Viscount Stair

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In the Gilbert Scott Building of this University of Glasgow, at the foot of the grand staircase leading up to the University Court Room and the Senate Room, and outside what used to be the Law Classroom, there is a carved stone tablet on the wall commemorating Viscount Stair. On the Fifth Centenary gates one of the names recalling the third century of the University's history is Stair. When in 1985 the School of Law was about to move into the accommodation newly converted for it, the School unanimously resolved that the premises be named the Stair Building. Why do we, and why should Glasgow University, and particularly its lawyers and the lawyers of Scotland, remember and honour Stair? Before trying directly to answer that question, I must try to sketch the background[1] and Stair's career.[2]

James Dalrymple was born in Ayrshire in 1619, son of the laird of Stair and his wife, who were strong Presbyterians. He came up to the University of Glasgow from Mauchline Grammar School in 1633 and went through the Arts curriculum. He graduated Master of Arts in 1637 and was listed first in his year.[3] At this time Charles I was attempting to anglicise the Presbyterian Church of Scotland and to impose a service book on it. This gave rise to protests, to the famous riot in St. Giles Cathedral in Edinburgh, at which one Jenny Geddes is said to have hurled her stool at the officiating clergyman, and to the signing by large numbers of people of the National Covenant in 1638. Young Stair probably signed the Covenant. The General Assembly of the Kirk which met in Glasgow in 1638 condemned Charles's ecclesiastical policy, the book of canons, the service book and other elements of the king's policy. A covenanting army was raised and marched to the Border but Charles, by the Pacification of Berwick, agreed to the Scottish demands. In this force young Stair commanded a company in the Earl of Glencairn's regiment of foot. The Scottish army then occupied Newcastle and

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1. See Pryde, *Scotland from 1603 to the Present Day*, Ch. 1; Donaldson, *Scotland: James V–James VII*, Part III; Davies, *The Early Stuarts, 1603–1660*; G. N. Clark, *The Later Stuarts, 1660–1714*.
2. See Mackay, *Memoir of Sir James Dalrymple, First Viscount Stair*; Walker, *The Scottish Jurists*, Ch. 8, and references therein.
3. *Munimenta Almae Universitatis Glasguensis*, III, 22.

insisted on remaining on English soil until a settlement was reached. A treaty was agreed at Ripon in August 1641. But in March 1641, young Stair, aged 22, had been invited by some of his former teachers to become a candidate for a vacant post of regent or teacher in the University of Glasgow and, still in uniform, competed for the post and was appointed. Under the system of regenting, a regent took an intake of students through the whole curriculum and did not confine himself to teaching a specific subject. But Stair's teaching seems to have been mainly philosophy, particularly logic, and there survives a volume of dissertations on philosophical subjects which students had, as a requirement for graduation, to prepare and defend publicly before the regents as their examiners, and which is dedicated to Stair.[4] While Stair was engaged in regenting, he also studied Latin and Greek literature, classical history and antiquities, and the civil law of Rome. He also married. In 1647 he resigned, went to Edinburgh and in 1648 was called to the Scottish bar.[5]

It is noteworthy that Stair had no formal legal education. Though it had been taught earlier in each of them, law was not then taught in any of the four Scottish universities, and only if he had gone to France or the Netherlands could Stair have had the benefit of academic legal education. He learned entirely, accordingly, by private study. There were available various editions of the texts of the civil law of Rome and various books thereon, all published on the Continent, but we do not know which he may have read. The materials on Scots law were very scanty. There were in existence the collection of Scottish legislation from 1424 to 1566 known as the Black Acts, Skene's *Lawes and Actes* of 1597, covering the same period and continued to 1597, Skene's edition of *Regiam Maiestatem and the Auld Lawes* of 1609 and little more. There were no printed reports of decisions. There were several collections of notes of decisions and legal points circulating in manuscript, notably those now known as Balfour's *Practicks*,[6] Haddington's *Practicks*,[7] and Hope's *Practicks*.[8] There were no textbooks on Scots law at all. Sir Thomas Craig's *Jus Feudale* was a text on the feudal law of Western Europe with reference to its application in Scotland, but was not a comprehensive work; it dealt only with the land law; though written about 1600 it was not printed until 1655, though probably known in manuscript earlier. There were accordingly in existence some collections of materials on Scots law but no book, and it is hard to say that there was a system of law. Certainly it was unsystematised and there were gaps and areas of uncertainty. The need for a comprehensive text on Scots law, systematically arranged, may have been apparent to Stair even in 1648.

During the years Stair had been teaching in Glasgow, the English Civil War had been fought and by 1648 the forces of the parliament had triumphed and Charles I

4. *Theses Logicae, Metaphysicae, Physicae, Mathematicae et Ethicae*, G.U. Library, Sp. Coll. 62.3.
5. SRO, CS 1/5 f. 182v.
6. Printed 1754 and reprinted by the Stair Society in 1962–63.
7. Still unpublished.
8. Edited by Lord President Clyde and published by the Stair Society in 1937–38.

was a prisoner. In January 1649, Charles I was tried by his English subjects and executed. In February, Charles II was proclaimed King of Scots and the Scottish Estates appointed commissioners to proceed to The Hague to negotiate with him; young Stair went as secretary to the commissioners. Immediately before he left he was named one of a large commission appointed by Parliament to undertake the revision of the law with powers to consider the customs and practices both of the civil and criminal courts "in order that the commissioners might frame a formal model or frame of a book of just and equitable laws to be established and authorised by his Majestie and the Estates of Parliament, and might abrogate any bygone Acts of Parliament which had fallen into desuetude or become superfluous or unprofitable."[9] The analogy with Justinian's appointment of commissioners to frame the *Digest* and the *Institutions* is clear. Again this may have suggested to young Stair the need for a book, if not of just and equitable laws, at least of the accepted customs and rules. But there is no record of this commission ever having met, still less reported; life was too hectic in and after 1649 for law reform. But the appointment to the delegation to negotiate with Charles II and to the commission to reform the laws both suggest that young Stair was regarded as an able young man, a rising man, and one well thought of.

In 1650 another commission, again with Stair as secretary, was sent to negotiate with Charles II at Breda. In connection with both commissions, young Stair is likely to have met Charles II, who was only a little younger than him. Whether on these trips to the Netherlands Stair sought out any of the great Dutch jurists then teaching, such as Paul Voet, Vinnius,[10] or Antonius Matthaeus, or got hold of any of their books, is unknown but is possible.

In May 1650, Stair was appointed by Parliament with others to meet Charles II when he landed at Garmouth at the mouth of the Spey and signed the Solemn League and Covenant, but he was not with the Scottish army defeated by Cromwell at Dunbar in September 1650 or at Worcester in 1651. Thereafter Charles II escaped back to the Netherlands and Scotland was an occupied country; the Scottish parliament was abolished and from 1652 the Court of Session was replaced by a body of Commissioners for the Administration of Justice, half of whom were English. Stair seems to have established amicable relations with the occupying power and when in 1657 one of the Commissioners died, General Monck, commander in chief in Scotland, nominated Stair as a good lawyer and one fit to be a judge.[11] He took his seat on the bench on 1st July, 1657, aged 38 and of nine years' standing at the Bar. He had come pretty far very quickly.

9. 1649, APS VI (2), c.271. There had been earlier commissions in 1425 (APS II, 10, c.10), 1469 (APS, II, 97, c.20), 1473 (APS II, 105, c.14), 1566 (APS I, 29 and III, 40) (which resulted in the publication of the Black Acts), 1574 (APS, I, 30 and III, 89) (which resulted in the compilation of Balfour's *Practicks*), 1578 (APS, III, 105, c.18), 1592 (APS III, 564, c.45) and 1628 (APS, I, 34-35) renewed in 1633 (APS, V, 46). There were also later ones, in 1681 (APS, VIII, 356, c.74) and 1695 (APS IX, 455, c.57).

10. Vinnius' *In IV Libros Institutionum Commentarius*, a book long famous in law schools and repeatedly re-issued, was published in 1642.

11. APS VI (2) 764, 907, 908.

In 1660 Charles II was restored and Stair went to London to pay his respects to the king, and doubtless reminded him that they had met before. He was knighted and when the Court of Session was restored in 1661 he was again made a judge.[12] In 1664 he was advanced to be a baronet. In 1670 he was a member of a commission which negotiated with English commissioners on a possible closer union between the two countries, but negotiations broke down, we are told, on the insistence of the Scots that Scots law be preserved and not abolished in the interest of unity.[13] In 1669-72 he was also a member of a large commission charged to consider the regulation of the three supreme courts in Scotland, Session, Justiciary and Exchequer, and this commission in 1672 recommended various changes, many of which were adopted and regulated these courts for a very long time. In 1671 Stair was promoted Lord President of the Court of Session. He was not Lord Justice General (head of the criminal court), which office was then and until 1830 held by a lay lord, and all his career he had little contact with the criminal law, for which indeed he had a distaste. He also sat in parliament for Wigtownshire and is credited with having sponsored various reforms, notably the Subscription of Deeds Act 1681.[14] He probably also had a hand in other important legislation of that year, such as the Judicial Sale Act 1681, and the Bills of Exchange Act 1681.

But later in 1681 Parliament passed the Test Act[15] which imposed on all persons in offices and places of public trust the duty to swear publicly and to subscribe an oath, ostensibly designed to secure the protection of the Protestant religion but truly designed to secure the submission of all in important positions to the royal supremacy, and to obtain a repudiation of the National Covenant and the Solemn League and Covenant. As a young man Stair had probably signed the National Covenant and he had been a party to getting Charles II to subscribe the Solemn League and Covenant. He declined to subscribe the Test, was replaced as Lord President, and retired to his home in Galloway. In 1682 he thought it prudent to leave Scotland and he established himself at Leiden in the Netherlands where he and several of his sons matriculated at the University; he became a mature student, aged 62. In his absence attempts were made to have him extradited and prosecuted for treason, and in 1685 he was actually indicted for high treason.[16]

While in the Netherlands, he associated with the refugees who grouped round William of Orange, the hope of those who wished a Protestant succession to the Crowns, who was nephew of both Charles II and James VII and II and also son in law of James. He became a confidant and adviser of William and when in 1688 William invaded England and James fled, Stair came with William in the royal flagship. He acted as intermediary between William and the Scottish Convention

12. APS VII, 124.
13. E. U. Laing. MSS. 11. 521.
14. APS, VIII, 242, c.5.
15. APS VIII, 243, c.6.
16. APS VIII, App. 32. See also VIII, 490, c.52.

which ultimately in April, 1689, offered the crown of Scotland to William and Mary. In March 1689, the Lord President of the Court of Session, Sir George Lockhart, was conveniently assassinated by a disgruntled litigant and in October Stair was reappointed to his old office and to the Scottish Privy Council. He held office until his death in 1695. In 1690 he was created Viscount Stair, Lord Glenluce and Stranraer.[17] In that year too attacks by political enemies drove him to write and publish his *Apology* defending his conduct.

He left a large family, several of whom attained distinction.[18] His eldest son, John, was Lord Justice Clerk, 1688–90, Lord Advocate 1687–88 and 1690–91 and Secretary of State 1691–95, and as such shared responsibility and obloquy for the Massacre of Glencoe. In 1703 he became the first earl of Stair. The third son, Hew, succeeded his father as Lord President (1698–1737). The fifth son, David, became Lord Advocate, 1709–11 and 1714–20. More remote descendants included many distinguished in the law, including several judges, and in the army, and the family is still a leading one in the southwest of Scotland.

Such was, in outline, his varied career, which included much distinguished public service. But it is not for his public service alone that he is remembered, but rather for his writings, and to these we must now turn.

At the end of 1681, while in retirement in Galloway, after the Test Act and his consequent resignation, he published at Edinburgh a book, *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.* It comprises a Dedication to Charles II, and two parts with separate title-pages and pagination, the first comprising 22 titles, the second 9 titles, and there is also a small treatise entitled *Modus Litigandi or Form of Process observed before the Lords of Council and Session in Scotland* normally bound in. These deal, as he tells us,[19] with the constitution of original rights, the transmission of original rights among the living and from the dead, and the cognition and execution of these rights. One should note the title. The word "Institutions" is clearly derived from Justinian's *Institutions* indicating a general instructional book; "deduced from its originals" means, I think, that principles and rules are arrived at by deduction from more fundamental origins, sources of higher authority; "collated with the civil, canon and feudal laws and with the customs of neighbouring nations" means that Scottish deductions are compared with the deductions arrived at by the earlier, wide-ranging, European systems and the customs of England, France and the Netherlands.

In 1683, while at Leiden, he published at Edinburgh *The Decisions of the Lords of Council in the most important Cases debate before them, Part First,* containing decisions noted by him from 1661 to 1671 when he became President. The book runs to 720 pages and includes about 1200 cases in chronological order. This was

17. APS IX, 112.
18. On them see *Scots Peerage*, s.v. Stair.
19. Advertisement to Second edition.

the first volume to be published in Scotland containing reports of decisions in recognisably modern form. In 1685, while still at Leiden, he published there a work entitled *Physiologia Nova Experimentalis*, a treatise on natural philosophy or physics, which must have been projected or even written earlier, as it is mentioned in the royal licence he obtained for printing his *Institutions* in 1681. It was, however, soon superseded by Isaac Newton's *Principia* of 1687, but has interest as an account of the pre-Newtonian view of the natural world. It is at present being translated for the first time.

Then in 1687 there appeared *The Decisions of the Lords of Council and Session in the Most Important Cases Debate Before Them; Part Second*, covering the years 1671 to 1681, the years when he was Lord President, extending to 896 pages and comprising about 1200 cases. This continued the reports of the previous volume.[20]

Back in Scotland, he published in 1693 a revised edition of his *Institutions*, of which I shall speak more later. In 1695, at the end of his life, he published a *Vindication of the Divine Perfections*, eighteen meditations on God as revealed by reason and revelation. Considering his public duties, as Lord President, member of the Privy Council and Parliament, it was a considerable volume of publication. The *Institutions*, *Physiologia* and *Divine Perfections* may be regarded as parts of a complete system of his philosophy, comprising knowledge of the relations of men, of the universe and of God, and connects with his original concern in Glasgow fifty years earlier with metaphysics and ethics, and goes some way to explain his view of law as ultimately divinely ordained. His contract of 1681 with the printer[21] refers also to a treatise containing Four Enquiries concerning Human Knowledge, Natural Theology, Morality and Physiology but unless the *Physiologia* and the *Divine Perfections* are part of this enterprise, this work was never printed and is now lost. There have also been attributed to Stair several anonymous pamphlets designed to win support for the Revolution Settlement of 1689 but the authorship of these is not certain. It is at present being investigated by computer analysis of the word pattern and language used.

Of these works, the two volumes of *Decisions* must have been at the time of immense value and utility. They were the first collections of decisions to be published in Scotland. They cover the first twenty years after the Restoration in chronological order and probably include all the important and interesting decisions recorded by a very skilled lawyer who sat or presided when they were argued and decided and we know that he recorded them contemporaneously.

To concentrate, however, on his most important work, the *Institutions*. In the

20. Several of Stair's colleagues on the bench after 1661 also collected decisions, but none of them were published till later. These include Gilmour's *Decisions, 1661-66* (published with Falconer's *Decisions* in 1701), Nisbet, Lord Dirleton, whose *Decisions* were published with his *Doubts and Questions in the Law* in 1690, Falconer, whose *Decisions* appeared with Gilmour's in 1701 and Hog, Lord Harcarse, whose *Decisions* appeared in 1757, while others compiled *Practicks*, editions of the statutes or editions of books. They were a distinguished and industrious set of judges, one of the most illustrious Benches ever to have sat in Scotland.

21. Printed in Dallas *Styles* (1st ed. Pt. II, 152; 2nd ed. Vol. 1 Pt. II, 76).

Dedication of the first edition to Charles II, he calls the work "A Summary of the law and customs of your ancient kingdom of Scotland", but he goes on "In which material justice (the common law of the world) is, in the first place, orderly deduced from self-evident principles, through all the several private rights thence arising, and in the next place, the expedients of the most polite nations for ascertaining and expeding the rights and interest of mankind, are applied in their proper places, especially those which have been invented or followed by this nation . . . But there is not much here asserted upon mere authority . . . but the original motives, inductive of the several laws and customs, are therewith set forth . . . I have, as distinctly and clearly as I could, by this Essay, given a view of the law and custom and the decisions of the Session, since the Institution of the College of Justice, as they have been remarked and reported by the most eminent judges and pleaders from time to time, which I hope shall be more enlarged and improved by others." Legal rights accordingly were deductions from higher principles, not merely rules laid down by authority.

The second edition of 1693 bears to be "Revised, Corrected and Much Enlarged". It contains an Advertisement, Index of the Titles, the text, and an Appendix dealing with some recently enacted statutes. In the Advertisement, Stair points out that he has referred only to the later and more authentic and useful collections of decisions. Also, "in the former edition, I designed the treatise to be divided into three parts as being the most congruous to the subject-matter of jurisprudence. The first part, being concerned with the constitution of original rights; the second, concerning the transmission of these original rights, among the living and from the dead; the third concerning the cognition and execution of all these rights. Yet, finding it would be acceptable to divide the institutions of our law into four books, as the Institutions of the Civil Law are divided, and, especially because there is a more eminent distinction in our law between heritable rights of the ground and moveable rights, 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." He goes on to say that he had divided the long titles in the first book and put them under more special titles and divided the paragraphs.

There have been four further posthumous editions of the *Institutions* of which the fifth, by Professor J. S. More in 1832, has extensive notes substantially bringing the text up to date; the sixth, which reprints the text of Stair's own second edition was published in 1981 to celebrate the tercentenary of the book's first publication.

What had prompted Stair to write his *Institutions*? There are several possible factors, the study of Justinian's *Institutions*, his membership of the law reform commission of 1649, the example of the Dutch jurists whose works he probably saw in the Netherlands in 1649 and 1650,[22] his membership of the commission on

22. These would include Joost van Damhouder (*Praxis Rerum Civilium*, 1567), Peter Peckius (*Tractatus de Jure Sistendi*, 1564), Petrus Gudelinus (*De Jure Novissimo*, 1624), Hugo Grotius (*Inleiding tot de Hollandsche Rechtsgeleerdtheyd*, 1621 and *De Jure Belli ac Pacis*, 1625), and Simon Van Leeuwen (*Het Roomsch Hollandsche Recht*, 1651).

union in 1670,[23] which showed the threat to Scots law, the need in the comparatively settled times after the Restoration for a book to guide judges and lawyers. There was still in the 1680's an almost complete dearth of textbooks; Craig's *Jus Feudale* had been published in 1655 and was used by Stair[24] but only covered part of the ground. It may have been simply the desire of a learned and diligent judge, partly for his own satisfaction, partly for the benefit of his colleagues and younger men, partly to assist and improve the administration of justice, to try to set down in logical form the principles on which the courts should act in administering justice. Manuscripts date from as early as 1664 and copies of the work began to circulate in manuscript in the 1670's and this led him to publish it. "My modesty did not permit me to publish it, lest it should be judicially cited where I sat; but now, becoming old, I have been prevailed with to print it, while I might oversee the press."[25] He also wrote: "The former edition was collected by me in many years and designed chiefly for my own particular use, that I might know the decisions and Acts of Session, since the first institution of it, and that I might the more clear and determine my judgment in the matter of justice."[26]

It is however hard to take this at face value. If Stair, or any other lawyer, were compiling a book for his own use, his private reference book, it seems more likely that he would have compiled it as notes, with references, as was done by the compilers of *Practicks*, rather than as a fully written out, discursive text. One must suspect that he had publication and the instruction of others in mind from the start, just as modern politicians assiduously keep diaries with an eye to their eventual publication as their Memoirs.

Whether Stair realised it or not, and whether he was seeking deliberately to do so or not, he was in fact doing what was being done all over Western Europe about that time. All over Europe jurists were writing texts on the nascent distinct national legal systems which were evolving separately as distinct nation-states developing their distinctive legal system, utilising materials drawn from the civil, canon and feudal laws which had previously, to various extents, been common to them all.[27]

What was his view of law, in the most general sense of that term? He defined law as "the dictate of reason, determining every rational being to that which is congruous and convenient for the nature and condition thereof . . ."[28] Law then was not to him the command of the current political superior, but what human reason dictated. To him the absolute sovereign was divine law, which was also the

23. *Cf.*, Cowell's *Institutiones Juris Anglicani*, 1605; Zouche's *Elementa Jurisprudentiae*, 1629.
24. On this see Walker, "The Background of the Institutions" in *Stair Tercentenary Studies* (Stair Society, 1981), p. 69.
25. Dedication to First Edition.
26. Preface to Second Edition.
27. K. Luig, "The Institutes of National Law in the Seventeenth and Eighteenth Centuries", 1972 *Juridical Review* 193.
28. *Inst.* I, 1, 1.

law of all rational creatures and also called the law of nature.[29] The law by which private rights were constituted, conveyed or extinguished were divine or human.[30] Divine law was the law of nature written in the hearts of men and also called conscience,[31] equity[32] or the moral law;[33] human law was introduced by men, by tacit consent, custom or command of those having legislative power.[34] Human laws included the law of nations[35] and the civil or municipal law of various communities.[36] Human positive law was needed to make precise the application of principles of natural law in particular circumstances.[37] His attitude was accordingly that rational creatures, by the exercise of their reason, saw law as the principles regulating conduct, principles dictated by God, nature, reason, conscience and morality. Human positive laws stood on a lower plane, being men's attempts to make precise in particular cases what they thought God, nature and reason prescribed. Thus Stair's view would have been that the law of God or of nature dictated that after some time rights not exercised should be extinguished; the human law of Scotland as to prescription lays down that some rights are extinguished after five years, some after twenty years, and some never.

His view of law is very similar to that of Aquinas[38] and he owes a good deal to the thought of the later Spanish jurist-theologians, to Vitoria, Molina and, particularly, Suarez. He was also certainly much influenced by Grotius' *De Jure Belli ac Pacis* of 1625, a book which ranges much more widely than its title would suggest and which he cites repeatedly. Grotius also sought to deduce positive law from principles of the law of nature.

Stair's attitude to and his view of law in general is accordingly traditional and based in the medieval tradition; in its time it was possibly even rather old-fashioned; he has little affinity with contemporary or later theorists such as Bodin and Hobbes and he cannot be regarded as a precursor of the Scottish Enlightenment or the Scottish School of Common Sense. This medieval theory of natural law was more held by Catholics than Protestants, but was also widely held by Protestants in the 16th and 17th centuries, not least by Calvin. There is nothing inconsistent with Stair's Presbyterianism in his holding a view of law previously developed mainly by Catholic thinkers. As the law has developed today we have to devote all our attention to understanding the positive laws of men and one would be hard pressed to deduce some of the modern rules from dictates of God, reason, nature or conscience.

29. *Ibid.*.
30. I, 1, 2.
31. I, 1, 5.
32. I, 1, 6.
33. I, 1, 7.
34. I, 1, 10.
35. I, 1, 11.
36. I, 1, 12.
37. I, 1, 15-16.
38. *Summa Theologiae*, I, 2, Qu. 90-91.

But Stair was trying to do more than set down the rules currently accepted in Scotland. He was trying to deduce propositions from fundamental principles of universal applicability. "The principles of law are such as are known without arguing and the judgment, upon apprehension thereof, will give its ready and full assent; such as God is to be adored and obeyed, parents to be obeyed and honoured, children to be loved and entertained. And such are these common precepts which are set forth in the civil law, to live honestly, to wrong no man, to give every man his right.[39] But here we shall speak of the most general principles which have influence upon all the rights of men, leaving the more particular ones to the rights flowing therefrom in their proper places."[40] He then lays down as the first principles of equity, natural law or conscience, obedience to God,[41] human freedom,[42] and human power to bind oneself,[43] and as the three prime principles of positive law, the liberty of men to make societies, to delimit every man's property and to maintain commerce with others. "The principles of equity are the efficient causes of rights and laws; the principles of positive law are the final causes or ends for which laws are made and rights constituted and ordered."[44] That is: equity or natural law gives rise to and creates rights and laws; laws are made and rights constituted to give rise to principles of positive law.

An example of his deducing propositions from fundamental principles can be seen in his treatment of reparation. Before his time there had been recognised various kinds of wrongs which gave rise to claims by the victims for redress, such as assythment for injuries, spuilzie of goods, ejection from land and so on. Stair puts it this way: obligations by delinquence are introduced by the law of nature;[45] the obligation to the victim is created by injury or wrongdoing;[46] apart from criminal consequences it gives rise to the right of exacting reparation for damage inferred thereby;[47] the interests of a person which may be damaged are his life, limbs and health, his liberty, his fame, reputation and honour, his property.[48] Under these heads fall the recognised specific delinquences, such as injury, extortion, spuilzie, ejection, and others.[49]

What were Stair's models? It is important to observe that while in a general way Stair was clearly influenced by Justinian's *Institutions* he did not copy the structure or arrangement of that work.[50] Nor did he set out to adapt that work to

39. *Cf.*, Justinian, *Inst.* I, 1, 3: *Honeste vivere, alterum non laedere, suum cuique tribuere.*
40. I, 1, 18.
41. I, 1, 19.
42. I, 1, 20; I, 2, 1-16.
43. I, 1, 21; I, 3 to I, 18.
44. I, 1, 18.
45. I, 9, 1.
46. I, 9, 2.
47. I, 9, 2 at end.
48. I, 9, 4.
49. I, 9, 7-30.
50. The structure of that work is: I: Introductory matters, persons and family law; II: Property rights and wills; III: Intestacy; obligations by contract and quasi-contract; IV: Delicts; actions.

Scotland nor to produce a Scottish edition or version of it. So far as has been discovered the structure of his book is original and not closely founded on any earlier work. If that is so, it adds to his intellectual stature that of himself he devised such a logical structure.

What were the sources of his particular propositions? In his *Apology* of 1690 Stair wrote: "And I did write the *Institutions of the Law of Scotland* and did derive it from that common law that rules the world, and compared it with the laws civil and canon and with the custom of the neighbouring nations . . ." By the common law which rules the world I understand him to mean the law of nature, conscience or the moral law. The sources most commonly referred to for the rules of human positive law applied in Scotland are the decisions of the Court of Session, drawn largely from his own *Decisions*, and from some of the *Practicks*, particularly those of Spottiswoode, Hope and Haddington. Next are statutes of the Scottish Parliament. A long way behind these in frequency of citation are Craig's *Jus Feudale*, the Dutch jurists, particularly Grotius, the Bible, the Roman civil law and the canon law. Stair's book is accordingly a statement predominantly based on indigenous materials, not on either theoretical or foreign ones. The hierarchy of formal sources is (1) our ancient and immemorial customs called our common law, as declared in frequent decisions of the Lords of Session; (2) Scottish statutes; (3) Acts of Sederunt of the Lords; (4) recent customs and practices as evidenced by decisions and, failing other sources, (5) the judges' views of what equity and natural law prescribe. To him the civil, canon and feudal laws and the customs of neighbouring nations were not sources from which to copy so much as sets of principles and rules valuable as yardsticks for comparison. They might cast light on Scots law by showing what the lawyers of other developed countries had deduced from ideas of the law of nature. Stair made substantial reference, particularly in Book I, to Roman civil law but not as authoritative nor to adopt it but rather, when deducing the law of Scotland from principles of natural law, to see how far the results corresponded with or departed from principles recognised in Roman law. In some cases he suggests that a Roman rule should be adopted in Scotland to fill a gap, in default of native authority. Similarly he recognises that in certain areas, marriage, testamentary succession and executry, Scots law had, under the influence of the medieval church, accepted rules of canon law but by Stair's time that had become an historical source and no longer a well from which to draw a living stream. So too with feudal law; Stair founded substantially on Craig's *Jus Feudale* but a large part of his account is based on the analysis of the customs and conveyancing practice of the 17th century and the decisions which had shaped and clarified these customs: it was a restatement of the feudal law of Scotland and there is not much incorporation of or even cross-reference to the original feudal law of Western Europe. Of those "customs of neighbouring nations" he refers mainly to England and France, but not nearly as much as did Craig who pointed to numerous parallels with England, though he considerably overstated the similarity.

To what extent did Stair create modern Scots law? I think he did to a material extent. In the first place he put a great many rules and groups of legal propositions into order, grouping them in a logical way, under general heads in a way that had never been done before. There had previously been recognised various rules about contracts and about harm to others and so on, but Stair, following Roman ideas, recognised the broad general category of Obligations in General,[51] which he then divided into Conjugal Obligations springing from marriage,[52] Obligations between parents and children,[53] Obligations between guardians and their wards,[54] Obligations to make restitution of things belonging to others,[55] Obligations to make recompense or remuneration,[56] Obligations to make reparation for delinquencies,[57] and Obligations Conventional, by promise, paction and contract,[58] followed by titles on the major particular kinds of contracts[59] and concluding with Liberation from Obligations.[60] Previously, and to some extent afterwards, an obligation meant in Scots law a bond, particularly to pay money; Stair introduced the wider concept of obligations as a nexus between persons, created by family relationship, by unjustifiable harm, or by promise or agreement. Secondly, under each of the Titles his analysis and exposition of the principles is a great advance on anything that had appeared previously. Previous writing, published and unpublished, recorded the substance of particular statutes or of the decision of particular disputes, but did not, as he did, state general principles or propositions and deduce from them the precise rules which determined particular disputes, with frequent illustrations from decisions which he and others had noted. Most of the points collected in the earlier *Practicks* are specific points only and it is not at all clear whether there is a higher and more general proposition. Thirdly, at some points he filled gaps by suggesting the use of a principle derived from elsewhere, frequently from Roman law. A notable one is the principle of the carrier's liability derived from the Edict *Nautae, Caupones, Stabularii.*

What has been the importance and value of Stair's *Institutions*? The short answer is: Enormous. From its first publication the *Institutions* has been regarded as of outstanding importance and value. Not only does it cover the whole private law but it presents the subject matter not as a series of dictates of a superior but as a body of principles deduced from fundamental propositions of just dealing, which principles are then elaborated, explained and exemplified and the exceptions stated. Thus in relation to the right to be free from harm or injury, he expresses the basic proposition "that obligations by delinquence are introduced by the law of

51. I, 3.
52. I, 4.
53. I, 5.
54. I, 6.
55. I, 7.
56. I, 8.
57. I, 9.
58. I, 10.
59. I, 11-17.
60. I, 18.

nature";[61] the views of all men and all nations evince this by everywhere acknowledging the reparation of damages. This had a double aspect, punishment, which was a matter for God, and "the obligation of repairing his damage by putting him in as good a condition as he was in before the injury."[62] That is the general principle. He then goes on to enumerate the interests which may be infringed by a wrongdoer.[63] "According to our several rights and enjoyments, damages and delinquences may be esteemed. As first, our life, members and health, . . . next to life is liberty and the delinquences against it are restraint and constraint . . . The third is fame, reputation and honour . . . The fourth interest that may be damnified is our content, delight and satisfaction and especially by the singular affection to, or opinion of the value or worth of anything that the owner hath . . . The last damage is in goods and possessions." This gives us a framework or series of major heads under which the main applications of the principles of repairing damage can be fitted. It is still a sound logical basis for stating and explaining the law.[64] Then later[65] he deals with the individual kinds of delinquences, assythment, extortion, circumvention and so on. The esteem in which the work has been held is evidenced by the number of times it has been cited in argument and decision and relied on as authority. It was being cited even in his lifetime and repeatedly in the 18th and 19th centuries, the classical age of Scots law. It was constantly referred to by the later text writers. Thus Hume in 1821 told his students: "He who has done most for us and stands certainly in the highest place is Lord Stair, an acute reasoner certainly and a profound and intelligent lawyer, who has given us a complete system of our law, from which all later authorities have drawn, and were obliged to draw, a great part at least of what is most valuable in their works."[66]

What accordingly has been Stair's achievement, and why do we, why should we, honour him? In the first place he wrote the first connected narrative statement of the whole private law of Scotland, laid out in clear logical order, and well supported by references to authorities. Secondly, his text is an enormous advance on all previous writings on the subject. Most of the earlier works, the *Practicks*, were then still in manuscript, and some still are, and they were collections of notes and references, very useful materials, but not integrated into a readable text. Thirdly, the earlier works, apart from Craig, were collections of individual instances and did not infer inductively any general propositions which justified them and related instances. Fourthly, the *Institutions* is a creative work in that to a very large extent he created the private law of Scotland as a complete and rational system, seeking to deduce specific rules from fundamental principles, not simply

61. I, 9, 1.
62. I, 9, 2.
63. I, 9, 4.
64. The writer, in his *Law of Delict in Scotland* (1966), 2nd ed. (1981) found this classification of interests the best basis for a statement of the modern law.
65. I, 9, 6.
66. *Lectures* (ed. Paton, Stair Society), I, 14.

the rules accepted in his time. Fifthly, it is highly original in that it owes little to previous books in Scotland, or, for that matter, books at Rome or in England, though he certainly owes some of his ideas to the Roman law. Sixthly, it established Scottish private law as a rational body of principles which existed until the present century, since when many of the principles have been overwhelmed by exceptions and changes enacted in the name of reform or obscured by excessively detailed provisions about particular cases. This statement in rational form was probably of great importance when, only 14 years after the revised edition, Scotland entered into the Union with England. The protection given for Scots law in private rights by Article 18 of the Treaty of Union would not have been of much value against the ignorance of the eighteenth century Chancellors in the House of Lords or the patronising disregard of parliaments (which in many respects continues to this day) if Scottish lawyers had not had Stair's *Institutions* to point to to prove what their law of private rights was. An English Chancellor, some fifty years ago, referred patronisingly to "those interesting relics of barbarism, tempered by a few importations from Rome, known to the world as Scots Law." But it was not a Scot, but Oliver Cromwell, who is said to have described the law of England, not much earlier than Stair's time, as "an ungodly jumble". Finally, and by no means least, Stair's great work has been repeatedly accepted as authoritative, as laying down the law as much as does a decision of the Court of Session. Sometimes passages have been explained or qualified but in all substantials it has repeatedly been accepted as the starting point for inquiry as to the principles relevant to a specific difficulty. In the course of time, of course, much of the detail of the law has been changed and there are many topics on which Stair says little or nothing. But even the modern law can be fitted into the system and pattern which he established. The foundations which he laid remain, though some of the structures erected thereon have been replaced and many new ones added. But that should not detract from his achievement. I cannot do better in conclusion than quote some of the words of the memorial plaque in the entrance hall of the University: "A Supreme Master of Jurisprudence who in his *Institutions* laid an imperishable foundation for the law of Scotland." Glasgow has reason to be proud of Stair.