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THE SOURCES AND METHOD OF THE
INSTITUTIONS OF THE LAW OF SCOTLAND
BY SIR JAMES DALRYMPLE, 1ST VISCOUNT STAIR,
WITH SPECIFIC REFERENCE TO THE LAW OF OBLIGATIONS

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ABSTRACT

This thesis examines the sources and method used by Sir James Dalrymple, 1st Viscount Stair, when writing and revising his seminal work, the *Institutions of the Law of Scotland* (1681). In doing so, it focuses particularly on Stair's titles on the law of obligations.

The thesis shows how Stair used learned authority and continental legal treatises. It demonstrates that Stair relied particularly upon Hugo Grotius' *De jure belli ac pacis* (1625), Petrus Gudelinus' *De jure novissimo* (1620), and Arnoldus Vinnius' *Commentarius academicus et forensis* (1642), and, to a lesser extent, Vinnius' *Jurisprudentia contracta* (1624-1631) and Arnoldus Corvinus' *Digesta per aphorismos* (1642). It establishes when, in the process of writing and later revising the *Institutions*, Stair first used and when he returned to these continental legal treatises. It explains Stair's pattern of borrowing from these treatises, and shows how his method and pattern of borrowing changed as he revised the *Institutions*. It establishes Stair's purpose in consulting each of these works and how he was influenced by them. Overall, the thesis explains Stair's method of writing and his use of sources and authorities, places his work in the context of continental jurisprudence, and thus significantly enhances current understanding of Stair's *Institutions*.

I hereby declare that this thesis was written by me, is my own work, and has not been submitted in whole or in part for any other degree or professional qualification.

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ABBREVIATIONS

Adv.MS(S).	manuscript(s) in the Advocates Library
<i>A.P.S.</i>	<i>Acts of the Parliament of Scotland</i>
<i>B.B.K.L.</i>	<i>Biographisch-Bibliographisches Kirchen Lexicon</i>
C.	<i>Codex</i> of Justinian
D.	<i>Digest</i> of Justinian
<i>D.E.J.</i>	<i>Decisions of the English Judges, during the Usurpation from the year 1655, to his Majesty's Restoration, and the sitting down of the Session in June 1661</i> (Edinburgh, 1762)
E.	(in case names) Earl of
<i>Edin.L.R.</i>	<i>Edinburgh Law Review</i>
Gai.	<i>Institutes</i> of Gaius
Hope, Maj.	Lord Clyde (ed): <i>Hope's Major Practicks 1608-1633</i> (Stair Society series volumes 3-4, Edinburgh, 1937-1938)
<i>I.C.L.Q.</i>	<i>International Comparative Law Quarterly</i>
Inst.	<i>Institutes</i> of Justinian
<i>J.L.H.</i>	<i>Journal of Legal History</i>
<i>Jud.Rev.</i>	<i>Judicial Review</i>
<i>Jur.Rev.</i>	<i>Juridical Review</i>
L.	(in case names) Laird of
<i>L.Q.R.</i>	<i>Law Quarterly Review</i>
M.	W.M. Morison: <i>Decisions of the Court of Session, from its first institution to the present time, digested under proper heads, in the form of a dictionary</i> [Morison's <i>Dictionary of Decisions</i>] (Edinburgh, 1801-1807)
M.Supp.	M.P. Brown: <i>Supplement to the Dictionary of the Decisions of the Court of Session</i> [Supplement to Morison's <i>Dictionary of Decisions</i>] (Edinburgh, 1826)
<i>McGill L.J.</i>	<i>McGill Law Journal</i>
MS(S)	manuscript(s)
N.A.S.	National Archives of Scotland
Nov.	<i>Novels</i> of Justinian
<i>O.D.N.B.</i>	<i>Oxford Dictionary of National Biography</i> (Oxford, 2004)
pr.	<i>Prooemium</i>
<i>R.I.D.A.</i>	<i>Revue internationale des droits de l'antiquité</i>
<i>R.P.C.</i>	<i>Records of the Privy Council</i>
<i>R.P.S.</i>	<i>Records of the Parliament of Scotland</i> (www.rps.ac.uk)
S.	Stair's <i>Institutions of the Law of Scotland, deduced from its originals, and collated with the Civil, Canon, and Feudal-Laws; and with the customs of neighbouring nations</i> (Edinburgh, 1681)
S.Dec.	Stair's <i>The Decisions of the Lords of Council and Session in the most</i>

*important cases debate before them, with the Acts of Sederunt...from
June 1661. to July 1681 (Edinburgh, 1683-1687)*

SC	<i>Senatus consultum/consulta</i>
S.H.R.	<i>Scottish Historical Review</i>
T.v.R.	<i>Tijdschrift voor Rechtsgeschiedenis</i>

INTRODUCTION

“Every body of men has its own special idol, and of Scots lawyers it is safe to say that Stair’s position is impregnable.” – A.C. Black¹

Black here aptly summarized the importance of Stair’s *Institutions of the Law of Scotland, deduced from its originals, and collated with the Civil, Canon, and Feudal-Laws; and with the customs of neighbouring nations* (Edinburgh, 1681).² This treatise is an example of institutional writing, a genre of early-modern legal works which set out national private law.³ Institutional writing is a feature of every Western-European legal system where Roman law has been received. Scots law was never codified and thus puts peculiar emphasis on such treatises. Since the nineteenth century,⁴ certain Scottish institutional works have been regarded as sources of law.⁵ Stair is considered the most important of these Scottish institutional writers. His *Institutions* remains a source of law and has thus had a profound impact on the development of certain areas of Scots private law.⁶

Since 1981 (the tercentenary of the first printing of the *Institutions*), there has been an increased interest in Stair’s intellectual influences and use of authority.⁷ One

¹ “The Institutional Writers, 1600-1829” in *An Introductory Survey of the Sources and Literature of Scots Law, by various authors, with an introduction by the Rt. Hon. Lord Macmillan* (Stair Society series volume 1, Edinburgh, 1936) 59, 63.

² The *Institutions* will be cited “S.first edition\second edition”. All quotations are drawn from the first printed edition unless otherwise indicated.

³ On institutional writing in Europe, K. Luig: “The institutes of national law in the seventeenth and eighteenth centuries” [1972] *Jur.Rev.* 193-226 generally.

⁴ J.W.G. Blackie: “Stair’s later reputation as a jurist” in D.M. Walker (ed): *Stair Tercentenary Studies* (Stair Society series volume 33, 1981) 207, 219-227.

⁵ J.W. Cairns: “Institutional writings in Scotland reconsidered” (1984) 4 *J.L.H.* 76, 90.

⁶ The Scots law of promise was shaped by Stair’s rejection of opinions expressed by Hugo Grotius [on whom, below, ch.4]: W.W. McBryde: “Promises in Scots law” (1993) 42(1) *I.C.L.Q.* 48-66, 54-56. Stair’s acceptance of Grotius’ rejection of Franciscus Connanus [on whom, below, 3.2.2.2] in relation to consideration in contract “sealed the fate of consideration in Scots law”: G. Lubbe “Formation of contract” in K. Reid & R. Zimmermann (eds): *A History of Private Law in Scotland* volume 2 (Oxford, 2000) 1, 15.

⁷ e.g. D.M. Walker (ed): *Stair Tercentenary Studies* (Stair Society series volume 33, Edinburgh, 1981) generally; W.M. Gordon: “Stair’s use of Roman law” in A. Harding (ed): *Law-Making and Law-Makers in British History: papers presented to the Edinburgh Legal History Conference, 1977* (Royal Historical Society Studies in History series volume 22, London, 1980) 120 generally.

area of interest has been the continental treatises on which Stair relied.⁸ Gordon's study of Stair's choice and use of such sources allowed a new level of critical insight; he showed that Stair, like most jurists of the period,⁹ did not always acknowledge his sources and could not be assumed to have read everything he cited.¹⁰ Yet Gordon's was not a comprehensive study, and, because there have been few subsequent articles which have built on Gordon's findings, knowledge of Stair's choice and use of sources remains limited.

This thesis will build on Gordon's pioneering research and examine Stair's use of continental legal literature in his titles on obligations. First, it will identify the treatises on which Stair relied. Three treatises acted as Stair's principal sources in writing and revising these titles of the *Institutions*: Hugo Grotius' *De jure belli ac pacis libri tres* (Paris, 1625), Petrus Gudelinus' *Commentaria de iure novissimo libri sex* (Arnhem, 1620), and Arnoldus Vinnius' *In quatuor libros institutiones Imperiales commentarius academicus et forensis* (Leiden, 1642). Stair's use of two minor sources will also be discussed, specifically Arnoldus Vinnius' *Jurisprudentia contracta sive partitiones juris civilis libri IIII* (The Hague, 1631) and Arnoldus Corvinus' *Digesta per aphorismos strictim explicata* (Amsterdam, 1642).¹¹

⁸ e.g. A. Rodger: "Molina, Stair and the *jus quaesitum tertio*" [1969] *Jur.Rev.* 34-44 (Parts one and two) and 128-151 (Parts three and four) generally; J. Cameron: "James Dalrymple, 1st Viscount of Stair" [1981] *Jur.Rev.* 102-109 *passim*; W.M. Gordon: "Stair, Grotius and the sources of Stair's *Institutions*" in *Roman law, Scots law and Legal History: selected essays* (Edinburgh Studies in Law series volume 4, Edinburgh, 2007) 255 generally; T. Richter: "Molina, Grotius, Stair and the *jus quaesitum tertio*" [2001] *Jur.Rev.* 219-222 generally; T. Richter: "Did Stair know Pufendorf?" (2003) 7(3) *Edin.L.R.* 367-378 generally; J.D. Ford: "Stair's title 'Of Liberty and Servitude'" in A.D.E. Lewis and D.J. Ibbetson (eds): *The Roman Law Tradition* (Cambridge, 1994) 135 *passim*; and J.D. Ford: *Law and Opinion in Scotland during the Seventeenth Century* (Oxford, 2007) *passim*.

⁹ On Grotius' borrowing, see R. Feenstra: "L'influence de la Scholastique Espagnole sur Grotius en droit privé: quelques expériences dans questions de fond et de forme, concernant notamment les doctrines de l'erreur et de l'enrichissement sans cause" in P. Grossi (ed): *La seconda Scolastica nella formazione del diritto privato moderno* (Milan, 1973) 377, 382-385; S.M. Villa: "The philosophy of international law: Suárez, Grotius and epigones" (1997) 37(1) *International Review of the Red Cross* 539-552 generally.

¹⁰ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*" generally.

¹¹ This thesis will follow the naming conventions of R. Tuck (ed): *The Rights of War and Peace, from the edition of Jean Barbeyrac* (Natural law and Enlightenment series, Indianapolis, 2005) [on which, volume 3, 1763-1814]. For jurists not given by Tuck, the Latinised versions of jurists' names will be preferred.

It will also investigate when Stair used these sources. Stair wrote the first version of the *Institutions* in 1659-1662.¹² His work was copied and circulated as manuscripts. A stem of manuscripts (the earliest of which dates from 1662) developed from this first version. He thereafter revised his text three times. His first revision was made in 1666-1667. Stair did not revise his text extensively but rather updated it according to recent case law and other Scottish authorities. This second version gave rise to a second manuscript stem, dating from 1666.¹³ Stair revised his text again when preparing the *Institutions* for print in 1681. This was the third version of the *Institutions*. The fourth version was the second printed edition (Edinburgh, 1693). The two printed editions included changes to the text, his pattern of citation, and his choice and use of sources. It will be shown that the continental legal sources Stair used varied for each of these four versions of his text. His three most important sources were all used for the first version, as was Corvinus. None were re-examined for the second version. When preparing the first printed edition, Stair again used Vinnius' commentary and Grotius' *De jure belli*, and consulted Vinnius' *Jurisprudentia contracta* as a new source. When preparing the second printed edition, Stair re-examined all three of his principal sources but neither Corvinus nor Vinnius' *Jurisprudentia contracta*.

This thesis will also set out Stair's pattern of borrowing from these sources. Gordon demonstrated that Stair used his sources at points in the *Institutions* in which they were not cited.¹⁴ This thesis will investigate whether there was a pattern to Stair's borrowing, and what material and/or information Stair took from his sources. It will be shown that he borrowed: citations of other early-modern jurists, Roman law, Canon law, and writers of classical antiquity; references to continental legal systems; structure of sentences or paragraphs; wording and phrasing; and substantive points of law. This thesis will establish that Stair generally did not check the citations borrowed from these sources for the first version. He did, however, check the citations of Roman law which

¹² Below, 1.1.1.

¹³ Ford: *Law and Opinion*, 67. Below, 1.1.2.

¹⁴ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*" generally.

he borrowed when preparing the third and fourth versions. Indeed, Stair generally increased the detail and accuracy of his citations for the printed editions.¹⁵

Finally, this thesis will establish for what purpose and to what extent Stair used these continental juristic sources, and his method in doing so. It will show that he selected recent continental treatises for specific purposes. Stair used Vinnius' commentary as an important source for Roman law, to consult indirectly continental treatises, and to engage with continental juristic debates.¹⁶ Gudelinus' *De jure novissimo* was his principal source for comparative law as well as another important source for Roman law.¹⁷ Stair consulted Grotius for natural law, and thus borrowed citations of the writings of classical antiquity as well as of Roman law and of continental jurists from Grotius.¹⁸ Finally, he used Corvinus as his principal source for Canon law when writing in 1659-1662.¹⁹ This use of continental sources locates Stair within the European intellectual tradition and shows that he was using modern works to access recent law and jurisprudence. This thesis will also show that he was critical in using these treatises: he often disagreed with them and, when preparing the printed editions, he checked borrowed material. It will demonstrate how his method and use of sources changed as the *Institutions* was revised. It will prove that the method which he applied to his continental juristic sources was also applied to his sources of Scots law. This research will locate these aspects of Stair's use of his sources and authorities within the context of seventeenth-century continental jurisprudence, and significantly enhance current understanding of Stair's *Institutions*.

The focus of this thesis has been limited to Stair's titles on the law of obligations.²⁰ There are two reasons for this. First, this is the area of law which is traditionally, and correctly, considered to be the most heavily influenced by Roman law

¹⁵ Below, 3.1.3.

¹⁶ Below, ch.6.

¹⁷ Below, ch.5.

¹⁸ Below, ch.4.

¹⁹ Below, ch.7.

²⁰ S.3/1.3-S.11/1.18.

and the civilian tradition.²¹ Secondly, it is in these titles where most of the citations of continental jurists, Roman law, writers of classical antiquity, and Canon law are found.

²¹ Luig: “The institutes of national law in the seventeenth and eighteenth centuries”, 198.

STAIR AND HIS *INSTITUTIONS*

In order to understand this work and its author, it is necessary to draw together three seemingly-disparate topics: the *Institutions*, Stair's intellectual background, and the collection and use of continental legal literature by seventeenth-century Scottish advocates.

The first part of this chapter will consider the *Institutions*. It will establish Stair's timeline for writing and revising the four versions of the *Institutions*. It will consider the textual accuracy of the printed editions by examining seventeenth-century Scottish printing. It will also look at how the pattern of citation, structure and content of the *Institutions* differed in the four versions. It will examine the sources he used for Scottish case law. Overall, this part of the chapter will set out aspects of the *Institutions* which are relevant to this thesis.

The second part will examine two aspects of Stair's intellectual background: his education and lecture for admission as an advocate. This will show that Stair was already familiar with some of the sources subsequently cited by him in the *Institutions*. It will show that his education would have exposed him to humanism and scholasticism. Humanist influence can also be seen in his lecture for admission as an advocate. Both humanist and scholastic influences are apparent in his *Institutions*. Overall, this part of the chapter will set out Stair's early intellectual influences, and allow findings on such influences in the *Institutions* to be set in the context of his life.

The third part investigates which examples of continental legal literature were being sought by Scottish advocates during the seventeenth century, and to what extent Stair's contemporaries engaged with such sources. An examination of the catalogues of three private libraries shows that Stair's principal sources were popular. A brief review of the secondary literature shows that some of Stair's contemporaries had thorough knowledge of continental legal literature whereas others were more pedestrian in their choice and use of sources. This brief survey indicates that there was significant variation in the knowledge of and engagement

with continental legal literature by Stair's contemporaries. This in turn puts Stair's choice and use of sources in the contemporary Scottish context.

The three parts of this chapter set up and give context to the research detailed in the later chapters. The first is a necessary preamble to the subsequent chapters, and the other two allow the broader conclusions of those chapters to be drawn in the context of Stair's life and contemporary Scottish knowledge and use of continental literature.

1.1 THE INSTITUTIONS

1.1.1 When did Stair write the first version?

Various dates have been suggested in the secondary literature as the period during which Stair wrote the first version.¹ Ford, who has recently published the results of his systematic examination of the manuscripts,² plausibly concluded that it was substantially written in 1659-1661 but revised and completed in 1662.³ This was

¹ Hutton suggested that Stair wrote the *Institutions* and collected decisions simultaneously during the period 1657-1663 [G.M. Hutton: "Stair's aim in writing the *Institutions*" in D.M. Walker (ed): *Stair Tercentenary Studies* (Stair Society series volume 33, Edinburgh, 1981) 79, 81]. Hutton's suggestion that Stair wrote from the date of his appointment to the Bench agrees with that of the nineteenth-century compiler of Stair's correspondence [J.M. Graham (ed): *Annals and Correspondence of the Viscount and the First and Second Earls of Stair* volume 1 (Edinburgh, 1875), 55]. Hutton wrongly dated the completion of the earliest version of Stair's *Institutions* to 1664 [Hutton: "Stair's aim in writing the *Institutions*", 79]. In doing so, he followed a tract by one of Stair's contemporaries [Baron J. Somers & Sir W. Scott: *Collection of scarce and valuable tracts, on the most interesting and entertaining subjects* volume 11 (2nd edition, London, 1809), 550]. Stair's biographer also referred to this tract [A.J.G. Mackay: *Memoir of Sir James Dalrymple, first Viscount Stair President of the Court of Session in Scotland and Author of the "Institutions of the Law of Scotland": A study in the history of Scotland and Scotch law during the seventeenth century* (Edinburgh, 1873 rept. Boston, 2005), 152 n.1]. This suggestion must be inaccurate because copies of the manuscript tradition survive from 1662.

Earlier dates have been suggested. In 1649, Stair was appointed to a commission to review and revise Scots law, to draw on all previous statutes and customs to create "a constant, certain and known model and frame of law according to equity and justice" [R.P.S., 1649/1/306: Commission for Revising the Laws 1649 <<http://rps.ac.uk/trans/1649/1/306>>, accessed 16th July 2010; Ford: *Law and Opinion*, 175-176]. More, editor of the fifth edition of the *Institutions*, stated: "it is not improbable that Lord Stair's appointment, as one of the Commissioners, may have first turned his attention to the preparation of his '*Institutions*'." [J.S. More (ed): *The Institutions of the Law of Scotland, Deduced from its Originals, and Collated with the Civil, Canon, and Feudal Laws, and with the Customs of Neighbouring Nations by James, Viscount of Stair, Lord President of the College of Justice: a new edition with notes and illustrations by John S More, Esq. Advocate* (5th edition, Edinburgh, 1832) volume 1, xii]. This suggestion has not found recent support.

² Ford: *Law and Opinion*, esp. 63-73.

³ Ford: *Law and Opinion*, 72.

based partly on the pattern of citation of Scottish cases found in a manuscript held by the University of Glasgow, MS.Gen.1495.⁴

It is possible to determine the period during which Stair wrote the first version by examining the manuscripts. Stair's work circulated in manuscript for around twenty years before it was printed in 1681. The Advocates' Library's catalogue currently lists fourteen manuscript copies and the National Library of Scotland's four.⁵ Ford identified another fourteen manuscripts held by the National Archives, the Signet Library, the Mitchell Library, the libraries of the Universities of Edinburgh, Glasgow and Aberdeen, and of the School of Law at Harvard.⁶ Many of these manuscripts bear the date that they were copied. The earliest surviving known manuscript of Stair's *Institutions* dates from 1662. Taking this date as a starting point, it can be deduced that Stair must have completed the first version and allowed it to be copied by 1662.

The manuscripts of the 1662 stem, which represent Stair's earliest version, cite recent cases. These citations show when Stair wrote the first version. Here his pattern of citation of cases heard during the 1650s and early 1660s is most important. During the 1650s, judicial business in Scotland was undertaken by the Commission for Justice, the interregnum court which replaced the Court of Session.⁷ The Commission's Bench predominantly consisted of English lawyers during this time, which caused tension with the Scottish legal community.⁸ The Commission closed in

⁴ Ford noted that "these two manuscripts [seemingly MS.Gen.1495 and Adv.MS.25.1.10] contain a dozen references to cases decided between November 1661 and February 1662" [Ford: *Law and Opinion*, 71]. However, the Glasgow University library catalogue stated wrongly that MS.Gen.1495 contained no references to cases or other legal authorities dating after 1659 [Glasgow University Library Special Collections Online Catalogue entry for MS.Gen.1495 <<http://special.lib.gla.ac.uk/manuscripts/search/detaild.cfm?DID=2830>> accessed 16th July 2010]. Examples of such citations in the body of MS.Gen.1495 include *E. Lauderdale v Tenants of Swintoun* 1662 [M.10023. MS.Gen.1495, fol.54 wrongly cited this case as having been heard in 1660] and *L. Musbon v Lawrie of Macvissorms* 1662 [MS.Gen.1495, fol.55. Probably *Monsual's Children v Laurie of Maxwellton* 1662 [M.2614,], heard by Stair 14th February and cited again, S.30.74/3.8.74].

⁵ In the Advocates' Library: Adv.MSS.25.2.2-25.2.3, Adv.MSS.25.1.7-25.1.11, Adv.MS.31.2.11, Adv.MS.25.4.17, Adv.MS.25.1.5, Adv.MS.25.1.14, Adv.MS.25.1.13, Adv.MS.25.1.12, and Adv.MS.24.2.10. In the National Library of Scotland: MS.5434, MS.5058, MS.3721, and MS.3172. The National Library of Scotland catalogue also identifies MS.7116 as a transcript of Stair's *Institutions*.

⁶ Ford: *Law and Opinion*, 60 n.258.

⁷ Ford: *Law and Opinion*, 92-122.

⁸ Ford: *Law and Opinion*, 123-151.

1659; the Session re-opened in 1661, after the Restoration of Charles II the year before.⁹

Six manuscripts were checked for citations of cases heard during the 1650s and early 1660s, three from the 1662 stem (representing Stair's first version) and three from the 1666 stem (representing his second version).¹⁰ It can be deduced from an examination of these manuscripts that Stair gave *c.*130 citations of cases heard during the interregnum.¹¹ With very few exceptions, each citation was found in all six manuscripts, although there were variations in the spelling of the names of the parties, and sometimes in the date given. These variations seem to be errors made by individual copyists. An examination of Stair's use of these citations supports Ford's observation that Stair was "treating these decisions in the same way as he treated the decisions of the session."¹² Stair viewed the decisions of the Commission as equally authoritative as those of the Session. This research also supports Ford's conclusion that almost all of these citations referred to cases which were heard after Stair was promoted to the Bench,¹³ specifically *c.*120 of the *c.*130 citations. Indeed, Stair cited in the titles on obligations thirty-five-plus cases heard in the winter session of 1658-1659. Two conclusions can be drawn from this. First, the high number of cases heard in the winter session of 1658-1659 cited in the first version suggests that Stair probably began writing after the Commission closed. Secondly, that so many cases from 1657-1659 were cited suggests that Stair focused on recent case law. There is an obvious parallel here between his focus on recent case law and his use of recent continental legal literature as sources for the *Institutions*.

For the second version, Stair added numerous citations of cases heard both before and after but not during the interregnum. All *c.*130 citations of interregnum cases were retained. However, Stair removed the citations of interregnum cases when preparing the third version, with one exception. The citation of *Ross v L. May* 1657

⁹ Ford: *Law and Opinion*, 116-121.

¹⁰ 1662 stem: Adv.MSS.25.1.8, 25.1.10, and 25.1.11. 1666 stem: Adv.MSS.25.1.5, 25.1.7, and 25.1.12.

¹¹ Ford wrongly stated that the manuscript which he examined from the 1662 stem, Adv.MS.25.1.10, contained sixty-six citations of cases heard during the 1650s. [Ford: *Law and Opinion*, 122 n.189]. Eight of the *c.*130 citations were missing from Adv.MS.25.1.10 but appeared in other manuscripts from this stem.

¹² Ford: *Law and Opinion*, 121.

¹³ Ford: *Law and Opinion*, 122 n.189.

was only removed for the second printed edition.¹⁴ Taking the five citations of interregnum cases in “Recompense” as a typical example, it can be seen how Stair removed these citations.¹⁵ Four were removed without significant change to the surrounding passage;¹⁶ the same points were made but the authority for them was removed. Stair still adhered to the points of law which the cases established or clarified; he was simply omitting the supporting citations. Only one citation, of *Viscount Dudope v Marquess of Argyle* 1659 [not found], was removed with several lines of text.

Stair’s removal of these citations for the third version may help to establish the date when Stair was close to completing the first version. Ford argued that Stair had substantially written the *Institutions* by the time that an Act of 1661 was passed¹⁷ which “condemn[ed] the rulings of the Interregnum court”.¹⁸ The 1661 Act Concerning the Judicial Proceedings in the Time of the Late Usurpers said that the Commissioners “did sometimes proceed in an arbitrary way, contrary to law and justice, and at other times many of them, being strangers and ignorant of the law, did proceed unwarrantably and unjustly”.¹⁹ It allowed appeals against the decisions of the interregnum court. The decisions were to “stand in full force” unless challenged by the summer of 1662; even after this deadline, other appeals were approved by parliament.²⁰ This meant that the cases heard during the interregnum that Stair had cited could be overruled by the Session. The authority of these cases was no longer sound. Yet the high number of citations of cases heard 1657-1659 suggests that Stair was focussing on cases from that period, hence Ford’s argument that Stair had substantially completed the first version by 1661. This argument is credible, but not

¹⁴ *D.E.J.*, 97. S.24.52/3.2.53. *Smith v Muire* [M.9858] said to have been heard 23rd December 1660 [S.27.52/3.5.52] was actually heard in 1668 [Walker (ed): *Institutions*, 724].

¹⁵ A sixth citation, of *Seaton v tenants of Forbes*, was cited as having been heard in 1656 in Adv.MS.25.1.5, 9.24 and Adv.MS.25.1.7, 9.23. The other manuscript from the 1666 stem gave 1506 [Adv.MS.25.1.12, 9.23-24]. All three manuscripts from the 1662 stem gave the year 1566 [Adv.MSS.25.1.8 and 25.1.10, 9.23; Adv.MS.25.1.11, fol.84R]. Possibly *Seyton v Forbes*, heard 9th January 1566 [M.685] or a later action between these same parties. Although there was no mention of his tenants in this action, the case was on the relevant point of law.

¹⁶ A case heard 18th July 1657 [not found]; *Viscount Dudope v Marquess of Argyle* 1658 [*D.E.J.*, 218]; *McBryde v Agnous* 1654 [not found]; and *Hope v Clackmannan* 1655 or 1658 [not found].

¹⁷ Ford: *Law and Opinion*, 121-122.

¹⁸ Ford: *Law and Opinion*, 122.

¹⁹ *R.P.S.*, 1661/1/117 <<http://rps.ac.uk/trans/1661/1/117>>, accessed 16th July 2010.

²⁰ E.g. *R.P.S.*, 1663/6/103: Act for a Review to [William Kerr, Earl of] Lothian of Some Decrees given Against Him <<http://rps.ac.uk/trans/1663/6/103>>, accessed 16th July 2010.

certain. It is hard to establish precisely why Stair removed these citations. His change in use of cases heard during the interregnum between the four versions may be a result of the passing of the 1661 Act. It may, however, have simply been a reflection in the change in the political situation since he originally wrote, and of his hesitation to commit citations of interregnum cases to print in post-Restoration Scotland.

There is, however, another indication that Stair had written the substantial part of the first version by the time the Session reopened: his citation of cases heard in the early 1660s. No cases heard after 1662 were cited in the first version. In the titles on obligations, there were only two citations of cases heard during the winter session 1661-1662, and none of cases heard during the summer session 1662.²¹ This corroborates Ford's research; he found only twelve citations of cases heard in the winter session 1661-1662 throughout the first version. These twelve citations can be compared to the thirty-five-plus citations of cases heard in the winter session 1658-1659. There were around three times as many citations of cases heard in the last session of the 1650s as there were of those heard in the first session of the 1660s. This may simply be indicative of reduced court activity during the 1661-1662 winter session, although this seems unlikely. What seems more likely is that Stair had already written the substantial part of the first version by then, and in 1662 went back over his work for a final edit, completed it, and took the opportunity to include some recent case law. Stair's citation of cases heard in 1662 shows that he continued to work on his earliest version in 1662. Given that a manuscript which was copied in 1662 survives, he must have allowed the first version to be copied for circulation very soon after its completion. In order to do so, the substantial part of the first version must have been written before the winter session of 1661-1662. In the following break between court sittings, Stair revised and updated his draft, completing the first version. Ford's conclusion "that Stair worked on his book no later than the vacation from March to May 1662" is therefore correct.²² This proposition that Stair used the break between sessions to complete his first version is

²¹ It has not been determined whether this was typical of the *Institutions*; brief examination of later titles suggests that this may have been the case.

²² Ford: *Law and Opinion*, 71.

compatible with Ford's suggestion that Stair later used the time between sessions to prepare the second version in 1666 and 1667.²³

Given what has been set out above, it is possible to determine when the first version was written. Stair wrote the greater part of it between 1659 and the resumption of judicial business in November 1661 (possibly by the passing of the 1661 Act). No copies survive of a version completed in 1661. It thus seems plausible (although not certain) that Stair did not allow his manuscript to be copied at that time. He finished the first version after the winter session of 1661-1662. He then allowed the manuscript to be copied and to be circulated, resulting in the many surviving copies belonging to the 1662 stem. This confirms Ford's conclusion that "the text was substantially written before 1661 and was revised in 1662."²⁴

1.1.2 When did Stair revise his text?

Stair's second version can be extrapolated from the 1666 stem. Ford examined the citations of Scottish cases in the manuscripts from that stem and concluded that:

Stair revised the first part of his book during the vacation from March to May 1666, that he revised the second part during the vacation from August to October 1666, and that he revised the whole text again and made a few slight alterations in the following year.²⁵

Ford stressed that these revisions "do not appear to have been extensive".²⁶ This research supports Ford's conclusion that Stair did not make significant changes to the text, but rather made changes to his wording, added sentences or small paragraphs, and added around 500 citations.²⁷ Most seem to have been of recent case law.

Stair carried out a major revision of the *Institutions* for its first printing in 1681.²⁸ This was the third version. Much material and authority was added such as

²³ Ford: *Law and Opinion*, 70, 72.

²⁴ Ford: *Law and Opinion*, 72.

²⁵ Ford: *Law and Opinion*, 70.

²⁶ Ford: *Law and Opinion*, 70.

²⁷ This corroborates the view of Ford: *Law and Opinion*, 65

²⁸ Ford: *Law and Opinion*, 70, 73, 431-435.

numerous citations of cases, including of those heard in 1681.²⁹ Again, Stair tried to cite recent cases where possible, and must have sent his work for printing very soon after completing the third version. This is the same practice as was seen with his allowing the first and second versions to be copied soon after their completion.

When preparing the second printed edition (the fourth version), he added citations of cases heard in the 1690s. There does not seem to have been quite the same focus on very recent case law in this final version. He cited cases heard in 1691 and 1692 but none heard in 1693 in the titles on obligations.³⁰ This suggests that Stair completed the fourth version (or at least that version's titles on obligations) in 1692 rather than 1693. There are three possible explanations to this. First, the printer may have caused the delay. Secondly, perhaps Stair simply delayed sending the fourth version for printing after its completion. This would differ from his previous practice: he allowed the first and second versions to be copied and sent the third for printing soon after completing them. Finally, it is possible that he revised each of the four books of the fourth version in turn and thus stopped working on the titles on obligations (found in the first book) earlier than he completed that version overall. If this was the case, it would also represent a break with his previous method. He previously seems to have revised the entire *Institutions* title by title and then gone back over it for a final quick edit, incorporating very recent authority as he went. If this final suggestion is correct, the lack of cases heard in 1693 may indicate that he omitted to go back over the fourth version for that final editing stage.

²⁹ In the titles on obligations: *Gordon v Inglis* 1681 [M.5924, 6180], S.4.15/1.4.19; *Robertson v Gray* 1681 [M.7134], S.6.38/1.6.38; *Spence v Foulis* 1681 [M.11437], S.8.1/1.8.2; *Bathgate v Bogil* [Bowdoun?] 1681 [S.Dec.2.841], S.9.15/1.9.15; *Neilson v Ross* 1681 [M.1045], S.9.15/1.9.15; *Master of Balmerinloch v Laird of Pourie* 1681 [M.Supp.2.270], S.10.46/1.12.17; *Home v Home* 1681 [M.2142], S.10.90/1.17.7. *Bruce v Hepburn* 1681 [M.13554], S.11.1/- is removed for the second printed edition.

³⁰ In the first book: *Sandilands v L. Niddrie* 1692 [not found], S.1.6.18; *Fletcher of Aberlady v Murray of Blackbarony and others* 1691 [not found], S.1.6.36; *E. Lauderdale and Lord Haltoun v Earl of Aberdeen* 1692 [M.Supp.2.130], S.1.9.8; *Creditors of Lantoun and Cockburn* 1691 "competing" [possibly M.1290], S.1.9.15; *Hume v Hamilton* 1691 [not found], S.1.11.7; *Lord Hatton v Earl of Aberdeen* 1691 [Harcarse, 154], S.1.17.11.

1.1.3 The printed editions

1.1.3.1 *Printing in the seventeenth century*

Proper understanding of the printed editions of the *Institutions* requires detailed consideration of their printing. The method of printing in use in the seventeenth century was moveable-type printing. This method used reliefs of individual letters arranged to make words or pages which were subsequently imprinted onto multiple sheets of paper.³¹ There were problems with moveable-type printing. First, the carved letters became eroded and the lettering appeared less clear on the printed page. Secondly, if the press was knocked after a page was type-set, it could upset the lettering, which would then need to be reset. Two books from the same edition or print-run could thus differ. Cairns found that this was the case with Mackenzie's *Institutions of the Law of Scotland* (Edinburgh, 1684).³² This research has found similar variations in the second printed edition of Stair's *Institutions*.³³ Finally, printing standards required that the lines of text on the page be justified. In order to achieve lines of equal length, the printers – and not the author – would determine the setting and spacing of letters, spelling, punctuation and any abbreviations.³⁴ These features of the printed text of the *Institutions* were therefore fixed by the printer rather than Stair.³⁵ No assumptions about Stair's intention can be based on these accidents of printing.

Both the first and the second printed editions of the *Institutions* were printed by the Heirs of Andrew Anderson in Edinburgh. Anderson had been the King's Printer since 1671, giving him a monopoly "so extensive that no one in the kingdom was at liberty to print any book, from a bible to a ballad, without a license from Andrew

³¹ On the invention of moveable-type printing, e.g. F.G. Kilgour: *The Evolution of the Book* (Oxford, 1998), 85-92; M. Pollack: "Printing in Venice – before Gutenberg?" (1975) 45(3) *Library Quarterly* 287-308 generally.

³² J.W. Cairns: "The moveable text of Mackenzie: bibliographical problems for the Scottish concept of Institutional Writing" in J.W. Cairns and O.F. Robinson (eds): *Critical Studies in Ancient Law, Comparative Law and Legal History: Essays in honour of Alan Watson* (Oxford, 2001) 235, 242-244.

³³ Below, 6.1.1.2, 6.4.1, introduction to ch.8.

³⁴ See e.g. M.B. Parkes: *Pause and Effect: An Introduction to the History of Punctuation in the West* (Berkeley CA, 1993), 50-61 esp. 53.

³⁵ An argument based on the punctuation in the printed editions is found in Rodger: "Molina, Stair and the *JQT*", 131.

Anderson".³⁶ The poor quality of his printing resulted in this monopoly being reduced to Bibles and Acts of Parliament within the year after his printing a New Testament so inaccurate that it had to be withdrawn by the Privy Council.³⁷ On the death of Anderson in 1676, his widow ran the printing house as 'the Heirs of Andrew Anderson'. Aldis, who researched printing in Scotland before 1700, said of Anderson:

A considerable portion of his type and ornaments had been in use in Edinburgh by a succession of previous presses, and are in a much worn condition. His productions, and those of his successors, are among the poorest and most slovenly that proceeded from the Scottish press.³⁸

It is possible that the poor quality of Anderson's printing was exacerbated by the quantity of printing he undertook. Aldis identified the printers of sixty of the eighty-three items printed in Scotland in 1681. Forty-three were printed by the Heirs of Andrew Anderson.³⁹ This includes: five of the six printed Acts of Parliament; four items printed on behalf of Charles II; thirteen of the fourteen proclamations of the Privy Council; and a large proportion of the treatises by private individuals, including Stair's *Institutions and Modus litigandi, or Form of process observed before the Lords of Council and Session in Scotland* (Edinburgh, 1681) and Mackenzie's *Idea eloquentiae forensis hodiernae: una cum actione forensi ex unaquaque juris parte* (Edinburgh, 1681).⁴⁰

³⁶ C.H. Timperley: *A Dictionary of Printers and Printing, with the Progress of Literature, Ancient and Modern* (London, 1839), 546. On the origins of printing privileges in Europe, E. Armstrong: *Before Copyright: The French book-privilege system 1498-1526* (Cambridge Studies in Publishing and Printing History series, Cambridge, 1990 rept. Cambridge, 2002), 1-20.

³⁷ Timperley: *Dictionary of Printers*, 546.

³⁸ H.G. Aldis: *A List of Books Printed in Scotland Before 1700 including those printed furth of the realm for Scottish booksellers with brief notes on the printers and stationers* (Edinburgh Bibliographical Society occasional publications series, Edinburgh, 1904), 107.

³⁹ Although one gave "the Relict of Andrew Anderson". Aldis: *List of Books Printed in Scotland Before 1700*, 60-62.

⁴⁰ Later translated into English and printed as G. Mackenzie: *An Idea of the Modern Eloquence of the Bar: Together with a pleading out of every part of law* (Edinburgh, 1711). Aldis: *List of Books*, 60-62.

1.1.3.2 *The printing of the Institutions*

The quality of the printing of the *Institutions* by the Heirs of Andrew Anderson was poor. Stair himself mentioned his dissatisfaction at the level of inaccuracy in the first edition,⁴¹ although this was a standard complaint.⁴² There is no guarantee that the second printed edition was more accurate as the same printers were used. Indeed, variations in the print-run have been found in the second printed edition.⁴³ Additionally, not all of the errors made by the printer in the first printed edition were corrected for the second.⁴⁴ That citations appeared correctly in the manuscripts (and thus presumably in the first and second versions) but not in the first printed edition suggests that the errors were probably made by the printer. The occurrence of these same errors in the second printed edition may suggest that Stair used the first printed edition, rather than his own manuscript of the third version, to prepare the second. This seems plausible, as Stair may well have sent his own hand-written copy of the third version to the printers, and not have had it returned. He would therefore have had to use a printed copy of the third version to consult his treatise. It would thus have been difficult for him to remove errors from citations as they would not be as evident as, for example, errors in the spelling of legal terminology.⁴⁵ Removing these errors would require him to have checked every citation. Although some were checked for the second printed edition,⁴⁶ there is no evidence that Stair checked all his citations at that time.

The poor quality of the printing of the *Institutions* means that errors found in the first and second printed editions cannot necessarily be presumed to have been made by Stair. Both printed editions and manuscripts from both stems will be examined each time a passage of the *Institutions* is discussed. This will provide evidence on whether errors were made by the printer or whether they can be

⁴¹ S.-/ first page of the *advertisement*.

⁴² T. Craig: *Jus feudale tribus libris comprehensum: quibus non solum consuetudines feudales, & praediorum jura, quae in Scotia, Anglia, & plerisque Galliae locis obtinent, continentur, sed universum ius Scotium, et omnes fere materiae iuris clare & dilucide exponuntur, et ad fontes iuris feudalis & civilis singula reducuntur* (London, 1655), last two pages of Burnet's preface, "*Ad Lectorem*".

⁴³ Below, 6.1.1.2, 6.4.1, introduction to ch.8.

⁴⁴ e.g. the citation of Connanus [below, 4.1.6.1].

⁴⁵ e.g. "*multilinimve*" was corrected to "*utilium inutiliumve*", S.2.5/1.2.5.

⁴⁶ e.g. D.16.3.31.1 [below, 4.1.3.2]; D.13.6.3 [below, 4.1.4.3]; C.5.37.24 [below, 5.1.3.2].

attributed to Stair. If errors found in the first printed edition frequently occur in the manuscripts then it is more likely that they were made by Stair and were merely preserved by the copyists and by his printer.

1.1.4 **What revisions did Stair make?**

Ford correctly stated that the first printed edition was the first extensive revision of the *Institutions*.⁴⁷ He demonstrated this by detailing the amendments made to Stair's passage on the sources of Scots law.⁴⁸ This was the only passage which he examined in detail in the four different versions. The extent and nature of Stair's revision of the *Institutions* can be examined by considering the changes to his pattern of citation and the structure and content of the *Institutions* more generally.

1.1.4.1 *Stair's pattern of citation*

Ford's examination of one manuscript from each stem demonstrated that: "It is in the citation of sources that the manuscripts differ most frequently from each other and from the first edition." In Adv.MS.25.1.10 from the 1662 stem, he found "some two thousand references to decisions and statutes, to texts on the civil, canon and feudal laws, and to books by later jurists". In Adv.MS.25.1.5 from the 1666 stem, he located "five hundred or so more references than [in] the earlier copy, a few of which date from 1667". Finally, in the first printed edition he found "about a thousand more [than in the manuscript from the 1666 stem] to a total of around three thousand five hundred, mostly through the addition of references to decisions and statutes from the 1660s and 1670s."⁴⁹ These figures have not been checked. What is most relevant to this research is the number of citations given of continental jurists, Roman law, Canon law, and writers of classical antiquity in the titles on obligations in the printed editions and in the manuscripts. These have been counted, which has allowed comparison between the extent and use of such citations between the four versions of the *Institutions*.

⁴⁷ Ford: *Law and Opinion*, 70, 73.

⁴⁸ S.1.15/1.1.16. Ford: *Law and Opinion*, 414-439 esp. 431-435.

⁴⁹ All quotations in this paragraph from Ford: *Law and Opinion*, 65.

The title “Restitution” provides a typical example of the types of changes that Stair made. There were two main changes to the content of the title. First, there was a lengthy discussion of restitution from public enemies in the sample manuscripts from both stems which was removed for the third version. This may have been because Stair added a long discussion of prize law to “Rights Real” at that time. It may have seemed unnecessary to retain such a similar discussion in “Restitution” given the new addition to “Rights Real”.⁵⁰ Instead, he cut the passage in “Restitution” so that there remained only a brief discussion, based on the opening lines of that in the manuscripts.⁵¹ Secondly, a long exploration of the effect of fraud was added for the third version.⁵²

There were two changes to Stair’s pattern of citation in “Restitution”. First, the removal of much of Stair’s discussion of restitution from public enemies meant the removal of citations of relevant authority: of Xenophon, Aristotle’s *Politics*, Plato’s *De legibus*, and the Bible.⁵³ The citations in the discussion of restitution from public enemies were not given in the new (perhaps replacement) discussion of prize law in “Rights Real” in the third version. Secondly, Stair added references to recent cases. He cited three cases in “Restitution” in the first and second versions.⁵⁴ For the third version, Stair removed one of these (*Bissat*) and added twelve new citations of cases. This meant that Stair gave: six citations of cases heard before 1659;⁵⁵ two of cases heard in 1666,⁵⁶ and six of cases heard in 1666-1681.⁵⁷ Most of the cases added

⁵⁰ This is certainly suggested by his cross-reference to S.12.43/2.1.3. It is interesting that this cross-reference was not updated in the second printed edition to take account of the new division into four books. It still indicated to “*Tit. 12. Rights Real, §.43.*” [S.7.6/1.7.6].

⁵¹ S.7.6/1.7.6.

⁵² S.7.14/1.7.14.

⁵³ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 7.5; Adv.MS.25.1.11, fol.62L. 1666 stem: Adv.MS.25.1.5, 7.6; Adv.MSS.25.1.7, 7.5; Adv.MS.25.1.12, 7.5 wrongly cited “Cato de legibus”. Below, 4.1.8.

⁵⁴ *Inglis v Kirkwood* 1627 [M.3976]; *Capt. Crawford v L. Lamington* 1629 [M.12374]; *Bissat v Bissat* 1624 [M.12368] was removed. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 7.9; Adv.MS.25.1.11, fol.65R. 1666 stem: Adv.MS.25.1.5, 7.10; Adv.MS.25.1.7, 7.9; Adv.MS.25.1.12, 7.10.

⁵⁵ *Home v Wilson* 1610 [not found]; *Inglis v Kirkwood* 1627 [M.3976]; *Capt. Crawford v L. Lamington* 1629 [M.12374]; *Carmichael v Hay* 1623 [M.11404]; [*Wallace off Eldersly’s Bairns v his Heir* 1624 [Durie, 145]; and *Valence [Wallace] v Crawford* 1625 [Durie, 167], all S.7.14/1.7.14.

⁵⁶ *Brown & Fountain v Maxwell of Netheryet* 1666 [M.3978]; and *Fairly v Dick’s Executors* 1666 [M.12278], both S.7.14/1.7.14.

⁵⁷ *Ramsay v Robertson* 1673 [M.2924], S.7.9/1.7.9. *Hadden and Lauder v Shaorswood* 1668 [M.16997], *Dick v Oliphant* 1677 [M.6548], *McLurg v Blackwood* 1680 [M.845], *Bain v McMillan* 1677 [M.11495], and *Campbel and Cunninham v Bain and McMillan* 1678 [M.9128], all S.7.14/1.7.14.

for the third version were heard in time to have been included in the first or at least the second version.

1.1.4.2 *The structure and content of the Institutions*

The *Institutions* set out the traditional areas of private law. Although Stair called his work the *Institutions*, his arrangement did not follow the order of Gaius and Justinian, which was commonly followed in books of this kind.⁵⁸ The first edition was divided into two parts. Part one consisted of twenty-two titles. The first eleven discussed the law of obligations. The remaining titles in the first part examined property law, ending with the title “Prescription”. The nine titles of the second part covered loss of proprietary rights, including succession. Although the arrangement of these titles was logical, there was no formal break between the titles on obligations and those on property law. In the fourth version, this was achieved by dividing titles into different books.

The fourth version was divided into four books, more akin to the institutional division.⁵⁹ Stair described the division: “I have divided this Edition into Four Parts. The *first* being of Original *Personal* Rights: The *Second* of Original *Real* Rights: The *Third* of the *Conveyance* of both: And the *Fourth* of the *Cognition and Execution* of the whole”.⁶⁰ The first book contained the eleven titles on obligations. There were eighteen titles in the first book of the second edition as “Obligations Conventional”, which had been c.40,000 words long, was divided into eight titles. The second book was the other eleven titles from the first part of the earlier versions. The most substantial change in the substance of these titles seems to be the addition of the discussion of prize law added to “Rights Real” for the third version. It was c.8,000

⁵⁸ On Stair’s structure, A.H. Campbell: *Structure of Stair’s Institutions, being the twenty-first lecture of the David Murray Foundation in the University of Glasgow delivered on 24th of February, 1954* (Glasgow, 1954) generally; D.M. Walker: “The structure and arrangement of the *Institutions*” in D.M. Walker (ed): *Stair Tercentenary Studies* (Stair Society Series volume 33, Edinburgh, 1981) 100, 103-105; D.M. Walker (ed): *The Institutions of the Law of Scotland Deduced from its Originals, and Collated with the Civil, Canon and Feudal Laws, and with the Customs of Neighbouring Nations. in IV books by James, Viscount of Stair, Lord President of the Session 1693* (6th edition, Edinburgh, 1981), 17-18; N. MacCormick: “The rational discipline of law” [1981] *Jur.Rev.* 146-160 *passim*.

⁵⁹ On comparison with Mackenzie’s structure, Blackie: “Stair’s later reputation as a jurist”, 217.

⁶⁰ S.-/first page of the *advertisement*.

words long, constituting over a third of “Rights Real”.⁶¹ It was added in recognition of the “many questions as to the Rights and Interests of Allies, and Newters [*sic*], very fully and accurately [*sic*] debated, and decided in the Session, upon occasion of the late [Anglo-Dutch] Wars”.⁶² The second lasted 1665-1667 and the third 1672-1674; during these Scottish privateering became a lucrative industry.⁶³ The third version was the first revision of the *Institutions* after these wars; Stair revised it to incorporate recent law. In the fourth version, Stair separated prize law out into a discrete title, resulting in twelve titles in the second book.⁶⁴ The third book was taken from the nine titles in the second part of the earlier versions. No significant structural changes were made. The material for the fourth book was taken from Stair’s *Modus litigandi or Form of Process* (1681).

The *Modus litigandi* was a guide to court procedure in Scotland. It circulated in manuscript form as the *Form of Process* before being printed in 1681. Ford located twelve manuscripts.⁶⁵ Although three bore the date 1666 and another 1667, he suggested that these four manuscripts were actually copied in the 1670s and 1680s.⁶⁶ Both he and Mackay believed that “Stair did work on his books [i.e. the *Institutions* and *Form of Process*] in 1666 and 1667.”⁶⁷ The *Modus litigandi* was, like the *Institutions*, written in the vernacular. It was only forty-four pages when printed. The text was continuous, rather than divided into paragraphs or titles, and did not include an index. It was printed by the Heirs of Andrew Anderson and bound with the first printed edition of the *Institutions*.

⁶¹ S.12.42/2.1.1-2, S.12.43/2.1.3 and S.12.44/2.1.4-26. He also added a detailed overview of a 1667 case on prize to his discussion of acquisition by occupation [S.12.33/2.1.33].

⁶² S.12.44/2.2.4. On these contentions e.g. A.J. Carty: “The law of nature and nations as a source” in D.M. Walker (ed): *Stair Tercentenary Studies* (Stair Society Series volume 33, Edinburgh, 1981) 127, 128 and *passim*. S. Murdoch, A. Little and A.D.M. Forte: “Scottish privateering, Swedish neutrality, and prize law in the third Anglo-Dutch War, 1672-1674” (2003) 59(1) *Forum navale* 37-65, 43-53 discussed cases involving Swedish ships.

⁶³ Murdoch, Little and Forte: “Scottish privateering, Swedish neutrality, and prize law in the third Anglo-Dutch War, 1672-1674” generally; G. Rommelse: *The Second Anglo-Dutch War (1665-1667)* (Hilversum, 2006), 172-173; C.A. Whatley: *The Scots and the Union* (Edinburgh, 2006 rept. Edinburgh, 2007), 75; E.J. Graham: *A Maritime History of Scotland, 1650-1790* (East Linton, 2002) 19-28. On Scottish prize law generally, J.D. Ford: “The law of the sea and the two unions” in T.C. Smout (ed): *Anglo-Scottish Relations from 1603 to 1900* (Oxford, 2005) 127 generally.

⁶⁴ S.-/2.2.

⁶⁵ Ford: *Law and Opinion*, 71 n.306.

⁶⁶ Ford: *Law and Opinion*, 71 n.311; Mackay: *Memoir*, 152 n.1.

⁶⁷ Ford: *Law and Opinion*, 71; Mackay: *Memoir*, 152 n.1.

Stair later said that he had “designed the [*Institutions*] to be divided into three parts” with the *Modus litigandi* being the third part.⁶⁸ Watson disputed this by showing: first, the *Form of Process* was not (generally) included in the manuscripts of the *Institutions*;⁶⁹ and secondly, that the omission of an account of procedure was also true of Grotius’ *Inleydinge* on the law of Holland and, extrapolating from this, seventeenth-century “books on local substantive law” generally.⁷⁰ Rather, Watson believed the *Modus litigandi* was “intended as a separate work of very short compass.”⁷¹ This was accepted by Ford, who suggested that “although the ‘Form of Process’ was never meant to be the third part of the *Institutions*, it may have been written as an alternative to the third part”.⁷² This is plausible but cannot be confirmed as there was no preface to the *Modus litigandi*.

The only authority cited in the *Modus litigandi* was Scottish statutory law. Stair made no reference to Scottish cases or law books. He made three references to Roman law but did not include any citations in support.⁷³ He referred once to the subscription of writs in France, Germany, England and Ireland,⁷⁴ but did not cite any continental jurist. This pattern of citation stands in sharp contrast to that seen in the *Institutions*, which was written less than ten years before the *Modus litigandi* and gave many citations of Scottish case law, Roman law and continental jurists. This suggests that he used a very different method when writing these two different works. When the *Modus litigandi* was incorporated into the fourth version of the *Institutions*, it underwent extensive change. It was much enlarged and divided into fifty-two titles. The titles were divided into paragraphs, as with the other three books.

⁶⁸ S.-/first page of the advertisement.

⁶⁹ A. Watson: *The Making of the Civil Law* (Cambridge MA, 1981), 31. He stated a privately-owned manuscript written by Robert Baillie of Jarviswood completed 1679 (identified by Watson as belonging to the 1666 stem) had the *Form of Process* before the *Institutions* [Watson: *Making of the Civil Law*, 31 n.16]. Adv.MS.25.1.12 from the 1666 stem also included the *Form of Process* at the end of the manuscript.

⁷⁰ Watson: *Making of the Civil Law*, 29-32 esp. 30. However, it should be noted that those more rigidly based on the institutional scheme would have naturally consider actions to some extent, including Mackenzie. It is worth noting that Stair did not rely on Grotius’ *Inleydinge tot de Hollandsche rechts-geleertheyd* (Edition consulted: Haarlem, 1631) [A.L.M. Wilson: “Stair and the *Inleydinge* of Grotius” (2010) 14(2) *Edin.L.R.* 259-268 generally].

⁷¹ Watson: *Making of the Civil Law*, 31.

⁷² Ford: *Law and Opinion*, 71. Hutton, although noting that the *Form of Process* was “originally a separate compilation in Ms”, said it was “incorporated as the third and last part of the First Edition of 1681” [Hutton: “Stair’s aim in writing the *Institutions*”, 79].

⁷³ Stair: *Modus litigandi*, 11, 21, 35.

⁷⁴ Stair: *Modus litigandi*, 14.

Citations of Scottish cases, Grotius,⁷⁵ Seneca and Cicero were added.⁷⁶ The new fourth book on actions was still markedly different to the other three in its formatting, but Stair's revision of it in the 1690s made it more akin to the rest of the *Institutions*.

1.1.5 Stair's source for his citations of Scottish cases

Much of what has been said so far has been based on Stair's use of Scottish case decisions. A further insight into both Stair's method and use of authority is had by identifying his source for these citations of cases. Stair's citations of cases can helpfully be grouped into three categories: those of cases heard before the interregnum, those heard during the interregnum, and those heard after 1661.

For cases heard before the interregnum, he used earlier practicks.⁷⁷ Ford showed that Stair cited cases from Durie's practicks "over six hundred and sixty times" in the first version.⁷⁸ To this must be added the 280 citations of Hope, 150 citations of Spottiswoode, 100 of Haddington,⁷⁹ seventy of Nicholson⁸⁰ and occasional citation of Sinclair, Maitland and Balfour.⁸¹ The practicks of Durie, Hope, Spottiswoode, Haddington and Nicholson were also those used most heavily in the printed editions (although Stair removed Durie's name from the citations of his practicks⁸²). Stair used the most recent practicks. This is consistent with his focus on recent interregnum cases, and his choice of the most recent continental legal treatises as sources.

For cases heard after the Restoration, Stair used his own collection of case notes, later printed in part as his *Decisions*.⁸³ All the cases in his *Decisions* were

⁷⁵ S.-/4.40.23.

⁷⁶ Both S.-/4.3.41.

⁷⁷ On the practicks, H. McKechnie: "Practicks, 1469-1700" in *An Introductory Survey of the Sources and Literature of Scots Law, by various authors, with an introduction by the Rt. Hon. Lord Macmillan* (Stair Society series volume 1, Edinburgh, 1936) 25 generally.

⁷⁸ Ford: *Law and Opinion*, 84.

⁷⁹ All three statistics from Ford: *Law and Opinion*, 84.

⁸⁰ Ford: *Law and Opinion*, 471.

⁸¹ Ford: *Law and Opinion*, 84.

⁸² Ford: *Law and Opinion*, 471.

⁸³ As has been found in this research, and as can be seen from e.g. surveying the citations in Walker (ed): *Institutions*.

heard by him as a Lord of Session.⁸⁴ Most of the citations which he added for the second, third and fourth versions of the *Institutions* are found in his *Decisions* and were thus of cases he had heard. His addition of citations of recent cases to the second, third and fourth versions is comparable to his focus on recent case law in the first version. That he used his own case notes suggests that he was using a source with which he was familiar and to which he had easy access; he does not seem to have consulted other collections of contemporary case notes.

It is more difficult to determine his source for his citations of cases heard during the interregnum; he did not cite them as he did cases in collections of practicks and it is improbable that he maintained his own collection of notes on decisions during the 1650s.⁸⁵ Stair stated in his *Decisions* that: “I have marked them from the first of *June* 1661. until the first of *August* 1681” because after the interregnum “the Session was almost wholly new, therefor [*sic*] it was very necessary that their Decisions should be Observed, which induced me (being one of that Nomination) to undertake that Task”.⁸⁶ In his Apology: “I did, carefully and faithfully, observe the debates and decisions of the Lords of Session, during all the time I was in it”.⁸⁷ The implication here is that he began collecting notes on decisions in 1661 when the Session was reopened, although it does not prove that he did not collect them from 1657 when he was appointed to the Bench.⁸⁸ However, even had Stair kept such notes from 1657, these were not his source for his citations of interregnum cases. Although most of the interregnum cases cited in the earliest version dated after his appointment to the Bench, Stair was not the judge who heard the majority of them. The twenty-nine cases heard in the 1650s cited in the titles on obligations have been checked against the relevant general minute books.⁸⁹ Fourteen

⁸⁴ S.Dec.1, penultimate page of the “Dedicatory”.

⁸⁵ Hutton suggested that Stair began to collect notes on cases from 1657 [Hutton: “Stair’s aim in writing the *Institutions*”, 81]. Ford is sceptical, stating that Stair “could conceivably have made separate reports of [cases heard in the 1650s], but this can be no more than speculation.” [Ford: *Law and Opinion*, 72 n.315].

⁸⁶ S.Dec.1, final and fifth unpaginated pages of the “Dedicatory” respectively.

⁸⁷ J. Dalrymple, Viscount Stair: *An Apology for Sir James Dalrymple of Stair, President of the Session, by Himself* (Edinburgh, 1690 rept. Bannatyne Club series volume 6.13, Edinburgh 1825), 13.

⁸⁸ Walker accepted that Stair began collecting notes on cases in 1661 but (wrongly) suggested that Stair started writing the *Institutions* at the same time [Walker (ed): *Institutions*, 16].

⁸⁹ N.A.S. CS8/23–CS8/30.

of these cases have been found;⁹⁰ the judge was listed for thirteen of them. Only two were heard by Stair. This does not reflect the sum total of his activity; Stair heard more cases than any other judge during the late 1650s, sitting “in the outer house for fifteen of the forty-four weeks during which hearings were heard between November 1657 and February 1659.”⁹¹ Had Stair maintained his own collection of notes on decisions, it is likely that more cases heard by him would have been cited in the first version given his heavy reliance on his own collection when preparing the later versions. He must have used an alternative source.

That half of the cases cited did not appear in the general minute books on the date given suggests that he did not rely on court records. Additionally, given his extensive use of the earlier practicks and his own case notes, that would not seem to have been his usual method for citing Scottish cases. Although he would have been familiar with the general minute books (he would have had to sign them as a sitting judge), there is no reason to believe that Stair used them for the *Institutions*.

What about other practicks? Stair said that notes on decisions “have been intermitted” between the death of Durie and “the Kings return” in 1661.⁹² It seems, however, that Stair used collections of practicks for his citation of cases heard during the interregnum. Case notes must have been maintained during the period. The *Decisions of the English Judges [D.E.J.]*, printed from Adv.MS.24.3.1, included notes on cases heard between November 1655 and February 1659.⁹³ A second manuscript, Adv.MS.24.4.1, also contained notes on cases heard in the 1650s. When and by whom were these manuscripts written? It seems likely, as Ford suggested, that Adv.MS.24.3.1 was written “long after the Interregnum”;⁹⁴ McMillan proposed

⁹⁰ This represents about half of these citations. Six citations were not specific enough to locate the case as they omitted either part of the date or the names of the parties. These omissions appeared in all six of the manuscripts checked, and thus were presumably made in Stair’s first and second versions. The other interregnum cases cited in the first and second versions cannot be found on the dates specified. There could be three reasons for this: Stair may have incorrectly written them down; they may have been incorrectly transcribed by the copyists of the manuscripts checked and thus become corrupted; or the general minute books may be inaccurate or incomplete.

⁹¹ Ford: *Law and Opinion*, 115.

⁹² S.13.3/2.3.3. The wording is slightly amended for the fourth version, but the meaning is not changed.

⁹³ The editors declared that they “print[ed] the Manuscript just as it stood, rather than endeavour to make the sense complete”. [*D.E.J.*, advertisement] A brief examination of Adv.MS.24.3.1 suggests this is generally correct, although the printed version included cases heard until 23rd February 1659 but the manuscript only those heard until 29th July 1658.

⁹⁴ Ford: *Law and Opinion*, 111 n.118.

that it was compiled by William Downie, one of the clerks of court during the interregnum.⁹⁵ Adv.MS.24.4.1 was described by a later hand as Fountainhall's practicks; these case-notes could not originally have been made by Fountainhall, who was only a child at the time.⁹⁶ They were probably written by an unidentified practitioner active during the 1650s.⁹⁷ Ford argued that Adv.MS.24.3.1 was "clearly based on" Adv.MS.24.4.1.⁹⁸ Yet this is not evident: Adv.MS.24.4.1 included no cases heard 3rd-26th January 1658 while the *D.E.J.* included many cases heard then. There must have been other collections of notes on cases used as sources for Adv.MS.24.3.1 in addition to Adv.MS.24.4.1. There is clearly much still to be learned about the origins of the *D.E.J.* and the availability of collections of notes on cases heard in the 1650s.

Did Stair rely on such collections? Approximately half of the *c.*130 cases cited by Stair are found in the *D.E.J.* on the date given by Stair.⁹⁹ Some of the cases cited by Stair appeared for the same dates in the *D.E.J.* and Adv.MS.24.4.1 but not the relevant general minute books, including: *Viscount of Dudhope v Marquess of Argyll*, 22nd July 1658;¹⁰⁰ *Rae v Riddochs*, 17th November 1657;¹⁰¹ and *Dalmahoy v his Bretheren*, 19th December 1657.¹⁰² The apparent errors in the citations of these cases may indicate that Stair used manuscripts which were later incorporated into the *D.E.J.* If this is correct, it shows that Stair was relying on practicks for his citations of interregnum cases, which is the same type of source he was relying on for earlier decisions of the Session. There therefore seems to have been continuity in his choice of sources for Scottish case law as he wrote and revised the *Institutions*.

⁹⁵ A.R.G. McMillan: "The judicial system of the Commonwealth in Scotland" (1937) 49(3) *Jur.Rev.* 232-255, 245. McMillan gave no evidence to support this assumption.

⁹⁶ D. Allan: "Lauder, Sir John, second baronet, Lord Fountainhall (1646-1722)" *O.D.N.B.* (Oxford, 2004; online edition) <<http://www.oxforddnb.com/view/article/16115>>, accessed 19th August 2010.

⁹⁷ Ford: *Law and Opinion*, 111 n.118.

⁹⁸ Ford: *Law and Opinion*, 111 n.118.

⁹⁹ Some other cases were listed on dates other than those given by Stair; as parties often litigated more than once, these have been disregarded.

¹⁰⁰ *D.E.J.*, 218. Adv.MS.24.4.1, 188. 1662 stem: Adv.MS.25.1.8, 9.21 gave the year 1628; Adv.MS.25.1.10, 9.21; Adv.MS.25.1.11, fol.82L. 1666 stem: Adv.MS.25.1.5, 9.21 gave 1655; Adv.MS.25.1.7, 9.21; Adv.MS.25.1.12, 9.21. The case was not listed for this date in CS8/29.

¹⁰¹ *D.E.J.*, 78. Adv.MS.24.4.1, 78. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 11.6; Adv.MS.25.1.11, fol.127R. 1666 stem: Adv.MSS.25.1.5 and 25.1.7, 11.6; Adv.MS.25.1.12 gave the date 15th November 1655, 11.6. The case was not listed in either CS8/28 or CS8/29 on this date.

¹⁰² *D.E.J.*, 99. Adv.MS.24.4.1, 99. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 11.7; Adv.MS.25.1.11, fol.129L. 1666 stem: Adv.MSS.25.1.5 and 25.1.7, 11.7; Adv.MS.25.1.12, 11.7. The case appeared in neither CS8/28 nor CS8/29 on this date.

1.2 STAIR'S EDUCATION AND HIS LECTURE FOR ADMISSION AS AN ADVOCATE

1.2.1 Stair's education

1.2.1.1 *Pre-university education in seventeenth century Scotland*

The First Book of Discipline (presented in 1560; printed in 1621), a Scottish Reformation text, called for a school to be founded in every parish and, in more important towns, for an independent schoolmaster who could “teach Grammar and the Latine tongue”.¹⁰³ It also suggested that the Catechisms be taught in the schools,¹⁰⁴ and prescribed study of “three years or foure at most sufficient to the Arts, to wit, Logick and Rhetorick, and to the Greek tongue 4 years”.¹⁰⁵ The Privy Council later decreed that there should be a school established in each Scottish parish¹⁰⁶ and that pupils:

be exercised and trayned up in civilitie, godlines, knowledge, and learning, that the vulgar Inglishe tounge be universallie plantit... [and] be taught at least to write and reid, and be catechiesed and instructed in the groundis of religioun...¹⁰⁷

The Privy Council's decret did not have the same references to the arts, wit, logic, rhetoric or Greek as in the *First Book*. Although “it is today generally agreed” that the lowland network of parish schools was not complete until the late seventeenth

¹⁰³ J.K. Cameron: *The First Book of Discipline with Introduction and Commentary* (Edinburgh, 1972), 130, 133. R Anderson: “In search of the ‘lad of parts’: the mythical history of Scottish education” (1985) 19(1) *History Workshop Journal* 82-104, 83.

¹⁰⁴ Cameron: *First Book of Discipline*, 130, 133.

¹⁰⁵ Cameron: *First Book of Discipline*, 134.

¹⁰⁶ Act Ordering that There Be an English School in Every Parish of the Kingdom *R.P.C.*, 1616 volume 10 671-672. Ratification of the Act of Council Regarding Plantation of Schools 1633: *R.P.S.*, 1633/6/20 <<http://rps.ac.uk/trans/1633/6/20>> accessed 16th July 2010.

¹⁰⁷ *R.P.C.*, 1616 volume 10 671-2. Donaldson and Rait gave this decret as an example of the Privy Council's legislative capability [G. Donaldson: *Scotland: James V to James VII* (Edinburgh History of Scotland series volume 3, Edinburgh, 1965), 287-288; R.S. Rait: *The Parliaments of Scotland* (Glasgow, 1924), 10]. Goodare showed it was “less a statute than a declaration of intent” [J. Goodare: “The Scottish parliament and its early modern ‘rivals’” (2004) 24(1) *Parliaments, Estates and Representation* 147-172, 161-162].

century,¹⁰⁸ Stair is thought to have attended a parish school at Mauchline in Ayrshire.¹⁰⁹ Ford observed that Stair's Latin must have been of a satisfactory level for him to have matriculated at the University of Glasgow at the normal age of fourteen.¹¹⁰ This supports Anderson's research, which shows that schoolmasters "taught enough Latin to allow boys to pass directly into university classes."¹¹¹

1.2.1.2 *Liberal arts curriculum at Glasgow*

Stair enrolled at Glasgow as a student of the liberal arts in 1633. Shepherd showed that Glasgow in the early seventeenth century adopted a different method of teaching to that of Aberdeen, Edinburgh and St Andrews. The method in the latter universities was the 'regent' system, where the class was allocated one regent who taught every subject during the four years of study. She suggested that this system allowed "little opportunity for specialization, and insufficient time to keep abreast of new trends in philosophical and scientific thinking",¹¹² although this need not have been true of all masters. Glasgow practised the 'professorial' system, by which each professor taught a specific subject and the class was taught by more than one professor.¹¹³ Shepherd found that this system operated at Glasgow until 1642; it would have been in effect while Stair was a student.¹¹⁴

The liberal arts curriculum in seventeenth-century Scotland was still heavily influenced by the sixteenth-century scholar and principal of Glasgow, Andrew Melville. Melville studied at St Andrews, Paris and Geneva. While at Paris he was influenced by Petrus Ramus, a humanist and critic of Aristotelian philosophy who

¹⁰⁸ R. Anderson: "The history of Scottish education, pre-1980" in T.G.K. Bryce & W.M. Humes (eds): *Scottish Education: Post-Devolution* (2nd edition, Edinburgh, 2003 rept. Edinburgh, 2006) 219, 219. Anderson did not cite this general opinion.

¹⁰⁹ J.D. Ford: "Dalrymple, James, first Viscount Stair (1619-1695)" *O.D.N.B.* (Oxford, 2004; online edition October 2009) <<http://www.oxforddnb.com/view/article/7050>> accessed 26th August 2010.

¹¹⁰ Ford: "Dalrymple, James, first Viscount Stair (1619-1695)".

¹¹¹ Anderson: "The history of Scottish education, pre-1980", 220.

¹¹² C.M. Shepherd (then King): *Philosophy and Science in the Arts Curriculum of the Scottish Universities in the Seventeenth Century* (Ph.D. thesis, University of Edinburgh, 1975), 18.

¹¹³ Shepherd: *Philosophy and Science in the Arts Curriculum*, 19.

¹¹⁴ Even under the professorial system the masters were termed 'regents'. There is controversy surrounding the masters who would have taught Stair. Cf. Ford: "Dalrymple, James, first Viscount Stair (1619-1695)"; Shepherd: *Philosophy and Science in the Arts Curriculum*, 372; *Munimenta Alme Universitatis Glasguensis: records of the University of Glasgow from its foundation till 1727* volume 3 (Maitland Club series, Glasgow, 1854), 378-382.

became famous for his systematising of knowledge.¹¹⁵ Melville's Ramist curriculum replaced the regenting system with the professorial system. It "epitomized the new humanist values designed to replace the old scholasticism."¹¹⁶ Set subjects were studied in each year of the arts: Greek grammar and rhetoric in the first year; oratory and elementary philosophy in the second; mathematics, Aristotle's *Logic*, *Ethics* and *Politics* in the third; and physics, cosmography, history and Hebrew in the fourth.¹¹⁷ Stair thus studied works of classical antiquity, most notably those of Aristotle. Forbes was clearly correct in stating that Stair learned Greek and philosophy at Glasgow.¹¹⁸

The extent to which Melville's curriculum fully replaced the earlier scholastic teaching has been debated. Shepherd found that the early scholastic commentators of Aristotle (Aquinas, Scotus and Ockham) were referred to in almost all the surviving seventeenth-century student dictates from Glasgow's course on Logic.¹¹⁹ Additionally, "The theses [on Logic] for graduation of 1646, 1663, and 1671 are Aristotelian and scholastic."¹²⁰ She also found that "Aristotle and the scholastic commentators provided both the framework and the body of the teaching" of metaphysics in the early seventeenth century.¹²¹ Reid said that "The arts curriculum of Scottish universities was overwhelmingly both Aristotelian and scholastic throughout the seventeenth century."¹²² Reid also showed that Glasgow library "held all of the major works of Aquinas".¹²³ Yet, although there was still scholastic influence and texts used in seventeenth-century teaching, Shepherd argued that:

The 1640 curriculum statements make it clear that the Commissioners and the representatives of the various universities intended that this

¹¹⁵ J. Kirk: "Melville, Andrew (1545-1622)" *O.D.N.B.* (Oxford, 2004; online edition) <<http://www.oxforddnb.com/view/article/18543>> accessed 11th June 2009.

¹¹⁶ Kirk: "Melville, Andrew (1545-1622)".

¹¹⁷ Shepherd: *Philosophy and Science in the Arts Curriculum*, 30-31.

¹¹⁸ W. Forbes: *A Journal of the Session: containing the decisions of the Lords of Council and Session, in the most important cases, heard and determin'd from February 1705 till November 1713: and the Acts of Sederunt made in that time* (Edinburgh, 1714), xxx.

¹¹⁹ D. Reid: "Thomas Aquinas and Viscount Stair: the influence of scholastic moral theology on Stair's account of restitution and recompense" (2008) 29(2) *J.L.H.* 189-214, 203; Shepherd: *Philosophy and Science in the Arts Curriculum*, 75-81.

¹²⁰ Shepherd: *Philosophy and Science in the Arts Curriculum*, 80.

¹²¹ Shepherd: *Philosophy and Science in the Arts Curriculum*, 112.

¹²² Reid: "Thomas Aquinas and Viscount Stair", 202.

¹²³ Reid: "Thomas Aquinas and Viscount Stair", 204.

Renaissance and humanistic approach to the text of Aristotle should be the one adopted in the university courses.¹²⁴

This means that Stair's formal education would have exposed him to the methods and influences of both humanism and scholasticism; the implications of this will be considered below.

1.2.1.3 *Stair's appointment as a regent at Glasgow*

Stair returned to the University in 1641 as *linguae Graecae professor*, to teach Greek and Dialectic to first-year students.¹²⁵ This agrees with Forbes' statement that, while working at Glasgow, Stair "studied hard the *Greek* and *Latin* Languages, with the History and Antiquities of *Greece* and *Rome*".¹²⁶ Stair's appointment strongly implies that he was proficient in Greek. Yet, as will be shown, Stair borrowed all the Greek terms in the third version from seventeenth-century legal treatises, although he would clearly have understood their meaning.¹²⁷

The year after Stair's appointment, Glasgow returned to the regenting system. Stair retained his current students for all four years of their education.¹²⁸ He would have revised and refreshed his knowledge of the entire curriculum. Some insight into the subjects Stair taught and the material he used to do so can be gained from looking at his *Theses Logicae, Metaphysicae, Physicae, Mathematicae et Ethicae* (1646), a collection of some of the theses debated by his students. A manuscript entitled *Methodus instituendae disputationis philosophicae* written in 1670-71 from the dictations of James Pilan, a regent at Edinburgh, described the disputation of theses.¹²⁹ The students selected a thesis put forward for debate by one particular

¹²⁴ Shepherd: *Philosophy and Science in the Arts Curriculum*, 340.

¹²⁵ Ford: "Dalrymple, James, first Viscount Stair (1619-1695)".

¹²⁶ Forbes: *Journal of the Session*, xxx. His claim that Stair did so "in order to the Study of the Civil law" is speculation. Although MacQueen has shown that much of Forbes' account of Stair's life is taken from Stair's *Apology*, this is a comment which could not have come from the *Apology*. [H.L. MacQueen: "Stair's later reputation as a jurist: the contribution of William Forbes" in W.M. Gordon (ed): *Miscellany Three* (Stair Society series volume 39, Edinburgh, 1992) 173].

¹²⁷ Below, 4.1.5, 4.1.7, 6.1.2.

¹²⁸ Shepherd: *Philosophy and Science in the Arts Curriculum*, 18-19; Ford: "Dalrymple, James, first Viscount Stair (1619-1695)".

¹²⁹ B. Lawn: *The Rise and Decline of the Scholastic Quaestio Disputata: with special emphasis on its use in the teaching of medicine and science* (Education and Society in the Middle Ages and Renaissance series volume 2, Leiden, 1993), 138.

student. That student then defended or, if the text was ambiguous, explained the thesis. An opponent was selected who then attempted either to present an argument which the defending student could not answer, or to find evidence against the thesis.¹³⁰ Stair's collection was divided into five subjects: logic, metaphysics, physics, maths and ethics.¹³¹ Shepherd stated that "Dalrymple's *Theses metaphysicae* are thoroughly scholastic"¹³² and categorised his theses on ethics as "Aristotelian".¹³³ Aristotle was one of the few authorities debated in the *Theses*.¹³⁴

1.2.1.4 *Did Stair's formal education before 1648 influence the Institutions?*

The purpose of this short investigation is to determine, first, whether Stair would have been familiar before 1648 with any of the works cited in the *Institutions* and, secondly, whether Stair would have been familiar with or influenced by any particular schools of thought. It is clear that by 1648 Stair would have had a thorough knowledge of Aristotle, whose *Logic*, *Ethics* and *Politics* were the basis of teaching for the third year of the liberal arts degree. Stair graduated as the highest achieving member of his class.¹³⁵ He would have acquired and been able to demonstrate a high level of knowledge and understanding of the subjects on the curriculum, including Aristotle. Additionally, as Aristotle was cited in Stair's printed *Theses*,¹³⁶ Stair used him when teaching. Yet all the citations of Aristotle which appear in the *Institutions*, as well as the majority of those of other writers of classical antiquity, were borrowed from seventeenth-century legal treatises.¹³⁷ Secondly, Stair's education would have introduced him to the principles and methods of both humanism and scholasticism. This had a profound impact on his writing. Reid has found evidence of scholastic

¹³⁰ Lawn: *Rise and Decline of the Scholastic Quaestio Disputata*, 138-140.

¹³¹ Viscount Stair: *Theses Logicae, Metaphysicae, Physicae, Mathematicae, et Ethicae* (Glasgow, 1646).

¹³² Shepherd: *Philosophy and Science in the Arts Curriculum*, 134.

¹³³ Shepherd: *Philosophy and Science in the Arts Curriculum*, 187.

¹³⁴ e.g. Stair: *Theses Logicae, Metaphysicae, Physicae, Mathematicae, et Ethicae, Mathematicae* XIII.

¹³⁵ Ford: "Dalrymple, James, first Viscount Stair (1619-1695)".

¹³⁶ e.g. Stair: *Theses Logicae, Metaphysicae, Physicae, Mathematicae, et Ethicae, Mathematicae* XIII.

¹³⁷ Below, 4.1.2, 4.1.3.3, 4.1.4.2, 4.1.6.2, 4.1.8, 5.1.2.3.

influence in Stair's titles on obligations.¹³⁸ Humanist influence has been found in the *Institutions* and in Stair's lecture for admission as an advocate in 1648 by this research.¹³⁹ Although there is no evidence to suggest that Stair consulted directly any scholastic or humanist jurists for the *Institutions*, the influence that these movements and methods had on his intellectual formation can be seen clearly in that work.

It should be noted that not having studied law at university made Stair untypical of the advocates. Mackay suggested that Stair's education in the liberal arts served him well:

When he came to write on law he wrote, not as a mere lawyer, but as one who had reasoned and taught in other subjects, especially philosophy, ... His mind, as we see it exhibited in his *Institutions*, never forgot the search for principles which had formed its early training. It is this which constitutes the distinction of that work, making it worthy to be read by the philosophical jurist as well as the Scotch lawyer...¹⁴⁰

Although this is hyperbole, Mackay's underlying point is correct. Stair wrote as an educated man, and his reasoned thinking is evident throughout his writing. Yet his lack of formal training in law did have an impact on the *Institutions*, which did not display the same breadth of civilian opinion that can be found in the collected works of his predecessor Thomas Craig, thought to also have studied law in France,¹⁴¹ nor in those of his contemporary Sir George Mackenzie, who studied law at Bourges.¹⁴²

1.2.2 **Stair's lecture for admission as an advocate**

Stair's lecture for admission as an advocate is the earliest evidence of what Stair may have been studying and of the extent of his knowledge of the law at that point in his life. It was given on 15th February 1648. In the lecture he cautioned against the creation of a new superior between the existing superior and his direct vassal, which

¹³⁸ Reid: "Thomas Aquinas and Viscount Stair" *passim*.

¹³⁹ Below, 1.2.2, 3.2.2.1.

¹⁴⁰ Mackay: *Memoir of Sir James Dalrymple*, 24.

¹⁴¹ J.W. Cairns: "Craig, Thomas (1538?–1608)" *O.D.N.B.* (Oxford, 2004; online edition) <<http://www.oxforddnb.com/view/article/6580>> accessed 10th February 2010.

¹⁴² C. Jackson: "Mackenzie, Sir George, of Rosehaugh (1636/1638–1691)" *O.D.N.B.* (Oxford, 2004; online edition January 2007) <<http://www.oxforddnb.com/view/article/17579>> accessed 11th June 2009.

would put the vassal in a worse position than he was previously.¹⁴³ Stair explained that he had seen a case, likely heard in the summer session of 1647,¹⁴⁴ where a prelate's superiority had been abolished, leaving the baron as the direct vassal of the king. The defenders had then "obtained from the king and gotten them erected in temporal livings qherby they are interponed betwixt the king and the barrons persewers as intermediat superiors".¹⁴⁵ Stair argued that this should not be allowed, stating: "we will abhorre that intention"¹⁴⁶ and advised the judges: "the politick is stored with monstrous & new conceptions, by your hurculean courage to cutt in peeeces this Gordian knot."¹⁴⁷

It was unusual for a lecture to be on Feudal law.¹⁴⁸ Cairns noted that "the norm was to read a lesson on civil law" and that this was "sufficiently expected for the entry in the Books of Sederunt to be formulaic".¹⁴⁹ Indeed, he observed that even Stair was recorded as having given a lesson on Roman law.¹⁵⁰ Stair explained his choice:

I turned over so many vast volums of leaves lyke Sybillaes leaves by an indigested digested & confused Cod and the glosses of commentaries written theron with there counsells & decisions the wearisomnesse therof is well knowne to such qho hes straggled in these bywayis without a guide so that I know [not] qhat first to speake in such a variety of things I was inhibite to handle any title or chapter of the civil Law by the copious amplitude of the matter...¹⁵¹

Stair's comment that he found Roman law unmanageable likely referred to the medieval juristic literature rather than to the *Corpus iuris civilis* itself. Ford also interpreted this passage in this way, and noted that "it had long since become conventional for lawyers to complain about the unwieldy proportions and the

¹⁴³ A transcript of Stair's lecture survived: "Scotstarvet's 'Trew Relation'" (1916) 13(4) *S.H.R.* 380-392.

¹⁴⁴ Ford: *Law and Opinion*, 11 n.49.

¹⁴⁵ "Scotstarvet's 'Trew Relation'", 381.

¹⁴⁶ "Scotstarvet's 'Trew Relation'" 390.

¹⁴⁷ "Scotstarvet's 'Trew Relation'" 391.

¹⁴⁸ The relevant text is *Libri feudorum* 1.22.1.

¹⁴⁹ J.W. Cairns: "Advocates' hats, Roman law and admission to the Scots Bar, 1580-1812" 20(2) *J.L.H.* 24-61, 37.

¹⁵⁰ Cairns: "Advocates' hats, Roman law and admission to the Scots Bar, 1580-1812", 37. Mackay: *Memoir of Sir James Dalrymple*, 25.

¹⁵¹ "Scotstarvet's 'Trew Relation'", 381.

labyrinthine meanders of the civilian literature.”¹⁵² This was a regular complaint made by legal humanists, who “concentrated their efforts on ridding the texts of the glosses and commentaries that engulfed them.”¹⁵³ The concern of legal humanism was “to revive the true law of Justinian, by appealing to the undiluted word of the texts.”¹⁵⁴

That Stair did not lecture on a point of Roman law must be considered in the broader context of his life. Ford suggested that:

It was expected that regent masters in the liberal arts would spend their time outside the classroom in studying one of the higher academic disciplines, and Stair had evidently applied himself to the study of the civil law, almost certainly in conjunction with the canon law of the medieval church.¹⁵⁵

Ford pointed to Forbes’ declaration that Stair “studied hard the *Greek* and *Latin* Languages, with the History and Antiquities of *Greece* and *Rome*, in order to the Study of the Civil Law”.¹⁵⁶ This classical learning was the currency of all educated men. Yet Stair used no Greek or Latin in his lecture and, as Richter has shown,¹⁵⁷ little Greek in his *Institutions*. Additionally, Cairns showed that Stair borrowed his history of law in Europe from Craig.¹⁵⁸ Nonetheless, that Stair dedicated himself to learning law in his spare time as a regent is plausible: “Stair himself claimed in 1681 that he had been engaged in ‘the Study and Practice of Law’ for ‘little short of forty [sic] years’, which clearly implies a period of study before his admission to practice.”¹⁵⁹ A “little short” of forty years suggests Stair began studying law sometime during the 1640s. As the case on which Stair gave his lecture was likely heard in the summer session of 1647,¹⁶⁰ Stair must have been observing cases in

¹⁵² Ford: *Law and Opinion*, 9.

¹⁵³ P.G. Stein: *Roman Law in European History* (Cambridge, 1999), 76.

¹⁵⁴ Stein: *Roman law in European History*, 77.

¹⁵⁵ Ford: *Law and Opinion*, 10.

¹⁵⁶ Forbes: *Journal of the Session*, xxx.

¹⁵⁷ Richter: “Did Stair know Pufendorf?”, 369.

¹⁵⁸ J.W. Cairns: “The civil law tradition in Scottish legal thought” in D.L. Carey Miller and R. Zimmermann (eds): *The Civilian Tradition and Scots Law: Aberdeen quincentenary essays* (Schriften zur Europäischen Rechts- und Verfassungsgeschichte Series volume 20, Berlin, 1997) 191, esp. 204-205.

¹⁵⁹ Ford: *Law and Opinion*, 10. The quotation from Stair is found on the last page of the dedication of this writer’s personal copy; this page is omitted from the Harvard copy.

¹⁶⁰ Ford: *Law and Opinion*, 11 n.49. Above, 1.2.2.

court in Edinburgh within a short period of his resignation of his office at Glasgow in April 1647. It is possible to deduce what Stair studied by examining the authorities cited by him in his lecture.

By 1648 Stair was already familiar with “our learned countryman m^r. Tho. Craig [and] his learned book of the fewes”.¹⁶¹ Craig also insisted that new superiors could not be interposed above a vassal.¹⁶² Additionally, Stair cited statutes of James VI.¹⁶³ Stair therefore had some knowledge of Scots law before being admitted as an advocate; this was not true of all candidates.¹⁶⁴ Craig’s *Jus feudale* was used by those who had recently passed as an advocate to acquaint themselves with Scots law. Indeed, Cairns stated that “reducing that law to an ordered science, thereby making it easier for students to learn” was Craig’s intention;¹⁶⁵ compendia indicate that *Jus feudale* was used in this way.¹⁶⁶

Stair also cited continental authority, specifically five Italian lawyers. The first was Obertus de Orto (d.c.1175), who was a compiler of the *Libri feudorum*.¹⁶⁷ The second was Francischinus Curtius (1470-1533);¹⁶⁸ Ford suggested that the relevant passage was in Curtius’ *Tractatus illustrium iurisconsultorum*.¹⁶⁹ The citation of the third jurist – “Capit” – is less clear.¹⁷⁰ This may be to the Frankish capitularies, the collection of imperial legislation issued by the Carolingian kings.¹⁷¹ Stair did refer to certain Holy Roman emperors, specifically “emperour [*sic*] Frederick” (Frederick I Barbarossa) and “Conrad” (likely Conrad II).¹⁷² Legislation

¹⁶¹ “Scotstarvet’s ‘Trew Relation’”, 387.

¹⁶² Craig: *Jus feudale* 2.11.35, 216.

¹⁶³ “Scotstarvet’s ‘Trew Relation’”, 385.

¹⁶⁴ A third of advocates would have acted as a servitor to an advocate before admission; two thirds were admitted on the grounds of their knowledge of Roman law. Cairns: “Advocates’ hats, Roman law and admission to the Scots Bar, 1580-1812”, 33-48 esp.34, 36, 40.

¹⁶⁵ Cairns: “Craig, Thomas (1538?–1608)”.

¹⁶⁶ G. Dolezalek: *Scotland under Jus commune: census of manuscripts of legal literature in Scotland, mainly between 1500 and 1660* (Stair Society series volumes 55-57, Edinburgh, 2010) volume 1, 184-185; J.H. Baker: “Migrations of manuscripts” (2000) 21(2) *J.L.H.* 123-128, 123. On the importance of the epitomes, J.W. Cairns: “The *breve testatum* and Craig’s *Jus feudale*” (1988) 56(3-4) *T.v.R.* 311-332, 331-332.

¹⁶⁷ “Scotstarvet’s ‘Trew Relation’”, 384; Ford: *Law and Opinion*, 14.

¹⁶⁸ “Scotstarvet’s ‘Trew Relation’”, 387.

¹⁶⁹ Ford: *Law and Opinion*, 17 n.71 citing volume 10(2), f 90r.

¹⁷⁰ “Scotstarvet’s ‘Trew Relation’”, 387.

¹⁷¹ On the capitularies, T.M. Buck: *Admonitio und Praedicatio. Zur religios-pastoralen Dimension von Kapitularien und kapitulariennahen Texten (507-814)* (Freiburger Beiträge zur mittelalterlichen Geschichte 9, Frankfurt, 1997) and “Capitularia imperatoria. Zur Kaisergesetzgebung Karls des Großen von 802” (2002) 122(1) *Historisches Jahrbuch* 3-26.

¹⁷² “Scotstarvet’s ‘Trew Relation’”, 386.

promulgated under these emperors was included in the *Libri feudorum*. Yet Stair referred to “the learned men in thir places Curtius and Capit”, which seems to indicate a jurist rather than the capitularies.¹⁷³ Ford argued the reference was to the *Investitura feudalis* of Antonius Capycius (1450/70-1545), often cited in works on Feudal law.¹⁷⁴ Stair’s reference to “Capit” could plausibly be to either the Capitularies or to Capycius. If the reference was borrowed from another source, it is likely that the source would need to be identified before the reference could be verified with certainty. The fourth jurist cited was “Bardus also in his 16 counsell p. 436”¹⁷⁵ probably Baldus, whom Stair also cited in the *Institutions* (although only indirectly through Craig).¹⁷⁶ Finally, Stair cited “Fulgo in his 9 counsell”,¹⁷⁷ whom Ford identified as Raphael Fulgosius, a late-thirteenth to early-fourteenth century jurist.¹⁷⁸

Stair’s choice of citations of continental legal sources for his lecture is markedly different to the sources he used for his *Institutions*. In his lecture, the five continental jurists referred to by Stair were all older authorities, dating from the twelfth to the mid-sixteenth centuries. There were no citations to recent continental jurists in the lecture. In his *Institutions*, although Stair cited some older authorities, all the treatises which Stair consulted directly were recent, having been written in the seventeenth century. It is possible that between writing his lecture and writing the first version Stair changed how he selected or what he looked for in his sources. This, however, seems unlikely. First, it is a significant change to go from using such old sources to using exclusively recent sources. Secondly, it seems unlikely that so early in Stair’s career he was familiar with these older authorities when later he borrowed all his references to such authorities from other works. Such a change in his method of research and writing seems improbable. What is perhaps more likely is that Stair borrowed his references to the older authorities in his lecture from another source, which has yet to be identified. If this is correct, it would mean that there was

¹⁷³ “Scotstarvet’s ‘Trew Relation’”, 387.

¹⁷⁴ Ford: *Law and Opinion*, 17 n.71.

¹⁷⁵ “Scotstarvet’s ‘Trew Relation’”, 387.

¹⁷⁶ S.21.19/2.11.19.

¹⁷⁷ “Scotstarvet’s ‘Trew Relation’”, 387.

¹⁷⁸ Ford: *Law and Opinion*, 17.

continuity in this aspect of his method between the point at which he wrote his lecture and when he wrote the *Institutions*.

There is not really any treatment of Roman law in Stair's lecture. Stair mentioned the *Digest* and *Codex* and, if this reading is correct, dismissed the great body of civilian literature. He did not select a topic of Roman law for the basis of his lecture.¹⁷⁹ Eleven years later Stair wrote the *Institutions*. More than 140 citations of Roman law have been found in the sample manuscripts from the 1662 stem (and thus presumably Stair's first version). Many of the citations of Roman law will be shown to have been borrowed from continental jurists.

It is hard to determine with certainty whether Stair studied Roman law before 1648, as Forbes and Ford suggested.¹⁸⁰ Certainly, Stair did not always use the knowledge he had acquired: he did not use much Greek in the *Institutions*, and borrowed his citations of Aristotle from other seventeenth-century jurists. He may have had knowledge of Roman law, but merely chose not to utilise that knowledge in his lecture. What can be said is that by 1648 Stair had already focused on the needs of legal practice and had acquired knowledge of Scots law, Feudal law and Craig's *Jus feudale*.

1.3 CONTINENTAL LEGAL LITERATURE IN SEVENTEENTH-CENTURY SCOTTISH LIBRARIES AND WRITING

In principle nothing can be ruled out as a possible source for the *Institutions*. However, it is possible to deduce the sort of continental legal treatises that Stair would likely have examined by considering which were being sought by Scottish advocates during the seventeenth century. Many advocates in the sixteenth and seventeenth centuries were keen book collectors. Amongst these men were: Clement Litill, whose donation founded the Edinburgh University Library;¹⁸¹ Scot of Scotstarvit, who donated numerous volumes to St Andrews University Library and encouraged others to do the same; and Thomas Hamilton, who began the library of

¹⁷⁹ Although the *Libri feudorum* was incorporated into the *Corpus iuris civilis* as the *Decima collatio novellarum*.

¹⁸⁰ Forbes: *Journal of the Session*, xxx; Ford: *Law and Opinion*, 10.

¹⁸¹ J. Bevan: "Scotland" in J. Barnard and D.F. Mckenzie (eds): *Cambridge History of the Book in Britain* volume 4: 1557-1695 (Cambridge, 2002) 687, 699.

the Earls of Haddington.¹⁸² It is probable that Stair had good access to books. Unfortunately, a catalogue of Stair's own library has not survived. In order to determine which treatises were of interest to contemporary Scottish advocates, the catalogues of three libraries have been examined. The first catalogue to be examined is that of Lord Fountainhall, who was made a Lord of Session in 1689.¹⁸³ The second appendix to his journal provides a list of those books which he acquired 1667-1679.¹⁸⁴ The second is that of Lord George Douglas, who was intended for a career as a diplomat before his death at the age of twenty-eight. His library was donated to the Faculty of Advocates in 1695 after his death.¹⁸⁵ It included over 800 works, the majority of which were legal treatises.¹⁸⁶ Finally, the 1683 and 1692 catalogues of the Advocates' Library. The collections of the Advocates' Library were generally acquired from the private libraries of the advocates (whether purchased or gifted).¹⁸⁷ This is in keeping with Wijffels' conclusion that the growth of the law libraries of English institutions "seems to have been more often the result of individual benefactions of actual copies than the outcome of a policy of acquisition."¹⁸⁸ An examination of that library's catalogues thus demonstrates the type of books that advocates of the period were collecting. The library had been acquiring books since 1682, and produced its first catalogue in 1683, although it was only officially inaugurated in 1689.¹⁸⁹ By 1683, its collection was extensive and continued to expand, as is seen in the 1692 catalogue.¹⁹⁰

¹⁸² T.I. Rae: "The origins of the Advocates' Library" in P. Cadell and A. Matheson (eds): *For the Encouragement of Learning: Scotland's national library 1689-1989* (Edinburgh, 1989) 1, 12-13.

¹⁸³ Allan: "Lauder, Sir John, second baronet, Lord Fountainhall (1646-1722)".

¹⁸⁴ D. Crawford (ed): *Journals of Sir John Lauder Lord Fountainhall with His Observations on Public Affairs and Other Memoranda 1665-1676* (Scottish History Society series volume 36, Edinburgh, 1900), 283-299.

¹⁸⁵ On the contents of his library, W.A. Kelly: *The Library of Lord George Douglas (ca. 1667/8?-1693?): an early donation to the Advocates Library* (Libri Pertinentes series volume 5, Cambridge, 1997), 23-137; W.A. Kelly: "Lord George Douglas (1667/1668?-1693?) and his library" in W.M. Gordon (ed): *Miscellany Three* (Stair Society series volume 39, Edinburgh, 1992) 160, 166-170.

¹⁸⁶ Kelly: "Lord George Douglas (1667/1668?-1693?) and his library", 166.

¹⁸⁷ M. Townley: *The Best and Fynest Lawers and Other Raire Bookes: a facsimile of the earliest list of books in the Advocates' Library* (Edinburgh Bibliographical Society publications series, Edinburgh, 1990), 11.

¹⁸⁸ A. Wijffels: "The civil law" in L. Hellinga and J.B. Trapp (eds): *The Cambridge History of the Books in Britain* volume 3: *1400-1557* (Cambridge, 1999) 399, 403.

¹⁸⁹ Townley: *Best and Fynest Lawers*, 11.

¹⁹⁰ *Catalogus librorum bibliothecae juris utriusque, tam civilis quam canonici, publici quam privati, feudalis quam municipalis variorum regnorum, cum historicis Graecis & Latinis, literatis & philosophis plerisque celebrioribus: a Facultate Advocatorum in supremo Senatu Judicum in Scotia,*

The collective content of these libraries was extensive, containing works on Roman, Canon, Feudal, Scots, English, and continental law. Although this is a limited sample and may not be representative of advocates' libraries as a whole, some conclusions can still be drawn. All the continental legal treatises which Stair consulted for his titles on obligations appeared in at least one of these three libraries. It therefore seems that these works were sought by Scottish advocates. Additionally, certain editions of these works seem to have been particularly popular. Both Lord George Douglas and the Advocates' Library had the 1680 edition of Grotius, the 1643 edition of Gudelinus, and the 1665 edition of Vinnius' commentary. Gudelinus' *De jure novissimo* was also owned by Fountainhall, although his journal does not record the edition acquired. Vinnius' *Jurisprudentia contracta* and Corvinus seem not to have been so widely sought, being held only by the Advocates' Library. The sources Stair used were therefore being sought by his contemporaries, with his principal sources being popular.

To what extent did Stair's contemporaries engage with the continental literature? The breadth of reading of some Scottish lawyers was impressive. Lord Cooper suggested that Mackenzie's possession of "so extensive a knowledge and so acute a critical appreciation of the entire range of legal literature" was likely to have been unique or, at least, unusual for his day.¹⁹¹ This is hyperbole, but Chalmers, Gane and Leverick also recognised Mackenzie's knowledge of continental legal literature:

These works display very extensive scholarship and acquaintance with continental sources. Even assuming amanuenses to help him, Mackenzie must have devoted considerable time and thought regularly, despite the calls of other commitments, to research and writing. He clearly was well-read, and had very broad interests in law and a very deep interest in its elucidation and exposition.¹⁹²

in usum cupidae legum juventutis, constructae una cum praefatione doctissima D. Georgii MacKenzie a Valle Rosarum e jusdem Facultatis Decani (Edinburgh, 1692) generally.

¹⁹¹ Lord Cooper: "The Scottish lawyer's library in the seventeenth century" (1954) 66(1) *Jur.Rev.* 1-5, 2.

¹⁹² G. Mackenzie: *The Laws and Customes of Scotland, in Matters Criminal: wherein is to be seen how the Civil law, and the Laws and Customs of other Nations do agree with and supply ours, with a new introduction by J. Chalmers, C. Gane and F. Leverick* (Clark NJ, 2005), ix.

Extensive citation of continental legal literature is also seen in Spottiswoode's practicks, compiled roughly a generation before Stair. Brooks noted that "No other practicks surpass Spottiswoode's range of authorities."¹⁹³ Cairns found that there was frequent citation of Civilian literature in Spottiswoode's practicks.¹⁹⁴ Indeed, he stated: "It is obvious that, for preference, Spottiswoode cited relatively contemporary, indeed modern, Civilian works on substantive law and that, among the authors he preferred, Humanists tended to predominate."¹⁹⁵ Other seventeenth-century advocates also had good knowledge of continental literature, but did not engage with it to the same extent. Lord Cooper found Fountainhall's "acquaintance with legal literature was as extensive as Mackenzie's, though visibly less critical and discriminating."¹⁹⁶

Not all legal treatises of this period demonstrated such learning. Cooper suggested that the *Doubts* by Lord Dirleton relied predominantly on four textbooks of the 1660s and 1670s. He thus said Dirleton "was content to lift ideas from a superficial perusal of a few second-rate modern handbooks."¹⁹⁷ However, this comment is probably unfair. The *Doubts* was published posthumously, after an attempted reconstruction of Nisbet's original work from epitomized manuscript copies.¹⁹⁸ The printed volume thus does not necessarily reflect accurately Nisbet's learning. Further, Blackie has shown that the *Doubts* cited Covarruvias, Justus Clarus, Gregorius Tholosanus, Cujacius "and various Roman texts" when discussing consistorial courts.¹⁹⁹ Presuming that these citations were in Nisbet's original manuscript, they indicate that he did have knowledge of Roman law and the leading continental jurists of the early modern period.

Nonetheless, this shows that not all the works by Scottish jurists of the mid-seventeenth century (whether available in print or in manuscript copies) engaged with the continental legal literature. However, some Scottish jurists did have

¹⁹³ S. Brooks: "The decision practicks of Sir Thomas Hamilton, First Earl of Haddington" (2004) 8(2) *Edin.L.R.* 206-230, 217.

¹⁹⁴ J.W. Cairns: "*Ius civile* in Scotland, ca. 1600" (2004) 2(1) *Roman Legal Tradition* 136-170, 162-163.

¹⁹⁵ Cairns: "*Ius civile* in Scotland, ca. 1600", 163.

¹⁹⁶ Cooper: "Scottish lawyer's library in the seventeenth century", 4.

¹⁹⁷ Cooper: "Scottish lawyer's library in the seventeenth century", 3.

¹⁹⁸ J. Nisbet of Dirleton: *Some Doubts and Questions in the Law, especially of Scotland* (Edinburgh, 1698), advertisement.

¹⁹⁹ J. Blackie: "Defamation" in K. Reid & R. Zimmermann (eds): *A History of Private Law in Scotland* volume 2 (Oxford, 2000) 633, 641; Nisbet: *Some Doubts and Questions in the Law*, 30.

extensive knowledge of that literature and incorporated this into their writing. It cannot be presumed that Stair or any other seventeenth-century lawyer was familiar with a wide range of the continental literature, despite that literature being popular in Scotland at the time of writing.

1.4 CONCLUSIONS

The first part of this chapter examined certain relevant aspects of the nature of the *Institutions*. The timeline for Stair's writing and revising it has been established. Stair wrote the substantial part of the first version in 1659-1661 during the suspension of judicial business. He completed it only in 1662 during the break between court sittings. Stair's own manuscript does not survive, so the first version can be seen only through the manuscripts of the 1662 stem. Stair revised the *Institutions* during the breaks between sessions in 1666-1667; this was the second version, and can be seen through the manuscripts of the 1666 stem. Stair revised the *Institutions* again for the third version, which was printed in 1681 as the first printed edition. He made his final revision for the fourth version, the second printed edition.

Ford has shown that the greatest change which Stair made for the second and third versions was his increasing the number of citations of Scottish authority. Stair also added a number of citations of Roman law for the third version. It will be shown that Stair's method changed when preparing the fourth version, when he more than doubled the number of citations of Roman law.²⁰⁰ Stair also made changes to the structure and content of the *Institutions*. Most important amongst these were, first, his division of the fourth version into four books according to the institutional scheme of Gaius and Justinian's *Institutes*.²⁰¹ The second important change was his incorporation into the fourth version of the *Modus litigandi*, written in the 1660s and bound with the *Institutions* when printed in 1681. Finally, he added a long discussion of prize law for the third version, which became a separate title in the fourth. This was almost certainly in response to the increased judicial activity caused by Scottish privateering during the second and third Anglo-Dutch Wars.

²⁰⁰ Below, esp. 3.1.1.

²⁰¹ Above, 1.1.4.2.

Stair was shown to have used collections of *practicks*, probably exclusively, as his source of Scottish case law. For cases heard before the interregnum, he used particularly those of Durie, Hope, Spottiswoode, Haddington and Nicholson. These were the most recent collections of case notes; this focus on recent sources is also seen in his selection of continental legal treatises. For interregnum cases, he also used collections of *practicks*. These have not been identified (they may not all have survived), but it is probable that he used manuscripts which were later used in the compilation of the *Decisions of the English Judges*. For cases heard after 1661, he seems to have used his own collection of case notes exclusively.

When Stair completed the first, second and third versions, he shortly thereafter allowed each to be circulated (whether by copying from his manuscript or sending it for printing). There is no evidence in the titles on obligations of the fourth version that he continued to revise it until sending it to the printer. This may indicate that he was slowing down in his work habits. Alternatively, it may show that he revised each of the four books of the fourth version in turn and thus stopped working on the titles on obligations (in the first book of the second printed edition) earlier than he completed that version overall.²⁰² If this second possibility is correct, it would be a change in his previous working habit: he seems to have gone back over the entire *Institutions* one last time before completing the first, second and third versions.

The printing of the third and fourth versions by the Heirs of Andrew Anderson was sometimes inaccurate, and there are variations in the print-run of the second printed edition.²⁰³ There are also variations within the manuscripts. These variations raise doubt as to how reliable a reflection of what Stair actually wrote are the printed editions and manuscripts.²⁰⁴

The second part of this chapter examined Stair's intellectual formation, and established three important points. First, Stair's formal education exposed him to the methods and influences of both scholasticism and humanism. The Scottish liberal arts curriculum was traditionally scholastic, but there was during the seventeenth-

²⁰² The pattern of citation of recent Scottish authorities in the other three books of the second printed edition would need to be examined to confirm this.

²⁰³ Above, 1.1.3.2. Below, 6.1.1.2, 6.4.1, introduction to ch.8.

²⁰⁴ Below, introduction to ch.8.

century a greater emphasis on humanist methods and learning. This early exposure to humanism and scholasticism had quite an impact on Stair: the influences of both can be seen in his later work. Reid has shown that Stair's titles on restitution and recompense showed intellectual influence from scholasticism. His lecture for admission as an advocate contained a declaration typical of legal humanism, and his writing of the *Institutions* will be shown to have been influenced by humanism also. The second important point to note is that Stair's formal education meant that he knew Latin and Greek, and was familiar with Aristotle as well as other writers of classical antiquity. When writing and revising the *Institutions*, Stair did not draw on this knowledge. Richter showed that Stair used few Greek terms in the *Institutions*;²⁰⁵ this research will show that he borrowed all the Greek terms in the first version from Grotius and Vinnius.²⁰⁶ It will also show that Stair's citations of Aristotle were borrowed from the continental legal literature.²⁰⁷ The final point is that Stair's lecture for admission as an advocate was untypical for the period as it focused particularly on Scottish legal practice rather than Roman law. He may have done so simply to be different, but the justification he gave was his lack of understanding of the civilian literature and possibly Roman law itself. Eleven years later, Stair wrote the *Institutions*, which contained a significant number of citations of Roman law and civilian literature. The question is then raised whether and to what extent Stair improved his knowledge of Roman law and civilian literature in the intervening decade.

The third part of this chapter examined the collection, knowledge and use of continental legal literature by seventeenth-century Scottish advocates. Some seventeenth-century Scottish jurists had a detailed knowledge of continental legal literature, and engaged with these treatises in their writing. Others did not display such a comprehensive knowledge in their writing, and were more pedestrian in their choice and use of such sources. This gives some context in which to place this research.

²⁰⁵ Richter: "Did Stair know Pufendorf?", 369.

²⁰⁶ Below, 4.1.5, 4.1.7, 6.1.2.

²⁰⁷ Below, 4.1.2, 4.1.8.

All five treatises which will be examined as Stair's sources in the titles on obligations were held by at least one of the three sample libraries. Stair's three principle sources were held by more than one, sometimes all, of those libraries. Certain editions of Grotius, Gudelinus and Vinnius' commentary appear to have been favoured. Although the small sample of libraries considered does not allow definite conclusions, this strongly indicates that all five treatises which will be examined in detail as sources for the *Institutions* would have been available to Stair. This in turn supports the conclusion that his references to these works were not borrowed from elsewhere but the product of his consultation of them.

METHODOLOGY

2.1 METHOD OF RESEARCH

2.1.1 Reading the *Institutions*

The four versions of the *Institutions* were examined for this thesis. This revealed Stair's method, choice and use of sources, and his patterns of citation. It also showed his purpose in writing each version, and how this changed over time. The necessity of consulting each version produced by Stair was complicated by the variations which existed within both the manuscript stems and the print-run of the printed editions.¹ Two copies of each printed edition were thus consulted for this thesis. For the first printed edition, a digitized copy of that held in the Harvard Law School Library (now available through Early English Books Online²) and the writer's own copy were used. For the second printed edition, the Edinburgh University Law Library copy³ and the Aberdeen University Historic Collections copy⁴ were consulted. Most of the variations found in the print-runs related to punctuation and other accidents of printing, but important variations were noted in certain citations in the second printed edition. Such problems were not found when comparing the copies of the first printed edition. Yet there were changes in punctuation in some of the citations, suggesting that the print-run was still not uniform. However, that only few and minor variations were found between the two copies of each printed edition suggests that they were pretty close to Stair's own version, as one would expect.

¹ Below, 6.1.1.2, 6.4.1, introduction to ch.8.

² <http://eebo.chadwyck.com/search/full_rec?SOURCE=pgimages.cfg&ACTION=ByID&ID=24565362&SEARCHCONFIG=undefined&ECCO=undefined> accessed 28th October 2010.

³ Shelfmark: *Fol.KK.Sta.

⁴ Shelfmark: pi MH f34702 Sta.

Sample manuscripts were also chosen for use in this thesis from the thirty-plus surviving manuscripts of the *Institutions* forming the two stems.⁵ Variations in the manuscript stems included accidental errors or omissions and deliberate alterations by the copyists who “incorporat[ed] changes they had noted in other manuscripts”.⁶ Three manuscripts from each stem were consulted to ensure that such variations did not distort the perception of Stair’s writing at that time. All six were selected from those held by the Advocates’ Library: first, so that all six could be consulted together and thus compared as necessary; and secondly, because the stem to which each of the Advocates’ Library’s manuscripts belonged had already been identified.⁷ The accurate identification of the stem of each of the six manuscripts selected was affirmed by checking them for authorities dating after 1662 or 1667 and examining passages which Stair had revised for the second version. Although occasionally an authority dating after the completion of the relevant version was cited,⁸ or the text was otherwise updated according to a later version, the manuscripts were found to have been identified as belonging to the correct stem. These sample manuscripts were therefore taken as being representative of the stems generally, and thus Stair’s first and second versions. The manuscripts consulted for this thesis were:

<u>From the 1662 stem:</u> ⁹	<u>From the 1666 stem:</u> ¹⁰
Adv.MS.25.1.8	Adv.MS.25.1.5
Adv.MS.25.1.10	Adv.MS.25.1.7
Adv.MS.25.1.11	Adv.MS.25.1.12

An important consideration when selecting manuscripts was to identify which were closest to Stair’s version. Of those from the 1662 stem, Adv.MS.25.1.10 had been

⁵ Ford: *Law and Opinion*, 60.

⁶ Ford: *Law and Opinion*, 68.

⁷ Watson: *The Making of the Civil Law*, 31; Ford: *Law and Opinion*, 65 n.282-283.

⁸ e.g. *Cranston v Wilkison* 1666 [M.10340] was cited at the end of Adv.MS.25.1.11 [fol.355L], suggesting it was updated; the other two manuscripts from this stem end before this, citing *Dingwall v Wanderson* 1619 [?M.4449?] [Adv.MSS.25.1.8 and 25.1.10, 31.19]. Yet Adv.MS.25.1.11 does not go on to discuss the opinion of Lord Gossford expressed in 1672 like Adv.MSS.25.1.5 and 25.1.7 from the 1666 stem [31.19 and 31.18 respectively]. Adv.MS.25.1.12, 31.19 also ends at *Dingwall*.

⁹ Also Adv.MS.24.2.10, 25.1.9, 25.1.14, and 25.4.17. These others have not been checked.

¹⁰ Also Adv.MS.25.1.13, 25.3.2, 25.3.3. These others have not been checked.

analysed by Ford, who showed that the manuscript was not updated by its copyist.¹¹ It does not feature the date of its completion, but it must have been before November 1667 when it was acquired by a William Primrose, as is recorded on the front leaf. Despite the possibility that it was copied after Stair had already completed the second version, Adv.MS.25.1.10 is close to Stair's first version. Adv.MSS.25.1.8 and 25.1.11 were selected for use in this thesis from the remaining six manuscripts from the 1662 stem in the Advocates' Library as a control. Adv.MS.25.1.8 bore neither the date nor the copyist's name but was obviously contemporary, judging by the handwriting.¹² Adv.MS.25.1.11 did not bear its date of completion, but it must have been between 1666 and 1685: the manuscript was acquired by a David Strachan in 1685; *Cranston v Wilkinson* 1666 [M.10340] was cited at the end of the manuscript.¹³ This manuscript was thus updated by its copyist. It was selected nonetheless, first, because the titles on obligations did not appear to have been extensively amended by the copyist and, secondly, because it was deemed useful to see what sort of amendments had been made.

Of those from the 1666 stem, Adv.MS.25.1.5 was selected as Ford showed it had also not been updated by its copyist.¹⁴ It was completed in April 1678 and thus was copied before Stair had the third version printed. It was thus presumably close to Stair's second version. The other two manuscripts used for this thesis were chosen as controls. Adv.MS.25.1.7, apparently completed in February 1677, was chosen because Ford found that it varied little from Adv.MS.25.1.5 and was therefore also presumably close to Stair's version.¹⁵ These two manuscripts were found by this thesis to be similar enough to suggest that Adv.MS.25.1.5 may have been a direct copy of Adv.MS.25.1.7. Adv.MS.25.1.12 did not bear the date on which it was copied.¹⁶ Further examination of

¹¹ Ford: *Law and Opinion*, 65.

¹² The bookplate of Henry Home of Kames is present but, given he was an eighteenth-century lawyer [A.J. Durie and S. Handley: "Home, Henry, Lord Kames (1696–1782)" *O.D.N.B.* (Oxford, 2004; online edition) <<http://www.oxforddnb.com/view/article/13643>>, accessed 18th August 2010], this is not helpful in dating the manuscript.

¹³ Adv.MS.25.1.11, fol.355L.

¹⁴ Ford: *Law and Opinion*, 65.

¹⁵ Ford: *Law and Opinion*, 67 n.293.

¹⁶ Its identification as being "*ex libris archibaldi colquhoun*" is not useful for dating the manuscript. There was an Archibald Colquhoun, son of William Colquhoun of Garscadden, who was examined for admission as an advocate in March 1684 [J.M. Pinkerton (ed): *The Minute Book of the Faculty of*

this manuscript showed that in some places it had been updated according to the first but not the second printed edition, and hence must have been copied between 1681 and 1693. However, there were very few such deliberate amendments by the copyist; the manuscript is still fairly close to Stair's second version. It was selected as it was considered useful to see how the manuscript had been amended in these places and to take into account the passages and authorities not present in Adv.MSS.25.1.5 and 25.1.7.¹⁷

In selecting three manuscripts from each stem, a control was built into this research. This meant that the variations introduced by the copyists were more apparent in this research than, for example, in Ford's, and could thus be identified and the implications discussed. Although Ford showed that Adv.MS.25.1.10 and Adv.MS.25.1.5 were not updated by their copyists, there were apparent errors and omissions in the texts introduced by the copyists;¹⁸ using additional manuscripts as a control in this research allowed these variations to be identified and a more complete insight into Stair's first and second versions to be had.

After the printed editions and manuscripts had been selected, the titles on obligations in the Harvard copy of the first printed edition and the Edinburgh copy of the second were compared word-for-word and all dissimilarities were noted.¹⁹ Certain passages of the manuscripts were also compared word-for-word for evidence of Stair's revising the text for the second and third versions. These sample passages were chosen as they were relevant to this thesis because, for example, they contained citations of continental jurists or authorities borrowed from Stair's principal sources. These detailed comparisons of Stair's wording between the four versions revealed the type of changes

Advocates volume 1: 1661-1712 (Stair Society series volume 29, Edinburgh, 1976), 68] but also an Archibald Colquhoun, Lord Advocate 1807-1816 [G.F.R. Barker (rev. E. Metcalfe): "Colquhoun, Archibald Campbell- (c.1754-1820)" *O.D.N.B.* (Oxford, 2004; online edition) <<http://www.oxforddnb.com/view/article/5986>>, accessed 18th August 2010]. The latter agrees with the book being donated to the Advocates' Library in 1824, as was recorded by its book plate.

¹⁷ Ford: *Law and Opinion*, 67-68 esp. n.295.

¹⁸ e.g. Adv.MS.25.1.5, 4.7 omitted the citation of Wesenbecius.

¹⁹ As most of the variations found within the print-runs of the two different printed editions were minor, it was not necessary to compare all four copies word-for-word.

which Stair made to his text each time he revised it, and showed which passages had been substantially amended.

2.1.2 **Working out Stair's pattern of citation**

Stair's citations indicate the legal authorities which he thought authoritative and may have consulted. It was therefore necessary to continue this research by working out his pattern of citation. A list was compiled of his citations of Roman law, Canon law, foreign statutes, continental legal treatises and writers of classical antiquity in the titles on obligations in the manuscripts and both printed editions (and, extrapolating from this, all four versions). This has four important functions. First, the addition of citations during a revision could indicate the initial or repeated use of a continental treatise. Secondly, his pattern of citation of a particular type of source (such as Roman law) is indicative of his use of that source and his perception of its authority, but can also reflect on the nature of legal authority more generally. His changes in the pattern of citation of a type of source could indicate a shift in Stair's use of the source or his perceptions of it. Thirdly, determining the number of citations to any given authority made it possible to identify those places where Stair included more authorities and to recognise which authorities he found most compelling for particular discussions. Finally, the list of Stair's citations of Roman law, Canon law, foreign statutes, continental legal treatises and writers of classical antiquity could be compared to lists of authority found in continental treatises to identify citations which may have been borrowed.

2.1.3 **Comparing the *Institutions* to continental treatises**

2.1.3.1 *Identifying and verifying Stair's citations of continental jurists*

For this thesis, the complete text of the printed editions of the *Institutions* was checked to ensure that any jurist cited outwith the titles on obligations, but who may have been a source for them, was not omitted from this research. Taking account of all four versions,

Stair cited twenty-six continental jurists in the entire *Institutions*. It was necessary to identify and check the treatises and passages to which Stair referred. Citations which gave only the name of the jurist but not the treatise presented a challenge. Later editions of the *Institutions* and the secondary literature were checked to see if the relevant treatise had already been identified (as was the case for Corvinus' *Digesta per aphorismos* and Molina's *De justitia et jure*).²⁰ Where Stair had cited by name a treatise by the same jurist elsewhere, the other citations were invariably found to refer to the same work (as in the case of Grotius' *De jure belli*). Where a jurist was renowned for a particular treatise, Stair's citations were invariably found to refer to it (as was the case for Connanus' commentary). Other treatises were identified as Stair's citations were found to have been borrowed from another jurist who gave more detail (such as Faber's commentary on Inst.3.23.pr, Wesenbecius' *Paratitla*, and Mynsinger's *Apotelesma*).

Some, however, could not be identified. Stair borrowed a citation of Cujacius from Craig;²¹ neither Stair nor Craig gave the name of the treatise. As Cujacius was a prolific writer, the reference could have referred to a number of works. However, in this instance it is clear that Stair borrowed the citation without checking it, and thus there cannot have been direct influence from Stair's reading of Cujacius. It is therefore less important to identify the treatise of Cujacius which Craig may have read.

2.1.3.2 *Treatises identified as possible sources of the Institutions*

An examination of the treatises cited by Stair often showed whether he had directly consulted them or borrowed his citation from a different source. Borrowing could be deduced where, for example, Stair's citation or description of the text was incorrect. An instance of this is Stair's citation of Balduinus for the customs of the "Neighbour Nations" in his discussion of written contracts;²² no such comparative reference is found

²⁰ e.g. Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 264 n.16; Richter: "Molina, Grotius, Stair and the *jus quaesitum tertio*" *passim*; Rodger: "Molina, Stair and the *jus quaesitum tertio*" *passim*.

²¹ Below, 3.2.2.1.

²² S.10.11/1.10.11.

in the title of Balduinus cited.²³ Stair's inaccurate description of Balduinus is explained by the fact that he borrowed this citation from Gudelinus without checking it.²⁴ In such cases, there could not have been direct influence from the treatise cited and thus it could be rejected as a possible source for the *Institutions*.

Those continental legal treatises which appear to have been directly consulted by Stair were designated as his possible sources and were examined further by this thesis. These included: Grotius' *De jure belli*; Gudelinus' *De jure novissimo*; Vinnius' *Jurisprudentia contracta*; Corvinus' *Digesta per Aphorismos*; and Stephanus' *Oeconomia*.²⁵ Some treatises which were cited and probably consulted by Stair have not been examined further as they contained no parts which could reasonably have been used for Stair's titles on obligations (specifically Gudelinus' *De jure feudorum* and Zoesius' *De feudis*). Treatises identified as possible sources of the *Institutions* by the secondary literature were also examined, including: Vinnius' commentary,²⁶ Vinnius' *Notae*;²⁷ and the three major works by Samuel Pufendorf (1632-1694), the famous Natural lawyer.²⁸ His use of Scottish works cited in the *Institutions* (Craig's *Jus feudale* and Skene's *De verborum significatione*) was also analysed for this research, so that comparisons in Stair's use of Scottish and continental treatises could be made.

2.1.3.3 *Editions of texts consulted*

Osler has shown the importance of selecting scientifically editions of treatises for use in legal-historical research.²⁹ Some of the treatises on which Stair may have relied were

²³ F. Balduinus: *Commentarij in libros quatuor Institutiones iuris civilis: Et eiusdem libri duo ad leges Romuli, & leges XII. Tabularum ab ipso autore denuo recogniti, & multo locupletiores facti* (Edition consulted: Paris, 1554), 3.21.

²⁴ Below, 5.1.4.2.

²⁵ For an overview of the lives and works of these jurists, below, 3.2.6. The first three of these had already been shown by Gordon to have been sources of borrowing by Stair [Gordon: "Stair, Grotius and the sources of Stair's *Institutions*" *passim*]. This research has confirmed his findings.

²⁶ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 257-258.

²⁷ Richter: "Did Stair know Pufendorf?", 374-375.

²⁸ Richter: "Did Stair know Pufendorf?", 371-373, 375-378. S. Pufendorf: *De jure naturae et gentium libri octo* (London, 1672), *Elementa jurisprudentia universalis libri II. Editio novissima & emendatissima* (Cambridge, 1672), and *De officio hominis & civis juxta legem naturalem libri duo* (Cambridge, 1682).

²⁹ D.J. Osler: "Dies diem docet" (1991) 18 *Ius commune* 207-224, esp. 207-210, 222-224.

available in more than one edition before Stair wrote. It was important to consult copies of the continental treatises which were as close to what Stair would have read as possible. Three questions had to be taken into account when selecting editions of these treatises. First, which of Stair's possible sources had more than one edition printed before 1693? Secondly, which of these editions were being sought by the Scottish legal community? Finally, what was the extent of the changes between editions?

Most of Stair's treatises were available in more than one edition before 1693. Grotius' *De jure belli* had eight authorised editions before 1659.³⁰ Gudelinus' *De jure novissimo* had three editions before 1693, in 1620, 1643 and 1661. Vinnius' commentary was first printed in 1642, with subsequent editions in 1655, 1659, 1665 (perhaps reprinted in 1666), and 1692. Vinnius' *Jurisprudentia contracta* had four editions: 1624-1631, 1647, 1664, and 1690. Vinnius' *Notae* was first printed in 1646, with subsequent editions printed in at least 1652, 1658, 1663, 1669 and 1690.³¹ Corvinus had editions in at least 1642, 1649, 1656, and 1664. Pufendorf's *Elementa* had editions in 1660, 1669, 1672 and 1680. His *De jure naturae* had editions in 1672, 1684 and 1688. His *De officio hominis* also had only one edition, printed in 1682. Stephanus also seems to have had only one edition, printed in 1614.

Certain editions of these treatises seem to have been sought after particularly by the advocates, as can be inferred from the four library catalogues consulted.³² The popular edition of Gudelinus (the 1643 edition) was printed before Stair wrote the first version. The editions of Grotius, Vinnius' commentary and Corvinus which were held by the sample libraries dated after Stair wrote the first version (1690, 1665 and 1664 respectively). Stair could not have used them when first writing the *Institutions*. The

³⁰ Plus unauthorised editions. J.S. Reeves: "Grotius, *De jure belli ac pacis*: a bibliographical account" (1925) 19(2) *American Journal of International Law* 251-262, 251-255.

³¹ The decrease in the frequency of the *Notae*'s printing was likely because after 1665 some of Vinnius' *Notae* on certain texts were incorporated into editions of Vinnius' commentary. R. Feenstra and C.J.D. Waal: *Seventeenth-Century Leyden Law Professors and their Influence on the Development of the Civil Law: A Study of Bronchorst, Vinnius and Voet* (Koninklijke Nederlandse akademie van Wetenschappen afd. letterkunde, nieuwe reeks volume 90, Amsterdam, 1975), 31.

³² Above, 1.3.

secondary literature revealed that the 1646 edition of Grotius' *De jure belli* became the standard edition in the mid-seventeenth century; later editions were based on its text.³³

The editions to be used in this research had to be chosen on the basis of this information. Stephanus and Pufendorf's *De officio hominis* had only one edition each in the seventeenth century (in 1614 and 1682 respectively). These were used in this research as they would have been the only editions available to Stair. The popularity of the 1643 edition of Gudelinus and 1646 edition of Grotius meant these were used in this research. Stair probably used either the 1642 or 1655 edition of Vinnius' commentary for this first version; the 1655 edition was used in this research as the more recent edition. It was possible to show that Stair used the 1656 edition of Corvinus;³⁴ it was used in this research. Unfortunately, availability of the texts meant it was possible only to consult the 1664 edition of Vinnius' *Jurisprudentia contracta* and the 1690 edition of Vinnius' *Notae*. The 1672 editions of both Pufendorf's *Elementa* and *De jure naturae* were consulted for this thesis.

Of course, Stair may not have consulted these particular editions. This was not a problem: the changes made to each new edition of Grotius, Gudelinus, Vinnius' commentary and Corvinus were found to be minimal. Reeves found that the 1646 edition of Grotius was "practically the same as that of 1642 except for the correction of certain errors".³⁵ A comparison of various sample passages of the 1643 and 1661 editions of Gudelinus showed there were no noteworthy amendments made (which included each passage discussed in this thesis). Sample passages of the 1655 edition of Vinnius' commentary were compared to the 1665 edition³⁶ and, again, no significant changes to the text seemed to have been made to those passages. Sample passages of the 1642, 1649, 1656 and 1664 editions of Corvinus were checked. As with the other treatises, there was usually no significant change.³⁷ It can be deduced that the extent of the revisions between the editions of these four works was generally limited. It is possible to extrapolate from this that the changes made to the other treatises between

³³ Reeves: "Grotius, *De jure belli ac pacis*: a bibliographical account", 254.

³⁴ Below, 7.2.

³⁵ Reeves: "Grotius, *De jure belli ac pacis*: a bibliographical account", 255.

³⁶ Availability of texts meant the 1642 edition could not be checked.

³⁷ Although see below, 7.1.1.4, 7.2.

editions may also have been minor. This means that, even if the editions selected for use in this research were not those used by Stair, they were likely sufficiently similar to those consulted by him to ensure that this research would not be misled.

Editions of the *Corpus iuris civilis*, the Bible and texts of classical antiquity cited by Stair also had to be selected. Dionysius Gothofredus' 1583 edition of the *Corpus iuris civilis* became authoritative;³⁸ a second edition was printed in 1628. The most notable development of Gothofredus' text was the third edition (printed in Amsterdam, 1663) by Simon van Leeuwen. Stair used a copy of the *Corpus iuris civilis* based on Gothofredus' edition; he referred to texts by their position therein. The Van Leeuwen edition was printed after Stair wrote the first version. Stair must have used either the first or second edition of Gothofredus' text, at least for the first version. A 1656 copy of the *Institutes and Digest*³⁹ and a 1614 copy of the *Codex and Novels*⁴⁰ have been consulted. It is possible that Stair acquired Van Leeuwen's edition and used this for the later versions, but it is unlikely that this could be confirmed. The modern standard edition was also checked so that differences could be explained.⁴¹ Citations in this thesis conform to the modern standard arrangement.

Citations of the Bible were checked against the King James version. Two versions of the Bible were used in Scotland during the seventeenth century: the recent

³⁸ e.g. D.J. Osler: "Legal humanism" published online, formerly at <http://www.mpier.uni-frankfurt.de/Forschung/Mitarbeiter_Forschung/osler-legal-humanism.htm> now at <http://www.giuri.unige.it/intro/dipist/digita/storiadir/docenti/savelli/osler_legal_humanism.pdf>, accessed 17th August 2010, 6.

³⁹ *Corpus iuris civilis Iustinianei universum: in quo pandectae, ad Florentinarum exemplarum fideliter expressae: ... cum summaribus, argumentis, epitomis, & indicibus CL. V. Dionysii Gothofredi* (Geneva, 1656).

⁴⁰ *Codicis Iustiniani ... notis Dionysii Gothofredi illustrati* (4th edition) bound with *Authenticae seu Novellae Constitutiones DN. Iustiniani Sacratissimas, principibus quibus Leonis & aliorum quorundam Imperatorum additae, notis Dionysii Gothofredi illustrati* (4th edition) and with *Canones sanctorum et venerandorum apostolorum per Clementem a Petro Apostolo Romae ordinatum episcopum, in unum congesti, Gregorio Haloandro interprete* [without a distinct title page] and with *Epitome feudorum, Dionysio Gothofredo iurisconsulto auctore* [without a distinct title page] and with *Consuetudines feudorum* [without a distinct title page] and with *Constitutiones Frederici Secundi Imperatoris* [without a distinct title page] and with *Extravagantes, quas nonnulli ix. collationem appellant* [without a distinct title page] (Geneva, 1614).

⁴¹ P. Krueger (ed): *Corpus iuris civilis: Institutiones* (Berlin, 1928); P. Krueger and T. Mommsen (eds): *Corpus iuris civilis: Digesta* (Berlin, 1928); P. Krueger (ed): *Corpus iuris civilis: Codex Iustinianus* (Berlin, 1906); R. Schoell (ed): *Corpus iuris civilis: Novellae* (Berlin, 1959).

King James and the older Geneva Bible.⁴² The King James version retained the Geneva's numbering of the chapters and verses; it is thus less important to determine the exact version used by Stair.⁴³

Stair's citations of the writers of classical antiquity were checked by this research against seventeenth-century copies of the texts. Modern editions were also consulted so that any differences could be explained, such as the different numbering of passages in Pliny the Elder's *Natural History*.⁴⁴

There are dangers in using single copies of these texts. Osler showed that a treatise's title page may not always record accurately the edition.⁴⁵ Further, there may be variations within a print-run, as Cairns established was the case with Mackenzie's *Institutions* and this research has shown with the second printed edition of Stair's *Institutions*.⁴⁶ It has, however, been necessary to put these issues aside: all copies of every edition of each treatise could not possibly have been consulted, both because the availability of copies is limited and because researching the varying title pages, editions, and print-runs of continental treatises and other texts is outwith the scope of this research. This has not proved to be a problem in this research, however, as a control has been built in through the comparisons of sample passages between editions of the four treatises examined as Stair's sources.

2.1.3.4 *Using Stair's citations to pinpoint borrowing from continental treatises*

The selected editions of the continental treatises identified as Stair's possible sources were then compared to the *Institutions*. A list was made of all the citations within the titles on obligations of the continental treatises, which was compared to that of Stair's

⁴² I.M. Green: *Print and Protestantism in Early Modern England* (Oxford, 2000), 80-82.

⁴³ V. Westbrook: *Long Travail and Great Paynes: a politics of Reformation revision* (Studies in Early-Modern Religious Reforms series, Dordrecht, 2001), xxvi.

⁴⁴ Below, 4.1.6.2.

⁴⁵ D.J. Osler: "Turning the title-page" (1987) 6(1) *Rechtshistorisches Journal* 173-182 generally.

⁴⁶ Cairns: "The moveable text of Mackenzie: bibliographical problems for the Scottish concept of Institutional Writing", 242-244. Below, 6.1.1.2, 6.4.1, introduction to ch.8.

citations. All citations common to both treatises were recorded. The passages of Stair and the continental treatise surrounding these common citations were compared to determine to what extent, if any, Stair had used those passages of the continental treatise. Certain features were used for this thesis as indicators of borrowing or use by Stair, including shared citations of authority, collections of citations common to both jurists, a common use of an unusual citation such as a medieval-style citation Roman law,⁴⁷ an error in a citation common to both jurists, shared hypothetical examples, shared metaphorical imagery, use of the same archaic term, use of the same Greek terms, similar structure of discussions, quotations from other jurists, scripture or writers of classical antiquity, and any inaccuracies in those quotations. There were, on some occasions, sufficient similarities between the texts to suggest that Stair had merely translated the passage of the continental treatise and incorporated it into the *Institutions*. On the other hand, sometimes a single indicator of borrowing was sufficient to establish Stair's use of a treatise, such as common errors in citations. These indicators of borrowing revealed that certain legal treatises were used by Stair as sources when writing or revising passages of the *Institutions*. This method of comparing lists of citations: allowed focused comparisons of key passages of the treatises, overcame the problems of variations in the substantive text of the *Institutions* between revisions, and meant that the differences in language between Stair's use of the vernacular and the continental jurists' use of Latin did not hinder this research.

When comparing citations, it was important to be aware that jurists could use authority for a variety of purposes. Although not concerned with historical material, Posner notes citations: "signify an acknowledgement of priority or influence, a useful source of information, a focus of disagreement, an acknowledgment of controlling authority, or the prestige of the cited work or its author."⁴⁸ Additionally, jurists could cite texts for direct authority or for an analogous legal rule, or to support a specific statement of substantive law or a larger discussion in more general terms. The treatise

⁴⁷ Below, 3.1.3.

⁴⁸ R.A. Posner: "The theory and practise of citations analysis, with special reference to law and economics" John M. Olin Law and Economics working paper series number 83, published online by the University of Chicago <http://www.law.uchicago.edu/files/files/83.RAP_Citations_40532.pdf>, accessed 3rd December 2008, 7.

may not always have clearly indicated how the authority was being used. If Stair borrowed citations from another jurist without checking them, this could result in error if he had misunderstood their context within or use by his source, as happened with his citation of Molina.⁴⁹ Determining not only what authority Stair cited but also the reason for which he cited it was therefore critical to understanding Stair's use and consideration of authority.

It was also important to understand Stair's use of a citation when making such comparisons. For example, Roman texts may have taken on new connotations in the civilian literature. Stair was most likely aware of this and used a text as authority in terms of its new interpretation. An example of this is D.19.2.33, which became associated with support for the burdening of the seller with the risk of theft or destruction before delivery in sale, although the text actually concerned return of key-money where leased land was confiscated by the state.⁵⁰ Alternatively, errors found in Stair's citations may have been the result of careless printing; this problem was overcome by checking the citations against two copies of each printed edition and the three copies of each manuscript stem. Such possibilities will be discussed in regards to individual examples in subsequent chapters.

These comparisons and analyses revealed which treatises were Stair's sources and the extent to which he used them. It could, for example, be shown whether Stair used a particular continental treatise as a principal source for certain information, such as Corvinus for Canon law (in the first version) or Gudelinus for comparative law. His method of borrowing from these treatises could also be established, such as whether Stair checked the authorities he borrowed. It was deduced that he did not check the borrowed citation where it or his description of the text were wrong, or where Stair stated that information was found in the cited passage which could in fact only have been taken second-hand from his source. He could be shown to have checked the text where he discussed information found in the text cited which was not mentioned in his source. By establishing whether Stair was checking citations borrowed from his sources,

⁴⁹ Below, 4.1.6.1.

⁵⁰ Below, 6.2.2.

a greater understanding of Stair's use of a source was achieved. Working out the extent to which he did so reveals Stair's knowledge and understanding of a particular source of law. This in turn helped to establish his general method.

2.2 LIMITATIONS OF THIS METHOD

There are limitations to this method of research. First, it cannot be used to detect Stair's use of a treatise if used as a source of ideas or inspiration rather than as direct authority. It is inevitable that works which Stair read earlier in his life influenced his later thinking and therefore indirectly the *Institutions*; the difficulty in trying to identify such works is evident in the study by Hutton, which suggested many possible sources of influence which could never be proved.⁵¹ Yet the purpose of this thesis is not to find which works may have subtly influenced Stair but to identify those treatises which he used when he wrote, and on which he based, his *Institutions*.

Secondly, this method used a comparison of citations; it would thus not work with treatises which gave very few citations. As most of Stair's possible sources extensively cited authority, this was not a problem. This was more challenging with the works of Pufendorf. He cited relatively little Roman law but cited often writers of classical antiquity. As Stair gave only seventeen citations of writers of classical antiquity, this left little to compare between the two jurists. Nonetheless, Pufendorf cannot have influenced the substantive content of Stair's titles on obligations to any material extent. Richter notes that Stair would most likely have become familiar with Pufendorf's works "in the 1670s and 1680s, when Pufendorf gained European-wide renown for his *De jure naturae* and *De officio*", if at all.⁵² This means that Stair would only have consulted Pufendorf when preparing the third version.⁵³ By this time, most of the content in the titles on obligations was already fixed; the greatest change made each

⁵¹ G.M. Hutton: "Stair's philosophic precursors" in D.M. Walker (ed): *Stair Tercentenary Studies* (Stair Society series volume 33, Edinburgh, 1981) 87 generally.

⁵² Richter: "Did Stair know Pufendorf?", 377.

⁵³ *Elementa jurisprudentia universalis* was printed in 1660, but it is highly unlikely that this was used by Stair in 1659-1662 or when updating the manuscript in 1666-1667 [Richter: "Did Stair know Pufendorf?", 373].

time Stair revised the *Institutions* was his pattern of citation. Those important changes which were made to the substantive content in later revisions have been identified as being the result of the political context or his reading of other continental treatises.⁵⁴ This means that even if Stair did examine Pufendorf, he could not have had significant influence over either Stair's pattern of citation or substantive content. It must be acknowledged, however, that there is a chance that Stair may have made very limited use of Pufendorf (such as for some of the minor changes made to his phrasing in later revisions).⁵⁵

Finally, different continental treatises might have given the same citation or citations as authority. Where this was the case, comparison of the surrounding paragraphs usually revealed which was more likely to have been Stair's source.

⁵⁴ Ford: *Law and Opinion*, 414-439; below, e.g. 6.2.2.

⁵⁵ Richter: "Did Stair know Pufendorf?", 377-378.

STAIR'S PATTERN OF CITATION

This chapter examines Stair's pattern of citation of Roman law and continental legal literature. The first part examines his citations of Roman law. This was the only type of authority borrowed from each of Stair's four principal sources. It is therefore necessary to study his citation of Roman law in order to understand his use of these sources. Four aspects of Stair's use of Roman law are examined: the changes to his pattern of citation between the four versions; the number of citations of the *Digest*, *Codex*, *Institutes* and *Novels*; the style and accuracy of his citations; and whether Stair used Roman law "for its equity"¹ or as direct and binding authority for Scots law.

The second part of this chapter examines Stair's citation of continental jurists. First, it discusses Stair's pattern of citation of continental jurists in the four versions. Thereafter, it examines the schools of scholarship to which the jurists who are cited in the titles on obligations belonged. Within these larger discussions, the individual jurists are discussed, specifically regarding their lives and works, the distribution of those works in Scotland in the later seventeenth century, and the use and citation of them by Stair. This allows a greater understanding of the views and methods by which Stair was influenced and on which he relied.

3.1 STAIR'S CITATION OF ROMAN LAW

3.1.1 How often Stair cited Roman law

There were either 131 or 132 citations of Roman law in Stair's titles on obligations in the first version, depending on the interpretation of a specific reference found in the sample manuscripts from the 1662 stem. Six citations of Roman law were added for the second version: five in the much-extended discussion of *mutuum*,² and one in a

¹ S.1.11/1.1.12.

² S.10.19/1.11.3-S.10.22/-; Adv.MS.25.1.5, 10.19; Adv.MSS.25.1.7 and 25.1.12, 10.18.

new sentence explaining that “Restitution is to be made, *cum omni causa*”.³ Stair did not, however, add new citations of Roman law to existing passages for the second version. In the third version, the titles on obligations had 173 citations of Roman law, a net increase of almost forty since the second version.⁴ Citations were added to existing sentences, to new passages, and some replaced citations which had appeared in the earlier versions. Stair thus deliberately increased his citation of Roman law for the third version. In the fourth version, there were 353 citations of Roman law in the titles on obligations, almost double the number found in the third version; Stair added new citations to nearly all the titles on obligations.⁵ Only “Tutors & Curators” had fewer citations of Roman law in the fourth version; a paragraph containing four citations was removed. This increase in the number of citations of Roman law for the fourth version is also seen in the titles on property law: there were fifteen in the third version and sixty-one in the fourth.⁶ The number of Stair’s citations of Roman law in the titles on property law thus increased almost fourfold. Stair deliberately ‘Romanised’ the fourth version; the reason for his doing so is unclear. He did not mention adding citations of Roman law to the fourth version in its advertisement; he stated merely that he “correct[ed] what [he] found wrongly cited”.⁷ He declared that he updated the *Institutions* “by occasion of new Statutes of Parliament, Acts of Sederunt, and Decisions since the treatise was written”. It would thus be expected that Stair would have increased the number of citations of Scottish authority to take account of developments in the law since 1681; this would have been consistent with his increasing the number of citations of recent Scottish authority in previous versions.⁸ Yet this was not the case. In “Restitution”, he added eight citations of

³ S.10.56/1.13.10; AdvMS.25.1.5, 10.37; Adv.MSS.25.1.7 and 25.1.12, 10.36.

⁴ “Common Principles” was the only title on obligations which contained no citations of Roman law.

⁵ “Permutation and Sale” retained the same number of citations of Roman law, although a citation of D.18.1.2 was removed [S.10.69/1.14.7] and one of D.18.1.43 added [S.-/1.14.1].

⁶ “Rights Real” increased from nine to thirty; “Infeftments” increased from one to eight; “Superiority” had only one citation of Roman law in both the third and fourth versions; “Liferents” had none in the third version but eight in the fourth; “Servitudes Real” had none in the third version but seven in the fourth; “Prescription” increased from four to seven. McLeod has counted the citations in the sixth edition titles S.2.1, S.2.3-7, and S.2.9-11. As he did not count references to paragraphs of Roman law as separate citations, he found only twenty-nine in “Rights Real” and seven citations in “Liferents” [G. McLeod: “The Romanization of property law” in K. Reid and R. Zimmermann (eds): *A History of Private Law in Scotland* volume 1 (Oxford, 2000) 200, 226 n.32]. He also included general references to Roman law as citations and thus found fifteen in “Prescription” [McLeod: “Romanization of property law”, 226 n.25].

⁷ S.-/advertisement.

⁸ e.g. above, 1.1.4.1.

Roman law but only one of Scottish authority.⁹ In “Recompense”, he added twenty-one citations of Roman law, but removed a citation of a case in Haddington’s practicks (the surrounding passage remained the same).¹⁰ In the passages which remained in “Obligations Conventional”, citations of seventeen cases and one statute were removed and twenty-two citations of Roman law were added. Eight of these citations of Scottish cases were deleted along with Stair’s brief description of each case; the surrounding paragraphs remained substantially unchanged.¹¹ The other nine citations of cases and that of the statute were removed along with a short passage;¹² this meant Stair gave no discussion of Scots law on enforcement of bilateral contracts, barring stating that it was consistent with Roman law.¹³ Stair added to “Loan” for the fourth version two citations of Scottish cases,¹⁴ one citation of the Bills of Exchange Act 1681,¹⁵ and a citation of *Bills of Exchange* by John Marius, a seventeenth-century English civilian.¹⁶ Even here he added eighteen citations of Roman law, more than doubling the number found in the third version.¹⁷

The addition of citations of Roman law was the greatest change between the third and fourth versions. This was a departure from Stair’s previous method. When preparing the second and third versions, he included citations of recent Scottish cases and statutes. A possible reason for this change might be found in the circumstances of his life between completing the third and fourth versions. He spent much of the 1680s in exile, principally in the Netherlands. Ford notes:

⁹ *Ramsay v Robertson* [M.2924], S.7.9/1.7.9.

¹⁰ S.8.7/1.8.8, *Harvey v Hunter* 1630 [?M.13456/793?].

¹¹ Five citations of cases were removed from S.10.9/1.10.9: *L. Innerleith v Byres* [date unknown; not found]; *Adamson v Fullartoun* [date unknown; not found]; *Angus v Mckie* [date unknown; not found]; *Eglintoun v his Tenants* 1620? [M.8917?]; and *King’s Advocat v E. Nithisdale* 1679 [M.Supp.2.248]. Two were removed from S.10.11/1.10.11: *Skein and Thores v Ramsay* 1665 [M.5634]; *Jack v Fiddes* 1661 [M.5633]. One was removed from S.10.13/1.10.13 (*Alexander v Kinneir* 1531 [M.6278]).

¹² Citations of *Park v Somervell* 1668 [?M.3459?] and of the Act Regarding Playing at Cards and Dice and Horse Races 1621 [R.P.S., 1621/6/26 <<http://rps.ac.uk/trans/1621/6/26>>, accessed 16th July 2010] were removed from S.10.8/1.10.8. Three citations of cases were removed from S.10.12/1.10.12: *Rew v Houstoun* 1668 [M.16484]; *Ramsay v Robison* [Robertson?] 1673 [?M.2924?]; *Burnet v Ewing* 1681 [M.16494]. Five were removed from S.10.16/1.10.16: *L. Keirs v Marjoribanks* 1546 [?M.5036?]; *Crichtoun v Crichtoun* 1565 [Balfour, 391]; *Lord Herreis v Provost of Lincluden* 1581 [not found]; *L. Ker[se?] v Panter* 1548 [?Balfour, 391?]; *E. Glencairn v Commendator of Kilwinning* 1563 [not found].

¹³ S.10.16/1.10.16.

¹⁴ *Brown v Johnston* 1662 [M.16802], S-/1.11.7; *Hume v Hamilton* 1691 [not found], S-/1.11.7.

¹⁵ S-/1.11.7. R.P.S., 1681/7/44: Bills of Exchange Act 1681 <<http://rps.ac.uk/trans/1681/7/44>>, accessed 3rd September 2010.

¹⁶ S-/1.11.7.

¹⁷ Although one, of D.12.1.15, was removed.

...he returned during his years of exile to the life of a scholar. Shortly after arriving in the Netherlands he matriculated as a member of the University of Leiden ... and he became acquainted with the professors of law both there and at Utrecht.¹⁸

Stair would almost certainly have engaged with the local intellectual community. If Ford is correct, then Stair may also have discoursed with the leading law professors. Among the professors at Leyden and Utrecht at this time were Johannes Voet and Gerard Noodt, both highly acclaimed and influential scholars of Roman law. Stair might well have used his time in exile to undertake formal training in law, or at least to see these great men lecture. If so, his increasing the number of citations of Roman law in the fourth version of the *Institutions* could reflect a better working knowledge, or a greater appreciation, of Roman law after his time in exile in the centre of Roman-Dutch jurisprudence.

3.1.2 Stair's citation of the four parts of the *Corpus iuris civilis*

Most of Stair's citations of Roman law in the titles on obligations were of specific parts of the *Corpus iuris civilis*; these were not cited with equal frequency. Table one below shows that, taking account of all four versions, the *Digest* was cited most often, then the *Codex*, the *Institutes*, then finally the *Novels* (including the *Authenticum* and *Collatio*). The percentage of the citations of each part of the *Corpus iuris civilis* in relation to all the citations of Roman law in the titles on obligations varied little between the four versions. Stair also cited Roman jurists,¹⁹ *Senatus Consulta*,²⁰ the Edict,²¹ and *Lex Rhodia*,²² presumably these were also drawn from titles of the *Corpus iuris civilis* or from some secondary source. The *Gloss*²³ was also cited (once in the printed editions; twice in the manuscripts).

¹⁸ Ford: "Dalrymple, James, first Viscount Stair (1619–1695)".

¹⁹ Proculus, S.10.36/1.12.9; Sulpicius Rufus and Mucius, S.10.80/1.16.3.

²⁰ *SC Vellianium*, S.4.11/1.4.16 and S.10.19/1.11.3; *SC Macedonianum*, S.10.19/1.11.3.

²¹ e.g. S 9.5/1.9.5; S.10.10/1.10.10.

²² S.8.6/1.8.7.

²³ S.10.50/1.13.3.

Table One:

	<i>Digest</i>	<i>Codex</i>	<i>Institutes</i>	<i>Novels</i>
First version	87 (69%)	26 (20%)	7 (6%)	7 (6%)
Second version	90 (69%)	27 (21%)	7 (5%)	7 (5%)
Third version	116 (72%)	31 (19%)	6 (4%)	8 (4%)
Fourth version	235 (71%)	60 (18%)	30 (9%)	8 (2%)

Showing the number of citations (and the percentage of the total) of each part of the *Corpus iuris civilis* in Stair's titles on obligations

That most of Stair's citations were of the *Digest* was in keeping with the use of the *Corpus iuris civilis* in court in the 1660s and 1670s.²⁴ The small number of references to the *Novels* was typical. Most of the *Novels* were in Greek, which was generally not read during the medieval period; texts were labelled *Graeca non leguntur* [Greek not read]. The *Novels* were consulted through the *Authenticum*,²⁵ which Scheltema showed contained alternative translations of each Greek term within 134 of the *Novels* as an aid for Latin-speaking students;²⁶ it was not a translation of the texts. The Greek text no longer appeared with the Latin by the seventh century,²⁷ so the *Authenticum* appeared corrupt.²⁸ Imerius, the eleventh-century Glossator who discovered the *Authenticum*, believed it was a forgery.²⁹ The complicated nature of the *Authenticum* discouraged its extensive use; jurists gave far fewer citations of the *Novels* than of the *Digest*, *Codex* and *Institutes*. For example, the third book of Gudelinus' *De jure novissimo*, a principal source for Stair's titles on obligations,³⁰ gave over 900 citations of Roman law; only around eighty were of the *Novels* or *Authenticum*. Stair's mere eight citations of the *Novels* or *Authenticum* were in keeping with this.

Most of the *Novels* related to ecclesiastic matters or to private law where it

²⁴ T.B. Smith: "Scots law and Roman-Dutch law: A shared tradition" [1959] *Acta juridica* 36-46, 39.

²⁵ e.g. J.H.A. Lokin: *Graeca leguntur? The significance of Justinian's Novel 159 in the Württemberg v. William of Orange case (1544-1666)* (Amsterdam, 2007), esp. 10.

²⁶ Lokin: *Graeca leguntur?*, 10 citing H.J. Scheltema: "Subseciva XI. Das Authenticum" (1963) 31(2) *T.v.R.* 275-279 generally.

²⁷ Lokin: *Graeca leguntur?*, 10.

²⁸ Lokin: *Graeca leguntur?*, 13.

²⁹ Lokin: *Graeca leguntur?*, 10.

³⁰ Below, ch.5.

related to such matters (e.g. marriage, legitimacy, succession and oaths), to procedural matters, or to public offices. Many of the *Novels* would thus not have been relevant to Stair's treatise on private law. This may also have contributed to the low number of citations of the *Novels* in the *Institutions*.

What is perhaps surprising is the comparatively low number of citations of the *Institutes*. One of Stair's principal sources was Vinnius' commentary on Justinian's *Institutes*, which set out the *Institutes* passages before the relevant commentary. Stair must therefore have been familiar with more of the *Institutes* than he cited. Indeed, he gave synopses of texts which he did not cite. His use and knowledge of the *Institutes* was thus not adequately represented in the number of citations of it.

3.1.3 The method by which Stair cited Roman law and the accuracy of his citations

The first standard arrangement of the *Corpus iuris civilis* was by Dionysius Gothofredus (1583).³¹ There was thus no standard arrangement of the texts in the medieval period and much of the sixteenth century; citation could not have used a numbering system such as is standard now.³² Instead, citations began with the opening phrase of the paragraph then sub-paragraph if required. Then followed a siglum or abbreviation: 'ff' rather than the modern 'D' for the *Digest*, 'C' for the *Codex*, 'Nov' for the *Novels*, and 'Inst' for the *Institutes*. Finally, jurists would give the name of the title.³³ So, Ulpian on pacts (D.2.14.1) was cited *l. huius edicti ff de pactis*. After Gothofredus, citations still identified the title by name but the paragraph by number; Ulpian would have been cited *l. 1 ff de pactis*. Here, for convenience, these will be referred to as the 'medieval' and 'early-modern' styles or methods of

³¹ Above, 2.1.3.3. For a discussion of the *Littera Gothofrediana* and of other editions and arrangements of the *Digest*, G.C.J.J. van den Bergh and B.H. Stolte Jr.: "The unfinished *Digest* edition of Henrik Brenkman (1681-1736): a pilot-survey and edition of *Digest* 9.2 ad legem Aquiliam" (1977) 45(2) *T.v.R.* 227-305, esp. 227-230. M.H. Hoeflich: "A seventeenth century Roman law bibliography: Jacques Godefroy and his 'Bibliotheca juris civilis Romani'" (1982) 75(4) *Law Library Journal* 514-528, 516.

³² Additionally, Bryson observed that, because in the Middle Ages numbers were written as Roman numerals, any such method of citation would have been confusing in the long and complex citations of the *Corpus iuris civilis* [W.H. Bryson: *Dictionary of Sigla and Abbreviations to and in Law Books before 1607* (Charlottesville, 1975), 5].

³³ Bryson: *Dictionary of Sigla and Abbreviations*, 4-9.

citation.

Stair usually used the early-modern method of citation. Only eighteen (20%) of the 127 citations of the *Corpus iuris civilis* in the titles on obligations in the first version, and twenty-four (18%) of the 161 citations of the *Corpus iuris civilis* in the third version, used the medieval method. These medieval-style citations usually appeared in clusters, sometimes several in the same or neighbouring paragraphs.³⁴ These citations reveal something of Stair's method. At least twelve of those in the first version were borrowed: eight from Gudelinus and four from Grotius.³⁵ When preparing the third version, Stair removed four and added paragraph numbers to seven of these medieval-style citations. He also added ten new medieval-style citations to his titles on obligations, eight of which included the paragraph numbers for that version. When preparing the fourth version, he added the paragraph numbers to four of these citations and removed four. No new medieval-style citations were added for the fourth version. The result of these changes was that, like in the first version, there were twenty medieval-style citations in the fourth version. However, unlike in the first version, in the fourth only four of these citations did not also give the relevant paragraph numbers. Stair must have checked these citations for either the third or fourth version to have been able to add these numbers; he must therefore have made a deliberate effort to modernise his citations of Roman law for the printed editions.

Similarly, he increased the detail of his citations for the third and fourth versions. Of the 113 citations of the *Digest* or *Codex* in the first version, sixty-one were of texts which had sub-paragraphs. Stair cited sub-paragraphs for only sixteen (26%) of these sixty-one. The small number of citations in which Stair gave a sub-paragraph is representative generally of the low level of detail in his citations in the manuscripts. Stair specified sub-paragraphs in many more of his citations of the *Digest* or *Codex* in the third version. Of the 147 citations of the *Digest* or *Codex*,

³⁴ The most pronounced example of this was in Stair's discussion of loss of liberty by bondage, S.2.9/1.2.9.

³⁵ Below, 4.1.3.2, 4.1.4.3, 4.1.6, 5.1.2.3-5, 5.1.3.2, 5.1.4.2. The seven medieval-style citations in "Of Liberty" [S.2.9/1.2.9. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 2.10; Adv.MS.25.1.11, fol.18L-R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 2.9-10] (D.50.17.118, D.41.1.10, D.15.1.4, D.15.1.41, D.50.17.22, D.50.17.107, and D.15.1.41) were also borrowed from Gudelinus: *De jure novissimo*, 1.3, 3-4. These will not be examined further as they are outwith Stair's titles on obligations.

eighty-two were of texts which had sub-paragraphs. Stair's citations of forty-five (56%) of these gave sub-paragraphs. Stair increased the detail in his citations again for the fourth version. Of the 295 citations of the *Digest* or *Codex* in the titles on obligations, 176 were of texts which had sub-paragraphs. Stair specified sub-paragraphs when referring to 116 (66%) of them. This means that Stair increased significantly the detail in his citations of the *Digest* and *Codex* when preparing the third and fourth versions.

The citations which gave the number and opening phrase of the text are useful in determining the rate of error in Stair's citations. Most of these citations were correct, at least to a sufficient extent as to identify the appropriate text, but a small number contained errors. In the third version, Stair cited "*l. placet. 99. ff. de acquirenda haered.*" for the power of the Roman *paterfamilias* over his sons.³⁶ D.29.2.99 began "*Aristo in decretis*" and discussed the denial of inheritance by a female heir; it was D.29.2.79 which began "*Placet*" and concerned persons *alieni iuris*. This was probably a printing error: the citation was given without the paragraph number in the manuscripts, suggesting Stair checked the *Digest* when preparing the third version.³⁷ The error is unlikely to have been the result of Stair having a flawed copy of the *Digest*, as the citation was corrected in the fourth version. Additionally, Stair's citation "*l.in contractibus, ff. de non numerata pecunia*"³⁸ should rather have been a reference to the *Codex*; there was no such title in the *Digest*.³⁹ The citation was corrected in the fourth version, and the relevant paragraph number was added.⁴⁰ Again, this indicates that Stair consulted the text when preparing the fourth version.

This rate of error is not necessarily restricted to the medieval-style citations; errors have also been found in Stair's early-modern-style citations.⁴¹ Although some can be attributed to errors in printing, some were also present in the manuscripts and were thus likely errors made by Stair. Examples of such errors in citations, both of

³⁶ S 5.11/1.5.11.

³⁷ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.10; Adv.MS.25.1.11, fol.42R gave "*placet l*". From the 1666 stem, Adv.MSS.25.1.5 and 25.1.7, 5.10; Adv.MS.25.1.12, 5.10 gave "*pluc*".

³⁸ S 10.11/1.10.11.

³⁹ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 10.11; Adv.MS.25.1.11, fol.91L. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 10.11. Not all the manuscripts gave a siglum.

⁴⁰ Although there was still an error in the citation, in that the number fourteen should have been in front of rather than behind the siglum 'C', this is a minor point.

⁴¹ e.g. D.19.2.25.9 [below, 5.2.1].

Roman law and of other sources, will be discussed in subsequent chapters.

3.1.4 **Did Stair cite Roman law as binding authority for Scots law or “for its equity”?**⁴²

Stair declared in the *Institutions* that he used Roman law “for its equity” rather than as binding authority.⁴³ William Forbes, writing a generation after Stair, accepted in his *Great Body of the Law of Scotland* Stair’s account of his use of Roman law: “Stair (Inst. Lib.1 Tit.1 §.16.) alledges, that the Civil Law (tho of great Weight with us for its Equity and Expediency in Cases where a formed Custom is wanting) hath no legal Authority.”⁴⁴ Gordon also suggested that this was an accurate representation of Stair’s use of Roman law.⁴⁵ He argued that only rarely did Stair use Roman law in the absence of Scottish authority,⁴⁶ and that he did not follow Roman law automatically but rather critically examined and engaged with it.⁴⁷ This suggestion was supported by Ford:

Stair sometimes identified issues that the local sources had failed to resolve and drew attention to solutions available in the learned sources, his approach was to assess the equity of the proposed solutions so that an informed judgment could be made about how the issues should be resolved locally.⁴⁸

Gordon admitted that Stair seemed to occasionally cite Roman law as authority for Scots law.⁴⁹ He alluded to subsequent legal practitioners’ misunderstanding of his use and context as the real cause of the subsequent absorption into Scots law of the Roman rules discussed, as opposed to over-reliance on or misuse of Roman law by

⁴² S.1.11/1.1.12.

⁴³ S.1.11/1.1.12.

⁴⁴ Forbes’ *A Great Body of the Law of Scotland, containing the harmony thereof, and differences from the civil and feudal laws: and shewing how far the Scots and English law do agree and differ; with incident comparative views of the modern constitutions of other nations in Europe* (1708-1739). [MS.Gen.1246, 1.2.4.3.1, 84]. Andrew Simpson helpfully directed me to this reference.

⁴⁵ W.M. Gordon: “Roman law as a source” in D.M. Walker (ed): *Stair Tercentenary Studies* (Stair Society series volume 33, Edinburgh, 1981) 107, esp. 110; Gordon: “Stair’s use of Roman law” generally.

⁴⁶ Gordon: “Stair’s use of Roman law”, 122-3.

⁴⁷ Gordon: “Roman law as a source”, 112.

⁴⁸ Ford: *Law and Opinion*, 275.

⁴⁹ Gordon: “Stair’s use of Roman law”, 123-124.

Stair himself.⁵⁰ Gordon's results are generally confirmed by this research. It should be noted, however, that for Stair to have used Roman law critically he would have had to have consulted and understood the texts; this is not always the case.

A different view is expressed by McLeod,⁵¹ who examined Stair's citations of Roman law in sample titles on property law in the fourth version. He argued "There are only five occasions...when Stair says with any degree of explicitness that Scots law has adopted or should adopt the Roman rule given."⁵² This was not many, but even here it is not so clear that Stair is adopting Roman law. First, McLeod pointed to Stair's discussion on rights of way.⁵³ Stair said that "amongst the *Romans*; and with us" there was a distinction between public rights of way and servitudes of access. At this point Stair was still introducing his topic and explaining the classification of access rights. In the following sentences, he outlined Scots law by citing two statutes and a case in Nicholson's *practicks* on private rights of way. Stair was not using Roman law here as authority for Scots law but rather for comparison. Roman law as the basis of the *ius gentium* was the context of the second of McLeod's examples.⁵⁴ In the third, Stair again followed his discussion of Roman law with that of Scots law, in which he cited Scottish authority.⁵⁵ The fourth example put forward by McLeod was of a passage in which Stair stated that the origin of relief was in a rescript of Constantine.⁵⁶ Stair here was following Craig in giving a philological discussion typical of legal humanism and was not claiming the rescript (which was not identified) was authority for Scots law.⁵⁷ McLeod's final example was three citations of Roman law on accession.⁵⁸ These citations were used in Stair's discussion of the "contrariety betwixt the two *Roman Juris-consults, Paulus and Caius*" resolved by Justinian's *Institutes*.⁵⁹ Stair stated that "Positive law may determine this point either way, without injustice" before deciding along the same lines as Justinian on the basis of common sense. Although this could be regarded as

⁵⁰ Gordon: "Stair's use of Roman law", 126.

⁵¹ McLeod: "Romanization of property law", 226-227.

⁵² McLeod: "Romanization of property law", 226.

⁵³ S.17.10/2.7.10.

⁵⁴ S.24.5/3.2.5.

⁵⁵ S.12.38/2.1.40.

⁵⁶ S.16.19/2.6.19.

⁵⁷ Below, 3.2.2.1.

⁵⁸ S.12.37/2.1.38-39 (incorrectly identified as S.2.2.38-9 by McLeod: "Romanization of property law", 226 n.36).

⁵⁹ S.12.37/2.1.39.

reception, this can only have been a critical one as Stair then rejected the Roman rule of accession of writing, following “*Grotius, Minsynger* and others”. Further, these citations of Roman law (as well as those of Grotius and Mynsinger) were borrowed from Vinnius;⁶⁰ Stair was not turning to Roman law as authority, but to other seventeenth-century jurists.

McLeod thereafter suggested that:

...there are thirty-three more instances [by which he meant references rather than passages; only thirty involved citations] where, although Stair is obviously describing Scots law, the Roman references given provide the only authority for the rules laid down in his text. The implication would seem to be that, in these areas, the Scots law rules are basically the same as the Roman ones. Although Stair would say that these rules should be followed in Scotland not because they are Roman, but because they are equitable, the source of the rules is clear.⁶¹

Most of these thirty citations were used to establish general principles of law; Scots law was often not mentioned. Indeed, some were clearly not given as authority for Scots law.⁶² It seems that, in most of these thirty cases, Stair cited these texts for natural law or equity. As with the example of Roman law in accession, Stair was not advocating the uncritical reception of Roman law.

An appreciation of Stair’s use of Roman law can only be had when the structure he used to set out the law is considered. Stair’s discussions typically had the same structure. First, he addressed general points of law and what he deemed to be the equitable position. It was during these introductory remarks on a topic that he normally cited Roman law, continental jurists, the Bible, and writers of classical antiquity. In citing these authorities, he was following the established humanist method of philological study and the new method of the natural lawyers, possibly in imitation of Grotius,⁶³ of working out natural law using historical sources and by drawing on the common understanding of jurists. He thus put Scots law in the

⁶⁰ Below, 6.2.3, 8.1.3.

⁶¹ McLeod: “Romanization of property law”, 226-227. He did, however, state in a footnote to this passage that “The connection between Roman law and [natural law, equity and the *ius gentium*] must, however, be taken as implicit in all he says about property.” [McLeod: “Romanization of property law”, 227 n.38].

⁶² e.g. the three citations at S.12.23/2.1.23, which is followed by a discussion of Scots law in the next paragraph.

⁶³ Below, 4.4.

context of this historical and intellectual tradition of the learned laws and continental jurisprudence. By doing so, he reinforced in each title of the *Institutions* his central claim of Scots law's "nearness to Equity" and natural law.⁶⁴ Thereafter, he outlined the position in Scots law. Here he cited statutes, practicks, cases and earlier Scottish writers such as Sir John Skene and Thomas Craig. In doing so, he often stated where Scots law agreed with or diverged from Roman law or continental systems, thus drawing out the unique or specific rules of Scots law, further demonstrating "the proportion and propinquity of it to Equity".⁶⁵

The opening paragraphs of "Recompence" provide a good example of Stair's use of Roman law. The entire title had three citations of Roman law in the first and second versions, ten in the third version, and twenty-nine in the fourth. Stair thus increased significantly the number of citations of Roman law in this title. He began his title with a discussion of recompence as an obligation under natural law, and said that donation is never presumed when a party is enriched. He excludes from this transactions by parents in the name of their children, which are presumed to be donation "because of the Parents Natural Affection, and Natural Obligations".⁶⁶ He discussed eight cases that were decided on the basis of various familial ties in Scottish courts 1665-1681. In the concluding words of this paragraph, Stair stated that "the delivery of any thing is not presumed to be a Donation, but for Recompence, or Loan", and cited another Scottish case as authority. In the third version, these nine Scottish cases were the only authority cited in this paragraph. In the fourth version, the discussion was separated into two paragraphs. The division was made immediately following Stair's explanation of recompence as a natural obligation; the discussion of donation became the second paragraph. Nine citations of Roman law were added to this second paragraph, all to the discussion of the natural rules and equitable justification of recompence and donation, not as authority for Scots law.

In the next three paragraphs,⁶⁷ Stair discussed *negotiorum gestio*. In the third

⁶⁴ S.1.15/1.1.16.

⁶⁵ S.1.15/1.1.16.

⁶⁶ S.8.1/1.8.2.

⁶⁷ S.8.2/1.8.3-8.4/1.8.5.

version, Stair cited Grotius and three texts of Roman law.⁶⁸ Five citations of Roman law were added for the fourth version. Although Stair discussed the position of the absentee owner in terms of the plural first person, he did this as if ‘we’ were the absentee owner and ‘he’ was the gestor. Stair did not use the first person plural to indicate that Roman law was authority for Scots law; rather, he classified *negotiorum gestio* as part of natural law: “though there were no Positive Law for it, the very Light of Nature would teach, it ought to be Recompenced; and therefore, can be no other then an Obediential, or Natural Obligation, by the Authority of God”.⁶⁹ Stair used Roman law to prove that these were rules of natural law.⁷⁰

In the remaining paragraphs, Stair examined the duty to recompense when unjustifiably enriched. He used citations of Roman law and Cicero’s *De officiis* here as evidence of such enrichment as “a most Natural Obligation”.⁷¹ He then discussed the need to recompense goods found after being thrown from a ship; all but two of the ten citations of Roman law given in this discussion were clearly used to support Stair’s declarations of the principles of natural law or equity.⁷²

In sum, when discussing a point of law, Stair first examined natural law, often citing Roman law (but also Canon law, writers of classical antiquity, continental jurists, etc) as evidence of natural law. He then declared whether this agreed or was at odds with the principles of Scots law, which he established by reference to Scottish cases and statutes. This pattern was typical of his use of Roman law in the titles on obligations. Even in the titles on property law, where some of the passages in which Stair cited Roman law did discuss Scots law, Stair usually used Roman law for general principles of law or natural law. Gordon and Ford were therefore correct in suggesting that Stair used Roman law to expound the principles of equity.

⁶⁸ Two were of texts in the *Digest* title D.3.5. The paragraphs of this title of the *Digest* were renumbered in Krueger and Mommsen (eds): *Corpus iuris civilis: Digesta*. In the modern standard edition, the texts cited by Stair are numbered as D.3.5.9.1 and D.3.5.46. Stair cited them correct according to seventeenth-century copies of the *Digest*, as D.3.5.10.1 and D.3.5.47. Similarly, the *Codex* title Stair cited was renumbered in the modern standard edition. The text Stair cited is now identified as C.2.18.24, but was C.2.19.24 in seventeenth-century copies.

⁶⁹ For a comparison with Grotius’ views, below 4.1.4.1.

⁷⁰ S.8.2/1.8.3.

⁷¹ S.8.5/1.8.6.

⁷² S.8.6/1.8.7. In Walker (ed): *Institutions*, this passage appeared as 1.8.8.

3.2 STAIR'S CITATION OF CONTINENTAL JURISTS

3.2.1 Stair's citations

3.2.1.1 *The citations in the manuscripts and printed editions*

Stair cited twenty-six continental jurists in the entire *Institutions*,⁷³ taking account of the four versions. These twenty-six jurists included some of the leading continental lawyers from the fourteenth to the seventeenth centuries. Stair drew on these jurists for the authority and reputation of their works rather than because he had sympathy with their religious views, as is made clear by his citation of three (Catholic) second scholastics.⁷⁴ Stair did not directly consult all the jurists cited by him. Nonetheless, an insight into his method and thoughts on continental jurisprudence can be had from even the citations which he borrowed.

Most of Stair's citations of continental jurists remained unchanged from the first to the fourth version. However, some were added, amended, or removed. Citations of twenty-two jurists have been found in the manuscripts (and thus were presumably given by Stair in the first and second versions).⁷⁵ No citation has been found in the manuscripts from one stem without being found in those from the other, proving Stair did not add or remove any citations of jurists for the second version. The greatest change in Stair's pattern of citation of continental jurists was made when he prepared the third version. Stair added citations of jurists cited in the earlier versions, namely one of Connanus and one of Grotius.⁷⁶ He also added citations of four jurists not cited in the manuscripts, specifically Gregorius, Mynsinger, Vinnius and Cujacius.⁷⁷ Stair also removed four citations of jurists: Grotius⁷⁸ and Connanus⁷⁹

⁷³ This category excludes Scottish jurists (e.g. Craig) and English jurists (e.g. John Marius, an English civilian jurist) who might nevertheless be considered to have been part of a pan-European intellectual community.

⁷⁴ Below, 3.2.3.2.

⁷⁵ Additional citations which do not appear in the printed editions may yet be found in later titles of the manuscripts. It was not feasible to examine the manuscripts to their full extent.

⁷⁶ Both at S.12.41/2.1.41.

⁷⁷ S.11.6/1.18.6 (Gregorius), S.12.37/2.1.39 (Mynsinger); S.5.4/1.5.4 (Vinnius), S.10.69/1.14.7 and S.14.26/2.4.26 (both Cujacius).

⁷⁸ Stair cited *De jure belli*, 2.13. 1662 stem: Adv.MS.25.1.8, 10.78; Adv.MS.25.1.10, 10.77; Adv.MS.25.1.11, fol.123R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 10.77. Below, 4.1.8.

along with the surrounding paragraph; Corvinus because the surrounding paragraph was revised;⁸⁰ and Gomezius although the surrounding passage and other citations remained substantially unchanged.⁸¹ Stair therefore cited twenty-five jurists across forty-four citations in the third version. Thirty-three (75%) of these citations were in his titles on obligations. When preparing the fourth version, Stair added two citations of jurists already cited in the *Institutions*, namely Cujacius and Grotius. No citations of jurists were removed during this revision, meaning the same twenty-five jurists were cited in the third and fourth versions.

Stair cited most of these jurists only once. Four were cited twice, namely Connanus, Duarenus, Wesenbecius and, in the manuscripts, Corvinus. Only four were cited more often: Cujacius was cited twice in the third version but three times in the fourth; Stephanus was cited three times; Gudelinus six times; and Grotius nine times in the third version but ten in the fourth.

3.2.1.2 *How Stair cited the continental jurists*

Stair usually included in his citations the name of the jurist, the treatise, and the book, title and paragraph. Thirteen of his citations, including one added for the second edition, gave only the jurist's name. An example is found in Stair's title "Rights Real", where he cited Connanus without any reference to a treatise: "*Conanus* is of the opinion".⁸² Others cited in this manner are: Baldus, Cujacius, Donellus, Faber, Gregorius, Grotius (on three separate occasions), Mynsinger, Salmasius, Tiraquellus, and Wesenbecius. It is usually possible to deduce to which treatise, if any, the citation should have referred. This may be the case where one treatise by that jurist is cited often by Stair, such as Grotius' *De jure belli*. Alternatively, if the citation is found to have been borrowed from another jurist, there is often greater detail found in the citation in that other treatise, such as a citation of

⁷⁹ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 10.78; Adv.MS.25.1.11, fol.124R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 10.78. Below, 4.1.8.

⁸⁰ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 4.3; Adv.MS.25.1.11, fol.27R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 4.3. This was first observed by Ford: *Law and Opinion*, 64-65. Below, 7.1.1.4.

⁸¹ 1662 stem: Adv.MS.25.1.8, 10.5; Adv.MS.25.1.10, 10.6; Adv.MS.25.1.11, fol.89R. 1666 stem: Adv.MS.25.1.5, 10.6; Adv.MS.25.1.7, 10.5; Adv.MS.25.1.12, 10.6. Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 264. Below, 4.1.6.1.

⁸² S.12.41/2.1.41.

Wesenbecius which was borrowed from Vinnius.⁸³ This was also the case with the citations of Faber, Mynsinger, and one of Grotius (all which were borrowed from Vinnius).

Sometimes, Stair omitted the name of the treatise and only cited the book, title or paragraph. This was generally only the case where a jurist was famous for one particular treatise. The other of Stair's citations of Connanus' *Commentaria iuris civilis libri decem. Argumentis tum ante singulorum librorum capita, tum cuiusque legis numero atque ordine in textu annotatis* (Edition consulted: Hanover, 1610) and his citation to Molina's *De justitia et jure opus in sex tomos divisum* (Edition consulted: Mainz, 1659) were given in this manner.⁸⁴ Yet there was one occasion where this caused difficulty. Stair cited "*Corvinus de pactis*" in "Obligations Conventional". This could have referred to either the father, Johannes Corvinus (1582-1650) or his son, Arnold Corvinus, (died c.1680), both of whom were notable jurists. Neither wrote a treatise called *De pactis*; the reference could have referred to a title inside any one of a number of their treatises. The 1759 edition of the *Institutions* wrongly identified this citation as being to Arnoldus Corvinus' *Jus canonicum per aphorismos strictim explicatum* (Edition consulted: Paris, 1671), where "*De pactis*" was the name of the brief title 3.5. Gordon, however, correctly suggested that the citation referred to Corvinus' *Digesta per Aphorismos* on D.2.14, the *Digest* title dedicated to pacts.⁸⁵

3.2.2 Legal humanism

Legal humanism is usefully defined by Osler as:

the school, active in the 16th century, particularly in France, which applied historical and philological methods to understanding the sources of Roman law that had survived from antiquity. It is also often taken to apply to the scholars who continued to practice this branch of legal

⁸³ S.10.65/1.14.3.

⁸⁴ S.10.10/1.10.10 and S.10.5/1.10.5 respectively.

⁸⁵ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 264 n.16. Ford wrongly ascribed this treatise to Johannes Corvinus [*Law and Opinion*, 65].

scholarship, particularly in the Netherlands, in the 17th and 18th centuries.⁸⁶

The legal humanists applied their philological method to Roman, Canon and, to a lesser extent, Feudal law.⁸⁷ Stair cited various legal humanist works, particularly those on Roman law, and was otherwise influenced by this method.

Legal humanists sought to rediscover the classical texts of Roman law. This was aided by an understanding of Greek, which meant they were able to read the parts of the *Corpus iuris civilis* which had been ignored by earlier European jurists.⁸⁸ Stein noted that the early legal humanists “concentrated their efforts on ridding the texts of the glosses and commentaries that engulfed them.”⁸⁹ Kelley suggested that this allowed the legal humanists to “rescue civil law from the clutches of the medieval commentators”.⁹⁰ Criticisms of the earlier Italian schools were expressed by various legal humanists. Lorenzo Valla, a fifteenth-century Italian humanist, famously criticised the inelegant Latin of Bartolus and other Commentators,⁹¹ claiming this was proof of their incompetence as jurists.⁹² A more colourful criticism was allegedly made during a lecture by Eguinarius Baro, a sixteenth-century French legal humanist, whereby he likened Bartolist commentators writing repeatedly on the same points to dogs marking their territory in the same spots.⁹³ Stein related that Guilielmus Budaeus [Budé], a sixteenth-century French legal humanist, described such glosses and commentaries as “a malignant cancer on the texts, which had to be cut away.”⁹⁴ Ulrich Zasius, a late-fifteenth- to early-sixteenth-century German legal

⁸⁶ D.J. Osler: “Images of legal humanism” (2001) 9(1) *Surfaces* 101.6 <<http://www.pum.umontreal.ca/revues/surfaces/vol9/osler.htm>> accessed 1st October 2010.

⁸⁷ e.g. D.R. Kelley: “The rise of legal history in the Renaissance” (1970) 9(2) *History and Theory* 174-194, 176-190.

⁸⁸ Osler: “Images of legal humanism”, pt.VII (4). Below, 3.2.2.

⁸⁹ Stein: *Roman Law in European History*, 76.

⁹⁰ Kelley: “Rise of legal history in the Renaissance”, 179.

⁹¹ Stein: *Roman law in European history*, 75; L. Nauta: “Lorenzo Valla” in E.N. Zalta (ed): *The Stanford Encyclopedia of Philosophy* (Summer 2009 edition) <<http://plato.stanford.edu/archives/sum2009/entries/lorenzo-valla/>> accessed 9th February 2010. On the Commentators, F. Wieacker: *A History of Private Law in Europe, translated by T. Wier and with a foreword by R. Zimmermann* (Oxford, 1995), 55-61; N. Horn: “Die legistische Literatur der Kommentatoren und der Ausbreitung des gelehrten Rechts” in H. Coing (ed): *Handbuch der Quellen und Literatur der neueren Europäischen privatrechtsgeschichte* volume 1 (Munich, 1973) 261, generally.

⁹² Stein: *Roman law in European history*, 75.

⁹³ Kelley: “Rise of legal history in the Renaissance”, 180.

⁹⁴ Stein: *Roman law in European history*, 76.

humanist who was cited by Stair, described them as “a giant creeper which had taken root around the texts.”⁹⁵ Stair’s statement in his lecture for admission as an advocate that “the glosses and commentaries written thereon with their counsells & decisions the wearisomnesse thereof is well knowne”⁹⁶ echoed these humanist remarks.

Osler noted that works of textual criticism were printed from the early sixteenth century, bearing titles such as *Annotationes*, *Observationes* and *Emendationes*.⁹⁷ In these, legal humanists tried to reconstruct the original wording of classical texts. Stein noted that in doing so the humanists “relied largely on conjecture, using their knowledge of antiquity to guess what the text ought to be.”⁹⁸ This observation is illustrated in Osler’s outline of legal humanist writings on D.28.5.41(40), a passage of Julian on the division of inheritance between a first-named heir and his substitute when the former was a slave.⁹⁹ Legal humanists tried to explain the text’s apparent division of the inheritance into quarters rather than into halves. Andreas Alciatus, a sixteenth-century Italian legal humanist who worked at Bourges 1529-1533, replaced the term *heredem* for *coheredem*.¹⁰⁰ Antonius Faber, a late-sixteenth- to early-seventeenth-century French legal humanist, also believed that the passage discussed co-heirs, which he deduced from the original context of the passage in Julian’s work.¹⁰¹ This would resolve the apparent contradiction in the text as then it would be one half share which was divided rather than the full inheritance. A different solution was put forward by Jacobus Cujacius, a sixteenth-century French legal humanist who was cited by Stair. Osler noted that Cujacius argued that the phrase causing difficulty, “*alter semis* [one half]”, was incorrectly added by the compilers. Cujacius suggested that the text originally read “*ut as inter eum* [that the inheritance be divided between them]” but that the compilers assumed that “*as* [here ‘the inheritance’]” was an abbreviation for “*alter semis*”, and that their substitution resulted in the text implying that half, rather than the whole, of the inheritance was

⁹⁵ Stein: *Roman law in European history*, 76.

⁹⁶ “Scotstarvet’s ‘Trew Relation’”, 381.

⁹⁷ Osler: “Images of legal humanism”, pt.VII (1).

⁹⁸ Stein: *Roman law in European history*, 77.

⁹⁹ Osler: “Images of legal humanism”, pt.VIII.

¹⁰⁰ Osler: “Images of legal humanism”, pt.VIII (1).

¹⁰¹ Osler: “Images of legal humanism”, pt.VIII (4).

divided.¹⁰² This attempt to resolve the apparent difficulty in the text by ‘correcting’ the Latin was typical of the humanist style.

Cujacius’ attempted reconstruction of the text by identifying and correcting a presumed interpolation was described by Osler as “the archetypal activity of the legal humanists”.¹⁰³ Kelley argued that Franciscus Balduinus, a sixteenth-century French legal humanist cited by Stair, “was the most original scholar of the group” and that his *Iustinianus sive de iure novo commentaria libri III* (Edition consulted: Basel, 1560) was the “first comprehensive treatment of the anti-Tribonianist theme.”¹⁰⁴ *Antitribonianus sive dissertatio de studio legum* (Paris, 1603) by Franciscus Hotmannus, a sixteenth century French legal humanist, was perhaps the most famous treatise to criticise Tribonian’s compilation.¹⁰⁵ Stair mentioned Tribonian only twice in the *Institutions*. First, he simply named Tribonian as one of the compilers of Justinian’s *Codex*.¹⁰⁶ Secondly, he mentioned Tribonian in his discussion of specification.¹⁰⁷ Stair outlined the debate between the Proculians and the Sabinians as to whether the owner of the original materials or the manufacturer acquired ownership of the *nova species*. He then stated: “Tribonian miseth [*sic*] the matter thus, that if the product can easily be reduced to the first matter, the owners of the matter remain proprietars of the whole...but otherways the materials cedes to the Workmanship”.¹⁰⁸ Stair was thus aware that Tribonian made changes to the text, but was not critical of him.

This attention to the language of the texts was central to the legal humanists’ method. It was on the basis of language as well as historical inaccuracy that Valla was able to prove that the Donation of Constantine was a forgery.¹⁰⁹ Stair was also concerned with textual authenticity. He followed Craig in rejecting *Regiam*

¹⁰² Osler: “Images of legal humanism”, pt.VIII (2).

¹⁰³ Osler: “Images of legal humanism”, pt.VII (6).

¹⁰⁴ Kelley: “Rise of legal history in the Renaissance”, 180.

¹⁰⁵ G. Hamza: “Comparative law and antiquity in the trends of legal humanism and natural law” (2007) 47(3) *Acta Antiqua* 279-290, 282; Kelley: “Rise of legal history in the Renaissance”, 180.

¹⁰⁶ S.1.11/1.1.12. Tribonian also, of course, oversaw the compilation of the *Digest* and the writing of the *Institutes*.

¹⁰⁷ S.12.41/2.1.41.

¹⁰⁸ S.12.41/2.1.41. This, of course, is not entirely correct as already in the classical period this solution had been suggested: D.6.1.5.1; D.32.78.4; D.41.1.24; D.41.1.26.pr.

¹⁰⁹ The Donation and Valla’s *Discourse* have been translated by C.B. Coleman and are reproduced with the Latin in C.B. Coleman: *The Treatise of Lorenzo Valla on the Donation of Constantine: Text and Translation into English* (New Haven, 1922), which also includes a brief but useful introduction to the debate.

Majestatem as a source of Scots law because they “were compyled for the Customs of *England*, in 13. Books, by the Earl of *Chester*, and by some unknown and inconsiderate hand, stollen thence”.¹¹⁰

The legal humanists were also able to reconstruct Roman treatises which survived as fragments in the *Corpus iuris civilis*. From the twelfth century, manuscripts of the *Digest* omitted the inscriptions of the different texts (which gave the name of the jurist and the work from which the excerpt was taken).¹¹¹ The *Index* by Jacobus Labittus, a sixteenth-century legal humanist, identified these authors and treatises.¹¹² In it, Labittus listed: the texts of the *Digest* according to their authors, the works in which they appeared, and the books of those works from which they were excerpted; other *Digest* texts which cited that jurist; those jurists who were not themselves excerpted in the *Digest* but who were referred to by other jurists therein; and finally those texts in the *Codex* and *Novels* which mentioned specific jurists. Labittus’ *Index* was of fundamental importance for the study or reconstruction of classical law. Osler noted that after it became available, Cujacius “ceased to write commentaries on the *Digest*, but instead reconstituted the original works of the Roman jurists on the basis of Labittus’ *Index*, and wrote his commentaries on these ‘reborn’ classical works.”¹¹³ One such treatise of Cujacius, his commentary on Africanus, was cited by Stair.¹¹⁴

The legal humanists also applied this method to the *Codex*. Like the manuscripts of the *Digest*, those of the *Codex* stopped including the subscriptions bearing the date on which the legislation was issued.¹¹⁵ Balduinus’ *Iustinianus sive de iure novo* has been lauded as the first example of the “historicisation” of the *Codex*, having “reconstituted the legislation of the Emperor Justinian from the excerpts scattered throughout the *Corpus Iuris*.”¹¹⁶ Earlier legislation was also reconstructed. For example, Balduinus attempted to reconstruct very early Roman

¹¹⁰ S.1.15/1.1.16. Below, 3.2.2.1.

¹¹¹ Osler: “Images of legal humanism”, pt.VII (2).

¹¹² Osler: “Images of legal humanism”, pt.VII (2). Edition consulted: J. Labittus: *Index legum omnium quae in Pandectis continentur: in quo singulae ad singulos iurisconsultorum libros ex quibus desumptae sunt, ut earum monet inscripto, referuntur ... Additur postremo eiusdem indicis* (Paris, 1557).

¹¹³ Osler: “Images of legal humanism”, pt.VII (2).

¹¹⁴ S.10.69/1.14.7.

¹¹⁵ Osler: “Images of legal humanism”, pt.VII (3).

¹¹⁶ Osler: “Images of legal humanism”, pt.VII (3).

law in *Libri duo ad Leges Romuli regis Romanorum Leges XII Tabularum. Ejusdem consilium de nova iuris civilis demonstratione* (Lyon, 1550).

Legal humanists were also concerned with applying a more systematic structure to Roman law. Jolowicz and Nicholas explained that, when arranging the titles of the *Digest*, “the compilers used Ulpian’s commentary as their chief guide, civil law topics being fitted in with the praetorian matter as had been done in the classical *digesta*”.¹¹⁷ The legal humanists reorganised the texts into a more scientific arrangement. Stein referred to the *Epistula de ratione docendi discendi iuris*¹¹⁸ by Franciscus Duarenus, a work cited by Stair, as “the manifesto”¹¹⁹ of these legal humanists, which was nonetheless “confined to a general plea for treating the material of the *Corpus iuris* in a more rational and systematic way”.¹²⁰ Franciscus Connanus, a sixteenth-century French legal humanist cited by Stair, in his *Commentaria iuris civilis libri decem* attempted to re-order legal material in a more rational structure under the *Institute*’s tripartite division of persons, things and actions¹²¹. Hugo Donellus, a sixteenth-century French legal humanist cited by Stair, wrote the greatest exposition of the rational discipline of law in his *Commentarii de iure civili libri viginti octo* (Frankfurt, 1595-1597). Rather than follow the traditional treatment of law where actions and procedure were of primary importance, Donellus regarded the rights of the individual as being of greater importance, and the method by which he could defend or secure those rights as being secondary to this. The structure of his commentary reflected this.¹²² Donellus also separated the law of

¹¹⁷ H.F. Jolowicz and B. Nicholas: *Historical introduction to the Study of Roman law* (3rd edition, Cambridge, 1972), 483. This does not appear to have been mentioned in T. Honoré: *Justinian’s Digest: Character and Compilation* (Oxford, 2010).

¹¹⁸ Consulted in F. Duarenus: *Omnia quae quidem hactenus edita fuerunt opera ... omnia nunc demum unico comprehensa volumine. Editio, ut postrema, ita & caeteris umquam antehac alibi egressis, compluribus in locis, multo tersior ac emendatior* (Frankfurt, 1592)

¹¹⁹ P.G. Stein: “Donellus and the origins of the modern civil law” in J.A. Ankum *et al* (eds): *Mélanges Felix Wubbe: offerts per ses collègues et ses amis à l’occasion de son soixante-dixième anniversaire* (Fribourg, 1993) 439, 443.

¹²⁰ Stein: “Donellus and the origins of the modern civil law”, 443.

¹²¹ Stein: *Roman law in European history*, 80; M. Scattola: “*Scientia iuris* and *ius naturae*: The jurisprudence of the Holy Roman Empire in the seventeenth and eighteenth centuries” in D. Canale, P. Grossi, H. Hofmann (eds): *A Treatise of Legal Philosophy and General Jurisprudence, volume 9: A History of the Philosophy of Law in the Civil Law World, 1600–1900* (Dordrecht, 2009) 1, 12.

¹²² P. Garnsey: *Thinking about Property: from antiquity to the age of revolution* (Ideas in Context series, Cambridge, 2007), 202; Stein: “Donellus and the origins of the modern civil law”, esp. 448-452.

obligations from the law of property, originally considered to both be aspects of the law of things. Stein thus called Donellus “the founder of the modern civil law”.¹²³

Stair was also concerned with establishing “*Whether Law may, or should be handled as a Rational Discipline*”.¹²⁴ He criticised those lawyers who “rest satisfied with any order, whereby the particular Heads and Titles may be found, whereunto the confused Order of the Civil Law (which is the greatest blemish in it) hath been instrumental”.¹²⁵ In this regard, he also criticised the Italian schools: “There is little to be found among the Commentars and Treatises on the Civil Law, arguing from any known Principles of Right; but all their Debates is a Congestion of the Contexts of the Law, which exceedingly nauseates delicate ingines”.¹²⁶ These complaints, and the addressing of this question generally, were typically humanist. Further, Stair lauded later jurists: “there are not wanting of late of the learnedest Lawyers, who have thought it both feasible and fit, that the Law should be formed as a Rational Discipline, and have much regrated that it hath not been effectuated”.¹²⁷ In this regard, he specifically mentioned Duarenus’ *Epitome*, a work of legal humanism, and Grotius’ *De jure belli*.¹²⁸

Finally, Osler noted that, during the sixteenth century, other Roman legal texts which survived independently of the *Corpus iuris civilis* were rediscovered. Legal humanists compared these to the *Corpus iuris civilis* to discover the method of its compilers,¹²⁹ amongst other things. Reference was also had to works of classical antiquity which provided historical context and understanding, most notably to Cicero. Stair also cited various writers of classical antiquity, including Cicero, who was cited five times in the third version and six times in the fourth.

3.2.2.1 *Legal humanism in Scotland*

¹²³ Stein: “Donellus and the origins of the modern civil law”, 452. On the influence of Donellus, also R. Feenstra: “Hugues Doneau et les juristes Néerlandais du XVII^e siècle: l’influence de son << système >> sur l’évolution du droit privé avant le Pandectisme” in R. Feenstra: *Legal Scholarship and Doctrines of Private Law, 13th-18th Centuries* (Variorum Collected Studies series, Aldershot, 1996) ch.4, 233-243.

¹²⁴ S.1.16/1.1.17. Emphasis in the original.

¹²⁵ S.1.16/1.1.17.

¹²⁶ S.1.16/1.1.17.

¹²⁷ S.1.16/1.1.17.

¹²⁸ S.1.16/1.1.17.

¹²⁹ Osler: “Images of legal humanism”, pt.VII (5).

There was no satisfactory or consistent teaching of law in Scotland before the eighteenth century.¹³⁰ Scots desiring a legal education studied abroad.¹³¹ Cairns, Fergus and MacQueen suggested that the failure of legal education in Scotland before the eighteenth century meant that “it was perhaps inevitable that there should have been no major contribution in Scotland”¹³² to legal humanism of a Romanist nature. Yet, although few Scots were prominent legal humanists,¹³³ the influence of legal humanism was felt in Scotland. That Andrew Melville’s curriculum for the liberal arts was humanist has already been shown.¹³⁴ Cairns, Fergus and MacQueen noted that the various commissions to collect and print early Scottish statutes were “reminiscent of the directions which humanism took in contemporary France and

¹³⁰ On failed attempts to provide legal education in Scotland before the eighteenth century see e.g. J.W. Cairns: “The law, the advocates and the universities in late sixteenth-century Scotland” (1994) 73(2) *S.H.R.* 171-190 generally; J.W. Cairns: “Academic feud, bloodfeud, and William Welwood: legal education in St. Andrews, 1560-1611” (1998) 2(2-3) *Edin.L.R.* 158-179 (Part I) and 255-287 (Part II) generally; J.W. Cairns: “Lawyers, law professors, and localities: the universities of Aberdeen, 1680-1750” (1995) 46(3-4) *Northern Ireland Legal Quarterly* 304-331 generally. On Scottish legal education in the eighteenth century see e.g. J.W. Cairns: “Rhetoric, language, and Roman law: legal education and improvement in eighteenth-century Scotland” (1991) 9(1) *Law and History Review* 31-58 generally; J.W. Cairns: “John Spotswood, professor of law: a preliminary sketch” in W.M. Gordon (ed): *Miscellany III* (Stair Society series volume 39, Edinburgh, 1992) 131 generally; J.W. Cairns: “The origins of the Glasgow law school: the professors of the Civil law, 1714-61” in P. Birks (ed): *The Life of the Law: proceedings of the tenth British Legal History Conference Oxford 1991* (London, 1993) 151 generally; J.W. Cairns “‘As famous a school for law as Edinburgh for medicine’: the Glasgow law school, 1761-1801” in A. Hook and R. Sher (ed): *The Glasgow Enlightenment* (East Linton, 1995) 133 generally.

¹³¹ e.g. Sir George Mackenzie who studied law at Bourges; Sir John Skene who studied law at Paris and Wittenberg; and Thomas Craig, who studied at Paris and presumably studied law in France. For biographies of these three men: Jackson: “Mackenzie, Sir George, of Rosehaugh (1636/1638–1691)” A. Murray: “Skene, Sir John, of Curriehill (c.1540–1617)” *O.D.N.B.* (Oxford, 2004; online edition) <<http://www.oxforddnb.com/view/article/25669>> accessed 10th February 2010; and J.W. Cairns: “Craig, Thomas (1538?–1608)” *O.D.N.B.* (Oxford, 2004; online edition) <<http://www.oxforddnb.com/view/article/6580>> accessed 10th February 2010. On the later trend of studying in the Netherlands, e.g. P. Nève: “Disputations of Scots students attending universities in the Northern Netherlands” in W.M. Gordon and T.D. Fergus (ed): *Legal History in the Making: proceedings of the ninth British Legal History Conference Glasgow 1989* (London, 1991) 95 generally; J.W. Cairns: “Importing our lawyers from Holland: Netherlands influences on Scots law and lawyers in the eighteenth century” in G.G. Simpson (ed): *Scotland and the Low Countries, 1124-1994* (Mackie Monograph 3, East Linton, 1996) 136 generally; J.W. Cairns: “Legal study in Utrecht in the late 1740s: the education of Sir David Dalrymple, Lord Hailes” (2002) 8(1) *Fundamina: A journal of legal history* 30-73 *passim*.

¹³² J.W. Cairns, T.D. Fergus and H.L. MacQueen: “Legal humanism in Renaissance Scotland” (1990) 11(1) *J.L.H.* 40-69, 40.

¹³³ An exception is Edward Henryson, who taught at Bourges in the 1550s [Cairns, Fergus and MacQueen: “Legal humanism in Renaissance Scotland”, 40-41; M. Tucker: “Henryson, Edward [Henry Édouard] (1522–c.1590)” *O.D.N.B.* (Oxford, 2004; online edition) <<http://www.oxforddnb.com/view/article/12982>> accessed 24th February 2010].

¹³⁴ Above, 1.2.1.2.

England.”¹³⁵ Two of the Scottish jurists consulted by Stair, Thomas Craig of Riccarton and Sir John Skene, Lord Curriehill, were influenced by legal humanism. This discussion will establish, first, the extent to which they were influenced by legal humanism and, secondly, whether Stair was indirectly influenced by legal humanism through his use of their work.

Craig graduated in the arts at St Andrews in 1555 and then went to Paris to continue his studies. By 1563 he had returned to Scotland, when he was admitted as an advocate.¹³⁶ During the intervening years, he is thought to have studied law in France, “perhaps canon law at Paris and civil law elsewhere”.¹³⁷ His most notable treatise, *Jus feudale*, was on Feudal law. Cairns showed it was probably written between the late 1590s and 1606.¹³⁸ It was published posthumously, in Latin, in 1655. The original manuscript has not survived.¹³⁹

Craig was certainly influenced by legal humanism. As Cairns, Fergus and MacQueen observed, Craig cited various legal humanists in the *Jus feudale*. They found that Hotmannus was the jurist cited most often, and that both his *Francogallia* (1573) and *De feudis* (1573) were cited.¹⁴⁰ Cairns stated elsewhere that there were twenty-five citations of Hotmannus in the *Jus feudale*,¹⁴¹ and that the structure of Craig’s work bore a resemblance to Hotmannus’ *De feudis*.¹⁴² Cairns, Fergus and MacQueen also noted that “conventional humanist traits are apparent in all Craig’s work”, most notably: a conscientious use of Latin;¹⁴³ pride in his knowledge of Greek;¹⁴⁴ and the citation of at least sixteen different writers of classical antiquity.¹⁴⁵ They also showed that Craig’s discussion of the history of Roman law was “typically humanistic”,¹⁴⁶ and that his use of Roman law as ancillary to Scottish sources is comparable to Cujacius’ and Hotmannus’ rejection of Roman law for French

¹³⁵ Cairns, Fergus and MacQueen: “Legal humanism in Renaissance Scotland”, 43.

¹³⁶ Cairns: “Craig, Thomas (1538?–1608)”.

¹³⁷ Cairns: “Craig, Thomas (1538?–1608)”.

¹³⁸ J.W. Cairns: “The *breve testatum* and Craig’s *Jus feudale*”, 317.

¹³⁹ J.A. Clyde (trans): *The Jus feudale by Sir Thomas Craig of Riccarton, with an appendix containing the books of the feus* (Edinburgh, 1934) volume 1, xvi.

¹⁴⁰ Cairns, Fergus and MacQueen: “Legal humanism in Renaissance Scotland”, 48.

¹⁴¹ J.W. Cairns: “*Jus civile* in Scotland, ca. 1600” (2004) 2(1) *Roman Legal Tradition* 136-170, 151.

¹⁴² J.W. Cairns: “Craig, Cujas, and the definition of *feudum*: is a feu a usufruct?” in P. Birks (ed): *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (Oxford, 1989) 75, 78.

¹⁴³ Cairns, Fergus and MacQueen: “Legal humanism in Renaissance Scotland”, 49-50.

¹⁴⁴ Cairns, Fergus and MacQueen: “Legal humanism in Renaissance Scotland”, 50.

¹⁴⁵ Cairns, Fergus and MacQueen: “Legal humanism in Renaissance Scotland”, 50.

¹⁴⁶ Cairns, Fergus and MacQueen: “Legal humanism in Renaissance Scotland”, 50-51.

practice.¹⁴⁷ They also argued that Craig's frequent discussions of etymology not only followed the humanist style but also sometimes included citations of similar discussions by Hotmannus and Budaeus.¹⁴⁸ Indeed, they referred to Craig's *Jus feudale* as "The most profound achievement of this humanist movement in Scotland".¹⁴⁹

Yet Craig's reliance on the legal humanists was not uncritical and should not be overstated. Cairns showed that Craig did at times disagree with Hotmannus and had "no sympathy with his political views."¹⁵⁰ Elsewhere he showed that Craig disagreed with the definition of *feudum* as a usufruct put forward by Cujacius. Cairns established that Craig instead preferred the definition put forward by *inter alia* Zasius and Petrus Rebuffus, namely of *feudum* as *dominium utile* (as distinct from *dominium directum*, which was reserved for the feudal superior).¹⁵¹ He has also convincingly undermined Robertson's suggestion that Craig used Baro in his discussion of the *breve testatum*.¹⁵² Craig was aware of the legal humanist literature, but was critical in his use of it.

Stair cited Craig in both his lecture for admission as an advocate and his *Institutions*. As his lecture was given prior to *Jus feudale* being printed, he must have had access to a manuscript copy or epitome of Craig. The first version was written four years after Burnet's edition of Craig was printed in 1655. It is likely that Stair purchased Burnet's edition of Craig, although, as there is no surviving catalogue of Stair's library, this cannot be confirmed.¹⁵³

Stair cited Craig *c.*100 times in the third version. Only two of these were in the titles on obligations. Stair recognised his debt to Craig:

¹⁴⁷ Cairns, Fergus and MacQueen: "Legal humanism in Renaissance Scotland", 53.

¹⁴⁸ Cairns, Fergus and MacQueen: "Legal humanism in Renaissance Scotland", 51.

¹⁴⁹ Cairns, Fergus and MacQueen: "Legal humanism in Renaissance Scotland", 59.

¹⁵⁰ Cairns: "Craig, Cujas, and the definition of *feudum*: is a feu a usufruct?", 78.

¹⁵¹ Cairns: "Craig, Cujas, and the definition of *feudum*: is a feu a usufruct?", 76.

¹⁵² J.J. Robertson: "The Illusory 'Breve Testatum'" in G.W.S. Barrow (ed): *The Scottish Tradition: Essays in Honours of Ronald Gordon Cant* (Edinburgh, 1974) 84, 90. Cairns: "The *breve testatum* and Craig's *Jus feudale*", 329-330.

¹⁵³ It may prove possible – by comparing manuscripts and Burnet's printed edition of the *Jus feudale*, and the manuscripts and printed editions of the *Institutions* – to determine whether Stair used manuscript copies or the printed edition of Craig's treatise when writing the first version. This has, however, been unfeasible here.

Our Learned Countrey-man, Mr. *Thomas Craig* Advocat, hath largely and learnedly handled the Feudal Rights of this and other Nations, in his Book *de Feudis*; and therefore, we shall only follow closely, what since his time by Statute or Custom hath been cleared or altered in Feudal Rights...¹⁵⁴

To what extent Stair was influenced by the legal humanist method through his use of Craig? In all likelihood Gordon is correct in suggesting that Stair borrowed two of his citations of continental jurists from Craig:

Stair's reference to Cujas in *Institutions*, 2.4.26 would appear to come from Craig's *Jus feudale*, 2.20.30. It is less clear but also probable that Stair's reference to Tiraquellus in *Institutions*, 3.4.34 comes from Craig's *Jus feudale*, 2.17.21.¹⁵⁵

Both Cujacius and Tiraquellus were legal humanists; this borrowing indicates that Stair was indirectly influenced by legal humanism through his use of Craig. This is particularly notable in relation to his borrowing of this citation of Cujacius. Craig referred to Cujacius in a discussion of the origin of relief.¹⁵⁶ After saying that some Scots credited King Malcolm with introducing relief, Craig stated that he followed Cujacius in believing that it was mentioned in a decree of Emperor Leo which was preserved in the *Novels*:

*Ego altuis [sic] hujus Relevii originem repetendam puto, Cujacium in hoc sequutus, qui ex veteri consuetudine, nempe Leonis Imperatoris constitutione, quae in novellis extat...*¹⁵⁷

Following Cujace however, I think the origin of relief must be sought in older times. The opinion adopted by Cujace is that relief owed its origin to an ordinance of Emperor Leo, which is to be found in the *Novels*. [Translation: Lord Clyde]

This was certainly the source for Stair's similar comment: "Releef is generally treated on by the *Fewdists*. The Original whereof *Cujace* ascribeth to the constitution of the *Emperor Leo*, extant in the *Novels*".¹⁵⁸ Stair rarely referred to the *Novels*, so

¹⁵⁴ S.13.3/2.3.3.

¹⁵⁵ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 265.

¹⁵⁶ Craig: *Jus feudale*, 2.20.30, 291.

¹⁵⁷ Craig: *Jus feudale*, 2.20.30, 291.

¹⁵⁸ S.14.26/2.4.26.

this reference was unusual.¹⁵⁹ Additionally, Stair, like Craig, continued in the next passage by considering the different rules of French and English law.¹⁶⁰ This philological concern with the origin and development of relief, in which Stair was indirectly influenced by Cujacius through his use of Craig, was typical of legal humanism.

There is less evidence of indirect humanist influence from Tiraquellus. He was cited by Stair, Craig and Zoesius, another jurist consulted by Stair,¹⁶¹ on whether there can be representation in succession.¹⁶² It is probable that Craig was Stair's source here as Stair also cited the relevant title of Craig within his discussion. Craig put forward two possibilities: either a child whose parent predeceases his grandparent will inherit the parent's share of the inheritance; or the predeceased's share will be distributed amongst the other heirs. Craig provided Tiraquellus' name and the relevant treatise, *De jure primogeniorum*, but cited no particular passage and did not explore his argument,¹⁶³ merely stating that he discussed the views put forward by various jurists on this matter:

*Hanc quaestionem tractat vir doctissimus Tiraquellus, in suo de primogeniture libro, ubi diversas multorum hominum & doctorum sententias inter se pugnantes refert,*¹⁶⁴

This topic is discussed by Tiraquellus, an author of great learning, in his book on primogeniture, in which he collects a number of opposite opinions held by eminent people. [Translation: Lord Clyde]

¹⁵⁹ Above, 3.1.2.

¹⁶⁰ S.14.27/2.4.27.

¹⁶¹ H. Zoesius: *Praelectiones feudales, nunc primum editae* [known as *De feudis*] (Edition consulted: Leuven, 1641), 12, 85-89 was cited with Gudelinus' *De iure feudorum et pacis commentarii ad mores Belgij ac Franciae conscripti*, S.14.18/2.4.18. The two treatises were bound together, at least for the 1641 edition (the edition consulted). Examination of Zoesius and *De jure feudorum* confirms that Stair consulted those treatises.

¹⁶² S.26.34/3.4.34; Craig: *Jus feudale*, 2.17.21, 258-259; Zoesius: *De feudis*, 11.30, 80.

¹⁶³ Tiraquellus' *Commentarii de jure primogeniorum* [consulted in A. Tiraquellus: *Commentarii de nobilitate et iure primogeniorum, quarta hac eademque postrema editione, ab auctore ipso diligentissime recogniti, & tertia amplius parte locupletati* (Leiden, 1617), 410] asked "uter praeferatur in iure primogeniturae an filius primogeniti, an verò patruus ipsius. [which is preferred in the law of primogeniture, the oldest son or his uncle?]" Tiraquellus found for the son: "tunc haud dubie filius primogeniti id ius primogeniturae consequetur, patruo suo omnino excluso. [it is not doubted that his oldest son acquires by the law of primogeniture, and thus entirely excludes his uncle]". [*Quaestio* 40, para.1, 591].

¹⁶⁴ Craig: *Jus feudale* 2.17.21, 259.

Craig then explained that Roman law, English law, French law and Scots law all recognised representation in inheritance, meaning that the child would inherit. Stair also explained that the child would inherit in Scots law, “though that be contraverse, by the more comon Feudall Customs, as is largely and learnedly dispute by *Tiraquellus*.”¹⁶⁵ This reference to the “contraverse” probably reflected Craig’s discussion of the possibility that the inheritance be divided amongst the other heirs to the exclusion of the predeceased’s child. Although Stair borrowed the citation of *Tiraquellus*, Stair was here influenced by Craig himself rather than by *Tiraquellus*.

“Common Principles” provides further evidence of Stair having been influenced by the humanist nature of Craig’s *Jus feudale*. Both jurists began their treatise with an examination of the history of law. Both the structure and the content of Stair’s discussion followed that of Craig to sufficient a degree as to presume that Craig was Stair’s source.¹⁶⁶ Stair’s examination of the history of Roman law, for example, owed much to Craig’s “typically humanistic”¹⁶⁷ discussion. Additionally, Stair was also influenced by Craig’s textual criticism, specifically in rejecting the *Regiam Majestatem* as a source of Scots law, believing it to be overly reliant on England’s *Glanville*.¹⁶⁸ There was a legal-humanist theme throughout Stair’s first title, much of which derived from his use of Craig.

Stair’s reliance on Craig for philological and historical examinations, typical of the legal humanist style, can also be seen in later titles. In his discussion of courtesy, Stair stated: “The original of this Liferent by the Courtesie, as *Craig* observeth, *lib. 2. dieges. 22.* is from the Rescript of the Emperour *Constantine*, whereby the Father had

¹⁶⁵ S.26.34/3.4.34.

¹⁶⁶ For specific examples, compare: S.1.10/1.1.11 on Draco to Craig: *Jus feudale* 1.1.15, 7; the list of Roman jurists, S.1.11/1.1.12 and Craig: *Jus feudale* 1.2.4, 8; Cairns has shown that Stair’s confusion as to the date of the death of Justinian, S.1.11/1.1.12 comes from his reading of Craig: *Jus feudale* 1.2.11, 9 [Cairns: “Civil law tradition in Scottish legal thought”, 204-205]; or their discussions of Gratian, S.1.13/1.1.14 and Craig: *Jus feudale* 1.3.8, 13-14. See also Ford: *Law and Opinion*, 218-220, 221-222; J.M. Halliday: “Feudal law as a source” in D.M. Walker (ed): *Stair Tercentenary Studies* (Stair Society series volume 33, Edinburgh, 1981) 136, 139.

¹⁶⁷ Cairns, Fergus and MacQueen: “Legal humanism in Renaissance Scotland”, 50.

¹⁶⁸ S.1.15/1.1.16 Craig: *Jus feudale* 1.8.11, 38-39. For more information on the *Regiam Majestatem* see e.g. Lord Cooper (ed): *Regiam Majestatem and Quoniam Attachiamta, based on the text of Sir John Skene* (Stair Society series volume 11, Edinburgh, 1947). Stair’s remark concerning *Regiam* did not feature in the manuscripts. Stair’s discussion of the laws of Scotland was extended both when Stair revised the *Institutions* in 1666-1667 and when preparing the third version [1662 stem: Adv.MSS.25.1.8 and 25.1.10, 1.20; Adv.MS.25.1.11, fol.10R-11R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 1.20. For a detailed account of the changes in Stair’s discussion of the sources of Scots law, see Ford: *Law and Opinion*, 414-439]. The reference to *Regiam* was added for the third version. This shows that Stair repeatedly turned to and borrowed from Craig’s *Jus feudale*.

the Usufruct of the heretage of his Children, befalling to them as heirs to their Mother”¹⁶⁹. Stair was correct; Craig explained that “*Ex Constantini enim rescripto sancitum est* [It was decreed by a rescript of Constantine [Translation: Lord Clyde]]”, and that the law of courtesy was also found in Norman and English law.¹⁷⁰ Craig’s interest in the origin of the rule was typically humanist, and there was at least some evidence of this influence in Stair.

Of course, Stair also used Craig for information which was not representative of the legal humanist style. He expressly used Craig to consult Baldus.¹⁷¹ Sellar suggested that “the bulk of [Stair’s] references to English law concern matters of property and succession, and in this ... Stair largely follows Sir Thomas Craig.”¹⁷² There were seventeen references to English law or custom in Stair’s discussion of obligations in the third version. Five of these (approximately a third) were borrowed from Craig.¹⁷³ Four of these five were in “Common Principles”.

Stair’s reliance on Craig can be over-stated. Ford suggested, despite Stair’s declaration that he was merely explaining law since Craig, that:

It would be going too far to say that Stair based his account of recent developments in land law on an epitome of Craig’s treatise, for much of his discussion of the feudal law was his own and the material he adopted from Craig was integrated into a coherent account which owed little in its structure to the *Ius feudale*.¹⁷⁴

¹⁶⁹ S.16.19/2.6.19.

¹⁷⁰ Craig: *Jus feudale* 2.22.40, 312.

¹⁷¹ S.21.19/2.11.19.

¹⁷² W.D.H. Sellar: “English law as a source” in D.M. Walker (ed): *Stair Tercentenary Studies* (Stair Society series volume 33, Edinburgh, 1981) 140, 142. Note, however, that Thomas Craig was not knighted: Cairns: “Craig, Thomas (1538?-1608)”.

¹⁷³ Stair’s discussions of the different inferences of the term ‘common law’ in Scotland and England were both likely taken from Craig [S.1.10/1.1.11; S.1.15/1.1.16; Craig: *Jus feudale* 1.7.13, 32]. Stair’s discussion of the localised customs of the “Gavil kind of Kent” [S.1.10/1.1.10. The ‘gavelkind’ were a specific group of Feudal tenants peculiar to the Kentish region. They are distinguished from normal English feudal tenants as, on the vassal’s death, the tenancy was divided equally amongst his sons rather than passing by primogeniture. For more information of gavelkind tenancies, see N. Neilson: “Custom and the common law in Kent” (1924-1925) 38(4) *Harvard Law Review* 482-498, *passim*] probably used an analogous statement made by Craig, although that specific term in not used by him [Craig: *Jus feudale* 1.7.18, 34]. Stair also borrowed his discussion of the apparent failure of the English legal system in not having an alternative to the Scottish rule of desuetude from Craig [S.1.15/1.1.16; Craig: *Jus feudale* 1.8.9, 38]. Finally, Stair’s discussion of villainy likely derived in part from Craig [S.2.11/1.2.11; Craig: *Jus Feudale* 1.11.32, 71-72]. This final instance was the only one not found in “Common Principles”.

¹⁷⁴ Ford: *Law and Opinion*, 215.

Halliday also cautioned against the assumption that Stair was overly reliant on Craig.¹⁷⁵ He argued that Stair’s principal sources for his discussion of Feudal law were “the customs and conveyancing practice of the 17th century and the decisions of the Court which had clarified and formed it”¹⁷⁶ rather than Craig. He stated that Stair could not have used Craig to a great extent because there had been much development of the law since Craig wrote, particularly regarding registration of sasines, registration of adjudications, positive prescription and bounding title.¹⁷⁷ Further, he stated that various aspects of Feudal law only developed into concrete principles after Craig wrote.¹⁷⁸ These Halliday claimed “Stair stated virtually *de novo*... [and thus] owed virtually nothing to Craig.”¹⁷⁹ Any detailed re-examining of Stair’s use of Craig in the second and third books is unfeasible here, but Halliday’s findings that Stair was not overly reliant on Craig as a source of Feudal law is consistent with the findings of this thesis regarding Stair’s use of Roman law and of continental jurists in the titles on obligations.¹⁸⁰

Stair was also indirectly influenced by legal humanism through his use of Sir John Skene, Lord Curriehill.¹⁸¹ Skene was Clerk Register and a Lord of Session from 1594. He was also part of a commission to review early acts of the Scottish parliament, printed as *The Lawes and Actes of Parliament, maid be King James the First, and his successours Kinges of Scotland* (Edinburgh, 1597). In the same year, Skene published his *De verborum significatione: The exposition of the termes and difficill wordes, conteined in the foure buikes of Regiam Majestatem, and uthers, in the Acts of Parliament, Infestments, and used in practique of the Realme, with diverse rules, and common places, or principalles of the Lawes* (Edinburgh, 1597 rept. Edinburgh, 1631). Cairns, Fergus and MacQueen called this “a work of a characteristically humanist type”¹⁸²: the name of the work was also used by Valla and Alciatus, amongst others; Budaeus, Zasius, Alciatus and Cujacius were all cited

¹⁷⁵ Halliday: “Feudal law as a source”, 140.

¹⁷⁶ Halliday: “Feudal law as a source”, 139.

¹⁷⁷ Respectively S.13.20/2.3.20; S.13.22/2.3.22; S.-/4.35.15; and S.13.26/2.3.26.

¹⁷⁸ Halliday: “Feudal law as a source”, 139.

¹⁷⁹ Halliday: “Feudal law as a source”, 139.

¹⁸⁰ Below, esp. 8.1.2.

¹⁸¹ A. Murray: “Skene, Sir John, of Curriehill (c.1540–1617)”.

¹⁸² Cairns, Fergus and MacQueen: “Legal humanism in Renaissance Scotland”, 45.

by Skene,¹⁸³ and Matthaeus Wesenbecius, a German legal humanist cited by Stair, was recognised by Skene as his teacher.¹⁸⁴ Cairns, Fergus and MacQueen also showed that Skene was concerned with the textual purity of the text: “excision from the texts of later intruding glosses and additions, the restoration of rubrics to their proper place... and the retention of the *ipsissima verba* of the originals”,¹⁸⁵ taking special account of the manuscripts, was part of his method. They also showed that Skene made various philological notes on the text,¹⁸⁶ and used the historical records available to him as Lord Clerk Register to elucidate certain points.¹⁸⁷

Stair used Skene’s *De verborum significatione* for the *Institutions*. Stair referred to it on six occasions, all which were in the titles on property law.¹⁸⁸ The manuscripts reveal that, similar to his use of Craig, Stair used *De verborum significatione* both when writing and when later revising the *Institutions*. Two of Stair’s citations of Skene were found in the sample manuscripts from the 1662 stem and were thus included in the first version.¹⁸⁹ Two were added for the second version.¹⁹⁰ Two were added when Stair was preparing the third version.¹⁹¹

Stair was influenced by legal humanism through his use of Skene. Stair’s second citation of Skene was in his discussion of *herzelds* (the gift of an animal to the Feudal superior on the death of his vassal). This was an etymological discussion

¹⁸³ Cairns, Fergus and MacQueen: “Legal humanism in Renaissance Scotland”, 45.

¹⁸⁴ Cairns, Fergus and MacQueen: “Legal humanism in Renaissance Scotland”, 44.

¹⁸⁵ Cairns, Fergus and MacQueen: “Legal humanism in Renaissance Scotland”, 45.

¹⁸⁶ Cairns, Fergus and MacQueen: “Legal humanism in Renaissance Scotland”, 46-47.

¹⁸⁷ Cairns, Fergus and MacQueen: “Legal humanism in Renaissance Scotland”, 47-48.

¹⁸⁸ S.13.67/2.3.67 citing Skene: *De verborum significatione* under “Forestarius”; S.13.80/2.3.80 citing Skene: *De verborum significatione* under “Herrezelda”; S.14.25/2.4.25 citing Skene: *De verborum significatione* under “None-Entres”; S.14.28/2.4.28 citing Skene: *De verborum significatione* under “Releuium”; S.14.41/- citing Skene: *De verborum significatione* under “Maritagium” – this citation and the surrounding passage were removed from the fourth version; S.16.19/2.6.19 citing Skene: *De verborum significatione* under “Curialitas”.

¹⁸⁹ The citation at S.13.80/2.3.80 is found in the 1662 stem: Adv.MS.24.1.8, 13.52; Adv.MS.25.1.10, 13.44; Adv.MS.25.1.11; fol.172L. 1666 stem: Adv.MS.25.1.5, 13.45; Adv.MS.25.1.7, fol.62L (folio reference is used because the paragraphs in this title are not numbered); Adv.MS.25.1.12, 13.44. The citation at S.16.19/2.6.19 is found in the 1662 stem: Adv.MS.25.1.8, 16.20; Adv.MS.25.1.10, 16.16; Adv.MS.25.1.11, fol.195L-R. 1666 stem: Adv.MSS.25.1.5, 16.17; Adv.MS.25.1.7, 16.16; Adv.MS.25.1.12, 16.17.

¹⁹⁰ The citation at S.14.28/2.4.28 is found in the 1666 stem in Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 14.15, but does not appear in the manuscripts from the 1662 stem. The citation, S.14.41/- appears in Adv.MS.25.1.5, 14.27; Adv.MSS.25.1.7 and 25.1.12, 14.26, but not in the manuscripts from the 1662 stem.

¹⁹¹ The citation at S.13.67/2.3.67 does not feature in any of the manuscripts consulted; the surrounding passage was revised for the third version. The citation at S.14.25/2.4.25 appears only in Adv.MS.25.1.12, 14.14. This manuscript was that which was updated in places according to the third version; this citation of Skene was probably another example of this.

typical of the philological style of legal humanism. Stair defined *herzelds* as “the best Horse, Ox or Cow of the Tennent dying on the Ground, is introduced by custom, derived from the *Germans*, as the word of their Language, expressing the same evidenceth”.¹⁹² His source for this was undoubtedly Skene, even though Skene says the custom is Dutch not German:

for *Herr* in dutch, in latine *herus, dominus*, signifies ane lord, or maister, and *zeild* is called ane gift, tribute, or taxation, as in the auld actes of parliament maid be King James the first...Swa *Herrezelda*, is ane gift given be onie man to his maister and Lord, quhilk suld be his best...¹⁹³

Although this passage of Skene was not discussed by Cairns, Fergus and MacQueen, it nonetheless agrees with what they term Skene’s “not uncritical interest in language and its origins [which is] of a characteristically humanist nature.”¹⁹⁴ Stair was therefore indirectly influenced by legal humanism through his use of Skene, if to a lesser extent than through his use of Craig.

3.2.2.2 *Stair’s citation of works of legal humanism*

Just under half (nine) of the jurists cited in the titles on obligations were legal humanists. This number of citations is in keeping with his use of humanist methods. Yet, as will be shown, Stair probably did not consult any of these legal humanists. Rather, he borrowed these citations from other continental jurists. Nonetheless, Stair’s citation of so many legal humanists shows that he obviously recognised the prestige of legal humanism and made an effort to cite such jurists, drawing on them for authority.

Stair cited Balduinus (1520-1573), along with Nicholas Boerius and Rebuffus, in his discussion of written contracts for debt.¹⁹⁵ Gordon correctly suggested that all three of these citations were borrowed from Gudelinus.¹⁹⁶ Balduinus has been mentioned already as being a leading French legal humanist,

¹⁹² S.13.80/2.3.80.

¹⁹³ Skene: *De verborum significatione*, “Herrezelda”.

¹⁹⁴ Cairns, Fergus and MacQueen: “Legal humanism in Renaissance Scotland”, 47.

¹⁹⁵ S.10.11/1.10.11.

¹⁹⁶ Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 264. Below, 5.1.4.2.

who: gave historical context to passages of the *Codex*; wrote a commentary on the XII tables; and was the first to write a comprehensive treatise on the interpolations made by Tribonian.¹⁹⁷ He was, like many of his time, a lawyer, a historian and a theologian.¹⁹⁸ He was the professor of both the Roman and Canon laws at Bourges, Strasbourg, Heidelberg, and at Angers. He wrote various treatises on the law; his *Commentarij Institutiones iuris civilis* was cited by Stair. Yet the small sample of library catalogues consulted indicates there may have been limited interest in his works in Scotland. None are listed in either the 1683 or 1692 catalogues of the Advocates' Library, or in the journal of Lord Fountainhall.¹⁹⁹

Connanus (1508-1551) studied law at Orleans and later at Bourges under Alciatus. He went on to practise law and became a powerful public figure. He was regarded as one of the greatest jurists of his time and his commentary was highly regarded²⁰⁰ and was one in which he attempted to reorder legal material into a more rational structure.²⁰¹ Connanus was cited three times by Stair, twice on promises and naked pactions,²⁰² and once on specification.²⁰³ None cited any particular treatise, but one gave two passages within an unidentified treatise. One of these three citations of Connanus was correctly suggested by Gordon to have been borrowed from Grotius.²⁰⁴ This thesis shows that all three were in fact borrowed from him.²⁰⁵ Stair's citation of Connanus on three separate occasions probably reflected the popularity of

¹⁹⁷ Above, 3.2.2.

¹⁹⁸ R. Baier: "BAUDOIN (oder BAUDUIN), François" in *B.B.K.L.* volume 22 (2003) columns 61-64 <http://bautz.de/bbkl/b/audoin_f.shtml> accessed 28th February 2010.

¹⁹⁹ Townley: *Best and Fynest Lawers; Catalogus librorum*; Crawford (ed): *Fountainhall's Journals*.

²⁰⁰ E. Holthöfer: "Connan (Connanus), François (1508-1551)" in M. Stolleis (ed): *Juristen: ein biographisches Lexicon von der antike bis zum 20. Jahrhundert* (Munich, 1995 rept. Munich, 2001) 140 generally; C.J. de Ferrière: *The History of the Roman or Civil law: Shewing its Origins and Progress; how, and when the several parts of it were first compil'd; with some account of the principal writers and commentators thereupon: and of the method to be observ'd in studying the same Translated into English by J.B. [John Beaver]* (London, 1724 rept. Clark NJ, 2005), 147.

²⁰¹ Stein: *Roman Law in European History*, 80; M. Scattola: "Scientia iuris and ius naturae: The jurisprudence of the Holy Roman Empire in the seventeenth and eighteenth centuries", 12.

²⁰² S.10.10/1.10.10. The second of these citations appears only in the manuscripts. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 10.78; Adv.MS.25.1.11, fol.124R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 10.78.

²⁰³ S.12.41/2.1.41.

²⁰⁴ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 262.

²⁰⁵ Below, 4.1.6.1, 4.1.8.

Connanus in Scotland. Both the Advocates' Library catalogues and Lord George Douglas' listed a 1610 copy of Connanus' commentary printed at Hanover.²⁰⁶

Cujacius (1520-1590) was professor of law at Cahors, Bourges, Valence, Turin, and Paris. He was a jurist of great reputation, and was known as the greatest textual critic of French legal humanism.²⁰⁷ A scholar writing not long after Stair remarked that: "his Writings have the majestick Gravity of *Papinian*, the rich Abundance of *Ulpian*, the Sweetness and Chastness of *Paul*, and the Conciseness and Sententiousness of *Affricanus*. [*sic*]"²⁰⁸ Stair cited Cujacius three times. First, he cited his commentary on Africanus on risk in sale. Secondly, he gave a general reference to Cujacius on the origin of relief.²⁰⁹ Thirdly, he cited Cujacius' *Observationes et emendationes*²¹⁰, a miscellany of notes and corrections on the law in twenty-eight books.²¹¹ All three of these citations were borrowed, two from Vinnius and one from Craig. Again, Stair's repeated citation of Cujacius probably reflects his popularity in Scotland. Two copies of his *Opera* appeared in the 1683 Advocates' Library catalogue,²¹² although only that printed in Paris in 1658 featured in the 1693 catalogue.²¹³ Fountainhall acquired a copy of his *Observationes et emendationes*, amongst other works.²¹⁴ That Stair borrowed three citations of Cujacius indicates that he was aware of his importance and was drawing on his reputation.

Donellus (1527-1591) taught at Bourges, Heidelberg, Leiden, and Altdorf. His work was highly influential²¹⁵ and his importance in explaining law as a rational

²⁰⁶ Townley: *Best and Fynest Lawyers*, 46; *Catalogus Librorum*, 35. Kelly: *Library of Lord George Douglas*, 51. It is this edition of Connanus which has been examined for this thesis.

²⁰⁷ See e.g. Stein: *Roman law in European History*, 77.

²⁰⁸ de Ferriere: *History of the Roman or Civil law*, 152.

²⁰⁹ S.14.26/2.4.26.

²¹⁰ Consulted in J. Cujacius: *Opera, quae de iure fecit, et edi voluit. Ab ipso auctore postremum recognita & libris quibusdam aucta. In tomos quatuor distincta* (Frankfurt, 1623).

²¹¹ S.-/1.9.4. Kenny explained Cujacius' use of this "selective, unsystematic approach" on the grounds that "he no longer believes that Roman law is a complete, coherent system" [N. Kenny: *The Palace of Secrets: Béroalde de Verville and Renaissance Conceptions of Knowledge* (Oxford, 1991 rept. Oxford, 2001), 48 n.155]. It is interesting to note that printing of this treatise began before Labbitus' *Index* was printed.

²¹² Townley: *Best and Fynest Lawyers*, 44.

²¹³ *Catalogus Librorum*, 8. Other works of Cujacius are listed in the *Catalogus Librorum*, 8, 36.

²¹⁴ Crawford (ed): *Fountainhall's Journals*, 291.

²¹⁵ Feenstra: "Hugues Doneau et les juristes Néerlandais du XVII^e siècle: l'influence de son << système >> sur l'évolution du droit privé avant le Pandectisme", 234-243.

discipline has already been noted.²¹⁶ Stair referred to Donellus only once in the *Institutions*.²¹⁷ No particular treatise was cited, but it could be presumed that the citation would be of Donellus' commentary. Whether this citation was borrowed, and if so from which source, is unclear. Donellus' work seems to have been popular among Scottish advocates. Lord George Douglas owned three of Donellus' treatises: his *Commentarii absolutissimi*, his commentary on D.50.17, and his *Commentaria iuris civilis*.²¹⁸ All three of these works, and his commentary on the *Codex*, appeared in the 1683 catalogue of the library of the Faculty of Advocates.²¹⁹ Five copies of works by Donellus feature in the 1692 catalogue, including his *Commentaria iuris civilis*.²²⁰ Fountainhall did not list Donellus in his journal, although he may have acquired copies of his works before that catalogue of purchases was started.²²¹

Duarenus (1509-1559) was a professor of law at Bourges and Paris.²²² Duarenus' *Epitome* has already been discussed as encouraging "treat[ment of] the material of the Corpus iuris in a more rational and systematic way".²²³ This was a tract on the teaching of law, in which

After castigating the customary teaching methods, he argued that law should be expounded in the same way as other sciences, by proceeding from what is universal and familiar to us to what is particular. To this end he commended the briefer and more systematic approach of the Institutes as superior to any other.²²⁴

Stair cited this work when he lauded those who tried to treat law as a rational discipline in "Common Principles".²²⁵ It is unclear whether Stair consulted this work directly or whether he borrowed the citation from another, unknown source. Stair also cited Duarenus' *In primam partem Pandectarum, sive Digestorum, methodica*

²¹⁶ Above, 3.2.2.

²¹⁷ S 10.54/1.13.8.

²¹⁸ Kelly: *Library of Lord George Douglas*, 60.

²¹⁹ Townley: *Best and Fynest Lawers*, 46-7.

²²⁰ *Catalogus Librorum*, 9 and 65.

²²¹ His earlier catalogue was kept "in the little black-skinned book", see Crawford (ed): *Fountainhall's Journals*, 290.

²²² J. Otto: "Duaren (Duarenus), François (1509-1559)" in M. Stolleis (ed): *Juristen: ein biographisches Lexicon von der antike bis zum 20. Jahrhundert* (Munich, 1995 rept. Munich, 2001) 186, 186.

²²³ Stein: "Donellus and the origins of the modern civil law", 443. Above, 3.2.2.

²²⁴ Stein: *Roman law in European History*, 80.

²²⁵ S.1.16/1.1.17.

enarratio along with Didacus Covarruvias, Bartholomaeus Chassanaeus and Matthaeus Wesenbecius on the power of a husband.²²⁶ Gordon correctly suggested that these citations were borrowed from Gudelinus.²²⁷ The sample library catalogues suggest there may have been limited interest in Duarenus' treatises in Scotland. Neither Lord George Douglas nor Fountainhall appear to have owned one, although Duarenus was included in Fountainhall's journal in a list of jurists who taught at Bourges, so he was generally aware of him.²²⁸ Two copies of Duarenus' *Opera omnia* (in which his *Digestorum methodica enarratio* and *Epitome* were printed) were, however, listed in the catalogues of the Advocates' Library.²²⁹

Petrus Gregorius (1540-1597), often styled "of Toulouse" (*Tholosanus*), taught at Cahors. Stair cites Gregorius once but does not refer to any treatise. Dolezalek noted that "lawyers everywhere liked to consult the encyclopaedic work *Syntagma*...because it gave a good survey of the law."²³⁰ Stair's reference to Gregorius almost certainly refers to this work, although his summary of Gregorius does not seem to be quite correct. This may indicate either that the reference was borrowed, or that Stair's expression is unclear. Copies of Gregorius' *Syntagma* were owned by both the Advocates' Library in 1683 and Lord George Douglas.²³¹ The 1692 catalogue of the Advocates' Library also listed other works by Gregorius.²³² While Fountainhall's journal did not list the purchase of any of Gregorius' treatises, he mentioned Gregorius in the body of the journal.²³³

Claudius Salmasius (1588-1653) was an advocate in Dijon who taught at Leiden from 1631. Here he wrote his greatest work (published anonymously), *Defensio regia, pro Carolo I. ad serenissimum Magna Britanniae Regem Carolum II. filium natu majorem, heredem & successorem legitimum* (Leiden, 1649). Although highly esteemed on its initial publication, it was challenged by John Milton's *Pro populo anglicano defensio: contra Claudii anonymi, alias Salmasii, Defensionem*

²²⁶ S.4.8/1.4.12.

²²⁷ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 263. Below, 5.1.1.

²²⁸ Crawford (ed): *Fountainhall's Journals*, 66.

²²⁹ Townley: *Best and Fynest Lawers*, 48; *Catalogus librorum*, 9.

²³⁰ G.R. Dolezalek: "French legal literature quoted by Scottish lawyers 1550-1650" in B. d'Alteroche et al (eds): *Mélanges en l'Honneur d'Anne Lefebvre-Teillard* (Paris, 2009) 375, 385.

²³¹ The 1582 Leiden edition was held by the Advocates' Library, see Townley: *Best and Fynest Lawers*, 106. The 1611 edition of Orleans was owned by Lord George Douglas, see Kelly: *Library of Lord George Douglas*, 72.

²³² *Catalogus Librorum*, 13 and 41.

²³³ Crawford (ed): *Fountainhall's Journals*, 36.

regiam (London, 1651).²³⁴ Stair cited Salmasius without referring to any particular treatise. Given that the context of the citation was *mutuum*, one may be able to deduce that it may have been to Salmasius' *Diatriba de mutuo non esse alienationem: adversus Coprianum* (Edition consulted: Leiden, 1640) that Stair intended to refer. Salmasius' *Diatriba* and his *Defensio regia pro Carolo I*, along with other works, were listed in the catalogue of Lord George Douglas.²³⁵ Only his *Defensio regia pro Carolo I* featured in the 1683 catalogue of the Advocates' Library,²³⁶ although other treatises were also acquired by the library by 1692.²³⁷

Wesenbecius (1531-1586) was educated at Leuven, and later studied and taught at Jena before becoming professor of law teaching the *Codex* at Wittenberg. He was a brilliant and prolific scholar of Roman law. His most noted work was his *Pandectae iuris civilis, & codicis Iustiniani, libros commentarij: olim paratitla dicti: nunc ex postrema ipsius authoris, necnon aliorum quorundam iurisconsultorum recognitione multo quam antehac emendatius editi cum indice gemino* (Edition consulted: Frankfurt, 1619). It went through many subsequent editions and was used for over a century.²³⁸ Stair cited it with Duarenus, Chassaneus, Covarruvias and Gudelinus. Gordon correctly showed that these citations were borrowed from Gudelinus.²³⁹ Stair also cited "Wesenbecius, Faber and others" in his discussion of earnest in sale.²⁴⁰ Gordon correctly noted that Wesenbecius' *Paratitla* was cited with Faber by Vinnius,²⁴¹ who was Stair's source.²⁴² Wesenbecius was certainly well known in Scotland. Skene was one of his pupils at Wittenberg, and recognised Wesenbecius' influence in *De verborum significantione*.²⁴³ Lord George Douglas owned a copy of his *Paratitla*, which was bound with his treatise on Feudal law.²⁴⁴

²³⁴ e.g. W.J. Grace: "Milton, Salmasius, and the natural law" (1963) 24(3) *Journal of the History of Ideas* 323-336 *passim*.

²³⁵ Kelly: *Library of Lord George Douglas*, 118.

²³⁶ Townley: *Best and Fynest Lawers*, 104.

²³⁷ *Catalogus Librorum*, 26 and 75.

²³⁸ M. Ahsmann: "Wesenbeck, Matthaeus (1531-1586)" in M. Stolleis (ed): *Juristen: ein biographisches Lexicon von der antike bis zum 20. Jahrhundert* (Munich, 1995 rept. Munich, 2001) 669 generally; *Allgemeine deutsche Biographie & Neue deutsche Biographie* volume 42 (Leipzig, 1897), 134-139.

²³⁹ S.4.8/1.4.12. Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 263.

²⁴⁰ S.10.65/1.14.3.

²⁴¹ Vinnius: *Commentary on Inst.3.23pr* (as *Inst.3.24pr*), 13; Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 257-258.

²⁴² Below, 6.1.3.

²⁴³ Above, 3.2.2.1.

²⁴⁴ Kelly: *Library of Lord George Douglas*, 135.

Fountainhall referred to him in his journal.²⁴⁵ Finally, one of his works was listed in the 1692 Advocates' Library catalogue.²⁴⁶

Zasius (1461-1535) was a leading legal humanist and a professor at Freiburg.²⁴⁷ Stair cited his lectures on *De verborum obligatione*, specifically that on D.45.1.107, with Matthaeus Stephanus, on the German law on the emancipation of children.²⁴⁸ Although neither Lord George Douglas nor Fountainhall listed any of Zasius' treatises in their catalogues, copies of two of his other works were present in the 1683 and 1692 catalogues of the Advocates' Library.²⁴⁹ The particular treatise which Stair cited may not have been particularly sought by Scottish advocates.

3.2.3 Second Scholasticism

The term 'scholasticism' was first used by sixteenth-century humanists to disparage the scholarship of the old-fashioned Middle Ages.²⁵⁰ Southern applied the term 'scholastic humanism' to the "urgent and consistent effort to enlarge the field of natural reason"²⁵¹ in the twelfth and thirteenth centuries, which was particularly attractive to lawyers.²⁵² It was a continuation of this method "which went on developing for two hundred years until it was submerged in a sea of doubts and contradictions in the schools of the early fourteenth century".²⁵³ A similar definition of scholasticism can be found in McGrath:

scholasticism is best regarded as the medieval movement, flourishing in the period 1200-1500, which placed emphasis on the rational justification of religious belief and the systematic presentation of those beliefs.

²⁴⁵ Crawford (ed): *Fountainhall's Journals*, 122.

²⁴⁶ *Catalogus Librorum*, 29.

²⁴⁷ J. Otto: "Zasius, Ulrich (1461-1535)" in M. Stolleis (ed): *Juristen: ein biographisches Lexicon von der antike bis zum 20. Jahrhundert* (Munich, 1995 rept. Munich, 2001) 686 generally; G. Kaller: "ZASIUS (Zäsi), Ulrich" in *B.B.K.L.* volume 14 (1998) columns 357-359 <<http://bautz.de/bbkl/z/zasius.shtml>> accessed 14th July 2009. For a comprehensive account of his life, S.W. Rowan: *Ulrich Zasius: A jurist in the German Renaissance, 1461-1535* (Frankfurt, 1987), esp. 14-202.

²⁴⁸ S.5.13/1.5.13

²⁴⁹ Townley: *Best and Finest Lawyers*, 114; *Catalogus librorum*, 29, 80.

²⁵⁰ A.E. McGrath: *Reformation Thought: An introduction* (3rd edition, Oxford, 1999 rept. Oxford, 2001), 66-67.

²⁵¹ R.W. Southern: *Scholastic Humanism and the Unification of Europe* (Oxford, 1995-2001) volume 1, 18.

²⁵² Southern: *Scholastic Humanism* volume 1, 58.

²⁵³ Southern: *Scholastic Humanism* volume 1, 21.

‘Scholasticism’ thus does not refer to a *specific system of beliefs*, but to a *particular way of doing and organizing* theology – a highly developed method of presenting material, making fine distinctions, and attempting to achieve a comprehensive view of theology.²⁵⁴

Second scholasticism was a later adaptation, the result of the sixteenth-century revival of medieval scholasticism by Catholic religious orders.²⁵⁵ The scholars within these orders were generally intensely loyal to the earlier ideas and scholarship of their order’s previous masters.²⁵⁶ This led to the formation of schools of second scholasticism being established in the different orders: Thomism was strictly adhered to by the Dominicans,²⁵⁷ Scotism²⁵⁸ and Ockhamism²⁵⁹ were Franciscan schools, and in the seventeenth century Suarezianism and Molinism became popular amongst the Jesuits.²⁶⁰ Second scholasticism was thus heavily, if not exclusively,²⁶¹ associated with Catholicism and Catholic theology.²⁶² This led to tension between the predominantly-Catholic scholastic movement and the post-Reformation rise in Protestant scholarship. Goss noted that the scholastic method was used “to respond to Protestant reformers”,²⁶³ notably by the Jesuits who “gave a rigorous articulation of

²⁵⁴ A.E. McGrath: *Christian Theology: An Introduction* (5th edition, Chichester, 2010), 29; McGrath: *Reformation Thought*, 67.

²⁵⁵ R.E. Goss: “The first meeting of Catholic scholasticism with dGe lugs pa [i.e. Tibetan] scholasticism” in J.I. Cabezon (ed): *Scholasticism: Cross-Cultural and Comparative Perspectives* (Albany NY, 1998) 65, 71. For an account of logic in medieval scholasticism, A. Broadie: *Introduction to Medieval Logic* (2nd edition, Oxford, 1993 rept. Oxford, 2002) generally.

²⁵⁶ J.E. Gurr: “Modern or middle scholasticism” in *New Catholic Encyclopedia* volume 12 (New York, 1967) 1158, 1159.

²⁵⁷ Following the teachings of St Thomas Aquinas (1225–1274) who dismissed “both the Averroistic interpretations of Aristotle and the Franciscan tendency to reject Greek philosophy. The result was a new *modus vivendi* between faith and philosophy which survived until the rise of the new physics.” [R. McNerny and J. O’Callaghan: “Saint Thomas Aquinas” *The Stanford Encyclopedia of Philosophy* (September 2009 edition) <<http://plato.stanford.edu/entries/aquinas/>> accessed 6th September 2010].

²⁵⁸ Following the teachings of John Duns Scotus (c.1265–1308), a Scot educated in England and Paris who taught there and in Cologne. On whom, A. Broadie: *A History of Scottish Philosophy* (Edinburgh, 2009), 7–33; G. Leff: “Duns Scotus, John (c.1265–1308)” *O.D.N.B.* (Oxford, 2004; online edition, January 2008) <<http://www.oxforddnb.com/view/article/8285>> accessed 2nd March 2010.

²⁵⁹ Following the teachings of William of Ockham (c.1287–1347), a English monk who was excommunicated after claiming that Pope John XXII was a heretic who had forfeited the papacy. P.V. Spade: “William of Ockham” *The Stanford Encyclopedia of Philosophy* (July 2006 edition) <<http://plato.stanford.edu/entries/ockham/>> accessed 6th September 2010.

²⁶⁰ Followers of Suarez. Gurr: “Modern or middle scholasticism”, 1158–1160.

²⁶¹ Gurr: “Modern or middle scholasticism”, 1162. Reid: “Thomas Aquinas and Viscount Stair”, 201–202.

²⁶² On Catholic scholasticism, C. Bergfeld: “Katholische Moraltheologie und Naturrechtslehre” in H. Coing (ed): *Handbuch der Quellen und Literatur der neueren Europäischen privatrechtsgeschichte* volume 2.1 (Munich, 1977) 999, 1016–1029.

²⁶³ Goss: “The first meeting of Catholic scholasticism with dGe lugs pa scholasticism”, 72.

second scholasticism, producing their texts in defense of Catholic Christianity and the papacy.”²⁶⁴

The founder of the Jesuits, Ignatius of Loyola (1491-1556), like Melville in Scotland, outlined a curriculum for Jesuit scholastic teaching:

a rigorous three-year philosophical curriculum covering logic, natural and moral philosophy, metaphysics, rational psychology, and scholastic and positive theology. With a foundation in the study of classical languages, grammar, rhetoric, and Latin and Greek literature, the Jesuit student then pursued scholastic philosophy. Humanist classical studies was propaedeutic to the study of scholastic philosophy.²⁶⁵

Goss explained that this pedagogy led to “an explosion of Jesuit scholarship” in various subjects.²⁶⁶ Gurr noted that the Jesuits were less constrained by the opinions of their order’s intellectual masters, which meant that their work showed a greater independence of thought.²⁶⁷ Despite being derived from the methodological basis of medieval scholasticism, second scholasticism differed in its method, if perhaps not significantly. Goss explained that there was in second scholasticism a greater emphasis on “dogmatic theses and proof”, creating what he described as the “apologetic syllogistic method of second scholasticism” (debate where conclusion is based on two related propositions).²⁶⁸

Although second scholasticism was a movement most notably associated with theology, various second scholastics wrote on the law.²⁶⁹ Bellomo explained that the flourish of second scholasticism came during the Golden Age of Spanish Empire during the fifteenth to seventeenth centuries “when, for the first time, they found themselves face to face with unknown lands and ‘savage’ and ‘infidel’ peoples.”²⁷⁰ This and a rise in commercial activity posed questions of moral and legal philosophy. Gurr noted that several jurists – including Franciscus Vitoria, a sixteenth-century Dominican second scholastic, and Franciscus Suarez, a late-sixteenth- to early-

²⁶⁴ Goss: “The first meeting of Catholic scholasticism with dGe lugs pa scholasticism”, 73.

²⁶⁵ Goss: “The first meeting of Catholic scholasticism with dGe lugs pa scholasticism”, 71.

²⁶⁶ Goss: “The first meeting of Catholic scholasticism with dGe lugs pa scholasticism”, 72.

²⁶⁷ Gurr: “Modern or middle scholasticism”, 1160.

²⁶⁸ Goss: “The first meeting of Catholic scholasticism with dGe lugs pa scholasticism”, 72.

²⁶⁹ Bergfeld: “Katholische Moralthologie und Naturrechtslehre”, 1017.

²⁷⁰ M. Bellomo: *The Common Legal Past of Europe: 1000-1800* (trans. L.G. Cochrane) (Washington, 1995), 225.

seventeenth-century second scholastic – should be lauded for “their brilliant reworking of the scholastic position on warfare.”²⁷¹ Vitoria argued that the Holy Roman Emperor’s authority did not reach these new lands, that the pope had no power over these non-Christians, and that as a result relations must be governed by the *ius gentium*.²⁷² Among the jurists who developed these arguments was Didacus Covarruvias, a sixteenth-century second scholastic cited by Stair.²⁷³

3.2.3.1 *Second Scholasticism in Scotland*

There was a significant Scottish contribution to scholasticism. Scotism, as has been shown, was named for John Duns Scotus (c.1265–1308), the official doctor of the Franciscan scholastics.²⁷⁴ The “last great flowering” of Scots scholastic scholarship was in the works of John Mair (c.1467–1550) and his circle.²⁷⁵ He was “one of the last of the major scholastic thinkers”, and his theories of international law were influential on leading second scholastics Vitoria, his pupil, and Suarez.²⁷⁶

Yet, despite there having been Scottish participation in scholasticism before the Reformation, there was little acceptance of it thereafter.²⁷⁷ The universities began to adopt humanist rather than scholastic methods; Melville’s “revised curriculum epitomised the new humanist and Ramist values designed to replace the old scholasticism.”²⁷⁸ The pupils of the Scottish scholastics did not follow their masters.

²⁷¹ Gurr: “Modern or middle scholasticism”, 1161.

²⁷² Stein: *Roman law in European History*, 94-95.

²⁷³ Stein: *Roman law in European History*, 95.

²⁷⁴ Above, 3.2.3.

²⁷⁵ Broadie: *History of Scottish Philosophy*, 89. On which, A. Broadie: *The Tradition of Scottish Philosophy* (Edinburgh, 1990), 20-26.

²⁷⁶ Broadie: *History of Scottish Philosophy*, 54. See also A. Broadie: “Mair, John (c.1467–1550)” *O.D.N.B.* (Oxford, 2004; online edn, May 2006) <<http://www.oxforddnb.com/view/article/17843>> accessed 18th February 2010]. Mair was nonetheless “not wholly opposed to the encroachment of renaissance humanism.” [Broadie: *History of Scottish Philosophy*, 48]. There does not, however, seem to be much support for the suggestion that Mair was a humanist made in J. MacQueen: “Aspects of humanism in sixteenth- and seventeenth-century literature” in J. MacQueen (ed): *Humanism in Renaissance Scotland* (Edinburgh, 1990) 10, 19-20; J. MacQueen: “Conclusion” in J. MacQueen (ed): *Humanism in Renaissance Scotland* (Edinburgh, 1990) 178, 178.

²⁷⁷ Broadie: *History of Scottish Philosophy*, 102.

²⁷⁸ J. Kirk: “‘Melvillian’ reform in the Scottish universities” in A.A. MacDonald, M. Lynch and I.B. Cowan (eds): *The Renaissance in Scotland: studies in literature, religion, history, and culture offered to John Durkhan* (Brill’s Studies in Intellectual History series volume 54, Leiden, 1994) 276, 282.

George Buchanan, a pupil of Mair, was later critical of him, although probably still influenced by Mair's teaching.²⁷⁹ As Broadie aptly summarised:

There were valuable gains made by the circle of John Mair in the first few decades [of the sixteenth century], and there was a great loss in so far as most, if not all of the advances made by those immensely able men were discarded by the generation of philosophers which followed them.²⁸⁰

3.2.3.2 *Second scholastics who were cited by Stair*

Stair's citation of second scholastics shows that he drew on the works of jurists who held religious views incompatible with his own. This in turn indicates that he was not inclined to cite jurists because he had sympathy with their religious views. Rather, it seems that Stair selected his sources on the basis of their reputations, and their usefulness and relevance to his own writing.

While many prominent names were associated with the second scholasticism, three are of particular relevance here. Ludovicus Molina (1535-1600) studied Jurisprudence, Philosophy and Theology at leading universities in Spain and Portugal. He later taught Philosophy at Coimbra, Evora, Cuenca and Madrid.²⁸¹ His principal legal work, *De justitia et jure opus in sex tomos divisum* (edition consulted: Mainz, 1659), quickly gained a formidable reputation. Molina was cited by Stair only once, in his discussion of *jus quaesitum tertio*.²⁸² The passage of Molina cited was not on the same topic as Stair's; this generated speculation as to Stair's reason for citing Molina.²⁸³ Richter recently settled this debate by showing that Stair borrowed this citation from Grotius.²⁸⁴ There may have been limited interest in Molina's work in mid-to-late seventeenth-century Scotland; no work of Molina is listed in any of the four library catalogues consulted.

²⁷⁹ I.D. McFarlane: *Buchanan* (London, 1981), 27-28.

²⁸⁰ Broadie: *Tradition of Scottish Philosophy*, 88-89 and on this period generally, 74-91.

²⁸¹ F. Ross: "Molina, Luis de (1535-1600)" in M. Stolleis (ed): *Juristen: ein biographisches Lexicon von der antike bis zum 20. Jahrhundert* (Munich, 1995 rept. Munich, 2001) 449, 449; M. Plathow: "MOLINA, Luis de" in *B.B.K.L.* volume 6 (1993) columns 43-44 <http://bautz.de/bbkl/m/molina_1.shtml> accessed 14th July 2009.

²⁸² S.10.5/1.10.5.

²⁸³ Rodger: "Molina, Stair and the *JQT*" generally; J.T. Cameron: "*Jus Quaesitum Tertio*: The true meaning of Stair I.x.5" [1961] *Jur.Rev.* 103-118 generally.

²⁸⁴ Richter: "Molina, Grotius, Stair and the *JQT*", 221-222. See below, 4.1.6.1.

Covarruvias (1512-1577) was a professor of Canon law at Salamanca and Bishop of Segovia.²⁸⁵ Although he was a leading figure in the scholastic school of Salamanca,²⁸⁶ Van Liere has found both humanist and scholastic influences in five of the orations which Covarruvias gave when a student at Salamanca.²⁸⁷ His later work also showed humanist traits, including classical and Greek references. Seelmann noted: “*wird er mitunter in die näha des juristischen humanismus gerückt* [he sometimes moved into the realms of legal humanism]”.²⁸⁸ Stair cited Covarruvias’ *In librum quartum Decretalium epitome* (edition consulted: Salamanca, 1556) in his discussion of the husband’s power over his wife.²⁸⁹ Gordon correctly suggested that this citation was borrowed from Gudelinus.²⁹⁰ There seems to have been some interest in Covarruvias’ works in Scotland: copies of his *Opera omnia* were listed in the library catalogue of Lord George Douglas,²⁹¹ and in the 1683 and 1692 catalogues of the Advocates’ Library.²⁹²

Antonius Gomezius (1500-1572) was a student and later a professor at the University of Salamanca.²⁹³ Along with Gudelinus and Corvinus, his *Commentaria, variaque resolutiones juris civilis, communis et regii, tomi tres* (Edition consulted: Leiden, 1585) was cited in the first and second versions on naked pactions.²⁹⁴ This citation was removed for the third version even though the surrounding discussion, and the citations of Gudelinus and Corvinus also given therein, was retained.²⁹⁵

²⁸⁵ K. Seelmann: “Covarubias (Covarruvias) y Leyva, Diego de (1512-1577)” in M. Stolleis (ed): *Juristen: ein biographisches Lexicon von der antike bis zum 20. Jahrhundert* (Munich, 1995 rept. Munich, 2001) 148 generally.

²⁸⁶ J. Bordat: “Covarruvias y Leyva, Diego de (Didacus Covarruvias)” in *B.B.K.L.* volume 29 (2008) columns 319-322 <http://bautz.de/bbkl/c/covarruvias_y_1_d.shtml> accessed 14th July 2009.

²⁸⁷ K.E. van Liere: “Humanism and scholasticism in sixteenth-century academe: five student orations from the University of Salamanca” (2000) 53(1) *Renaissance Quarterly* 57-107 *passim*.

²⁸⁸ Seelmann: “Covarubias (Covarruvias) y Leyva, Diego de (1512-1577)”, 149.

²⁸⁹ S.4.8/1.4.12.

²⁹⁰ Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 263. Below, 5.1.1.

²⁹¹ Kelly: *Library of Lord George Douglas*, 55.

²⁹² Townley: *Best and Fynest Lawyers*, 41; *Catalogus librorum*, 8.

²⁹³ N. Reichardt: “Gómez, Antonio (nach 1500 – vor 1572)” in M. Stolleis (ed): *Juristen: ein biographisches Lexicon von der antike bis zum 20. Jahrhundert* (Munich, 1995 rept. Munich, 2001) 252 generally.

²⁹⁴ S.10.7/1.10.7. 1662 stem: Adv.MS.25.1.8, 10.5; Adv.MS.25.1.10, 10.6; Adv.MS.25.1.11, fol.89R. 1666 stem: Adv.MS.25.1.5, 10.6; Adv.MS.25.1.7, 10.5; Adv.MS.25.1.12, 10.6.

²⁹⁵ As this citation will be shown to have been borrowed from Grotius, its select removal does not lend authority to the suggestion that Stair also used, although he did not cite, another second scholastic, Francisco Suarez (1548-1617), as is suggested by Hutton: “Stair’s philosophic precursors”, esp. 89-91.

Gordon was the first to notice this citation.²⁹⁶ He did not speculate as to whether Stair may have consulted Gomezius, only that Stair's citation of him "does not seem to come from Gudelinus."²⁹⁷ Instead, it was borrowed from Grotius.²⁹⁸ Although no treatise by Gomezius featured in the library of Lord George Douglas or the journal of Lauder of Fountainhall, a copy of his *Commentaria, variaque resolutiones* is listed in both the 1683 and 1692 catalogues of the Advocates' Library.²⁹⁹

3.2.4 Jurists who wrote on French law

A number of sixteenth-century French jurists wrote tracts on local or national law and practice, sometimes in addition to works on legal humanism. These lawyers built on the *mos italicus*, which was still the more important tradition (as opposed to legal humanism) in practice.³⁰⁰ Perhaps the leading jurist of this sort was Carolus Molinaeus (1500-1566), an advocate who wrote commentaries on the Custom of Paris, on general French custom, and on the Edict of Henry II. He was consulted on matters of practice, as his *Consilia et responsa juris analytica* (Leiden, 1560) shows.³⁰¹ Another leading French national jurist was Guido Conchyleus (1523-1603), an accomplished advocate who wrote commentaries on the customs of Nivernais, and the *Institutions au droit des François* (Paris, 1607).³⁰² Some jurists wrote on French national law and wrote humanist works. Rebuffus was known principally as a Canonist and a legal humanist, but Stair cited his commentary on royal constitutions, designed to be useful in practice, and thus Rebuffus will be discussed here. Stair cited two other jurists in his titles on obligations relevant here: Nicholas Boerius and Bartholomaeus Chassanaeus. That Stair cited works written specifically for practice mirrors his own focus on writing for and on practice, as

²⁹⁶ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 264.

²⁹⁷ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 264.

²⁹⁸ Below, 4.1.6.1.

²⁹⁹ Townley: *Best and Fynest Lawyers*, 60; *Catalogus librorum*, 12.

³⁰⁰ N. Kenny: *The Uses of Curiosity in Early Modern France and Germany* (Oxford, 2004), 86; Wijffels: "The civil law", 401; D.K. Shuger: *The Renaissance Bible: Scholarship, Sacrifice and Subjectivity* (Berkeley CA, 1994 rept. 1998), 61.

³⁰¹ J. Otto: "DuMoulin (Molinaeus), Charles (1500-1566)" in M. Stolleis (ed): *Juristen: ein biographisches Lexicon von der antike bis zum 20. Jahrhundert* (Munich, 1995 rept. Munich, 2001) 188, 189.

³⁰² E. Holthöfer: "Coquille (Conchyleus), Guy (1523-1603)" in M. Stolleis (ed): *Juristen: ein biographisches Lexicon von der antike bis zum 20. Jahrhundert* (Munich, 1995 rept. Munich, 2001) 143 generally.

witnessed in his lecture for admission as an advocate in 1648 (which was untypical because it concerned Scottish practice),³⁰³ his *Institutions* (which presupposed knowledge of practice) and his *Decisions* (printed for practical use). His use of these particular works also agrees with their use in earlier Scottish legal writings “as models for the interpretation of parallel institutions in Scottish domestic law”.³⁰⁴

Boerius (1469-1539) was the principal judge of the court of appeal in Bordeaux. He was best remembered for his *Decisiones Burdegalenses summa diligentia et eruditione collectae et explicatae* (Leiden, 1566), a collection of the decisions of the *Parlement* with reflections on Canon and criminal law. Stair cited his *Consuetudines infrascriptarum civitatum & Provinciarum Galliae ... Commentariis singulae illustratae. Nunc autem recognitae, dispunctae ac distinctae melius a Dionysio Gothofredo... (Bituricensis)* (Edition consulted: Frankfurt, 1598) in conjunction with Balduinus and Rebuffus. Boerius’ *Consuetudines* was an exploration of French customary law and went through a number of editions.³⁰⁵ Gordon correctly suggested that this citation was borrowed, with citations of Balduinus and Rebuffus, from Gudelinus.³⁰⁶ No copies of the *Consuetudines* were listed in the four library catalogues consulted; Boerius’ *Decisiones Burdegalenses* was listed in the Advocates’ Library’s 1683 and 1693 catalogues.³⁰⁷ Although this small sample seems to indicate that interest in the *Consuetudines* in Scotland may have been limited, Boerius was cited by Skene³⁰⁸ and in the 1641 trial of the Earl of Montrose.³⁰⁹

Chassanaeus (1480-1541) was a doctor *iuris utriusque* educated at Dole, Poitiers, Turin and Pavia.³¹⁰ Stair cited his most renowned treatise, *Consuetudines ducatus Burgundiae fereque totius Galliae* (Edition consulted: Leiden, 1574), as

³⁰³ Above, 1.2.2.

³⁰⁴ Dolezalek: “French legal literature quoted by Scottish lawyers 1550-1650”, 385-386. Spottiswoode, for example, cited Boerius and Chassanaeus, and Craig cited Rebuffus [Cairns: “*Ius civile* in Scotland, ca. 1600”, 152, 164].

³⁰⁵ It was the 1598 edition printed in Frankfurt which was examined for this thesis.

³⁰⁶ Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 264.

³⁰⁷ One printed 1547 and the other 1593; Townley: *Best and Fynest Lawyers*, 30-31; *Catalogus Librorum*, 4.

³⁰⁸ Dolezalek: “French legal literature quoted by Scottish lawyers 1550-1650”, 386.

³⁰⁹ Dolezalek: “French legal literature quoted by Scottish lawyers 1550-1650”, 389.

³¹⁰ E Holthöfer: “De Chasseneuz (De Chassaneo), Bartholomaeus (1480-1541)” in M. Stolleis (ed): *Juristen: ein biographisches Lexicon von der antike bis zum 20. Jahrhundert* (Munich, 1995 rept. Munich, 2001) 161, 161.

authority for a wife being in the power of her husband in French law.³¹¹ The citation was given with those of Covarruvias, Duarenus, Gudelinus and Wesenbecius. Gordon correctly suggested that Gudelinus was Stair's source for the other four citations. A 1599 copy of his *Consuetudines* was listed in the 1692 catalogue of the Advocates' Library, and a 1547 copy was owned by Lord George Douglas.³¹² Dolezalek has found references to Chassanaeus in Skene, Sinclair's *practicks*, and Spottiswoode's *practicks*.³¹³

Rebuffus (1487-1557) was a professor at the University of Paris. Principally a Canonist, he considered Canon and Roman law to have been intrinsically linked. He had a particular interest in benefices, a topic on which he often published.³¹⁴ However, Stair did not cite any of Rebuffus' works on Canon law but rather his *In constitutiones regias Gallicas commentarius: Ob ipsa juris Romani fundamenta, ad planiorem rationis & veritatis intellectum reducta & ad usum practicum accommodata, non solum in Scholis, sed & in foro versantibus utilissimus* (Edition consulted: Amsterdam, 1668), a treatise designed to be useful in practice. Gordon correctly suggested that this citation was borrowed from Gudelinus along with those to Boerius and Balduinus.³¹⁵ None of Rebuffus' works are listed in the 1683 Advocates' Library catalogue, although his *Commentaria in constitutiones regias Gallicas* and another treatise had been acquired by 1692.³¹⁶ No work by Rebuffus is listed in the catalogue of the library of Lord George Douglas or in the journal of Lord Fountainhall. This would seem to indicate that interest in Rebuffus' works in Scotland may have been limited, but, given his non-canonist works were cited four times by Craig, this is perhaps misleading.³¹⁷

3.2.5 **Ultramontani**

³¹¹ S.4.8/1.4.12.

³¹² *Catalogus librorum*, 7; Kelly: *Library of Lord George Douglas*, 43. Chassanaeus is not listed in either the 1683 catalogue of the Advocates Library or in Fountainhall's journal.

³¹³ Dolezalek: "French legal literature quoted by Scottish lawyers 1550-1650", 386-389.

³¹⁴ C. van de Wiel: *History of Canon law* (Louvain Theological and Pastoral Monographs series volume 5, Leuven, 1991), 160.

³¹⁵ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 264. See below, 5.1.4.2.

³¹⁶ *Catalogus Librorum*, 23.

³¹⁷ Cairns: "*Ius civile* in Scotland, ca. 1600", 152.

Stair cited “Faber” in his discussion of earnest in sale without referring to any particular work³¹⁸. There were two noted jurists named Faber: Antonius Faber (1557-1624), who was both a legal humanist and a French national lawyer; and Johannes Faber (d.1340), who belonged to the French school known as the *ultramontani*. Stair borrowed this citation from Vinnius, who cited Johannes Faber.³¹⁹

Johannes Faber was the only jurist of the *ultramontani* cited by Stair. He “acquired a great reputation. He criticised the prolixity of his contemporaries, taught in the French language and became a great authority on the practice of the courts.”³²⁰ He became known as “*pater practicae*”.³²¹ Phillipson showed that his works had an “eminently practical character” typical of the *ultramontani*, who “endeavoured to impart to the customary institutions and political organisation of their time a new vigour and vitality by ingrafting therein principles of Roman law.”³²² Stair cited his *In Iustiniani Imp. Institutiones juris civilis commentarii: cum autographo et nonnullis antea editis exemplaribus collati: multis erroribus purgati, multis quoque (post priorem illam doctiss. Pardulphi Pratei recognitionem) adhuc desideratis Supplementis & Additionibus nunc recens renovati & illustrati* (Leiden, 1593). No work of Johannes Faber was owned by Lord George Douglas or Fountainhall or appeared in the 1683 Advocates’ Library catalogue. However, one of his works was listed in the 1692 catalogue.³²³ It seems Faber’s works were not being sought particularly by Scottish advocates in the mid-to-late seventeenth century.

3.2.6 **Seventeenth-century jurists cited by Stair**

The majority of Stair’s citations of jurists of the sixteenth century and earlier were borrowed from his seventeenth-century sources. Stair cited five seventeenth-century continental jurists, most of whom were from the Low Countries (then the United

³¹⁸ S 10.65/1.14.3.

³¹⁹ Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 257-258. Below, 6.1.3.

³²⁰ J.W. Wessels: *History of the Roman-Dutch Law, with a new introduction by Michael H. Hoeflich* (Grahamstown, 1908 rept. Clark NJ, 2005), 118.

³²¹ C. Phillipson: “Andrea Alciati and his predecessors” in J. MacDonell and E. Manson (eds): *Great jurists of the world, with an introduction by Van Vechten Veeder* (Continental Legal History series volume 2, Boston, 1914) 58, 66.

³²² C. Phillipson: “The great jurists of the world: XVI. Jacques Cujas” (1912) 13(1) *Journal of the Society of Comparative Legislation* 87-107, 88.

³²³ *Catalogus Librorum*, 10.

Provinces of the Netherlands and the Spanish Netherlands). Only these five of the twenty-one jurists cited in the titles on obligations can be shown to have been consulted by Stair.

Hugo Grotius (1583-1645) was educated at Leiden and Orléans and thereafter practised at the Bar at The Hague. He was imprisoned, escaped and fled the country as a consequence of his involvement in the political and religious disturbances of the period. Grotius' two main treatises on the law were *De jure belli ac pacis libri tres, in quibus ius naturae & gentium, item juris publici praecipua explicantur* (Edition consulted: Amsterdam, 1646³²⁴) and *Inleydinge tot de Hollandsche rechtsgeleertheyd* (Haarlem, 1631). *De jure belli* was one of the first treatises on international law, and is the cause of Grotius sometimes being lauded as the founder of modern natural and international law.³²⁵

Natural law theories had already been expounded in the Middle Ages by St. Thomas Aquinas and the second scholastics on the basis of Aristotle.³²⁶ Grotius' theories of natural and international law were influenced by the scholastics.³²⁷ Villa has argued that *De jure belli* was "merely a repetitive echo of principles that had already been commonplace for generations in Spain" and was "virtually bereft of originality".³²⁸ D'Entrèves has argued that what makes Grotius important was his secularisation of natural law.³²⁹ Although the view of Grotius' natural law as secular is widely held,³³⁰ it has been challenged.³³¹ Hallowell suggested that, to make his

³²⁴ As reprinted in Carnegie Classics of International Law series (Washington, 1913).

³²⁵ A.P. d'Entrèves: *Natural law: An introduction to legal philosophy* (2nd edition, London, 1970), 53. On Grotius generally, R. Zimmermann: "Römisch-holländisches Recht – ein Überblick" in R. Feenstra and R. Zimmermann (eds): *Das römisch-holländische Recht-Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (Schriften zur Europäischen Rechts- und Verfassungsgeschichte 7, Berlin, 1992) 9, 26-32.

³²⁶ See e.g. H. Kelsen: "Foundation of the natural law doctrine" (1973) 2(1) *Anglo-American Law Review* 83-111, esp. 103-106; F. Oakley: "Medieval theories of natural law: William of Ockham and the significance of the voluntarist tradition" (1961) 6(1) *Natural Law Forum* 65-83 generally; Reid: "Thomas Aquinas and Viscount Stair", 195-196.

³²⁷ A. Croust: "Hugo Grotius and the scholastic Natural law tradition" (1943) 17(2) *The New Scholasticism* 101-133 generally; d'Entrèves: *Natural law*, 53-54; S.M. Villa: "The philosophy of international law: Suárez, Grotius and epigones" (1997) 37(1) *International Review of the Red Cross* 539-552 generally; P.E. Sigmund: *Natural Law in Political Thought* (Cambridge MA, 1971 rept. Washington, 1982), 64-65.

³²⁸ Villa: "The philosophy of international law: Suárez, Grotius and epigones", 545, 546 respectively.

³²⁹ d'Entrèves: *Natural law*, 54-55.

³³⁰ e.g. R.H. Cox: "Hugo Grotius 1583-1645" in L. Strauss and J. Cropsey (eds): *History of Political Philosophy* (Rand McNally Political Science series, Chicago, 1963) 344, 347.

³³¹ e.g. R. Vetterli and G. Bryner: "Hugo Grotius and Natural law: A reinterpretation" (1993) 22(1) *Political Science Reviewer* 370-402 generally.

theories of natural law acceptable to all Christians, Grotius used common sense and observation as to what was “morally self-evident.”³³² He argued that Grotius’ originality was in his using a new, scientific methodology to derive the principles of natural law.³³³ Sigmund suggested that Grotius “separated natural law from the *theologians* in the sense that he used it for a secular purpose, the creation of an international legal system”.³³⁴ He, like Hallowell, noted the importance of this in post-Reformation Europe: “Grotius’ solution was to make use of natural law, long familiar in the West, but given a new importance because of the religious division of Europe.”³³⁵ He also noted that “It was to a kind of natural theology that Grotius appealed rather than to the modern rationalist’s denial of the relevance of God”.³³⁶ The questions of Grotius’ originality and his formulation of a secularised natural law were recently examined by Haakonssen.³³⁷ He successfully established the differences between the theories of natural law of second scholasticism and Grotius:

The scholastic point was that human beings have the ability to understand what is good and bad even without invoking God but have no obligation proper to act accordingly without God’s command. Grotius is suggesting that people unaided by religion can use their perfect – and even imperfect – rights to establish the contractual and quasi-contractual obligations on which social life rests. God is simply an additional source perceived by Christians...³³⁸

The cause of this difficulty in determining to what extent Grotius’ natural law theory was secular has been identified by Tuck: Grotius made changes to his *Prolegomena* “to make divine law a basis for natural law in a more direct fashion”.³³⁹ These changes meant that God went from the creator of the universe in the 1625 edition of *De jure belli* to the law-giver in the 1631 edition.³⁴⁰ This change may have been to make Grotius’ theories “more acceptable to the Aristotelian, Calvinist culture of his

³³² J.H. Hallowell: *Main Currents in Modern Political Thought* (New York, 1950), 96.

³³³ Hallowell: *Main Currents in Modern Political Thought*, 95.

³³⁴ Sigmund: *Natural Law in Political Thought*, 62.

³³⁵ Sigmund: *Natural Law in Political Thought*, 62.

³³⁶ Sigmund: *Natural Law in Political Thought*, 65.

³³⁷ K. Haakonssen: *Natural law and moral philosophy: from Grotius to the Scottish Enlightenment* (Cambridge, 1996), esp. 15-30.

³³⁸ Haakonssen: *Natural law and moral philosophy*, 29.

³³⁹ R. Tuck: *The Rights of War and Peace: political thought and the international order from Grotius to Kant* (Oxford, 1999), 100.

³⁴⁰ Tuck: *Rights of War and Peace*, 101.

opponents within the United Provinces”³⁴¹ from which he was in exile. The content of Grotius’ work, ideas and theory of natural law and individual rights remained unchanged between editions.³⁴²

Yet Grotius was also influenced by legal humanism. Tuck showed that Grotius’ early life “belonged wholly to the humanist world”, in that his early scholarly works were on topics typical of humanism, such as the writing of poems and histories.³⁴³ He found Grotius’ political writings to have been typically humanist.³⁴⁴ Tuck suggested that the working papers of Grotius’ early legal work, *De Indis* (as called by Grotius, but later known and printed in 1868 as *De jure praedae*), emphasised the difference between his views and those of Vitoria and showed that Grotius did not seem to have been familiar with the more recent scholastic literature.³⁴⁵ E.M. Wilson, however, stated that despite “The Grotian signature of micro-oscillation...between Late Scholasticism and Civic Humanism”,³⁴⁶ “Late Scholasticism must be understood as forming the dominant pole of [*De Indis/De jure praedae*].”³⁴⁷ Tuck also showed that Grotius, like the humanists but unlike the scholastics, stated in both *De Indis/De jure praedae* and *De jure belli* that injury could be inflicted on ‘barbaric peoples’ – “like the good humanist he was”.³⁴⁸ He noted that, in Grotius’ argument of rights of individuals as opposed to nations, “he took the old humanist account of the pursuit of self-interest by individuals or cities, and made it the foundation of an account of rights.”³⁴⁹ Indeed, Tuck said that “Far from being an heir to the tradition of Vitoria and Suarez... he was in fact an heir to the tradition Vitoria most mistrusted, that of humanist jurisprudence.”³⁵⁰ This agrees with Cox’s earlier observation regarding Grotius’ argument that a nation could declare a just war against another state even if neither it, nor any under its

³⁴¹ Tuck: *Rights of War and Peace*, 99.

³⁴² Tuck: *Rights of War and Peace*, 102.

³⁴³ Tuck: *Rights of War and Peace* 78. On Grotius’ poems, A. Eyffinger: “Hugo Grotius, poet and man of letters” in *The World of Hugo Grotius (1583-1645): Proceedings of the International Colloquium organized by the Grotius Committee of the Royal Netherlands Academy of Arts and Sciences, Rotterdam 6-9 April 1983* (Amsterdam, 1984) 83 generally.

³⁴⁴ Tuck: *Rights of War and Peace*, 79.

³⁴⁵ Tuck: *Rights of War and Peace*, 81.

³⁴⁶ E.M. Wilson: *Savage Republic: De Indis of Hugo Grotius, Republicanism and Dutch Hegemony within the Early Modern World System (c.1600-1619)* (Leiden, 2008), 399.

³⁴⁷ Wilson: *Savage Republic: De Indis of Hugo Grotius*, 356.

³⁴⁸ Tuck: *Rights of War and Peace*, 89.

³⁴⁹ Tuck: *Rights of War and Peace*, 90.

³⁵⁰ Tuck: *Rights of War and Peace*, 108.

jurisdiction, had been injured.³⁵¹ He showed that Grotius' quotation from Seneca and citation of Aristotle – and indeed various others – was consistent with humanist influence. Cox also noted that Grotius “explicitly takes issue with writers ... such as Francisco Victoria [Vitoria], who had taught that whoever metes out punishment must either have suffered injury ... or have jurisdiction over him who is attacked.”³⁵² Indeed, Grotius specifically distinguished his view from several scholastics, namely Vitoria, Fernandus Vasquius (a sixteenth-century secular jurist at Salamanca³⁵³), Molina, and Johannes Azorius (a sixteenth-century Jesuit theologian). Brett also argued that Grotius should be distinguished from the scholastic philosophy of natural law. Although she distinguished her conclusions from those of Tuck and Haakonssen,³⁵⁴ her research showed Grotius' theories of civic philosophy were more akin to those of the legal humanists than of the second scholastics. She explained that, by the sixteenth century, there was legal humanist interest in and commentaries on Aristotle, and shows that Connanus drew on both Paul and Aristotle “to create a juridical schema based on a disjunction between the *honestum* and the *utile* ... equity and utility were located in distinct spheres, the sphere of nature and the sphere of the human establishment or the city.”³⁵⁵ Although Brett suggested that *De jure belli* 1.1 reflected a scholastic-Aristotelianism which was likely “straight from Suarez”,³⁵⁶ she showed that his discussions of civil philosophy and of rights owe much to the legal humanist tradition.³⁵⁷ Haagenmacher said that Grotius' work was

a genuine offshoot of legal humanism as it had developed during the sixteenth century along two main lines, the one philological and historical (with scholars like Budé [Budaeus], Cujas [Cujacius] and du Faur [Antonius Faber]), the other dogmatic and systematic (for example, Connan [Connanus], Le Douaren [Duarenus], and Doneau [Donellus]).³⁵⁸

³⁵¹ Grotius: *De jure belli ac pacis*, 2.20.40.

³⁵² Cox: “Hugo Grotius 1583-1645”, 352.

³⁵³ K. Seelmann: “Vasquez de Menchaca, Fernando (1512-1569)” in M. Stolleis (ed): *Juristen: ein biographisches Lexicon von der antike bis zum 20. Jahrhundert* (Munich, 1995 rept. Munich, 2001) 647, 648.

³⁵⁴ A. Brett: “Natural right and civil community: the civil philosophy of Hugo Grotius” (2002) 45(1) *The Historical Journal* 31-51, 32 esp. n.3.

³⁵⁵ Brett: “Natural right and civil community: the civil philosophy of Hugo Grotius”, 35-36.

³⁵⁶ Brett: “Natural right and civil community: the civil philosophy of Hugo Grotius”, 38.

³⁵⁷ Brett: “Natural right and civil community: the civil philosophy of Hugo Grotius”, e.g. 39-41, 44.

³⁵⁸ P. Haagenmacher: “Grotius and Gentili: a reassessment of Thomas E. Holland's inaugural lecture” in H. Bull, B. Kingsbury, and A. Roberts (eds): *Hugo Grotius and international relations* (Oxford, 1990 rept. Oxford, 2002) 133, 161.

The humanist and scholastic influence in Grotius' work was reflected in his pattern of citation. Haagenmacher found in *De Indis/De jure praedae* more citations of canonists,³⁵⁹ medieval commentators,³⁶⁰ and second scholastics³⁶¹ than of legal humanists.³⁶² In *De jure belli*, Grotius included many citations of leading second scholastics: Vitoria was cited almost sixty times and Molina more than twenty times. Bartolus and Baldus were also cited often, both around thirty times. The legal humanists were again cited to a lesser extent: Connanus was cited ten times; Cujacius seven times; and Donellus and Duarenus were both only cited once.³⁶³ Haagenmacher noted that where a jurist was cited repeatedly by Grotius, there was normally some influence, but that there was also important influence on Grotius from the less frequently cited legal humanists.³⁶⁴

The popularity of *De jure belli* is demonstrated by its many editions and reprints; eight before 1659.³⁶⁵ Reeves determined that they fell into two phases: the first being those editions up to and including the soon-standard 1646 edition, and the second being those published thereafter.³⁶⁶ It is unknown how many of these editions circulated in Scotland. The Advocates' Library catalogues listed the 1680 edition.³⁶⁷ Four other works of Grotius were listed in the 1692 catalogue, including the *Inleydinge* and *Mare liberum* (a chapter of *De Indis/De jure praedae* printed separately in Leiden in 1609).³⁶⁸ A copy of the 1680 edition of *De jure belli* was

³⁵⁹ Sylvester Prierias, a sixteenth/seventeenth century Dominican canonist, is cited *circa* ninety times; Pope Innocent IV, a thirteenth century canonist, twenty-five times; and Panormitanus, a fifteenth century canonist, twenty-five times. Haagenmacher: "Grotius and Gentili: a reassessment of Thomas E. Holland's inaugural lecture", 146.

³⁶⁰ Bartolus is cited fifty-seven times; and Baldus fifty-one times. Haagenmacher: "Grotius and Gentili: a reassessment of Thomas E. Holland's inaugural lecture", 146.

³⁶¹ Vasquez de Menchaca, a second scholastic, is cited seventy-four times; and Covarruvias thirty-four times. Haagenmacher: "Grotius and Gentili: a reassessment of Thomas E. Holland's inaugural lecture", 146

³⁶² Donellus is cited nine times; Cujacius six times; Duarenus five times; Connanus three times; Alciatus once; and Budaeus once. Haagenmacher: "Grotius and Gentili: a reassessment of Thomas E. Holland's inaugural lecture", 146 n.51.

³⁶³ All these numbers are according to the entries in the index of Kelsey's translation.

³⁶⁴ Haagenmacher: "Grotius and Gentili: a reassessment of Thomas E. Holland's inaugural lecture", 146-147.

³⁶⁵ All but one were published in Amsterdam: 1625, 1626 (Frankfurt), 1631, 1632, 1642, 1646, 1650, and 1651.

³⁶⁶ Reeves: "Grotius, *De jure belli ac pacis*: a bibliographical account", 255.

³⁶⁷ Townley: *Best and Fynest Lawyers*, 58 plus another work; *Catalogus Librorum*, 68.

³⁶⁸ *Catalogus Librorum*, 41, 68 and 84.

owned by Lord George Douglas.³⁶⁹ Fountainhall's journal stated that he acquired two texts of Grotius,³⁷⁰ although neither were works on law.

Which of Grotius' works were used by Stair? Grotius' *Inleydinge* has been shown elsewhere not to have been a source.³⁷¹ Campbell showed that Grotius' *De jure belli* was not a source for the arrangement of the titles of the *Institutions*;³⁷² it will be shown, however, to have been an important source for its content. Grotius was the jurist cited most often by Stair: there were nine citations of Grotius in the third version; ten in the second. An additional citation of Grotius has been found in the manuscripts.³⁷³ Several scholars have in recent years debated the extent of Grotius' influence on Stair. Most relevant to this study, Gordon showed that various passages of the *Institutions* contained material which could likely be attributed to Grotius.³⁷⁴ This material seems to be typical of the legal humanist influence in *De jure belli*. First amongst these are twelve citations of writers of classical antiquity, including four citations of Cicero. Indeed, this thesis shows nearly all Stair's citations of writers of classical antiquity in the titles on obligations were borrowed from Grotius.³⁷⁵ Additionally, Gordon suggested that Stair borrowed a citation of Connanus from Grotius; it will be shown that in fact all Stair's citations of this leading legal humanist were borrowed from Grotius. Gordon also suggested that Stair's etymological discussion (another typical characteristic of legal humanism) of the Latin term '*damnum*' may come from Grotius.³⁷⁶ Grotius was also Stair's source for a citation of a second scholastic: Richter showed that Stair's citation to Molina was borrowed from Grotius.³⁷⁷ Stair was thus indirectly influenced by humanism and second scholasticism through his use of Grotius; both schools had influenced Grotius and, through his work, influenced Stair.

Gudelinus (1550-1619) was cited six times by Stair, which made him the jurist cited most often by Stair after Grotius. Gudelinus was the *professor primarius*

³⁶⁹ Kelly: *Library of Lord George Douglas*, 72.

³⁷⁰ Crawford (ed): *Fountainhall's Journals*, 293, 296.

³⁷¹ Wilson: "Stair and the *Inleydinge* of Grotius" generally.

³⁷² Campbell: *Structure of Stair's Institutions*, 17-20.

³⁷³ 1662 stem: Adv.MS.25.1.8, 10.78; Adv.MS.25.1.10, 10.77; Adv.MS.25.1.11, fol.123R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 10.77. Below, 4.1.8.

³⁷⁴ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 256-262.

³⁷⁵ Below, 4.1.2, 4.1.3.3, 4.1.4.2, 4.1.6.2, 4.1.8.

³⁷⁶ Below, 4.1.5.

³⁷⁷ Richter: "Molina, Grotius, Stair and the *JQT*", 221-222; S.10.5/1.10.5.

(the most esteemed chair) of Civil law at Leuven from 1590.³⁷⁸ Gudelinus was influenced by legal humanism; Lesaffer commented on his “faith in the historical-philological methods of his humanist predecessors”.³⁷⁹ Yet Lesaffer also noted Gudelinus’ interest in local law and customs.³⁸⁰ This was consistent with what Lesaffer termed “the Louvanist *via media*”,³⁸¹ a combination of the philological method of legal humanism and an interest in legal practice. Of particular importance to this thesis is Gudelinus’ *De jure novissimo*, printed posthumously with additions by Maximilian Wittebort. It was an analysis of the civilian tradition in seventeenth-century comparative law. The humanist influence on this “Louvainist *via media*”³⁸² was evident in, for example, Gudelinus’ *De jure novissimo* 3.3. Here Gudelinus quoted from a Roman dramatist³⁸³ and Aulus Gellius’ *Attic Nights*.³⁸⁴ Later he cited Aristotle, Marcus Portius Cato, Plutarch, Pliny the younger,³⁸⁵ and Martial.³⁸⁶ Gudelinus’ citation of these classical historians, philosophers, poets and other writers is evidence of humanist influence. He also showed concern for philology, citing Isidorus of Seville’s³⁸⁷ philological study *Etymologiae*.³⁸⁸ He also gave four Greek terms³⁸⁹ and cited various legal humanists, including Rebuffus³⁹⁰

³⁷⁸ M. Ahsmann: “Gudelinus (Goudelin), Petrus (1550-1619)” in M. Stolleis (ed): *Juristen: ein biographisches Lexicon von der antike bis zum 20. Jahrhundert* (Munich, 1995 rept. Munich, 2001) 269 generally; R. Lesaffer: “An early treatise on peace treaties: Petrus Gudelinus between Roman law and modern practice” (2002) 23(3) *J.L.H.* 223-252, 226.

³⁷⁹ Lesaffer: “An early treatise on peace treaties: Petrus Gudelinus between Roman law and modern practice”, 227.

³⁸⁰ Lesaffer: “An early treatise on peace treaties: Petrus Gudelinus between Roman law and modern practice”, 227

³⁸¹ Lesaffer: “An early treatise on peace treaties: Petrus Gudelinus between Roman law and modern practice”, 244.

³⁸² Lesaffer: “An early treatise on peace treaties: Petrus Gudelinus between Roman law and modern practice”, 244.

³⁸³ *De jure novissimo* 3.3, 100. Gudelinus attributes the quotation, written as “*si mutuo non potero, sumam foenore*”, to Terentius, but it actually appears to be from Plautus’ *Asinaria* line 248: “*nam si mutuas non potero, certum est sumam foenore*. [if I can’t borrow it without interest, I’ve decided to take up a loan at interest. [translation: W. de Melo (trans): *Plautus: Amphitryon, the Comedy of Asses, the Pot of Gold, the Two Bacchises, and the Captives* (Loeb Classical Library series, Cambridge MA, 2011), 169]]” On which, see H.W.P. Stevens: “Roman law in the Roman drama” (1913) 13(3) *Journal of the Society of Comparative Legislation, New Series* 542-569, 556-558; L. Estavan: “Roman law in Plautus” (1965-6) 18(5) *Stanford Law Review* 873-909, 893-896.

³⁸⁴ Gudelinus: *De jure novissimo*, 3.3, 100. Although Gudelinus does not specify a particular passage, it could be 16.12.

³⁸⁵ All Gudelinus: *De jure novissimo*, 3.3, 104.

³⁸⁶ Gudelinus: *De jure novissimo*, 3.3, 105.

³⁸⁷ A late-sixth- to early-seventh-century bishop.

³⁸⁸ Gudelinus: *De jure novissimo*, 3.3, 104. Gudelinus cites 18.24, although the citation does not appear to be correct.

³⁸⁹ Three in Gudelinus: *De jure novissimo*, 3.3, 102 and the fourth, 103.

and Nicolas Everardus,³⁹¹ who is credited with bringing legal humanism to Leuven.³⁹² He also cited Martinus Aspilcueta (also known as ‘Doctor Navarrus’), a sixteenth-century Spanish canonist,³⁹³ and Covarruvias.³⁹⁴ Although not every title of *De jure novissimo* had such a range of authorities, the use of such humanist sources and methods was important for Stair’s writing. Gordon explored Stair’s use of Gudelinus’ *De jure novissimo*,³⁹⁵ and correctly suggested that Stair’s citations of legal humanists Balduinus, Boerius, Chassanaeus, Duarenus, Rebuffus and one of Wesenbecius, as well as that of Covarruvias, were borrowed from it.

This legal humanist influence is also evident in Gudelinus’ other works. Lesaffer noted that Gudelinus’ *De jure pacis commentarius* (Leuven, 1620) also demonstrated “an explicit use of the philological-historical methods of the humanists”³⁹⁶ – citation of classical texts – which Lesaffer notes were often borrowed.³⁹⁷ He also noted that *De jure pacis commentarius* cited second scholastics, most notably Vasquius.³⁹⁸

The four catalogues of libraries from the period consulted show that multiple copies of *De jure novissimo* were available in Scotland. The 1683 and 1692 catalogues of the Advocates’ Library listed the 1643 edition of *De jure novissimo*.³⁹⁹ Also listed in the later catalogue were other treatises by Gudelinus.⁴⁰⁰ Fountainhall’s list of acquisitions also included *De jure novissimo*.⁴⁰¹

³⁹⁰ Gudelinus: *De jure novissimo*, 3.3, 106.

³⁹¹ Gudelinus: *De jure novissimo*, 3.3, 105.

³⁹² Lesaffer: “An early treatise on peace treaties: Petrus Gudelinus between Roman law and modern practice”, 244.

³⁹³ Gudelinus: *De jure novissimo*, 3.3, 105.

³⁹⁴ Gudelinus: *De jure novissimo*, 3.3, 104, 105.

³⁹⁵ Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 263-265. Gordon showed that another work of Gudelinus, *De jure feudorum*, was cited by Stair in the manuscripts. An examination of the text suggests that Stair did consult *De jure feudorum*. [Gordon: “Stair, Grotius”, 263, n.14] This will not be discussed further as Stair’s use of this text seems to have been exclusively outwith his titles on obligations.

³⁹⁶ Lesaffer: “An early treatise on peace treaties: Petrus Gudelinus between Roman law and modern practice”, 245.

³⁹⁷ Lesaffer: “An early treatise on peace treaties: Petrus Gudelinus between Roman law and modern practice”, 245.

³⁹⁸ Lesaffer: “An early treatise on peace treaties: Petrus Gudelinus between Roman law and modern practice”, 245.

³⁹⁹ Townley: *Best and Fynest Lawyers*, 60; *Catalogus Librorum*, 41.

⁴⁰⁰ *Catalogus Librorum*, 13 and 68.

⁴⁰¹ Crawford (ed): *Fountainhall’s Journals* listed *De jure feudorum*, 288 and *De jure novissimo*, 291.

Arnoldus Vinnius (1588-1637) was a professor of law at the University of Leiden.⁴⁰² He is generally regarded as one of the founders of the Dutch elegant school,⁴⁰³ a continuation of legal humanism, but this has been challenged by Van den Bergh.⁴⁰⁴ There was undeniable legal humanist influence in Vinnius, which was admitted by Van den Bergh.⁴⁰⁵ Feenstra and Waal noted that Vinnius' *Jurisprudentia contracta* (1624-31), cited by Stair, "deals with Roman Law in a new systematic order" based on that of Donellus' commentary.⁴⁰⁶ However, like Gudelinus' works, Vinnius' *Jurisprudentia contracta* also emphasised modern practice, although not specifically Dutch practice.⁴⁰⁷ Feenstra and Waal also examined Vinnius' commentary and noted that he provided a philological-historical account of the *Institutes*, typical of the legal humanist style, and provided a thorough account of Dutch law. Their examination of his pattern of citation in a number of titles showed that "humanists occupy an important place",⁴⁰⁸ particularly Cujacius, Hotmannus and Wesenbecius. As with *Jurisprudentia contracta*, there was also an important emphasis placed on practice. Feenstra and Waal noted that the number of citations of Glossators and Commentators (still used in practice) was "considerably larger than one would have thought."⁴⁰⁹ Vinnius cited various foreign jurists whose principal concern was with practice, including Mynsinger (a sixteenth-century German legal humanist also cited by Stair). Vinnius also used Grotius' *Inleydinge*, the first institutional work of the law of Holland, and Paulus Christianaeus' collection of decisions of the Grand Counsel of Malines.⁴¹⁰ Feenstra and Waal also noted the influence of natural law on Vinnius' commentary, for which he used particularly Grotius' *De jure belli*, which was cited "relatively often", and made use of the

⁴⁰² M. Ahsmann: "Vinnius, Arnold (1588-1657)" in M. Stolleis (ed): *Juristen: ein biographisches Lexicon von der antike bis zum 20. Jahrhundert* (Munich, 1995 rept. Munich, 2001) 653 generally; Feenstra and Waal: *Leyden Law Professors*, 24-35 and 52-69; Zimmermann: "Römisch-holländisches Recht – ein Überblick", 42-43.

⁴⁰³ Feenstra and Waal: *Leyden Law Professors*, 24.

⁴⁰⁴ G.C.J.J. van den Bergh: *Die Holländische Elegante Schule: Ein Beitrag zur Geschichte von Humanismus und Rechtswissenschaft in den Niederlanden 1500-1800* (Frankfurt, 2002), 23-25, 151-152.

⁴⁰⁵ Van den Bergh: *Die Holländische Elegante Schule* 151-152; Feenstra: "Hugues Doneau et les juristes Néerlandais du XVII^e siècle: l'influence de son <<systeme>> sur l'évolution du droit privé avant le Pandectisme", 236-237.

⁴⁰⁶ Feenstra and Waal: *Leyden Law Professors*, 27.

⁴⁰⁷ Feenstra and Waal: *Leyden Law Professors*, 27.

⁴⁰⁸ Feenstra and Waal: *Leyden Law Professors*, 28.

⁴⁰⁹ Feenstra and Waal: *Leyden Law Professors*, 28.

⁴¹⁰ Feenstra and Waal: *Leyden Law Professors*, 28, 30.

system of classification of subjective rights found in the *Inleydinge*.⁴¹¹ They observed that Vinnius' *Notae* (1646) on the *Institutes* of Justinian were "of a predominantly humanist nature" with writers of classical antiquity and Cujacius, Hotmannus and Wesenbecius being cited often.⁴¹²

Stair added in the third version a citation of Vinnius' *Jurisprudentia contracta* to his discussion of a child's reaching the age of majority. It has been shown elsewhere that Stair consulted but did not cite Vinnius' commentary;⁴¹³ Richter suggested (wrongly, at least in that instance) that Stair consulted Vinnius' *Notae*.⁴¹⁴ Gordon discussed Stair's probable borrowing from Vinnius.⁴¹⁵ He showed that one of Stair's citations of Grotius in "Rights Real" did not refer to *De jure belli*; this was borrowed by Stair from Vinnius' commentary which actually cited Grotius' *Inleydinge*.⁴¹⁶ Gordon argued that Stair could not have consulted the *Inleydinge* directly as it was in Dutch and thus was indirectly influenced by the *Inleydinge* through his use of Vinnius. It has since been confirmed elsewhere that Stair did not consult the *Inleydinge*.⁴¹⁷ Significant indirect influence through Vinnius is unlikely given he checked the only reference to Grotius which he borrowed from Vinnius.⁴¹⁸

These three texts of Vinnius were all readily available in Scotland during the seventeenth century. The 1683 catalogue of the Advocates' Library listed two copies of the *Jurisprudentia contracta* and the fourth (1665) edition of the commentary; the *Notae* was not listed.⁴¹⁹ Both of these treatises were also listed in the 1692 catalogue, as were two other treatises of Vinnius, not including the *Notae*.⁴²⁰ Fountainhall's journal listed only a different text of Vinnius. The library of Lord George Douglas contained a 1665 copy of the commentary, as well as another treatise by Vinnius.⁴²¹ Vinnius' *Notae*, although not listed in any of the four catalogues consulted, was

⁴¹¹ Feenstra and Waal: *Leyden Law Professors*, 30.

⁴¹² Feenstra and Waal: *Leyden Law Professors*, 31.

⁴¹³ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 257-258; Wilson: "Stair and the *Inleydinge* of Grotius", 267-268.

⁴¹⁴ Richter: "Did Stair know Pufendorf?", 374-375.

⁴¹⁵ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 256-258.

⁴¹⁶ Below, 6.2.3.

⁴¹⁷ Wilson: "Stair and the *Inleydinge* of Grotius" generally.

⁴¹⁸ Below, 4.2, 6.2.3.

⁴¹⁹ Townley: *Best and Finest Lawyers*, 107-108.

⁴²⁰ *Catalogus Librorum*, 57 and 78.

⁴²¹ Kelly: *Library of Lord George Douglas*, 133.

known to Scottish scholars. It was used extensively in the education of Lord George Douglas under Alexander Cunningham.⁴²²

Arnoldus Corvinus (d.c.1680), the son of jurist Johannes Corvinus, was born in Leiden and became professor of law at Mainz. It has been said that:

Seine litterarische Thätigkeit gipfelt in der Abfassung von ganz kurzen Lehrbüchern, meist im Westentaschenformat...ohne wissenschaftlichen Werth sind.

His literary activity culminated in the writing of short textbooks, usually pocketbooks...[which] were without scientific value.⁴²³

Stair's citation "*Corvinus, de pactis*"⁴²⁴ was identified by Gordon as having referred to Arnoldus Corvinus' *Digesta per aphorismos* on D.2.14.⁴²⁵ He correctly suggested this may have been the source of borrowing by Stair.⁴²⁶ A sample of titles from Corvinus' *Digesta per aphorismos* reveals a pattern of citation typical of treatises written by seventeenth-century lawyers.⁴²⁷ These lawyers tended to provide numerous citations as authority for a proposition, and often borrowed their sources' citations without checking them.⁴²⁸ In his commentary of D.2.14, the title cited by Stair, Corvinus provided numerous citations for each point. The majority of these were of Roman law, but there were also many of jurists of the *mos italicus*, specifically Jason Maynus (cited nine times), Bartolus (cited seven times), and Baldus (cited six times). The only legal humanists cited were Cujacius and Wesenbecius. This frequent citation of jurists of the *mos italicus* and occasional citation of legal humanists was typical of the titles of Corvinus' *Digesta per aphorismos* examined.

The 1683 catalogue of the Advocates' Library did not list works by Corvinus. By 1693, copies of Corvinus' *Jus Canonicum per aphorismos, Digesta per*

⁴²² Kelly: *Library of Lord George Douglas*, 5.

⁴²³ *Allgemeine deutsche Biographie & Neue deutsche Biographie* volume 4 (Leipzig, 1876), 509.

⁴²⁴ S.10.7/1.10.7.

⁴²⁵ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 264 n.16.

⁴²⁶ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 264 n.16. Below, ch.7.

⁴²⁷ D.2.14, D.2.15, D.3.1-3, although Corvinus cites Vasquius, a second scholastic, and Mynsinger, also cited by Stair, in D.3.3, 93 and 99 respectively.

⁴²⁸ Haagenmacher: "Grotius and Gentili: a reassessment of Thomas E. Holland's inaugural lecture", 148.

aphorismos and several of his other works had been acquired.⁴²⁹ Corvinus' *Jus Canonicum per aphorismos* was owned by Lord George Douglas.⁴³⁰ It seems from this small sample that there was some interest in both Corvinus' *Jus Canonicum per aphorismos* and his *Digesta per aphorismos* in Scotland during the later seventeenth century.

The lesser-known Matthaeus Stephanus (1576-1646) was a professor of law at Greifswald. His *Oeconomia practica juris universi civilis, feudalis & canonici in tres partes divisa* (Frankfurt, 1614) has been called an "inquiry into the proper order of legal doctrine".⁴³¹ This treatise was cited by Stair three times in "Parents and Children".⁴³² These citations were the product of Stair's direct consultation of Stephanus, although Stephanus' *Oeconomia* was not a principal source for Stair. No treatise of Stephanus was listed in the library catalogue of Lord George Douglas. Another of his treatises was owned by Fountainhall.⁴³³ Although the Advocates' Library did not own any copies of Stephanus in 1683, copies of both his *Oeconomia* and another work had been acquired by 1692.⁴³⁴ These sample catalogues may suggest that Stephanus' *Oeconomia* was a minor work which was not particularly sought after by the Scottish advocates.

3.3 CONCLUSIONS

The first part of this chapter examined Stair's pattern of citation of Roman law. The majority of Stair's citations of Roman law in the first, second and third versions was in his titles on obligations. Stair cited the *Digest* most often, then the *Codex*, then the *Institutes*, with the *Novels* being only occasionally cited. This infrequent citation of the *Novels* is likely the result of the use of the seemingly-corrupt *Authenticum* to access the *Novels* in the medieval period, and the fact that the subject matter of most the *Novels* was irrelevant to a treatise on private law. Infrequent citation of the *Novels* is thus also seen in Gudelinus' *De jure novissimo*. More surprising was

⁴²⁹ *Catalogus Librorum*, 35 and 82.

⁴³⁰ Kelly: *Library of Lord George Douglas*, 54.

⁴³¹ Scattola: "*Scientia iuris and ius naturae: The jurisprudence of the Holy Roman Empire in the seventeenth and eighteenth centuries*", 12.

⁴³² S.5.4/1.5.4; S.5.12/1.5.12; S.5.13/1.5.13.

⁴³³ Crawford (ed): *Fountainhall's Journals*, 291.

⁴³⁴ *Catalogus librorum*, 55.

Stair's infrequent citation of the *Institutes*, especially given Vinnius' commentary included the text. Yet Stair gave synopses of *Institutes* texts which were not cited by him, which shows he had a greater knowledge of it than is implied by his pattern of citation.

Most of his citations of the *Digest* and *Codex* were in the early-modern style, but eighteen of those in the first version were in the medieval style. Twelve of these were borrowed from Gudelinus or Grotius. Ten more medieval-style citations were added for the third version (although four others were removed). Stair either removed altogether or added the relevant paragraph numbers to most of these medieval-style citations for the third and fourth versions, thereby modernising them. He also increased the level of detail in his citations of Roman law, adding paragraph numbers to 66% of those of *Codex* and *Digest* texts which had sub-paragraphs for the fourth version. Stair's addition of paragraph numbers or references to sub-paragraphs indicates that he checked these citations for the third or fourth versions. This agrees with his new practice of checking the citations of Roman law which he borrowed for the fourth version. It also implies that Stair tried to increase the detail and accuracy of his citations for the printed editions.

The greatest change made to Stair's pattern of citation of Roman law, however, was the deliberate 'Romanising' of the fourth version and, to a lesser extent, the third version. Indeed, this was one of the most notable changes made to the *Institutions* for the fourth version. This corroborates Ford's finding that the greatest change made for the second and third versions was in the pattern of citation.⁴³⁵ In those versions, however, it was predominantly citations of Scottish authority which were added. This means that, when preparing the fourth version, Stair changed his practice, despite his declaration that he had continued to update his treatise with recent Scottish authority.⁴³⁶

Finally, it was shown that Gordon and Ford were correct in suggesting that Stair used Roman law for the principles of equity or natural law, and in the absence of Scottish authority only critically.⁴³⁷ This was demonstrated for the titles on obligations in the third and fourth versions by a thorough examination of Stair's use

⁴³⁵ Ford: *Law and Opinion*, 65.

⁴³⁶ S.-/advertisement.

⁴³⁷ Gordon: "Roman law as a source" *passim*, esp. 110-112; Gordon: "Stair's use of Roman law" *passim*, esp. 122-3; Ford: *Law and Opinion*, 275.

of Roman law in “Recompence”. Yet McLeod argued that the majority of Stair’s citations of Roman law in the titles on property law in the sixth printed edition were seemingly used as authority for Scots law.⁴³⁸ It was shown, however, that the structure of Stair’s discussions of law – first an examination of natural law, often relying on Roman law, then an outline of the position of Scots law – meant that the citations in these titles were in fact generally being used as authority for general legal principles and only rarely as authority for Scots law itself. It should, however, be noted that many of Stair’s citations of Roman law were borrowed from the works of continental jurists without being checked. In such cases, whether Stair was using the citation as authority for Scots or natural law, he could probably not have done so critically.

Stair’s use of Roman law to explain general legal principles and then comparing and contrasting these to Scots law was sound given his readership: a legal community most of whom were formally educated in Roman law. Stair explained the Roman law or natural law rule, with which his readership would to some extent have been familiar, and then explained to what extent Scots law had converged or diverged with that widely-understood system. This would have made his writing more accessible to those with a sound knowledge of Roman law but a limited understanding of at least certain areas of Scots law.

This examination of Stair’s use of Roman law has shown both that Stair was adding citations of Roman law to the fourth version, but that he used Roman law as a source of equity and as authority for natural law. Citations of Roman law were added, in large numbers, to Stair’s discussions of natural law. This must have been a conscious effort on his part to provide a greater quantity of authority for these discussions of general legal principles in the fourth version. It is very interesting that he did not see fit to increase the number of citations of Scottish authority at the same time. This could be because his previous revisions, for the second and third versions, focused on adding citations of Scottish authority, which he now felt was generally sufficient. Stair declared that the principal changes to the text since the third version were to take account of changes in Scots law, when in fact it was the bolstering of his discussion of natural law and equity with an increased number of citations of Roman

⁴³⁸ McLeod: “Romanization of property law” 226-227.

law.

The second part of this chapter examined Stair's pattern of citation of continental jurists. Citations of twenty-two jurists have been found in the manuscripts. The sole citation of one jurist, Gomezius, was removed for the third version even though the surrounding paragraph and other citations remained substantially unaltered. A citation of Corvinus was replaced by one of Dutch legislation. Citations of Grotius and Connanus were also removed, but along with the surrounding passages. It was shown that eight citations of jurists were added to the third version, including citations of four jurists who had not previously been cited by Stair: Gregorius, Mynsinger, Vinnius and Cujacius. It was also shown that Stair added citations of Cujacius and Grotius when preparing the fourth version, but did not add citations of any jurists who had not been cited in the earlier versions. Approximately two-thirds of Stair's citations of continental jurists appear in his titles on obligations. This focus of citations in these titles is also the case with his citations of Roman law and of writers of classical antiquity.

The specific schools of scholarship to which these jurists belonged were examined. Many of the typical characteristics of legal humanism were present in Stair's *Institutions* and in his lecture for admission as an advocate: his criticism of "the wearisomnesse"⁴³⁹ of the medieval Glosses and Commentaries on Roman law; the awareness of Tribonian's amendments of the classical texts; the critical rejection of *Regiam Majestatem* as not being truly representative of Scots law; the concern with treating law as a rational discipline; his use of Greek; and his citation of writers of classical antiquity. Indeed, more than half of the jurists who were cited by Stair in the *Institutions* were legal humanists. Many of those whom he cited were leading figures of the movement, such as Connanus, Cujacius and Donellus. Although most of these citations will be shown to have been borrowed from works of seventeenth-century jurists, this does not preclude a significant impact of legal humanism on the *Institutions*. For example, it was shown that Stair was indirectly influenced by Cujacius through his use of Craig.

This humanist influence is seen in the works of other Scottish jurists,

⁴³⁹ "Scotstarvet's 'Trew Relation'", 381.

particularly Thomas Craig and Sir John Skene. Indeed, Stair was indirectly influenced by legal humanism through his use of their works. Stair borrowed a citation of Cujacius,⁴⁴⁰ and possibly that of Tiraquellus,⁴⁴¹ from Craig, and adopted Cujacius' discussion of the history of relief after finding it in Craig. The structure and content of Stair's first title, including his rejection of *Regiam Majestatem*⁴⁴², was shown to follow Craig's own discussion of the history and universality of law. It was also shown that Stair borrowed other discussions of Craig which were typical of legal humanism, such as that of the origin of courtesy.⁴⁴³ Stair used Craig both in 1648 in his lecture for admission as an advocate, when writing the first version and when preparing the third version. Each time, he was indirectly influenced by legal humanism. Stair's use of Skene is less extensive; nonetheless, he used *De verborum significatione* for the first, second and third versions. Again, there is evidence of indirect legal humanist influence through Skene in Stair's etymological discussion of *herzelds*.

Stair's use of the legal works of second scholastics was also examined. Although there was a greater Scottish contribution to this movement, it had less of an impact on Scots law given the predominance of legal humanist influence in Scotland. Stair borrowed his three citations of second scholastics without checking them: those of Molina and Gomezius from Grotius, and that of Covarruvias from Gudelinus.⁴⁴⁴ The citation of Gomezius appeared only in the manuscripts; it was removed for the third version.

Stair also cited three sixteenth-century works on French law, each by a different jurist, as well as a jurist of the *ultramontani*. His citations of all four of these jurists were borrowed from the works of later jurists; there is no evidence of indirect influence from any of these jurists.⁴⁴⁵ Nonetheless, his citation of these works on French law was in keeping with their use in other Scottish treatises and in court.⁴⁴⁶

Stair's principal sources were all jurists of the seventeenth century. Grotius

⁴⁴⁰ S.14.26/2.4.26; Craig: *Jus feudale* 2.20.30, 291. Above, 3.2.2.1.

⁴⁴¹ S.26.34/3.4.34; Craig: *Jus feudale* 2.17.21, 259. Above, 3.2.2.1.

⁴⁴² S.1.15/1.1.16; Craig: *Jus feudale* 1.8.11, 38-39. Above, 3.2.2.1.

⁴⁴³ S.16.19/2.6.19; Craig: *Jus feudale* 2.22.40, 312. Above, 3.2.2.1.

⁴⁴⁴ Below, 4.1.6.1, 5.1.1.

⁴⁴⁵ Below, 5.1.1, 5.1.4.2, 6.1.3.

⁴⁴⁶ Dolezalek: French legal literature quoted by Scottish lawyers", 385-389.

was influenced both by legal humanism and by second scholasticism; the extent to which he was influenced by one in relation to the other is a point of contention amongst Grotian scholars. Nonetheless, it will be shown that Stair borrowed various citations of legal humanist works, as well as citations of writers of classical antiquity, typical of legal humanism, from Grotius. Stair also borrowed citations of second scholastics Molina and Gomezius from Grotius but, at least in the case of Molina, there cannot have been any indirect influence on Stair.⁴⁴⁷

Stair's tendency to borrow citations without attributing his source was not unusual in the seventeenth century; Hope will also be shown to have borrowed a citation (of an Act of Sederunt) without checking it. Haagenmacher has suggested that the practice of borrowing citations was humanist: "Humanist vanity and 'elegance' induced scholars to hide their real, direct sources, in order to show only the pure wisdom of antiquity".⁴⁴⁸ He notes that, in contrast, lawyers tended to provide numerous citations as authority for a proposition, and often borrowed their sources' citations without checking them.⁴⁴⁹ Grotius, for example, "as both a humanist and a lawyer", also borrowed citations from his sources in this way.⁴⁵⁰

Stair's other two principal sources, Gudelinus and Vinnius, also combined an interest in legal humanist methodology with one of legal practice. Stair made extensive use of the works of both of these jurists who were as important, if not more important, to his writing than Grotius. Again, he may have been indirectly influenced by legal humanism through his use of these jurists' works. He borrowed various citations of legal humanists from both of these jurists, and citations of writers of classical antiquity from Gudelinus. The purpose of their works was also very similar to Stair's. Both Gudelinus and Vinnius were trying to balance a study of the intellectual analyses of Roman law by the great legal humanists with the needs of contemporary practice. The similarity in their aims may have been a significant factor in Stair's selection of these works as sources.

One other observation should be made regarding the question as to why Stair

⁴⁴⁷ Below, 4.1.6.1.

⁴⁴⁸ Haagenmacher: "Grotius and Gentili: a reassessment of Thomas E. Holland's inaugural lecture", 148.

⁴⁴⁹ Haagenmacher: "Grotius and Gentili: a reassessment of Thomas E. Holland's inaugural lecture", 148.

⁴⁵⁰ Haagenmacher: "Grotius and Gentili: a reassessment of Thomas E. Holland's inaugural lecture", 148.

may have relied particularly on the works of Grotius, Gudelinus and Vinnius. Lord Cooper examined the court records of the 1660s and 1670s, from which he compiled a list of those authorities which were being cited often in court. Although Cooper's list does not seem to be extant today, comments were made on it by both Campbell and Smith, who presumably saw it.⁴⁵¹ Apparently, the *Corpus iuris civilis* was the most heavily cited source, followed by earlier Scottish cases and Craig's *Jus feudale*. Smith noted: "Repeated reference is made to Grotius, Vinnius, Gail and Gudelinus, Schotanus, Matthaeus, Perezius and eight more writers."⁴⁵² He also noted that the lawyers of the period tended "to rely on the most modern works from the Continent and from the Netherlands in particular."⁴⁵³ The three jurists who were used most heavily by Stair were therefore also highlighted in Cooper's list as having been those most frequently cited in court. His choice of continental legal sources was therefore in keeping with the use of continental legal literature by his Scottish contemporaries.

⁴⁵¹ Although taking references like this second- or third-hand through other scholars' works is not ideal, it has not been possible to rebuild Cooper's list while researching this thesis. This list does not seem to be among the papers of his held by the National Library of Scotland.

⁴⁵² Smith: "Scots law and Roman-Dutch law: A shared tradition", 39.

⁴⁵³ Smith: "Scots law and Roman-Dutch law: A shared tradition", 39.

STAIR AND GROTIUS

Grotius was the jurist cited most often by Stair, with nine citations in the third version and another added for the fourth. An additional citation of Grotius has been found in the manuscripts. Gordon established that Stair also used Grotius for passages in which he did not cite him explicitly.¹ This chapter will expand on Gordon's research to establish four points in relation to Stair's use of Grotius. First, it will show that Stair used Grotius three times: for the first, third and fourth versions. Secondly, it will show that Stair borrowed from Grotius citations of Roman law, continental jurists, and writers of classical antiquity. All these citations of Roman law and writers of classical antiquity were borrowed by Stair from Grotius for the first version. Four of those of continental jurists were borrowed for the first version, and another was borrowed for the third version. Stair normally did not check citations when he borrowed them from Grotius. Thirdly, this chapter will confirm Gordon's suggestion that one of Stair's citations of Grotius was borrowed from another source, Vinnius' commentary.² Finally, it will draw some important conclusions about Stair's use of Grotius as a source of natural law.

4.1 STAIR'S USE OF GROTIUS FOR THE FIRST VERSION

4.1.1 "Of Obligations"

Stair included a paraphrase of Cicero's *De officiis* 3.17.68 when explaining that not all natural obligations had civil effect: "as Cicero saith, *Philosophum spectant quae mente tenentur, juridicum quae manu tenentur* [The philosopher considers what is distinguished by reason, the judge what is distinguished by the hand]".³ Here Cicero stated that philosophers responded to trickery with reason and the law with a firm hand. Stair's paraphrase made three important changes to Cicero. First, Stair's

¹ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 258-263.

² Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 256-257.

³ S.3.6/1.3.5. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 3.6; the quotation differed slightly in Adv.MS.25.1.11, fol.21L. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 3.6.

statement was broader: while Cicero wrote of *astutias* [trickery], Stair distinguished between judges and philosophers more generally. Secondly, Cicero wrote of the law, Stair about judges. Finally, Stair amended the structure of Cicero’s sentence, and thus discussed philosophers first rather than second as Cicero did.

Gordon noted that there was an inexact comparison between Stair’s paraphrase and a quotation of this passage of Cicero in *De jure belli* 2.12.12.⁴ Grotius quoted Cicero accurately but for the addition of words to give context in relation to inequitable terms in contracts. This was probably Stair’s source. Grotius 2.12 was used extensively by Stair in “Obligations Conventional”. Stair probably found Grotius’ quotation of Cicero at the same time that he was borrowing material for “Obligations Conventional”. He would have seen it was broadly applicable to the nature of law, and included it here. Rather than quote Cicero, however, Stair amended Grotius’ quotation so that his paraphrase would support his proposition that not all natural obligations had legal effect. There is no evidence to suggest that Stair consulted Cicero directly. Stair therefore used Grotius to provide a citation of a writer of classical antiquity as authority for natural law.

4.1.2 “Parents and Children”

4.1.2.1 *Stair’s citation of Grotius and Aristotle*

Stair distinguished between: “Infancy, or Pupilarity; Minority, or less Age; and Majority, or full Age”.⁵ He cited Aristotle and Grotius: “*Aristotle* distinguish, *Polit. l. cap. ult. Ethic. l. 4. cap. 3. l. 5. cap. 10.* And after him, *Grotius, de jure belli & pacis, l. 2. cap. 5.*”⁶ The citation of the last chapter of *Politics* 1 was relevant: here Aristotle discussed the role of the persons within the household – master, wife, child and slave – and stated that children were to be educated in line with the constitution

⁴ Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 259.

⁵ S.5.2/1.5.2. The manuscripts gave “infancy or pupill age, minoritie & majoritie or full age”. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.2; Adv.MS.25.1.11, fol.38R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 5.2.

⁶ S.5.2/1.5.2. 1662 stem: Adv.MS.25.1.8, 5.2 omitted the book and title of the citation of Aristotle’s *Politics*, and gave ‘E’ instead of ‘Ethics’; Adv.MS.25.1.10, 5.2; Adv.MS.25.1.11, fol.38R omitted the book number of Aristotle’s *Politics*. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 5.2.

so as to fulfil their later obligations as citizens.⁷ Stair’s citations of *Nicomachean Ethics* 4.3 and 5.10, however, were irrelevant; neither discussed children.

Stair’s error was copied from Grotius. In a marginal note in *De jure belli* 2.5.2, Grotius cited the same three passages of Aristotle: “*Pol. I. c ult. Nic. IV, 3.*” and then “*Eth. V, c. 10.*” Grotius’ citation of 4.3 should instead have been of 3.5.⁸ Indeed, Grotius gave a Greek phrase, “τοῦ βουλευτικοῦ ἀτελοῦς”, and term, “προαίρεσις”, which he took from 3.5:

ὄντος δὴ βουλευτοῦ μὲν τοῦ τέλους, βουλευτῶν δὲ καὶ προαιρετῶν τῶν πρὸς τὸ τέλος, αἱ περὶ ταῦτα πράξεις κατὰ προαίρεσιν ἂν εἶεν καὶ ἐκούσιοι.⁹

If then whereas we wish for our end, the means to our end are matters of deliberation and choice, it follows that actions dealing with these means are done by choice, and are voluntary.¹⁰

Grotius changed the ending of “βουλευτῶν”, added alpha to the start of “τέλους”, and reversed “βουλευτικοῦ” and “ἀτελοῦς”. Nonetheless, these quotations show that this was clearly the passage to which Grotius intended to refer. Yet this choice is puzzling as 3.5 principally explained that man had control over his own vices. The general context of this passage was therefore not particularly relevant to his overall discussion.

Further, Grotius should have cited 5.6 rather than 5.10. Again, this can be established by his quotation from 5.6: “ἕως ἂν ἡ χωρισθῆ”. Aristotle at 5.6.8 stated “ἕως ἂν ἡ πηλίκον καὶ χωρισθῆ [or a child till it reaches a certain age and becomes independent [translation: Rackham]]”. Grotius again slightly altered Aristotle’s wording. Although 5.6.8 did mention children attaining majority, the wider context of this passage is again irrelevant.

Stair’s citation of the same irrelevant passages of *Nicomachean Ethics* as Grotius establishes *De jure belli* as his source. His citation of Aristotle’s *Politics* was

⁷ Numbered 1.8 in P. Sylvestro Mauro (ed): *Aristotelis opera* volume 2 (Rome, 1668), 537-541; numbered 1.5 in H. Rackham (trans): *Aristotle: in twenty-three volumes* volume 21: *Politics* (Loeb Classical Library series, London, 1977), 56-67.

⁸ Kelsey’s translation gave 3.4, which is not correct.

⁹ Sylvestro Mauro (ed): *Aristotelis opera*, 67; H. Rackham (trans): *Aristotle: The Nicomachean Ethics with an English translation* (Loeb Classical Library series, London, 1962), 142.

¹⁰ Rackham (trans): *The Nicomachean Ethics*, 143.

also undoubtedly borrowed from Grotius at the same time. Clearly, Stair did not check the texts. He did, however, amend Grotius' citation of *Nicomachean Ethics* 5.10. Grotius cited "Nic. IV, 3." and "Eth. V, c. 10". "Nic" referred to the *Nicomachean Ethics*, Aristotle's greatest work on ethics. Yet "Eth" would normally also refer to the *Nichomachean Ethics* for that reason. Aristotle wrote a lesser book on ethics, his earlier *Eudemian Ethics*, books four to six of which were incorporated into the *Nicomachean Ethics* as books five to seven.¹¹ It would thus be surprising if Grotius had cited book five of the *Eudemian Ethics* independently of the *Nicomachean Ethics*. Therefore Stair, who had both studied and lectured on Aristotle,¹² understandably combined the citations: "Ethic. l. 4. cap. 3. l. 5. cap. 10." As with the citation of Cicero in "Of Obligations", Stair here borrowed citations of a writer of classical antiquity from Grotius. Here, however, he used the citations as authority for the stages of childhood rather than for natural law *per se*.

It would also appear that Stair used this passage of Grotius for his next paragraph, S.5.3/1.5.3. Stair defined infancy as when "the Children are without Discretion".¹³ The word "discretion" probably reflected Grotius' use of "προαίρεσις", which was quoted from Aristotle. Stair therefore used this passage of Grotius in his preliminary overview of the legal stages of childhood.

4.1.2.2 *Stair's further citation of Aristotle*

Stair's only other reference to Aristotle in the printed editions was in a passage which also cited Caesar's *De bello Gallico*, two texts of Roman law, and the Bible. When discussing the parental power of life and death, Stair stated: "*Arisotle* testifieth the like of the Persians, *lib. 8. Ethic. cap. 12.*"¹⁴ Gordon observed that Grotius

¹¹ F. Sparshott: *Taking Life Seriously: A Study of the Argument of the Nicomachean Ethics* (Toronto Studies in Philosophy series, Toronto, 1994 rept. Toronto, 1996), 153-156. Sparshott found that surviving manuscripts of the *Eudemian Ethics* "simply refer readers to the better-known work." [Sparshott: *Taking Life Seriously*, 153].

¹² Above, 1.2.1.2-3.

¹³ S.5.3/1.5.2. 1662 stem: Adv.MS.25.1.8, 5.2-3; Adv.MS.25.1.10, 5.2; Adv.MS.25.1.11, fol.38R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 5.3.

¹⁴ S.5.6/1.5.6. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.6; Adv.MS.25.1.11, fol.39R. 1666 stem: Adv.MS.25.1.5, 5.5 cited *Ethics* 5.12; Adv.MSS.25.1.7 and 25.1.12, 5.6.

“ma[de] the same reference to Aristotle”.¹⁵ What Gordon did not mention was that this shared citation was wrong: Aristotle discussed the tyrannical rule of Persian fathers in 8.10 not 8.12.¹⁶ That Stair also cited 8.12 proves, first, that he borrowed this citation from Grotius and, secondly, that he did not check the text. Again, Stair has borrowed a citation of a writer of classical antiquity from Grotius. Like the previous citation of Aristotle which he borrowed from Grotius, however, he did not use this citation expressly in relation to natural law. Instead, he gave Aristotle in relation to ancient law. Later this thesis will show that Stair’s citations of Caesar and Roman law were borrowed, without being checked, from Gudelinus.¹⁷

4.1.3 “Restitution”

4.1.3.1 *Stair’s citation of Grotius*

Stair classified restitution as part of natural law.¹⁸ He stated “The learned *Grotius, de jure belli, l.2. cap.10.*”¹⁹ regarded such obligations to be “by tacit consent, or Contract” between nations. Stair was correct; Grotius here stated that restitution as an “*obligatio tanquam ex contractu universali omnes homines tenet* [obligation is binding on all men, as if by universal agreement [translation: Kelsey]]”.²⁰ Stair disagreed with this, and said that restitution was obligated by natural law and “it is most just and sure, to attribute such obligations to the *Law of God written in our hearts*, rather than unto any other conjecture of supposed consent.” Stair therefore rejected Grotius’ classification; this is the first of six occasions on which Stair explicitly rejected Grotius.

¹⁵ Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 259-260; Grotius: *De jure belli*, 2.5.7.

¹⁶ Checked in Sylvestro Mauro (ed): *Aristotelis opera* volume 2, 239.

¹⁷ Below, 5.1.2.3.

¹⁸ S.7.1/1.7.1.

¹⁹ S.7.2/1.7.2. 1662 stem: Adv.MS.25.1.8, 7.2 gave “cap.20”; Adv.MS.25.1.10, 7.2; Adv.MS.25.1.11, fol.59R. 1666 stem: Adv.MSS.25.1.5 and 25.1.7, 7.2 cited 2.12; Adv.MS.25.1.12, 7.2 omitted the book.

²⁰ Grotius: *De jure belli*, 2.10.1.

4.1.3.2 *Stair's citation of D 16.3.31.1*

Stair explained that if property was pledged or deposited by someone other than the owner, “we are bound to restore to the owner, though thereby we lose what we gave”. He cited D.16.3.31.1, “*l.bona fide, 31.ff.§.1.depositi*”, and discussed the case of a robber depositing Mevius’ property with Seius.²¹ Stair’s citation did not include the paragraph number or the reference to the specific sub-paragraph in the manuscripts; they were added for the third version. Stair’s citation in the first version therefore read the same as that at *De jure belli* 2.10, the title cited by Stair: “*L. Bona fides. D. depositi*”.²²

Stair probably did not check this text. Gordon suggested that “Stair may simply have had his attention drawn to the text in the context of restitution by Grotius’ reference to it.”²³ Grotius quoted a large part of D.16.3.31.1; Stair would thus have known that D.16.3.31 said stolen property deposited with another must be returned to the owner not the depositor. Grotius then went on to confirm that the deposittee “*reddere eam non teneatur* [is not bound to return it [translation by Kelsey]]”. Stair went further and said that to restore the property to the depositor would be a delinquency. He then held that a contract would be void if goods were received by their owner in deposit. A similar statement is found in D.16.3.31.1 (but not in the part quoted by Grotius), which stated: “*non contrahi depositum* [there is no contract of deposit [translation by Watson]]”.²⁴ Did Stair follow the *Digest* in saying the contract was void? Probably not: it is not a great intellectual leap from there not being an obligation to return something deposited (as found in Grotius and the section of D.16.3.31 cited by him) to Stair’s saying the contract is void. Stair could simply have expanded on Grotius. This suggestion is supported by Stair also referring to an “error in the substance of the Contract” and giving a second example of pledge, neither of which was referred to by Grotius or D.16.3.31.1.²⁵ If Stair applied this rule to another contractual relationship (pledge), it seems likely that he

²¹ S.7.4/1.7.4. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 7.3; Adv.MS.25.1.11, fol.61L. 1666 stem: Adv.MS.25.1.5, 7.4; Adv.MSS.25.1.7 and 25.1.12, 7.3.

²² Grotius: *De jure belli*, 2.10.1.

²³ Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 260.

²⁴ This was not in the section quoted by Grotius.

²⁵ S.7.4/1.7.4. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 7.3; Adv.MS.25.1.11, fol.61L-R. 1666 stem: Adv.MS.25.1.5, 7.4; Adv.MSS.25.1.7 and 25.1.12, 7.3.

would have been able to develop Grotius' point and declare the contract void. Additionally, checking the *Digest* for the first version would not be consistent with Stair's practice at that time. He did not check any of the citations of Roman law which he borrowed from Grotius or Gudelinus (or probably Vinnius) at that time.

He did, however, check D.16.3.31.1 when preparing the third version; he specified sub-paragraph one and gave the paragraph and sub-paragraph numbers. He probably decided to cite the first sub-paragraph because that was where the case of Mevius and Seius was discussed; he had included the hypothetical discussion of these two characters in the first version, having taken them from Grotius' quotation of D.16.3.31.1.

4.1.3.3 *Stair's citation of Xenophon, Plato, Aristotle, 2 Chronicles 14.13 and Numbers 31.27*

Stair's discussion of restitution from public enemies was much longer and more detailed in the first and second versions than in the third. In the third version there remained only a brief discussion, based on the opening lines of that in the earlier versions.²⁶ When discussing the spoils of victory in the first and second versions, Stair cited: Xenophon's *Cyropaedia* 5; Aristotle's *Politics* 1; Plato's *De legibus*; 2 Chronicles 14.13; and Numbers 31.27. The removal of this passage meant there were no citations of Xenophon or Plato in either the third or fourth versions, despite them being leading writers of the classical period. Stair borrowed these citations from *De jure belli* 3.6.1-2 where these same five texts are also cited.²⁷ This is shown by Stair's citing and paraphrasing the same passages of these writers in the same order as Grotius.

Stair cited Xenophon's *Cyropaedia* 5: "Zenophon Lib: 5. de Inst: Cyri: being on Cyrus, saying that it is perpetual law that the enemies' city being taken, their goods and moveables remain to the victor". Xenophon did allude to a rule of spoils at 5.5.23, but Stair's paraphrase of Xenophon does not describe that passage. The

²⁶ S.7.6/1.7.6. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 7.5; Adv.MS.25.1.11, fol.61R-62R. 1666 stem: Adv.MS.25.1.5, 7.6; Adv.MSS.25.1.7 and 25.1.12, 7.5.

²⁷ The citations of the Bible were given at Grotius: *De jure belli*, 3.6.1, and the writers of classical antiquity at 3.6.2.

citation is obviously inaccurate. Grotius also cited *Cyropaedia* 5. He identified this as the source of a quotation which he gave from Xenophon. Kelsey showed that the quoted sentence was not in *Cyropaedia* 5 but rather at 7.5.73:

“νόμος γὰρ ἐν πᾶσιν ἀνθρώποις αἰδιός ἐστιν, ὅταν πολεμούντων πόλις ἁλῶ, τῶν ἐλόντων εἶναι καὶ τὰ σώματα τῶν ἐν τῇ πόλει καὶ τὰ χρήματα.²⁸

for it is a law established for all time among all men that when a city is taken in war, the persons and the property of the inhabitants thereof belong to the captors. [translation: Miller]²⁹

Stair's paraphrase is clearly of this sentence of 7.5.73; this was the passage he should have cited. Stair could easily have given his paraphrase of Xenophon from this quotation in Grotius. That Stair cited book five proves that Grotius was Stair's source; that he did not realise the error in the citation shows he did not consult Xenophon.

Both Stair and Grotius then cited Plato. Stair described the passage: “And Plato de legibus says that all the goods of the vanquished became the victors [*sic*].³⁰ This paraphrased Plato 1.626b, which was near-accurately quoted by Grotius: “*Plato dixit, πάντα τῶν νικωμένων ἀγαθὰ τῶν νικόντων γίνεσθαι. bona quae victus habuit omnia victoris fieri* [Plato said: ‘All goods of the conquered become the property of the conqueror’. [translation by Kelsey]]” That Grotius was Stair's source is shown by his paraphrase being a direct translation of Grotius' quotation, and its proximity to the citation and quotation of Xenophon which Stair also borrowed. There is nothing which suggests that Stair checked Plato. Indeed, Grotius did not indicate the location of the cited passage within *De legibus*. It is highly unlikely that Stair would have searched through Plato to find this phrase.

Both then cited Aristotle's *Politics* 1.³¹ Stair said: “The law is a common pact that things taken by war should become the takers [*sic*].³² Grotius:

²⁸ Checked in *ΞΕΝΟΦΩΝΤΟΣ ΚΥΡΟΥ ΠΑΙΔΕΙΑΣ, ΒΙΒΛΙΑ ΤΕΤΤΑΡΑ: Xenophontis Cyri paediae libri quatuor posteriores* volume 2 (Paris, 1539), 91-92.

²⁹ W. Miller (trans): *Xenophon: Cyropaedia* volume 2 (Loeb Classical Library series, London, 1914), 293.

³⁰ Adv.MS.25.1.12, 7.5 cited “Cato de legibus”.

³¹ Two of the manuscripts cited *Politics* 10. This is inaccurate; *Politics* had only eight books.

Sed Aristotle quoque auctore ὁ γὰρ νόμος ὁμολογία τις ἐστὶν ἐν ᾧ τὰ κατὰ πόλεμον κρατούμενα τῶν κρατούντων εἶναι φασιν *Lex velut pactum quoddam commune est quo bello capta capientium fiunt*

On the authority of Aristotle also we read: ‘The law is a sort of agreement, according to which things taken in war belong to those who take them’ [translation by Kelsey].

This citation of *Politics* 1 was correct: Aristotle classified plunder in war as a natural method of acquisition of property at *Politics* 1.6.³³ Again, Stair paraphrased the same passage of Aristotle, and cited him in the same way as Grotius, giving the book but not the title.

Finally, Stair’s citation of two passages of the Bible likely resulted from his consultation of Grotius. Stair cited 2 Chronicles 14.13 on King Asa’s winning “great victorie and spoyle” in his war with the Ethiopians, and Numbers 31.27 for the “judicial law of dividing the spoils”. These two texts were cited by Grotius in the same order in the passage before that in which he cited Xenophon, Plato and Aristotle.³⁴ Did Stair check Grotius’ citations in the Bible? He almost certainly already knew these passages, and may have recognised the citations as being correct. He probably did not need to check these citations. Either way, his discussion of the Bible here seems to be a reflection of Grotius.

Stair therefore used Grotius as a source for these three citations of writers of classical antiquity. He used the quotations given by Grotius to paraphrase the texts in the first version. Stair used these citations and paraphrases in relation to the natural law of spoil in victory. This agrees with Stair’s previous use of Grotius for citations of writers of classical antiquity as authority for natural law. That he also borrowed the citations of the Bible was unusual, and shows that Stair used Grotius here for texts with which he must have been familiar. This was consistent with his borrowing

³² 1662 stem: Adv.MS.25.1.8, 7.5 did not cite Aristotle; Adv.MS.25.1.10, 7.5; Adv.MS.25.1.11, fol.62L. 1666 stem: Adv.MS.25.1.5, 7.6; Adv.MSS.25.1.7 and 25.1.12, 7.5.

³³ The seventeenth-century copy consulted gave it as *Politics* 1.4.1: Sylvestro Mauro (ed): *Aristotelis Opera* volume 2, 522. There were minor differences in wording between the text of Aristotle and Grotius’ quotation.

³⁴ Grotius: *De jure belli*, 3.6.1.

of citations of writers of classical antiquity; he must at least have been familiar with Aristotle given his time at Glasgow.³⁵

4.1.4 “Recompence” [sic]

4.1.4.1 *Stair’s citation of Grotius*

Stair classified recompence as being part of natural law³⁶ and gave *negotiorum gestio* as an example.³⁷ Stair justified the right of the gestor to his expenses, despite the lack of “Conventional Obligation”³⁸ between the parties, because there was a natural, obediencial obligation to recompence him. He said that Grotius disagreed:

Grotius, l.2.Cap.10. de Jure Belli §.8. doth not own this Obligation as Natural, but as arising, *Ex lege civili nullum enim (saith he) habet eorum fundamentorum, ex quibus natura Obligationem inducit* [from the civil law; it contains none of those basic elements by virtue of which nature imposes an obligation. [translation: Kelsey]]³⁹

Stair therefore disagreed with Grotius’ categorisation of this aspect of unjustified enrichment; this agrees with his rejection of Grotius’ classification of restitution in relation to natural law.⁴⁰

The accuracy of the quotation proves that Stair consulted Grotius. Yet Stair’s citation in the first printed edition was inaccurate: the passage quoted was at 2.10.9, not 2.10.8. This was not a printing error as two of the manuscripts (Adv.MS.25.1.10 from the 1662 stem and Adv.MS.25.1.12 from the 1666 stem) also cited 2.10.8; the others consulted cited only 2.10.⁴¹ Admittedly, Adv.MS.25.1.12 was updated according to the first printed edition in places,⁴² but this was not the case with Adv.MS.25.1.10. The implication therefore is that Stair specified *De jure belli* 2.10.8

³⁵ Above, 1.2.1.2-3.

³⁶ S.8.1/1.8.1.

³⁷ S.8.2/1.8.3.

³⁸ S.8.2/1.8.3.

³⁹ S.8.2/1.8.3. 1662 stem: Adv.MS.25.1.8 and 25.1.10, 8.2; Adv.MS.25.1.11, fol.67R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 8.2.

⁴⁰ Above, 4.1.3.1.

⁴¹ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 8.2; Adv.MS.25.1.11, fol.67R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 8.2.

⁴² Especially at 10.20.

in the first version, and that it was retained for the second version. Why did the other four manuscripts consulted not cite paragraph eight? It is likely that copyists omitted the paragraph number, whether accidentally or deliberately on finding the error, and that this was transmitted through the stems by later copying from the manuscript(s). It therefore seems that Stair simply wrote down the wrong paragraph number in the first version, and did not correct this error when preparing the later versions.

4.1.4.2 *Stair's citation of Cicero*

Stair discussed the need to recompense a person who built on or repaired another's property as "a most Natural Obligation, as *Cicero, l.3. de officiis*, Sayeth, that it is against Nature, for a man, of anothers damage, to increase his profite".⁴³ Although the implication in the wording here is that Stair has translated and quoted Cicero, in fact this is a paraphrase of *De officiis* 3.5.21.

Gordon observed that this passage was also given at *De jure belli* 2.10.2 but that "the quotations [we]re not given in precisely the same context".⁴⁴ Stair gave this paraphrase to justify the rule that even the builder who knew the land on which he built was not his had to be recompensed; Grotius quoted Cicero after saying the rules of ownership ensured equality where a person has been enriched by another's possessions. Gordon therefore noted that Stair and Grotius gave Cicero "in the same general context."⁴⁵ This was not the only occasion on which Stair used borrowed authority in a different context from his source.⁴⁶

That Grotius was Stair's source here is clear. Grotius did not quote Cicero, but instead paraphrased him. However, there was an implication that Grotius was quoting Cicero because the paraphrase was printed in italics, which was Grotius' usual way of indicating a quotation. Stair's own paraphrase of Cicero is a literal translation of Grotius'. Stair's alleged quotation from *De officiis* is much closer to Grotius than to Cicero. Further support for the suggestion that Grotius was Stair's source here is that both referred to *De officiis* 3; this was the only time Stair referred

⁴³ S.8.5/1.8.6. 1662 stem: Adv.MSS.25.1.8, 8.5 omitted Cicero's name; Adv.MS.25.1.10, 8.6; Adv.MS.25.1.11, fol.68L. 1666 stem: Adv.MS.25.1.5, 25.1.7 and 25.1.12, 8.6.

⁴⁴ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 260.

⁴⁵ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 261.

⁴⁶ Below, 5.1.2.4.

to any particular passage within a text of Cicero, despite citing him six times across the four versions. As in “Of Obligations”, Stair here used the authority which he borrowed from Grotius in relation to natural law.

Stair’s next sentence also shows influence from Grotius. He continued: “Justice suffers not that with the spoil of others, we should augment our riches”.⁴⁷ This reflected Grotius, who then accurately quoted *De officiis* 3.5.22:

*Et alibi: Illud natura non patitur, ut aliorum spoliis nostras facultates, copias, opes augeamus.*⁴⁸

In another passage he adds: ‘Nature does not suffer this, that we should increase our means, riches, and resources from the spoils of others.’
[translation: Kelsey]

That Grotius, not Cicero, was Stair’s source is shown by the choice and proximity of these two quotations in Stair and Grotius.

4.1.4.3 *Stair’s citation of D.13.6.3*

Gordon noted that “Like Grotius in *De jure*, 2.10.2.2 Stair goes on to mention the case of recovery of money lent to a person under the age of contractual capacity.”⁴⁹ Stair stated that pupils, although without legal capacity, must nonetheless recompense people by whom they are unjustifiably enriched. He then gave a Latin phrase and cited D.13.6.3: “*in quantum locupletiores facti, l.sed mihi ff. commodati*”.⁵⁰ Grotius also gave this rule, and cited D.13.6.3 (also in the medieval style). He did so later in the same paragraph from which Stair borrowed the quotation from Cicero (although, admittedly, after other examples of persons who must recompense another).

⁴⁷ S.8.5/1.8.6. The manuscripts gave “nature” rather than “justice”. 1662 stem: Adv.MS.25.1.8, 8.5; Adv.MS.25.1.10, 8.6; Adv.MS.25.1.11, fol.68L. 1666 stem: Adv.MS.25.1.5, 25.1.7 and 25.1.12, 8.6.

⁴⁸ Grotius: *De jure belli*, 2.10.2. Underlining in this quotation indicates use of italics in the original source.

⁴⁹ Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 261.

⁵⁰ S.8.5/1.8.6. 1662 stem: Adv.MS.25.1.8, 8.5; Adv.MS.25.1.10, 8.6 omitted the citation; Adv.MS.25.1.11, fol.68L omitted the opening phrase. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 8.6.

Stair used this passage of Grotius in three ways. First, he borrowed the citation of D.13.6.3. Stair’s citation, which gave only the text’s opening words, was identical to that in Grotius. There is no evidence that he checked D.13.6.3 for the first version. Rather, the addition of the paragraph number in the fourth version suggests that Stair checked it at that point (Stair also added a citation of D.26.8.5 at that time). Secondly, Stair’s sentence structure was influenced by Grotius: both said pupils had no right to contract, then imposed an obligation of recompense. This structure was no particular reflection of D.13.6.3. Finally, Stair’s Latin phrase, “*in quantum locupletiores facti*”, was probably taken indirectly from D.13.6.3.pr through Grotius’ quotation of it – “*si pupillus locupletior factus sit*” – as he does not appear to have consulted the text directly. Stair here, as in “Of Obligations” and with his citation of Cicero just discussed, used the authority which he borrowed from Grotius in relation to natural law.

4.1.5 “Reparation”

Stair discussed “the private Rights of Men, arising to them by Delinquence, by exacting Reparation of their Damnages inferred thereby.”⁵¹ In the following paragraph, he stated:

Damage is called, *damnum a demendo* [loss by being diminished] because it damnifieth, or taketh away something from an other, which of Right he had. The Greeks for the like reason, call it ελαττον by which Man hath less then he had⁵²

Stair’s interest in the etymology of the term and his use of Greek here are in keeping with the method of legal humanism.⁵³

Stair’s source was *De jure belli* 2.17.2, which stated: “*Damnum forte a demendo dictum, est τὸ ἔλαττον* [Damage, the Latin word for which, *damnum*, was perhaps derived from the word meaning to take away, *demere*, in Greek is ‘the being

⁵¹ S.9.2/1.9.2. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 9.3; Adv.MS.25.1.11, fol.70L. 1666 stem: Adv.MS.25.1.5, 25.1.7 and 25.1.12, 9.3.

⁵² S.9.3/1.9.3. 1662 stem: Adv.MS.25.1.8, 9.4 omitted the Greek term; Adv.MS.25.1.10, 9.4 gave ελαττον; Adv.MS.25.1.11, fol.70L βλαβη. 1666 stem: Adv.MS.25.1.5, 9.4 gave ελχττον; Adv.MS.25.1.7, 9.4 ελχπον; Adv.MS.25.1.12, 9.4 εκλειπον.

⁵³ Above, 3.2.2.

less' [translation by Kelsey]]". Stair's phrase "*damnum a demendo*" was clearly drawn from Grotius' "*damnum forte a demendo*", and his Greek term was also evidently borrowed from Grotius. Indeed, Stair borrowed all four of the Greek terms in the third version: this and another from Grotius, and the remaining two from Vinnius.⁵⁴

Gordon noticed that:

There is a parallel in Grotius, *De jure*, 2.17.2.1 but in this case the parallel is not exact as Grotius, while referring to the derivation of *damnum* from *demere* and to the Greek word ἔλαττον, expresses himself less positively on the derivation and does not cite D 39.2.3.⁵⁵

Yet the absence of this citation in Grotius does not undermine this comparison: the Latin and Greek were borrowed from Grotius for the first version. The citation to which Gordon refers was not added until Stair's fourth version (when it was borrowed from Vinnius).⁵⁶ This paragraph of the *Institutions* as it was in the first version is therefore wholly drawn from Grotius.

4.1.6 "Obligations Conventional"

4.1.6.1 *Stair's citation of Grotius, Molina, Gomezius, Connanus, D.2.14.1, the Edict de constituta pecunia, and D.50.17.84*

It is helpful to give an overview of Stair's consideration of promises and pactions before analysing the sources he used here. Stair devoted eight paragraphs to "distinguish betwixt Promise, Pollicitation, or Offer, Paction and Contract".⁵⁷ In S.10.3/1.10.3, Stair explained that obligations were "sometime absolute and pure, and sometime conditional". These conditions could relate either to the performance of the obliged act or to an aspect of the obligation itself. He said that in the latter case, "when the condition is relating to the constituting of the Obligation, then the

⁵⁴ Below, 6.1.2.

⁵⁵ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 261.

⁵⁶ Below, 6.3.1.

⁵⁷ S.10.3/1.10.3. All quotations from the *Institutions* in this overview are found in the manuscripts unless otherwise indicated. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 10.3-7; Adv.MS.25.1.11, fol.88L-90R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 10.3-7.

very Obligation it self [*sic*] is pendent, till the condition be purified, and till then it is no Obligation”.⁵⁸ He gave the example of offer, which required acceptance before it became binding. He explained that “an offer accepted is a Contract, because it is the deed of two, the offerer and acceptor.”⁵⁹

He described promise at S.10.4/1.10.4 as “that which is simple and pure, and hath not implied as a Condition, in its being the acceptance of another”.⁶⁰ He rejected the contrary opinion of Grotius, who required acceptance of promises, before stating that “promises now be commonly held Obligatory, the Canon Law having taken off the exception of the Civil Law, *de nudo pacto*”.⁶¹

In S.10.5/1.10.5, he discussed *jus quaesitum tertio* within this greater framework,⁶² and cited Molina. Stair explained that a promise on behalf of the third party was valid, but it could also be “made by way of offer” or conditional. Here Stair began to confuse his terminology: he used “promise” here generically, without implication that offer or conditional obligations were sub-sets of promise proper.⁶³ Instead, Stair was here saying that the *jus quaesitum tertio* could be: a promise; an offer, which required acceptance; or a conditional obligation, which required action. He then explained: “Hence is our vulgar distinction betwixt Obligations and Contracts, the former being only where the Obligation is μονοπλευρος [unilateral] on the one part; the other where the Obligation is δυπλευρος [bilateral] an Obligation on both parts.”⁶⁴ He therefore used these distinctions within the example of *jus quaesitum tertio*.

⁵⁸ The manuscripts (and fourth version) gave “relateth”.

⁵⁹ The manuscripts gave “promise or contract” or “paction or contract”.

⁶⁰ The manuscripts gave “the other” not “another”.

⁶¹ This did not appear in the manuscripts.

⁶² On which, T.B. Smith: “Jus quaesitum tertio: remedies of the ‘tertius’ in Scottish law” [1956] *Jur.Rev.* 3-21, 21; D.I.C. Ashton Cross: “Bare promise in Scots law” [1957] *Jur.Rev.* 138-150, 141-142; Rodger: “Molina, Stair and the *JQT*”, 130; H.L. MacQueen: “Third party rights in contract: *jus quaesitum tertio*” in K. Reid and R. Zimmermann (eds): *A History of Private Law in Scotland* volume 2 (Oxford, 2000) 220, 223.

⁶³ W.D.H. Sellar: “Promise” in K. Reid and R. Zimmermann (eds): *A History of Private Law in Scotland* volume 2 (Oxford, 2000) 252, 254. On Stair’s use of “pollicitation”, T.B. Smith: “Pollicitatio – Promise and offer: Stair v Grotius” [1958] *Acta Juridica* 141-152 *passim*; Rodger: “Molina, Stair and the *JQT*”, 130-132; Sellar: “Promise”, 267-268; D. Smal: “The Requirements of Writing (Scotland) Act 1995: A Nail in the Coffin for Stair and Scots Promise?” (2010) 2(1) *Edinburgh Student Law Review* 15-41, 23-24; T.B. Smith: “Unilateral promise (pollicitatio)” in T.B. Smith: *A Short Commentary on the Law of Scotland* (Edinburgh, 1962) 742, 745; G. MacCormack: “A note on Stair’s use of the term pollicitatio” [1976] *Jur.Rev.* 121-126 generally.

⁶⁴ 1662 stem: Adv.MS.25.1.8, 10.3 gave μονοωλευρος and διωλευρος; Adv.MS.25.1.10, 10.3 μονοηλευ and διπλευρος; Adv.MS.25.1.11, fol.88R μονοπλευρος οιω and διπολευρος. 1666 stem:

Stair defined pactions in S.10.6/1.10.6: “the consent of two or more parties, to some things to be performed by either of them”. Such consensus was subjective and thus:

it must be taken by the words or other signs, so if the words be clearly obligator and serious, no pretence, that there was no purpose to oblige, will take place, if the promise be pendent on acceptance, and no more then an offer, it is imperfect and ambulatory, and in the power of the offerer, till acceptance...

Here again Stair used the term “promise” generically in the context of offer.

In S.10.7/1.10.7, but still within the context of pactions, Stair explained that Roman law required formalities for pactions to be enforceable, but that “the common Custome of Nations hath resiled therefrom, following rather the Canon Law, by which every paction produceth action, *omne verbum de ore fideli cadit in debitum*”.⁶⁵ He cited the *Liber Extra*,⁶⁶ Gudelinus, Corvinus and, in the manuscripts, Gomezius. He also stated that “we have a special Statute of Session, *November 27. 1592. acknowledging all pactions and promises as effectual*”.⁶⁷

In S.10.8/1.10.8, he examined various actions received into Scots law. At the end of this paragraph, he said “Instead of the remeids of Stipulation, the inconveniences that rejected naked Paction among the *Romans*, are remeided with us by this means.” First, “If the matter be of great Moment, and which requireth to its perfection, solemnity in Write...such as Dispositions of Lands, and Heretable Rights, Tacks, Rentals, and Assignations to Writs, &c.”⁶⁸ Secondly, “by a Statute of *Par. 1579. cap. 80.* all Writes of great importance, are to be subscribed by the party, or by two Nottars and four Witnesses, wherein custome hath interpret matters of importance to be that which exceeds an hundred Pound *Scots*”.⁶⁹ Sellar showed that this second rule was established by the end of the sixteenth century.⁷⁰ This use of written evidence, Stair reasoned, eliminated the need for stipulation as the only sums

Adv.MS.25.1.5, 10.3 gave μονοπλζορος and διπλεορος; Adv.MS.25.1.7, 10.3 μονοπλεομος and διπλεορος; Adv.MS.25.1.12, 10.3 μονσπλεοζος and διπλεοζος.

⁶⁵ The manuscripts generally gave “common law”; Adv.MS.25.1.10, 10.6 gave “Roman law”.

⁶⁶ Part of the *Corpus iuris canonici*, the compilation of Canon law.

⁶⁷ The Act of Sederunt is possibly apocryphal. Below, 5.1.4.1.

⁶⁸ S.10.9/1.10.9.

⁶⁹ S.10.9/1.10.9. Adv.MS.25.1.10, 10.6 gave “1000 Merks Scots”.

⁷⁰ Sellar: “Promise”, 254-256.

which could be deponed without writing (and therefore by promise or naked paction) were comparatively nominal.

Finally, in S.1.10/1.10.10, Stair said “Promises or naked Paction, are morally Obligatory by the Law of Nature”, although he acknowledged that Connanus disagreed. He cited as authority for his view Canon law, Roman law, Biblical law, and logic:

if Promises were not morally oblieging, they could have no effect, but by Positive Law (which is no more it self then a publick Paction,⁷¹ *laborans eodem morbo*) and then all Pactions and Agreements among Nations would be ineffectual, and all Commerce and Society among men should be destroyed...⁷²

The importance of these paragraphs for the development of the Scots law has often been expressed. Hogg, for example, noted that “The acceptance of the validity of bare pacts, gratuitous contracts, and unilateral contracts, under Stair’s direction, was to provide Scots Law with a very flexible and broad law of voluntary obligations.”⁷³ Stair’s discussion of naked pactions in Scots law, and his citation of Gudelinus and Corvinus, will be examined later.⁷⁴ Here it will be shown that his citations of Molina, Gomezius, Connanus, and Roman law were all borrowed from Grotius.

Grotius required promises to be accepted in order to be binding. Stair rejected this:

But a Promise is that which is simple and pure, and hath not implied as a Condition, in its being the acceptance of another, in this *Grotius* differeth, *de jure belli l.2. C.11. §.14.* holding, *that acceptance is necessar [sic] to every Conventional Obligation in equity, without consideration of positive Law;*⁷⁵

⁷¹ Added to the second edition were: the phrase “*communis reipublicae sponsio*” (the final phrase of D.1.3.1), a citation of that text, the phrase “*communis sponsio civitatis*”, and a citation of D.1.3.2.

⁷² S.10.10/1.10.10.

⁷³ M. Hogg: “Perspectives on contract theory from a mixed legal system” (2009) 29(4) *Oxford Journal of Legal Studies* 643-673, 653.

⁷⁴ Below, 5.1.4.1, 7.1.2.

⁷⁵ 1662 stem: Adv.MS.25.1.8, 10.3; Adv.MS.25.1.10, 10.3 omitted “*to every Conventional Obligation in equity*”; Adv.MS.25.1.11, fol.88L. 1666 stem: Adv.MSS.25.1.5 and 25.1.7, 10.3; Adv.MS.25.1.12, 10.3 wrongly cited 2.14 (which was on promises, contracts, and oaths made by heads of state). This error was probably made by the copyists.

Stair accurately summarised Grotius' *De jure belli* 2.11.14, which compared the requirement of acceptance in promise to that in the transfer of ownership. There is no doubt that this citation and summary of Grotius was the product of Stair's consultation and consideration of the text. Stair's rejection of Grotius was fundamental to the development of the Scots law of promise: "The result was to set Scots law on a path different from some other civilian systems and also from the common law."⁷⁶

Scholars have speculated that in departing from Grotius, Stair was following Molina and second scholasticism. Gordley noted that the second scholastics debated the requirement of acceptance in promise.⁷⁷ Hogg and Walker both suggested that in accepting "that all contracts are enforceable...Stair was largely influenced by the Spanish Scholastic School."⁷⁸ Lubbe stated: "Stair was not merely aware of Molina's views, but seems to have been influenced by them in adopting the position that an unqualified unilateral promise had an obligatory effect."⁷⁹ Certainly Stair cited Molina *De justitia et jure* disp.263 in his discussion of *jus quaesitum tertio* as an example of promise and offer.⁸⁰ The passage which Stair cited did not, however, discuss *jus quaesitum tertio*. Rather, *Disputatio* 263 discussed whether promises could be revoked before acceptance. This led the editors of the third, fourth and fifth printed editions of the *Institutions* to amend the citation to read to *Disputatio* 265, which examined donation in favour of a third party. This interpretation was later supported by Cameron and Smith.⁸¹ Furthermore, *Disputatio* 263 does not appear to support Stair's overarching argument that promises were binding before acceptance:

Convenerunt Doctores, promissionem antequam acceptetur, atque adeo antequam in pactum transeat, regulariter neque obligationem civilem, neque actionem in seculari foro parere, ut constat, tum ex aliis iuribus, tum ex l.pactum, ff. de pollicitationibus iuncta gloss. ibi, in verb.

⁷⁶ McBryde: "Promises in Scots law", 56.

⁷⁷ J. Gordley: *The Philosophical Origins of Modern Contract Doctrine* (Oxford, 1991), 80-81.

⁷⁸ Hogg: "Perspectives on contract theory from a mixed legal system", 652. Walker (ed): *Institutions*, 32-35, 36.

⁷⁹ G. Lubbe "Formation of contract" in K. Reid & R. Zimmermann (eds): *A History of Private Law in Scotland* volume 2 (Oxford, 2000) 1, 43.

⁸⁰ S.10.5/1.10.5. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 10.3; Adv.MS.25.1.11, fol.88R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 10.3.

⁸¹ Cameron: "*Jus quaesitum tertio*: the true meaning of Stair I.x.5", esp. 108; Smith: "Jus quaesitum tertio: remedies of the 'tertius' in Scottish law", 5.

offerentis. & l. nuda pollicitatio. Cod. de contrahen. stipul. cuius haec sunt verba: Nuda pollicitatione secundum ea, quae saepe constituta sunt, aed praestanda ea, quae promiserat, urgeri quenquam non semper iura permittunt.⁸²

The *doctores* are agreed that as a rule a promise before acceptance, and so before it turns into a pact, gives rise to neither a civil obligation nor an action in a secular court, as is agreed both from other texts and from D.50.12.3, the gloss on the work *offerentis* there, and from C.8.37(38).5 which runs as follows: *according to what has often been decided the law does not always allow anyone to be obliged by a pollicitation to perform what he had promised.* [translation: Rodger⁸³]

This means that the passage cited by Stair was not only on promise rather than *jus quaesitum tertio*, but also began by *denying* that promises were binding without acceptance. This has been noted by various scholars. Mackenzie Stuart said that “there appears no warrant in Molina for the views ascribed to him”.⁸⁴ McBryde believed that “An examination of Molina’s text suggests to the writer that the position was much more obscure, with the arguments of the ‘doctores’ favouring the view that an unaccepted promise was not enforceable in a civil court.”⁸⁵ Scholars have tried to explain Stair’s citation of Molina’s *Disputatio* 263. In *Carmichael v Carmichael’s Executrix*,⁸⁶ an insurance contract taken out on a son’s life had included a term transferring the right to the proceeds to the son’s executrix and the duty to pay the premiums to the son on his majority; both had previously lain with the father. After reaching majority but before paying the first premium, the son died. Lord Dunedin, who heard the case, said that the appellant’s argument required Stair’s discussion of *jus quaesitum tertio* to be interpreted to mean that “the moment you find from the form of the obligation that there was a *jus* conceived in favour of a *tertius* it proved that that *jus* was *quaesitum* to that *tertius*.”⁸⁷ He said that this interpretation “attempts too much” and would be inconsistent with Roman law, the

⁸² Molina: *De justitia et jure*, volume 2, *Disputatio* 263.1. Underlining in this quotation indicates use of italics in the original source.

⁸³ Rodger: “Molina, Stair and the *JQT*”, 136-137.

⁸⁴ A.J. Mackenzie Stuart: “Contract and quasi contract” in *An Introduction to Scottish Legal History by various authors with an introduction by the Rt. Hon. Lord Normand* (Stair Society series volume 20, Edinburgh, 1958) 241, 263

⁸⁵ McBryde: “Promises”, 55. Cf. Gordley: *Philosophical Origins of Modern Contract Doctrine*, 80.

⁸⁶ 1920 S.C. (H.L.) 195; 1920 2 S.L.T. 285. On which, MacQueen: “Third party rights in contract: *JQT*”, 240-250.

⁸⁷ 1920 SC (HL) 195, 199.

cases cited by Stair, and the later authorities. He stated that it would thus have been “a holocaust of accepted authorities in the law of Scotland; but I do not think Lord Stair meant any such thing.”⁸⁸ Lord Dunedin instead suggested that “irrevocability is the test; the mere execution of the document will not constitute irrevocability.”⁸⁹ This re-interpretation of Stair was criticised by Cameron, who said that Molina should have been examined.⁹⁰ Rodger also dismissed Dunedin’s judgement:

Lord Dunedin’s judgement is confused. There is no authority whatsoever for transposing clauses in sentences of Stair. The entire exercise is transparently one of adapting the text to fit in with preconceived ideas. ... To rewrite the text and make it say the very reverse of what it appears to say is unsound and unconvincing.⁹¹

Yet he also criticised Cameron’s reading of Molina,⁹² and noted that “all the manuscripts and the first and fourth versions are unanimous in telling us that Stair referred to Molina, *Disputatio* 263.”⁹³ He explained Stair’s structure:

Stair thought that the third party beneficiary acquires his right by a pollicitation on the part of the promisor and so he does not need to ‘accept’ in any way whatsoever. ... what led him to include the *jus quaesitum tertio* at this stage was that he saw it as a case where a person acquired a right from a promise which he did not need to accept.⁹⁴

Rodger explained the apparent disagreement between Stair’s and Molina’s views on whether promises were binding by showing that, in a later passage of *Disputatio* 263, Molina stated:

*Veruntamen [sic: verum tamen], quod contendimus, est, promissionem ipsam ex natura sua, secluso iure positivo, quod aliud statuit, vim habere, antequam acceptetur, ad obligandum ex parte sua promittentem, ita ut manifestare donatario promissionem teneatur, ut, si ea acceptare velit, illam adimpleat, prout ex parte sua ante acceptationem tenebatur.*⁹⁵

⁸⁸ 1920 SC (HL) 195, 199.

⁸⁹ 1920 SC (HL) 195, 201.

⁹⁰ Cameron: “*JQT*: The true meaning of Stair I.x.5”, 104.

⁹¹ Rodger: “Molina, Stair and the *JQT*”, 39.

⁹² Rodger: “Molina, Stair and the *JQT*”, 42-44.

⁹³ Rodger: “Molina, Stair and the *JQT*”, 44.

⁹⁴ Rodger: “Molina, Stair and the *JQT*”, 135.

⁹⁵ Molina: *De justitia et jure*, volume 2, *Disputatio* 253.12.

What we assert is nonetheless true, namely, that leaving aside positive law which decides otherwise, a promise itself by its very nature has force before acceptance to bind the promisor for his part in such a way that he is bound to show the promise to the beneficiary so that if he wishes to accept it, he [the promisor] should fulfill [*sic*] it, as he was bound for his part before the acceptance. [translation: Rodger;⁹⁶ parenthesis in the original]

This perhaps takes this text too far. Molina here said that the promisor is bound only to relay the promise to the beneficiary, but is not bound to fulfil the promise by performing the promised act. Stair, however, said that the promisor *was* bound to fulfil the promise by performing that act. This is a fundamental difference. Nonetheless, this was until recently the leading explanation. MacQueen followed Rodger's interpretation, and suggested that his citation of Molina, and his discussion here generally, "exemplified Stair's basic contention that Scots law was close to the requirements of natural law."⁹⁷

All this assumes that Stair read Molina. Richter, however, has correctly argued that Stair's citation of Molina was borrowed from Grotius.⁹⁸ Grotius stated that promises needed acceptance. He then acknowledged the opposite view and cited Molina: "*quae ratio quosdam induxit, ut jure naturae solum promittentis actum sufficere judicarent* <Molina disput. 263.>⁹⁹ [Nevertheless this consideration has led some to judge that the act of promising is alone sufficient. [translation: Kelsey]]"¹⁰⁰ Why Grotius cited Molina as authority here is unknown, given that Molina seems not to have supported this view; perhaps he also borrowed this citation from another source.¹⁰¹ Grotius defended his own position by drawing on Roman law, which did not allow a promise to be rescinded so as to allow the benefiting party the opportunity to accept.

⁹⁶ Rodger: "Molina, Stair and the *JQT*" 138.

⁹⁷ MacQueen: Third party rights in contract: *JQT*, 225.

⁹⁸ Richter: "Molina, Grotius, Stair and the *JQT*", 221-222.

⁹⁹ Triangular brackets indicate marginal citation.

¹⁰⁰ Grotius: *De jure belli* 2.11.14.

¹⁰¹ This was certainly part of his practice: one of Grotius' citations of Covarruvias should rather have been of Lancellotus Conradus and was borrowed from Leonardus Lessius [R. Feenstra: "L'influence de la Scholastique Espagnole sur Grotius en droit privé: quelques expériences dans questions de fond et de forme, concernant notamment les doctrines de l'erreur et de l'enrichissement sans cause" in P. Grossi (ed): *La seconda Scolastica nella formazione del diritto privato moderno* (Milan, 1973) 377, 382-385].

Grotius' discussion varied in topic from that of Stair, as Richter noted.¹⁰² Stair instead discussed a third party's right to overrule the rescission of a contract under which he benefits, despite the mutual consent of both parties to the contract. Essentially, he stated that anyone with rights under a contract must consent to its rescission for that rescission to have effect. There was, however, some similarity in the context of the citation of Molina in Stair and in Grotius: giving the promisee opportunity to consider whether to accept or decline the promise. It is therefore possible to see why Stair may have felt that the citation of Molina would have been broadly relevant to his own discussion; that Grotius rejected Molina may have been why Stair borrowed this citation. That Stair was treating *jus quaesitum tertio* as an example of promise in the greater context¹⁰³ may also have given him the confidence to use the citation as authority for his broader point. Yet that Stair described Molina incorrectly suggests that he did not check *De justitia et jure*. There cannot have been even indirect influence, given Grotius' wrong use of Molina. However, Stair believed that Molina supported the idea that promise alone was sufficient to bind a promisor. This may have contributed to some extent to his conviction in rejecting Grotius.¹⁰⁴

Stair cited another second scholastic, Gomezius, when he explained that in contemporary law pactions required only consent. Stair explained that in Roman law stipulations were required for pactions to be enforceable, but:

the common Custome of Nations hath resiled therefrom, following rather the Canon Law, by which every paction produceth action, *omne verbum de ore fideli cadit in debitum*, C. 1. & 3 de pactis. And so observeth *Guidilinus, de jure, Nov. l.3.cap.5.§.ult.* and *Corvinus de pactis*.¹⁰⁵

All the sample manuscripts but Adv.MS.25.1.12¹⁰⁶ (and thus, presumably, the first and second versions) cited Gomezius 2.9.3 between Gudelinus and Corvinus.¹⁰⁷ Stair

¹⁰² Richter: "Molina, Grotius, Stair and the *JQT*", 221.

¹⁰³ MacQueen: Third party rights in contract: *JQT*", 225; T.B. Smith: "*JQT*: remedies of the 'tertius' in Scottish law", 21.

¹⁰⁴ See H.L. MacQueen & W.D.H. Sellar: "Scots law: *ius quaesitum tertio*, promise and irrevocability" in E. Schrage (ed): *Ius Quaesitum Tertio* (Comparative Studies in Continental and Anglo-American Legal History series volume 26, Berlin, 2008) 357, 357-360 esp.359. On pre-existing Scots law, see MacQueen: "Third party rights in contract: *JQT*", 221-223; Sellar: "Promise", 260-266.

¹⁰⁵ S.10.7/1.10.7.

¹⁰⁶ Adv.MS.25.1.12, 10.6 cited "L.2. respons 9, ii, 3".

borrowed this citation from the passage of Grotius immediately before that in which Grotius cited Molina. Yet Grotius cited Gomezius 2.9.1.¹⁰⁸ Stair and Grotius therefore cited the same book and title of Gomezius, but different paragraphs. The difference may simply have been Stair's error in copying the citation. Neither citation was correct. It was Gomezius' *Commentaria, variaque resolutiones* 2.9.2 rather than 2.9.3 which was on naked pactions. Here Gomezius stated: "*Et istud pactum efficaciter obligat, & producit actionem de Iure Canonico* [And that paction binds effectually, and produces an action of the Canon law]".¹⁰⁹

Stair used the citation of Gomezius in a different context to Grotius: Stair gave him as authority for the Canon law prescribing that "every paction produceth action"; Grotius cited him on the need for acceptance of promises. These were, however, sufficiently similar contexts for Stair to have identified Gomezius as relevant authority for his discussion from reading Grotius'. That the citation is wrong suggests that Stair borrowed this citation without checking it. This is the same practice as his borrowing the citation of Molina, also from Grotius, without checking it.

Stair's final citation of a continental jurist here was of Connanus. Although Stair said that most jurists believed that promises or naked pactions were morally binding, he cited two titles within an unnamed treatise of Connanus which he said denied this. Grotius also cited these titles; their citations are remarkably similar. Stair wrote: "*l.1.C.6.l.5.C.9*";¹¹⁰ Grotius "Lib. 1, c. VI: Lib. V, c. 1."¹¹¹ Neither referred to any particular treatise, both cited 1.6, and both book five, although Stair cited 5.9 and Grotius 5.1. The majority of the manuscripts (and thus presumably the first and second versions), however, cited 5.1.¹¹² This indicates that the different citation in the first printed edition was a printing error; it was not corrected for the second printed edition. Both Connanus 1.6 and 5.1 were relevant. Connanus' *Commentaria*

¹⁰⁷ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 264.

¹⁰⁸ Grotius: *De jure belli*, 2.11.14. This citation was printed in error in the margin beside 2.10.3 in the 1646 Amsterdam edition, but correctly appears at 2.11.14 in the 1625 Paris and 1632 Amsterdam editions.

¹⁰⁹ Gomezius: *Commentaria, variaque resolutiones iuris civilis*, 2.9.2, 290.

¹¹⁰ S.10.10/1.10.10.

¹¹¹ Grotius: *De jure belli*, 2.11.1.

¹¹² 1662 stem: Adv.MS.25.1.8 and 25.1.10, 10.7; Adv.MS.25.1.11, fol.90L cited 5.2. 1666 stem: Adv.MS.25.1.5 and 25.1.7, 10.7; Adv.MS.25.1.12, 10.7 cited 5.2 (as "5 ii").

iuris civilis libri decem 1.6.12 stated that promises were not enforceable either legally or morally:

*verbis factae promissiones, etiam si ob causam essent factae, non constituebant obligationem ... At idem multa profert exempla, in quibus liceat vel naturae consensu de promissis recedere: ... Mihi quidem videtur, semper fas esse datam fidem non implere, si nihil inde veniat incommodi ad eum, cui data est.*¹¹³

promises made by words, even if made for cause, do not constitute an obligation ... but there are many examples advanced, in which it is permitted or from the nature of the agreement to recede from promises: ... to me indeed it seems by divine law is acceptable not to satisfy the promise if the other party is not thereby disadvantaged.

Connanus expressed the same in his commentary at 5.1.5:

*Pactiones autem quaecunque non habebant συνάλλαγμα, quia si non implerentur, nihil fraudis afferre videbantur ei, cui factae erant, non afferebant promittenti necessitatem, sed liberum erat ab illis resilire. Tam enim videbatur esse in culpa, qui temere nulla de causa pollicenti crediderant, quam ille ipse, qui vanitatem adhibuerat promissionis.*¹¹⁴

But pactions in any way do not have currency; if they are not fulfilled, no offences are spoken of or seen by the same which is made, nor obligation conveyed by promise, but he is free to resile from this. So indeed it is seen to have been the fault of he who rashly trusts promise without cause, which foolishness invites promises.

The passage cited by Stair in the third version, 5.9, was instead on donation. This confirms that this change was a printing error. Stair borrowed these citations from Grotius for the first version: the same two passages are cited in the same manner and the same order. There is no evidence that Stair consulted Connanus; it is likely that he borrowed these citations without checking them.

Stair cited a range of authority against Connanus, including Canon law, three texts of Roman law (D.2.14.1, the Edict *de constituta pecunia*, and D.50.17.84), and the Bible.¹¹⁵ All these citations appeared in the sample manuscripts, and thus

¹¹³ Connanus: *Commentaria iuris civilis libri decem*, 27.

¹¹⁴ Connanus: *Commentaria iuris civilis libri decem*, 398.

¹¹⁵ S.10.10/1.10.10.

presumably the first and second versions.¹¹⁶ Gordon noted these three Roman legal texts were also cited by Grotius.¹¹⁷ Stair stated:

[by] the Civil Law *l.1.ff. de pactis*, there is nothing so congruous to humane trust, as to perform what is agreed among them; the Edict, *de constituta pecunia*, saith, *it is suitable to natural Equity*, and saith farther, *that he is debtor by the Law of Nature, who must pay by the Law of Nations*, whose faith we have followed, *l.cumamplius, ff. de regulis juris...*¹¹⁸

This passage reads as if it was describing D.2.14.1, then summarising the Edict in the two italicised phrases, then citing D.50.17.84 to show that the Edict was followed. Stair's summary of D.2.14.1 was accurate, and his description of "*natural Equity*" in the first italicised phrase was found in D.13.5.1.pr, which recorded the Edict:

Hoc edicto praetor favet naturali aequitati: qui constituta ex consensu facta custodit, quoniam grave est fidem fallere.

With this edict, the praetor promotes natural equity in that he protects a *constitutum* made by agreement on the ground that it is a serious matter to go back on one's word [translation: Watson].

Yet the second italicised phrase ("*that he is debtor by the Law of Nature, who must pay by the Law of Nations*") was instead a paraphrase of D.50.17.84.1, which stated: "*Is natura debet, quem iure gentium dare oportet, cuius fidem secuti sumus* [Someone owed something by nature if the law of nations in which we trust obliges him to give it [translation by Watson]]". Stair's use of authority in this last part of the passage was therefore confused.

This confusion reveals Grotius as Stair's source. Grotius discussed the Edict and D.50.17.84.1 together; hence Stair's muddling the content of the texts.¹¹⁹ That

¹¹⁶ Although D.50.17.84 was wrongly cited as being of Connanus in Adv.MS.25.1.5 and 25.1.7, 10.7: "*L. Conanus: ff. de regulis juris*". It is probable a copyist misread this citation and that this error was copied into later manuscripts. Adv.MS.25.1.12, 10.7 stated "we have followed Conanus *Lib. de regulis juris*". This may have been an attempt to make sense of this, clearly wide-spread, inaccurate citation. That the copyist of Adv.MS.25.1.12 did not simply compare the citation to the first printed edition suggests that only a limited number of passages of this manuscript were updated.

¹¹⁷ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 262; Grotius: *De jure belli*, 2.11.1.

¹¹⁸ S.10.10/1.10.10. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 10.7; Adv.MS.25.1.11, fol.90L-R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 10.7.

¹¹⁹ Grotius: *De jure belli*, 2.11.1.

Stair misunderstood Grotius shows that he did not check the *Digest*. Another indication that Grotius was Stair's source is that he, like Stair, cited D.50.17.84 in the medieval style. He did, however, also include the paragraph number in his citation. Stair does not seem to have borrowed the number for the first version.

In sum, Stair consulted and cited Grotius, but disagreed with his position on the need for acceptance in promise. In doing so, he may have been following established Scots law.¹²⁰ He borrowed his citations of Molina, Gomezius and Connanus from Grotius, checking none of them. He cited Molina and Gomezius in slightly different contexts from Grotius, although his use of Connanus was the same as that of Grotius. Stair also borrowed from Grotius his citations of Roman law. Again, as Stair seems to have confused D.50.17.84.1 with the Edict, it is likely that he borrowed these citations without checking them. All six citations were borrowed from only two paragraphs of Grotius. Those of Molina and Gomezius were borrowed from *De jure belli* 2.11.14, the passage cited by Stair, and those of Connanus and Roman law from 2.11.1. It will be shown that Stair also used Gudelinus and Corvinus for these passages for the first version. When preparing the third version, Stair removed the citation of Gomezius. It is unclear as to why he did this. Certainly he did not check Molina, Connanus or the texts of Roman law at that time, which suggests that he did not remove the citation of Gomezius because he found the error.

4.1.6.2 *Stair's citation of Grotius, Pliny the Elder, C.4.44.8, Seneca and Saint Ambrose*

At S.10.14/1.10.14, Stair discussed whether there had to be equality between contracting parties. This passage cited many authorities: Pliny the Elder, Grotius, the *Codex*, Seneca and Ambrose. Mackenzie Stuart described this as “a passage taken almost in its entirety, including the literary embellishments, and with scant acknowledgement, from Grotius, *De Jure Belli*, II.12.14”.¹²¹ Indeed, all Stair's citations here were borrowed from Grotius.

¹²⁰ On which, MacQueen & Sellar: “Scots law: *ius quaesitum tertio*, promise and irrevocability”, 357-360; MacQueen: “Third party rights in contract: *JQT*”, 221-223; Sellar: “Promise”, 260-266.

¹²¹ Mackenzie Stuart: “Contract and quasi contract”, 258.

Stair cited Pliny the Elder twice in the *Institutions*.¹²² Here he cited and quoted from Pliny's *Natural History*: "*Plin.lib.9.cap.55 Margaritis pretium luxuria fecit*". This citation (in the first and second printed editions) was incorrect. The sample manuscripts from both stems (and thus, presumably, the first and second versions) cited 9.35, which is correct.¹²³ This change was likely a printing error. Grotius also cited 9.35 and quoted the same phrase of Pliny: "*Margaritis, inquit Plinius [ix, 35], pretia luxuria fecit.*"¹²⁴ Both Stair and Grotius used the citation within the context of assessing the value of property, and both paraphrased a longer sentence in Pliny:

*Conchylia & purpuras omnis hora atterit, quibus eadem mater luxuria paria paene et margaritis pretia fecit*¹²⁵

whereas every hour of use wears away robes of scarlet and purple, which the same mother, luxury, has made almost as costly as pearls.
[translation: Rackham]¹²⁶

While this paraphrasing of Pliny is understandable, that both Grotius and Stair do so in the same way indicates, first, that Grotius was Stair's source and, secondly, that Stair did not check this text. There is nothing in Stair that would suggest otherwise; none of his other examples of things which are valued disproportionately to their usefulness ("Portraits, Tulips, or other Flowers")¹²⁷ were in Pliny. Rather, these items reflected seventeenth-century Dutch concerns.¹²⁸ These examples thus support the suggestion that Stair was influenced by Dutch sources here. However, Grotius does not give these examples. This might indicate that Stair also consulted another Dutch

¹²² Also S.18.2/2.8.2.

¹²³ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 10.15; Adv.MS.25.1.11, fol.94L. 1666 stem: Adv.MSS.25.1.5 and 25.1.7, 10.15; Adv.MS.25.1.12, 10.15 cited Pliny 9.23, presumably an error made by the copyist. The modern standard arrangement of the text is that by nineteenth-century scholar B. Teubner. Printing of the *Bibliotheca Teubneriana* began in 1849, with Pliny the Elder's *Natural History* printed in 1854. This edition amended the arrangement of the passages within the ninth book, and thus this passage of Pliny is now at 9.60. In editions of the text before Teubner's, however, the passage quoted is found at 9.35, as Stair and Grotius stated.

¹²⁴ Grotius: *De jure belli*, 2.12.14.

¹²⁵ Pliny: *Naturalis Historia, cum commentariis & adnotationibus* volume 1 (Leiden, 1669), 627 gave 'pene rather than 'paene', but this cannot have been correct.

¹²⁶ H. Rackham (trans): *Pliny: Natural History with an English translation in ten volumes* volume 3 (Loeb Classical Library series, London, 1940), 247.

¹²⁷ S.10.14/1.10.14.

¹²⁸ On which, e.g. S. Schama: *The Embarrassment of Riches: An Interpretation of Dutch Culture in the Golden Age* (New York, 1988), 350-359.

source for this passage in addition to Grotius, although he may have furnished these examples himself.

Stair explained that Roman law “did not notice every inequality, but that which was enorm, above the half of the just value”,¹²⁹ but intimated that Scots law did not follow this, citing *Farie v Inglis* 1669.¹³⁰ That this case appears in Stair’s *Decisions* establishes that Stair was the judge.¹³¹ The pursuer, who had contracted as a minor and ratified the contract after minority, sought reduction *inter alia* on the grounds of inequality of value. The defender successfully responded that “our Law and Custom acknowledges not that Ground of the Civil Law, of annulling Bargains, made without Cheat or Fraud on the inequality of the Price”.¹³² After citing this case, Stair explained that “*Grotius, de jure belli, l.2.cap.12.* is for the affirmative on this ground, chiefly that the purpose of the Contracters is to give one thing for an other of equal value, without purpose to gift on either hand”.¹³³ In the first, second and third versions, Stair cited *De jure belli* 2.12. At *De jure belli* 2.12.8, Grotius said that if there was not equality then he who was disadvantaged had an action on the inequality. Grotius here expressed Aristotelian philosophy, although Aristotle was not cited.¹³⁴ Stair disagreed with Grotius, saying that value was subjective and that it was “the first rule in such Contracts, when both parties being free, do agree on such a rate, there is here no Donation, but a particular Estimation, wherewith either ought to rest satisfied”.

Stair in the fourth version cited *De jure belli* 2.12.11. This paragraph was on equality in contracts of exchange, and was thus less broadly applicable than 2.12.8.¹³⁵ This was the only citation of a jurist which Stair made more detailed for the fourth version.¹³⁶

¹²⁹ S.10.14/1.10.14.

¹³⁰ Suits between these two parties were heard on 23rd and 24th June 1669. It is the earlier case which was referred to here. This citation did not appear in the manuscripts for obvious reasons.

¹³¹ S.Dec.1.623.

¹³² S.Dec.1.623.

¹³³ “is for the affirmative” did not appear in the manuscripts. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 10.16; Adv.MS.25.1.11, fol.94L. 1666 stem: Adv.MS.25.1.5, 25.1.7 and 25.1.12, 10.16.

¹³⁴ Gordley examined the Aristotelian basis of the development of the concept of liability in contract and delict, J. Gordley: “Contract and delict: toward a unified law of obligations” (1996-1997) 1(3) *Edin.L.R.* 345-360, esp. 347-348.

¹³⁵ Below, 4.3.

¹³⁶ That of Rebuffus was also amended, but was actually less accurate in the fourth version.

Stair then explained that precedents in transactions began to establish an objective value,

and therefore, it is safest to conclude with the Law, *l. si voluntate, C. de resin. vend.* which saith, this is the substance of buying and selling, that the buyer having a purpose to buy cheap, and the seller to sell dear, that they come to this Contract, and after many debates, the seller by little and little diminishing what he sought, and the buyer adding to what he offered, at last they agree to a certain price.¹³⁷

Stair's citation of C.4.44.8 gave only the opening words of the text and not its paragraph number. This citation also appeared in the manuscripts, although 'si' was rendered 'ff'. This mistake was probably made by the copyists, but was understandable given the style of lettering at the time. It probably indicates that Stair's writing here was particularly difficult to read. Two points establish Grotius as Stair's source. First, Stair's citation was identical to Grotius': "*L. Si voluntate, C. de rescind. vend.*"¹³⁸ Grotius quoted the same part of C.4.44.8 as Stair, who seems to have simply translated and incorporated this quotation into the *Institutions*. The rest of the legislation, which was not mentioned by Grotius, likewise did not feature in Stair.

Stair then cited Seneca: "*Seneca says, l.6. de beneficiis, cap. 15.* It is no matter what the rate be, seing [*sic*] it is agreed between the buyer and the seller, for he that buyes well, owes nothing to the seller".¹³⁹ Grotius also cited *De beneficiis* 6.15, and accurately quoted from Seneca:¹⁴⁰

*pretium autem cuiusque rei pro tempore est. Cum bene ista laudaveris: tanti sunt, quanto pluris vaenire non possunt.*¹⁴¹

the price of everything varies with circumstances; though you have well praised your wares, they are worth only the highest price at which they can be sold; [translation: Basore¹⁴²]

¹³⁷ S.10.14/1.10.14.

¹³⁸ Grotius: *De jure belli*, 2.12.26.

¹³⁹ S.10.14/1.10.14. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 10.16; Adv.MS.25.1.11, fol.94R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 10.16.

¹⁴⁰ Grotius: *De jure belli*, 2.12.14.

¹⁴¹ L.A. Seneca: *De beneficiis* in *Opera quae exstant omnia, variorum notis illustrata* volume 1 (Amsterdam, 1619), 6.15, 143.

Stair could have drawn his discussion of Seneca from Grotius. Yet Stair also said that if the price was lower than the value, the seller had no recourse against the buyer. This point was not related by Grotius here but was made by Seneca in the sentence immediately following that quoted by Grotius: “*praeterea nihil venditori debet, qui bene emit* [he who buys well owes nothing to the seller]”. That Stair’s sentence is a direct translation of Seneca suggests he consulted *De beneficiis*.

If Stair did check Seneca, this represents a departure from his usual practice when writing the first version. He may have checked Seneca but not the other authorities because Grotius said that “*Seneca multis exemplis ostendit* [Seneca has made this plain by many examples [translation: Kelsey]]”.¹⁴³ Stair probably had easy access to a copy of Seneca, else he would not have checked the text. Yet this was Stair’s only citation of Seneca in this version, so his checking *De beneficiis* did not result in his further use of it.

Finally, Stair cited Ambrose when discussing defects in goods sold: “according to the Sentence of *Ambrose, in Contracts*, saith he, *even the defects of the things which are sold, ought to be laid open, and unless the seller intimate the same, there is competent to the buyer an action of Fraud*”.¹⁴⁴ Grotius also cited and quoted from this same passage of Ambrose. Grotius’ citation, “*Offic. ii. c. 10*”, was wrong.¹⁴⁵ Kelsey noted in his translation of *De jure belli* that the citation should have read to 3.10. Here Ambrose stated:

*Non solum itaque in contractibus (in quibus etiam vitia eorum quae veneunt, prodi iubentur, ac nisi intimaverit venditor, quamvis in ius emptoris transcripserit, doli actione vacuantur) sed etiam generaliter in omnibus dolus abesse debet.*¹⁴⁶

Fraud, then, ought to be wanting not only in contracts, in which the defects of those things which are for sale are ordered to be recorded (which contracts, unless the vendor has mentioned the defects, are

¹⁴² J.W. Basore (trans): *Seneca: Moral Essays* volume 3 (Loeb Classical Library series, Cambridge MA, 1935), 393-395.

¹⁴³ Grotius: *De jure belli*, 2.12.14.

¹⁴⁴ S.10.14/1.10.14. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 10.16; Adv.MS.25.1.11, fol.95L. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 10.16.

¹⁴⁵ Grotius: *De jure belli*, 2.12.9.

¹⁴⁶ Ambrose: *Opera omnia quae exstant, ex editione Romana* volume 4 (Cologne, 1616), 3.10, 37.

rendered void by an action for fraud, although he has conveyed them fully to the purchaser), but it ought also to be absent in all else. [translation: Schaff]¹⁴⁷

Grotius paraphrased the portion in parenthesis; Stair's own paraphrase gave only that same section and was closer to Grotius than to the actual text. It is therefore likely that Grotius was Stair's source. Unfortunately, Stair did not provide a citation of Ambrose, and thus it cannot be known whether Stair was aware of the error in Grotius' citation.

In sum, Stair consulted and borrowed from *De jure belli* 2.12, from paragraphs nine to twenty-six. He borrowed citations of Pliny the Elder, Seneca, Ambrose, and C.4.44.8. It seems he only checked the citation of Seneca. This did not cause him to use Seneca elsewhere. Stair made no changes to these citations for the third version. Yet, when preparing the fourth version, he made his citation of Grotius more specific by referring to the eleventh subparagraph of *De jure belli* 2.12.¹⁴⁸ He also added a citation of D.21.1.1.6 but, as this was not cited by Grotius, it could not have been borrowed from him.

4.1.7 “Obligations Conventional/Depositum”

Stair discussed pledge in “Obligations Conventional/Depositum”. He gave a Greek term in his discussion of pledge: “if the profite of the Pledge be allotted for the profite of the Debt, which is called ἀντιχρησις, it is a mixt Contract, having in it a Mandat, and the exchange of the Usufruct, or use of the Pledge for the use of the Debt.”¹⁴⁹ Richter gave this as one of the Greek terms which were “possibly taken from Grotius”.¹⁵⁰ Indeed, Grotius' *De jure belli* 2.12.20 read: “*Atque ideo ex ἀντιχρήσις usus pecuniae cum fructibus praedii compensatur* [And so ‘in reciprocal usage’ the

¹⁴⁷ P. Schaff: *Nicene and Post-Nicene Fathers* series 2, volume 10: *Ambrose: Select Works and Letters* (Oxford, 1896 rept. New York, 2007), 78.

¹⁴⁸ Below, 4.3.

¹⁴⁹ S.10.57/1.13.11. 1662 stem: Adv.MS.25.1.8, 10.38 gave ἀντιχρησις; Adv.MS.25.1.10, 10.38 gave ἀντιχρησις; Adv.MS.25.1.11, fol.106L gave ἀντιχρησις. 1666 stem: Adv.MS.25.1.5, 10.38 gave ἀντιχρησις; Adv.MS.25.1.7, 10.38 gave ἀντιχρησις; Adv.MS.25.1.12, 10.38 omitted the Greek term. The manuscripts from the 1666 stem also gave “the use of the fruits”.

¹⁵⁰ Richter: “Did Stair know Pufendorf?”, 369 n.14.

use of money is compensated for by the fruits of an estate].”¹⁵¹ It is clear that this term was borrowed from this passage; this title of Grotius was used extensively by Stair for “Obligations Conventional”.

4.1.8 Passages in “Obligations Conventional/Accessory Obligations” in the manuscripts only

In the first and second versions, Stair cited Grotius *De jure belli* 2.13 and Deuteronomy 17 in his discussion of promissory oaths; the passage concerned the Israelites’ commanded destruction of other nations.¹⁵² The Gibeonites had falsely claimed to be from distant lands and the two nations had thereby sworn an oath of peace. This meant that, after their deceit was discovered, the Israelites could not slay them.¹⁵³

Grotius also discussed oaths procured by fraud. He said that if someone swore an oath after being misled (who would not have sworn it had he known the truth) then the oath was not binding. If, however, he would have sworn the oath anyway, he would still be bound.¹⁵⁴ Grotius said the Israelites’ oath could have been sworn irrespective of the Gibeonites’ fraud. He argued that the people of Jordan could have surrendered because God’s command did not preclude sparing certain people (they spared Raban and her family for her assistance).¹⁵⁵

Stair’s citation of Grotius was therefore correct and relevant, but again he disagreed with Grotius:

they being Hivites were amongst the nations which the people of Israel were commanded utterly to destroy Deut. 17. and could not spare them on their submission, as Grotius supposes *De jure belli* l.2. cap.13. for it is clear from that chapter that the sparing of those who willingly submitted, vers. 10 and 11. It is only of cities far off and not of these nations but these without exception are to be utterly destroyed.¹⁵⁶

¹⁵¹ Grotius: *De jure belli*, 2.12.20.

¹⁵² The passage followed after the citation of *Maxwell v E. Nithsdale* 1632 [M.2115], S.10.96/1.17.13.

¹⁵³ Joshua 9.16-27.

¹⁵⁴ Grotius: *De jure belli* 2.13.4.

¹⁵⁵ Grotius: *De jure belli* 2.13.4.

¹⁵⁶ 1662 stem: Adv.MS.25.1.8, 10.78 cited either *De jure belli* 1.2.13 or 7.2.13; Adv.MS.25.1.10, 10.77; Adv.MS.25.1.11, fol.123R-124L. 1666 stem: Adv.MS.25.1.5, 10.77; Adv.MS.25.1.7, 10.77 cited *De jure belli* 1.2.13; Adv.MS.25.1.12, 10.77.

Stair cited Deuteronomy 17.10-11, which said that God’s commandments had to be followed exactly and his instructions not deviated from. In the case of Joshua, the instructions were clear: “But thou shalt utterly destroy them...as the LORD they God hath commanded thee”.¹⁵⁷ Grotius, however, cited Deuteronomy 20.10: “When thou comest nigh a city to fight against it, then proclaim peace unto it”. It is clear that Stair, although he consulted Grotius, did not find his argument compelling, and independently selected texts to support his own reading of the story of Joshua. Stair extensively revised this passage for the third version;¹⁵⁸ the citations of Grotius and Deuteronomy did not appear in the printed editions.

Stair also cited Connanus in his discussion of the effects of oaths in the first and second versions, but there was no comparable passage in the printed editions. He for the second time cited Connanus regarding his opinion that promises were not binding: “some have thought that promises and pactions are only obligatory by reason of the weight of the matter as Connanus and yet on any frivolous pretence may shift or retract but cannot do so after an oath is interposed.”¹⁵⁹ Stair cited Connanus in this context earlier in “Obligations Conventional”, a citation borrowed from *De jure belli* 2.11.1.¹⁶⁰ It seems very probable that Stair also borrowed this citation of Connanus from that same paragraph of Grotius. There Grotius refuted Connanus in detail, although he did not give a citation beyond ““Lib. 1, c. VI: Lib. V, c. 1.” which Stair borrowed for that earlier passage.¹⁶¹ While discussing Connanus, Grotius referred specifically to stipulations “*quarum ea est efficacia, ut quod per se honestum est id efficere possint etiam necessarium* [which have the effect of rendering obligatory that which in itself is only honourable [translation: Kelsey]].”¹⁶² This comment probably related to Connanus’ commentary 5.1.7:

Valde enim dissentio ab iis, quę hactenus uno ore tradiderunt, quod olim iuregen. passim obligarentur homines quibuslibet promissis, etiam

¹⁵⁷ Deuteronomy 20.17.

¹⁵⁸ S.10.97/1.17.14.

¹⁵⁹ Spelling has been modernised as a result of variations between manuscripts. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 10.78; Adv.MS.25.1.11, fol.124L-R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 10.78.

¹⁶⁰ S.10.10/1.10.10. Above, 4.1.6.1.

¹⁶¹ Above, 4.1.6.1.

¹⁶² Grotius: *De jure belli*, 2.11.1.

*leviter & nulla de causa effutitis, infinitae lites & controversiae orirentur: idcirco iure civili constitutum fuisse, ut ne de huiusmodi conventis appellaretur quisquam, nisi stipulatio verborum intervenisset.*¹⁶³

Indeed, I vigorously dissent from those people who until now have relayed that they are related by speech because formerly, by the law of nations, men were bound by whatever they promised, even if made lightly and without cause, and so arose unlimited quarrels and debates. Therefore it was constituted by the civil law that none of this sort of agreement could be litigated without the intervention of a stipulation of words.

Grotius' description may have inspired Stair's comment here. Alternatively, Stair may simply have remembered Grotius' examination of Connanus and inserted Connanus' name. In either case, it seems likely that Grotius was ultimately Stair's source for this citation, and unlikely that Stair consulted Connanus directly.

4.2 STAIR'S USE OF GROTIUS FOR THE THIRD VERSION

There is no evidence that Stair borrowed from Grotius for the titles on obligations when preparing the third version. However, a citation of Grotius was added to Stair's titles on property law. Although outwith the titles on obligations, this citation reveals much about Stair's method, and probably why he returned to Grotius when preparing the third version. It will therefore be briefly discussed here.

Stair added citations of Grotius and Mynsinger to "Rights Real" for the third version as authority for the Roman rules of accession of writing and painting being in desuetude.¹⁶⁴ This was the first citation of Grotius which did not refer to a specific treatise, or any part of a treatise. These rules were discussed at *De jure belli* 2.8.21, but there was no mention there of the rule being in desuetude, and Mynsinger was not cited by Grotius. Gordon correctly suggested "the reference in Stair to Grotius, coupled with Mynsinger, comes from Vinnius."¹⁶⁵

¹⁶³ Connanus: *Commentaria iuris civilis libri decem*, 399.

¹⁶⁴ S.12.37/2.1.39.

¹⁶⁵ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 257.

Stair consulted Vinnius when preparing the third version.¹⁶⁶ He borrowed Vinnius' citation of Grotius: "*Grotius lib.2. manuduct. c.8.*"¹⁶⁷ Vinnius' citation was of the *Inleydinge*, but Stair seems to have assumed that the reference was to *De jure belli*. Stair did not consult the *Inleydinge*;¹⁶⁸ he checked Vinnius' citation against *De jure belli* 2.8, probably because he had easy access to it. Coincidentally, both the *Inleydinge* and *De jure belli* discussed these rules at 2.8 (paragraphs three and twenty-one respectively). Having found the rule at 2.8, Stair did not realise his error.

That Stair consulted *De jure belli* 2.8.21 is confirmed by his second citation of Grotius and one of Connanus, added to his discussion of specification in the third version.¹⁶⁹ After Stair checked Vinnius' citation of Grotius' *De jure belli* 2.8, he must have read Grotius' full three-paragraph discussion of Connanus' view of *specificatio* and *accessio*, *De jure belli* 2.8.19-21. Stair's citation here, although it did not refer to a specific paragraph, was clearly of *De jure belli* 2.8.19. From this paragraph he borrowed the citation of Connanus. Both Stair and Grotius referred to Connanus' awarding the property according to its value. Stair's sentence was structured in exactly the same way as that of Grotius. Indeed, Stair effectively translated Grotius' Latin with no significant alteration. The difference between the two was that Grotius specified "*Lib. iii. 6*" whereas Stair gave only Connanus' name. Grotius' citation was accurate; Connanus' commentary 3.6.6 stated that a picture whose value surpassed the board would be the principal, but that

*vix non credi potest, levi cuique & rudi picturae tabulam, quae maioris sit aestimationis accedere.*¹⁷⁰

it could hardly be credible that a board worth more would accede to a trivial and poor picture.

This was Stair's second and final citation of Connanus in the third version. The first was also borrowed from Grotius, as was the additional citation of Connanus in the manuscripts.¹⁷¹ This means that all Stair's citations of Connanus were borrowed from

¹⁶⁶ Below, 6.2.

¹⁶⁷ Vinnius: Commentary on Inst.2.1.33.

¹⁶⁸ Wilson: "Stair and the *Inleydinge* of Grotius" generally.

¹⁶⁹ S.12.41/2.1.41.

¹⁷⁰ Connanus: *Commentaria iuris civilis libri decem*, 207.

¹⁷¹ Above, 4.1.6.1, 4.1.8.

Grotius. There is nothing in the text which suggests that Stair consulted Connanus directly here. Rather, it would appear that Stair, again, used Grotius' summary of him.

No further evidence of Stair's use of Grotius for the third version has so far been found. This could be because Stair only consulted *De jure belli* 2.8.19-21 at that time, his attention being drawn to it by Vinnius.

4.3 STAIR'S USE OF GROTIUS FOR THE FOURTH VERSION

Stair added a reference to paragraph eleven to his citation of *De jure belli* 2.12 in his discussion of equality in contracts.¹⁷² This paragraph of Grotius was on the need for equality in contracts of exchange. There were, however, more generally-applicable passages, such as 2.12.8. Yet, as paragraph eleven was not cited in any of the manuscripts or in the first printed edition, Stair must have added this for the fourth version. Presumably, Stair checked Grotius for this citation, rather than finding it in a different source.

It seems probable that Stair returned to Grotius when preparing the fourth version to correct a printing error in Stair's quotation of Grotius in "Of Liberty". He may have decided to check his other references to Grotius at the same time.

4.4 CONCLUSIONS

This chapter has shown that Stair consulted Grotius when writing the first version, and for the third and fourth versions. *De jure belli* was an important source for the first version. Most of the titles on obligations contained material borrowed from Grotius; Stair cited him six times in these titles in the first and second versions (five in the third and fourth). This suggests that Stair wrote the first version with Grotius in front of him. However, Grotius was an important source only for the first version. That no material seems to have been borrowed for the second version suggests that Stair did not consult Grotius at that time. For the third version, Stair returned to Grotius only after being led to him by Vinnius. Having Grotius before him again,

¹⁷² S.10.14/1.10.14.

Stair read the three-paragraph discussion cited by Vinnius, cited Grotius twice, and borrowed a citation of Connanus from this discussion. Yet this did not encourage him to use Grotius as a principal source again, as can be deduced from no other material having been borrowed from him. *De jure belli* was thus only a minor source for the third version. Stair returned to Grotius when preparing the fourth version, when he made minor amendments to pre-existing quotations and citations¹⁷³ and added a citation of Grotius to the new book on actions.¹⁷⁴ Again, however, this seems to have been the full extent of his consultation of *De jure belli* at that time. While Stair used Grotius as an important source of the first version, he did not thereafter use him as such.

However, Grotius was an important source for the first version. Stair was prepared to transplant authority borrowed from the same passage of Grotius into different titles of the *Institutions*: material borrowed from *De jure belli* 2.10 is found in “Restitution” and “Recompence”; *De jure belli* 2.12 was used for “Of Obligations” and “Obligations Conventional”. Stair’s distribution of material borrowed from Grotius suggests that, when he was consulting him, he was able to think of the relevance of his source to the *Institutions* as a whole.

What material did Stair borrow from Grotius? He borrowed two of his four Greek terms in the first version from Grotius: “ελαττον” (with the accompanying Latin phrase, “*damnum a demendo*”) and “αντιχρησις”. This confirms Richter’s suggestion that these two Greek terms were “possibly taken from Grotius”.¹⁷⁵ Stair’s use of Grotius is most evident, however, in his borrowing of citations.

He borrowed six citations of Roman law for his titles on obligations. Most were atypical of Stair’s normal method of citing the *Corpus iuris civilis*: four were in the medieval style, and one was one of only two times that Stair cited the Edict independently the *Corpus iuris civilis*.¹⁷⁶ Only one of the citations of Roman law which Stair borrowed from Grotius was in the early-modern style. None of these six citations were checked by Stair for the first version. However, the later addition of

¹⁷³ Also amended was Stair’s citation and quotation of Grotius, S.2.5/1.2.5.

¹⁷⁴ S.-/4.40.23.

¹⁷⁵ Richter: “Did Stair know Pufendorf?”, 369 n.14.

¹⁷⁶ Another reference to the Edict which did not cite the *Corpus iuris civilis* was added for the third version, S.10.46/1.12.18. This reference appeared in Adv.MS.25.1.12, 10.20, but this passage had been updated according to the first printed edition.

the relevant paragraph numbers (and the reference to a sub-paragraph of D.16.3.31) means that D.16.3.31 and D.13.6.3 must have been checked for third and fourth versions respectively.

Three of Stair's citations of continental jurists in the printed editions, and another two found only in the manuscripts, were borrowed from Grotius. This supports Gordon's argument that not all the jurists or treatises cited in the *Institutions* were directly consulted by Stair.¹⁷⁷ Both of Stair's citations of Connanus in the manuscripts, as well as that added for the third version, were borrowed from Grotius. Grotius was thus the source for all Stair's citations and discussions of Connanus; none appear to have been checked. Stair gave two of these citations in relation to Connanus' denial of any moral obligation to keep a promise; on both occasions Stair expressly disagreed with Connanus, without having checked the text. This chapter has also confirmed Richter's suggestion that Stair borrowed his citation of Molina from Grotius. Stair did not check this citation; his consequent misunderstanding of the content of the text and the context of its citation in Grotius meant that he used it inappropriately. Richter has noted that the debate between Lords Rodger and Coulsfield concerning Stair's reasoning for citing Molina had an incorrect premise.¹⁷⁸ This also has wider implications. It has been shown that Stair could not even have been indirectly influenced by Molina. This undermines many of the suggestions as to Stair's motivation for accepting unilateral promise.¹⁷⁹ Stair also borrowed his citation of Gomezius (which appeared only in the manuscripts) from Grotius. Again, he did so without checking the text. This means that both of Stair's citations of second scholastics were borrowed from Grotius. This suggests that Stair could have been influenced by this movement only indirectly through Grotius, if at all.

The significant majority of Stair's citations of writers of classical antiquity were borrowed from Grotius. This includes: all his citations of Aristotle, both his citations of Cicero in the titles on obligations, as well as citations of Pliny the Elder, Xenophon, Plato and Seneca. Examination of the relevant passages shows that

¹⁷⁷ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 256.

¹⁷⁸ Richter: "Molina, Grotius, Stair and the *JQT*", 222.

¹⁷⁹ See MacQueen & Sellar: "Scots law: *ius quaesitum tertio*, promise and irrevocability", 357-360 esp.359. Above, 4.1.6.1.

Gordon was also clearly correct in suggesting that Stair's citations of Cicero in "Common Principles" and "Of Liberty" as well as his citation of Plutarch in "Rights Real" were also borrowed from Grotius.¹⁸⁰ This list of seven leading ancient Greek and Roman writers includes a lawyer, four philosophers, a historian, and a natural scientist. Stair generally borrowed these citations without checking them. The exception was his citation of Seneca, which was borrowed from Grotius but seems to have been checked against the text. If this is correct, it is the only citation borrowed from Grotius which Stair checked for the first version. Stair may have owned or had easy access to a copy of Seneca. Why Stair would have checked the citation of Seneca but not those to, for example, Aristotle is puzzling. Perhaps he was sufficiently familiar with Aristotle to recognise the philosophies being discussed as being correct? This is credible given the importance of Aristotle in the Scottish arts curriculum.¹⁸¹ Stair may have been less familiar with, but still owned or had easy access to a copy of, Seneca's *De beneficiis*. This is, however, purely speculative. That Stair borrowed such citations at all is interesting, as he studied at least some of these writers as a student of the arts at Glasgow.¹⁸² He therefore used Grotius for citations of authority which he would have been able to generate himself.

The wide range of citations which Stair borrowed from Grotius is not surprising, given that Grotius cited many works as authority or for comparative reference. Buckle argued that Grotius' main method for determining natural law was *a posteriori*, that which is based on the common understanding of civilised nations.¹⁸³ Grotius' definition of *a posteriori* was that which is based on the pan-European traditional views of "writers of authority".¹⁸⁴ Grotius' historical approach to natural law was inherent to his building of a system of rational law.¹⁸⁵ In doing so, Buckle challenged what he sees as the widely-held view that Grotius' approach was

¹⁸⁰ Stair's citations of Cicero at S.1.5/1.1.5 and S.2.3/1.2.3 from Grotius: *De jure belli* 1.2.3; and his citation of Plutarch at S.12.6/2.1.5 from Grotius: *De jure belli* 2.2.13. Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 259, 262.

¹⁸¹ Above, 1.2.1.2-3.

¹⁸² Above, 1.2.1.2.

¹⁸³ As distinct from *a priori*, that inherent in the nature of society, Grotius: *De jure belli* 1.1.12.1. S. Buckle: *Natural Law and the Theory of Property: Grotius to Hume* (Oxford, 1991 rept. 2002), 5.

¹⁸⁴ Stein: "Theory of law", 182.

¹⁸⁵ Buckle: *Natural Law and the Theory of Property*, 4-9.

a-historical.¹⁸⁶ Grotius' citation of Roman law, writers of classical antiquity, the Bible, and continental jurists was critical to how he established the rules of natural law and how he built a coherent, rational system of law.

Stair selected his sources for specific purposes. When he wrote the first version, he too was attempting to make law a "rational discipline".¹⁸⁷ Natural law was also central to Stair's treatise. Grotius' treatise had been printed just over thirty years before Stair wrote, and had attracted international praise.¹⁸⁸ Stair incorporated into the *Institutions* a reflection of Grotius' own use of authority. Grotius had established and elucidated the principles of natural law by drawing on Roman law, Canon law, the writings of continental jurists, and writers of classical antiquity. Stair followed Grotius in offering this variety of authority, and drew from *De jure belli* a selection to represent and illustrate that natural law, particularly borrowing from him citations of writers of classical antiquity.

However, it is less clear that "In the main he adopted the views of the great Dutch jurist Hugo Grotius".¹⁸⁹ On the majority of occasions on which Stair referred to Grotius' view of natural law, he disagreed with him. This was famously the case when he rejected Grotius' requiring promises to be accepted before they were binding. Stair believed that no acceptance was necessary; Grotius believed that it was. Yet Stair also disagreed with: Grotius' classification of restoration of property, as Stair believed it was under natural law; Grotius' classification of *negotiorum gestio*, which Stair also classified under natural law; the equitable principles of whether value in contract was required, Stair believing that there could be no such action given that value was subjective; and Grotius' interpretation of Deuteronomy 20 relating to oaths sworn as a result of fraud. In the fourth version, in the new book on actions, Stair also disagreed with Grotius on whether it was acceptable to lie to one's enemies, Stair saying it was not.¹⁹⁰ Stair only agreed with Grotius on three occasions: that law should be a rational discipline; that men are free unless they have

¹⁸⁶ The example he gave was P. Foriers and C. Perelman: "Natural law and natural rights" in P.P. Weiner (ed): *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas* volume 3 (New York, 1973) 13, 20. Although Foriers and Perelman stated: "Grotius' method opened the door to the construction of a rational law no longer verified by experience but deduced abstractly", they were really concerned with Grotius' secularisation of natural law rather than his method for determining it.

¹⁸⁷ S.1.16/1.1.17.

¹⁸⁸ Above, 3.2.6.

¹⁸⁹ Stein: "Theory of law", 181.

¹⁹⁰ S.-/4.40.23

somehow been subjected to slavery or bondage; and that there are three stages of childhood. It is important that each of the occasions on which Stair disagreed with Grotius was in relation to natural law or equity. With the exception of the general point on the liberty of men, Stair never agreed explicitly with Grotius' interpretation of substantive natural law. It is thus possible to conclude that, although Stair emulated Grotius' use of authority to establish natural law, and used him as a source for natural law, Stair may have been significantly less influenced by Grotius' theories and interpretation of natural law than is currently assumed.

STAIR AND GUELINUS

Gordon's comparison of five passages of Stair and Gudelinus showed that: "for [Stair's] Roman law, however, he certainly used Gudelinus' *De jure novissimo*."¹ Gordon was correct: Stair borrowed from Gudelinus twenty citations of Roman law without checking them for the first version, although he checked some against the text when preparing later versions. He also borrowed six citations of Roman law from Gudelinus for the fourth version; these were checked when borrowed. Yet Stair's use of Gudelinus was much more extensive than this. Gudelinus was Stair's principal source for references to contemporary continental legal systems. Seven of Stair's citations of continental jurists were borrowed from Gudelinus; all were used in relation to national law rather than general legal principle. Gudelinus was also Stair's principal source for his references to specific legal systems and about legal trends in Europe.

5.1 STAIR'S USE OF GUELINUS FOR THE FIRST VERSION

5.1.1 "Conjugal Obligations"

Stair explained that a husband had a "power oeconomical".² This was an authority over all domestic matters, which included power over his wife's person and sole administration of "a community of Goods betwixt the Married persons".³ This *jus mariti* Stair defined "as a Term in our Law, [which] doth signifie the right that the Husband

¹ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 263.

² S.4.5/1.4.9. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 4.5; Adv.MS.25.1.11, fol.29R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 4.5. The paragraph numbers were printed inaccurately in both copies of the first printed edition, and therefore the numbers of the paragraphs used are those identified in the list of paragraphs at the start of the title. This was the same as those printed in the text after number thirteen (although the number eighteen is missing at the start of that paragraph).

³ S.4.5/1.4.9. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 4.5; Adv.MS.25.1.11, fol.29R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 4.5.

hath in the Wifes Goods”.⁴ He did not state expressly whether this right applied to moveable or to all goods in the first and second versions; this was likely an accidental omission as this right was never recognised in heritage. Balfour discussed this power in only “his wife’s moveabill gudis”.⁵ A case of 1582, for another example, confirmed that a gift on non-entry granted by a now-deceased husband could be recovered by his widow, who had not consented to the transaction but who was “lawful cessioner and assignee of the same”.⁶ That community of goods was limited to moveables in Scotland was confirmed by Mackenzie:

From the *conjugal Society*, arises, the communion of *moveable Goods* betwixt *Man* and *Wife*...but he has no further *Right* to her *Heritage*, save that he has *Right* to the *Rents* of it, and to *Administrate* and *Manage* it, during the *Marriage*, and this is called *Jus Mariti*.⁷

Scots law in the sixteenth and seventeenth centuries therefore recognised community of moveable goods, the administration of which was in the power of the husband, but not community of heritage, which was administered but could not be disposed by the husband without the consent of the wife.

Stair clarified his definition of *jus mariti* for the third version, by adding a phrase saying that it was peculiar to moveable property.⁸ He at that time defined the right as “a Legal Assigment to the Wifes moveable Rights, needing no other intimation, but the

⁴ S.4.5/1.4.9. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 4.5; Adv.MS.25.1.11, fol.29L. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 4.5.

⁵ P.G.B. McNeill (ed): *The Practicks of Sir James Balfour of Pittendreich, reproduced from the printed edition of 1754* volume 1 (Stair Society Series 21, Edinburgh, 1962), 93 “Materis concerning the husband and the wife” c.4.

⁶ *Pennycook v Cockburn* 1582 [M.5764].

⁷ Mackenzie: *Institutions* 1.6, 46-47.

⁸ This paragraph was also amended for the second version. The manuscripts of the 1662 stem [Adv.MSS.25.1.8 and 25.1.10, 4.6; Adv.MS.25.1.11, fol.30R] ended this discussion after explaining that a man must provide for his family according to his means (at “*quoad potest*”). For the second version, Stair added the passage: “hence it is, that the Aliment, or Furnishing of the Wife, is a Debt of her Husbands, not only for what is furnished by Merchants and others, *hoc nomine*, in the Husbands Life, but even her Mournings after his Death, if it be proper for her quality to have Mournings, burden the Executors of the Husband, and not the Wife” [Adv.MSS.25.1.5 and 25.1.7, 4.6; Adv.MS.25.1.12, 4.6 ended at “*quoad potest*”]. This was clearly a description of the case *Lady Craiggaffie v Neilson* 1664 [M.5921], which Stair heard as a judge. Stair did not cite this case in the second version but instead only added a citation of it for the third version.

Marriage”.⁹ He also added a discussion of *Achinleck v Williamson and Gillespie* 1667¹⁰ which he heard as a judge. This case found that a pre-marital disposition to the bride’s son without her future husband’s knowledge was fraudulent.¹¹ Stair’s note on this case explained that “*the Marriage, and jus Mariti is a legal Assignment*”.¹² Nisbet also recorded that the Lords in this case found that the husband had “by his Marriage a publick Right Equivalent to an Assignment”.¹³ Presumably, Stair added this phrase and citation to the existing discussion to clarify the extent of this right.

Stair’s discussion of community property was comparative. He distinguished Roman law in that it “hath exceedingly varied in this matter from the Natural Law”,¹⁴ given that the Roman wife was not in the power of her husband, retained ownership in her goods, and had the right to the value of her dowry. He then explained that, like Scots law, the contemporary law of Europe had “returned to the natural course”.¹⁵ He cited: Chassanaeus and Duarenus as authority for French law; Wesenbecius and Covarruvias for “the Customs of the *Germans, Spaniards, and most part of the Nations of Europe*”¹⁶; and Gudelinus for the Netherlands. These were Stair’s only citations of Chassanaeus and Covarruvias, and one of his two citations of both Duarenus and of Wesenbecius. All these citations and comparative references were present in the first and second versions.¹⁷

⁹ S.4.6/1.4.10.

¹⁰ S.4.6/1.4.10. M.6033.

¹¹ S.Dec.1.496, as “*John Auchinleck contra Mary Williamson and Patrick Gillespy, December 18. 1667.*” J. Nisbet of Dirleton: *The Decisions of the Lords of Council and Session, in most cases of importance, debated, and brought before them; from December 1665, to June 1677* (Edinburgh, 1698), 50, as “*Gillespie contra Auchinleck*”, 18th December 1667.

¹² S.Dec.1.497.

¹³ Nisbet of Dirleton: *Decisions*, 51.

¹⁴ S.4.7/1.4.11. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 4.7; Adv.MS.25.1.11, fol.30R. 1666 stem: Adv.MS.25.1.5, 25.1.7 and 25.1.12, 4.7.

¹⁵ S.4.8/1.4.12. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 4.8; Adv.MS.25.1.11, fol.30R. 1666 stem: Adv.MS.25.1.5, 4.7; Adv.MSS.25.1.7 and 25.1.12, 4.8.

¹⁶ S.4.8/1.4.12.

¹⁷ 1662 stem: Adv.MS.25.1.8, 4.8 omitted the reference to French law and the citation of Wesenbecius; Adv.MS.25.1.10, 4.8 and Adv.MS.25.1.11, fol.30R-31L read as the third version, although the spelling of Covarruvias varied. 1666 stem: Adv.MS.25.1.5, 4.7 and Adv.MS.25.1.7, 4.8 omitted the reference to French law and citation of Wesenbecius, and called Covarruvias “Lobar”; Adv.MS.25.1.12, 4.8 called Wesenbecius “Messen” and cited cap.17 rather than cap.7 of Covarruvias. That these errors did not appear consistently in the manuscripts from either stem merits further research into the nature of the manuscripts [Ford: *Law and Opinion*, 63-73].

Stair was correct: community property in European law is thought to have originated in Germanic customary law. In “the folk-laws” the wife retained ownership in some property after marriage, but the husband had the right to possession.¹⁸ From this, certain German legal systems developed community of acquests (profits and property acquired during the marriage).¹⁹ This was not as extensive as community of goods (all moveable property). Community of acquests was received in various European countries, including northern France by the twelfth century²⁰ and Friesland in the Netherlands by the eleventh century.²¹ Community of all moveable goods later became prevalent in much of Germany.²² By the end of the fourteenth century, community of goods was recognised in Groningen.²³ By the later Middle Ages community of goods was recognised in much of northern Europe but most of Southern Europe adopted the Roman notion of separate patrimonies.²⁴ Howell noted that there was a varying degree of “hybridity”²⁵ between these two regimes and that “marital property law was unstable everywhere during the Middle Ages, fluctuating over time, according to the social place of the people involved, and with respect to geography.”²⁶

Community of goods survived in various early-modern systems, but was often customary and varied by region. Lobinger explained that this was true of the original seven states of the Dutch Republic, which had diverse rules of community property until they were harmonised by the Dutch Civil Code in the nineteenth century.²⁷ Howe showed that this was also the case in France, which had some customary laws (e.g. Paris,

¹⁸ R. Huebner: *A History of Germanic Private Law* (translation of the second (1913) edition by F.S. Philbrick) (Continental Legal History series volume 4, Boston, 1918 rept. Union NJ 2000), 626.

¹⁹ Huebner: *History of Germanic Private Law*, 627-628, 640.

²⁰ J. Brissaud: *A History of French Private Law, translated from the second edition by R. Howell* (Continental Legal History series volume 3, London, 1912), §.553.

²¹ J.W. Wessels: *History of the Roman-Dutch Law, with a new introduction by Michael H. Hoeflich* (Grahamstown, 1908 rept. Clark NJ, 2005), 455.

²² Huebner: *History of Germanic Private Law*, 643.

²³ Wessels: *History of the Roman-Dutch Law*, 455-456.

²⁴ M. Howell: “Marriage in medieval Latin Christendom” in C. Lansing and E.D. English (eds): *Companion to the Medieval World* (Blackwell Companions to European History series, Chichester, 2009) 130, 133.

²⁵ Howell: “Marriage in medieval Latin Christendom”, 134.

²⁶ Howell: “Marriage in medieval Latin Christendom”, 134.

²⁷ C.S. Lobingier: “The marital community: its origin and diffusion: A problem of comparative law” (1928) 14(4) *American Bar Association Journal* 211-218, 213.

Orléans, Brittany, and Anjou) which implied community property and others (e.g. Normandy) which expressly prohibited community property.²⁸ In Spain, community of goods was mentioned in *Fuero Real* (1255), and the later *Leyes de Toro* (1505) and *Neuva Recopilación* (1567).²⁹ This accords with what Stair said, namely that community of goods was recognised to some extent in the Netherlands, France, Spain and Germany.

Stair borrowed his references to these European legal systems and his citations of Chassanaeus, Duarenus, Wesenbecius and Covarruvias from Gudelinus. Stair's citation of Gudelinus was incomplete; in neither of the printed editions did Stair give a book or title of *De jure novissimo*. In the first and second versions, Stair referred to "cap 7".³⁰ Gordon suggested that the relevant title was *De jure novissimo* 1.7: "*De potestate maritalis [sic: maritalis] & societate conjugali* [of the power of the husband and conjugal society]."³¹ He correctly argued that this passage of Gudelinus was a source of borrowing for Stair, and that "The derivation seems clear."³²

Three points indicate this. First, both jurists cited exactly the same passages of these four jurists: the fourth rubric of Chassanaeus' *Consuetudines ducatus Burgundiae*; Duarenus' title "*de nuptiis*" in his *Digestorum methodica enarratio*; Wesenbecius' title "*De ritu nuptiarum*" in his *Paratitla*; and Covarruvias' *Decretalium epitome* 2.7. Secondly, both jurists referred to German and Spanish law. Finally, Stair's reference to the "most part of the Nations of Europe"³³ was nearly a direct translation of Gudelinus' phrase "*plerosque omnes Europae populos* [all other peoples of Europe]".³⁴

Gudelinus explained that the husband's power over his wife was "*veluti patrem atque tutorem* [as if the father and even the tutor]".³⁵ He also discussed community of

²⁸ W.W. Howe: "The community of acquets and gains" (1903) 12(4) *Yale Law Journal* 216-225, 217; S. S. Desan: "Making and breaking marriage: an overview of old regime marriage as a social practice" in S. Desan and J. Merrick (eds): *Family, Gender, and Law in Early Modern France* (Pennsylvania PA, 2009) 1, esp. 5-7.

²⁹ Lobingier: "The marital community: its origin and diffusion", 215.

³⁰ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 4.8; Adv.MS.25.1.11, fol.31L. 1666 stem: Adv.MS.25.1.5, 4.7; Adv.MSS.25.1.7 and 25.1.12, 4.8.

³¹ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 263.

³² Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 263.

³³ S.4.8/1.4.12. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 4.8; Adv.MS.25.1.11, fol.31L. 1666 stem: Adv.MS.25.1.5, 4.7; Adv.MSS.25.1.7 and 25.1.12, 4.8.

³⁴ Gudelinus: *De jure novissimo* 1.7, 12.

³⁵ Gudelinus: *De jure novissimo* 1.7, 12.

goods:

...ut omnis pecuniae omnisque supellectilis, omnium denique mobilium, nec non totius aeris alieni sit inter eos communio: & sic quae praedia constante matrimonio emuntur vel aliter comparantur, utriusque communiter acquirantur:

That all money and furnishings and finally all moveables, and also all other money, exists communally between them; and so property bought during the marriage or otherwise acquired by both is common.³⁶

Gudelinus then discussed the division of the community property on the death of the husband between the widow and the deceased's heir, and the difficulties which might have arisen if the husband had outstanding debts or obligations. He then cited Duarenus and Chassanaeus as authority for this wider proposition of the recognition of community of moveable goods in early-modern law.

Stair cited Gudelinus specifically in relation to the Netherlands. Yet Gudelinus discussed the law generally, although he did note that the husband's *potestas* over his wife was found in nearly all municipal laws.³⁷ Stair extrapolated his authority for Dutch law from Gudelinus as he was from the Spanish Netherlands. He probably did the same when he gave Chassanaeus and Duarenus as authority for French law. Gudelinus did not use these citations in relation to French law, but did state on the previous page:

*Certe apud Belgas, caeterosque Gallos arctior semper fuit tum maritalis potestas, tum rerum inter conjuges societas*³⁸

Certainly with the Belgians and the rest of the Northern French there has always been both marital power and a society of goods between the spouses.

Stair likely extrapolated that these rules existed in French law from this earlier discussion and, as will be shown, from the title of Chassanaeus' treatise and from Duarenus being French.

³⁶ Gudelinus: *De jure novissimo* 1.7, 12.

³⁷ Gudelinus: *De jure novissimo* 1.7, 12.

³⁸ Gudelinus: *De jure novissimo* 1.7, 11.

Chassanaeus' *Consuetudines ducatus Burgundiae* was arranged into thirteen rubrics. Stair and Gudelinus cited the fourth, "*Des droicts & appartenances à gens mariez, & de la communion d'iceux* [Of rights and belongings of married persons and conjugal society]".³⁹ The first custom explained that a wife needed her husband's permission to contract, appear in court, or bequeath or dispose of her property;⁴⁰ in his commentary, Chassanaeus explained that a wife transferred into the *potestas* of her husband on marriage.⁴¹ The second custom stated:

Femme mariee au Duché de Bourgonge selon la generale coustume dudict [sic] Duche, est participante avec sondict mari pour la moytié de tous meubles, & acquestz [sic] faicts constant mariage de sondict mari, & d'icelle

A woman married in the Duchy of Burgundy by the general customs of the Duchy participates with her husband for half of all furniture and acquisitions made by virtue of their marriage.⁴²

Chassanaeus also discussed conjugal society in other regions. He explained that in Bourges:

maritus & uxor sunt communes in bonis mobilibus & acquestibus factis constante eorum matrimonio

the spouses have common ownership in those moveable goods acquired during their marriage.⁴³

He then confirmed that this community of property was recognised in Orléans, Niverne and "*ferè quasi in tota Gallia* [almost as if in all France]".⁴⁴ Chassanaeus was therefore relevant authority for Stair's and Gudelinus' discussions of community property. There is no evidence that Stair consulted Chassanaeus directly; he could easily have

³⁹ Chassanaeus: *Consuetudines ducatus Burgundiae* Rubric 4, 491.

⁴⁰ Chassanaeus: *Consuetudines ducatus Burgundiae* Rubric 4, Custom 1, 499.

⁴¹ Chassanaeus: *Consuetudines ducatus Burgundiae* Rubric 4, Custom 1, 502, paragraph 19.

⁴² Chassanaeus: *Consuetudines ducatus Burgundiae* Rubric 4, Custom 2, 520.

⁴³ Chassanaeus: *Consuetudines ducatus Burgundiae* Rubric 4, Custom 2, 521.

⁴⁴ Chassanaeus: *Consuetudines ducatus Burgundiae* Rubric 4, Custom 2, 521-522.

extrapolated that Chassanaeus' discussion was "in relation to the Custome of *France*"⁴⁵ from the treatise being on the customs of Burgundy.

The citation of Duarenus was also relevant.⁴⁶ Duarenus explained that in French law:

*Nam usu, moribusque receptum est in Gallia, ut viri potestati omnino subiiciatur, nec ullum negotium absque consensu & auctoritate mariti sui contrahere possit.*⁴⁷

For through use and custom, it is received in France that she is wholly subjected to the husband's power, nor can she make any transaction without the consent and authority of her spouse.

Duarenus confirmed that "*moribus comparatum est ferè in Gallia, ut mobilia inter coniuges communicentur* [by custom it is provided generally in France, that moveables are shared between the spouses]".⁴⁸ Stair cited Duarenus as authority for French law even though Gudelinus did not. It cannot be determined whether Stair consulted this text and was able to relate Duarenus' discussion of specifically French law, or whether he simply extrapolated that Duarenus discussed French law because he was French. The latter is more probable given that he likely did the same with Chassanaeus.

Gudelinus then said that conjugal society was also found in German and Spanish law:

Simile jus, tum potestatis maritalis, tum societatis conjugalis, & apud Saxones seu Germanos existit, nec non apud Hispanos, & plerosque omnes Europae populos

Similarly a right, both marital power and conjugal society, exists with the Saxons or Germans, and among the Spanish and all other peoples of

⁴⁵ S.4.8/1.4.12.

⁴⁶ Edition consulted: F. Duarenus: *Pandectarum sive Digestorum methodica enarratio* in Duarenus: *Omnia quae quidem hactenus edita fuerunt opera ... omnia nunc demum unico comprehensa volumine. Editio, ut postrema, ita & caeteris umquam antehac alibi egressis, compluribus in locis, multo tersior ac emendatior* (Frankfurt, 1592).

⁴⁷ Duarenus: *Pandectarum sive Digestorum*, 244.

⁴⁸ Duarenus: *Pandectarum sive Digestorum*, 244.

Europe.⁴⁹

He then cited Wesenbecius, who taught in Germany, and Covarruvias, a Spanish jurist, as authority. Although he just gave both citations together, and did not associate each jurist with a particular system, the implication would be that Wesenbecius was the authority for German law and Covarruvias for Spanish law. Stair also cited these two jurists together “[i]n reference to the Customs of the *Germans, Spaniards*, and most part of the Nations of *Europe*”.⁵⁰

It was Wesenbecius’ title “*De ritu nuptiarum*”, title 23.2 of his *Paratitla*, which was cited by Stair and Gudelinus. Wesenbecius explained that by divine law, Canon law, customary law, and Saxon law: “*in eius est quasi potestate & cura* [the wife is as if in the husband’s power and care]”.⁵¹ He then stated that the husband acquired all “*fructus dotales, & quicquid constante matrimonio acquiritur* [dotal fruits and whatever is acquired during the course of the marriage]”.⁵² He explained that the husband received these profits “*pro oneribus coniugii quae marito incumbunt* [for the burdens of marriage which rest on the husband]”.⁵³ He also declared that the husband received “*singulare dominium in donatione propter nuptias ... & uniuersalem hypothecam in omnibus bonis* [sole ownership in gifts on account of the marriage, and universal hypothec over all goods]”.⁵⁴ He also indicated that Saxon law allowed full society of all goods between the spouses. This citation of Wesenbecius in Gudelinus and Stair was therefore correct and relevant.

Gudelinus and Stair also cited Covarruvias’ *Decretalium epitome*. In the chapter cited, Covarruvias explained that neither Canon nor Imperial law recognised conjugal society, but that French and Portuguese law did. He said that, in Spain, Royal laws “*bonis societatem quandam inter virum & uxorem constituerunt* [establish certain

⁴⁹ Gudelinus: *De jure novissimo* 1.7, 12.

⁵⁰ S.4.8/1.4.12.

⁵¹ Wesenbecius: *Pandectas iuris civilis* 23.2.6.

⁵² Wesenbecius: *Pandectas iuris civilis* 23.2.6.

⁵³ Wesenbecius: *Pandectas iuris civilis* 23.2.6.

⁵⁴ Wesenbecius: *Pandectas iuris civilis* 23.2.6.

society in moveables between husband and wife]”.⁵⁵ Gudelinus’ use of Covarruvias was therefore correct. Stair borrowed this citation of Covarruvias (with those of Duarenus, Chassanaeus and Wesenbecius) from Gudelinus. It is unlikely that he checked Covarruvias; there is nothing else in the *Institutions* to indicate that Stair consulted him, and Stair did not check the other citations which he borrowed from Gudelinus.

This comparison between Stair and Gudelinus confirms Gordon’s suggestion that *De jure novissimo* was Stair’s source for these four citations. Stair borrowed them for the first version, probably without checking them. He extrapolated his authority for Dutch law from Gudelinus as he was from the Spanish Netherlands. He did the same for Duarenus and Chassanaeus, whom he used as authority for French law, from a previous discussion of Gudelinus, from the title of Chassanaeus’ treatise, and from Duarenus being French. This means that Stair must have had knowledge of Duarenus as a French jurist, even if he did not consult him.

5.1.2 “Parents and Children”

5.1.2.1 *Stair’s citation of Gudelinus*

Stair discussed the parental power of the Roman *paterfamilias*, and the son’s *peculium*.⁵⁶ He stated that seventeenth-century law departed from Roman law in this regard, and instead followed natural law in requiring parents to aliment their children, even if “they expell them from their Families”.⁵⁷ He cited Gudelinus for this rule in France and the

⁵⁵ Covarruvias: *In librum quartum Decretalium epitome* (Salamanca, 1556), 2.7.1.5. In later editions [e.g. in Covarruvias: *Covarruvias: Opera omnia. Iam post varias editiones correctiora, & cum veteribus ac melioris notae exemplaribus de novo collata, & ab innumeris mendis seriò repurgata. Cum auctoris Tractatu in tit. de frigidis & maleficiatis, septem quaestionibus distincto, quibus an matrimonium cum hoc impedimento constare possit, accuratè explicatur. Accesserunt de novo Iohannis Vffelii ... in variarum resolutionum libros, notae vberiores. Cum duplici indice, capitum & rerum locupletissimo, suis numeris restituto* (Geneva, 1679)], 2.7.1.5 is divided into two paragraphs. Covarruvias’ remarks about Canon and Imperial law were still in 2.7.1.5, but those on Spanish, French and Portuguese law were in 2.7.1.6.

⁵⁶ S.5.11/1.5.11. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.10; Adv.MS.25.1.11, fol.42R-43R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 5.10.

⁵⁷ S.5.12/1.5.12. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.12; Adv.MS.25.1.11, fol.43R. 1666 stem: Adv.MSS.25.1.5 and 25.1.7, 5.12; Adv.MS.25.1.12, 5.11.

Netherlands, and Stephanus for it in Germany.⁵⁸

His citation of Gudelinus was incomplete in all four versions: “*Gudel. de jure Nov. cap. 13*”. He thus gave the title of *De jure novissimo*, but not the book. The editors of the third edition of the *Institutions* correctly concluded that the citation referred to *De jure novissimo* 1.13. Stair clearly borrowed from that title of Gudelinus. First, Stair’s statement that, regarding paternal power, the “Customs of the Neighbouring Nations do follow more closely the Natural Law”⁵⁹ than Roman law was a reflection of Gudelinus: “*Planè discernitur haec parentum potestas juris civilis, ab altera [sic: altera] illa juris gentium seu naturali*; [Clearly this Roman paternal power is discernible from the *ius gentium* and Natural law]”.⁶⁰ Secondly, Stair stated that the laws of France and the Netherlands imposed a parental duty to aliment children “if they expell them from their Families”.⁶¹ Gudelinus explained that “*mores nostri* [our custom]”⁶² repudiated the Roman rule by which a child can be disinherited, stated that French children were not *in potestate*, then stated that “*apud nos* [with us]”⁶³ children could not be emancipated in the Roman manner “*quas manumissiones è pane vocitamus* [which we call manumission ‘from the bread’]”.⁶⁴ Presumably, Gudelinus’ use of these pronouns relates to Dutch law. Gudelinus’ reference to French law perhaps sat a little awkwardly here, but his discussion of French and Dutch law certainly explains Stair’s comparative references.

Two things are noteworthy about this comparison. First, Stair again used Gudelinus for references to the law of other European nations. Secondly, these two sentences of Gudelinus appear relatively far apart, on the first and third of the four pages of his title. It therefore seems that Stair read and used the full extent of this title. Indeed, that Stair made significant use of this chapter of Gudelinus will now be confirmed: all thirteen citations of Roman law in “Parents and Children” were borrowed from *De jure*

⁵⁸ S.5.12/1.5.12. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.11; Adv.MS.25.1.11, fol.43R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 5.11 .

⁵⁹ S.5.12/1.5.12. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.11; Adv.MS.25.1.11, fol.43R. 1666 stem: Adv.MS.25.1.5, 25.1.7 and 25.1.12, 5.11.

⁶⁰ Gudelinus: *De jure novissimo* 1.13, 29.

⁶¹ S.5.12/1.5.12. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.12; Adv.MS.25.1.11, fol.43R. 1666 stem: Adv.MS.25.1.5 and 25.1.7, 5.12; Adv.MS.25.1.12, 5.11.

⁶² Gudelinus: *De jure novissimo* 1.13, 32.

⁶³ Gudelinus: *De jure novissimo* 1.13, 32.

novissimo 1.13.

5.1.2.2 Stair's citation of D.1.1.2

Stair cited D.1.1.2 in his discussion of the “Natural Obligations betwixt Parents and Children”.⁶⁵ Three points indicate that Stair borrowed this citation from Gudelinus. First, both Stair and Gudelinus cited the text in the early-modern style: “*l. 2. ff. de justitia & jure*”.⁶⁶ Secondly, this citation appeared in the same title of Gudelinus that Stair cited, *De jure novissimo* 1.13. Finally, there is a discrepancy in that these duties were regarded by Stair “as an evident Instance of the Law of Nature”,⁶⁷ but they were classified by D.1.1.2 as part of the *ius gentium*. In D.1.1.2, Pomponius stated that “*erga deum religio: ut parentibus et patriae pareamus* [religious duties towards God, or the duty to be obedient to one’s parents and fatherland [translation by Watson]]” were under the *ius gentium*.

This comparison is complicated by the changing concept of *ius gentium* in Rome. Cicero, the first person recorded as using the term, saw *ius gentium* as the same as the rules that exist in nature.⁶⁸ Gaius developed this, making *ius naturale* and *ius gentium* “synonymous, both derived from the *ratio naturalis*.”⁶⁹ Stein notes that “The jurists generally adopted the identification of *ius gentium* with natural law and used the two terms indiscriminately.”⁷⁰ As Pomponius was contemporary with Gaius, this may have been the intended usage in D.1.1.2, the text cited by Stair. Florentinus later distinguished the two using the example of slavery which, although common to most nations, was

⁶⁴ Gudelinus: *De jure novissimo* 1.13, 32.

⁶⁵ S.5.1/1.5.1. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.1; Adv.MS.25.1.11, fol.38L. 1666 stem: Adv.MSS.25.1.5, 25.1.7, and 25.1.12, 5.1.

⁶⁶ Gudelinus: *De jure novissimo* 1.13, 29; S.5.1/1.5.1. 1662 stem: Adv.MSS.25.1.8, 5.1 read instead “*l. 1. ff. de justitia et jure*”; Adv.MS.25.1.10, 5.1; Adv.MS.25.1.11, fol.38R. 1666 stem: Adv.MSS.25.1.5, 25.1.7, and 25.1.12, 5.1.

⁶⁷ S.5.1/1.5.1. 1662 stem: Adv.MS.25.1.8 and 25.1.10, 5.1; Adv.MS.25.1.11, fol.38R. 1666 stem: Adv.MS.25.1.5, 25.1.7 and 25.1.12, 5.1.

⁶⁸ R. Domingo: *The New Global Law* (ASIL Studies in International Legal Theory series, 2010), 6-8.

⁶⁹ Domingo: *New Global Law*, 10.

⁷⁰ P.G. Stein: “The Roman jurists’ conception of law” in A. Padovani and P.G. Stein (eds): *A Treatise of Legal Philosophy and General Jurisprudence* volume 7: *The Jurists’ Philosophy of Law from Rome to the Seventeenth Century* (Dordrecht, 2007) 1, 8.

against the natural state of man.⁷¹ Ulpian built on this distinction, stating that the *ius gentium* applied to man only but the *ius naturale* to all life.⁷² Justinian followed this division.⁷³

That Stair would have appreciated that Pomponius may have used the terms *ius gentium* and *ius naturale* interchangeably would have required a detailed knowledge of Classical Roman law and jurisprudence as distinct from post-Classical and Justinianic developments. More likely is that Stair's classification here was based on his reading of Gudelinus:

*Nam alioqui nulla gens est, vel fuit sub sole, quae non tribuerit aliquam auctoritatem & potestatem parentibus erga liberos ratione naturali, & lege divina cunctis gentibus hoc praescribente, ut parentes honoremus, & revereamus, eis que pareamus, & obsequamur. l. 2. ff. de justitia. & jure.*⁷⁴

Since there is no nation, nor has there ever been one under the sun, which does not attribute some measure of authority and power to parents in respect of their children on account of natural reason and through divine law the nations are urged by these words to honour and revere their parents, and to obey and follow them.

Gudelinus' references to natural reason and divine law probably caused Stair to classify these obligations as part of natural law. If so, it is possible that Stair did not read Pomponius. This would certainly be consistent with his general practice when writing the first version.

5.1.2.3 *Stair's citation of Caesar's De bello Gallico, D.28.2.11 and C.8.46.10*

Stair cited Caesar's *De bello Gallico*, Aristotle, the *Digest* and the *Codex* in his

⁷¹ D.1.5.4.1.

⁷² Domingo: *New Global Law*, 10; Stein: "Jurists' conception", 8; D.1.1.1.2-4.

⁷³ Inst.1.2.1-2.

⁷⁴ Gudelinus: *De jure novissimo* 1.13, 29. Underlining in this quotation indicates use of italics in the original source.

discussion of the Roman *paterfamilias*' power of life and death over his children.⁷⁵ The citation of Aristotle was borrowed from Grotius;⁷⁶ Stair's other three citations were borrowed from Gudelinus, who referred to this power at two points within *De jure novissimo* 1.13,⁷⁷ the title cited by Stair in "Parents and Children".

Three observations indicate that Stair borrowed the citation of Caesar from Gudelinus.⁷⁸ First, Gudelinus correctly cited Caesar's sixth book; it is at 6.19 that Caesar discusses this power of life and death.⁷⁹ Stair's citation was of book two in the printed editions, but book six in the manuscripts.⁸⁰ The implication is that his citation in the first and second versions was to book six; the change was presumably a printing error. Stair's citation was thus both correct and the same as Gudelinus'. Secondly, both Stair and Gudelinus referred specifically to the Belgae and the Gauls. Caesar did not mention the Belgae in or near this passage. Rather, he talked about the Gauls generally. Stair must have borrowed his reference to the Belgae from Gudelinus. Finally, Stair's sentence: "Writes that among the Gauls and Belgae, Parents had the power of Life and Death"⁸¹ was virtually a translation of that of Gudelinus: "*scripsit Belgarum, caeterorumque Gallorum moribus parentes in liberos vitae necisque habuisse potestatem* [writes, by the customs of the Belgae and other Gauls, parents had the power of life and death in their children]"⁸².

Stair thus used Gudelinus not only as his source for this citation of Caesar, but for these remarks concerning the laws of these peoples. Stair's borrowing of the citation of Caesar in relation to the customs of the Belgae and Gauls is the same practice as is seen with his borrowing Gudelinus' citations of Chassanaeus, Duarenus, Wesenbecius

⁷⁵ S.5.6/1.5.6.

⁷⁶ Above, 4.1.2.2.

⁷⁷ Gudelinus: *De jure novissimo* 1.13, 29 and 31.

⁷⁸ Gudelinus: *De jure novissimo* 1.13, 31.

⁷⁹ W W.A. MacDevitt (trans): "*De Bello Gallico*" and *Other Commentaries of Caius Julius Caesar* (New York, 1915 rept. Cosimo Classics series, New York, 2007), 149; C. Cellarius: *C. Iulii Caesaris Commentarii de Bello Gallico et Civili, cum utriusque supplementis ab A. Hirtio vel Oppio adiectis. Christophorus Cellarius recensuit, & notis ac novis tabulis geographicis illustravit* (Leipzig, 1705), 195.

⁸⁰ S.5.6/1.5.6. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.6; Adv.MS.25.1.11, fol.39L. 1666 stem: Adv.MS.25.1.5, 5.5; Adv.MS.25.1.7, 5.6. Adv.MS.25.1.12, 5.6 did not identify the book.

⁸¹ S.5.6/1.5.6. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.6; Adv.MS.25.1.11, fol.39L-R. 1666 stem: Adv.MS.25.1.5, 5.5; Adv.MSS.25.1.7 and 25.1.12, 5.6.

⁸² Gudelinus: *De jure novissimo* 1.13, 31.

and Covarruvias in relation to specific contemporary legal systems.

Stair's citations of Roman law here were also borrowed from Gudelinus. Gudelinus cited C.8.46.10 and D.28.2.11 at the end of the sentence:

*At jus civile hanc postestatem longius traxit, & eousque [sic] olim ut parentes haberent in liberos jus vitae, & necis; l. ult. C. de pat. potest. l. in suis. ff. de lib. & posthum.*⁸³

But the civil law extended this power further and at one time parents had the right of life and death over their children: C.8.46.10, D.28.2.11.

Stair drew on this sentence for his own description: "The like power had the *Romans* anciently". He followed this phrase with two citations in the first and second versions. An average reading of these citations in the sample manuscripts is: "*L. in suis de libris et posth.*" and "*L: ff: de pater potest*".⁸⁴ The "ff" in the second citation should probably have read 'ult'. This may have been Stair's error, but was more likely the result of the copyists' misreading his citation. If this suggestion is correct, it means that Stair did not give the relevant sigla in either of these citations in the first or second versions. Nonetheless, the similarity of these two citations in the manuscripts to Gudelinus' citations is clear. That Stair gave the citations the other way around from Gudelinus does not undermine this comparison.

How Stair wrote and revised this passage can be deduced. Stair borrowed the citations of Roman law and that of Caesar, and his comparative references to the Belgae and Gauls, from Gudelinus for the first version. He also reflected Gudelinus' wording in his writing. It is clear that Stair did not check the reference to Caesar; he probably did not check the *Digest* or *Codex* for the first printed edition either. In the first printed edition, Stair's citations of C.8.46.10 and D.28.2.11 read: "*l. in suis haredibus, 11. ff. de liberis & posthumis, l. libertati, 10. Cod. de patria potestate*". Presumably, Stair checked these citations when preparing the third version; this allowed him to add the relevant

⁸³ Gudelinus: *De jure novissimo* 1.13, 29. Underlining in this quotation indicates use of italics in the original source.

⁸⁴ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.6; Adv.MS.25.1.11, fol.39R. 1666 stem: Adv.MS.25.1.5, 5.5; Adv.MSS.25.1.7 and Adv.MS.25.1.12, 5.6.

paragraph numbers and sigla.

5.1.2.4 *Stair's citation of Inst.1.9.2, Inst.1.8, D.29.2.79, C.8.46.10, D.28.2.11, and C.4.43.2*

Stair also cited C.8.46.10 and D.28.2.11 later in this title, along with Inst.1.9.2, D.29.2.79 and C.4.43.2. The source of these citations was again *De jure novissimo* 1.13. Each of these five citations, and the surrounding discussions, shed light on Stair's method; each is therefore worth considering in turn.

First, Stair stated: “for thereby the Parents power is so great, that no Nation hath the like”.⁸⁵ This was likely drawn from Gudelinus: “*nimirum quia alij homines talem in liberos potestatem non habent, qualem Romani* [undoubtedly no other people have so great a power over their children as the Romans]”.⁸⁶ Stair followed this sentence with a citation. Most of the sample manuscripts cited Inst.1.9; one specified Inst.1.9.1.⁸⁷ This suggests that, in the first version, either: Stair did not specify a paragraph of Inst.1.9 and a single copyist added this detail, or he specified Inst.1.9.1 and the paragraph number was omitted by the copyists. However, Inst.1.9.1 was not relevant to the question of paternal power. Gudelinus also cited Inst.1.9.1, immediately after the sentence which Stair paraphrased. Stair borrowed Gudelinus' citation of Inst.1.9 (with or without the paragraph number) for the first version, at the same time that he was also influenced by Gudelinus' wording. When preparing the third version, Stair amended his citation to read to Inst.1.9.2, which was relevant and discussed paternal power.⁸⁸ Depending on whether Stair had cited Inst.1.9.1 in the first and second versions, his citation of Inst.1.9.2 was either a correction or the addition of a detail. Either way, Stair must have checked Inst.1.9 when preparing the third version.

Stair also cited D.28.2.11 and C.8.46.10 in the first version.⁸⁹ Gudelinus cited

⁸⁵ S.5.11/1.5.11.

⁸⁶ Gudelinus: *De jure novissimo*, 1.13, 29.

⁸⁷ 1662 stem: Adv.MS.25.1.8, 5.10; Adv.MS.25.1.10, 5.10 specified Inst.1.9.1; Adv.MS.25.1.11, fol.42R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 5.10.

⁸⁸ This has been checked in the 1656 copy of the *Institutes*.

⁸⁹ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.10; Adv.MS.25.1.11, fol.42R. 1666 stem: Adv.MSS.25.1.5

these two texts in the same context as Stair, the power of life and death which the Roman *paterfamilias* had over his children. Stair's citations (as found in the manuscripts) were identical to Gudelinus' and were given in the same order. D.28.2.11 and C.8.46.10 were cited by Stair earlier in this title, where (as has been shown) they were again borrowed from Gudelinus.⁹⁰ Stair may either have borrowed the citations here from Gudelinus once again or simply re-used them for this passage. This cannot be confirmed either way as he used them in both instances in the same context: the *paterfamilias*' power of life and death.

Stair cited "*L. placet ff: de acquir hered*" in the first version (as can be deduced from the manuscripts).⁹¹ This citation was of D.29.2.79, which concerned the acquisition of inheritance through someone in the power of the *paterfamilias*. Stair incorrectly used it for paternal power "being almost Dominical, and the Children as Servants". The text contained nothing which could explain Stair's reference. This error is explained by his borrowing the citation without checking it from Gudelinus. Stair's citation in the manuscripts was identical to Gudelinus'.⁹² Gudelinus used this citation as authority for the extent of paternal power in Roman law compared to early-modern law. He therefore used it as a specific example of this broader principle. Stair, having not checked this citation, obviously misinterpreted Gudelinus' use of it. His reference to "Children as Servants" was also likely a misinterpretation of Gudelinus' reference to sons having been sold being subject to "*jus servitij* [the law of slavery]"⁹³ in the previous sentence. His (incorrect) association of this text to that previous sentence led him to cite it out of context.

Stair's citation "*l. 2. Cod. de patribus qui filios*"⁹⁴ was also identical to that in Gudelinus. Stair borrowed it from him for the first version. Stair also used this citation

and 25.1.7, 5.10; Adv.MS.25.1.12, 5.10 omitted the citation of the *Digest*.

⁹⁰ Above, 5.1.2.3.

⁹¹ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.10; Adv.MS.25.1.11, fol.42R gave "*placet I*". 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 5.10 gave "*pluc*". The wrong paragraph number was added for the third version, S.5.11/1.5.11; the number 99 was added rather than 79. This was presumably a printing error; it was corrected for the fourth version.

⁹² Gudelinus: *De jure novissimo* 1.13, 29.

⁹³ Gudelinus: *De jure novissimo* 1.13, 29.

⁹⁴ S.5.11/1.5.11. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.10; Adv.MS.25.1.11, fol.43L. 1666 stem:

out of context. C.4.43.2 discussed the sale and subsequent recovery of sons; he used it as authority for the paternal power being slowly eroded until “retrenched to cases of extreme necessity”.⁹⁵ This is explained by Stair’s having (again) borrowed this citation without checking it from Gudelinus. Gudelinus cited this text in a discussion of paternal power. He began by explaining the right of life and death that fathers had in their children. He then compared this with the position of slaves, saying the right of life and death: “*abolitum fuit merito, cum & dominis in servos tanta acerbitas adempta fuerit* [was deservedly abolished, and the great severity was withdrawn from the owners in respect of their slaves]”.⁹⁶ He then went on to say that fathers could not sell their sons (as they could their slaves) unless driven to it by “*extrema necessitas* [extreme necessity]”.⁹⁷ It was for this last point that Gudelinus cited C.4.43.2. The identical citations and reference to extreme necessity point to this passage of Gudelinus as Stair’s source. Why did Stair use this citation, clearly given by Gudelinus in the context of sale of sons, for the reduction of the father’s power? He may simply have misread Gudelinus. Alternatively, he may have intended that this citation, and the rule that fathers could not sell their sons at will, would serve as an example of a limit on paternal power. Stair may thus not have intended this citation to be used as authority for the overall reduction of the father’s power. This might, however, be a generous interpretation of an error resulting from Stair’s borrowing this citation without checking it.

An additional citation appeared in the manuscripts but not the printed editions. Stair explained that limits were placed on the *paterfamilias*’ power to punish his children. Here the manuscripts cited: “*Inst. de his qui sui*”, with two of the manuscripts from the 1662 stem specifying Inst.1.8.1.⁹⁸ Presumably, therefore, Stair cited Inst.1.8.1 in the first version. This citation was borrowed from Gudelinus, from the passage just discussed. When Gudelinus compared the power over sons and slaves he stated: “*id*

Adv.MSS.25.1.5 and 25.1.7, 5.10. Adv.MS.25.1.12, 5.10 just reads “*l.2 cap*”.

⁹⁵ S.5.11/1.5.11. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.10; Adv.MS.25.1.11, fol.43L. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 5.10.

⁹⁶ Gudelinus: *De jure novissimo* 1.13, 29.

⁹⁷ Gudelinus: *De jure novissimo* 1.13, 29.

⁹⁸ 1662 stem: Adv.MS.25.1.8, 5.10; Adv.MS.25.1.10, 5.10 and Adv.MS.25.1.11, fol.43L specified Inst.1.8.1. 1666 stem: Adv.MS.25.1.5 and 25.1.7, 5.10. Adv.MS.25.1.12, 5.10 did not give the citation.

abolitum fuit meritò, cum & dominis in servos tanta acerbitas adempta fuerit, instit. de his qui sui vel alieni juris sunt. § 1. [it was deservedly abolished, and the great severity was withdrawn from the owners in respect of their slaves, Inst.1.8.1]”.⁹⁹ The similarity in language and the citation indicate that Gudelinus was Stair’s source. Why did Stair remove this citation for the third version? Inst.1.8, and the legislation it discussed, related only to slaves, not to children in power. The subject of the text being only of an analogous topic may have been the cause of, or contributed to, Stair’s removal of the citation. If correct, this suggests that Stair did not check this citation when writing the first version but may have done when preparing the third version.

In sum, Stair borrowed all six of these citations from Gudelinus for the first version. Two of these – of D.28.2.11 and C.8.46.10 – were cited earlier in the title, where they were again borrowed from Gudelinus. They may have been borrowed from Gudelinus anew or re-used for either this or the earlier passage of the *Institutions*, depending on which was written by Stair first. Another two citations borrowed from Gudelinus – D.29.2.79 and C.4.43.2 – were used out of context. This suggests strongly that Stair borrowed them without checking them. When preparing the third version, he checked the *Digest* and *Institutes*, and added the paragraph numbers to the citations of D.29.2.79 and D.28.2.11. That he still used D.29.2.79 out of context may suggest that he did not actually *read* it. He also seems to have realised that Inst.1.8 was not direct authority (and removed it for the third version accordingly), and was able to correct or add the paragraph number to the citation of Inst.1.9. He had no reason to consult the *Codex*, the paragraph number having been given by Gudelinus. He may therefore have been unaware that his use of C.4.43.2 was out of context.

5.1.2.5 *Stair’s citation of D.14.6.2, C.6.60.2, D.44.7.39, and Nov.117*

Stair cited Roman law five times in his discussion of the *peculium*: D.14.6.2, C.6.60.2,

⁹⁹ Gudelinus: *De jure novissimo* 1.13, 29. Underlining in this quotation indicates use of italics in the original source.

D.44.7.39, and Nov.117 twice. These texts were also cited by Gudelinus.¹⁰⁰ Stair borrowed these citations from Gudelinus for the first version, and was also at that time influenced by Gudelinus' wording.

First, Stair and Gudelinus gave identical citations of D.14.6.2 after discussing the *peculium castrense* and *quasi-castrense*. Stair's explanation that it was acquired "by Arms, or liberal Arts"¹⁰¹ was similar to Gudelinus' "*militiae armatae, vel sacrae, togataeve acquisivit* [acquired by military armed service, or sacred, or civil duty]". This comparison is all the more compelling given D.14.6.2 did not discuss how the *peculium* was earned, but said only that the son managed it independently. Stair thus likely borrowed this citation from Gudelinus without checking it.

Secondly, Stair's phrase "the Father had the Usufruct and Administration; but not the Property or Power of Alienation" likely reflected Gudelinus' statement "*usufructus autem, & plena administratio esset patris, alienatione ei interdictâ* [the usufruct and full administration resided with the father who was prohibited from alienating it]". Both followed these sentences with citations of Roman law. Stair cited C.6.60.2: "*l. 2. Cod. de bonis maternis*";¹⁰² Gudelinus cited C.6.60.1 and C.6.60.2 – "*l. l. & 2. de bonis maternis*" – and two other texts. This citation of C.6.60.2 was relevant: the text protected such property from being alienated by the father. Stair and Gudelinus' similar phrasing, as well as the significant amount of borrowing by Stair from this title of Gudelinus, indicates that this was his source for this citation. Why did Stair ignore the reference to C.6.60.1? It was certainly relevant as it discussed the father having only usufruct and administration over a child's inheritance from his mother. Indeed, it was more relevant than C.6.60.2, which considered property from the maternal grandparents. It is unlikely that Stair would have dismissed this reference on purpose. Instead, it is probable that when he simply copied down the reference from Gudelinus he omitted to

¹⁰⁰ Gudelinus: *De jure novissimo*, 1.13, 30. S.5.11/1.5.11. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.10; Adv.MS.25.1.11, fol.42R-43R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 5.10.

¹⁰¹ The reference to the liberal arts was omitted in Adv.MSS.25.1.10 and 25.1.11. The phrase "which the Son acquired by Arms, or liberal Arts, the Father had no power" was omitted from Adv.MSS.25.1.5 and 25.1.7. The reference to liberal arts therefore appeared in only one manuscript from each stem: Adv.MS.25.1.8 from the 1662 stem and Adv.MS.25.1.12 from the 1666 stem.

¹⁰² Some of the manuscripts have "paternis" rather than "maternis".

note both C.60.60.1 and C.6.60.2.

Thirdly, Stair said that “Children were as Fathers of Families” in relation to the *peculia*. This possibly derived from Gudelinus describing them as “*si in nullius foret potestate* [if he was not *in potestate*]”. Again, both followed these phrases with a citation. Stair in the first and second version cited D.44.7.39: “*L: filiusfamilias ff: de obligat: et act.*” In the third version, he added the (wrong) paragraph number.¹⁰³ D.44.7.39 was relevant: it said that a suit could be brought against a son “*tamquam cum patre familias potest* [as though against a head of the household [translation by Watson]]”. Gudelinus cited D.44.7.39 in exactly the same way as Stair did in the first version. He also cited D.5.1.57, again in the medieval style. Stair therefore borrowed only the first of Gudelinus’ two references. It is unlikely that he checked either D.44.7.39 or D.5.1.57 for the first version. It is more likely that he felt one citation was sufficient and borrowed the first one given by Gudelinus.

The final comparison which can be made is of Stair’s citations of Nov.117. He cited Nov.117 twice as authority for the reasons that the father’s usufruct in the *peculia* could end. First, where goods were “left to the Children, excluding the Parents” he cited the *Novel* “*in principio*” in all four versions.¹⁰⁴ Secondly, “When the Goods came by the Fathers [*sic*] fault, as when he did unjustly Divorce with the Mother” he cited the *Novel* generally in the first and second versions but “*cap. 10*” in the third and fourth versions.¹⁰⁵ Stair’s citations were relevant; Nov.117 did discuss the father’s usufruct coming to an end. Gudelinus cited Nov.117 only once, in a sentence concerned the appointment of guardians. Thereafter he did discuss the *Novel* in relation to whether the father obtained rights in gifts to his child from its mother or maternal grandparents. This may explain Stair’s borrowing the citation. When Stair revised this passage for the third version, he added the reference to “*cap. 10*” to his second citation of the *Novel*. It is

¹⁰³ The paragraph numbers which were added indicated to D.44.7.1.39 rather than D.44.7.39. As D.44.7.39 had no sub-paragraphs, the addition of the number one cannot be explained as the paragraph and sub-paragraph numbers being accidentally reversed when printed. The addition of the number one was an error. This has been checked in the 1656 edition of the *Digest*.

¹⁰⁴ Adv.MS.25.1.12, 5.10 omitted this citation.

¹⁰⁵ S.5.11/1.5.11. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.10; Adv.MS.25.1.11, fol.43R. 1666 stem: 25.1.5, 25.1.7 and 25.1.12, 5.10.

possible he checked the *Novel*, as he did with the *Digest*, and found the relevant chapter himself.

In sum, Stair borrowed these five citations without checking them for the first version. This resulted in him using one, of D.14.6.2, out of context. When preparing the third version, he checked at least two of these citations against the text, as is shown by the addition of the paragraph number to the citation of D.44.7.39 and the chapter to the second citation of Nov.117. Whether he checked the other citations cannot be known, as it is possible that Stair sought specifically to add paragraph numbers to citations where they were lacking.

5.1.3 “Tutors and Curators”

5.1.3.1 *Stair’s citation of Gudelinus*

Stair explained that the pupil should “recompense of one good deed for an other [*sic*], to make up to the Tutors whatsoever is wanting to them, through their faithful Administration: This is all the substance of the Interests and Obligations of Tutors and Pupils”.¹⁰⁶ Stair acknowledged that the end of the period of tutorship “naturally is the Age of Discretion”¹⁰⁷ but “positive Law determines a particular year”.¹⁰⁸ He stated that Roman law followed natural law, which in turn influenced Scots, French and Dutch law.¹⁰⁹ He cited Gudelinus as authority for French and Dutch law.¹¹⁰ Stair therefore again used Gudelinus as a source for comparative law, as well as for Roman and natural law.

Stair cited *De jure novissimo* 10.8 in the third version. Most of the manuscripts

¹⁰⁶ S.6.4/1.6.4. 1662 stem: Adv.MS.25.1.8, 6.4; Adv.MS.25.1.10, 6.3; Adv.MS.25.1.11, fol.46R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 6.4.

¹⁰⁷ S.6.4/1.6.4. 1662 stem: Adv.MS.25.1.8, 6.4; Adv.MS.25.1.10, 6.4; Adv.MS.25.1.11, fol.46R. 1666 stem: Adv.MSS.25.1.5, 25.1.7, and 25.1.12, 6.4.

¹⁰⁸ S.6.4/1.6.4. 1662 stem: Adv.MS.25.1.8, 6.5; Adv.MS.25.1.10, 6.4; Adv.MS.25.1.11, fol.46R. 1666 stem: Adv.MS.25.1.5, 6.4; Adv.MS.25.1.7, 6.5; Adv.MS.25.1.12, 6.4.

¹⁰⁹ S.6.4/1.6.4. 1662 stem: Adv.MS.25.1.8, 6.5; Adv.MS.25.1.10, 6.4; Adv.MS.25.1.11, fol.47L. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 6.5.

¹¹⁰ S.6.4/1.6.4.

cited 10.18, although one cited 10.15.¹¹¹ This was wrong; *De jure novissimo* had only six books. Given that the error is found consistently through the manuscripts and printed editions of the *Institutions*, it is probable that it was made by Stair. The passage of Gudelinus to which Stair should have referred can be identified. Gudelinus discussed tutorship in *De jure novissimo* 1.17 and 1.18. Stair likely consulted *De jure novissimo* 1.18, but wrote down the wrong book number in error.

In *De jure novissimo* 1.18, Gudelinus stated “*Mores nostri in hac materia perparum a jure Romano recesserunt*; [Our customs have receded very little from Roman law in this matter]”,¹¹² except that tutorship in his time ended at twenty-five.¹¹³ He explained that not all countries recognised such a Roman law of tutorship, and thus, for example, in some nations, tutorship was an annual office. He stated finally the typical practice of the *ius commune*:

alijsque similibus observanda est cujusque civitatis consuetudo, & in reliquis ad juris Romani aequitatem recurrendum

the custom of whichever city should be observed in other similar matters and for the rest recourse must be sought to the equity of Roman law.¹¹⁴

Gudelinus therefore discussed the equity of Roman law, the differing points at which tutorship ends in various societies, and the closeness of most to Roman law. These comments were clearly the source of Stair’s own about Dutch law, Roman law, and natural law being similar, as well as his comments about tutelage ending “naturally” at majority but in all respects “positive Law determines a particular year”.

Despite Stair giving Gudelinus as authority for French law, there was no mention of French law in this paragraph of Gudelinus. Stair’s reference is explained by Gudelinus’ referring to Cujacius in the previous paragraph, which discussed the

¹¹¹ 1662 stem: Adv.MSS.25.1.8, 6.5; Adv.MS.25.1.10, 6.4; Adv.MS.25.1.11, fol.47L cited 10.15. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 6.5.

¹¹² Gudelinus: *De jure novissimo* 1.18, 43.

¹¹³ Gudelinus: *De jure novissimo* 1.18, 43.

¹¹⁴ Gudelinus: *De jure novissimo* 1.18, 43.

administration of orphans' estates as being "*persimiles* [very similar]".¹¹⁵ This analogy allowed Stair to deduce that French law was influenced by Roman tutorship. As was seen before in the example of Duarenus, Stair drew his authority for French law here from Gudelinus' citation of a French jurist, in this case Cujacius.

5.1.3.2 *Stair's citation of the Authenticum, Nov.94, C.5.37.24, and D.26.7.7.7*

Before relating that an Act of 1672¹¹⁶ required that a tutor keep an inventory of his pupil's estate,¹¹⁷ Stair stated that this was true of Roman law. This passage was included only in the first, second and third versions; it was removed for the fourth. Stair gave four citations of Roman law here: one of the *Authenticum* of Nov.72.8, two of C.5.37.24, and one of D.26.7.7. These texts were relevant: Novel 72.8 stated that a tutor had to take a sacred oath to ensure that he faithfully administered a pupil's property, but that he still had to render accounts; C.5.37.24 said that guardians had to make an inventory; and D.26.7.7.pr stated that a tutor who did not make an inventory was deemed to be acting fraudulently. *De jure novissimo* 1.18 (the title to which Stair's citation should have referred) was the source for Stair's discussion and citations. As with previous passages where Stair relied heavily on Gudelinus, Stair condensed this paragraph of Gudelinus, retaining his citations.

Gudelinus also cited the *Authenticum* of Nov.72 for tutors giving oaths. The two jurists' citations were essentially the same: "*Nov. 72. §. ult. & Auth. quod nunc generale. C. eo. de curat. furiosi*"¹¹⁸ in Gudelinus was "*Nov. 72. l. ult. Authen. quod nunc generale l. de curat. furiosi*" in the first printed edition of Stair. However, the citation in the manuscripts read "*N. 72. 9. Last & Auth. quod nunc generale de curat. furiosi*".¹¹⁹ It

¹¹⁵ Gudelinus: *De jure novissimo* 1.18, 43.

¹¹⁶ *R.P.S.*, 1672/6/9: Act Concerning Pupils and Minors and Their Tutors and Curators 1672 <<http://rps.ac.uk/trans/1672/6/9>>, accessed 16th July 2010.

¹¹⁷ This discussion was obviously not included in the manuscripts.

¹¹⁸ Gudelinus: *De jure novissimo* 1.18, 41.

¹¹⁹ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 6.6; Adv.MS.25.1.11, fol.48L omitted the citation of the *Novel*, but gave the *Authenticum*. 1666 stem: Adv.MSS.25.1.5 and 25.1.7, 6.6; Adv.MS.25.1.12, 6.6

seems to have specified Nov.72.9, but there were only eight paragraphs in Nov.72.¹²⁰ It is clear how this error occurred. When Stair borrowed Gudelinus' citation, he must have written in this first version "72 § ult". The symbol '§' was then misinterpreted by the copyists as '9'. That Stair's own version was correct is confirmed by the first printed edition giving "72. l. ult."

Stair gave three other citations in this passage: one of D.26.7.7 and two of C.5.37.24. Each appeared in the manuscripts exactly as in Gudelinus. Stair's citation "*L: tutores, C. de administratione tut*" in the manuscripts¹²¹ was identical to that of Gudelinus: "*l. tutores. C. de administ. tut.*".¹²² For the second printed edition, Stair added the paragraph number to his citation, indicating he checked it at that time. Stair then cited D.26.7.7.7 and C.5.37.24 together in the first version: "*L: Tutorem qui ff: de Administratione tut: l. tutores C. eodem*". For the third version, he added the paragraph number to the citation of the *Digest*,¹²³ the citation of the *Codex* remained unchanged.¹²⁴ These two citations thus appeared in the first version as in Gudelinus: "*l. tutorem qui. ff. de administrat. tut. d. l. tutores. C. eod.*"¹²⁵

Stair may also have been influenced by Gudelinus' wording when writing the first version. Stair referred to the tutor needing to find caution. This may have reflected Gudelinus referring to *satisdare* [to provide security]. Additionally, Stair's statement "and they behooved to make Inventar" may have been drawn from Gudelinus' phrase: "*Cogitur insuper conficere inventarium* [Additionally, he is compelled to make an inventory]"¹²⁶.

omitted the citation.

¹²⁰ This has been checked in the 1614 copy of the *Authenticum*.

¹²¹ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 6.6; Adv.MS.25.1.11, fol.48L. 1666 stem: Adv.MSS.25.1.5 and 25.1.7, 6.6; Adv.MS.25.1.12, 6.6 omitted the citation.

¹²² Gudelinus: *De jure novissimo* 1.18, 41.

¹²³ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 6.6; Adv.MS.25.1.11, fol.48L. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 6.6. The citation in the first printed edition read "*l.7. Tutor. qui 7. ff. Administratione, tut.*" It is likely that the second '7' in this citation was a printing error, as the paragraph then referred to was irrelevant (it concerned money deposited with a tutor for the purchase of land). Presumably Stair intended for there to be only one '7' in that citation. This has been checked in the 1656 edition of the *Digest*.

¹²⁴ 1662 stem: Adv.MS.25.1.8, 6.6 gave the siglum 'ff' rather than 'C'; Adv.MS.25.1.10, 6.6; Adv.MS.25.1.11, fol.48L gave no siglum. 1666 stem: Adv.MSS.25.1.5, 25.1.7, and 25.1.12, 6.6.

¹²⁵ Gudelinus: *De jure novissimo* 1.18, 41.

¹²⁶ Gudelinus: *De jure novissimo* 1.18, 41.

The strongest evidence of Stair's borrowing from Gudelinus here is an additional citation found only in the manuscripts, and thus presumably removed for the third version. It appeared after the first of Stair's citations of C.5.37.24 (already shown to have been borrowed from Gudelinus). An average reading of the citation in the sample manuscripts is: "*nov: ut sine prohibitione*".¹²⁷ This referred to Nov.94, which concerned mothers acting as guardians. Thereafter a three digit number was given, 214 or 244, then "*in fine*". The presence of the number is inexplicable, as there was no such section of that Novel. However, when Gudelinus is examined Stair's reference becomes clear. Gudelinus also cited this Novel, again immediately following C.5.37.24, but as: "*Nov. ut sine prohibitione. 24. in fine.*"¹²⁸ Gudelinus wrongly identified Nov.94 as Nov.24 (which concerned the praetorship of Pisidia).¹²⁹ Stair clearly borrowed this incorrect citation of the Novels from Gudelinus. The appearance of '244' or '214' in Stair's citation of the Novel reflected Gudelinus' error. Stair cannot have checked this citation. He probably removed the citation for the third version because he checked Nov.24 and found the error.

In sum, Stair must have consulted Gudelinus for the first version. He was influenced by Gudelinus' phrasing and structure and borrowed these citations without checking them, as can be deduced by the addition of their paragraph numbers only at a later date and the inclusion of '244' or '214' in his citation of Nov.94. When preparing the third version, Stair checked these references. He added the paragraph numbers to the citations of the *Digest* and *Codex*, and removed the citation of Nov.94. He also added a discussion of the Act of 1672 which required tutors in Scotland to make inventories. When preparing the fourth version, Stair removed this passage, his remarks concerning the Act of 1672, and his preceding discussion of a case in Nicholson's practicks concerning giving caution. The reason for Stair's removal of this passage is unknown.

¹²⁷ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 6.6; Adv.MS.25.1.11, fol.48L. 1666 stem: Adv.MSS.25.1.5 and 25.1.7, 6.6; Adv.MS.25.1.12, 6.6 omitted the citation.

¹²⁸ Gudelinus: *De jure novissimo* 1.18, 41.

¹²⁹ This was probably an accidental error, as later in the paragraph Gudelinus gave the citation correctly: "*N. 94. §. ult.*" in Gudelinus: *De jure novissimo* 1.18, 41. The 1661 Arnhem edition also wrongly cited Nov.24 [at 39].

5.1.4 “Obligations Conventional”

5.1.4.1 *Stair’s citation of Gudelinus, Corvinus, the Liber Extra, and use of a maxim of Canon law*

Stair’s discussion of naked pactions within the context of contract and promise is well known, and has already been discussed briefly.¹³⁰ Stair stated:

We shall not insist in these [Roman formalities], because the common Custome of Nations hath resiled therefrom, following rather the Canon Law, by which every paction produceth action, *omne verbum de ore fideli cadit in debitum* [all words from faithful mouths result in obligation]...¹³¹

This echoed his earlier declaration: “promises now be commonly held Obligatory, the Canon Law having taken off the exception of the Civil Law, *de nudo pacto*”.¹³² Stair’s adoption of this rule of Canon law was central to the development of Scots law.¹³³ Hogg noted that “The acceptance of the validity of bare pacts, gratuitous contracts, and unilateral contracts, under Stair’s direction, was to provide Scots Law with a very flexible and broad law of voluntary obligations.”¹³⁴ McBryde stated Stair’s acceptance of naked pactions and rejection of the requirement for acceptance of promises “was to set Scots law on a path different from some other civilian systems and also from the common law.”¹³⁵

Stair stated that this acceptance of naked pactions was already settled in Scots law: “we have a special Statute of Session, *November 27. 1592. acknowledging all pactions and promises as effectual*: So it hath been ever decided since, *January 14.*

¹³⁰ Above, 4.1.6.1.

¹³¹ S.10.7/1.10.7. 1662 stem: Adv.MS.25.1.8, 10.5; Adv.MS.25.1.10, 10.6; Adv.MS.25.1.11, fol.89R. 1666 stem: Adv.MS.25.1.5, 10.6; Adv.MS.25.1.7, 10.5; Adv.MS.25.1.12, 10.6.

¹³² S.10.4/1.10.4.

¹³³ Cf. J.J. Gow: “The constitution and proof of voluntary obligations” [1961] *Jur.Rev.* 1-20 (Part one) and 119-142 (Part two), 3-4.

¹³⁴ Hogg: “Perspectives on contract theory from a mixed legal system”, 653.

¹³⁵ McBryde: “Promises in Scots law”, 56.

1631. *Sharp contra Sharp*.”¹³⁶ Earlier cases concerned whether promises could be proved by witnessed or only *scripto vel juramento partis* [by writing or oath of the party].¹³⁷ Stair’s use of *Sharp v Sharp* 1631 and the Act of Sederunt were puzzling. In *Sharp v Sharp*, half-brothers John and William signed a contract stating that whatever heritage was inherited by them, in the event that one predeceased their father, would go first to the deceased half-brother’s children; failing which to the surviving half-brother; failing which to his surviving children; failing which to their father’s heirs. After the deaths of William and his only child, John sued William’s sister and nieces and nephews on the contract. The defence argued *inter alia* that the contract was “*pactum nudum*, Remaining in the naked Terms of an intention, not Vested with any Act following thereon, nor no Deed done by either of the Parties...and that the nature thereof was so ineffectual to bind”.¹³⁸ The Lords were not recorded by Durie as having decided such pactions to be lawful but merely that the contracts in this case were not found to be *nuda pacta* “but that they were good compleat Writs and Securities”¹³⁹ because the contract had been subscribed. Although “*Sharp v Sharp* has come to be seen as significant in Scots law’s move towards the Canon law’s position”,¹⁴⁰ the extent to which it decided this point can be questioned.

There is already controversy regarding Stair’s citation of the Act of Sederunt. The Act of that date in the printed collection of the Acts of Sederunt stated:

The quhilk day, the Lordis declaire, that, in all tyme cuming, thay will juge and decide on clausis irritant, conteint in contractis, takis, infeftmentis, bandis, and obligationis, precise according to the wordis and meining of the said clausis irritat, and efter the forme and tenor thairof;¹⁴¹

¹³⁶ S.10.7/1.10.7. *Sharp v Sharp* 1631 [M.4229].

¹³⁷ See e.g. Sellar: “Promise”, 254-255; M.12381-12383. It is telling that Morison classified “Naked Promise” as a sub-heading of “Proof” [Division 1, section 9, begins M.12381].

¹³⁸ M.4299-4300; A. Gibson, Lord Durie: *The Decisions of the Lords of Council and Session, in most cases of importance, debated, and brought before them, from July 1621, to July 1642* (Edinburgh, 1690), 553.

¹³⁹ M.4299, 4301; Durie: *Practicks*, 554.

¹⁴⁰ Cairns: “*Ius civile* in Scotland, ca. 1600”, 166.

¹⁴¹ *The Acts of Sederunt of the Lords of Council and Session, from the 15th of January 1553, to the 11th of July 1790* (Edinburgh, 1790), 19.

This Act therefore concerned the interpretation of irritancy clauses in (presumably written) contracts; it did not (as Stair claimed) acknowledge “*all pactions and promises as effectual*”.¹⁴² Sellar found a reference to an Act of Sederunt of the same date in Hope’s *Major Practicks*: “C 775 makes mention of ane statut insert in the sederunt books (27 Nov. 1592) beiring that the conventions of parties should be fulfilled albeit not aggreable to the comone law”.¹⁴³ Sellar suggested that:

the presumption must surely be either that another Act did once exist, or that the known Act was generally interpreted along the lines suggested by Stair and by Hope’s *Practicks*. Either way, we have important evidence as to the practice of Scots law in the century before Stair.¹⁴⁴

Sellar explained that:

questions are bound [to] have arisen on the matter of promises and ‘naked pactions’: should it follow the canon law rule *pacta sunt servanda* or the civil law maxim *ex nudo pacto non oritur actio*? This provides the perfect context for the Act of Sederunt of 1592.¹⁴⁵

If Sellar was correct, then Stair may simply have been explaining Scots law. However, it is more likely that this Act of Sederunt was apocryphal. Part of Stair’s practice when writing and revising the *Institutions* was to borrow citations without checking them from his sources. He has been shown to have done this when using his Scottish sources just as he did when using his continental sources.¹⁴⁶ Stair’s use of Hope has not been examined for this thesis but it is highly probable that he also borrowed references from Hope. If this assumption is correct, this means that Stair and Hope cannot be considered to have been independent witnesses to the existence of the Act. Additionally, it seems that Hope borrowed this reference from a manuscript, and the implication in his wording is that he did

¹⁴² As was also noted in J. Erskine: *An Institute of the Law of Scotland, in four books, in the order of Sir George Mackenzie’s Institutions of that law* (Edinburgh, 1773), 3.2.1, 426.

¹⁴³ J.A. Clyde (ed): *Hope’s Major Practicks, 1608-1633* volume 1 (Stair Society series volume 3, Edinburgh, 1937), 2.2.5.

¹⁴⁴ Sellar: “Promise”, 261-262.

¹⁴⁵ Sellar: “Promise”, 264.

¹⁴⁶ Above, 3.2.2.1.

not check the reference. What is in Hope is, therefore, a citation and description of an Act of Sederunt that is at least second-hand; in Stair it is at least a third-hand reference. Both are wrong. It is not feasible here to examine this question further, but two relevant conclusions can be drawn. First, it was also seemingly Hope's practice to borrow citations from his sources without checking them; this puts Stair's practice in the context of that of other seventeenth-century Scottish jurists. Secondly, there is therefore doubt as to the extent to which Stair drew on relevant Scottish sources. It must be determined which sources did influence Stair when writing this passage.

Stair used a range of continental sources for this passage. He cited Gudelinus, Corvinus and, in the manuscripts only, Gomezius.¹⁴⁷ It has already been shown that Stair cannot have been "largely influenced by the Spanish Scholastic School"¹⁴⁸ as the only references to second scholastics (including that of Gomezius) were borrowed from Grotius.¹⁴⁹ Stair also clearly used Gudelinus here, as his citation of Gudelinus was sufficiently accurate to allow the presumption that the passage was directly consulted by him. Stair cited the ultimate passage of *De jure novissimo* 3.5; there was much similarity between the texts. However, Gordon found no evidence of Stair's borrowing authority from Gudelinus in this passage;¹⁵⁰ this thesis confirms his findings. Instead, it will be shown that Stair's citations of the *Liber Extra* and his phrase "every paction produceth action" were borrowed from Corvinus.¹⁵¹

Stair turned to three continental jurists when writing this passage: a natural lawyer in Grotius; a comparative jurist in Gudelinus; and a Canonist in Corvinus. From these three sources, Stair drew on a wide range of authority including Canon law and an additional jurist, Gomezius.

¹⁴⁷ Above, 4.1.6.1; below, 7.1.2.

¹⁴⁸ Hogg: "Perspectives on contract theory from a mixed legal system", 652. Above, 4.1.6.1.

¹⁴⁹ Above, 4.1.6.1.

¹⁵⁰ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 263-4

¹⁵¹ Below, 7.1.2.

5.1.4.2 Stair's citations of C.4.30.14, Balduinus, Boerius and Rebuffus

Stair discussed the situation where money was not delivered under a contract of loan. In Roman law, it was common for the debtor to acknowledge receipt of the funds before they were released.¹⁵² The late-Classical *exceptio non numeratae pecuniae* gave the debtor the defence that the money had not been paid if the creditor later raised an action against him. He could also raise the action *querela non numeratae pecuniae* to challenge the contract of loan.¹⁵³ Both the *querela* and *exceptio* had to be brought within a specified period of time; under Justinianic law, both expired after two years.¹⁵⁴

In Stair's discussion of *non numerata pecunia* in the manuscripts and first printed edition is cited "*l. in contractibus, ff. de non numerata pecunia*"; two of the manuscripts from the 1662 stem cited "*§. illo*".¹⁵⁵ This citation should have been of the *Codex* passage C.4.30.14; the sub-paragraph starting *illo* was C.4.30.14.3. Stair seems to have given the wrong siglum in the first, second and third versions. He corrected this error, and added the relevant paragraph number, in the fourth version. C.4.30.14 was relevant, as it concerned the prescriptive period for these actions; C.4.30.14.3 specifically discussed the creditor's oath being time-barred, the context in which Stair used this citation. Stair increased the detail in his citations of Roman law by adding sub-paragraph numbers as he revised the *Institutions*;¹⁵⁶ here, however, the reference to a relevant sub-paragraph was removed, seemingly for the second version. It is not clear why he did this; perhaps he did so accidentally.

What is clear, however, is that Stair borrowed this citation from Gudelinus. Both Stair and Gudelinus cited the same sub-paragraph. Additionally, both Stair and Gudelinus referred to this period of two years in relation to the text, but this was not

¹⁵² R. Zimmermann: *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford, 1990), 93.

¹⁵³ Zimmermann: *Law of Obligations*, 94; J.A.C. Thomas: *Textbook of Roman law* (Amsterdam, 1976), 268-269.

¹⁵⁴ Inst.3.21.

¹⁵⁵ S.10.11/1.10.11. 1662 stem: a later unknown hand has written "§" after the citation in Adv.MS.25.1.8, 10.11; Adv.MS.25.1.10, 10.11 gave "'§. illo"; Adv.MS.25.1.11, fol.91L gave "'§. illo". 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 10.11.

¹⁵⁶ Above, 3.1.3.

mentioned in C.4.30.14.3. Stair made this association between the time period in which the action or defence could be brought and the *Codex* text because he had borrowed the reference from Gudelinus without checking it. Finally, this citation appeared in the same sentence in Stair as those of Balduinus, Boerius and Rebuffus which were also evidently borrowed from Gudelinus.¹⁵⁷

Stair explained that early-modern law had departed from these Roman rules. When writing the first version, he cited Balduinus, Boerius and Rebuffus as evidence for this in “the Neighbour Nations”.¹⁵⁸ Gordon said “there must be a very strong suspicion” that Stair’s citations of these jurists were borrowed from Gudelinus.¹⁵⁹ Indeed, Stair’s citations: “*Balduinus [sic] testifieth, ad titulum, Just. de lit. oblig. And Boetius, de consuetudine, tit. de jurisdic. And Rebuffus, ad proximum, const. Reg. gloss. 5. num. 59.*”¹⁶⁰ are clearly borrowed from Gudelinus, who wrote: “*Francis. Balduinus ad Inst. d. tit. de liter. obligat. & post Boerium de consuet. Byturigum tit. de jurisdic. §.8. & post Rebuff. ad proemium const. reg. glos.5. num.59.*”¹⁶¹ Both Stair and Gudelinus’ citations were in the same order and were of the same treatises and paragraphs, with one exception. Gudelinus cited section eight of Boerius; in neither the manuscripts nor the printed editions was Stair’s citation that specific. Stair simply omitted this detail.

Balduinus’ commentary repeated the text of Inst.3.21, “*De literarum obligatione*”, and provided annotations beneath.¹⁶² C.4.30.14 was cited four times by Balduinus. On the first of these occasions, he discussed the effect of the legislation and mentioned a time limit of thirty days for the *exceptio*. He then distinguished contemporary law, saying that such a rule would be inoperable in contemporary commerce.¹⁶³

The citation of “Boetius” was actually of Boerius’ *Consuetudines*, a treatise on

¹⁵⁷ Gudelinus: *De jure novissimo* 3.6, 114.

¹⁵⁸ S.10.11/1.10.11.

¹⁵⁹ Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 264.

¹⁶⁰ S.10.11/1.10.11. 1662 stem: Adv.MS.25.1.8, 10.11; Adv.MS.25.1.10, 10.11 omitted Balduinus’ name; Adv.MS.25.1.11, fol.91L. 1666 stem: Adv.MSS.25.1.10 and 25.1.7, 10.11; Adv.MS.25.1.12, 10.11 gave simply “Balduinus testifieth and others”.

¹⁶¹ Gudelinus: *De jure novissimo* 3.6, 114.

¹⁶² Balduinus: *Commentarii institutionum iuris civilis* 3.21, 551-553.

¹⁶³ Balduinus: *Commentarii institutionum iuris civilis* 3.21, 552 on “*debere*”.

Bourges custom. Presumably Stair and Gudelinus' citations of "*de iurisdic*" related to Boerius' title "*Des iuges & leur iurisdiction [sic]* [Judges and their jurisdiction]". When commenting on a custom which stated that reconventions "*nont point de lieu eu ladicte ville & septanie de Bourges par deuant aucun iuge* [have no place in the town or local jurisdiction of Bourges before any judge]",¹⁶⁴ he explicitly rejected the *exceptio* in French law:

*Et similiter de stylo & consuet. curiarum secularium & ecclesiasticae Biturigum exceptio non numeratae pecuniae, non habet locum, nec potest opponi.*¹⁶⁵

Similarly, the style and customs of the Bourges secular and ecclesiastic courts do not have a place [for it], nor is the defence of 'money not paid' able to be raised in court.

The citation of Rebuffus was amended by Stair for the fourth version:¹⁶⁶ the words "*ad proximum const Reg Gloss 5*" were changed to "*Tom 1 const in proam*". The reason for this alteration is not apparent, although Stair was correct in identifying the first tome. Nonetheless, the initial citation was more detailed and was correct.¹⁶⁷ It is unlikely that the change was made after Stair consulted the text. In the *prooemium* of the passage cited, Rebuffus referred to and explained the effect of C.4.30.14 before distinguishing French law: "*sed in Francia semper recipitur opponens non numeratam* [but in France the opponent can always recover unpaid money]".¹⁶⁸

All three jurists therefore distinguished contemporary law from Roman law. It is unlikely that Stair checked any of them. He did not give any of the details given in these three passages (e.g. the time limit of thirty days), nor did he borrow any of their authorities, nor was he otherwise influenced by them. Additionally, although these jurists discussed French law, Stair unusually gave them as evidence for "the Neighbour Nations" rather than any particular legal system. This was likely because Gudelinus did

¹⁶⁴ Boerius: *Consuetudines infrascriptarum*, 1.2.8, 36.

¹⁶⁵ Boerius: *Consuetudines infrascriptarum*, 1.2.8, 36, glossa 1.

¹⁶⁶ Rebuffus: *Commentaria in constitutiones regias Gallicas*.

¹⁶⁷ As was noted by Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 265 n.17.

not specify any legal systems, but just gave them as authority for seventeenth-century practice generally. Stair has previously been shown to have extrapolated that a jurist was authority for a specific legal system from the name of the treatise or their nationality. Even though Gudelinus cited Boerius' treatise "*de consuet. Byturigum*", Stair did not do so here.¹⁶⁹

Gudelinus (after citing Balduinus, Boerius and Rebuffus) cited Philibert Bugnyon, a sixteenth-century French jurist.¹⁷⁰ Stair did not borrow this citation. Gordon did not suggest any reason for this. Perhaps Stair rejected this citation because Gudelinus gave Bugnyon's treatise as "*in tract. quem Gallice scripsit legum abrogatarum*".¹⁷¹ The *Leges abrogatae et inusitatae in omnibus curiis, terris, jurisdictionibus, & dominiis regni Franciae tractatus* (Edition consulted: Brussels, 1677) was a summary of which Roman texts were not used in the different French regions.¹⁷² Perhaps Stair disregarded it because of its title, which was essentially "the abrogated and disused laws in France". He may, of course, have simply rejected it as he felt three citations here were sufficient.

5.2 STAIR'S USE OF GUDELINUS FOR THE FOURTH VERSION

5.2.1 "Obligations Conventional/Location and Conduction"

The structure of Stair's discussion of location and conduction was typical of his practice. He began with a jurisprudential discussion of the ideal and equitable position of the law, in which he gave only one citation of Roman law (of C.4.65.8) in the first, second and third versions.¹⁷³ He then examined the law in seventeenth-century Scotland. When preparing the fourth version, Stair added six citations of Roman law to his

¹⁶⁸ Rebuffus: *In constitutiones regias Gallicas commentarius, prooemium*, gloss 5, 13, para 59.

¹⁶⁹ Gudelinus: *De jure novissimo* 3.6, 114.

¹⁷⁰ Gudelinus: *De jure novissimo* 3.6, 114.

¹⁷¹ Gudelinus: *De jure novissimo* 3.6, 114.

¹⁷² Stein: *Roman law in European history*, 94. Gudelinus' citation of these two articles was correct and broadly relevant. Bugnyon's treatise served as a model for Simon Groenewegen van der Made's *Tractatus de legibus abrogatis et inusitatis in Hollandid vicinisque regionibus* (Leiden, 1649) [Stein: *Roman law in European history*, 100].

¹⁷³ S.10.72.1.15.3. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 10.53, and Adv.MS.25.1.11, fol.114L. 1666

jurisprudential discussion. He used Gudelinus when revising this passage. Their citations are compared in table two:

Table Two:

	Stair	Gudelinus: <i>De jure novissimo</i> 3.7
Inst.3.24	<i>Pr.1 & §.1. Inst.de.Locat.cond.</i>	<i>d. §. adeo. inst. de locat. & conduct.</i>
D.19.2.25pr	<i>l.25 in prin. ff. eod.</i>	-
D.19.2.15	<i>vid. l.15. ff. h. t.</i>	<i>l. ex conducto. §.1. & §. ubicunque. Eod. tit.</i>
D.19.2.15.4	<i>d.l.15.§.4. ff.h.t</i>	<i>d. l ex conducto. §. cum quidam & §. Papinianus.</i>
C.4.65.8	<i>l.8. Cod. Locati.</i>	<i>l. licet. C. de locat. & cond.</i>
D.19.2.25.6 or 9	<i>l.25.§. 9. ff h.t.</i>	<i>l. si merces §. vis major. ff. locati.</i>
C.4.65.9	<i>l.9.C.h.t.</i>	<i>l. emptorem. C. d tit. de loc. & cond.</i>

Comparing Stair and Gudelinus' citations (bold font denotes citations added for Stair's fourth version).

Stair's citation of D.19.2.25.9 was wrong; there was no such paragraph. The citation should have been of D.19.2.25.6. This may have been a simple printing error, the relief being inserted upside down. If this is correct, both Stair and Gudelinus cited Inst.3.24, D.19.2.15, D.19.2.15.4, C.4.65.8, C.4.65.9 and D.19.2.25.6. The difference was that Gudelinus identified the Roman texts by their opening words, while Stair gave the paragraph numbers. Stair must have checked and amended these citations when he borrowed them. This agrees with his practice of adding the paragraph numbers to his medieval-style citations for the printed editions.

There is additional evidence that Stair examined these texts. First, Stair added for the fourth version the sentence and citation: "Neither is there any abatement where the Hire is a propertion [*sic*] of the Fruits *l.25.§.9. ff h.t.*" Here he paraphrased D.19.2.25.6, the text which he probably intended to cite. He could not have taken this from Gudelinus, who did not paraphrase D.19.2.25.6 and gave the citation in the context of common land used for grazing. Stair could only have paraphrased the text if he had

stem: Adv.MSS.25.1.5, 25.1.7, 10.53; Adv.MS.25.1.12, 10.53 cited C.4.65.1.

consulted it. Additional evidence that Stair consulted D.19.2.25.6 is his citation of D.19.2.25.pr. The *prooemium* of D.19.2.25 was not cited by Gudelinus. Stair must have read D.19.2.25.pr when checking D.29.2.25.6, decided that it was relevant, and included a citation of it in the fourth version.

Secondly, Stair in the first, second and third versions stated: “this will take no place, if the abundance of another year compensate the sterility of the former, *l. 8. Cod. Locati.*” For the fourth version he replaced the phrase “this will take no place, if the abundance of another year” with “but the plenty of the former year doth not”. This was likely a reflection of C.4.65.8: “*et quae evenerunt sterilitates ubertate aliorum annorum repensatae non probabuntur* [if the meagreness of the crop is not shown to have been offset by the abundance of other years [translation: Blume]]”. Stair borrowed a citation of C.4.65.9 from Gudelinus for the fourth version. He probably consulted C.4.65.8 (the text cited in the first, second and third versions) while checking C.4.65.9.

Thirdly, Stair was led to a passage of the *Institutes* with which he was already familiar. Gudelinus cited Inst.3.24.3; Stair added a citation of Inst.3.24.pr-1. Although this was the first citation which Stair gave of Inst.3.24, the *Institutes*’ example of a tailor was reflected in Stair’s discussion of dying cloth as an example of location in the first, second and third versions. Stair may have been led back to Inst.3.24 by Gudelinus when preparing the fourth version, and added the relevant citation at that time.

Finally, Gudelinus cited D.19.2.33, D.19.2.15.1, D.29.2.15.7 and C.4.65.8 together: “*d. l. si fundus. l. ex conducto. §.1. & §. ubicunque. eod. tit. l. licet. C. de locat. & cond.*”¹⁷⁴ Stair seems to have checked these texts. He rejected Gudelinus’ citation of D.19.2.33, likely because it concerns forfeiture of leased lands and was thus not strictly relevant, even though it did become associated with *remissio mercedis* in the literature of the *ius commune*. He did, however, borrow that of D.19.2.15, which was directly relevant. He did not cite the first sub-paragraph of the text, however, although he did later cite D.19.2.15.4. This is likely because D.19.2.15.1 was only broadly relevant.

There was, however, an error in Stair’s use of two of the citations: D.19.2.15 and D.19.2.15.4 would have provided better authority if used the other way around. Stair

used D.19.2.15 as authority for the rule that “if there be any profite of the Fruit above the expenses, or work, the rent or hire should be due” and D.19.2.15.4 for the situation “in publick Calamities by War, not only the Cropt is taken away, but the Tennants are disinabled, and hindered to Labour”. Rather, D.19.2.15.4 applied to the rent and profits when arable land was sterile, while D.19.2.15 (specifically D.19.2.15.2) discussed “public Calamities”. These texts were used correctly by Gudelinus. Stair probably confused these citations when borrowing them, although the error could also have been made by the printer.

Stair did not rely on Gudelinus when writing this passage for the first version: their structure was different (even though there were some parallels in language), and Stair’s citation of C.4.65.8 gave the paragraph number while Gudelinus’ gave the opening words (Stair does not seem to have made such changes to citations when writing the first version). When preparing the fourth version, Stair consulted Gudelinus and used him as a source of Roman law. He checked Gudelinus’ citations, which allowed him to: supplement them with the relevant paragraph numbers, include an additional citation of D.19.2.25.pr, cite Inst.3.24.pr and Inst.3.24.1, and make amendments to his general discussion.

5.2.2 “Liberation from Obligations”

Stair expanded his discussion of consignation for the third version.¹⁷⁵ When preparing the fourth version, he added two citations: C.4.32.6 and C.4.32.19. These were borrowed from Gudelinus, who also discussed the consignation of funds with a magistrate.¹⁷⁶ These same citations were both given by Gudelinus in the medieval style, without paragraph numbers. Stair checked these citations and gave the paragraph numbers instead of the texts’ opening words. This suggests that Stair checked these citations when he borrowed them from Gudelinus. Additionally, both were also used by him in a

¹⁷⁴ Gudelinus: *De jure novissimo*, 3.7, 115.

¹⁷⁵ S.11.4/1.18.4. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 11.4, and Adv.MS.25.1.11, fol.127L-R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 11.4.

¹⁷⁶ Gudelinus: *De jure novissimo* 3.12, 131-132.

manner which indicates some knowledge of the texts. C.4.32.19 allowed a debtor whose creditor refused payment to deposit the money with a temple or judge to avoid interest accruing. Stair used it as authority for depositing funds with the Clerk of Bills to stop “the running of Annuals” [i.e. annually accruing interest payments] where there is “absence, lurking or refusal of the Creditor”. C.4.32.6 allowed a debtor whose creditor was absent to deposit the money owed with a suitable office-bearer.¹⁷⁷ Stair cited it as authority for depositing of money with “*authore pretore*”. Although the surrounding passage was otherwise unchanged, Stair’s use of the citations in these places indicates that he checked them. Further support for Stair having checked these citations is his rejection of Gudelinus’ citation of C.8.42.9, given after that of C.4.32.19. C.8.42.9 stated payment could only be effected at the location where the debt was due; it was thus irrelevant to Stair’s discussion. He presumably realised this when checking Gudelinus’ citations, which allowed him to reject this citation but borrow the other two.

5.3 CONCLUSIONS

Stair used Gudelinus for the first and fourth versions. Gudelinus was the only one of Stair’s three principal sources which was not consulted for the third version.¹⁷⁸ Stair used *De jure novissimo* books one and three for his titles on obligations. This is expected: book one was on the law of persons and book three on obligations. Stair probably also consulted book two, on property law, for later titles of the *Institutions*.¹⁷⁹ It is doubtful that Stair consulted the other books of *De jure novissimo* for the first version: the fourth was on judges and procedure, the fifth on public law (including criminal law),

¹⁷⁷ The Latin term used in the *Codex* text, “*praesidem*”, is translated “governor”.

¹⁷⁸ Above, 4.2; below, 6.2.

¹⁷⁹ Compare e.g. Stair and Gudelinus on the *SC Trebellianum* and Falcidian law [S.26.15/3.4.15. 1662 stem: Adv.MS.25.1.8, 26.15; Adv.MS.25.1.10, 26.10; Adv.MS.25.1.11, fol.291L. 1666 stem: Adv.MS.25.1.5, 26.15; Adv.MSS.25.1.7 and 25.1.12, 26.10. Gudelinus: *De jure novissimo* 2.11, 67-70]. Stair also cited and consulted Gudelinus’ *De jure feudorum* for his titles on property [Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 263 n.14. S.14.18/2.4.18 cited instead *De jure novissimo*. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 14.6; Adv.MS.25.1.11, fol.174L. 1666 stem: Adv.MS.25.1.5, 14.7; Adv.MS.25.1.7, 14.6; Adv.MS.25.1.12, 14.6 cited *De jure novissimo*.] It seems Stair borrowed the citation of the *Libri feudorum* 2.24 which he gave in that same passage from Gudelinus: *De jure feudorum*, 3.6.8, 89. This was Stair’s only citation of the *Libri feudorum*.

and the sixth on divine law. None were relevant to the first version.

What material did Stair borrow from Gudelinus? Gordon said: “For his Roman law, however, [Stair] certainly used Gudelinus’ *De jure novissimo*.”¹⁸⁰ Gordon was correct; twenty (15%) of Stair’s citations of Roman law in the titles on obligations in the first version were borrowed from Gudelinus. This included eight medieval-style citations. Indeed, all the citations of Roman law in “Parents and Children” were borrowed from Gudelinus.¹⁸¹ He borrowed these citations without checking them, although he checked some when preparing the third and fourth versions, as is seen from his addition of the relevant paragraph numbers to most of these citations. Stair also borrowed six citations from Gudelinus for his fourth version, and included another two citations, of the *Institutes* and a sub-paragraph of the *Digest*, after being led by Gudelinus to the surrounding title and paragraph respectively. Gudelinus identified these texts by their opening phrases, yet Stair gave the paragraph number. This shows that Stair checked these citations at the same time as he borrowed them. This is in keeping with his practice of checking the citations which he borrowed, and increasing the accuracy and detail of his citations, for the printed editions.¹⁸²

Stair also borrowed his citation of Caesar’s *De bello Gallico* from Gudelinus. He included this in the same passage as he inserted a citation of Aristotle which he borrowed from Grotius, Stair’s principal source for citations of writers of classical antiquity.

More importantly, Gudelinus was Stair’s principal source for references to continental legal systems, specifically for five discussions in his titles of obligations. This included, from these titles: three of his five references to French law,¹⁸³ three to of his four references to that of the Netherlands, his reference to Spanish law, one of his four references to German law, and two of his more general remarks about legal trends in Europe. Additionally, a reference to Portuguese law, a reference to Spanish law, and

¹⁸⁰ Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 263.

¹⁸¹ The nine citations of Roman law in “Of Liberty” in the manuscripts were all also clearly borrowed from Gudelinus: *De jure novissimo* 1.3, 3-4.

¹⁸² Above, 3.1.3.

¹⁸³ Not including the references to the Gauls and Belgae.

another of his more general references to European law were borrowed from Gudelinus for the first version for “Of Liberty”.¹⁸⁴ Gudelinus was also Stair’s source for his only reference in these titles to the laws of the Gauls and Belgae.

Although Gudelinus was Stair’s source for these references to foreign systems, Gudelinus did not always explicitly refer to that particular nation. Rather, Stair sometimes extrapolated information about legal systems from citations of jurists from that country, from earlier discussions in Gudelinus, or from the title of the treatises cited. This included Stair’s remarks concerning French law, extrapolated from Gudelinus’ citation of French jurist Duarenus and from the title of Chassanaeus’ treatise. One of his references to Dutch law must likewise have been derived from Gudelinus as he was from the Spanish Netherlands.

Further, the seven citations of continental jurists Stair borrowed from Gudelinus were all used in relation to continental law, including Stair’s only citations of Chassanaeus, Covarruvias, Balduinus, Boerius and Rebuffus and one of his two citations of Duarenus and Wesenbecius.¹⁸⁵ A quarter of Stair’s citations of continental jurists in the third version was either of or borrowed from Gudelinus.¹⁸⁶ Gudelinus was thus a very important source for Stair’s knowledge of continental jurisprudence in the first version. This changed for the fourth version, for which Stair borrowed no additional juristic authority from Gudelinus. Instead, Vinnius was the more important source for continental juristic authority for the fourth version.¹⁸⁷

That Gudelinus’ *De jure novissimo* was Stair’s principal source for comparative law is unsurprising. The title of his work translates as ‘a commentary on the most recent law’. Stair recognised this and utilised Gudelinus to access that novelty. In taking from Gudelinus so many references to contemporary systems and continental jurists, Stair first made the *Institutions* as modern as possible and, secondly, drew on the law of neighbouring legal systems. This supports the idea that Stair wrote within the historical

¹⁸⁴ S.2.11/1.2.11. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 2.13; Adv.MS.25.1.11, fol.19L. 1666 stem: Adv.MSS.25.1.5 and 25.1.7, 2.12; Adv.MS.25.1.12, 2.13. Gudelinus: *De jure novissimo* 1.4, 6. This was also noted by Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 265.

¹⁸⁵ The other citation of Wesenbecius was borrowed from Vinnius: below, 6.1.3.

¹⁸⁶ Eleven of the forty-five citations in the third version; forty-seven in the second.

¹⁸⁷ Below, 6.3, 6.5.

and intellectual tradition of continental jurisprudence and learned law. It also shows as unsound Hutton's declaration that Stair was "traditional, conservative and in many respects medieval in outlook and structure of thought".¹⁸⁸

The structure of Stair's discussions may have been inspired by Gudelinus. Stair began his discussions with an overview of natural law or Roman law, and then set out the rules in Scots law. This pattern was seen in Gudelinus. In *De jure novissimo* 1.13, a title used heavily by Stair, Gudelinus introduced Roman law then briefly mentioned "*nostros* [our]" reception. He then set out Roman law in greater detail, before outlining "*moribus nostris* [our customs]" going back to the law of the Gauls and Belgae with citation of relevant continental jurists, including Gregorius. This structure was also used in *De jure novissimo* 1.18, where Gudelinus discussed Roman and Canon law before discussing where "*mores nostri* [our customs]" diverged from Roman law. In *De jure novissimo* 3.5, Gudelinus set out Roman law, the Canon law, and then compared these with seventeenth-century law. This structural comparison has not been examined in any particular detail and further investigation would be required to determine whether Stair did model his structure, however loosely, on Gudelinus. At this point, all that can be said is that there was a similarity between the structures which the two jurists used and, as Gudelinus was a principal source for the first version, it is possible that Stair was influenced by Gudelinus in this way.

How did Stair's use of Gudelinus compare to his use of Grotius? More titles of the *Institutions* contained material borrowed from Grotius than Gudelinus, and there are more citations of *De jure belli ac pacis* than *De jure novissimo*. However, overall Stair borrowed more material from Gudelinus than from Grotius. Stair also used Gudelinus as a principal source not only for the first version but also for the fourth, whereas he used Grotius only as a principal source for the first version. Weighing the relative importance of these two jurists to Stair's writing is inexact. For example, it was shown in the last chapter that Stair's pattern of citation of natural law sources is, at least to some extent, a reflection of Grotius' establishing natural law *a posteriori*. The comparison of Stair and Gudelinus' structure may, however, indicate influence on this wider level. What this

¹⁸⁸ Hutton: "Stair's philosophic precursors", 87.

brief comparison has shown is that Grotius cannot simply be accepted as Stair's principal source.

STAIR AND VINNIUS

Three of Vinnius' works are relevant to this thesis. The first is his *Commentarius academicus et forensis*, an extensive commentary on Justinian's *Institutes*. It revealed influence from legal humanists, natural lawyers, and jurists writing on national law,¹ and combined a philological-historical explanation of the law with a detailed account of Dutch practice. The second is his *Notae*,² a work of annotations of Justinian's *Institutes* "of a predominantly humanist nature".³ The third is his *Jurisprudentia contracta*, a treatment of law and practice based on the systematic structure of Donellus' commentary.⁴

Stair did not cite Vinnius' commentary. Gordon suggested Stair may have consulted it as it was popular in Scotland.⁵ Gordon put forward three passages of the *Institutions* as examples of Stair's possible borrowing from either Vinnius' commentary or *Jurisprudentia contracta*.⁶ The first was a discussion of accession of writing and painting which contained citations of Grotius and Mynsinger. This passage has already been shown to have been the source of Stair's citation of Grotius. It will not be examined further here, as it is not in Stair's titles on obligations, other than to confirm that the citation of Mynsinger was also borrowed from Vinnius' commentary for Stair's third version. The second and third of the passages noted by Gordon, both of which were on sale, were also borrowed from Vinnius' commentary.⁷ Elsewhere, this writer has confirmed Stair's use of Vinnius' commentary in his discussion of partnership.⁸

Passages of Vinnius' *Notae* often included some of the same citations as the corresponding passages of his commentary. Some of the citations that Stair borrowed from Vinnius for the first version appeared only in the commentary: that must have

¹ Above, 3.2.6.

² This was the name given to this work when incorporated into later editions of Vinnius' commentary and that used in Feenstra and Waal: *Leyden Law Professors*.

³ Feenstra and Waal: *Leyden Law Professors*, 31; above, 3.2.6.

⁴ Above, 3.2.6; Feenstra and Waal: *Leyden Law Professors*, 27.

⁵ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 257.

⁶ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 257-258.

⁷ Below, 6.1.3, 6.2.2.

⁸ Wilson: "Stair and the *Inleydinge* of Grotius", 267-268.

been Stair's source. Other citations that he borrowed appeared in both the commentary and *Notae*. However, it seems probable that Vinnius' commentary was still his source, but that these citations coincidentally appeared in the *Notae* because it was, in some respects, a heavily abbreviated version of the commentary.

Stair did not use Vinnius for the second version but must have consulted Vinnius' commentary for the third; there was no correlation with the *Notae*. When preparing the fourth version, Stair again consulted Vinnius' commentary. Some of the citations added also appeared in the *Notae*. The 1665 edition of Vinnius' commentary had included some of Vinnius' *Notae* on certain texts.⁹ It is possible that Stair consulted a post-1665 edition of Vinnius' commentary when preparing the third and fourth versions. The *Notae* will thus be discussed along with Vinnius' commentary.

Vinnius commentary (possibly with his *Notae*) was an important source for the authority cited in the *Institutions*. Stair borrowed four citations of Roman law in the first version and a further eleven in the fourth version. Stair borrowed four references to continental jurists from Vinnius for his titles on obligations: to Wesenbecius and Faber for the first version, to Cujacius for the third version, and another to Cujacius for the fourth version.

Vinnius' *Jurisprudentia contracta* was less important as a source for Stair. Although Stair cited this treatise, he consulted it only when preparing the third version and made very limited use of it.

6.1 STAIR'S USE OF VINNIUS' COMMENTARY AND *NOTAE* FOR THE FIRST VERSION

6.1.1 "Tutors and Curators"

6.1.1.1 *Stair's citation of D.26.2.3*

Stair cited Inst.1.13.3 and D.26.2.3 in his discussion of tutors nominated in the will of a Roman *paterfamilias*: "A Tutor Testamentar, by the Civil Law, behoved to be

⁹ Feenstra and Waal: *Leyden Law Professors*, 31.

either named in the Testament, or Codicills confirmed by Testament, *l. 3. ff. de testamentaria tutela*, and could only be given to such as were *in patria potestate*, §. 3. *Inst. de tutelis.*”¹⁰ Both texts were relevant: Inst.1.13.3 said tutors could have been appointed by testament; D.26.2.3.pr said tutors could be legally constituted by testament or a codicil.

Four points indicate that Stair borrowed his citation of D.26.2.3 from Vinnius. First, Stair cited D.26.2.3 with Inst.1.13.3; Vinnius cited D.26.2.3 in his commentary and *Notae* on Inst.1.13.3. Secondly, Stair and Vinnius cited D.26.2.3 in the same context, specifically in relation to confirmation of tutors named in a codicil. Thirdly, both Stair and Vinnius cited D.26.2.3 in the early-modern style. Finally, neither cited the *prooemium*, despite its particular relevance.

The similarity of the relevant passages in the commentary and the *Notae* make it impossible to determine which was Stair’s source. It is unlikely that Stair checked D.26.2.3; there was nothing in the surrounding passage of the *Institutions* which Stair could only have included had he read D.26.2.3 and doing so would have been inconsistent with his usual method when writing the first version.¹¹

6.1.1.2 *Stair’s citation of D.26.4.5 and D.26.4.6*

Later in “Tutors and Curators”, Stair again discussed Roman tutorship, specifically in relation to agnates as tutors. He cited D.26.4.5 and D.26.4.6 and referred to the XII Tables when discussing the rule that agnates became tutors of the children who were formerly in the deceased’s power.¹² These texts were relevant: D.26.4.5.pr stated that “*lex duodecim tabularum fecit tutores* [the Law of the XII Tables made [agnates] tutors [translation by Watson]]”; D.26.4.6 discussed agnates being made tutors where the *paterfamilias* had died intestate, had not provided for a tutor in his will, or that tutor had died.

The average reading of the reference in the manuscripts is: “*l. 5. & 6. ff. de legit. tut*”, although there were variations, which were probably errors made by the

¹⁰ S.6.6/1.6.6. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 6.6; Adv.MS.25.1.11, fol.47R. 1666 stem: Adv.MS.25.1.5, 6.5 and Adv.MS.25.1.7, 6.6 omitted the title and cited “*L.3. Inst.*”; Adv.MS.25.1.12, 6.6.

¹¹ Below, 8.1.3.

¹² S.6.8/1.6.8.

copyists.¹³ This was therefore presumably how Stair wrote this citation in the first and second version. The citation in the third version was exactly the same. In the second printed edition, however, there was variation in the print-run: the Edinburgh University Law Library copy wrongly cited “l.6. & 6. ff. de legit. tit” but the Aberdeen University Historic Collections copy correctly cited “l.5 & 6. ff. de legit. tut.”¹⁴

Stair’s reference to the XII Tables was unusual. This was one of only six paragraphs of the third version which referred to the XII Tables.¹⁵ Three referred to the XII Tables simply as a source of ancient Roman law;¹⁶ another two referred to the XII Tables relating to inheritance.¹⁷ Stair’s reference to the XII Tables in “Tutors and Curators” was the only time he accompanied such a reference with citations of Roman law or any other authority.

Stair borrowed these two citations and his reference to the XII Tables from Vinnius. It was established in the last comparison that Stair consulted and borrowed from Vinnius’ commentary or *Notae* on Inst.1.13. In both works on Inst.1.13.1, Vinnius also cited these two *Digest* texts and referred to the XII Tables. Both Stair and Vinnius gave these citations together. The difference was that Vinnius cited D.26.4.5.pr but Stair cited D.26.4.5 in its entirety in all four versions.¹⁸ Stair was not concerned with including references to sub-paragraphs before the fourth version;¹⁹ that he omitted it here does not undermine this comparison. The relevant passages of Vinnius’ commentary and *Notae* were almost identical: which was his source is unclear.

¹³ 1662 stem: Adv.MS.25.1.8, 6.8 read “L.15 of 6 ff de legit tutoribus”; Adv.MS.25.1.10, 6.8; Adv.MS.25.1.11, fol.48L. 1666 stem: Adv.MS.25.1.5, 6.8 read “L:5. C. d: degest: de legit”; Adv.MS.25.1.7, 6.8 read “L.5. C.6. digest: de legitt tutor:”; Adv.MS.S 25.1.12, 6.8.

¹⁴ Similar variations in the print-run were found in Mackenzie’s *Institutions*, Cairns: “The moveable text of Mackenzie: bibliographical problems for the Scottish concept of Institutional Writing”, 242-244.

¹⁵ S.1.11/1.1.12, S.1.15/1.1.16, S.6.8/1.6.8, S.26.15/2.4.15, S.26.16/2.4.16, and S.30.2/3.8.2.

¹⁶ S.1.11/1.1.12, S.1.15/1.1.16, and S.26.15/2.4.

¹⁷ Stair quoted from Table 5.3 and described Table 5.4 [S. 30.2/3.8.2. and S.26.16/2.4.16 respectively]. His quotation and description were correct to the Tables as preserved in seventeenth-century copies of Justinian’s *Institutes* [Inst.2.22.pr; Inst.3.1.1; Inst.3.1.2]. Neither was correct to the modern understanding of the language of this source [M.H. Crawford (ed): *Roman statutes*, volume 2 (Bulletin of the Institute of Classical Studies 64, supplement, London, 1996), 580, 581].

¹⁸ The later editions of the *Institutions* (excluding Walker’s sixth edition) cited D.26.4.5.pr. This was a more detailed citation than ever appears to have been given by Stair himself.

¹⁹ Above, 3.1.3.

It seems unlikely that Stair checked the *Digest*. Although D.26.4.5.pr said it was by the law of the XII Tables that statutory tutors were made, Stair could have taken this information second-hand from Vinnius. Additionally, neither Stair nor Vinnius noted that the XII Tables were not discussed in D.26.4.6, although this may not be significant. Stair did, however, refer to agnates. This was a term not used in Vinnius or Inst.1.13 but used twice in D.26.4.6, but this was not an uncommon term and Stair could have used it independently of the *Digest*.

6.1.2 “Obligations Conventional”

Stair used two Greek terms when distinguishing bilateral (διπλευρος) contracts from unilateral (μονοπλευρος) obligations. These terms appeared in the manuscripts and both printed editions, although the spelling varied.²⁰ Mersinis suggested that Stair invented these terms.²¹ Richter disputed this, and argued that Stair borrowed them from Vinnius’ *Notae* on Inst.3.13 and Inst.3.14 respectively.²² Although Richter was correct in rejecting Mersinis’ suggestion, given the terms’ appearance in the *Notae*, Vinnius’ commentary on Inst.3.14.2²³ was in fact Stair’s source.

The terms appeared in relation to two different titles of the *Institutes* in Vinnius’ *Notae*. They appeared together, however, in Vinnius’ commentary:

*Nimirum, quod hic notandum est, contractuum quidam sunt μονόπλευροι, qui ex uno tantum latere obligant; quidam δίπλευροι, qui ultro citroque;*²⁴

without doubt, this is observed, certain contracts are unilateral, which oblige only one side, others bilateral, which oblige both sides.

²⁰ 1662 stem: Adv.MS.25.1.8, 10.3 gave μονοπ-ευρος and διπλευρος [‘-’ indicates that a letter has been obscured by a later unknown hand]; Adv.MS.25.1.10, 10.3 μονοηλευρος and διπλευρος; Adv.MS.25.1.11, fol.88R μονοπλευρος οιω and διπολευρος. 1666 stem: Adv.MS.25.1.5, 10.3 gave μονοπλευρος and διπλευρος; Adv.MS.25.1.7, 10.3 μονοπλευρος and διπλευρος; Adv.MS.25.1.12, 10.3 μονοπλευρος and διπλευρος. The third version gave μονοπλευρος and διπλευρος. The fourth version gave μονοπλευρος and δευπλευρος. These were orthographical fluctuations rather than errors. The spellings may have been decided by the copyist or printer.

²¹ T. Mersinis: “Stair, *Institutions*, 1.10.5: a linguistic note” (1996-1997) 1(3) *Edin.L.R.* 368-370, 369.

²² Richter: “Did Stair know Pufendorf?”, 374-375. He referred to the *Notae* as Vinnius’ commentary.

²³ Vinnius’ numbering of the titles of the third book of the *Institutes* was correct to seventeenth century copies. Krueger’s edition of the *Institutes* changed the order of titles. For clarity, here the citations will refer to the *Institutes* title as it is now known to be numbered, then give its number in Vinnius in brackets. Vinnius: Commentary on Inst.3.14.2 (Inst.3.15.2), para 2.

²⁴ Vinnius: Commentary on Inst.3.14.2 (Inst.3.15.2), para 2.

Stair's wording was very similar to that in Vinnius' commentary. Vinnius' phrasing probably influenced Stair, who distinguished "Obligations and Contracts, the former being only where the Obligation is μονοπλευρος on the one part; the other where the Obligation is δυπλευρος an Obligation on both parts."²⁵

Two points should be noted in relation to Stair's borrowing these terms from Vinnius' commentary. First, although both terms were included when Stair wrote the first version, it was only in the fourth version that Stair cited Inst.3.14 (the title to which Vinnius' commentary related). This shows that Stair for the first version used Vinnius' commentary on titles of the *Institutes* which he did not cite at that time.²⁶ Stair did the same when using Vinnius for the later versions of the *Institutions*. Secondly, Stair's borrowing these two Greek terms from Vinnius mirrors his drawing other Greek terms from Grotius.²⁷ All four of the Greek terms in the first version have therefore been shown to have been borrowed.

6.1.3 "Obligations Conventional/Permutation and Sale"

Stair discussed two alternative interpretations of the role of earnest in sale: that as "evidence of the Bargain closed and perfected" (*arra confirmatoria*); and that of a method of compensating one party should the other withdraw from the contract (*arra poenalis*).²⁸ These two views can be traced back to Roman law. Roman earnest (*arra*) has been the subject of much academic controversy. *Arra poenalis* featured in two plays by Plautus, a Roman dramatist who lived 254-184BC. Plautus' plays were based on Greek stories. It has been debated whether he was presenting Greek *arra* or whether penal *arra* was known in Rome during the Republic.²⁹ Watson³⁰ and Thomson³¹ suggested that *arra poenalis* was not recognised in Roman law but was used in Roman practice during the Republic. Thomas believed *arra* had "primarily

²⁵ S.10.5/1.10.5.

²⁶ This would still be true had Stair used Vinnius' *Notae*, as the term μονοπλευρος would still have to have been borrowed from Vinnius' notes on Inst.3.14.

²⁷ Above, 4.1.5, 4.1.7.

²⁸ S.10.65/1.14.3. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 10.49; Adv.MS.25.1.11, fol.109R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 10.49.

²⁹ M. McAuley: "One thousand years of arra" (1977) 23(4) *McGill L.J.* 693-706, 695-698; Zimmermann: *Law of Obligations*, 231-232.

³⁰ A. Watson: *The Law of Obligations in the Later Roman Republic* (Oxford, 1965), esp. 53.

³¹ J.M. Thomson: "Arra in sale in Justinian's law" (1970) 5(1) *Irish Jurist* 179-187, 184.

an evidentiary function but provision could be made for its use in a penal role for breach of contract by a term in the contract.”³² Crook³³ and McAuley³⁴ argued that the law of the Roman Republic recognised *arra poenalis*³⁵ before the development of consensual contracts.

250 years after Plautus, Gaius stated that Roman law recognised only *arra confirmatoria*.³⁶ This was markedly different to Plautus’ description of *arra*. Again, this text has been the subject of controversy. McAuley³⁷ and Crook³⁸ suggested that, by the classical period, *arra confirmatoria* had replaced penal *arra*. Thomson disagreed: “we would be wrong to conclude, that in the day to day business of the commercial world its rôle was so restricted.”³⁹

The particular focus of academic debate has been Justinianic law. C.4.21.17.2 is generally read as providing for *arra poenalis* in written contracts.⁴⁰ Depending on one’s view of the role of *arra* in classical law, C.4.21.17.2 can be seen either as “a continual evolution of Roman legal principles”⁴¹ or as Justinianic reform. Understanding of Roman *arra* has been complicated by Inst.3.23.pr, which first described earnest as *arra confirmatoria* in unwritten contracts of sale, but then seems to have allowed for *arra poenalis* in both written and unwritten contracts.⁴² Scholars attempting to reconcile these texts have argued that law and practice were not the same,⁴³ or have reinterpreted the wording of the texts.⁴⁴ Tylor suggested that *arra* was evidentiary in “informal sales”, those perfected by the agreement on the price, but that it was penal for “formal sales”, those perfected by a required formality.⁴⁵

³² J.A.C. Thomas: “Arra in sale in Justinian’s law” (1956) 24 *T.v.R.* 253-278, 261.

³³ J.A. Crook: *Law and Life of Rome, 90B.C. – A.D.212: Aspects of Greek and Roman Life* (Ithaca NY, 1967 rept. Ithaca NY, 1984), 220.

³⁴ McAuley: “One thousand years of arra”, 698.

³⁵ G. MacCormack: “A note on arra in Plautus” (1971) 6(2) *Irish Jurist* 360-366, 364-366.

³⁶ Gai.3.139; D.18.1.35.pr.

³⁷ McAuley: “One thousand years of arra”, 699.

³⁸ Crook: *Law and Life of Rome*, 220.

³⁹ Thomson: “Arra in sale in Justinian’s law”, 184.

⁴⁰ e.g. McAuley: “One thousand years of arra”, 703, Thomson: “Arra in sale in Justinian’s law”, 180; Cf. A.M. Honoré: “Arra as you were” (1961) 77(2) *L.Q.R.* 172-175 generally.

⁴¹ Thomson: “Arra in sale in Justinian’s law”, 187.

⁴² e.g. McAuley: “One thousand years of arra”, 704-5.

⁴³ Thomas: “Arra in sale in Justinian’s law”, 275-277; confirmed in J.A.C. Thomas: “A postscript on arra” (1959) 10(1) *Jura* 109-112 generally.

⁴⁴ A. Watson: “Arra in the law of Justinian” (1959) 6(3) *R.I.D.A.* 385-389 generally; Honoré: “Arra as you were” generally; M.L. Marasinghe: “Arra – not in dispute” (1973) 20(3) *R.I.D.A.* 349-353 generally.

⁴⁵ T.H. Tylor: “Writing and arra in sale under the *Corpus iuris*” (1961) 77(1) *L.Q.R.* 77-82 *passim*.

Thomson argued that the texts cannot be reconciled as the compilers of the *Institutes* did not compare their text to the *Digest* and *Codex*, hence such inconsistencies.⁴⁶ It is unfeasible here to re-assess Roman *arra*. What this overview has shown is that, taking account of written or unwritten contracts, *arra* had a two-fold purpose under Justinianic law: both evidentiary and penal.

Stair presented evidentiary and penal earnest as two different juristic interpretations of the same legal institution rather than rules which seem to have differentiated between written and unwritten contracts. He believed that Scots law had accepted *arra confirmatoria* because “ordinarily with us, Earnest is so inconsiderable that it cannot be thought to be the meaning of the parties to leave the Bargain Arbitrary, on the losing or doubling thereof”.⁴⁷ This agreed with Mackenzie’s description of earnest: “though *earnest*, or *arles* be given as a *Symbole* or *mark of agreement*; yet the *consent* without the *earnest* or *arles* (as we call it) compleats the *bargan*”.⁴⁸

Stair summarised the Roman position as *arra poenalis*; as authority he cited C.4.21.17 and Inst.3.23.pr “And many Interpreters” (who he did not name). He thus cited the most important Roman texts, although he did not acknowledge the evidentiary role of earnest discussed at the beginning of Inst.3.23.pr. He gave “*Wezenbecius, Faber* and others” as authority for *arra confirmatoria*. Stair did not provide enough detail in his citation of either Wesenbecius or Faber to determine the passages to which he intended to refer; the relevant passages have been found by examining Stair’s source for these citations.

Gordon discussed Stair’s use of Vinnius only briefly. This was one of two examples that he used to show that “Stair used Vinnius’s commentary or his *Partitiones [Jurisprudentia contracta]* or both”.⁴⁹ He observed:

Vinnius in his *Partitiones [Jurisprudentia contracta]* cites Wesenbeck and refers for fuller information to Donellus on C 4.21.17. In his commentary on Inst 3.23pr (Inst 3.24pr in the numeration used by Vinnius) at no 13, Vinnius cites Johannes Faber, Cynus, Bartolus,

⁴⁶ Thomson: “Arra in sale in Justinian’s law”, 180-182.

⁴⁷ S.10.65/1.14.3.

⁴⁸ Mackenzie’s *Institutions* 3.3, 233. He did not mention an alternative interpretation of earnest.

⁴⁹ Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 257.

Oldendorp, Wesenbeck, Donellus, Diodorus Tuldenus and Christinaeus in relation to the Roman law.⁵⁰

Gordon did not say whether he thought Vinnius' commentary or his *Jurisprudentia contracta* was Stair's likely source here, or whether he believed that Stair used both treatises. Vinnius' *Jurisprudentia contracta* was probably not Stair's source. Stair cited Wesenbecius with Faber; Vinnius' *Jurisprudentia contracta* cited Wesenbecius with Donellus.⁵¹ It is unlikely that Stair would have been led to Vinnius' commentary on Inst.3.23.pr by the citation in the *Jurisprudentia contracta*, as there is no evidence that Stair consulted the latter before he revised the third version.⁵² Checking references was also not generally part of Stair's method when writing the first version. Vinnius' *Notae* could not have been Stair's source as neither Wesenbecius nor Faber were cited anywhere within the *Notae* on Inst.3.23.

Stair's source was Vinnius' commentary on Inst.3.23. Vinnius, like Stair, discussed penal and evidentiary earnest as two juristic interpretations of the same legal institution. Vinnius favoured penal earnest. He explained that C.4.21.17 did not allow a party to unilaterally recede from a perfected contract. He then set out the opposing view of earnest, as money given when the contract was perfected as evidence of the perfected contract. Vinnius admitted that the latter was usual practice, but defended his view by explaining that both written and unwritten contracts took time to negotiate, and during this period penal earnest gave protection to the contracting parties.

Stair's discussion reflected Vinnius in two ways. First, both Stair and Vinnius set out the different roles of earnest as these two differing views of the same legal institution. This was a different interpretation of earnest than that in the *Institutes*, which set out the roles of earnest according to whether a contract was written or unwritten. This brings us to the second similarity. Vinnius regarded earnest as penal, irrespective of whether the contract was written or “*verum etiam cum sine scriptis* [in truth also when without writing].”⁵³ Stair also omitted to address the role of writing in relation to earnest, despite this being important in both Inst.3.23.pr and C.4.21.17.

⁵⁰ Gordon: “Stair, Grotius and the sources of Stair's *Institutions*”, 258.

⁵¹ Vinnius: *Jurisprudentia contracta*, 2.14.

⁵² Below, 6.4.

⁵³ Vinnius: Commentary on Inst.3.23.pr (Inst.3.24.pr), para 12.

Stair was influenced by Vinnius' rejection of the criterion of writing regarding Inst.3.23.pr. Yet Stair was not influenced by Vinnius' preference for penal earnest. Stair preferred evidentiary earnest on the basis of scripture and the nominal value of earnest in Scottish practice.⁵⁴ This, again, shows that Stair was influenced by, but did not accept unquestioningly, the views of his sources.

Stair borrowed his authority from Vinnius. In his commentary on Inst.3.23.pr, the paragraph of the *Institutes* cited by Stair, Vinnius cited C.4.21.17 around ten times. He also referred to five different jurists commenting on the text. Stair would thus have known from reading Vinnius not only the content of the *Codex* passage, but also that it was a key text in relation to *arra*. It is unlikely that Stair checked C.4.21.17 as he does not discuss the text, but merely used it to support the view (which he rejected) of earnest as penal. That he did not check the text is also supported by his lack of reference to the issue of writing in relation to Justinianic *arra*.

That both jurists cited Wesenbecius and Faber further supports the argument that Stair used Vinnius. Gordon referred to a passage of Vinnius' commentary where Wesenbecius and Faber were cited with six other jurists.⁵⁵ Examination of various titles of Vinnius' commentary shows that he generally divided strings of citations of continental jurists into two categories: those who belonged to the first schools after the rediscovery of the *Corpus iuris civilis* (the Glossators, *ultramontani* and Commentators), and those who wrote in the more recent period. Vinnius' commentary on Inst.3.23.pr⁵⁶ cited Faber, an *ultramontani*,⁵⁷ with the Commentators Bartolus (1313/1314-1357) and Cynus de Pistoia (1270-1336/1337). Wesenbecius was cited after Johannes Oldendorp (1488-1567), a German humanist, with Donellus, Diodorus Tuldenus (c.1595-1645), a Dutch jurist and professor at Leuven, and Paulus Christinaeus (1553-1631), who wrote on the law of the Spanish Netherlands (now Belgium). Stair may have borrowed the citation of Faber as the first in Vinnius' list of earlier jurists. His citation of Wesenbecius is more complex, being given after Oldendorp. Perhaps Stair rejected the citation of Oldendorp because he felt that one

⁵⁴ S.10.65/1.14.3.

⁵⁵ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 257-258.

⁵⁶ Vinnius: Commentary Inst.3.23.pr (Inst.3.24.pr), para 13.

⁵⁷ Above, 3.2.5.

of Wesenbecius was more compelling, being the more famous jurist. This was one of various instances in which Stair borrowed from his source a limited number of citations from a list of jurists.⁵⁸

Vinnius cited Wesenbecius' *Paratitla*, which he edited, enlarged, and had published in 1648.⁵⁹ Wesenbecius also discussed the two views of earnest. He agreed with the use of earnest as a penalty:

*Arrharum tamen datio, quasi contractus quidam per se existens l.3.C. de spons. & arr. hoc operabitur, ut qui adimplere tergiversatur, perdat quod dedit.*⁶⁰

However, by the giving of earnest a certain quasi-contract exists. C.5.1.3 will operate in this case, so that whoever turns his back on completing the contract loses what he gave.

Vinnius' citation of Wesenbecius was thus correct and relevant. What Wesenbecius did not do was distinguish between earnest in written and unwritten contracts.

Earnest was discussed in the first set of *additiones* to Faber's commentary on Inst.3.23.pr.⁶¹ At paragraph seven, the differing views of earnest were discussed, but there was no distinction made between earnest in written and unwritten contracts. As in Stair, Wesenbecius and Vinnius, the two purposes of interest were set out as two different interpretations of the same legal institution. Faber's text in the edition consulted has been corrupted by later amendments and printing errors, which seems to have had the result of making the text internally incoherent and inconsistent.⁶² However, it seems that penal earnest was preferred.⁶³ Vinnius' citation certainly identified the relevant passages of Faber's work.

⁵⁸ e.g. above, 5.1.4.2.

⁵⁹ Feenstra and Waal: *Leyden Law Professors*, 35.

⁶⁰ Wesenbecius: *Paratitla* on D.18.1 & C.4.38.40, 9. Underlining in this quotation indicates use of italics in the original source.

⁶¹ J. Faber: *In Iustiniani Imp. Institutiones juris civilis commentarii, Additiones A* on "Emptio", 342, paras 7-8.

⁶² Distribution of surviving copies means that the edition examined was printed in 1593. No editors are named on the title page, but the edition is "*ad hoc desideratis Supplementis & Additionibus nunc recens renovati & illustrati* [now with long-sought supplements and additions and recent renovations and illustrations]". Unfortunately, it has not been possible to consult a different edition of Faber as a result of the distribution of surviving copies. However, as the edition consulted was a late-sixteenth-century one, it is likely that this copy was similar to that used by Vinnius.

⁶³ *Additiones A*, on "Emptio", 342 para 7.

It is highly unlikely that Stair consulted Faber. This is confirmed in that that he gave Wesenbecius as authority for confirmatory earnest, when in fact Wesenbecius supported penal earnest; he clearly did not check Wesenbecius. It is even less likely that Stair would have checked a reference in an *ultramontani* work.

The comparison between Stair and Vinnius is complicated. In the period since Justinian, the focus of the debate regarding earnest seems, on this short survey, to have shifted. The distinction between the role of earnest in written and unwritten contracts seems no longer to have been the principal concern, at least among the jurists examined here. Rather, the two roles of earnest, evidentiary and penal, became two differing views of the same institution. That Stair cited Wesenbecius and Faber as supporting the view that earnest was evidentiary was neither consistent with their views nor with their citation in Vinnius. This makes it unlikely that he consulted either treatise. Additionally, there does not seem to be anything in this passage of Stair which could have been borrowed from either Wesenbecius or Faber. Although there remain questions about the reception of *arra* into the continental literature, and Stair's slightly different use of these citations to that of Vinnius, it is clear that Vinnius' commentary was Stair's source here.

6.2 STAIR'S USE OF VINNIUS' COMMENTARY FOR THE THIRD VERSION

6.2.1 "Conjugal Obligations"

Stair revised his discussion of whether parental consent was needed for a marriage between young people in the third version. He added a new explanation of the law of Holland: "the Magistrate or Minister, Celebrator of the Marriage, may refuse to proceed without consent of the Parents; as by the Law and Custom of *Holland*, Art. 3. *Ord. Pol.*"⁶⁴ This citation was of the *Politieke Ordonnantie van de Staten van Holland* 1580, an ordinance which for the first time in Europe allowed civil marriage as well as religious marriage.⁶⁵ The citation was correct and relevant; article three

⁶⁴ S.4.2/1.4.6.

⁶⁵ L. Kooijmans and C. Misset: "Van rebellen tot 'koningen in eigen huis': opstand, regentenbewind en politieke cultuur" in T. de Nijs and E. Beukers (eds): *De Geschiedenis van Holland verschijnt onder auspiciën van de Stichting Geschiedschrijving Holland* volume 2 (Hilversum, 2002) 9, 25.

explained that a young couple would not be married before the magistrate was informed of their parents' consent. Ford noted that this citation was unique: "Elsewhere, information on the laws of neighbouring nations was always drawn from the descriptions provided by other writers".⁶⁶ This was the only statute of a continental jurisdiction cited by Stair.⁶⁷ The ordinance was in Dutch. There has previously been speculation as to whether Stair could read Dutch. Elsewhere, this writer has shown that there was little reason for him to have learned Dutch before going into exile in the Netherlands, after the *Institutions* was printed in 1681.⁶⁸ Presumably, therefore, Stair borrowed this citation from a treatise without checking it: but which was his source?

Ford previously suggested that Stair borrowed this citation from Corvinus, who was cited in this discussion in the first and second versions of the *Institutions*.⁶⁹ It will be shown in the next chapter that Corvinus was not in fact Stair's source for this citation. Indeed, Stair borrowed this citation from Vinnius' commentary on Inst.1.10.pr. Here Vinnius explained that a celebrant would only marry a couple should their intentions have been announced, and should their parents have had a certain period to object to the marriage.⁷⁰ This was an accurate description of the *Ordonnantie* and could easily be the source of Stair's comment concerning the celebrant's right to refuse to conduct the ceremony. Vinnius then cited the *Ordonnantie* "art.3. ord. pol."⁷¹ Stair's citation was thus identical to Vinnius'. It is therefore clear that Stair borrowed this citation from Vinnius without checking it when preparing the third version.

⁶⁶ Ford: *Law and Opinion*, 64.

⁶⁷ Stair also referred to the English Magna Carta, S.14.27/2.4.27.

⁶⁸ Wilson: "Stair and the *Inleydinge* of Grotius", 262. This question was debated because Grotius' *Inleydinge*, an institutional work of Dutch law, was written in Dutch. Knowledge of Dutch would have been required for Stair to have used the *Inleydinge* as a source for the *Institutions*. This writer confirmed that in fact Stair did not use this work for the *Institutions* [Wilson: "Stair and the *Inleydinge* of Grotius" generally].

⁶⁹ Ford: *Law and Opinion*, 65.

⁷⁰ Vinnius: Commentary on Inst.1.10.pr, para 7.

⁷¹ Vinnius: Commentary on Inst.1.10.pr, para 7.

6.2.2 “Obligations Conventional/Permutation and Sale”

Stair’s view, as expressed in the printed editions of the *Institutions*, that risk in sale pertained to the seller was in contrast to the majority view that the buyer bore the risk. It was the majority view which was the position of Roman law, and of Mackenzie, and which was applied in the Scottish courts in the later seventeenth century.⁷²

Stair may not always have been of the minority view. A large passage of text, which featured in the manuscripts, was removed for the third version.⁷³ It stated that:

the intention and tendency of the property being to the buyer, if the seller be not *in mora*, the case is as if the delivery were made and the property changed, as to the intention and meaning of the parties, which regulates contracts.⁷⁴

This passage seems to have held that the buyer bore the risk. Stair’s first and second versions therefore seem to have supported the majority view. That Stair removed this passage when preparing the third version suggests that he had changed his view from the majority to the minority view.

Following on from that passage, Stair questioned whether, according to Scots law, the buyer would have to pay if the property had been destroyed. This discussion was expanded as Stair revised the *Institutions*. In the first version, he stated it was likely that “the buyer would not have payed willingly, which therefore seems to be our Custome”.⁷⁵ In the second version, he added: “seeing none have obtained price, who did not deliver or offer”.⁷⁶ In the third version, he added a citation of Cujacius’ commentary on Africanus on D.19.2.33.⁷⁷

It seems that Stair was originally aware of, but did not hold, the view that the risk should fall on the seller by virtue of his continued ownership of the property until delivery. Indeed, Grotius explained this in *De jure belli* 2.12, a title used

⁷² S.10.69/1.14.7. A.L.M. Wilson: “Stair, Mackenzie and risk in sale in seventeenth century Scotland” (2009) 15(1) *Fundamina: A journal of legal history* 168-180, 170-180.

⁷³ It is restored in the 1759 edition of the *Institutions* S.1.14.7.

⁷⁴ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 10.52, Adv.MS.25.1.11, fol.112R. 1666 stem: Adv.MSS.25.1.5, 25.1.7, and 25.1.12, 10.52.

⁷⁵ Adv.MS.25.1.8, 10.52; Adv.MS.25.1.10, 10.52 ended at “willingly”; Adv.MS.25.1.11, fol.112R.

⁷⁶ Adv.MSS 25.1.5, 25.1.7, and 25.1.12, 10.52.

⁷⁷ S.10.69/1.14.7.

extensively by Stair for the first version.⁷⁸ Here Grotius gave the example of risk passing to the buyer as one of the “*commenta sunt juris civilis, quod nec ubique observatur* [fictions of the civil law not universally recognized [translation: Kelsey]]” and said of seventeenth-century law “*res erit commodo & periculo venditoris* [both gain and loss in the commodity will fall to the seller [translation: Kelsey]]”.⁷⁹ Stair was not persuaded by Grotius’ view when writing the first version. Later, when preparing the third version, Stair changed his mind, amended his text accordingly, and added this citation of Cujacius as authority.

What was the reason for this change? Stair did not consult Cujacius himself. Cujacius discussed D.19.2.33 in its limited context, namely where the confiscation of farmland subject to a lease gave rise to an action for simple damages for the value of the price. He stated that this was not the normal understanding of risk in sale: “*Quod est contra id, quod vulgo dici solet, perfecta emptione periculum omne pertinere ad emptorem* [but this is contrary to what is commonly said, that after the sale is perfected, all risk pertains to the buyer]”.⁸⁰ He did not suggest that risk in sale generally fell on the seller. Stair’s using this text incorrectly is explained by his borrowing this citation from Vinnius without checking it.

Gordon noted the similarity of this passage of Stair’s *Institutions* to both Vinnius’ *Jurisprudentia contracta* and commentary.⁸¹ Vinnius’ *Jurisprudentia contracta* can be dismissed as Stair’s source; it discussed Cujacius in relation to confiscation of property, not risk in sale. Vinnius’ commentary on Inst.3.23.3⁸² was Stair’s source. Here Vinnius stated that Cujacius believed that risk fell on the seller rather than the buyer; he thus misinterpreted Cujacius’ discussion.

Stair’s and Vinnius’ citations of Cujacius were not identical. Stair cited “*Cujac. Ad L 33 ff Locati.*” while Vinnius stated “*Africani in l. si fundus. 33. locat. turbavit summos viros, Cujacium tract. 8. ad African.* [Africanus D 19.2.33, perturbs

⁷⁸ Above, 4.1.1, 4.1.6.2, 4.1.7.

⁷⁹ Grotius: *De jure belli*, 2.12.15.

⁸⁰ Cujacius’ commentary on Africanus (D.19.2.33) in J. Cujacius: *Opera, quae de iure fecit, et edi voluit. Ab ipso auctore postremum recognita & libris quibusdam aucta. In tomos quatuor distincta* volume 2 (Frankfurt, 1623) 375, 561.

⁸¹ Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 257-258. Cujacius was not cited in Vinnius’ *Notae* on this topic, which thus could not have been Stair’s source.

⁸² Vinnius: *Commentary on Inst.3.23.3* (Inst. 3.24.3), para 8.

the greatest of men, including Cujacius *On Africanus*”].⁸³ This difference in their citations is easily explained: Vinnius cited D.19.2.33 as a text of Africanus, and then just three words later gives Cujacius on Africanus. Stair could easily have combined these two citations to read “*Cujac. ad L.33. ff Locati*”.

Vinnius also cited Borcholten, a sixteenth century German jurist, and Vultejus, a late-sixteenth- to early-seventeenth-century German jurist, as supporting the minority view that the seller bore the risk.⁸⁴ Therefore, although Vinnius did not hold the minority view, he nonetheless indicated that there was significant support for it. It is possible that Stair reconsidered his view of risk in sale after learning that such “*summos viros* [greatest men]” supported the minority view when reading Vinnius for the third version, or that he had already been thinking along these lines and simply borrowed these citations to support his new view. This again shows that Stair used Vinnius but did not support the view of the law held by him. Rather, as in the case of earnest, Stair adopted the opposing side of the academic debate without consulting the treatise of the jurist whom he purported to follow.

In sum, when writing the first version, Stair seemingly supported the dominant view, derived from Roman law and received into Scots law,⁸⁵ that the buyer bore the risk in sale. He clearly knew that there were opposing views. He might have learned this from his experience in practice or from his consultation of Grotius’ *De jure belli*. Grotius supported the view that the seller bore the risk, but Stair was not influenced by this when reading Grotius for the first version. When preparing the third version, Stair consulted Vinnius and learned that some of the great jurists – including supposedly Cujacius – supported the minority view that the seller bore the risk. He may also have recalled Grotius’ support for that view. Either way, before or during his preparation of the third version, Stair changed his view of risk in sale and began supporting the minority view. He removed a large passage of text from the *Institutions*; this meant that the third version supported the minority view. He also borrowed Vinnius’ citation of Cujacius as authority. Stair clearly regarded Cujacius as persuasive; he cited him three times in the *Institutions*.⁸⁶ He did

⁸³ Underlining in this quotation indicates use of italics in the original source.

⁸⁴ These jurists have not been examined.

⁸⁵ Wilson: “Stair, Mackenzie and risk in sale in seventeenth century Scotland”, 173-180.

⁸⁶ S.-/1.9.4; S.10.69/1.14.7; S.14.26/2.4.26.

not check Cujacius, however, and was thus unaware that he did not actually support the view for which he was cited by Vinnius' commentary.

6.2.3 “Rights Real”

For the third version, Stair borrowed a citation of Grotius from Vinnius.⁸⁷ Stair checked this citation, but his use of Grotius at that time was limited to the paragraphs surrounding the one Stair was led to by Vinnius. This observation was fundamentally important because it shows why Stair returned to Grotius for the third version.⁸⁸

It is worth noting that the citation of Mynsinger, which Stair gave with that of Grotius, was also borrowed from Vinnius.⁸⁹ Vinnius' citation here read: “*Mynsing. hic. ex nostris Grotius lib.2. manuduct. c.8. add. Diod. Tuld. hic. c.38.*” Although Stair cited Grotius then Mynsinger, it is clear that Vinnius was his source.

Vinnius cited Tuldenus with Grotius and Mynsinger. Again, Stair did not borrow all the citations of jurists given by his source (in this case Vinnius). However, Stair's comment “*Grotius, Minsynger [sic] and others*” clearly reflects this additional citation in Vinnius.

6.3 STAIR'S USE OF VINNIUS' COMMENTARY AND *NOTAE* FOR THE FOURTH VERSION

6.3.1 “Reparation”

Stair's discussion of reparation has received some attention in recent years, much of which has focused on two passages: S.9.4/1.9.4 and S.9.6/1.9.6.⁹⁰ In S.9.4/1.9.4, he divided delinquencies into five categories, specifically those against: “Life, and Members, and Health”; “our Liberty”; “Fame, Reputation and Honour”; “Content,

⁸⁷ Above, 4.2.

⁸⁸ Above, 4.4.

⁸⁹ S.12.37/2.1.39; Vinnius: Commentary on Inst.2.1.33.

⁹⁰ See e.g. D.W. McKenzie and R. Evans-Jones: “The development of remedies for personal injury and death” in R. Evans-Jones (ed): *The Civilian Tradition in Scotland* (Stair Society Supplementary series volume 2, Edinburgh, 1995) 277, 285-289; H.L. MacQueen and W.D.H. Sellar: “Negligence” in K. Reid and R. Zimmermann (eds): *A History of Scots Private Law* volume 2 (Oxford, 2000) 517, esp. 521-524; A.D.M. Forte: “Reparation for pure economic loss: an historical perspective of Scots law in the seventeenth and eighteenth centuries” (1987) 8(1) *J.L.H.* 3-17, 7-9.

Delight, or Satisfaction” (*praetium affectionis*); and “Goods and Possession”.⁹¹ MacQueen and Sellar suggested that these categories were “clearly influenced by Grotius.”⁹² Stair’s preceding paragraph was also influenced by Grotius.⁹³

Yet Stair used Vinnius, not Grotius, when revising his discussion of “Life, and Members, and Health” for the fourth version, when he added a citation of Cujacius. This was one of only two citations of continental jurists added in the fourth version.⁹⁴ There were no other changes made to this brief passage since the first version.⁹⁵ The passage Stair used here was Vinnius’ commentary on Inst.4.3, which was on the *lex Aquilia*, the Roman statute on wrongful damage to property.⁹⁶ The *lex Aquilia* never allowed for damages resulting from the death of a freeman, but the reparation of the deceased’s family (recognised in Germanic customary law) was treated by the Dutch jurists as an extension of the Aquilian action.⁹⁷ Although Stair added more than forty citations of Roman law to “Reparation” for the fourth version, he never cited Inst.4.3. Yet MacQueen and Sellar observed that, in Stair’s discussion of *dolus* and *culpa*, “the influence of the contemporary natural law interpretation of Aquilian liability is clearly apparent.”⁹⁸ Stair, therefore, again used Vinnius’ commentary on a passage of the *Institutes* which was not cited in the *Institutions*.⁹⁹

Stair and Vinnius cited Cujacius’ *Observationes et emendationes* in the same context: reparation for the family of the person killed. Stair’s citation, “*Cuja. Obs. 14. c.4.*”, was almost exactly the same as Vinnius’: “*Cuiac.14. obs.4.*”¹⁰⁰ The citation was accurate and relevant; this chapter of Cujacius was entitled “*non esse novum, ut pars bonorum eius qui caedem fecerit addicatur occisi liberis, vel parentibus, vel uxori* [it is not new that a part of the killer’s goods is adjudged to the children, parents or wife of the deceased]”. He stated that this rule “*invenio factitatum* [I come

⁹¹ S.9.4/1.9.4.

⁹² MacQueen and Sellar: “Negligence”, 522.

⁹³ Above, 4.1.5.

⁹⁴ Also Grotius: *De jure belli*, S.4.40.23.

⁹⁵ 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 9.6; Adv.MS.25.1.11, fol.70R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 9.6.

⁹⁶ e.g. Thomas: *Textbook of Roman law*, 363-368; A. Watson: *Legal Transplants: An approach to comparative law* (Edinburgh, 1974), 79-81.

⁹⁷ e.g. W. Pollak: “Civil liability in the law of South Africa for the wrongful causing of death” (1930) 12(4) *Journal of Comparative Legislation and International Law* 203-212, 203-205.

⁹⁸ MacQueen and Sellar: “Negligence”, 524.

⁹⁹ A different passage of Cujacius (27.11) was cited in the *Notae* on Inst.4.3.

¹⁰⁰ S.-/1.9.4; Vinnius: Commentary on Inst.4.3.pr, para 1.

across frequently]”, before giving a historical account of the issue.¹⁰¹ There is nothing to suggest that Stair checked Cujacius.

In sum, when writing the first version, Stair read and was seemingly influenced by Grotius and natural law. When preparing the fourth version, he consulted Vinnius and found and borrowed, without checking it, a citation of Cujacius. Another of Stair’s citations of Cujacius, added for the third version, was borrowed from Vinnius’ commentary without being checked.

6.3.2 “Obligations Conventional/Mandate or Commission”

6.3.2.1 *Stair’s citation of D.47.10.11.3 and C.9.2.5*

In the third version, Stair added a passage which explained that the giving of advice was not the same as entering into a contract of mandate. This was a synopsis of Inst.3.26.6. He did not cite Inst.3.26.6 but must have consulted it, or a source which described it closely, when preparing this version.¹⁰²

In the fourth version, he added to this passage citations of D.47.10.11.3 and C.9.2.5. These were relevant: D.47.10.11.3 explained that both the mandator and promissor were liable for any action of *iniuria* arising from the mandate; C.9.2.5 said that there was no defence in claiming that a crime was commissioned by another.

Stair borrowed these two citations either from Vinnius’ commentary or from his *Notae* on Inst.3.26.7.¹⁰³ In the following sentence of the fourth version, Stair added a citation of Inst.3.26.8. Inst.3.26.7 was thus immediately between the passage of which Stair gave a synopsis in the third version and that which he cited in the fourth. It is therefore reasonable to assume that Stair would have known this passage, and read Vinnius’ commentary on it.

There are three indications that Vinnius was Stair’s source for these citations. First, both Stair and Vinnius gave the same two citations, including the same sub-paragraph of D.47.10.11. Stair did not often cite specific sub-paragraphs of the

¹⁰¹ J. Cujacius: *Observationes et emendationes* in J. Cujacius: *Opera, quae de iure fecit, et edi voluit. Ab ipso auctore postremum recognita & libris quibusdam aucta. In tomos quatuor distincta* volume 4 (Frankfurt, 1623) 2, 14.4, 328.

¹⁰² S.10.28/1.12.1.

¹⁰³ Vinnius: *Commentary on Inst.3.26.7 (Inst.3.27.7)*, para 2.

Digest or *Codex*, although he was trying to make his citations more detailed in the fourth version.¹⁰⁴ Secondly, the citations appeared together, in the same order, and in the early-modern style in both the *Institutions* and in both works of Vinnius. Finally, the surrounding passage in Vinnius was on the same topic as that which Stair had discussed in the first edition. Stair could have realised the relevance of these citations to his own discussion when reading Vinnius. As Vinnius gave these citations in both his commentary and *Notae*, and as there are no other changes made to Stair's surrounding text, it is unclear which was Stair's source. It was, however, most likely his commentary, given his obvious use of it elsewhere when preparing the fourth version.

Did Stair check these citations? In both of Vinnius' works, D.47.10.11.3 and C.9.2.5 were cited with other Roman law texts; Stair did not borrow the full list of authority given by Vinnius. Vinnius gave four citations of Roman law in the commentary; D.47.10.11.3 and C.9.2.5 were the second and third texts cited. The first citation was of D.48.8.15, which stated that it made no difference whether someone killed or occasioned the death. The final citation of Roman law in that list was of C.9.6.6, which discussed the effect of the death of the accused (in the *prooemium*) or the accuser (in the first sub-paragraph) where an appeal had been made against a sentence of relegation or capital punishment. Vinnius gave three citations in the *Notae*. The other text cited was D.47.10.44, which discussed someone who allowed smoke to affect his neighbour's property or dropped or poured something onto a neighbour. None of these other three texts would have lent support to Stair's discussion. If Vinnius was Stair's source, he must have checked, and decided to reject, these citations.

In sum, when preparing the third version, Stair added a synopsis of, but did not cite, Inst.3.26.6. Whether he read the *Institutes* directly or indirectly through a different source is unknown. When preparing the fourth version, he consulted Vinnius on Inst.3.26.7, the following paragraph. Here he found these citations of Roman law, and borrowed them. These were checked by Stair, which allowed him to reject the citations of less relevant texts also given by Vinnius.

¹⁰⁴ Above, 3.1.3.

6.3.2.2 *Stair's citation of D.50.17.47*

Stair also amended his next paragraph in the fourth version. In the third version, he had stated that a mandate could benefit the mandator or a third party but not the promissor only. In the fourth version, the reference to the third party he replaced with one to fraud, and added a citation of D.50.17.47.¹⁰⁵ The acknowledgement of liability for fraud did not sit well with the general context of the passage. It seems likely that Stair borrowed this citation from a source in which liability for fraud was discussed in the wider context of the rule that the promissor could not be the only party to have benefited from the mandate.

Stair's previous paragraph had explained that giving advice was not enough for mandate. This was the point made in Inst.3.26.6. Vinnius cited D.50.17.47 in his commentary and *Notae* on Inst.3.26.6. There are two other indications that Vinnius' commentary on Inst.3.26.6 was Stair's source here. First, Stair borrowed from Vinnius' commentary or *Notae* on Inst.3.26.7 (the next paragraph of the *Institutes*) for the previous passage of the *Institutions* for the fourth version.¹⁰⁶ The proximity of these citations in both Vinnius and Stair supports the suggestion that Vinnius was his source. Secondly, Vinnius discussed liability for fraud (for giving malicious advice) within the context of Inst.3.26.6. This explains Stair's addition of this remark concerning fraud, and the odd manner in which it was inserted into the fourth version.

D.50.17.47 did discuss liability for fraudulent advice. The discussions in both Vinnius' commentary and *Notae* here were very similar. In the *Notae*, this text was cited alone. If Stair's source was Vinnius' commentary, it is probable that he checked this text. Vinnius gave this as the first in a list of five citations.¹⁰⁷ The other four were not relevant to mandate but concerned: fraudulent declarations of solvency (D.4.3.8), fraudulent oaths by legatees (D.4.3.23), fraudulently encouraging slaves to leave the possession of their master (D.4.3.31), and said that slave-traders who had become surety for a debt were not mandators (D.50.14.2). If Vinnius' commentary was Stair's source (which seems probable), Stair seems to have checked these

¹⁰⁵ S.10.29/1.12.2.

¹⁰⁶ Above, 6.3.2.1.

¹⁰⁷ Vinnius: Commentary on Inst.3.26.6 (Inst.3.27.6), 3

citations, found them irrelevant, and rejected them accordingly. This indicates that he checked D.50.17.47. This would be consistent with his method generally for the fourth version.

6.3.3 “Obligations Conventional/Society”

Stair added twenty-four citations of Roman law to “Obligations Conventional/Society” for the fourth version. Seven were of paragraphs of Inst.3.25. Another eight were borrowed from Vinnius’ discussion of Inst.3.25. These eight citations appeared in two strings within two paragraphs of the fourth version: “*l.63.in fin. ff. h. t. l.77.§.20.de Legat.2 l.14. & l.70. eod.*”¹⁰⁸ then “*§.4. & seq. Inst. hoc. tit. l.4.§.1 l.59. l.63.§.ult l.65.§.9. ff. eod.*”¹⁰⁹

These citations appeared in Vinnius’ commentary, *Notae* and *Jurisprudentia contracta*. The *Notae* on Inst.3.25.4-5 can be dismissed as Stair’s source: it omitted the citation of D.17.2.59. Vinnius’ *Jurisprudentia contracta* 2.76 can also be dismissed as Stair’s source. First, these citations were scattered throughout the title of that treatise, which was different to their appearance in two strings of citations in Stair. Secondly, D.31.77.20 was incorrectly cited as D.31.77.29. That this error did not appear in Stair indicates either that Stair did not borrow these citations from the *Jurisprudentia contracta* or that he checked and corrected the citation. The former of these alternatives is more likely; Stair did not borrow citations which he found to be irrelevant.

Stair’s source was Vinnius’ commentary. The citations in his first string were borrowed from Vinnius’ commentary on Inst.3.25.4, cited by Stair in his second string of citations. They did not appear in a string as in Stair, but appeared in almost the same order in an eighty-five-word passage. Stair reversed the order of D.17.2.14 and D.17.2.70, but this is not significant. Stair did not follow Vinnius in giving the opening phrases of D.17.2.63, D.31.77.20 and D.17.2.70. This practice of removing these phrases in favour of the relevant paragraph numbers of citations borrowed for the fourth version was also seen in his use of Gudelinus.

¹⁰⁸ S.-/1.16.4. D.17.2.63, D.31.77.20, D.17.2.14, and D.17.2.70 respectively.

¹⁰⁹ S.-/1.16.5. Inst.3.25.4, D.17.2.4.1, D.17.2.59, D.17.2.63.10, and D.17.2.65.9 respectively.

It has elsewhere been shown by this writer that Stair's second string of citations (of Inst.3.25.4, D.17.2.4.1, D.17.2.59, D.17.2.63.10, and D.17.2.65.9) was borrowed from Vinnius' commentary on Inst.3.25.5.¹¹⁰ This was the paragraph following that of the *Institutes* cited by Stair. He rejected two of Vinnius' citations: D.17.2.35 and D.17.2.20. Both texts contradicted his point that partnerships could have been the subject of testament if there was agreement amongst the partners to that effect: D.17.2.35 stated that a partner's heir did not inherit the role in the partnership; D.17.2.52.9 stated that a partnership could not continue after the death of a partner. The other four texts cited by Vinnius did support Stair's discussion and were thus borrowed by him. Stair's rejection of two of Vinnius' citations indicates that he checked these citations.

6.4 STAIR'S USE OF VINNIUS' *JURISPRUDENTIA CONTRACTA* FOR THE THIRD VERSION

6.4.1 "Parents and Children"

Stair's discussion of the attainment of majority by a child appeared in the manuscripts, citing Stephanus' *Oeconomia* as authority.¹¹¹ Stair added a reference to Vinnius' *Jurisprudentia contracta* 1.7 in the third version.¹¹² Stair cited Vinnius as authority for the statement: "the Custome of Holland dissolveth the power of Fathers, by the Childrens age of 25".¹¹³ A marginal note to the first word of *Jurisprudentia contracta* 1.7 read:

*Moribus apud nos receptum est, ut etiam nuptiae filii, item aetas 25. annorum per se quod reliquum apud nos est potestatis patriae solvant.*¹¹⁴

¹¹⁰ Wilson: "Stair and the *Inleydinge*", 267-268. Vinnius: Commentary on Inst.3.25.5 (Inst. 3.26.5), para 1.

¹¹¹ S.5.4/1.5.4. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 5.4; Adv.MS.25.1.11, fol.39L. 1666 stem: Adv.MSS.25.1.5 and 25.1.7, 5.4; Adv.MS.25.1.12, 5.5 omitted the citation of Stephanus.

¹¹² The Edinburgh copy of the fourth version cited only "*Vinnius partitionum l. I. cap. in principio*", 1.5.4. This was a printing error; the Aberdeen copy correctly cited 1.7, 1.5.4. This is the second instance where there has been evidence of a variation in the print-run.

¹¹³ S.5.4/1.5.4. S.1.5.5 in the third, fourth and fifth editions.

¹¹⁴ *Jurisprudentia contracta* 1.7, 24, para.1, n.z.

It has been received through custom with us that also through the marriage of children, and similarly at the age of 25, what remains with us of the paternal power dissolves.

Their language was similar enough to suggest that Stair's reading of this passage of Vinnius influenced his own writing. Stair gave Vinnius as a source of comparative law on the laws of Holland. While Vinnius did not specifically mention Holland, he did say that these rules were received "*apud nos* [with us]". This sort of deduction has been seen in Stair's use of Gudelinus.

Why did Stair add this citation of Vinnius' *Jurisprudentia contracta* when he already gave that of Stephanus? In no other place did Stair add a citation of another continental jurist where he already gave one. Such an addition is, however, seen in his use of Scottish authority: in the third version, he added a citation of Skene to a passage which already cited Craig.¹¹⁵

There is no evidence that Stair consulted Vinnius' *Jurisprudentia contracta* for the first or second version. When Stair used *Jurisprudentia contracta* for the third version, there is no evidence that he used it beyond this passage. Did Stair turn to Vinnius' *Jurisprudentia contracta* because he had found the commentary useful? He certainly used two treatises by Gudelinus, so the use of more than one treatise by the same author was part of his method. However, he used both of the treatises by Gudelinus for the same version. With Vinnius, however, he used the *Jurisprudentia contracta* only later.

6.5 CONCLUSIONS

This chapter has shown that, despite not being cited by Stair, Vinnius' commentary was a principal source for the *Institutions*. Stair consulted and borrowed from it for the first, third and fourth versions. Unlike Grotius and Gudelinus, it was used by Stair as a principal source of borrowing for all three of these versions. Additionally, for the third version, Stair used it when making a significant change to his text, specifically when changing his view of risk in sale.

¹¹⁵ S.14.25/2.4.25.

Vinnius' commentary and *Notae* were very similar in many places. There are three passages in the *Institutions* where Stair could have used either work. Vinnius' commentary seems the more likely source. Yet the possibility of Stair's use of the *Notae* should not be dismissed. What can be said, however, is that if Stair did rely on the *Notae*, his borrowing from that source seems to have been limited. He used Vinnius' commentary on passages of the *Institutes* which Stair did not cite. For example, for the first version, Stair borrowed two Greek terms from Vinnius' commentary on Inst.3.14.2; he did not cite Inst.3.14 until the fourth version.

What material did Stair borrow from Vinnius? He borrowed from Vinnius' commentary two Greek terms, διπλευρος and μονοπλευρος. He also borrowed two Greek terms from Grotius; all the Greek in the titles on obligations in the first version were therefore borrowed. He also borrowed, for the third version, the only citation of a continental statute in the *Institutions* from Vinnius' commentary.

As with Grotius and Gudelinus, Stair used Vinnius as a source of Roman law. For the first version, he borrowed four citations of Roman law and a reference to the XII Tables. One of these citations was certainly borrowed from the commentary, although the other three and the reference to the XII Tables could also have been drawn from the *Notae*. He did not borrow any citations of Roman law for the titles on obligations from Vinnius for the third version. He did, however, borrow some for his titles on property law.¹¹⁶ For the fourth, he borrowed eleven, eight of which could only have been drawn from the commentary. He also borrowed his citations of Roman writers Seneca and Cicero, added to the new fourth book on actions, from Vinnius.¹¹⁷ It is unlikely, although it cannot be confirmed, that he checked the

¹¹⁶ First, S.12.37/2.1.39 cited Inst.2.1.33, D.10.4.3.14, Grotius and Mynsinger. Vinnius' commentary on Inst.2.1.33 was Stair's source for the citations of Grotius and Mynsinger. Vinnius also cited D.10.4.3.14, and was likely Stair's source for that citation. Stair's citation of Inst.2.1.33 also certainly reflects his use of Vinnius' commentary on that passage of the *Institutes* here. Secondly, S.22.3/2.12.3 cited Inst.2.6 and the *Authenticum* of Nov.119.7. Vinnius cited the same passage of the *Authenticum* in his commentary on Inst.2.6.2, para 2.

¹¹⁷ S.-/4.3.41; Vinnius' commentary on Inst.4.6.28, paras 2-3; Vinnius' *Notae* on Inst.4.6.28. These citations also appeared in Gudelinus' *De jure novissimo* 3.13, 129. The more likely source was Vinnius' commentary, however, as Stair and Vinnius gave "ex bono & aequo" but Seneca "ex aequo & bono". Seneca: *De Clementia* 2.7 [edition consulted: *De Clementia* in L.A. Seneca: *Opera quae exstant omnia, variorum notis illustrata* volume 2 (Amsterdam, 1619), 258]. Stair directly consulted Cicero: *De officiis* 3.70. He gave a list of obligations in that passage. He used the order of Cicero's own list of obligations and actions initially, and then started copying the order of that found in Inst.4.6.28, but omitting those actions which he had already included by virtue of copying from Cicero. Stair's consultation of this *Institutes* passage supports his use of Vinnius' commentary on it.

citations which he borrowed from Vinnius for the first version. If he did not, this would be in keeping with his use of Grotius and Gudelinus at that time. For the fourth version, he did check the citations which he borrowed from Vinnius. Again, this change in his practice from the first version is seen in his use of Grotius and Gudelinus.

Stair borrowed four citations of continental jurists from Vinnius' commentary for his titles on obligations: of Wesenbecius and Faber for the first version; of Cujacius for the third version; and another of Cujacius for the fourth. Stair used those of Wesenbecius, Faber and the first of Cujacius to engage with pan-European juristic debates, specifically on the role of earnest in sale and which party bore the risk in sale. In both cases, Stair took the opposing view to that held by Vinnius. As he did not check any of these citations, he actually used them as authority for views which they did not support. In the case of risk in sale, after reading that leading jurists supported the minority view, Stair may have amended his own in agreement. The citations of Grotius and Mynsinger which Stair borrowed from Vinnius were used in a slightly different manner, specifically to establish that a debate was no longer relevant, as the rules were then in desuetude. The citation of Cujacius added for the fourth version was simply added to Stair's existing text with no further discussion. This citation was used neither to enter a juristic debate nor in relation to any particular legal system.

Vinnius became an increasingly important source of juristic authority as Stair revised the *Institutions*. Only two of the citations of jurists found in the manuscripts – of Wesenbecius and Faber – were borrowed from Vinnius. However, when preparing the third version, Stair added eight citations of jurists, six of which were either: of Vinnius, borrowed from Vinnius, or borrowed from *De jure belli* after Stair was led to it by Vinnius. Vinnius was therefore the most important source for the juristic authority added for the third version. This was also true of the fourth version, as one of the two citations of jurists which were added for that edition (that of Cujacius) was also borrowed from Vinnius.

Gordon has suggested that Stair used Vinnius to indirectly consult Grotius' *Inleydinge*.¹¹⁸ Stair did borrow a citation of Grotius' *Inleydinge* from Vinnius, but

¹¹⁸ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 256-257.

believed it to be of *De jure belli* and checked that text. Stair's consultation of *De jure belli* meant that he was not reliant on Vinnius' description of the *Inleydinge*. While Gordon may have been correct, the extent to which Stair was indirectly influenced by the *Inleydinge* through his use of Vinnius was likely limited.

Stair also consulted Vinnius' *Jurisprudentia contracta*, but seemingly only for the third version. This was different to his use of Vinnius' commentary (and possibly *Notae*), which he had used for the first version. It is possible that Stair decided to consult this other treatise of Vinnius after having been impressed with his other works. He cited it for comparative law, as evidence that a rule existed in Holland. This use of Vinnius' *Jurisprudentia contracta* for comparative law was markedly different to Stair's use of Vinnius' commentary, but was consistent with his use of Gudelinus. There is not further evidence of Stair's borrowing from any additional titles of Vinnius' *Jurisprudentia contracta*.

STAIR AND CORVINUS

Stair used his three principal sources for specific purposes. He also did this with one of his minor sources, Corvinus' *Digesta per aphorismos*. This chapter will show the extent of Stair's use of Corvinus. Unlike his principal sources, he used Corvinus only once: when writing the first version. Moreover, he used Corvinus in only three of his titles on obligations. This chapter will also show that Stair used Corvinus as his source of Canon law. Most of Stair's general references to, and all seven of his citations of, Canon law in the first version were borrowed from Corvinus. Therefore, although Corvinus was only a minor source for the *Institutions*, he was an important one. It is thus necessary to examine Stair's use of him in detail.

7.1 STAIR'S USE OF CORVINUS FOR THE FIRST VERSION

7.1.1 "Conjugal Obligations"

7.1.1.1 *Stair's citation of Liber Extra 4.1.10, 4.1.2 and 4.8.3*

Stair briefly discussed the legal effect of a couple becoming engaged. He first set out Canon law:

Espousals be naturally obligatorie and effectual also by the Canon Law, whereby the espoused Persons may be compelled to perfect the Marriage, unless there arise some eminent Discoverie of the Corruption or Pollution of either Party, or defect or Deformity, through Sickness or some other Accident. *C.de literis extravag. de sponsalibus, & cap. 2. eodem, c. ult, de Conjug.*¹

¹ S.4.2/1.4.6. 1662 stem: Adv.MS.25.1.8, 4.3 gave "*carpiter 2^{do} de*" for the second citation and "4^o" instead of the final 'C'; Adv.MS.25.1.10, 4.2 omitted the first 'C' and gave '4' instead of the final 'C'; Adv.MS.25.1.11, fol.26L also gave '4' instead of the final 'C'. 1666 stem: Adv.MSS.25.1.5, 4.2 and

He then said that Roman law allowed a party to withdraw from an engagement, and confirmed that Scots law had followed Roman law in this matter. These three citations of Canon law – of *Liber Extra* 4.1.10, 4.1.2 and 4.8.3 respectively – were relevant to Stair’s discussion. He borrowed them from Corvinus, who stated in his title on D.23.1:

*Jure Pontificio ne poenitere quidem licet. c. ex literis. Ext. eod: nisi sponsalia mutuo dissolvantur consensu, c.2.Ext.eod.ubi Panor. aut justissima aliqua ex causa, puta deformitatis subsecutae, c.ult.de conjug. lep.*²

By the Canon law it is not even permitted to withdraw [from the engagement], *Liber Extra* 4.1.10, unless the betrothal is dissolved by the consent of both parties, *Liber Extra* 4.1.2, or on account of the very most just cause, such as subsequent disfigurement, *Liber Extra* 4.8.3.

Three points indicate that Corvinus was Stair’s source for these citations. First, they appear in exactly the same order in both Stair and Corvinus. Secondly, both Stair and Corvinus give the first citation in the medieval style, the second in the early-modern style, and indicate that the third is the final one in the title. This comparison is not undermined by the very minor differences between Stair and Corvinus’ citations.³ Finally, Stair’s wording here is essentially a translation of Corvinus (although he omitted the clause in Corvinus which explained that the parties could withdraw from the engagement by mutual consent). Stair thus condensed this passage of Corvinus, giving all three of the citations at the end rather than scattered through the text. Why he did so is unclear; perhaps it was simply to ensure that the citations did not interrupt the flow of the discussion.

25.1.7, 4.2 omitted the first ‘C’ and seem to have given ‘R’ before the second citation; Adv.MS.25.1.12, 4.2 gave ‘4’ instead of the final ‘C’.

² Corvinus: *Digesta per aphorismos* on D.23.1, 305. Underlining in this quotation indicates use of italics in the original source.

³ Corvinus referred to the relevant title in the first two citations as “eod” not “de sponsalibus”; as the title in which Corvinus gave these citations was “de sponsalibus”, Stair could easily have made that change. Stair also omitted “lep” from the third citation, probably accidentally.

7.1.1.2 Stair's citation of Liber Extra 4.2.9 and 4.2.14

Stair explained that consent was necessary to enter into marriage, and a “commixtion of bodies” could be evidence of “discretion and capacity” to marry. He stated that “this also is the sentence of the Canon Law”.⁴ The citation which follows in the first printed edition reads: “*de illic.[sic]⁵ cap. 9. ult. de spons.*”⁶ The title to which this citation seems to refer, “*De sponsalibus et matrimoniiis*”, is *Liber Extra* 4.1. However, this title does not fit with the description given in the rest of the citation. Paragraph nine does not begin “*de illic*”, and “*ult*” cannot refer to paragraph nine, which has no sub-paragraphs and was not at the end of the title.⁷ In fact, there are two errors in the citation (presumably printing errors) which are apparent on comparison with that in the manuscripts: “*C. de illis 9 Cap: ult: de spons <imp/pup>*.”⁸ The printed edition omitted “*imp*” at the end of this citation. Stair did not cite *Liber Extra* 4.1 but 4.2, “*De desponsatione impuberum*”. This is confirmed as 4.2.9 began “*de illis*”. The first printed edition also gave “9” and “*cap*” the wrong way round. Stair actually cited two paragraphs of *Liber Extra* 4.2: nine and fourteen (the last paragraph). Yet there is still a problem: these texts considered marriage between minors and so did not give comprehensive authority for Stair’s point.

Stair’s citations are explained by his borrowing them (without checking them) from Corvinus for the first version. Corvinus also cited *Liber Extra* 4.2.9 and 4.2.14 together: “*c. de illis. 9. c. ult. de despons. imp.*”⁹ These citations appear in his title on D.23.2, the title after that from which Stair borrowed his citations of *Liber Extra* 4.1.10, 4.1.2 and 4.8.3. Here Corvinus said that people without capacity (children, the mentally handicapped) could not marry. The broader context of Corvinus’ discussion was thus, like Stair, the necessity of consent to enter into marriage. Corvinus’ focus on young

⁴ S.4.2/1.4.6. The manuscripts attributed this rule to the common law. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 4.3; Adv.MS.25.1.11, fol.27L. 1666 stem: Adv.MS.25.1.5, 25.1.7 and 25.1.12, 4.3.

⁵ This should have read “*illis*”.

⁶ The reference was removed for the fourth version.

⁷ Edition consulted: *Corpus juris canonici emendatum et notis illustratum. Gregorii XIII. pont. max. iussu editum* volume 2: *Decretales d. Gregorii papae IX* (Rome, 1582).

⁸ The manuscripts generally gave “*pup*”; this is not correct but is clearly an error made by the relevant copyists. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 4.3; Adv.MS.25.1.11, fol.27L. 1666 stem: Adv.MS.25.1.5, 4.3; Adv.MS.25.1.7, 4.3 omitted the 9; Adv.MS.25.1.12, 4.3.

⁹ Corvinus: *Digesta per aphorismos* on D.23.2, 308.

persons explains the citation of *Liber Extra* 4.2.9 and 4.2.14. Later in his title on D.23.2, Corvinus again cited *Liber Extra* 4.2.9 (again by its opening phrase) in connection with “*copulam carnalem* [a carnal bond]”.¹⁰ It is therefore clear why Stair would have thought *Liber Extra* 4.2.9 and 4.2.14 relevant to his own discussion, which considered discretion, capacity, and a “commixtion of bodies”. It is unlikely that he checked these citations; he does not seem to have been aware that the texts focussed on minors marrying (although he could have dismissed this and used the citations anyway). He must have recognised them as being of Canon law, however, as Corvinus did not mention Canon law here.

7.1.1.3 Stair’s citation of D.48.19.17 and D.48.5.14(13)

Stair also said that marriages without parental consent “may be disallowed [*sic*], and the Issue repute as unlawful, but the Marriage cannot be annulled, *l. 11. de stat. hom. l. 13 §. 6. de Adult*”.¹¹ Both of these citations were amended for the first printed edition: that of D.1.5.11 was rather “*L.17 ff: de poenis*” (D.48.19.17) and that of D.48.5.14(13) did not give a paragraph number in the manuscripts.¹² Neither D.48.18.17 nor D.48.5.14(13) were relevant to Stair’s discussion of parental consent: D.48.19.17 said that people relegated to an island as punishment lost their rights under positive law and retained only those under the *ius gentium*; D.48.5.14(13) concerned the husband’s right to accuse his wife of adultery.

Stair’s citations are explained by his borrowing them, without checking them, from *Digesta per aphorismos*. Corvinus cited both texts together in the same order as Stair: “*l.17. de poen. l.13.pen.§.plane. de adult.*”¹³ Stair ignored the reference to sub-paragraph one of D.48.5.14(13); this corroborates the suggestion that he generally did not seek to provide sub-paragraphs in the first and second versions.¹⁴ These citations

¹⁰ Corvinus: *Digesta per aphorismos* on D.23.2, 310.

¹¹ S.4.2/1.4.6.

¹² 1662 stem: Adv.MS.25.1.8 and 25.1.10, 4.3; Adv.MS.25.1.11, fol.27R. 1666 stem: Adv.MS.25.1.5, 25.1.7 and 25.1.12, 4.3.

¹³ Corvinus: *Digesta per Aphorismos* on D.23.2, 308.

¹⁴ Above, 3.1.3.

appeared in the same title of Corvinus as (actually only ten lines above) the citations of the *Liber Extra* just discussed. Corvinus gave these citations in the same context as Stair. Why he did so is unclear, but this does explain Stair's use of these texts.

When Stair revised this passage for the first printed edition, he replaced the citation of D.48.18.17. This suggests that he checked it, found the text to be irrelevant, and removed the citation. He certainly checked D.48.5.14(13); he added a reference to sub-paragraph six. D.48.5.14(13).6 said that if a woman had committed adultery in a previous marriage, she could not be accused by her current husband. Why he felt that this paragraph was relevant to his discussion is unclear; perhaps it was a printing error.

Stair's writing was also influenced by Corvinus. Stair's phrase "may be disallowed [*sic*], and the Issue repute as unlawful, but the Marriage cannot be annulled"¹⁵ is a direct translation of Corvinus' statement at the beginning of the paragraph: "*non quidem dissolvebantur ... sed tamen nuptiae injustae, liberi injusti* [are indeed not dissolved ... but nevertheless the marriages are unlawful, the children illegitimate]".¹⁶ Stair and Corvinus both followed this by saying such children were excluded from succession rights.

7.1.1.4 *Stair's citation of Corvinus (in the manuscripts only)*

In the manuscripts, Stair cited Corvinus for Dutch law: "By the custom of Holland marriage contracted without either parents consent though never so fully consummated is dissolved. *Corvinus ad tit ff de ritu nuptiarum*".¹⁷ On the same page as the citations of Roman and Canon law borrowed by Stair, Corvinus said that Dutch custom required either parent's consent for the marriage of a person under twenty-five, without which a marriage which had not been consummated could be dissolved. This is the third time Stair used this page of Corvinus as a source of authority for "Conjugal Obligations".

¹⁵ 1662 stem: Adv.MS.25.1.8 and 25.1.10, 4.3; Adv.MS.25.1.11, fol.27R. 1666 stem: Adv.MS.25.1.5, 4.4; Adv.MS.25.1.7, 4.3.

¹⁶ Corvinus: *Digesta per Aphorismos* on D.23.2, 307.

¹⁷ 1662 stem: Adv.MS.25.1.8 and 25.1.10, 4.3; Adv.MS.25.1.11, fol.27R. 1666 stem: Adv.MS.25.1.5, 25.1.7 and 25.1.12, 4.3.

Stair's citation of Corvinus on D.23.2 was correct, relevant, and clearly the product of Stair's consultation of the text; indeed Stair seems to have simply translated Corvinus here.

When preparing the first printed edition, Stair replaced this citation of Corvinus and this point about the unconsummated marriage being dissolved with his discussion of the *Ordonnantie*.¹⁸ Ford was the first to notice this revision. However, his two conclusions here were incorrect. First, he said that Stair's change in citation from Corvinus to the *Ordonnantie* was a straight-forward substitution. In fact, Stair revised the surrounding passage and changed the focus of his discussion from one aspect of Dutch law to another. The change in his citation reflects this change in topic. Secondly, Ford stated that Corvinus was Stair's source for his citation of the *Ordonnantie*.¹⁹ In fact, Stair borrowed this citation from Vinnius.²⁰ Corvinus cited the *Ordonnantie* for the point about the unconsummated marriage not being dissolved (in the 1649 and 1656 editions²¹); Stair and Vinnius cited it to show that the celebrant had the right to refuse to marry the couple if he was unsure whether there was parental consent. Corvinus cited articles three and thirteen of the *Ordonnantie*; both Stair and Vinnius cited only article three and gave identical citations.

It is interesting that Stair revised this passage for the first printed edition. He knew that his citation of Corvinus was correct, and presumably he trusted him on this point or he would not have used this passage as authority in the first and second versions. Yet, when preparing the third version, Stair read Vinnius' discussion of a different rule of Dutch marriage law which was supported by a citation of the statute. He then changed this passage of the *Institutions* to discuss this other rule and borrowed the citation. He did not check the citation, so he could not have been as sure of its accuracy as he was about his own citation of Corvinus. Nonetheless, he may have found the citation of the statute more authoritative than the one of Corvinus, which was a very

¹⁸ Above, 6.2.1.

¹⁹ Ford: *Law and Opinion*, 65.

²⁰ Vinnius: Commentary on Inst.1.10.pr, para 7; Above, 6.2.1.

²¹ Of the three editions printed before Stair wrote the first version, only the 1649 and 1656 editions cited the *Ordonnantie*; the 1642 edition of Corvinus described the custom of Holland but did not cite it. That the 1642 edition did not give this citation was also noted by Ford: *Law and Opinion*, 65

simple text compared to the likes of Grotius and Vinnius.²² This could allow insight into Stair's concept of authority, although this could be pushed too far: he may simply have found the particular legal rule a more interesting comparison.

7.1.1.5 *Stair's reference to Canon law on the effect of adultery*

Stair later explained that, where adultery could be established: "the Canon Law doth not thereon dissolve [the marriage], that the Party injured may be free to marry again, but only granteth Separation".²³ Stair criticised this rule of Canon law, and gave examples from the Bible which contradicted it. He then set out the ways in which Scots law had departed from this rule.

Corvinus was probably Stair's source for this point of Canon law. Corvinus said:

*Ius Canonicum dumtaxat ob haereseos ... vel adulterij causa ... permittit divortium, non vinculi, sed tantummodo quoad separationem tori*²⁴

Canon law to this extent on account of heresy ... or adultery ... permits divorce, not of the chains, but only a separation of the bed

Stair essentially paraphrased Corvinus here, again using him as his source for a rule of Canon law.

7.1.2 **"Obligations Conventional"**

Stair cited Corvinus only once in the printed editions, with Gudelinus, as authority for "Canon Law, by which every paction produceth action, *omne verbum de ore fideli cadit*

²² It is criticised as being of no scientific merit in *Allgemeine deutsche Biographie & Neue deutsche Biographie* volume 4, 509.

²³ S.4.3/1.4.7. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 4.4; Adv.MS.25.1.11, fol.28L. 1666 stem: Adv.MSS.25.1.5 and 25.1.7, 4.4; Adv.MS.25.1.12, 4.4. The manuscripts generally gave "common law".

²⁴ Corvinus: *Digesta per Aphorismos* on D.24.2, 319.

in debitum [all words from the mouths of faithful men result in obligation]”.²⁵ Stair’s citation, “*Corvinus de pactis*”, omitted the relevant treatise’s name. The editors of the third, fourth and fifth printed editions of the *Institutions* identified the treatise as Corvinus’ *Ius Canonicum per aphorismos*;²⁶ this was not correct. Gordon said “It is tempting to suppose that Corvinus is an erroneous extension of an abbreviated reference to Covarruvias”,²⁷ who was cited by Gudelinus. He correctly suggested that, alternatively, Stair may have consulted Corvinus’ *Digesta per aphorismos* on D.2.14, the *Digest* title “*de pactis*”.²⁸ This is confirmed, as Stair borrowed from this title of Corvinus.

Stair borrowed his two citations of Canon law, correctly identified by Gordon as *Liber extra* 1.35.1 and 1.35.3,²⁹ from Corvinus.³⁰ The average reading of the citations in the manuscripts is: “*C. 1. & 3. ubi. con. opt. de pactis*”.³¹ Corvinus cited *Liber Extra* 1.35.1 and 1.35.3 in an identical manner and in the same context.³² Indeed, Corvinus gave these citations after the sentence: “*Iure Pontificio, ex quolibet pacto oritur actio* [by Canon law, from whatever paction proceeds action]”.³³ Gordon correctly suggested that Stair’s famous phrase “every paction produceth action” was a translation of this phrase of Corvinus.³⁴ Additionally, Stair’s statement that the adoption of Canon law was “the common Custome of Nations”³⁵ was probably drawn from Corvinus’ phrase “*Quod hodie in omni foro, ubi ex bono & aequo, & ex suprema potestate judicatur, obtinet*

²⁵ S.10.7/1.10.7. 1662 stem: Adv.MS.25.1.8, 10.5; Adv.MS.25.1.10, 10.6; Adv.MS.25.1.11, fol.89R. 1666 stem: Adv.MS.25.1.5, 10.6; Adv.MS.25.1.7, 10.5; Adv.MS.25.1.12, 10.6. The manuscripts generally gave “common law”, with the exception of Adv.MS.25.1.10 which gave “Roman law”.

²⁶ Walker’s edition did not attempt to identify any treatise.

²⁷ Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 263.

²⁸ Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 264 n.16.

²⁹ Cf. Walker (ed): *Institutions*, which gave C.2.3.1 and C.2.3.2.

³⁰ S.10.7/1.10.7. 1662 stem: Adv.MS.25.1.8, 10.5; Adv.MS.25.1.10, 10.6; Adv.MS.25.1.11, fol.89R. 1666 stem: Adv.MS.25.1.5, 10.6; Adv.MS.25.1.7, 10.5; Adv.MS.25.1.12, 10.6.

³¹ The printed editions omitted “*ubi. con. opt*”.

³² Corvinus: *Digesta per Aphorismos* on D.2.14, 75.

³³ Gordon: “Stair, Grotius and the sources of Stair’s *Institutions*”, 264 n.16; Corvinus: *Digesta per Aphorismos* on D.2.14, 75.

³⁴ MacQueen suggested it was a “translation of the canonist maxim, *pacta servanda sunt*” [H.L. MacQueen: “Scots law and English law: the case of contract” (2001) 54(1) *Current Legal Problems* 205-229, 217; H.H.L. MacQueen: “Good faith in the Scots law of contract: an undisclosed principle?” in A.D.M. Forte (ed): *Good Faith in Contract and Property Law* (Oxford, 1999) 5, 14 n.40].

³⁵ S.10.7/1.10.7. 1662 stem: Adv.MS.25.1.8, 10.5; Adv.MS.25.1.10, 10.6; Adv.MS.25.1.11, fol.89R. 1666 stem: Adv.MS.25.1.5, 10.6; Adv.MS.25.1.7, 10.5; Adv.MS.25.1.12, 10.6.

[which is maintained today in all courts where from good and equity and from the supreme power is judged].”³⁶ However, Stair’s Latin maxim of Canon law, *omne verbum de ore fidei cadit in debitum* [all words from the mouths of faithful men result in obligation], cannot be attributed to Corvinus. Snyder suggested that “perhaps he was the aphorist himself”.³⁷ The similar maxim *omne promissum cadit in debitum* [all promises result in obligation] was used by various jurists before Stair, including by Samuel Rutherford.³⁸ It is possible that Stair simply adapted this existing maxim to meet his own requirements.

7.1.3 “Obligations Conventional/Location and Conduction”

Stair also referred to Canon law when discussing usury:

So doth the Canon Law disapprove [usury], and most Nations, where that Law is in vigor; yet we, and generally other Protestant Nations do allow of the profite and hire of Money.³⁹

This sentence was also probably drawn from Corvinus, who said “*praecepto divino prohibita* [usury is prohibited by divine law]” but acknowledged “*Iure Civili & constitutionibus Principum Christianorum (licet sint odiosae) permittuntur* [by the Civil law and by the constitutions of the leading Christian nations (although it is odious) [usury] is permitted]”.⁴⁰ That Corvinus was Stair’s source is suggested by the common

³⁶ Corvinus: *Digesta per Aphorismos* on D.2.14, 75.

³⁷ D.V. Snyder: “Hunting promissory estoppel” in V.V. Palmer and E.C. Reid (eds): *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh Studies in Law series volume 6, Edinburgh, 2009) 281, 299 n.71.

³⁸ S. Rutherford: *Lex Rex, or the Law and the Prince: a dispute for the just prerogative of king and people containing the reasons and causes of the wars of Scotland* (London, 1644), q.50. For a comparison of Stair and Rutherford, specifically regarding their treatment of slavery and persons *alieni iuris*, see Ford: “Stair’s title ‘Of Liberty and Servitude’”, esp. 143-156; J.D. Ford: “Divine right and constitutional settlement: traces of political theory in Stair’s *Institutions*”, presented to the Scottish Legal History Group in 1989 and abstracted in (1990) 11(1) *J.L.H.* 134-135.

³⁹ S.10.74/1.15.7. 1662 stem: Adv.MS.25.1.8, 10.54; Adv.MS.25.1.10, 10.54 omitted “is in vigor”; Adv.MS.25.1.11, fol.114R. 1666 stem: Adv.MSS.25.1.5, 25.1.7 and 25.1.12, 10.54. The manuscripts gave “common law”.

⁴⁰ Corvinus: *Digesta per Aphorismos* on D.22.1, 279.

structure of their discussion and the similarity in their wording. Corvinus did not here mention Canon law; his stating that usury was considered odious by Christian nations may have precipitated Stair's saying that the Canon law "disapprove it".

7.2 CONCLUSIONS

Both of Stair's references to Corvinus (one of which appeared only in the manuscripts) omitted the name of the treatise cited. This chapter has shown that Gordon was correct in suggesting that the relevant work was Corvinus' *Digesta per aphorismos*.⁴¹

Stair borrowed two citations of Roman law from that treatise. However, the main purpose for which Stair used Corvinus was as a source of Canon law. Most, but not all, of his general references to Canon law were taken from Corvinus, including his famous phrase "every paction produceth action". Moreover, all seven citations of Canon law in the first version's titles on obligations were borrowed from Corvinus. That Stair used Corvinus specifically for Canon law is comparable to his use of Grotius, Gudelinus and Vinnius' commentary for specific material.

However, it seems that Stair did not use Corvinus again after he completed the first version. He added four citations of Canon law; none were borrowed from Corvinus. It has also been shown that Ford was wrong to attribute Stair's citation of the Dutch *Ordonnantie*, added in the third version, to his reading of Corvinus.⁴²

It is possible to identify the edition of Corvinus which Stair used. Almost all the passages and citations discussed here were the same in the 1642, 1649 and 1656 editions of Corvinus. However, the sentence on usury, paraphrased by Stair, did not appear in the 1642 or 1649 editions.⁴³ If the suggestion that Corvinus was Stair's source here is correct, Stair must have used the 1656 edition of Corvinus for the first version. This means that he was using the most recent edition of this work, printed only three years before he wrote the first version.

⁴¹ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 264 n.16.

⁴² Ford: *Law and Opinion*, 65.

⁴³ Another difference was Corvinus' addition of a citation of the *Ordonnantie* for the 1649 edition. Above, 7.1.1.4.

CONCLUSION

This thesis has established many important points about the nature of the *Institutions* and Stair's sources and method when he wrote it. It has shown that the manuscripts within the two stems are generally similar. It has confirmed Ford's finding that the changes made between the first and second versions were essentially limited to updating the work with citations of recent Scottish authority and adding small paragraphs. It has also confirmed his finding that some of the manuscripts were updated, most notably Adv.MS.25.1.12,¹ but only to a limited extent.² Furthermore, it has shown that the entry in the Glasgow University library catalogue for MS.Gen.1495 was not correct in stating that it was without reference to cases or other legal authorities dated after 1659.³ Rather, MS.Gen.1495 can be located within the 1662 stem generally.⁴

This thesis has shown that there were variations in the print-runs of the *Institutions*.⁵ In the two sample copies of the first printed edition, this was limited to minor changes in the punctuation of citations and the omission of the last leaf of the dedication in the Harvard copy. In the second printed edition, variations have been found in three citations.⁶ These were probably as a result of letters having been dislodged, or of the accidental incorporation of different or additional reliefs. However, the variations within the manuscripts and printed editions are limited, and thus it can be concluded that

¹ Ford: *Law and Opinion*, 68 n.295.

² The manuscript was updated at paragraph 10.20. However, the copyist did not check the citation of D.50.17.54 in the manuscripts from the 1666 stem ("*L. Conanus: ff: de regulis juris*"), which was evidently an error and which he attempted to make sense of: "we have followed *Conanus Lib. de regulis juris*" [10.7]. This suggests that he did not have the first printed edition in front of him.

³ Glasgow University Library Special Collections Online Catalogue entry for MS.Gen.1495 <<http://special.lib.gla.ac.uk/manuscripts/search/detaild.cfm?DID=2830>> accessed 16th July 2010; Ford: *Law and Opinion*, 69. See, however, e.g. *E. Lauderdale v Tenants of Swintoun* 1662 [M.10023] MS.Gen.1495, fol.54 (wrongly cited this case as having been heard in 1660). *Musbon v Lawrie of Macvissorms* 1662 [probably *Monsual's Children v Laurie of Naxwelton* 1662 [M.2614]], MS.Gen.1495, fol.55.

⁴ Cf. Ford: *Law and Opinion*, 69.

⁵ This was also the case with Mackenzie's *Institutions* [Cairns: "The moveable text of Mackenzie", 242-244].

⁶ In the citations of: Vinnius, S.5.4/1.5.4; D.26.4.5, S.6.8/1.6.8; and D.14.2.4.pr, S.-/1.8.7.

they are close enough to Stair's own version to be deemed reliable, which is what one would expect.

Other conclusions can be drawn from the research done for this thesis. When preparing the second and third versions, it is likely that Stair was working from his original manuscript, which he had written for the first version. It has been shown that printing errors were introduced into the text for the first printed edition; these probably did not appear in Stair's third version, because they were not found in the manuscripts. Some of these errors also appeared in the second printed edition. This suggests that Stair worked from a copy of the first printed edition rather than his original manuscript when preparing the fourth version. This is credible, as he may well have sent his hand-written copy of the third version to the printers and never had it returned.

The main purpose of this thesis has been to identify the sources and method of Stair when he wrote and revised the *Institutions*. The particular focus of this has been his use of continental legal literature. It has not been possible in the previous chapters to analyse Stair's use of all the continental legal treatises which he consulted. Those jurists who were used to a very limited extent⁷ or outwith the titles on obligations⁸ have not been discussed. However, this research has established significant points in relation to Stair's use of his principal sources (Grotius, Gudelinus, Vinnius and Corvinus), and about his use of Roman and Canon law.

⁷ Stair certainly consulted Stephanus: *Oeconomia*, 2.7 and 2.1. The passages cited by him were only relevant if interpreted broadly. He does not seem to have borrowed authority from Stephanus, but drew his Latin phrase "*pietate & reverentia* [with loyalty and reverence]" from him [S.5.4/1.5.4. 1662 stem: Adv.MS.25.1.8, 5.4; Adv.MS.25.1.10, 5.4; Adv.MS.25.1.11, fol.39L. 1666 stem: Adv.MS.25.1.5, 5.4; Adv.MS.25.1.7, 5.4; Adv.MS.25.1.12, 5.5 gave the Latin phrase but not the citation. Stephanus: *Oeconomia*, 2.7.7, 40].

⁸ He certainly consulted Gudelinus' *De jure feudorum* and Zoesius' *De feudis* for his titles on property law. He may also have consulted Menochius, whose discussion of the instances in which good faith is not presumed by the possessor is accurately described by Stair (although the citation is wrong in the manuscripts) [J. Menochius: *De arbitraria iudicum quaestionibus & causis: centuriae sex* (Edition consulted: Cologne, 1630), 2.226, 464 esp. para 4 & seqq.].

8.1 STAIR'S USE OF HIS PRINCIPAL SOURCES

8.1.1 Stair's choice of his principal sources

Stair drew on his principal sources for specific types of material. It is probable that he chose them for these purposes. He used Grotius as his source for natural law. Although he never explicitly agreed with Grotius' interpretation of natural law, he followed Grotius' method of drawing on citations of ancient and modern authorities to establish the principles of natural law. He emulated Grotius' pattern of citation, borrowing from him citations of writers of classical antiquity, the Bible, Roman law, and legal humanist and scholastic jurists. He used these citations, even those of early modern jurists, in the context of establishing natural law and jurisprudential principle. Stair did not check these citations when writing the first version (with the possible exception of that of Seneca and those of the Bible). Accordingly, he did not engage with the texts; his citations of writers of classical antiquity can be seen as merely supplementary to his argument. This may have implications for both the humanist and natural law traditions in Scotland.

Gordon was correct in stating “for [Stair's] Roman law, however, he certainly used Gudelinus' *De jure novissimo*.”⁹ Stair used Gudelinus as a principal source of Roman law for both the first and fourth versions. Indeed, Stair may have returned to Gudelinus when preparing the fourth version specifically for citations of Roman law. Furthermore, Gudelinus was also Stair's principal source for references to contemporary continental national law. In his titles on obligations, Stair drew from Gudelinus: three of his five references to French law, three of his four references to that of the Netherlands, his one reference to Spanish law, one of his four references to German law, and two of his more general remarks about legal trends in Europe. He also borrowed from Gudelinus citations of seven continental jurists. All seven citations were used by Stair either in relation to specific legal systems or to establish a principle in the contemporary

⁹ Gordon: “Stair, Grotius and the sources of Stair's *Institutions*”, 263.

law of the “Neighbour Nations”¹⁰ generally. Gudelinus did not always refer specifically to the legal system for which Stair used him as authority. Stair extrapolated his authority for Dutch law from Gudelinus as he was from the Spanish Netherlands. He did the same for Duarenus and Chassanaeus: he extrapolated that they discussed French law from a previous discussion of Gudelinus, from the title of Chassanaeus’ treatise, and from Duarenus as he was French.

Stair also used Vinnius’ commentary (and possibly his *Notae*) as an important source of Roman law. Moreover, he used Vinnius to engage with continental juristic debates, most notably in relation to the role of earnest in sale, and whether the buyer or seller bore the risk in sale. In both cases, Stair disagreed with Vinnius; he used him as a source of authority but did not support his views of these laws. He may even have changed his view of risk in sale after reading Vinnius (he certainly borrowed authority from him to support his newly-held view), although this cannot be confirmed as he may have changed his view at any point between completing the second and third versions. It is interesting that Stair had not, when writing the first version, been influenced to follow the minority view (that the seller bore the risk) when reading that Grotius supported it. This is in keeping with his repeated express rejection of Grotius’ interpretation of natural law.

Stair borrowed citations of Roman law from Corvinus, and cited him as authority for Dutch law.¹¹ However, Stair’s principal use of Corvinus was as a source for Canon law. All the citations of Canon law in the first version were borrowed from Corvinus, and many of his more general references to Canon law were likewise drawn from him. Yet this work of Corvinus was not a work of Canon law, despite it having made frequent reference to Canon law. Corvinus had written a work on Canon law: his *Jus Canonicum per aphorismos* was comparable in style to his *Digesta per aphorismos*. Yet, even though some of the citations of the *Liber Extra* which Stair borrowed from Corvinus’ *Digesta per aphorismos* appear in his *Jus Canonicum per aphorismos*,¹² it does not seem

¹⁰ S.10.11/1.10.11.

¹¹ This citation and the discussion of the rule which it supported were removed for the third version. Above, 7.1.1.4.

¹² e.g. *Liber Extra* 4.2.9 and 4.2.14 were also cited in Corvinus: *Jus Canonicum per aphorismos*, 2.13, 73,

that Stair consulted that second work. This may suggest that Stair did not turn to Corvinus' *Digesta per aphorismos* specifically for Canon law, but instead examined it for different reasons, then found it a useful exposition of Canon law and used it as such. This is, of course, mere speculation.

All Stair's principal sources were printed in the seventeenth century. Stair was thus selecting and using as sources the leading treatises from the most recent continental literature. Indeed, Stair can even be shown to have used the 1656 edition of *Digesta per aphorismos* for the first version, printed just three years before he started to write. There is an obvious parallel here between his focus on recent continental legal literature and his use of recent sources of Scots law. The practicks of Durie, Hope, Spottiswoode, Haddington and Nicholson were those which Stair used to the greatest extent; all were collections of decisions of cases heard in the seventeenth century. Stair also focused on citing the most recent interregnum cases in the first version. Stair's determination to use recent sources clearly shows that his purpose in writing was to create a modern treatise of law.

8.1.2 **Stair's method in using his principal sources**

Stair did not always return even to his principal sources when preparing later versions of the *Institutions*. He used Gudelinus for the first version, and then only returned to *De jure novissimo* for the fourth version. He may have done so specifically to use Gudelinus as a source of Roman law. He used Grotius as a principal source only for the first version. He returned to *De jure belli* for the third version only when led to it by Vinnius, and his use of Grotius at that time seems to have been limited to the three-paragraph discussion cited by Vinnius. His use of Grotius for the fourth version seems to have been limited to him having checked that citations and quotations were accurate. He did not return to Corvinus' *Digesta per aphorismos* at all after using it for the first version. Nor did he return to Vinnius' *Jurisprudentia contracta* after using it for the third version.

but here these texts were cited with *Liber Extra* 4.2.3 and 4.2.8. It is therefore more probable that Stair borrowed these references from Corvinus' *Digesta per aphorismos* [Above, 7.1.1.2].

Instead, Stair's usual method seems to have been to use his sources extensively the first time he consulted them, and to take everything that was useful or relevant in order that he did not need to return to that work. The exception to this general practice was Vinnius' commentary. This treatise Stair used as a principal source for the first, third and fourth versions. Why did he return repeatedly to Vinnius' commentary? Perhaps it was the depth of detail which he found in Vinnius; or the fact that (because it commented on the full extent of the *Institutes*) it covered the entirety of private law as well as actions; or perhaps it was the fact that Vinnius combined an account of juristic analysis and debate with reference to practice, which was Stair's aim also. It was likely be a combination of these factors. It is one of the wonderful quirks within Scottish legal history that the treatise which Stair arguably used to the greatest extent was nowhere cited by him.

Even though Stair's usual practice was not to return to his principal sources, he made considerable use of them when he wrote the first version. All his titles on obligations contain material drawn from these four works. The structure which he used in his discussions of points of law (setting out natural law then distinguishing Scots law) may have been modelled on the way that Gudelinus structured his passages.¹³ In several places, the structure of specific discussions, as well as Stair's language and phrasing, was a reflection of his principal sources. This level of influence suggests that Stair had at least Grotius' *De jure belli*, Gudelinus' *De jure novissimo* and Vinnius' commentary in front of him when he wrote the first version of the *Institutions*.

Stair used his sources critically. He expressly disagreed with Grotius' interpretation of several points of natural law. In neither risk in sale nor the role of earnest in sale did Stair follow Vinnius' views. This agrees with Halliday's findings that Stair was not overly reliant on Craig as a source of Feudal law.¹⁴ Even though Stair could be critical of continental jurisprudence, he nonetheless saw it as persuasive authority. Three times he dismissed the view of his principal source, but borrowed authority from it to support his own view. This was the case when he rejected: Grotius'

¹³ Above, 5.3.

¹⁴ Below, 3.2.2.1.

view of promise and cited Molina; Vinnius' view of earnest as penal and cited Wesenbecius and Faber; and Vinnius' view of risk in sale and cited Cujacius. In the first two cases, it is currently impossible to establish for how long Stair had held his views, and thus to what extent he was convinced by the citations of these scholastic and humanist jurists. In the case of risk in sale, however, Stair seems to have changed his view between completing the second and third versions. Whether that was a result of reading in Vinnius that the "*summos viros* [greatest men]"¹⁵ supported the minority view is unclear but possible.

8.1.3 **Stair's method of borrowing from his principal sources**

Stair borrowed a significant quantity of authority and other material from his principal sources. More than a quarter of the citations of Roman law in Stair's titles on obligations in the first version were borrowed from these four jurists. All his citations of Canon law were borrowed from Corvinus. All his citations of fourteen of the twenty-six jurists cited in the *Institutions* (as well as one of his two citations of a twenty-seventh, Duarenus) were borrowed from Grotius, Gudelinus, Vinnius or Craig. It is unknown whether Stair consulted directly, or whether he borrowed the relevant citation from another source, for only four of the jurists cited in the titles on obligations, specifically Donellus, Gregorius, Salmasius and Zasius.¹⁶

Stair borrowed from his sources citations of material with which he must have been familiar. For example, he borrowed citations of Cicero, Aristotle and other writers of classical antiquity from Grotius. Yet he must have had an extensive knowledge of at least Aristotle, having studied the liberal arts at Glasgow.¹⁷ He borrowed a citation of the

¹⁵ Vinnius: Commentary on Inst.3.23.3 (Inst. 3.24.3), para 8.

¹⁶ Stair mentioned Donellus, Gregorius and Salmasius' names only, but gave a full citation of Zasius. Stair's citation was correct and relevant [S.5.13/1.5.13; U. Zasius: *Lectura in titulum Digesti novi, de verborum obligationibus* in U. Zasius: *Opera* volume 3: *Commentaria, seu lecturas eiusdem in titulos tertiae partis Pandectarum (quod vulgò Digestum novum vocant) complectens* (Leiden, 1550), D.45.1.107, 497, esp. para 4]. It does, however, seem likely that Stair borrowed this citation from an unidentified source.

¹⁷ Above, 1.2.1.2.

Libri feudorum from Gudelinus' *De jure feudorum*,¹⁸ despite having lectured on a title of the *Libri feudorum* in 1648.¹⁹ He borrowed all the Greek terms in the titles on obligations in the first version (two from Grotius and two from Vinnius) despite having had a good knowledge of Greek, as can be deduced from his appointment to teach Greek at Glasgow.²⁰ Stair was therefore not revisiting the knowledge which he had acquired before being admitted as an advocate. Of course, more than ten years had passed since he had studied and taught at Glasgow and written his lecture for admission as an advocate. Perhaps he found it more expeditious to rely on his seventeenth-century juristic sources for this material.

The method Stair used when borrowing from his principal sources has thus been established for his titles on obligations. He used this same method for his other titles. For his titles on jurisprudence, Stair borrowed from Grotius two citations of Cicero and one of Gaius. One of these citations of Cicero was of Cicero's *Pro Milone*. He borrowed this citation, and a quotation of Cicero, from *De jure belli* 1.2.3 for his discussion of the difference between natural and positive law.²¹ Peculiarities common to the quotations in both Stair and Grotius, which do not correspond to the text of Cicero, establish Grotius as Stair's source, and show that he did not check this text. Later, Stair explained that self-defence was a right under natural law. He borrowed the citation of Gaius and the other citation of Cicero from *De jure belli* 1.2.3, and followed Grotius in quoting only the last seven words of the full passage of Gaius.²² Stair therefore borrowed from Grotius citations of Roman law and writers of classical antiquity, without checking them, for his titles on jurisprudence. He used these citations in relation to natural law. This was the same method that Stair used when borrowing from Grotius for his titles on obligations.

¹⁸ Above, 5.3.

¹⁹ Gudelinus: *De jure feudorum* 3.6.8, 89; S.14.18/2.4.18. Above, 1.2.2.

²⁰ Above, 1.2.1.3.

²¹ S.1.5/1.1.5. 1662 stem: Adv.MSS.25.1.8 and 25.1.10, 1.5; Adv.MS.25.1.11, fol.2R. 1666 stem: Adv.MSS.25.1.5 and 25.1.7, 1.5 gave "*tit: mora:*" instead of "*Cicero*"; Adv.MS.25.1.12, 1.5 gave "*uno*".

²² S.2.3/1.2.3. 1662 stem: Adv.MSS.25.1.5 and 25.1.10, 2.3; Adv.MS.25.1.11, fol.16R. 1666 stem: Adv.MS.25.1.7, 2.3.

The similarity here was noted by Gordon: "Stair, Grotius", 259, although he wrongly identified Gaius as D.9.2.4.1 rather than D.9.2.4.pr, and gave *De jure belli* 1.2.4.1 rather than 1.2.3.1.

Stair also used Gudelinus for the first version's titles on jurisprudence; he used an identical method here as he had in his titles on obligations. With the exception of the citation of Gaius borrowed from Grotius, all Stair's other nine citations of Roman law in "Of Liberty" in the first version were borrowed from Gudelinus.²³ They were all borrowed without being checked, as is shown by the fact that D.15.1.41 and D.50.17.22.pr would have been more relevant authority if given inversely. As with many of the other citations borrowed from Gudelinus for the first version, eight of these citations were in the medieval style. Stair removed two for the third version and added paragraph numbers to another two. For the fourth version, he removed another and added paragraph numbers to the last two. Stair also used Gudelinus for references to continental legal systems for the first version's titles on jurisprudence. Stair's reference to "*Spaniards, Portugals, and other Christian Nations, bordering on the Turks*"²⁴ was a direct translation of Gudelinus.²⁵

Stair also used Vinnius' commentary in the same way for his titles on property as he did for his titles on obligations. First, it has been shown that he borrowed his citations of Grotius and Mynsinger for the third version from Vinnius.²⁶ Both Stair and Vinnius also cited D.10.4.3.14 in those passages; Stair's citation was certainly borrowed from Vinnius.²⁷ Secondly, he borrowed his citation of D.46.3.78 in his discussion of accession from Vinnius' commentary on Inst.2.1.28; Stair cited neighbouring paragraphs of this title of the *Institutes* in the third version.²⁸ There was, in addition, much similarity between Stair's and Vinnius' discussions of these points, suggesting that Stair's passage was a reflection of Vinnius. Thirdly, later in his discussion of accession, Stair added a passage outlining the opposing views of Paul and Gaius on accession of paintings, in which he cited two texts of the *Digest* and Inst.2.1.34. This passage, including the

²³ Gudelinus: *De jure novissimo* 1.3, 3-4.

²⁴ S.2.11/1.2.11.

²⁵ *De jure novissimo* 1.4, 6.

²⁶ Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 257; above, 6.2.3.

²⁷ S.12.38/2.1.39. Vinnius: Commentary on Inst.2.1.33.

²⁸ S.12.34/2.1.34. Vinnius: Commentary on Inst.2.1.28, para 2. Vinnius did not cite this text in the *Notae* on this passage.

citations of the *Digest*, was drawn from Vinnius' commentary on the Inst.2.1.34.²⁹ There is nothing which suggests that Stair checked either *Digest* text. Finally, Vinnius was also probably Stair's source for the citation of the *Authenticum* which he added to his discussion of prescription for the third version.³⁰ Stair also used Vinnius in this way for the new fourth book on actions in the fourth version. It is likely that his citations of Seneca and Cicero too were borrowed from Vinnius.³¹

From this brief survey of Stair's use of his sources outwith the titles on obligations, it is clear that the method which he used when writing and revising his titles on obligations (as has been established by this thesis) was also that which he used for his other titles.

8.1.4 **How Stair was influenced by other movements of continental jurisprudence indirectly through his principal sources**

This thesis has shown that Stair was influenced to a material extent by legal humanism and second scholasticism, both through his education, and indirectly through his use of Scottish and continental treatises.

Scholastic influence can be detected in Stair's tenth title, and has been found in his seventh and eighth by Reid.³² That scholastic influence can be found in the *Institutions* is unsurprising, given the debt that Grotius' theories of natural law owed to scholastic jurisprudence.³³ Indeed, it is probable that most of the scholastic influence found in Stair's writing came indirectly through his use of Grotius. Both of Stair's citations of second scholastics were borrowed, without being checked, from Grotius. Stair drew on Grotius heavily in his titles "Restitution", "Recompence" and "Obligations Conventional", which is where the scholastic influence in Stair is found. It does not

²⁹ Vinnius: Commentary on Inst.2.1.34.

³⁰ S.22.3/2.12.13. Vinnius: Commentary on Inst.2.6.2, para 2

³¹ S.-/4.3.41. Vinnius: Commentary on Inst.4.6.28, para 2. These citations also appear in the *Notae* on Inst.4.6.28.

³² Reid: "Thomas Aquinas and Viscount Stair" generally.

³³ Above, 3.2.6.

seem likely that Stair consulted the works of any second scholastics directly:³⁴ by the seventeenth century, Scots lawyers had abandoned scholastic learning in favour of humanist methods.³⁵

There is a significant humanist aspect to the *Institutions*. Stair was influenced by the method of legal humanism. He showed an interest in the etymology of legal terms and the origin of legal rules. He was concerned with textual authenticity and with establishing law as a rational discipline. That he drew on writers of classical antiquity was in keeping with the methods of both legal humanism and natural law. Further, nine of the jurists cited in the titles on obligations were legal humanists. This was just under half of those jurists cited in the titles on obligations. He cited some legal humanists more than once: Connanus was cited three times in the titles on obligations; Cujacius was cited twice in the titles on obligations and three times in the entire *Institutions*; and Wesenbecius and Duarenus were both cited twice in the entire *Institutions*. Stair therefore repeatedly drew on the authority of these leading legal humanists. This not only indicates the respect in which he held these jurists, but also shows that he believed that citations of their work would be well received, possibly even expected, by his readership.

In contrast, there is hardly any explicit recognition of the *mos italicus* in the *Institutions*: just one citation of Baldus, which was expressly drawn from Craig.³⁶ This was a noticeable omission: Craig and Stair's continental sources made sometimes considerable use of the *mos italicus*. However, Cairns has shown that "Spottiswoode's work largely ignored the older authors" and that the only such jurist he actually consulted was Bartolus.³⁷ This rejection of the *mos italicus* literature was thus in keeping with the practice of Stair's contemporaries if not with that of his sources.

³⁴ Cf. Hutton: "Stair's philosophic precursors", esp. 89-91.

³⁵ Above, 3.2.3.1. Brodie: *Tradition of Scottish Philosophy*, 74-91.

³⁶ S.21.19/2.11.19.

³⁷ Cairns: "*Ius civile* in Scotland, ca. 1600", 163-164.

8.1.5 Stair's use of continental legal authority in the Scottish context

This thesis has not considered Stair's writing within the Scottish context. However, it is worth noting that his choice, and his method of use, of his continental sources was typical of Scottish jurists of the period. The catalogues of the three sample private libraries showed that Stair's principal sources were popular amongst late-seventeenth-century Scottish advocates. His use of Grotius, Gudelinus and Vinnius was in keeping with Cooper's having found them as among the fifteen continental jurists to whom "Repeated reference is made" in Scottish courts in the 1660s and 1670s.³⁸ Indeed, his focus on Low Countries jurisprudence was in keeping with the courts of the period: "the tendency being...to rely on the most modern works from the Continent and from the Netherlands in particular."³⁹

Stair also borrowed citations of other continental jurists, particularly of legal humanists but also of second scholastics and jurists who wrote on French national law. These same jurists were also cited in other Scottish works. Spottiswoode, Skene and other Scots cited Boerius and Chassanaeus on French national law.⁴⁰ Spottiswoode also cited humanists Connanus, Cujacius, Duarenus and Mynsinger.⁴¹ Craig cited Rebuffus⁴² and Zasius⁴³ and was Stair's source for citations of Cujacius and Tiraquellus.⁴⁴ Dolezalek has shown that Gregorius' *Syntagma* was popular.⁴⁵ The treatises of the jurists cited by Stair were often held by more than one of the sample libraries.⁴⁶ He therefore drew on his principal sources for citations of jurists to whom his contemporaries were also referring, and who would therefore be seen as authoritative.

³⁸ T.B. Smith: "Scots law and Roman-Dutch law" (1959) *Acta juridica* 36, 39.

³⁹ T.B. Smith: "Scots law and Roman-Dutch law" (1959) *Acta juridica* 36, 39.

⁴⁰ Cairns: "*Ius civile* in Scotland, ca. 1600", 164; Dolezalek: "French legal literature quoted by Scottish lawyers 1550-1650", 386-389.

⁴¹ Cairns: "*Ius civile* in Scotland, ca. 1600", 162-163.

⁴² Cairns: "*Ius civile* in Scotland, ca. 1600", 152; e.g. Craig: *Jus feudale*, 1.9.5, 42.

⁴³ Craig: *Jus feudale*, 1.9.5, 42.

⁴⁴ Above, 3.2.2.1. Gordon: "Stair, Grotius and the sources of Stair's *Institutions*", 265.

⁴⁵ Dolezalek: "French legal literature quoted by Scottish lawyers", 385

⁴⁶ Above, 1.3.

Stair's practice of borrowing authority from other jurists, even without checking it, was also typical of juristic writing of the period. Hope has been shown to have borrowed a citation of an Act of Sederunt, without checking it, from a manuscript.⁴⁷ On the continent this practice was also seen: one of Grotius' citations of Covarruvias was borrowed without having been checked from second scholastic Leonardus Lessius (it should rather have been of Lancelotus Conradus).⁴⁸

Earlier in this thesis, it was shown that some Scottish seventeenth-century jurists had an extensive knowledge of continental legal literature (including Mackenzie and Fountainhall). Stair was probably not as well versed in the continental legal literature as Mackenzie and Fountainhall (if they had read everything they cited). However, Stair used his principal sources to indirectly consult and to draw on the leading jurists of the early modern period, to learn the bases of their arguments, and to engage with the debates which they entered into. That he used his principal sources to consult the earlier continental literature, rather than checking it directly, does not undermine the scholarship of the *Institutions*, taking account of the standards of the period in which it was written.

8.2 STAIR'S USE OF ROMAN AND CANON LAW

8.2.1 Stair's use of Roman law

It has already been shown that Stair used Roman law “for its equity”⁴⁹ rather than as direct and binding authority for Scots law. This was true even of the fourth version, in which the number of citations of Roman law doubled in the titles on obligations and increased fourfold in those on property law.

⁴⁷ Above, 5.1.4.1.

⁴⁸ R Feenstra: “L'influence de law Scholastique Espagnole sur Grotius en droit privé: quelques expériences dans questions de fond et de forme, concernant notamment les doctrines de l'erreur et de l'enrichissement sans cause” in P. Grossi (ed): *La seconda Scolastica nella formazione del diritto privato moderno* (Milan, 1973) 377, 382-385.

⁴⁹ S.1.11/1.1.12.

What has not, until this study, been addressed is the extent of Stair's knowledge of Roman law. When Stair gave his lecture for admission as an advocate in 1648, he declared that he had found Roman law, with its many glosses and commentaries, unmanageable. He began writing the first version of the *Institutions* eleven years later. Even in the titles on obligations there were over 130 citations of Roman law, and two citations of the *Gloss*. To what extent did Stair increase his knowledge of Roman law in those eleven years?

More than a quarter of the citations of Roman law in Stair's titles on obligations in the first version were borrowed from Grotius, Gudelinus, Vinnius and Corvinus. It is probable that none of these were checked. Most were of the *Digest* or *Codex*, which Stair had called in 1648 the "indigested digested & confused Cod".⁵⁰ However, Stair must have been familiar with the *Digest* and *Codex*. The *Corpus iuris civilis* was the authority which was most frequently cited in court in the 1660s and 1670s, being referred to more often than even earlier Scottish cases or Craig's *Jus feudale*. Most of the references to Roman law in court were to the *Digest*.⁵¹ If this was also correct of cases heard in the interregnum, then Stair must have quickly gained some knowledge of the *Corpus iuris civilis* after 1648. Indeed, he clearly knew Justinian's *Institutes*: he gave synopses of passages in the first version, and consulted Vinnius' commentary, which included the *Institutes*' texts above the comments on them.

Stair added a few citations of Roman law for the second version, and there were approximately forty more in the titles on obligations in the third version than in the second. However, the doubling of the number of citations of Roman law in the titles on obligations (quadrupling in those on property law) for the fourth version was one of the greatest changes in the *Institutions*. He also became much more concerned with the accuracy and detail of his citations of Roman law: he specified sub-paragraphs in a large proportion of his citations of *Digest* and *Codex* texts which had sub-paragraphs; and added paragraph numbers to those which had previously been in the medieval style. He

⁵⁰ "Scotstarvet's 'Trew Relation'", 381.

⁵¹ Smith: "Scots law and Roman-Dutch law: A shared tradition", 39.

also checked a large number of his earlier citations of Roman law, and all those which he borrowed for the fourth version.

Why did he so heavily ‘Romanise’ the fourth version? A possible reason for this might be found in the circumstances of his life between completing the third and fourth versions. Ford has suggested that during Stair’s exile in the 1680s, predominantly spent in the Netherlands, “he matriculated as a member of the University of Leiden ... and he became acquainted with the professors of law both there and at Utrecht.”⁵² It has already been shown that Johannes Voet and Gerard Noodt were among the professors at Leyden and Utrecht at this time. If Stair had attended lectures by these great jurists, or discussed Roman law with them, he may have acquired a better working knowledge, or greater appreciation, of Roman law. If so, this may account for the change in his pattern of citation of Roman law for the fourth version.⁵³

8.2.2 Stair’s use of Canon law

Stair’s use of Canon law has also been examined for this thesis. The leading study of Stair’s use of Canon law is currently that by Robertson, but this did not recognise the full extent of Stair’s use of this source.⁵⁴ Robertson said that, in “Conjugal Obligations”, “the references to canon law are, perhaps surprisingly, not extensive.”⁵⁵ He then pointed to two places within “Conjugal Obligations” where Stair referred to Canon law: on engagements, and for the maxim “*consensus, non coitus, facit Matrimonium*”. He finally noted that Stair cited Covarruvias in this title, whom Robertson classified as a canonist.⁵⁶ Robertson erred in classifying Stair’s citation of Covarruvias as a reference to Canon law: Stair did cite Covarruvias’ *Epitome* on the *Liber Extra*, but in relation to Spanish, not Canon law. More importantly, Stair also cited five Canon law texts in this title (*Liber Extra* 4.1.2, 4.1.10, 4.2.9, 4.2.14, and 4.8.3) and referred to Canon law in his discussion

⁵² Ford: “Dalrymple, James, first Viscount Stair (1619–1695)”.

⁵³ Above, 3.1.1.

⁵⁴ Robertson: “Canon law as a source”, 116-118.

⁵⁵ Robertson: “Canon law as a source”, 117.

⁵⁶ Robertson: “Canon law as a source”, 117.

of the prohibited degrees of kinship, and in his discussion of adultery.⁵⁷ Robertson's assessment does not therefore appreciate the full extent of Stair's reference to Canon law in this title; his conclusion that it was "not extensive"⁵⁸ is wrong. Indeed, Stair made significant reference to Canon law here; nearly always these references were borrowed from Corvinus.

Further, Robertson's discussion of "Obligations Conventional" failed to take account of Stair's citation of the *Liber Extra* 1.35.1 and 1.35.3.⁵⁹ Robertson also gave Stair's citation of Rebuffus as an example of his citation of a canonist. As with Covarruvias, however, Stair was in fact citing Rebuffus on national law.

Finally, Robertson found two citations in "Obligations/Accessory Obligations", which he called Stair's "only direct and full reference to canon law".⁶⁰ This was incorrect for two reasons. First, Stair gave seven citations of Canon law in earlier titles. Secondly, the two citations which Robertson discussed were not actually given by Stair. In the third version, Stair added citations of four texts of Canon law here: *Liber Sextus* 2.11.2 and *Liber Extra* 2.24.28, 1.40.3, and 1.40.4.⁶¹ These were replaced without explanation in the third printed edition with "*C. cum continget, 28. De jurejurando*", "*cap.8. De jurejurando*" and "*C.15. De jurejurando*". This cannot have been done because of differences found in the manuscripts, as this passage appeared in none of those consulted. This change was followed in the fourth and fifth printed editions, but not in the sixth. Robertson referred to the first two of these replacement citations (but, oddly, not the third) as Stair's only citations of Canon law.⁶²

Stair's use of Canon law has thus never been fully considered. Unfortunately, this cannot be done here. Three points, however, should be observed. First, when Stair referred to Canon law in the titles on obligations in the first printed edition, the manuscripts usually gave instead "common law". This may indicate that Stair called Canon law "common law" in the first and second versions, but changed this terminology

⁵⁷ S.4.2/1.4.6 and S.4.3/1.4.7 respectively.

⁵⁸ Robertson: "Canon law as a source", 117.

⁵⁹ Cf. Walker (ed): *Institutions* 1.10.7.

⁶⁰ Robertson: "Canon law as a source", 117.

⁶¹ S.10.97/1.17.14

⁶² Robertson: "Canon law as a source", 117-118.

when preparing the third version. Alternatively, this might have been an amendment made by the copyists that became perpetuated through the manuscript stems.

Secondly, Stair made many more references to Canon law than is currently appreciated. Indeed, in the printed editions, Stair gave almost as many citations of Canon law texts (eleven) as he did of writers of classical antiquity (thirteen). He also made around ten additional general references to rules of the Canon law. Admittedly, Stair's citations of Canon law seem to have been borrowed from other seventeenth-century jurists without being checked.⁶³ Yet this is no different to his citation of writers of classical antiquity or his citation of Roman law in the first version. In the greater context of Stair's pattern of citation and use of authority, therefore, Canon law was an important source for Stair's titles on obligations. This is very interesting, given that the first version of the *Institutions* was written exactly 100 years after the Scottish Reformation.

Finally, all Stair's citations of Canon law in the titles on obligations in the first version were of the *Liber Extra*. Three of those added for the third version were also of the *Liber Extra*; one was of the *Liber Sextus*. He nowhere cited Gratian's *Decretum*. The *Liber Extra* was "a more orderly and complete statement of the canon law than [Gratian's *Decretum*]"⁶⁴ and replaced the *Decretum* as the basis of canonist teaching.⁶⁵ By the early fourteenth century, the principal texts in the canonist curriculum were the *Liber Extra*, *Liber Sextus* and *Clementines*; the *Decretum* "became a distinctly secondary subject in the curriculum."⁶⁶ However, seventeenth-century jurists still cited the *Decretum*. Grotius, for example, cited it around seventy times, the *Liber Extra* over forty times, and the *Liber Sextus* only five times. Stair's focus on the *Liber Extra* is not found in Corvinus, who did not show a preference: his commentary on D.23.1 cited the *Liber Extra* more often than the *Decretum*, both were cited often in his commentary on

⁶³ Presumably, the four citations which appear together in "Accessory Obligations" were also borrowed; Stair's source for these citations has not been identified.

⁶⁴ R.H. Holmholz: *The Spirit of Classical Canon Law* (Spirit of the Laws Series, Athens GA, 1996 rept. 2010), 12

⁶⁵ J.A. Brundage: "The teaching and study of Canon law in the law schools" in W. Hartmann and K. Pennington (eds): *The History of Medieval Canon Law in the Classical Period, 1140-1234: from Gratian to the Decretals of Pope Gregory IX* (Washington, 2008) 98, 102.

⁶⁶ Brundage: "The teaching and study of Canon law in the law schools", 111.

D.23.2, and the *Decretum* was cited almost twice as often as the *Liber Extra* in his commentary on D.24.2. Stair's choice of citations was not even a reflection of Corvinus' citations in the passages which he used. For example, he paraphrased a sentence of Corvinus on adultery which had several citations of Gratian's *Decretum*. Although not conclusive, this may indicate that, for whatever reason, Stair was hesitant to cite the *Decretum*.

8.3 CLOSING REMARKS

Much of Stair's aim in writing can be gleaned by considering the title he chose for his work: *The Institutions of the Law of Scotland, Deduced from its Originals, and Collated with the Civil, Canon, and Feudal Laws, and with the Customs of Neighbouring Nations*. Why did Stair choose to call his work the *Institutions*? There was no Scottish precedent for calling a work 'institutions'. The first, second and third versions did not follow the typical institutional division into four books, and contained no account of procedure; he did not choose this title because his structure exactly mirrored Gaius' and Justinian's. He did not call his work a commentary, as Gudelinus had done. In choosing the name *Institutions*, he was placing his work in an emerging category of European writing which focused on national law, with the likes of John Cowell (whom he cited⁶⁷), Conchyleus and Grotius' *Inleydinge*. The clause "*Collated with the Civil, Canon, and Feudal Laws, and with the Customs of Neighbouring Nations*" resembled other earlier continental works. Stephanus' *Oeconomia* had been "*juris universi civilis, feudalis & canonici* [of the universal Civil, Feudal and Canon law]". Craig's *Jus feudale* had been an examination of the law "*in Scotia, Anglia, & plerisque Galliae* [in Scotland, England, and most of France]". The titles of Boerius and Gomezius also reflected similar aims.

More than that, however, Stair's title precisely conveyed what he had done. He had set out Scots law, taking account of natural law, the learned laws, the law of England and various continental systems, and continental jurisprudence. He drew on the philosophies and methods of the leading schools and movements of the early-modern

⁶⁷ S.5.13/1.5.13.

period: legal humanism, second scholasticism, natural law, jurists who wrote on national law, and Dutch jurisprudence. This was not a work cobbled together from second-rate sources. Rather, Stair had been selective when choosing his sources, which he had used critically, and thereby had engaged with the arguments and debates between the leading jurists of the early-modern period. The *Institutions* was not just a book of Scots law; it was an expression of Scotland's place within the intellectual tradition of European jurisprudence.

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