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# English Influences on the Historical Development of Fiduciary Duties in Scottish Law

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## A. INTRODUCTION

In 1985 Sir Anthony Mason noted that: “The fiduciary relationship is a concept in search of a principle.”<sup>1</sup> More than twenty-five years later the search for principle continues,<sup>2</sup> though in recent years a number of important theories have been advanced to explain the underlying theory of fiduciary obligations. Ambiguity surrounding a conceptual basis clearly poses continuing difficulties for the identification of rules that apply the elusive fiduciary concept. Yet there remains enduring dissensus among the judges and academics of the Common Law world about the fundamental nature and function of fiduciary law in different legal systems.<sup>3</sup> That is quite understandable given the Common Law family is not a single entity: commonality is not uniformity.<sup>4</sup> Indeed, jurisprudential divergences can provide rich opportunities for evolution and cross-fertilisation. Debates across the Common Law world that foster new theories explaining the nature of fiduciary liability provide valuable guidance for the development of fiduciary liability in Scotland.

In considering Scottish fiduciary law it is important to have regard to the historical development of fiduciary law within Scotland. It is equally important to consider events in England in particular because the two systems share common elements of development, and there is a shared heritage in this area of law in particular. Caution is required in weighing the interrelated development of the two systems, however. The historical development is undoubtedly one of close association but there are differences between the two systems—to have a shared development presumes that there are separate entities, each of which has something to share. From the perspective of the Scottish legal system, therefore, it should always be borne in mind that it is for one legal system to evaluate critically the merits and fit of a legal rule emanating from another system.<sup>5</sup>

With these general precepts in mind the purpose of this article is to consider the historical development of the doctrinal structure of fiduciary law in Scotland. Therefore the article necessarily uses a mixture of text writers and important cases to illustrate in broad brush the development of the fiduciary concept. As with many areas of law it is useful to consider the historical development of doctrine

1 A Mason, “Themes and Prospects”, in P D Finn (ed), *Essays in Equity* (1985) 242 at 246.

2 L Hoyano, “The Flight to the Fiduciary Haven”, in P Birks (ed), *Privacy and Loyalty* (1997) 169 at 170.

3 M Conaglen, *Fiduciary Loyalty* (2010) 24-26; J Edelman, “Four fiduciary puzzles”, in E Bant and M Harding (eds), *Exploring Private Law* (2010) 299.

4 The flexible plurality of ‘common laws’ generally is superbly illustrated by Glenn: H P Glenn, *On Common Laws* (2005).

5 On inter-systemic recognition see: N Jansen, “The development of legal doctrine in Europe: extracontractual liability for fault”, in N Jansen (ed), *The Development and Making of Legal Doctrine* (2010) 1 at 1.

in a manner that allows us to understand the present structure of the law, so that in turn we might more adequately be prepared to tackle the task of considering its broader interstitial fit in the system of private law today. That is not to say that historical understanding is a substitute for considering the modern law – it is not. Law should, and indeed must, if it is to retain relevance and respect, be an organically dynamic institution that responds to the needs of its time. Acquaintance with an account of the past reveals the evolutionary processes that constitute the continuum of a doctrinal category’s past evolution.<sup>6</sup> An analysis according to these terms has been lacking in the literature on Scottish fiduciary law. This article seeks to give what appears to be the first tentative treatment of the historical development of fiduciary law in Scotland.<sup>7</sup>

A broader exercise in the same vein is to conceptualise historically a ‘tradition’ at a systemic level.<sup>8</sup> In modern Scottish academic writings there is frequent reference to the, or perhaps a, ‘civilian tradition’.<sup>9</sup> The ‘civilian tradition’ is of course, in these works, a component of the broader ‘Scottish legal tradition’ which contains other influences – a monograph or article on the ‘common law tradition’ in Scotland has yet to appear.<sup>10</sup> This may be because it has a greater, perhaps even a residual or default, presence. It would be an interesting tale. Historically grounding these constituent traditions does not entail the erection of a frozen interpretation of the past alone; rather, any understanding of these traditions and interface will be a dynamic one that is pregnant with possibilities for realigning thinking about the future. That task, with its attendant opportunity, can be similarly applied to the narrower examination of fiduciary law.<sup>11</sup>

This article suggests that the historical development of fiduciary liability in Scotland grew from a distinctive Scottish basis, and then subsequent substantively similar rules to those regulating fiduciary liability in English law were grafted

6 A point encapsulated crisply by Ibbetson: “The real difficulty with doctrinal legal history is that its primary focus is ideas rather than facts or events.” D Ibbetson, “Historical Research in Law”, in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 863 at 874. Much depends on the purpose with which one approaches legal history: difficulty often gestates possibility.

7 There is a single article regarding modern fiduciary law: P Hood, “What is so Special about being a Fiduciary?” (2000) 4 EdinLR 308. See also L J Macgregor, *The Law of Agency in Scotland* (2013) ch 6.

8 On the systemic significance see N Walker, “Out of Place and Out of Time: Law’s Fading Co-Ordinates” (2010) 14 EdinLR 13 at 20-21.

9 For example: R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995); N R Whitty, “The Civilian Tradition and Debates on Scots Law” (1996) *Tydskrif vir die Suid-Afrikaanse Reg* 227; D L Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law* (1997).

10 There are many texts about the ‘common law tradition’ generally: e.g. J H Baker, *The Common Law Tradition: Lawyers, Books and the Law* (2000); H P Glenn, *Legal Traditions of the World*, 2<sup>nd</sup> edn (2004); J W Head, *Great Legal Traditions: Civil Law, Common Law, and Chinese Law in Historical and Operational Perspective* (2011).

11 On the concept of a ‘tradition’ see: Glenn, *Legal Traditions* (n 10) ch 1.

onto the Scottish law creating a shared collection of ideas and concepts. This confluence of ideas came about through the shared space inhabited by the legal systems within the United Kingdom. The effective rules in English and Scottish law came to rest upon similar moral or policy objectives as a result of each system employing separate formulations of equity that formed an apparent common linguistic point of entry. Yet those formulations of equity are institutionally distinct, and hence the normative doctrinal core in Scotland potentially differs from the structural framework in English law. One of the reasons for a continuing different doctrinal approach is the complicated nature of equity in Scotland, compared to in England where it has built solid institutional structures. These shared institutional spaces and moral imperatives were thus fused in a slightly uneasy fashion in Scotland. It is suggested that this examination of the historically distinct doctrinal framework opens up the possibility of a different scope for, and approach to, substantial rules regulating fiduciaries in Scotland, and indeed different remedial responses today.

## B. HISTORICAL DEVELOPMENT OF FIDUCIARY LAW IN SCOTLAND

### (1) An overview of doctrinal challenges

The idea of a class of persons with special rules of liability called fiduciaries is a comparatively modern one for Scottish law. While in the past there were a number of separate legal mechanisms which produced results which today we would recognise as being directed towards the protection of those dealing with fiduciaries, the idea of a commonality of office-based obligations that can be used to classify different office-holders as ‘fiduciaries’, is relatively new. Not only is it rather new, much of the flesh of the rules of the nominate concept in modern Scottish law is borrowed from English equity. It is frequently stated that the principles of fiduciary liability are one and the same in Scottish and English law, even by Scottish judges.<sup>12</sup>

12 *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461 at 474 per Lord Chancellor Cranworth, pointing out the civilian heritage (D 18.1.34.7) and at 477 per Lord Brougham; *Dougan v MacPherson* (1902) 4 F (HL) 7, at 9 per Lord MacNaghten, and at 10 per Lord Shand; [1902] AC 197 at 204 per Lord MacNaghten, and at 205 per Lord Shand; *Aberdeen Town Council v Aberdeen University* (1877) 2 App Cas 544 at 554-555 per Lord O’Hagan (in the Law Reports his apposite citation of Stair 1.6.17 is reported but it is curiously omitted from Rettie), and at 558 per Lord Gordon (who also stated, a little incongruously given his comments in *McPherson v Watt* below, that the Scottish law rests upon the civil law, and that Scottish authority preceded English rules); (1877) 4 R (HL) 48 at 54-55 per Lord O’Hagan, and at 56 per Lord Gordon; *McPherson v Watt* (1877) 3 App Cas 254 at 270 per Lord Blackburn, and at 277 per Lord Gordon (who notes that the Scottish rules are based upon English authority); (1877) 5 R (HL) 9 at 20 per Lord Blackburn, and at 25 per Lord Gordon.

Yet, while it might appear, at first sight, that the law in Scotland and England is the same here, the picture is arguably more complicated notwithstanding repeated judicial assertions that the two are the same. Such assertions would in the ordinary course of things be conclusive. There is, however, a problem that cannot be ignored when stating that the two systems are the same. The structure of the English law relating to fiduciaries is heavily bound up with the enduring intellectual, and formerly institutional, separation of equity jurisprudence. The Scottish courts in contrast have, traditionally at least, been reticent to adopt remedial responses that mirror their English brethren.<sup>13</sup> It is often an eminently defensible position to say that this will be because the remedies for breaches of fiduciary duty in English law require nominate equitable remedies, some of which are not readily discoverable in Scottish law. This article seeks to examine the way in which Scottish equity has operated in the area, and indeed how English chancery jurisprudence came to inform and shape the Scottish approach to fiduciary liability.

So what, then, is the meaning of the term ‘fiduciary’ in Scottish law? It is an idea that is comparatively underdeveloped in Scottish academic writings,<sup>14</sup> and indeed in reported cases. Some of the older sources of Scottish law identify obligations and remedies that, today, we might describe as fiduciary.<sup>15</sup> These early conceptualisations of fiduciary obligations included the important rule that certain individuals—such as those acting as tutors or curators—could not act

13 A recent exception is *Commonwealth Oil & Gas Co v Baxter* [2009] CSIH 75, 2010 SC 156. See D J Carr, “Equity Rising?: *Commonwealth Oil & Gas Co v Baxter*” (2010) 14 EdinLR 273; N R Whitty, “The “No Profit from Another’s Fraud” Rule and the “Knowing Receipt” Muddle” (2013) 17 EdinLR 37. Recent Outer House authority questions the comprehensiveness of the decision: *Park’s of Hamilton (Holdings) Ltd v Campbell* [2011] CSOH 38 at para 23 per Lord Hodge.

14 R Candlish-Henderson, “Trusts in Scottish Law” (1949) 31 J of Comparative Legislation and International Law (3d series) 36 at 38.

15 The term ‘fiduciary’ is elusive in early Scottish sources, but some early examples of the term include *Kincardin v Kincardin* 29<sup>th</sup> November 1681 Harcarse 162; T Craig, *Scotland’s Sovereignty Asserted* (transl G Ridpath, 1695) 248. As regards contemporary English sources see E Coles, *An English Dictionary* (1677) describes a ‘Fiduciary’ as “... trusty, also a feoffee in a trust”; whereas to ‘fiduciate’ is to “commit a trust, or make condition of trust”; which is a straight copy of E Phillips, *The New World of English Words* (1658). For a discussion of the use of the word fiduciary in English law see Sir Thomas Smith’s criticism of Littleton: T Smith, *De Republica Anglorum* (1583) 111-13. Thereafter it is only in the eighteenth century that the term becomes more frequently utilised in Scottish law: Bankton, *Inst* 3.8.1, 3.8.77; Erskine, *Inst* 3.8.76; *Answers for Helen Chessels* (25<sup>th</sup> April 1772 MSS Bodleian Library; ECCO) 13; *Information for Anna Ker* (28<sup>th</sup> January 1728 MSS Bodleian Library ECCO) 3; W Forbes, *A Journal of the Session* (1714) 624. There is also the ‘fiduciary fiar’, which may well be akin to a constructive trustee, or something very close to it: *Creditors of Frog v Frog’s Children* (1735) Mor 4262; *Petition of Earl of Fife* (21<sup>st</sup> June 1794 MSS Bodleian Library ECCO) 32-34; see G L Gretton, *Constructive Trusts I* (1996-1997) 1 EdinLR 281 at 310; R Burgess, *Perpetuities in Scots Law* (1979) 123ff.

as *auctor in rem suam*.<sup>16</sup> These early views of what would now be described as fiduciary obligations were not necessarily commensurate with the idea of trusts, at least not what we would now identify as a trust; yet, in later times the concept of fiduciary obligations came to be seen as heavily associated with trust jurisprudence,<sup>17</sup> and indeed, English equity jurisprudence.<sup>18</sup> It is not clear to what extent the disparate older sources are consistent with the more dominant and recent nominate ‘fiduciary’ materials. It must be correct to say that later enunciated rules supersede and replace the older disparate rules, when not compatible, in this area of law. One can argue, however, that the later nominate ‘fiduciary’ rules slot into a broader doctrinal framework, within which the older rules developed, and in turn justifies an examination of older rules alongside the newer nominate ‘fiduciary’ rules.

## (2) *Auctor in rem suam*

The initial rules of law that carried out a role similar to that of modern fiduciary law were disparate and scattered to attach to different offices. The clearest examples of that early Scottish approach can be seen in relation to curators and tutors, whereby a broad application of the ‘*auctor in rem suam*’ principle is used to stipulate that a tutor or curator cannot act in a way which is incompatible with the interests of his pupil.<sup>19</sup> Some of the earliest appearances of the idea are in the sixteenth century. Accordingly, we see it mentioned by Balfour in the context of curators,<sup>20</sup> and Craig states in relation to interdictors:

They [interdictors] are therefore as much disabled, in law and justice, from acquiring his property from him as are tutors and curators from acquiring the property of their wards (Nov 72). Rather might it be said that if tutors and curators cannot turn their

16 J Trayner, *Latin Phrases and Maxims* (1861) 32-33. See also E Vinter, *A Treatise on the History and Law of Fiduciary Relationship*, 3<sup>rd</sup> edn (1955) 3.

17 J Rankine (ed), *Erskine’s Principles of the Law of Scotland*, 20<sup>th</sup> edn (1903) 1. 7. 11.

18 See S Halifax, *An Analysis of the Roman Civil Law* (1774) 43, for an analogy between trusts and uses and the Roman fiduciary settlements.

19 The technical meaning of *auctor in rem suam* is that a person may not ‘authorise’ himself in a transaction with another as that would be akin to authorising himself: see Lord Rodger of Earlsferry, “Only Connect” (2007) JR 163 at 165 n 8. In Scottish law the term appears to have been bastardised pretty early on to move beyond that technical meaning and mean that a tutor could not ‘act’ in a way that benefitted his own interest. A notable exception is Forbes: “Nor can any Tutor or Curator be Author in *Rem suam*, by authorizing the Minor to do any Deed tending directly to the Authorizer’s Advantage...”, W Forbes, *The Institutes of the Law of Scotland* (1722) 1,32. One is reminded of Zimmermann’s observation in relation to English law: “Often, of course, the Roman impulses led to rather un-Roman results”: R Zimmermann, “Roman Law and the Harmonization of Private Law in Europe”, in A Hartkamp et al (eds) *Towards a European Civil Code*, 4<sup>th</sup> revised and expanded edn (2011) 27 at 47.

20 J Balfour, *Balfour’s Practicks* (P G B McNeill ed, 1962) vol 1, 124.

office to their own advantage – as Justinian so admirably says (Inst 1.21.3) – far less can the friends at whose instance the interdicted person was deprived of the management of his own property, and placed under supervision, be allowed to use their consents for the purpose of acquiring his property for themselves. It is a principle which knows no exception that no man can make the law to suit himself or be the author of his own rights (D 2. 2. 10.).<sup>21</sup>

The idea of a prohibition against a tutor or curator being *auctor in rem suam*, in the narrow technical or broader policy sense, was successively repeated and elaborated in the seventeenth and eighteenth centuries. We can see Hope,<sup>22</sup> MacKenzie,<sup>23</sup> Stair,<sup>24</sup> Erskine,<sup>25</sup> Bankton,<sup>26</sup> Kames,<sup>27</sup> Forbes,<sup>28</sup> Wallace<sup>29</sup> and case law<sup>30</sup> referring to the prohibition placed upon tutors or curators from so acting in their own interest. The early development of this rule is clear but basic, and appears to represent a distinct indigenous approach, though clearly and expressly<sup>31</sup> associated with the perceived rule of the Roman law. The references to the Institutes, Digest<sup>32</sup> and indeed even the Novels, show the extent to which the rule is being developed and received from Roman law.<sup>33</sup> Therefore, the treatments of Stair, Erskine and Bankton are rather succinct in stating the rule; however, Wallace and Kames are somewhat more elaborate in their approach to the operation of the doctrine, and to whom it should be applied.

21 Craig, *Jus Feudale* 1.15.24; *Lord Sanquhar v Crichton* (1583) Mor 16233, where it is stated “*Tutor in rem suam auctor fieri non potest.*”

22 T Hope, *Hope’s Major Practicks 1608-1633* (Lord Clyde ed, 1937) vol 1, 4.10.3, 4.10.29, 4.10.30.

23 G MacKenzie, *Observations on the Acts of Parliament* (1686) 286 and 465.

24 Stair, *Inst* 1.6.17.

25 Erskine, *Inst* 1.6.23, 1.7.19, 1.7.58.

26 Bankton, *Inst* 1.7.39, 1.7.57.

27 Lord Kames, *Principles of Equity*, 3<sup>rd</sup> edn (1778) 1.87.

28 W Forbes, *The Institutes of the Law of Scotland* (1722) 1.32. In the unpublished *Great Body of the Law of Scotland*, Forbes states (163) that a tutor or curator is to “carefully manage the Minor’s Estate as if it were his own, and at the same time forbear appropriating or imbeziling it as belonging to another”. Forbes also cites Seneca’s consolatory letter to his exiled mother to explain a tutor or curator’s duty: “you [Seneca’s mother] managed our inheritances with such care that they might have been your own, with such scrupulousness that they might have been a stranger’s; you were as sparing in the use of our influence as if you were using a stranger’s property, and from our elections to office nothing accrued to you except your pleasure and expense. Never did your fondness look to self-interest”: L A Seneca, *Moral Essays*, (J W Basore trans, 1928-1935) vol 2, 12.14.

29 G Wallace, *A System of the Principles of the Law of Scotland* (1760) § 454.

30 *Ludquhairn v Haddo* (1632) Mor 9503; *Murray v Murray* (1710) Mor 9504; *Corsan v McGowan* (1736) Mor 9504.

31 Stair, *Inst* 1.6.4.

32 The rule set down in the Digest is of general application, and it is clearly recognisable today: “A tutor cannot buy a thing belonging to his ward; this rule extends to other persons with similar responsibilities, that is, curators, procurators, and those who conduct another’s affairs.” D 18. 1. 34. 7

33 The language of the marginal title for *Lord Sanquhar v Crichton* (1583) Mor 16233 is indicative: “*Tutor in rem suam auctor fieri non potest.*”. In fact the case report itself cites a rather fuller statement: “*nam de jure tutor in rem suam vel in eo negotio quod ad se principaliter pertinet auctor fieri non debet.*”



### (3) Kames

It is perhaps telling that, by the eighteenth century, the account given by Kames stands as an aspect of ‘equity’ stepping in to render items that are lawful ‘by common law’ ineffectual or reprobated.<sup>34</sup> Kames states that certain relations,<sup>35</sup> which today we would describe as fiduciary, are relations founded upon benevolence and a concomitant ‘disinterest’.<sup>36</sup> Disinterest in this context is not a reference to an actor’s attention to affairs, but rather to the impartiality that should be the hallmark of an actor’s administration of the affairs of another, whom they represent. Thus, there are certain matters which as a matter of ‘common law’ a trustee cannot be allowed to do, such as taking payment to undertake the articles of a trust.<sup>37</sup> Yet, this is not the end of the matter. The passage which Kames lays down as the position in equity is worthy of quotation in full:

Equity goes farther: it prohibits a trustee from making any profit by his management directly or indirectly. An act of this nature may in itself be innocent; but it is poisonous with respect to consequences; for if a trustee be permitted, even in the most plausible circumstances, to make profit, he will soon lose sight of his duty, and direct his management chiefly for making profit to himself. It is solely on this foundation that a tutor is barred from purchasing a debt due by his pupil, or a right affecting his estate. The same temptation to fraudulent practice<sup>38</sup> concludes also against a trustee who has a salary, or is paid for his labour.<sup>39</sup>

For Kames the doctrine is by now one based firmly upon policy considerations – notably to prevent those with responsibility for the interests of others from losing sight of that fact. Of course, when he states here that equity steps in, what he means is that equity as a driver of the law compels the law to intervene. Therefore, ‘equity’ steps in to make such actions ineffectual, and therefore removing the temptation from such persons to indulge in actions contrary to their duty to another. The emphasis, however, is not on the interest of the other; rather, it is upon not neglecting the duty in oneself. This is an important

34 Lord Kames, *Principles of Equity* (1760) 175; Lord Kames, *Principles*, 2<sup>nd</sup> edn (1767) 255; Kames, *Principles*, 3<sup>rd</sup> edn (n 27) 2.86; cf Craig, *Jus Feudale* 1.15.24.

35 He mentions guardian and infant, and trustee and beneficiary, yet they are examples only.

36 Kames, *Principles*, 2<sup>nd</sup> edn (n 34) 255; Kames, *Principles*, 3<sup>rd</sup> edn (n 27) 2.86.

37 Kames, *Principles*, 2<sup>nd</sup> edn (n 34) 255; Kames, *Principles*, 3<sup>rd</sup> edn (n 27) 2.86-87.

38 In the third edition the stronger formulation “temptation to fraudulent practice” replaces that of the second edition, which talked of “hazard and mischief”: compare Kames, *Principles*, 3<sup>rd</sup> edn (n 27) 2.87, and Kames, *Principles*, 2<sup>nd</sup> edn (n 34) 255.

39 Kames, *Principles* (n 34) 176; Kames, *Principles*, 2<sup>nd</sup> edn (n 34) 255; Kames, *Principles*, 3<sup>rd</sup> edn (n 27) 2.87. This is the text of the passage as it appears in the third edition, the last Kames prepared himself; only the punctuation is altered between the first and second editions. The wording of the passage is changed in the third edition, and it is arguably stricter by substituting the phrase “a tutor is barred from purchasing a debt” instead of the phrase “a tutor is barred from making profit, by purchasing debts”. Furthermore, the words “even in the most plausible circumstances” are a new addition in the third edition, and, in turn, further suggest a stricter view developing.

point, especially given later ideas of the arduous and important nature of fiduciary duty—the idea is that one is under a greater duty by virtue of a personal relation with another.

Furthermore, the underlying basis of fiduciary duties not to use an office of responsibility for one's own profit is applied as a principle to the following nominate cases: guardian and infant; trustee and beneficiary; advocate and client; members of the College of Justice barred from purchasing land subject of a law suit; 'factor' on a bankrupt's estate may not purchase bankrupt's debts; and, finally, if private factors and agents purchase debts due by their constituents, then the debts "... will be extinguished as purchased for the behoof of the constituents, and no claim will be sustained but for the transacted sum."<sup>40</sup> It seems, therefore, that Kames envisaged a generalised approach to fiduciary obligations.<sup>41</sup>

#### (4) Wallace

The somewhat neglected work of George Wallace, *A System of the Principles of the Law of Scotland*,<sup>42</sup> appeared in the same year as Kames's *Principles of Equity*. In the *System of the Principles* a detailed account of a tutor's office and role is given, and we are told that tutors are "... bound to manage the affairs of their pupils with fidelity, and to make their utility the measure of their conduct."<sup>43</sup> This is very close to what subsequently became known as fiduciary duties. The more narrow point about the tutor not being allowed to use his position in pursuit of his own interest is masterfully described:

Their office is neither mercenary nor lucrative. Therefore, they cannot turn their administration to their own profit, so as to make gain by it *l. 58. p. ff. eod. . .* For the same reason, a tutor cannot be *auctor in rem suam*; that is, he cannot do anything in the administration of his trust, or authorise his pupil to do anything, which is directly and principally promotive of his own interest, *l. I. p. l. 7. p. ff. de auctor. et confen. tut. et curat. C. March 1583, Lord Sanquhar.—St. 7<sup>th</sup> Dec. 1666, M'Kenzie.—25<sup>th</sup> July 1667, M'Kenzie*. Hence a tutor cannot do any thing by which it is directly and principally intended to bring his pupil under an obligation to him. . . In the same manner, if any action at Law is brought either by a tutor against his pupil, or by the pupil against his tutor, the tutor cannot authorise his pupil in it. . . In these cases, and in all others of the same kind, Law apprehends, that tutors would prefer their own interest to that of their pupils. To hinder them, therefore, from dealing doubly, it deprives them of the right of authorising their pupils in them; lest they should be tempted to do unjustly by them.<sup>44</sup>

40 Kames, *Principles*, 3<sup>rd</sup> edn (n 27) 2.8.

41 The other reference made by Kames is to an English case concerning the payment of a bond to a match-maker to procure a marriage as tending to ruin persons of fortune and quality: Kames, *Principles*, 3<sup>rd</sup> edn (n 27) 2.88-89.

42 Wallace, *A System of the Principles* (n 29).

43 Wallace, *A System of the Principles* (n 29) § 435.

44 Wallace, *A System of the Principles* (n 29) § 454.

Once more the idea is that of a policy prohibition against allowing a tutor to be placed in a situation whereby there may be a conflict of interest, where the law assumes the tutor would act for himself first. There is an interesting suggestion that a tutor could not buy the goods of a pupil not only because of the ‘fiduciary’ conflict of interest, but also because of the more technical contractual doctrine that one cannot be buyer and seller in the same transaction—*confusio*.<sup>45</sup> Therefore, we can see here quite a clear idea of the *auctor in rem suam* rule, and indeed there is a reasonably detailed discussion of the effects of a tutor receiving property in those circumstances.<sup>46</sup> The same rules are specifically said to apply to curators,<sup>47</sup> and in this sense some idea of a general fiduciary approach is evident.<sup>48</sup> Indeed, while it may not be as clearly enunciated as Kames’s approach, Wallace envisages a class of person who has “. . . the management of the affairs of others. . .”,<sup>49</sup> to which the same special rules of a higher standard of performance apply.<sup>50</sup> The case law of the eighteenth century also contains numerous references to a fiduciary,<sup>51</sup> and more often than not to the fiduciary fee,<sup>52</sup> as well as to the longstanding rules against being *auctor in rem suam*.<sup>53</sup>

## (5) Bankton

A curator is not empowered to authorise, the term ‘authorised’ being the technical and correct one, any transaction between the minor and curator, according to Bankton.<sup>54</sup> Likewise, interdictors ‘cannot consent to deeds in their own favour, and so be *auctores in rem suam*.’<sup>55</sup> Any tutor who acquires rights or property is presumed to do so “for the pupil’s behoof”, and such rights will have to be transferred to the pupil.<sup>56</sup> Although Bankton’s account suggests a generalised

45 Wallace, *A System of the Principles* (n 29) § 454.

46 Wallace, *A System of the Principles* (n 29) § 455.

47 Wallace, *A System of the Principles* (n 29) § 509.

48 Wallace also identifies the interdictor as subject to the *auctor in rem suam* rule: Wallace, *A System of the Principles* (n 29) § 588.

49 Wallace, *A System of the Principles* (n 29) § 668.

50 Wallace, *A System of the Principles* (n 29) § 687-88 suggests that the *gestor in negotiorum gestio* is subject to the same rules.

51 *Legatars of Hannah v Guthrie* (1738) Mor 3837 at 3838; *Cathcart v Schaw* (1755) Mor 15399 at 15400; *Farquhar v Paton* (1709) Mor 3833 at 3833; *Mackenzie of Rosehaugh v Mountstewart* (1707-1710) 14903 at 14907; *Elphingston v Paton* (1710) Mor 3835 at 3835; *Craigends v Cunninghamhead* (1712) 2 Fountainhall 754.

52 *Creditors of Frog v Frog’s Children* (1735) Mor 4262; *Newlands v Newlands* (1794) Mor 4289; *Mure v Mure* (1786) Mor 4288; *Wellwood v Wellwood* (1791) Mor 15463; *Melville v Creditors of Smiton* (1794) Mor 14327.

53 *Crawford v Hepburn* (1767) Mor 16208; *Bee v Biggar* (1745) Mor 6008; *Cochran v Cochran* (1732) Mor 16339.

54 Bankton, *Inst* 1.7.57.

55 Bankton, *Inst* 1.7.131.

56 Bankton, *Inst* 1.7.39.

approach by virtue of its organisation, it is more doctrinal, and less theoretical and discursive, than those of Kames and Wallace.

### (6) *York Buildings Co v Mackenzie*<sup>57</sup>

By the latter stages of the eighteenth century the more generalised approaches of Wallace and Kames were in the ascendant, particularly the approach taken by Kames and his development of this area of law with reference to equity. In this way we can trace the manner in which English chancery authority becomes locked into the Scottish approach. Indeed, we can follow a series of links which lead up to the seminal decision in *The York Buildings Co v Mackenzie*.<sup>58</sup> In *Parkhill v Chalmers*<sup>59</sup> we see the *auctor in rem suam rule* discussed, and, for the first time, we see serious use of English chancery materials.<sup>60</sup> Furthermore, the report states:

... the same equitable doctrine [as the *auctor in rem suam rule*] prevailed in England, Laws of this description were held to be of the nature of a trust; and the benefit of course communicated to those for whose behoof it was presumed the trust had been undertaken. . . Upon the same principle, a person acting as trustee was bound to communicate the benefit of any ease of lucrative transaction he had entered into with respect to his constituent's debts.<sup>61</sup>

This last sentence includes a reference to the case of *Crawford v Hepburn*<sup>62</sup> which is interesting because not only is the case authority for the proposition for which it is cited, regarding the communication of easements, but also because it is also reported by Kames. In his report, not only does Kames recount the case, but also appends his commentary approving of the case, and refers to the passage we considered above,<sup>63</sup> which duly refers to the *Abridgment of Cases in Equity*, though to a different section.<sup>64</sup> It may be that diligent counsel followed up Kames's footnote, and then looked further afield, though this is speculative.

<sup>57</sup> See D Murray, *The York Buildings Company: A Chapter in Scottish History* (1883, repr 1973). I am grateful to the anonymous referee for this reference.

<sup>58</sup> *The York Buildings Co v Mackenzie* (1795) 3 Paton 378, (1795) 8 Bro PC 42 (HL), 3 ER 432.

<sup>59</sup> *Parkhill v Chalmers* (1771) Mor 16365, affd (1773) 2 Paton 291.

<sup>60</sup> The cases cited are *Carter v Horne* (1728) 1 Eq Rep 7, 21 ER 832; *Palmer v Young* (1684) 1 Vern 276, 23 ER 468. The pleadings also cite *A General Abridgment of Cases in Equity*, 4<sup>th</sup> edn (1756) vol 1, 7, and vol 2, 741. The latter reference is to the page describing the well-known decision *Keech v Sandford* (1726) Sel Cas T King 61, 25 ER 223.

<sup>61</sup> *Parkhill v Chalmers* (1771) Mor 16365. This is in fact very similar to what Stair himself said: Stair, *Inst* 1.6.17.

<sup>62</sup> *Crawford* (n 53).

<sup>63</sup> See text at n 39, cited in *Crawford* (n 53) at 16209. The reference in *Crawford* is to the second edition of the *Principles of Equity*, published the same year as the decision in 1767.

<sup>64</sup> Kames, *Principles*, 2<sup>nd</sup> edn (n 34) 255.

Another coincidence, if it may be called that, is that *Parkhill v Chalmers*<sup>65</sup> was appealed to the House of Lords. Though the appeal was dismissed, we may note that counsel for the appellant before the House was one E Thurlow. This same E Thurlow would later become Lord Thurlow, and would give the first reported speech in *York Buildings Co*.

So it was that, at the very close of the eighteenth century, one of the leading cases on the subject in Scottish law was decided in the House of Lords, which in turn began the formally authoritative blending of Scottish and English approaches. In *York Buildings Co*<sup>66</sup> the House of Lords reversed a decision of the Court of Session concerning the ability of an agent of the creditors of a bankrupt to purchase property belonging to the bankrupt. The case called in the Court of Session on three occasions. On the first occasion the defender was *assolizied in toto*, by a slim majority of votes;<sup>67</sup> on the second occasion, there was again dissent on the bench, and, again by a slim majority, it was held that as common agent the defender was legally incapacitated from purchasing the property, though there was some dispute as to the generality of this rule.<sup>68</sup> On the third occasion, the case was essentially re-argued again, with particular attention being paid to the reasons barring an agent from purchasing at auction – covering the technical problem of contracting with oneself, and the policy arguments.<sup>69</sup> The Court held in favour of the agent (Mackenzie).

The arguments in the House of Lords were very detailed, and contained liberal amounts of English authority alongside civilian authority.<sup>70</sup> It was agreed that such an agent is legally incapax in this situation by virtue of the law of nature; that

65 *Parkhill v Chalmers* (1771) Mor 16365, affd (1773) 2 Paton 291.

66 *York Buildings Co* (n 58).

67 *York Buildings Co v Mackenzie* (1795) 3 Paton 378 at nn 379-387.

68 *York Buildings Co v Mackenzie* (1795) 3 Paton 378 at nn 387-388, (1795) 8 Bro PC 42 at 58, 3 ER 432 at 442.

69 *The York Buildings Co v Mackenzie* (1795) 3 Paton 378 at n 389, (1795) 8 Bro PC 42 at 59-63, 3 ER 432 at 443-445.

70 The account of the pleadings in Brown's report is much fuller than that in Paton's report. In particular, the report by Brown contains more detail about the English authorities cited, whereas Paton mentions only two English cases: *Keech* (n 60), and *Whelpdale v Cookson* (1747) 1 Ves Sen 9, 27 ER 856. More surprising, perhaps, is that Paton's report does not reproduce *any* of the civilian authorities cited to the court, though it does state "The same principle was recognized in the Roman law; and the law of Scotland stands on the same footing. . .": *The York Buildings Co v Mackenzie* (1795) 3 Paton 378 at 390. A kind interpretation might be that the reporter assumed that a Scottish audience would need no schooling in the civilian authority, but it would be useful to highlight the latest English authorities; the curious effect today is that someone reading the 'Scottish' report might think that only English authorities were cited in the House of Lords. On the other hand, Paton's report reproduces the speeches made by the judges in the House of Lords, whereas Brown's report does not. English and civilian authority was cited to the Court of Session: *The York-Buildings Co Mackenzie* (1793) Mor 13367 at 13367-13368.

is to say, it is natural law that a man cannot serve two masters.<sup>71</sup> This rests upon the idea that if one is entrusted with the interest of others, he cannot engage in a business in which he has an interest, as human frailty will always tend towards self-interest at the expense of those who have entrusted him; therefore the law's response was to incapacitate the entrusted.<sup>72</sup> These propositions are backed not by Scottish authority; rather, the cases cited are the well known decisions *Keech v Sandford*,<sup>73</sup> and *Whelpdale v Cookson*,<sup>74</sup> which suggests a consolidation of the English and Scottish authority.

That is given further credence by the pursuer's pleading that the principle laid down by *Keech v Sandford* is a general one, which attaches to those in whom a trust has been reposed; or, put another way, those in whom some nature of confidence has been placed.<sup>75</sup> Indeed, the principle is said not to rest upon that of the *auctor in rem suam* rule in the technical sense, but rather, that the two interests under that contract must be at arms length and of different interests.<sup>76</sup> The pursuer's pleading, relying upon *jus commune*<sup>77</sup> authority now, states that:

This conflict of interest is the rock, for shunning which, the disability under consideration has obtained its force by making that person, who has the one part entrusted to him, incapable of acting on the other side, that he may not be seduced by temptation and opportunity from the duty of his trust. And the principle of the thing, rightly understood, necessarily concludes the respondent's case to fall within the rule of disability which Lord King and Lord Hardwicke hold up as never to be relaxed or departed from in any case to the nature and circumstance of which the rule applies. It is upon the same principle that the general doctrine of the law of Scotland stands with regard to all the acts of tutors and guardians, factors, trustees, and all who are akin to a trust by any connection or character of their office. And the analogy of the law of England appears perfectly to agree in the same doctrine.<sup>78</sup>

The pleadings recounted above were preferred by the House of Lords, which issued an interlocutor whereby the purchase was avoided, and the respondent

71 *The York Buildings Co v Mackenzie* (1795) 8 Bro PC 42 at 63, 3 ER 432 at 446.

72 *The York Buildings Co v Mackenzie* (1795) 8 Bro PC 42 at 63, 3 ER 432 at 446.

73 *Keech* (n 60).

74 *Whelpdale* (n 70).

75 The term confidence is not used in a technical sense in this article: it is unclear what the nature of breach of confidence is in Scottish law, and consequently the overlap with fiduciary law is not clear. For the approaches in other common law jurisdictions see M Conaglen, *Fiduciary Loyalty* (n 3) 241ff.

76 See also *Wells v Middleton* (1784) 1 Cox Eq Cas 112; *Crowe v Ballard* (1790) 3 Bro CC 117 at 120, 29 ER 443 at 445 per Lord Chancellor Thurlow; *Mackreth v Fox* (1791) 4 Bro PC 258, 2 ER 175, (1788) 2 Bro CC 400, 29 ER 224, 2 Cox 320, 30 ER 148.

77 *The York Buildings Co v Mackenzie* (1795) 8 Bro PC 42 at 66-67, 3 ER 432 at 447-48.

78 *The York Buildings Co v Mackenzie* (1795) 8 Bro PC 42 at 66, 3 ER 432 at 447.

was required to refund all profits, less improvements made.<sup>79</sup> Lord Thurlow's speech is clear:

... the common agent did take upon himself the employment of carrying on the sale to the utmost advantage for the benefit of the creditors... All the gentlemen seem to admit that this was his duty, and taking it to be so, one side said *That* being your situation, it is utterly impossible for you to maintain (perform?) that duty in such a manner to derive an advantage to yourself. This seems to be a principle so exceedingly plain, that it is in its own nature indisputable, for there can be no confidence placed, unless men will do the duty they owe to their constituents, or be considered to be faithfully executing it, if you apply a contrary rule. The common agent has, in point of fact, gained an advantage by it. I take it to be sufficient to support this ground of equity, that he had such a duty, and that, in the execution of it, he did gain an advantage, and that advantage so gained, was to the prejudice of those in whose behalf he should have been exercising his duty. It seems to be enough to prove, in point of conscience, he ought to be compelled to set the matter right.<sup>80</sup>

This decision is of not a little importance, as it shows the use of English chancery jurisprudence in both pleading and decision.<sup>81</sup> This also marks a beginning of the conflation of ideas applicable to the law of trusts with some idea of a generalised fiduciary duty, which is again directly mediated through the connection with English chancery jurisprudence. It is interesting to see the manner in which *Keetch* appears to have been received into Scottish law, especially given the fact that, as an English authority, its initial status appears to have been somewhat marginal.<sup>82</sup> Both Getzler and Cretney point out that the case law prior to *Keetch* does not seem to have adopted so strong a rule,<sup>83</sup> which accords with Blackie's analysis of the native Scottish approach.<sup>84</sup> Yet, the argument in the case certainly used Scottish sources, and in fact utilised detailed pleadings from the *jus commune*, which were said to be of universal application due to their natural and equitable basis. There seems little doubt that the decision in *York Buildings Co* represented a consolidation of the broader approach heralded by *Keetch*, and, with regard to Scottish law, represented the fulfilment of increased Chancery contact through the academic writings of Kames and the institutional influence of the House of Lords.

79 *The York Buildings Co v Mackenzie* (1795) 8 Bro PC 42 at 70, 3 ER 432 at 450.

80 *The York Buildings Co v Mackenzie* (1795) 3 Paton 378 at 393.

81 See e.g. *The York Buildings Co v Mackenzie* (1795) 3 Paton 378 at 394: "The ground of equity I mean to state was this, that whoever comes into a Court of equity to ask for reparation for wrongs done, ought to come prepared to show the justice of his case."

82 J Getzler, "Rumford Market and the Genesis of Fiduciary Obligations", in A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (2006) 577 at 587.

83 Getzler, "Rumford Market" at 582 & 586; S Cretney, "The Rationale of *Keetch v Sandford*" (1969) 33 *Conveyancer* (NS) 161.

84 J W G Blackie, "Enrichment and Wrongs in Scots Law" 1992 *Acta Juridica* 23.

## (7) Hume

In Hume's lectures we find a convenient bridge between the eighteenth and nineteenth century approach to the *auctor in rem suam* rule, and indeed an insight into the development set in motion by the increased English influence. Therefore, it is asserted that *tutor in rem suam auctor fieri nequit* is a "salutary" maxim received from Roman law into Scottish law, which is "well founded technically" and of "obvious expediency".<sup>85</sup> These are two distinct points being made: the first limb of prohibition, resting upon the 'technicality' of the law, refers to an inability to contract with oneself; whereas with the second limb of prohibition, the expediency, refers to the policy against such transactions.<sup>86</sup>

The second limb is that which is really fiduciary in nature, which can be seen from the statement that

...we account it unbecoming that, even by transaction with a third party, the tutor should come to draw any profit out of his ward's estate; for he is bound as far as in him lies to improve and disencumber that estate. On all such occasions he is presumed, therefore, to contract in the character of agent for his ward, and with the purpose of communicating the benefit, if such arises, to him.<sup>87</sup>

This is an interesting solution to the problem of a fiduciary<sup>88</sup> who receives a benefit by virtue of his office: rather than saying it is held by the tutor on a constructive trust for the ward, it would rather appear that upon agency principles it is seen to transfer directly to the estate of the ward. This is perhaps significant, given there appears to have been substantial affinities, in the early law, between agency and trust jurisprudence.

## (8) Bell

Although Bell's statement that a tutor cannot be *auctor in rem suam* is very concise, it is telling that the reader is informed that it is "...a rule which in England has been carried further than hitherto in Scotland, and on principles recognised in both."<sup>89</sup> Here we can see the pulling together of English<sup>90</sup> and Scottish authority, though it may also refer to the idea that the remedial tools of

85 D Hume, *Baron David Hume's Lectures* (GCH Paton ed, 1952) vol 1, 275.

86 Hume, *Lectures*, vol 1 (n 85), 275-76.

87 Hume, *Lectures*, vol 1 (n 85), 276.

88 There is a suggestion that Hume considered the maxim to apply to factors at least, therefore it may have been seen as of general application: Hume, *Lectures*, vol 1 (n 85), 276 n 2.

89 G J Bell, *Principles of the Law of Scotland*, 4<sup>th</sup> edn (1839, 2010 reprint) § 2084; see also § 2093 in relation to curators.

90 *Wright v Proud* (1806) 13 Ves 136, 33 ER 246; *Hylton v Hylton* (1754) 2 Ves Sen 548, 28 ER 349; *Liles v Terry* [1895] 2 QB 685 (CA).



English law are more extensive. The English authorities cited are diverse insofar as they are not limited solely to guardians; rather they are of general application.<sup>91</sup> The rule which the English authorities had set-down, at this time, are probably best summed up by Turner LJ:

I take it to be a well-established principle of this Court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can shew to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them.<sup>92</sup>

If Bell is correct to say that the Scottish authorities will follow the English approach on these fiduciary approaches, then by this stage there is an evident relaxation of the rules.<sup>93</sup> Notably, such a gift would apparently stand good if the giver were to be adequately advised legally, though it also appears that a flow of value to the fiduciary would not have been allowed in either Scottish or English law<sup>94</sup>: “Trustees’ cannot be *auctores in rem suam*, That is to say, they are personally disqualified from contracting in any way with the trust estate.”<sup>95</sup>

91 *Ex parte Reynolds* (1800) 5 Ves Jun 707, 31 ER 816; *Ex parte Lacey* (1802) 6 Ves Jun 626 at 628-30, 31 ER 1228 at 1229-130 per Lord Chancellor Eldon; *Lister v Lister* (1802) 6 Ves 631, 31 ER 1231.

92 *Rhodes v Bate* (1866) LR 1 Ch 252 at 257. See also *Hatch v Hatch* (1804) 9 Ves 292, 32 ER 615; *Huguenin v Baseley* (1807) 14 Ves 273, 33 ER 526. Of course see now: *Barron v Willis* [1900] 2 Ch 121 at 131 per Lindley MR; *Wright v Carter* [1903] 1 Ch 27; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44; [2002] AC 773. For an example of the cross-fertilisation of the Scottish and English law in this area see *Newgate Stud Co v Penfold* [2004] EWHC 2993 (Ch), [2008] 1 BCLC 46 at paras 234 & 237 per David Richards J: “The applicability of the self-dealing rule to transactions involving the wives of fiduciaries has been decided or considered in a number of authorities, most of which are not English. A clear view was taken by the Court of Session nearly 90 years ago in *Burrell v Burrell’s Trs* 1915 SC 333 that the strict rule did not automatically apply to a dealing with a fiduciary’s wife. . . In my judgment the decision of the Court of Session in *Burrell v Burrell’s Trs* represents the law in England as well as Scotland. Not only would it be undesirable if the law on a subject of common application differed in the two jurisdictions, and not only has it been applied in Australia, but it is in my view right in principle.”

93 In *Campbell v Walker* (1800) 5 Ves Jun 678 at 681 Arden MR states that the rule against a trustee purchasing was never an absolute, on this point adopting the observations of Lord Chancellor Loughborough in *Whichcote v Lawrence* (1798) 3 Ves Jun 740 at 750, 30 ER 1248 at 1253.

94 *Keech* (n 60); *Ex parte James* (1803) 8 Ves Jun 337, 32 ER 337; *Addis v Clement* (1728) 2 P WMS 456, 24 ER 811; *Whelpdale* (n 70); *Blewett v Millett* (1774) 7 Bro PC 367, 3 ER 238; *Whichcote v Lawrence* (1798) 3 Ves Jun 740 at 750, 30 ER 1248 at 1253 per Lord Chancellor Loughborough (citing *York Buildings Co* (n 58)). Cf *Lesley’s Case* (1680) 2 Freeman 53.

95 The words ‘cannot be *auctores in rem suam*’ first appear in the seventh edition, edited by Guthrie, and remain in the tenth edition: G J Bell, *Principles of the Law of Scotland*, 7<sup>th</sup> edn (1876) § 1998; G J Bell, *Principles of the Law of Scotland*, 10<sup>th</sup> edn (1989 reprint) § 1998. Bell himself simply noted: “Trustees cannot be purchasers at a sale of the trust-estate”: G J Bell, *Principles of the Law of Scotland*, 4<sup>th</sup> edn (1839, 2010 reprint) § 1998. Although Bell had referred to *auctor in rem suam* in relation to tutors and curators – see n 89 above – its application, arguably reflecting a generalisation of the maxim, to trustees was Guthrie’s editorial decision.

This explanation places emphasis upon the technical prohibition against transacting with the trust estate, but the policy limb of the rule is also present.

**(9) *Aberdeen Railway Co v Blaikie Bros***<sup>96</sup>

The case law emanating from the Scottish and English decisions of the nineteenth century continue to mirror each other, to the point that one might say with confidence that the motivations underlying the applicable rules were the same in each system, and thus the same factual interlocutors would generate apparently similar rules. The reason for this was the two-way flow of authority between England and Scotland in the later eighteenth and early nineteenth centuries. *York Buildings Co*<sup>97</sup> became a leading case in both jurisdictions, and had proceeded on the basis of pleadings containing both common law and civilian authority. The fusion of authority reached maturity in *Aberdeen Railway Co v Blaikie Bros*,<sup>98</sup> where the Lord Chancellor (Carnworth) remarked in argument “I have doubts whether there is any real difference on this point between civil law and the law of this country.”<sup>99</sup> In his speech the Lord Chancellor himself made reference to English,<sup>100</sup> Scottish,<sup>101</sup> and civilian authority,<sup>102</sup> when he set down what remains one of the leading expositions of this area of law:

A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.<sup>103</sup>

Lord Carnworth’s use of the phrase ‘universal application’ was not a rhetorical flourish: he states that “the doctrine rests on such obvious principles of good sense that it is difficult to suppose there can be any system in which it would not be found”,<sup>104</sup> and he makes it explicit that rule applies in both England and

96 *Aberdeen Railway Co* (n 12).

97 *York Buildings Co* (n 58).

98 *Aberdeen Railway Co* (n 12).

99 *Aberdeen Railway Co* (n 12) at 463. It is slightly unclear to which country he refers when he says “this country”.

100 *Aberdeen Railway Co* (n 12) at 472, citing *Keech* (n 60); *Whelpdale* (n 70); *Ex parte James* (n 94).

101 *Aberdeen Railway Co* (n 12) at 474, citing *York Buildings Co* (n 58).

102 *Aberdeen Railway Co* (n 12) at 474, citing D. 18. 1. 34. 7.

103 *Aberdeen Railway Co* (n 12) at 471.

104 *Aberdeen Railway Co* (n 12) at 475.

Scotland.<sup>105</sup> The decision in *Aberdeen Railway Co v Blaikie Bros* authoritatively decided that law in this area would be treated in the same way. Indeed, the cases in this period might really be said to be concerned with the consolidation of the fundamental principles, and indeed exceptions to them, which had been worked out in the eighteenth century.<sup>106</sup> It is also noticeable, though space prohibits further discussion here, that there was some overlap between fiduciary relations arising from an office, the law of breach of confidence, and the manner in which undue influence was used by the courts.<sup>107</sup> The next stage of development was to be with respect to the generalisation of the fiduciary concept.

## C. GENERALISATION OF THE TERM ‘FIDUCIARY’

### (1) Fraser

The approach to the subject taken by Lord Fraser in his *Parent and Child*<sup>108</sup> is instructive as it demonstrates the generalisation of the fiduciary idea beyond trust texts, and it predates the generalised approaches that emerge in the trust texts a little later, and are considered in the next section. Indeed, while the account is predicated upon an explanation of the venerable rule against a tutor being *auctor in rem suam*, the following statement is of wider instruction:

105 *Aberdeen Railway Co* (n 12) at 473-474, see also Lord Brougham’s speech at 477-478. Even the reporter’s note demonstrates the coming together of the authority in both jurisdictions: *Aberdeen Railway Co* (n 12) at 481 n (a).

106 *Gibson v Jeyes* (1801) 6 Ves 266, 31 ER 1044; *Ex parte Hughes* (1802) 6 Ves 617, 31 ER 1223; *Ex parte Bennett* (1805) 10 Ves Jun 381, 32 ER 893; *Morse v Royal* (1806) 12 Ves 355 at 371-74, 33 ER 134 at 140-41 per Lord Chancellor Erskine; *Howard v Ducane* (1823) Turn & R 80, 37 ER 1025; *Grover v Hugell* (1827) 3 Russ 428 at 432, 38 ER 636 at 638 per Sir J Leach MR; *Hunter v Atkins* (1834) 3 My & K 113, 40 ER 43; *Greenlaw v King* (1840) 3 Beav 49 at 61, 49 ER 19 at 24; *Edwards v Meyrick* (1842) 2 Hare 60, 67 ER 25; *Denton v Donner* (1856) 23 Beav 285, 53 ER 112; *Savery v King* (1856) 5 HLC 627 at 655, 10 ER 1046 at 1058; *Davies v Davies* (1863) 4 Giff 417, 66 ER 769; *Tate v Williamson* (1866) 2 Ch App 55 at 61; *Guest v Smythe* (1869-70) LR 5 Ch App 551; *Dicconson v Talbot* (1870-71) LR 6 Ch App 32; *Pisani v A-G for Gibraltar* (1873-74) LR 5 PC 516 at 536; *Delves v Delves* (1875) LR 20 Eq 77; *Erlanger v The New Sombbrero Phosphate Company* (1878) 3 App Cas 1218 (HL); *De Cordova v De Cordova* (1878-79) LR 4 App Cas 692 at 703; *Plowright v Lambert* (1885) 52 LT 646; *Boswell v Coaks (No 1)* (1886) LR 11 App Cas 232; *In Re Postlethwaite* (1887) LR 35 Ch D 722; *Farrar v Farrar* (1889) LR 40 Ch D 395 at 409-10 & 415; *Salomon v Salomon* [1897] AC 22 (HL); *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 441 per Rigby LJ.

107 *Hoghton v Hoghton* (1852) 15 Beav 278, 51 ER 545; *Chambers v Crabbe* (1865) 34 Beav 457, 55 ER 712; *Potts v Surr* (1865) 34 Beav 543, 55 ER 745; *Turner v Collins* (1871-72) LR 7 Ch App 329; *Bainbrigge v Browne* (1881) 18 Ch D 188; *Luddy’s Trustee v Peard* (1886) LR 33 Ch D 500; *Hoblyn v Hoblyn* (1889) LR 41 Ch D 200; *Liles* (n 90) at 683 per Lord Esher MR. See also the infamous *Allcard v Skinner* (1887) LR 36 Ch D 145, accepted as Scottish law by Gloag; W M Gloag, *The Law of Contract*, 2<sup>nd</sup> edn (1929) 528.

108 P Fraser, *A Treatise on the law of Scotland as Applicable to the Personal Domestic Relations* (1846); H Cowan (ed.), *A Treatise on the Law of Scotland Relative to Parent and Child and Guardian and Ward*, 2<sup>nd</sup> edn (1866); J Clark (ed) *Fraser’s Parent and Child*, 3<sup>rd</sup> edn (1906).

It is as the representative and trustee of the pupil that the tutor appears in all the transactions of his office. A principle applicable to all offices of trust of this kind, and more especially of guardianship, is this, that the person acting with such deputed power shall not abuse the confidence placed in him by enriching himself at the constituent's expense, by using the knowledge he has acquired to make advantageous transactions for himself with the means of those for whom he acts; that he shall not be seller and purchaser – the granter of the obligation, and the creditor under it – the donor and the donee; in short, that he shall not be *auctor in rem suam*. This rule simply means this, that the tutor shall not, either directly or *per ambages*, be a party to any deed whereby an obligation is constituted in his own favour against the pupil.<sup>109</sup>

The importance of this passage is two-fold. First, the idea of a general principle is evident, as we are informed that the principle is applicable to all offices of trust of this kind, which is not a reference to a 'trust' in the sense of the legal institution; rather, the understanding appears to be to fix the higher duty of fidelity of a trustee onto others – what we would today call a fiduciary. The wording "... shall not abuse the confidence placed in him by enriching himself at the constituent's expense..." is also rather striking, and places one in mind of the great maxim of enrichment law: *nemo debet locupletari aliena jactura*.<sup>110</sup>

Between the publication of the first and third editions of Fraser's text a number of important decisions were laid down by the Court of Session,<sup>111</sup> and accordingly long quotations from these decisions are reproduced in the second and third editions. Therefore, the general principle is stated, and vouched for with ample contemporary authority, that our rules on the matter come from the law of tutors and curators, notably the *auctor in rem suam* rule.<sup>112</sup> Fraser also quotes approvingly this judicial assertion (from the Court of Session):

This principle is recognised, and has always been so, in Scotland as well as in England; nor is there any difference in its equitable application and effects in the two countries. It applies to the case of trustee, tutor, judicial factor, commissioner, agent; in fact, wherever the trust character exists the duty attaches, and the necessary effects of this principle are enforced.<sup>113</sup>

Once more then the law relating to fiduciaries is said to be common to both systems, and indeed while it may be open to question whether the development

109 Clark (ed), *Fraser*, 3<sup>rd</sup> edn (n 108) 372; the passage appears in the previous editions, albeit with slightly altered punctuation in the first edition: Fraser, *Domestic Relations* (n 108) vol 2, 139, and Cowan (ed), *Parent and Child* (n 108) 279.

110 The maxim is well established in Scots law: e.g. Stair, *Inst* 1.8.6.; Erskine, *Inst* 1.7.33.; Kames, *Principles*, 3<sup>rd</sup> edn (n 27) 1.140ff; *Reps of Innes v Duke of Gordon* (1827) 6 S 279 at 299.

111 *Aberdeen Railway Co* (n 12); *Cochrane v Black* (1855) 17 D 338; *Perston v Perston's Trs* (1868) 1 M 245.

112 Clark (ed), *Fraser*, 3<sup>rd</sup> edn (n 108) 373. See Lord Cooper, *Selected Papers 1922-1954* (1957) 288-89.

113 Clark (ed), *Fraser*, 3<sup>rd</sup> edn (n 108) 378; *Laird v Laird* (1855) 17 D 984.

before the eighteenth century was so choreographed, it seems settled by the nineteenth century. Furthermore, we can note the infiltration of the term 'equitable' in the passage. This seems to betray the increased closeness in the use of Scottish and English authorities in the matter, more particularly the idea of trust jurisprudence. The inexorable rise of the fashionable trust jurisprudence appears to have penetrated the Scottish scene. That both systems have equity has perhaps allowed English law, in this area, to assert its influence.

The remainder of Fraser's account is concerned with the exceptions and subsidiary specific rules that had grown up around the *auctor in rem suam* rule. Indeed, the different nuances and facets arising from the general fiduciary relation are said to include the following: the tutor cannot transfer any of the pupil's estate to himself, nor purchase it, even at auction;<sup>114</sup> there can be no loan made either way between pupil and tutor;<sup>115</sup> a trustee using a beneficiary's fund in furtherance of his own trade must account for profits;<sup>116</sup> a trustee must account for profits generally;<sup>117</sup> the tutor cannot take a lease from the pupil;<sup>118</sup> rights, gifts, and any emolument obtained by the tutor are *presumed* to accrue to the pupil;<sup>119</sup> a quorum of tutors may grant a deed in favour of one of their number, so long as the transferee does not consent to the instrument, and it may still be vulnerable to reduction on the grounds of lesion.<sup>120</sup> From this account of the specific uses of some of the fiduciary aspects of the tutor relation, it may be observed that the Scottish rules appear more severe than those of England at this time.

## (2) Trust law texts

The idea of a general law, or rather general principles, relating to a group of persons in which confidence or trust had been reposed had developed towards maturity through the eighteenth and nineteenth centuries. The leading Scottish trust law texts all considered the rule that a trustee could not allow his own interests to compete with those of the trust and the beneficiaries. Forsyth noted the multiple limbs of the prohibition: a trustee is prevented from "... deriving personal benefit from the trust-property, or doing any thing to place his own interest in competition with that of the trust. . .".<sup>121</sup> Further, a trustee could not

114 Ibid, 375, citing Stair, *Inst* 1.6.17; Bankton, *Inst* 1.7.39; Erskine, *Inst* 1.7.19; D 18.34.7.

115 Ibid, 376, citing Erskine, *Inst* 1.7.19; D 26.7.7.4; D 26.7.54; C 5.56.1; *Elphinstone v Robertson* 28<sup>th</sup> May 1814 FC.

116 Ibid, 376, citing *Cochrane v Black* (1855) 17 D 321, (1857) 19 D 1019.

117 Ibid, 377-80.

118 Ibid, 380-81.

119 Ibid, 383-85.

120 Ibid, 387.

121 C Forsyth, *The principles and practice of the law of trusts and trustees in Scotland* (1844) 116.

purchase the trust-property for himself on the basis of the *York Buildings* case,<sup>122</sup> Forsyth considered the rule in *York Buildings* to be an innovation from English law, and provides a sophisticated discussion of English authorities.<sup>123</sup>

McLaren's discussion differs from Forsyth by reverting to the phrase *auctor in rem suam* for his sidenote.<sup>124</sup> McLaren explains that it is important that a trustee must "maintain a disinterested position in all transactions into which he may enter"<sup>125</sup> because if he did enter a transaction where he had

a conflicting personal interest, it is obvious that the safety and probable success of this mode of carrying out the settlor's intentions would be materially impaired, and the confidence of the public in the security of trust settlements proportionately lessened.<sup>126</sup>

This represents a broader policy justification for the rule – the need to maintain public confidence. McLaren's citation of Forsyth and Lewin<sup>127</sup> demonstrates the continuing influence of English materials,<sup>128</sup> as well as noting that the "germ of the principle" is to be found in the Digest.<sup>129</sup> Perhaps most interestingly for present purposes is that McLaren states that the principle is of general application beyond trusts:

Looking to the whole scope of the opinions in this leading decision, as well as to the question actually decided, we think that the statement of the principle might be even further generalized. Of *all* engagements, in which the trustee (or other functionary having a delegated duty to perform) enters as an individual, into stipulations with himself in his fiduciary character – it may be predicated, that he has a personal interest "conflicting, or which may conflict, with that of the trust." Hence we deduce the more general rule, that trustees cannot enter into any transaction in which they have a personal interest.<sup>130</sup>

McLaren, therefore, builds upon the account of Forsyth, and in so doing develops a more generalised account of fiduciary law from within the law of trusts.<sup>131</sup>

122 Ibid, 117.

123 Ibid, 117-118.

124 J McLaren, *A treatise on the law of trusts and trust settlements* (1863) vol 1, 213. The passage survives in substantially the same form in the third edition: J McLaren, *The law of Wills and Succession*, 3<sup>rd</sup> edn (1894) vol 2, para 1632.

125 McLaren, *Trusts* (n 124) vol 1, 213-214; McLaren, *Wills*, 3<sup>rd</sup> edn (n 124) vol 2, para 1632.

126 McLaren, *Trusts* (n 124) vol 1 214; McLaren, *Wills*, 3<sup>rd</sup> edn (n 124) vol 2, para 1632.

127 McLaren, *Trusts* (n 124) vol 1 214; McLaren, *Wills*, 3<sup>rd</sup> edn (n 124) vol 2, para 1633.

128 McLaren states explicitly that the rules are the same in England and Scotland, and decisions of the courts should be treated as "mutually available for illustration or authority": McLaren, *Trusts* (n 124) vol 1, 214; McLaren, *Wills*, 3<sup>rd</sup> edn (n 124) vol 2, para 1633.

129 McLaren, *Trusts* (n 124) vol 1 214; McLaren, *Wills*, 3<sup>rd</sup> edn (n 124) vol 2, para 1633.

130 McLaren, *Trusts* (n 124) vol 1 214-215; McLaren, *Wills*, 3<sup>rd</sup> edn (n 124) vol 2, para 1633.

131 McLaren's work appeared after Fraser, discussed in the next section, who also adopted a generalised approach to fiduciaries, but Fraser detached his account from the law of trusts to some extent.

Nascent glimpses of a generalised idea of rules related to fiduciaries are therefore beginning to emerge in the mid-nineteenth century texts dealing with trust law. Writing in the later nineteenth century, Menzies' account<sup>132</sup> is detailed and follows civilian, Scottish, English, and even some American authority.<sup>133</sup> The assertion that the law will not allow a trustee to stand in a position where "his duty and his interest may conflict; for it is presumed that in such a position he will sacrifice his duty to his interest" was well established and orthodox.<sup>134</sup> Much more interesting is the continuation of the theme of generalisation in the trust law texts:

The principle is quite general, however, and though the examples are mostly drawn from the conduct of trustees for sale, these must be understood to be illustrative authority for the general rule. "The inability to contract," says Lord Cranworth, C., "depends not on the subject matter of the agreement, but on the fiduciary character of the contracting party."<sup>135</sup>

Doctrinal writings and case law are, therefore, beginning to coalesce around the generalisation of the fiduciary concept. Furthermore, it is around this time that legislative provisions start to reflect a growing generalisation, albeit still associated with trusts. The Trusts (Scotland) Amendment Act 1884 provided that the meaning of a trust, for the purposes of the then existing trust legislation,<sup>136</sup> was to:

mean and include any trust constituted by any deed or other writing, or by private or local Act of Parliament, or by resolution of any corporation or public or ecclesiastical body, and the appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise.<sup>137</sup>

This trend towards generalisation under the auspices of trust jurisprudence, and its often close association with English authority and equitable jurisprudence, is continued in the early twentieth century encyclopaedic entries,<sup>138</sup> and, as we shall see, with Gloag's account which builds upon this backdrop of generalisation.

132 A J P Menzies, *The law of Scotland affecting trustees* (1893) at paras 451-477, and A J P Menzies, *The law of Scotland affecting trustees*, 2<sup>nd</sup> edn (1913) paras 451-477.

133 The American case cited is *Buell v Buckingham* (1864) 85 Am Dec 516, at 522-523 per Dillon J.

134 Menzies, *Trustees* (n 132) at para 451; Menzies, *Trustees*, 2<sup>nd</sup> edn (n 132) at para 451.

135 Menzies, *Trustees* (n 132) at para 453; Menzies, *Trustees*, 2<sup>nd</sup> edn (n 132) at para 453.

136 Trusts (Scotland) Act 1861 (24 & 25 Vict, c 84), and the Trusts (Scotland) Act 1863 (26 & 27 Vict, c 115).

137 Trusts (Scotland) Amendment Act 1884, s 2. Similarly, a trustee is defined to include tutors, curators, and judicial factors. The current legislative provision, section 2 of the Trusts (Scotland) Act 1921, retains the definition with some minor additions.

138 C R A Howden, "Trustee", in J Chisolm (ed), *Green's Encyclopædia of the law of Scotland*, 2<sup>nd</sup> edn (1914) vol 12, 299 at 300; C R A Howden and G R Thomson, "Trustee", in J L Wark (ed), *Encyclopædia of the laws of Scotland* (1933) vol 15, 200 at para 424.

### (3) Glog

It may be said quite fairly that a general law of fiduciary obligations was probably in its infancy in the eighteenth century; whereas in the nineteenth century the infant grew through childhood into an eager and robust teenager: self-aware, but not yet mature. In the early twentieth century the law of fiduciary obligations developed, and this can be seen in Glog's *The Law of Contract*.<sup>139</sup> Also of interest is the place in which the law of the fiduciary was examined—in a monograph on contract law. Yet, as Glog recognised, ‘The subject belongs rather to the law of trust than of contract; only a statement of the leading principles is attempted.’<sup>140</sup> This statement is itself telling—the continued intellectual association of fiduciary liability with trust jurisprudence seems to be indicative of the influence of English Chancery jurisprudence, or at least the idea that the roles of a fiduciary and trustee are very similar.<sup>141</sup>

In any event, it is here that we find the first chapter dealing with ‘Contracts by Parties in Fiduciary Relations.’<sup>142</sup> While the chapter is in some ways a list of offices which carry differing fiduciary relations, there are some general principles set-out, and the key is that the offices are all placed together under one organising principle of the fiduciary, which to Glog is evidently closely connected with trust jurisprudence.

Glog states that the *auctor in rem suam* rule rests upon the idea of a trustee's office as a gratuitous one, and the prevention of conflict between personal interests and fiduciary duties<sup>143</sup> (thus the policy aspect). As regards the technical law, we see shades of the “contracting with oneself” idea in that we are told “... a contract is voidable if the parties to it are in substance a trustee on the one side and the trust estate on the other.”<sup>144</sup> At first sight this seems similar to the idea of preventing someone contracting with himself, but one must note that the contract is said to be voidable, and not void. In rudimentary contractual theory a voidable contract is one that subsists validly until set aside; whereas, the technical rule against contracting with oneself is really a matter of contract being void. The key word here is ‘substance’. Glog recognised that not all situations that might be characterised as involving an instance of *auctor in rem suam* will necessarily render a contract void:

139 W M Glog, *The Law of Contract* (1919); Glog, *Contract*, 2<sup>nd</sup> edn (n 107).

140 Glog, *Contract*, (n 139) 572 n 1; Glog, *Contract*, 2<sup>nd</sup> edn (n 107) 508 n 1.

141 Glog's approach here reflects that of the authors that he cites: McLaren, Menzies and Lewin.

142 Glog, *Contract*, (n 139) ch 27; Glog, *Contract*, 2<sup>nd</sup> edn (n 107) ch 31.

143 Glog, *Contract*, (n 139) 572; Glog, *Contract*, 2<sup>nd</sup> edn (n 107) 508.

144 Glog, *Contract*, (n 139) 572; Glog, *Contract*, 2<sup>nd</sup> edn (n 107) 508.



A contract between trustee and trust estate, though not illegal, is voidable even although no advantage may have been taken by the trustee, and though the transaction is perfectly fair. The principle is that a trustee must not enter into any transaction where his duties as trustee and his interests as an individual may come into conflict.<sup>145</sup>

The key aspect is the conflict between interest and duty, and it must be shown, as evidenced by the fact that honesty and fairness are not valid defences.<sup>146</sup>

For Gloag if the contract is not voidable, then any profits derived from holding the office of trustee, derived from contracting with the trust estate or otherwise, are held under a constructive trust.<sup>147</sup> These principles are said to extend generally “though with modifications, to all persons holding a fiduciary position”,<sup>148</sup> which therefore encompasses a *curator bonis*; trustees in bankruptcy; trustees in private trust for creditors; common agents in judicial sale; company directors; and in some respect to partners, agents, and promoters of companies.<sup>149</sup> As regards the company director, Gloag points out that it is “misleading to treat an office invariably undertaken as a means of earning money [director] as in all respects the same as one *primâ facie* gratuitous [trustee].”<sup>150</sup> Indeed, while stating that the authority of *Aberdeen Railway Company v Blaikie*,<sup>151</sup> decided on “principles of trust law” concerning conflict of fiduciary duty and personal interest, was “beyond question”, it is also observed that the principle was not likely to be extended.<sup>152</sup> This statement seems to rest upon a subsequent case, and perhaps from a sense of commercial efficacy.<sup>153</sup> It was earlier observed that Gloag placed some importance on the distinction between a trust and director on the basis of the gratuitous nature of the office – one is, in reality, concerned with earning money, while the other is *prima facie* gratuitous. Nevertheless, there *are* shared fiduciary principles that apply to both, such as the rule that directors cannot charge for work done unless so authorised in the

145 Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 509. The first edition has a (long) quotation from Lord Carnworth’s speech in *Aberdeen Railway Co* (n 12) at 471, in place of the second sentence, but the sentiment is the same: Gloag, *Contract*, (n 139) 573.

146 Gloag, *Contract*, (n 139) 573; Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 510.

147 Gloag, *Contract*, (n 139); Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 508.

148 Gloag, *Contract*, (n 139); Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 508.

149 Gloag, *Contract*, (n 139) 572; Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 508. A debtor granting security is not a fiduciary for the creditor: *Bank of Scotland v Hutchison, Main & Co* 1913 SC 255; affd 1914 SC (HL) 1.

150 Gloag, *Contract*, (n 139) 581; Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 514.

151 *Aberdeen Railway Co* (n 12).

152 Gloag, *Contract*, (n 139) 582; Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 515.

153 The case cited is *Paterson v Portobello Town Hall Co* (1866) 4 M 726.

articles of association.<sup>154</sup> The authority cited for this proposition is quite clear in its import:

It is clearly the law that where a party holds a fiduciary position, whether as a director of a company or one of a body of trustees, no matter how he is appointed, unless there is some express provision in the contract under which he acts that he shall receive remuneration, he must do the work gratuitously.<sup>155</sup>

The grounds that mark out an office for consideration as a fiduciary one are seen by Gloag as diverse in some respects, but unified by a sentiment of trust and confidence.<sup>156</sup> Therefore, the trust is fiduciary by virtue of its gratuitous nature and prevention of conflict; the company director is said by analogy to be akin to a trustee in this respect; a promoter is said to be imbued with a statutory ‘confidence’;<sup>157</sup> the partners in a firm are joined together by an ‘exuberant trust’, with many of the fiduciary incidents of such a relation embodied in statute;<sup>158</sup> whereas the agent is different still, as the rule that an agent’s profit beyond his remuneration is for the benefit of the principal, rests upon both trust and contractual principles.<sup>159</sup> Thus, it is said, an agent’s making a secret profit is a breach of contract, but the agent’s liability is not the loss of the principal and is in fact the gain of the agent;<sup>160</sup> yet, there can be no tracing of the money received by the agent, nor will the wronged principal rank as a ‘beneficiary’ as opposed to mere creditor.<sup>161</sup>

To the instances of fiduciary office stated above, there should be added the law agent and those in a confidential relationship.<sup>162</sup> Law agents’ fiduciary duties to clients are twofold: first as regards the management of their professional

154 Gloag, *Contract*, (n 139) 582-83; Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 515. See the contemporary J A Lillie, “Company”, in J L Wark (ed) *Encyclopaedia of the Laws of Scotland* (1927) vol 4, paras 218ff.

155 *McNaughten v Brunton* (1882) 10 R 111 at 113 per Lord President Inglis.

156 This is not a technical formulation like that found in many areas of contract law which are not concerned with fiduciaries, such as, for example, the law of employment, which is not a fiduciary relationship in itself.

157 Gloag, *Contract*, (n 139) 585; Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 517.

158 Gloag, *Contract*, (n 139) 586-87; Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 518-19.

159 Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 520-21. This is an intriguing change from the first edition: “The rule rests on principles of trust, not of contract.” Gloag, *Contract*, (n 139) 589. There is no textual explanation for this change.

160 *Ronaldson v Drummond & Reid* (1881) 8 R 956.

161 Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 521. This represents another change from the first edition, though this time the insertion of a reference to a case, the well known decision in *Lister v Stubbs* (1890) 45 Ch D 1, explains the change (though not why it was omitted from the first edition): Gloag, *Contract*, (n 139) 589. See also G J Bell, *Commentaries on the Law of Scotland*, 7<sup>th</sup> edn (1870) 1.533; *Pender v Henderson* (1864) 2 M 1429.

162 Gloag, *Contract*, (n 139) 593-596; Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 524-525. Gloag also refers to uneducated persons as a form of fiduciary, though this appears to be a latent form of contractual good faith in very specific circumstances: Gloag, *Contract*, (n 139) 599-600; Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 529-530.

relationship; secondly, further such duties subsist when law agents come forward to contract with clients ostensibly as third parties.<sup>163</sup> There is no absolute rule against such relations, though gifts are always revocable, but the transaction is open to detailed scrutiny, and requires full disclosure to the client of the situation.<sup>164</sup> The confidential relationship category is one that we today recognise as undue influence: that is where a party may exert dominant influence over the other, and if such influence was exerted, or, there was a failure of full disclosure, then the contract is open to reduction.<sup>165</sup>

In the early twentieth century then, we can see that Gloag has taken the diverse legal functions attaching to various legal offices and treated them within a single chapter relating to fiduciary liability. The organising principle that pervades the chapter is the idea of trust and confidence, and it is explicitly stated that the trust institution is important to the working of these institutions.<sup>166</sup> However, too much weight should not be placed on the chapter in showing a general law of fiduciaries. There are acknowledged differences in the rules applying to the different types of fiduciary at times, and the consequences of the actions of these fiduciaries can differ. It is also not clear at times whether liability rests upon contractual rules, trust rules, or indeed delictual rules dealing with reparation. This loose association of offices beneath a very general concept characterises the treatment of the fiduciary in Scottish law since the time of Gloag.

#### D. MODERNISATION OF THE GENERAL APPROACH

At the end of the twentieth century the structure of the academic consideration of fiduciary duties remained much the same as had been set out by Gloag in 1929. In the leading practitioner's monograph on trust law the chapter dealing with fiduciary duties reverts to the title '*Auctor in rem suam*.'<sup>167</sup> Wilson and Duncan state that the rule prohibits a trustee from entering a transaction which

163 Gloag, *Contract*, (n 139) 593; Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 524.

164 Gloag, *Contract*, (n 139) 594; Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 524. See Begg's detailed discussion for the particular position of the law agent around this time: J H Begg, *A Treatise on the Law of Scotland relating to Law Agents*, 2<sup>nd</sup> edn (1883) ch 21. Although the equivalent chapter in the first edition contains similar sentiments, it is of a different era: J H Begg, *A Treatise on the Law of Scotland relating to Law Agents* (1873) ch 27. For the modern rules, see Law Society of Scotland, *The Law Society of Scotland Practice Rules* (2011) rules B1.2, B1.4, and B1.8.

165 Gloag, *Contract*, (n 139) 596; Gloag, *Contract*, 2<sup>nd</sup> edn (n 107) 526.

166 T B Smith, *Studies Critical and Comparative* (1962) 199-200.

167 W A Wilson and A G M Duncan, *Trusts, Trustees and Executors*, 2<sup>nd</sup> edn (1995) ch 26.

sets his personal interest against the interests his fiduciary duty protects.<sup>168</sup> The importance of equity to the account is manifestly asserted by the content of the judicial pronouncements quoted.<sup>169</sup> However, also notable by its appearance as a normative justification, for the rule against the trustee acting in this way, is the fact that the trustee is imbued with knowledge of affairs beyond that of third parties, which could be turned to his profit.<sup>170</sup> The earliest Scottish case given is from 1842, and it is likely that it rests upon the shared tradition that had by now developed, derived as it was from English equity jurisprudence, which was talking in similar terms at the time. Finally, it is of course also noted as a general rule that fairness is irrelevant in deciding the question whether a fiduciary should be entitled to keep any benefit obtained, it merely requires objection from the interested party.<sup>171</sup>

In the *Stair Memorial Encyclopaedia* the discussion of fiduciary relations is within the volume dealing with trusts, and takes as its title '*Fiduciary Duties of Trustees and Others; Auctor in Rem Suam*.'<sup>172</sup> The section lays down the principle against having the interests of the fiduciary conflict with his duties by that office in standard terms, though it is noticeable that the use of English authority is extensive.<sup>173</sup> The consequences of a breach of fiduciary duty are said to be threefold. First, a fiduciary is a constructive trustee of any property that he obtains as a result of the breach of duty, and of any profit or other advantage that he derives from the breach, and that *the incidents of the constructive trust so arising are those of an ordinary trust*. Second, the fiduciary is liable to account to his beneficiary for the profit obtained from the breach, and that this duty to account is personal only, and shall not be invoked if the constructive trust can be enforced, yet is important if the property subject to the constructive trust

168 Wilson & Duncan, *Trusts*, (n 167) at para 26-01.

169 *Dale v IRC* [1954] AC 11 at 26 per Lord Normand; *Wright v Morgan* [1926] AC 788 at 797 per Lord Dunedin.

170 Wilson & Duncan, *Trusts*, (n 167) at para 26-02. The decisions cited are *Hamilton v Wright* (1842) 1 Bell's App Cas 574 at 591 per Lord Brougham; *Hall's Trs v McArthur* 1918 SC 646 at 651 per Lord Johnston.

171 Wilson & Duncan, *Trusts*, (n 167) at para 26-03. Citing *Hamilton v Wright* (1842) 1 Bell's App Cas 574 at 590 per Lord Brougham; *Ex parte James* (n 94) at 345 per Lord Chancellor Eldon; *Elias v Black* (1856) 18 D 1225 at 1230 per Lord President McNeill; *Wright v Morgan* [1926] AC 788 at 798 per Lord Dunedin. More generally see E C Reid and J W G Blackie, *Personal Bar* (2006) para 9-27.

172 Lord Ross et al, "Trusts, Trustees and Judicial Factors", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 24 (1989) para 170.

173 Ross, "Trusts" (n 172) para 170. Referring to standard Scottish authorities of *Aberdeen Railway Co* (n 12); *Huntington Copper and Sulphur Co Ltd v Henderson* (1877) 4 R 294 at 299 per Lord Young; *Aitken v Hunter* (1871) 9 M 756 at 762 per Lord Neaves; before going on to enunciate the following standard English authorities: *Bray v Ford* [1896] AC 44 at 51 per Lord Herschell; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Boardman v Phipps* [1967] 2 AC 46.

has been dissipated. Third, a breach of fiduciary duty is said to be a breach of trust, which, in turn, renders the fiduciary liable for any loss sustained by the beneficiary.<sup>174</sup>

This is a detailed account of the consequences of breaching a fiduciary duty. It is of some note that we are told that there are personal and real remedies associated with such a breach of duty. The primary remedy is that of a constructive trust, but there is also a personal duty to account that is *separate and subsidiary*; whereas, aside from the gain based remedies, there is also a remedy based upon the loss of the fiduciary. Unfortunately, there is no further elaboration on when the different remedies are appropriate. The lack of authority cited for these rather important propositions is suspect, and, as we shall see, such authority as is cited later is at least dubious.

The idea of general principles applicable to fiduciary relations can be seen from the fact that it is only after the general part above that a list of fiduciary persons is given. The list of fiduciary relations is said to apply to the following offices: trustees; tutors; curators; judicial factors; partners; company directors; agents and employees to some extent; company promoters; recipients of confidential information; and lastly, ‘*ad hoc*’ fiduciary relationships such as self-appointed agents and vitious intromitters.<sup>175</sup> To this list there can be added the *gestor* in a *negotiorum gestio*, and certain representatives of incapacitated persons.<sup>176</sup>

Before leaving the account given in the *Stair Memorial Encyclopaedia*, it is worth noting the consequences of breach of a fiduciary duty once more. In the later passages dealing with this issue, the authors are clear to state once more that a constructive trust arises over any profit or property obtained from the fiduciary office. Furthermore, the fiduciary can seek a declarator of trust with regard to that property or profit.<sup>177</sup> Therefore, not only are we said to be dealing with a ‘constructive trust’ in a truly proprietary sense, which would, in turn, avail against third parties, unless they take in good faith for value,<sup>178</sup> further, it will be prestable in a bankruptcy situation;<sup>179</sup> but it would appear that the fiduciary can find himself fixed with the full office of a trustee, presumably with all its attendant duties.

174 Ross, “Trusts” (n 172) at para 171.

175 Ross, “Trusts” (n 172) at para 172.

176 See A D Ward, *Adult Incapacity* (2003) at paras 4–31–4–38.

177 Ross, “Trusts” (n 172) at para 186.

178 *Redfearn v Somervail* (1813) 1 Dow 50.

179 Ross, “Trusts” (n 172) para 186 n 2, citing *Heritable Reversionary Co Ltd v Millar* (1891) 18 R 116, (1892) 19 R (HL) 43.

As an aside, this is not, as I understand it, the law in England.<sup>180</sup> The nature of a constructive trustee's duties is, in many respects, opaque.<sup>181</sup>

Furthermore, somewhat intriguingly, the authors also suggest that the English rule regarding secret commissions taken by agents and directors not giving rise to a constructive trust should not be followed in Scottish law.<sup>182</sup> It leaves one slightly startled to find a text advocating a broader conception of the constructive trust, and its real effect, in Scotland than in England at the time.<sup>183</sup> The sense one is left with is that the policy argument holds more sway here than that of technical law, and indeed one might say that it was ever thus – there are numerous statements that the rule is an equitable one. It is not necessarily surprising that someone may consider the policy more important than following more technical distinctions followed in England. This is certainly the sense of the passage “Constructive

180 *Lonrho plc v Fayed (No 2)* [1992] 1 WLR 1 at 12 per Millett J “It is a mistake to suppose that in every situation in which a constructive trust arises the legal owner is necessarily subject to all the fiduciary obligations and disabilities of an express trustee.”

181 See J E Martin, *Hanbury and Martin's Modern Equity*, 19<sup>th</sup> edn (2012) para 12-004.

182 Ross, “Trusts” (n 172) para 188. The decisions complained of are *Metropolitan Bank v Heiron* (1880) 5 Ex D 319; *Lister v Stubbs* (1890) 45 Ch D 1. After this entry was written the Privy Council reached the opposite conclusion in *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324. The most important recent decision is that of the Court of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch 453. The Court of Appeal, led by Lord Neuberger MR (as he then was), followed the decisions in *Lister v Stubbs*. The decision in *Sinclair* has not met with universal approval and it has not been followed by courts in Australia and Jersey: *Federal Republic of Brazil v Durant International Corp'n* [2012] JRC 211; *Grimaldi v Chameleon Mining NL (No. 2)* [2012] FCAFC 6. The decision in *Sinclair Investments* was followed by the English Court of Appeal in *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17; [2013] 3 WLR 466. Yet the Court of Appeal followed *Sinclair* with some apprehension, as illustrated by Sir Terence Etherton C's judgment, at para 116, which recognises the manifold difficulties in this area of the law. The Supreme Court has granted permission to appeal in *Mankarious*, and a decision will be eagerly awaited. See generally P Watts, “*Tyrell v Bank of London* – an inside look at an inside job” (2013) 129 LQR 527; R Hedlund, “Secret commissions and constructive trusts: yet again!” [2013] JBL 747; R Chambers, “Constructive trusts and breach of fiduciary duty” [2013] Conv 241; J Edelman, “Two fundamental questions for the law of trusts” (2013) 129 LQR 66; P Millett, “Bribes and secret commissions again” (2012) 71 CLJ 583; T Molloy, “Trading with their principal's capital: bribes and other unauthorized profit taking by fiduciaries” (2012) 18 Trusts and Trustees 925; W Swadling, “Constructive trusts and breach of fiduciary duty” (2012) 18 Trusts and Trustees 985; J E Penner, “The difficult doctrinal basis for the fiduciary's proprietary liability to account for bribes” (2012) 18 Trusts and Trustees 1000; D Hayton, “Proprietary liability for secret profits” (2011) 127 LQR 487; R Goode, “Proprietary liability for secret profits – a reply” (2011) 127 LQR 493. I am grateful to Niall Whitty and Laura Macgregor for drawing a number of these articles to my attention.

183 The decisions were never universally acclaimed however: R M Goode, “Ownership and Obligation in Commercial Transactions” (1987) 103 LQR 433. The text also notes the close connection between agency and constructive trust: and where an agent obtains in his own name, this is said to be on constructive trust: *Bank of Scotland v Hutchison Main & Co Ltd Liquidators* 1914 SC (HL) 1 at 15 per Lord Shaw of Dunfermline. The text in fact goes further, stating: “It is difficult to see why the same rule should not be applied to all property acquired by an agent in consequence of the fiduciary relationship”: Ross, “Trusts” (n 172) para 188.

trusteeship is imposed because of the fiduciary relationship, not because of the particular source of the property that the fiduciary receives in consequence.”<sup>184</sup>

The most modern attempt to state general principles of fiduciary obligation is to be found in Gloag and Henderson: “A fiduciary obligation is one under which as a matter of law a party (the fiduciary) is bound to prefer to his own interests those of another (the principal), for whose benefit he is exercising particular powers or undertaking particular transactions.”<sup>185</sup> In addition to this standard mantra however, the important point is made that the list of fiduciaries is not fixed, and rather the necessary ingredient for fiduciary status is being entrusted with powers or interests relating to another; yet fiduciary duties would not be imposed beyond those contained in a contract.<sup>186</sup>

## E. CONCLUSION

It will be apparent that there is very little analysis of what exactly a fiduciary is in modern Scottish law, especially when one considers the extent of similar analyses in other jurisdictions. While Scottish law accepts the idea of fiduciary relationships, it is apparent that the living experience and development of the fiduciary concept from day to day in the courts relies heavily upon English authority. Yet, throughout the foregoing analysis of the literature pertaining to fiduciary liability, it appears never to have been set out what exactly the basis of fiduciary liability is, and what remedial consequences such a relationship will have. The remedial consequences are of prime importance—are only personal remedies available, or are there proprietary remedies available? Is a fiduciary’s constituent at the risk of the fiduciary’s insolvency? In seeking to consider the remedial options it is important to consider the nature of the fiduciary office, and the way in which it is constituted, before considering the manner in which the holders of such an office fit into the law’s broader regime of remedial response. A modern law of fiduciaries for Scotland can be extracted from the complex historical context outlined above. That task is, however, for another occasion.

184 Ross, “Trusts” (n 172) para 188.

185 W M Gloag and R C Henderson, *The Law of Scotland*, 13th edn, by Lord Eassie et al (2012) para 3.03.

186 *Ibid*, para 3.03.