towards the first rather than the second reading of Pothier because of the emphasis on whom the seller intended to contract with.

In *Mitchell* an agent, intending to sell on behalf of one firm, did so in the name of a second, which had previously been his principal but was no longer in existence. The court allowed the first firm to enforce the contract, holding that no prejudice had been suffered as a result of the mistake. On its face, Brown's summary suggests a distinction between materiality of the error and prejudice so that an error which was immaterial might nonetheless vitiate a contract if prejudice followed. The focus is thus on protection from loss rather than on the decision to contract. Examination of the judgment, however, suggests that such an approach would be erroneous. No reference is made to materiality, only to prejudice, so the court drew no such distinction. In the context in which Brown uses it, the case seems best read as saying that the lack of prejudice shows that the error was not material and thus that the buyer had intended to contract with the agent's principal, whoever that may have been, rather than with the particular named firm.<sup>159</sup>

So understood, the decisions are consistent with the first reading of Pothier. In other areas, Brown's approach is very much in line with the subjective view of

155 (1752) Mor 4879.

156 (1816) 171 ER 233, Holt 253.

157 Brown, *Sale* (n 105) § 222.

158 Although it might be argued that the identity of the buyer is always material in a credit sale.

159 The judge was also motivated by apparent tacit ratification of the contract by the buyer after he had learned the truth. There may have been hints of estoppel by representation too.

contract formation and the analysis of error as a real-world obstacle to consent evident in the earlier Scottish materials. Although Brown's language does not at first sight encourage the idea, it is also possible to accommodate Pothier's view of *error in persona* within the traditional framework.

#### D. BELL'S APPROACH

##### (1) General theory of contracts

Bell gives the parties' will and subjective consent pride of place in his account of conventional obligations.<sup>160</sup> In doing so, he invokes Stair's "three acts of the will" account and goes on to discuss the "Nature and Requisites of Consent".<sup>161</sup> Offer and acceptance are discussed but, rather than being treated as the paradigm for consent, they are simply one mechanism by which consensus may be achieved.<sup>162</sup> It is noteworthy that Bell appears to endorse Pothier's position on revocation of offers, although his language is less explicit than Brown's.<sup>163</sup>

The view that Bell had an essentially subjective approach to consensus is bolstered by later case law. The key authority for substantive objectivism is *Muirhead & Turnbull v Dickson*, decided as late as 1905.<sup>164</sup> While it is possible to look back now on earlier cases like *Higgins & Sons v Wilson & Co*<sup>165</sup> and *Thomson v James*<sup>166</sup> and see them as laying the foundations for such a decision, it is not clear that they were so understood at the time. These cases were solely concerned with the timings of offers and acceptances and did not address differing views as to the content of the obligation. Even as he affirmed the postal acceptance rule in *Thomson*, Lord Ivory stressed that "both parties must be agreed as to all conditions essential to the contract; otherwise the one party would have in view one contract, and the other a different one".<sup>167</sup> Prior to *Muirhead & Turnbull*<sup>168</sup> and even after it,<sup>169</sup> objectivism was understood in the traditional Scots manner, as a rule of evidence. The substantive approach seems to have become firmly

160 Bell, *Principles* (n 2) § 7.

161 *Principles* §§ 10-14.

162 *Principles* § 72.

163 *Principles* § 73. There seems to have been a slight shift since Bell's first discussion of offer and acceptance in the 4th edition of the *Commentaries* (1821) vol I §§ 259-263, where the view of offers appears to be closer to Stair than Pothier.

164 (1905) 7 F 686.

165 (1847) 9 D 1407.

166 (1855) 18 D 1.

167 (1855) 18 D 1 at 15.

168 *Buchanan v Duke of Hamilton* (1878) 5 R (HL) 69.

169 E.g. *Bank of Scotland v Crerar* 1921 SC 736 at 752 per Lord President Clyde; T B Smith, *Short Commentary* (n 1) 812.

established only on the basis of Glog<sup>170</sup> as endorsed by Lord Reid in *M'Cutcheon v David MacBrayne Ltd.*<sup>171</sup>

## (2) Error

Error is discussed by Bell as part of his treatment of the “Nature and Requisites of Consent”.<sup>172</sup> Within this section, he also deals with force and fraud, following the example of Domat, Pothier and Erskine.<sup>173</sup> Bell’s major discussion on the relationship between error and fraud is the “Note relative to Sections 11, 12 and 13” which appears after § 14:

The want of consent, when the obligation proceeds from error or force, annuls the contract: But the nullity must be declared judicially. The contract ostensibly is valid and regular; and 1. it subsists till it be reduced; 2. it will be effectual against third parties without notice . . . A distinction has been taken in the case of fraud that it will not be effectual as a ground of reduction against third parties; seeing there is here consent, though proceeding on a false ground. Is there any real ground for such a distinction?

The passage is somewhat difficult to follow and has led some to conclude that Bell thought that error rendered a contract voidable rather than void.<sup>174</sup> Proponents of that view can point to the requirement that the nullity “be declared judicially” and to the words “it subsists till it be reduced”. On the other hand, Bell clearly, albeit reluctantly, acknowledges that the general view is that espoused by Stair and Brown: that there is no consent in cases of error whereas there is real but defective consent in cases of fraud and that this is the reason for the differing treatment of singular successors in cases of fraud and error.<sup>175</sup>

The insistence on contracts which are null for error being set aside judicially may be explained by the influence of Domat. Domat, however, was not motivated by the idea that the contract subsisted; rather he was concerned to avoid self help.<sup>176</sup> On balance, therefore, it seems better to conclude that Bell regarded error as giving rise to voidness rather than voidability.

Bell gives five categories of “error in substantialis”: subjects (that is, the object of sale), person (where the contract is *delectus personae*), price, quality (“if expressly or tacitly essential to the bargain”), and the nature of the

170 Glog, *Contract* (n 115) 7.

171 1964 SC (HL) 28 at 35.

172 Bell, *Principles* (n 2) §§ 10-14.

173 J Domat, *Loix civiles dans leur ordre naturel* (new edn, 1756) 1.1.2 § 2; Pothier, *Obligations* (n 131) § 16; Erskine, *Institute* (n 92) 3.1.16.

174 Smith, *Short Commentary* (n 1) 815-816; Glog, *Contract* (n 115) 442 n 3.

175 See also Bell, *Commentaries* (n 140) vol I, 297.

176 Domat, *Loix civiles* (n 173) 1.1.5 § 16.



contract.<sup>177</sup> These categories were well known to Scots lawyers by the time Bell employed them. Even the limitations applied to error regarding the person and quality had been seen before, in the work of Brown and Hume respectively. There has been some dispute as to whether *error in substantia* or *materia* is part of Bell's first category or of his fourth.<sup>178</sup> Since the rationale for accepting *error in substantia* is that it meant that one or both of the parties really had a different object of sale in mind, the distinction does not seem of much importance.

As Lord Watson notes,<sup>179</sup> Bell says nothing about whether the error in question is unilateral or mutual. Lord Watson doubted that unilateral uninduced error would often be relevant and his reserve is perhaps shared by Stein, who observes that none of the cases cited by Bell involves such error. If, however, the view taken here of Bell's theory of contract is correct, then uninduced unilateral error would have been relevant<sup>180</sup> but very difficult to prove due to the restrictions on evidence. This view seems the most natural inference to draw from Bell's silence. The *Principles* was written for students, who would surely have assumed that all errors in substantials were relevant unless told otherwise.<sup>181</sup> This position is consistent with the tradition in Scotland going back to Stair. The problem of unilateral error is not addressed directly, but the theory of contract espoused suggests that there would be no substantive obstacle to its being pled.

Since there is nothing new in Bell's approach, there is nothing in his treatment which necessitates a move from the analysis presented hitherto. Error is a way of talking about and explaining the results of other rules of contract law rather than an independent doctrine. This is highlighted by the fact, as Stein notes, that the cases Bell cites as authorities for error in relation to an essential quality are cited in the *Commentaries* as examples of implied conditions in sale.<sup>182</sup>

## E. CONCLUSION

Bell has acquired a reputation as the father of the doctrine of error in Scots contract law. Stein says that he "gives a much more comprehensive account

177 Bell, *Principles* § 11.

178 Gow, "*Culpa in docendo*" (n 1) at 255; Stein, *Fault in the Formation of Contract* (n 1) 183-184.

179 *Stewart v Kennedy (No 2)* (1890) 17 R (HL) 25 at 29.

180 Except in the case of quality, where the need for the requisite quality had to be communicated.

181 See also Lord Kyllachy's opinion in *Bennie's Trs v Couper* (1890) 17 R 782.

182 Stein, *Fault in the Formation of Contract* (n 1) 185. See *Christies v Fairholmes* (1748) Mor 4897, cited by Bell for *error in persona* in the *Principles* (n 2) § 11 and for fraud in the *Commentaries* (n 140) vol I, 297 and in the *Principles* § 14.

than any of his predecessors”<sup>183</sup> and Gow suggests “that Professor Bell may be primarily responsible for the decline of the Scots law of error into a state bordering on chaos”.<sup>184</sup> This may go some way to explaining the comparative neglect of the sources before Bell. In fact, Bell seems to deserve neither the credit nor the opprobrium. The picture is one of continuity rather than revolution. Bell’s was a work of minor synthesis, bringing together strands already present in the Scottish discourse. If Bell is guilty for the chaos which followed, then so are all those who preceded him; but, given the stability, simplicity and relative clarity of the law up to Bell, any blame might be more appropriately directed at his successors.

183 Stein, *Fault in the Formation of Contract* (n 1) 183.

184 Gow, “Mistake and error” (n 1) at 475.