

# Ownership and Obligation: Restitution, Vindication and the Recovery of Moveables in Stair's *Institutions*

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## A. INTRODUCTION

The doctrinal nature of an owner's right to recover possession of moveable property, and the extent to which it rests on proprietary right as opposed to personal obligation, has long been a topic of some complexity in Scots law.<sup>1</sup> This can be attributed in no

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small part to the “massively influential”<sup>2</sup> yet somewhat opaque account of Viscount Stair in his *Institutions*, in particular his rejection of the Roman division between real and personal actions and his declaration that “we make not use of the name or nature of Vindication”.<sup>3</sup> This article examines the context for Stair’s statement, connecting it to both the emergence in Europe of a Reformed natural law tradition and Stair’s conception of legal authority and the value of Roman law in Scotland.<sup>4</sup> It contributes to a growing body of research investigating the impact of moral theology on development of legal doctrine in the seventeenth century,<sup>5</sup> adding a new perspective on the link between theology and understandings of property and ownership.

The article begins by asserting Civilian influence on the Scots law prior to Stair. It highlights what appears to be a dialogue between Stair and one of the other great seventeenth-century Scots jurists, Sir George Mackenzie, arguing that Stair’s comments regarding the *vindicatio* may be read as a direct criticism of Mackenzie’s fidelity to the Romanist distinctions in his *Treatise on Actions*. Possible reasons for this divergence are considered; although Stair’s account of restitution reflects a long Scholastic tradition, it is radical among the Civilian jurists of the period in detaching the right to recover from its doctrinal basis in ownership. Stair’s approach, it is

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<sup>1</sup> W J Stewart describes the relationship between property and restitution as “probably one of the areas of greatest uncertainty in Scots private law”: *The Law of Restitution in Scotland* (1995) xx. Compare K G C Reid, *The Law of Property in Scotland* (1996) paras 158 and 531 (Gordon). See also K G C Reid, “Unjustified Enrichment and Property Law” 1994 JR 167; D L Carey Miller and D Irvine, *Corporeal Moveables in Scots Law* 2nd edn (2005) 224-235; Memorandum on *Corporeal Moveables: Remedies* (Scot Law Com Memorandum No 31, 1976) paras 6-8; R Evans-Jones, *Unjustified enrichment Volume 2: Enrichment Acquired in Any Other Manner* (2013) paras 4.35-4.36.

<sup>2</sup> Reid, “Unjustified Enrichment” (n 1)168-189.

<sup>3</sup> James Dalrymple, Viscount Stair, *The Institutions of the Law of Scotland*, 2<sup>nd</sup> edn (1693) 4.3.45.

<sup>4</sup> On which see generally S J Grabill, *Rediscovering the Natural Law in Reformed Theological Ethics* (2006); D VanDrunen, *Natural Law and the Two Kingdoms: A Study in the Development of Reformed Social Thought* (2010); J Witte, *The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism* (2007).

<sup>5</sup> See e.g. W Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)* (2013); J J Ballor et al (eds), *Law and Religion: The Legal Teachings of the Protestant and Catholic Reformations* (2014) and in the Scots context D Reid, “Thomas Aquinas and Viscount Stair: the influence of scholastic moral theology on Stair’s account of restitution and recompense” (2008) 29(2) *Journal of Legal History* 189; S Bogle, *The emergence of the will theory in Scots contract law, 1661-1761* (PhD Thesis, University of Edinburgh, 2015).

contended, substantiates Ford's thesis regarding his willingness to depart from learned authority.<sup>6</sup>

A further important feature of Stair's work is his concern to provide a justificatory account of the development of private property and his engagement with the right to recover as a question the answering of which requires more than an application of learned authority. The philosophical move from property to obligation, from a relation between a person and a thing to a relation between people, preoccupied both Stair and one of his most obvious and significant influences in this area, Hugo Grotius. It is argued that Stair's view of vindication is informed by a morally and theologically rich understanding of ownership that focussed on the creation of a sphere of individually protected rights rather than the strictures of the Roman distinction between property and obligation.

## **B. BEFORE STAIR: HOPE, SPOTTISWOODE AND CIVILIAN LEARNING**

### **(1) Hope's *Practicks***

This section affirms the influence of Civilian terminology and concepts on the way the Scots jurists of the early seventeenth century understood the recovery of moveables. The Roman action for the recovery of a thing, the *rei vindicatio*,<sup>7</sup> had several significant features. The action lay only against the possessor,<sup>8</sup> and gave a right to recovery based upon proof of ownership: “[f]or once I have proved that the thing is mine, the possessor will have to deliver it to me”.<sup>9</sup> In contrast to systems which require a wrong before the owner can assert his or her right, the *vindicatio* was available against any possessor, whether in good or bad faith.<sup>10</sup> The distinction

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<sup>6</sup> See J D Ford, *Law and Opinion in Scotland during the Seventeenth Century* (2007) 499; for more detailed discussion and further references see G(1) below.

<sup>7</sup> On the emergence of the *formula* of the *vindicatio*, see A Watson, *Roman Private Law Around 200 B.C.* (1971) 71.

<sup>8</sup> Originally the possessor in law (rather than the party with physical detention of the object.) However, by the time of Justinian the *vindicatio* could be used against any holder. See D 6.1.9.

<sup>9</sup> D 6.1.9: “*ubi enim probaui rem meum esse, necesse habebit possessor restituere*”. All English translations of the *Digest* are taken from T Mommsen, P Krueger and A Watson (eds), *The Digest of Justinian* (1995).

<sup>10</sup> This is the logical implication of D 6.1.9. See H F Jolowicz and B Nicholas, *Historical Introduction to the Study of Roman Law*, 3<sup>rd</sup> edn (1972) 140.

between actions *in rem* (against the thing itself) and those *in personam* (against a specified person) emerges from the structure of the *vindicatio*: in contrast to an action *in personam*, the possessor was not personally liable for the return of the thing and could not be forced to defend the action.<sup>11</sup> This might, in theory, mean that the *rei vindicatio* could not be tried. For this reason, in respect of moveable property the praetor granted the *actio ad exhibendum*,<sup>12</sup> by means of which the plaintiff could demand the production of the thing.<sup>13</sup> If the defendant failed to comply, he or she was condemned to pay the value of the thing as assessed by the plaintiff.<sup>14</sup> Even where the thing was produced, the difficulties of proving ownership meant that it was often preferable to use the possessory interdicts to gain possession, placing the burden of proof on the other party who would then be forced to bring his or her own *vindicatio*.<sup>15</sup>

Prior to the publication of the first printed edition of Stair's *Institutions* in 1681 there existed no comparably comprehensive account of the Scots law relating to the recovery of moveable property;<sup>16</sup> there is, however, ample evidence of the influence of Civilian learning on Scottish legal culture.<sup>17</sup> Indeed, according to Thomas

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<sup>11</sup> D 6.1.80. See L Wenger, *Institutes of the Roman Law of Civil Procedure*, trans O Harrison Fisk (rev ed 1986) 109. It is now known that when a person is claiming *in rem*, the defendant's name does not (apart from in exceptional cases) appear in the *intentio* at all, in a claim *in personam* it necessarily does, see F de Zulueta (trans and ed), *The Institutes of Gaius: Part 1* (1946) IV 41; F Schulz, *Classical Roman Law* (1951) 32-34.

<sup>12</sup> D 10.4.3.1 states the action to be "perquam necessaria" (extremely necessary) and introduced for the sake of the *vindicatio*.

<sup>13</sup> D 10.4.2; D 10.4.3.3. See Wenger, *Institutes* (n 11) 109-110.

<sup>14</sup> D 10.4.3.2.

<sup>15</sup> D 6.1.24.

<sup>16</sup> Indeed, the mediaeval and early modern law relating to moveable property in Scotland has been relatively little investigated. For a preliminary account of some of the key sources, see B Holligan, *Protection of Ownership and Transfer of Moveables by a Non-Owner in Scots Law* (PhD thesis, University of Edinburgh 2015) ch 2.

<sup>17</sup> On the importance of contact with Civilian learning in legal education and legal practice in the early seventeenth century, see e.g. J W Cairns, "Ius Civile in Scotland, ca. 1600" (2004) 2 RLT 136; J W Cairns, "Academic Feud, Bloodfeud and William Welwood: Legal Education in St Andrews 1560-1611" (1998) 2 EdinLR 158, 255; J W Cairns, "The Law, the Advocates and the Universities in Late Sixteenth-Century Scotland" (1994) 73 Scottish Historical Review 171. On the large numbers of Scottish advocates and jurists who studied canon and civil law in France, see J Durkan, "The French Connection in the Sixteenth and Early Seventeenth Centuries" in T C Smout (ed), *Scotland and Europe: 1200-1850* (1986) 19.

Craig's "great work of legal history and exegesis",<sup>18</sup> *Ius Feudale*, Roman principles are particularly applicable to transfer of moveables: "We follow the Civil Law, whether decisions or rules, especially in the administration of moveables".<sup>19</sup> Craig also states that in a number of respects, including that of actions, "[w]e propose to follow completely the Civil Law".<sup>20</sup>

Consistent with Craig's observations, a number of the extant legal writings suggest the influence of the Romanist division between actions against persons and those based on a right in a thing. One of the interesting features of the collections of *Practicks*<sup>21</sup> made by Sir Thomas Hope of Craighall<sup>22</sup> is the apparent demarcation of obligations from property.<sup>23</sup> Hope's characterisation of real actions is clearly structured around the right of the owner to follow the thing and recover it from unauthorised possessors: "*Actiones reales semper sequuntur rem, in quois hands sover it be, and whither moveable or immoveable*".<sup>24</sup> Hope refers extensively to the French

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<sup>18</sup> J W Cairns, "Craig, Thomas (1538?–1608)" (2004) *Oxford Dictionary of National Biography* [<http://www.oxforddnb.com/view/article/6580>, accessed 16 April 2016]. On Craig's legal practice, see also J Finlay, "*The early career of Thomas Craig, advocate*" (2004) 8 EdinLR 298.

<sup>19</sup> "*Sequimur itaque juris Civilis sive decisions sive regulas, in rerum praecipue mobilium administratione*": T Craig, *Jus Feudale* 3<sup>rd</sup> edn (1732) 1.2.14 (Translation author's own). For an English translation, see T Craig, *The Jus Feudale* trans J Avon Clyde (1934).

<sup>20</sup> "*ius Civile sequendem omninò proponimus*": Craig, *Jus Feudale* (n 19) 1.2.14 (Translation author's own).

<sup>21</sup> On the collections of *Practicks* in sixteenth and early seventeenth-century Scotland, see H McKechnie, "Practicks, 1469-1700", in H McKechnie (ed), *An Introductory Survey of the Sources and Literature of Scots Law* (1936) 25 and S Brooks, "The Decision Practicks of Sir Thomas Hamilton, First Earl of Haddington" (2004) 8 EdinLR 206.

<sup>22</sup> For discussion of the textual sources of Hope's work, see J Russell, "Hope's *Minor Practicks* and Richard Augustine Hay" (2009) 60 *The Innes Review* 170 and S Moir, "Collections Update: Hope's *Major Practicks* and the Study of Scots Law" (1999) 24 *Scottish Tradition* 75.

<sup>23</sup> See *Hope's Major Practicks, 1608-1633* ed J Avon Clyde (1938) and *Practical Observations Upon divers Titles of the Law of Scotland, Commonly called Hope's Minor Practicks* ed J Spottiswoode (1734). The *Major Practicks* separate personal obligations (Title 2) from rights relating to things (Title 3). The *Minor Practicks* distinguish (at 336) "a right where only a person and his heirs are bound" (a personal right) and a right where "*res controversa* is tied and affected really therewith" (a real right). Earlier collections of *Practicks* such as those of James Balfour of Pittendreich did not reflect such a structure (see J Balfour, *Practicks: or, a System of the More Ancient Law of Scotland*, P G B McNeill (ed) (1962; 1963) xli-xlii), perhaps due to "the absence of any generalized concept of the right of ownership". (ibid. liii).

<sup>24</sup> Hope, *Major Practicks* (n 23) vol 2 73.

jurist Jacques Godefroy<sup>25</sup> and his work on the customs of Normandy;<sup>26</sup> Ford makes the plausible suggestion that this represents an attempt to connect Scots law to a broader learned tradition rather than dwell on questions of the authenticity of the old Scots sources.<sup>27</sup> Godefroy's description of a real action as based on a real right in a thing as opposed to an undertaking (*promesse*) made by the possessor would provide an obvious source for Hope's scheme.<sup>28</sup>

In the *Minor Practicks*, Hope refers to the *vindicatio* as the appropriate action for claiming moveable property: "A real right in moveable property is where the property in a moveable thing belongs to someone, and the action which is proper to them on account of this is called the *rei vindicatio*, and is available against any possessor, whether natural or civil.<sup>29</sup> This is significant because of the implicit recognition of an action derived from the right of the owner, rather than any wrong committed; "*Jus in re*, or a Right in a Thing, is a Power or Faculty competent by Law, and inherent in the Thing itself, producing to the proprietor an Action against the Thing, towards the Recovery thereof".<sup>30</sup>

## (2) Spottiswoode's *Practicks*

Spottiswoode's *Practicks* provide further insight into the sources relied on in legal practice prior to the publication of Stair's *Institutions*.<sup>31</sup> The nature of Spottiswoode's project is open to debate but Ford has suggested that it can be understood as part of a process of translation of learned authority to local culture.<sup>32</sup> Cairns emphasises Spottiswoode's reliance on contemporary Civilian works, "the "common law" was

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<sup>25</sup> On the motivation for Hope's references to Godefroy and for brief biographical references, see Ford, *Law and Opinion* (n 6) 255-264.

<sup>26</sup> *Commentaires sur la coustume reformée du pays et duché de Normandie, anciens ressorts & enclaves d'iceluy* (1626).

<sup>27</sup> Ford, *Law and Opinion* (n 6) 264.

<sup>28</sup> Godefroy, *Commentaires* (n 26) I 55.

<sup>29</sup> "*Jus in re in mobilibus, est ubi proprietatis rei mobilis ad aliquem pertinet et actio quae ob hanc competit dicitur rei vindicatio, a quocunque possessore, sive naturali, sive civili*": Hope, *Minor Practicks* (n 23) 336 (translation author's own).

<sup>30</sup> Hope, *Minor Practicks* (n 23) 337.

<sup>31</sup> The *Practicks* were compiled by Sir Robert Spottiswoode from the 1620s to the 1640s, and published by his grandson in 1706. On Spottiswoode's sources, see Cairns, "*Ius Civile*" (n 17) 158-167 and on his life and work see Ford, *Law and Opinion* (n 6) 182-190.

<sup>32</sup> Ford, *Law and Opinion* (n 6) 210.

coming to appear as the *ius civile* rather than as the *utrumque ius*”,<sup>33</sup> and his title concerning *rei vindicatio* fits this general depiction. The text is substantially<sup>34</sup> taken from a work on the *Institutes* by German professor and judge Joachim Mynsinger von Frundeck (1514-1588).<sup>35</sup> On Spottiswoode/ Mynsinger’s account, *rei vindicatio* is a real action (*actio realis*), which is given to the owner against any possessor in order to recover his corporeal thing.<sup>36</sup> If the defender denies that he is the possessor, he is not compelled to submit to judgment, but the *actio ad exhibendum* will be competent against him for production of the thing.<sup>37</sup> An owner wishing to vindicate his thing is better off trying to obtain possession through one of the possessory interdicts available, as it is difficult to prove ownership.<sup>38</sup> Although adjusted to incorporate feudal landholdings,<sup>39</sup> the basic structure of the action described is thus that of the Roman law set out above. Spottiswoode’s collection does not, in itself, demonstrate reception of the *vindicatio* in Scotland but it nevertheless provides a further indication of influence of the Civilian distinction between real and personal actions and, by implication, Civilian concepts of ownership and possession.

### (3) Use of Civilian terminology

Given Stair’s contention that neither the name nor the nature of the *vindicatio* is recognised in Scotland, it is interesting that prior to the publication of the first printed edition of the *Institutions* in 1681 there are numerous case reports which make reference to recovery of a thing “*rei vindicatione*”.<sup>40</sup> As early as 1566 a ship was

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<sup>33</sup> Cairns, “*Ius Civile*” (n 17) at 167.

<sup>34</sup> The first paragraph and the final one of the title on “*Rei Vindicatio*” correspond more or less word for word with that of J Mynsinger’s *Apotelesma sive corpus perfectum scholiorum ad quattuor libros institutionum iuris civilis* (1589) 4.6 §*Omnium* 30. The correspondence of the middle paragraph is less exact but it appears to be based on Mynsinger, *Apotelesma* 4.6 §*Omnium* 35.

<sup>35</sup> On Mynsinger, see O F Robinson *et al.*, *European Legal History: Sources and Institutions* (2000) 11.3.8.

<sup>36</sup> R Spottiswoode and J Spottiswoode (ed), *Practicks of the Laws of Scotland* (1706) 275.

<sup>37</sup> Spottiswoode, *Practicks* (n 36) 275.

<sup>38</sup> *Ibid.* D 6.1.24 is to similar effect.

<sup>39</sup> There are said to be two kinds of *rei vindicatio*, *directa* and *utilis*. These are competent to the superior and the vassal respectively: Spottiswoode, *Practicks* (n 36) 275.

<sup>40</sup> See Gilmour and Newbyth’s reports of *Ramsay v Wilson* (1666) Mor 9113; *Forsyth v Kilpatrick* (1680) Mor 9120; *Van Porten v Dick* (1680) reported in J Dalrymple Viscount Stair (ed), *The Decisions of the Lords of Council & Session in the Most*

claimed “*per rei vindicationem*” from the possessors; the defence that the defenders had been imprisoned on the ship by pirates and had “hazardit their lyves” to bring it safely to port failed to convince the court that they should be allowed to keep it.<sup>41</sup>

Of particular significance is Lord Durie’s report of *Brown v Hudelstone*<sup>42</sup> which refers to the owner’s right to vindicate “*à quocunq̄ fuerit possessa*”.<sup>43</sup> *Brown* concerned an accusation of spuilzie (a delictual claim for recovery based on wrongful dispossession)<sup>44</sup> against a creditor who had poinded cattle not owned by his debtor. The Lords found the debtor’s two years of possession to be a good defence against spuilzie and also against the claim for delivery of the cow (*rei vindicatione*).<sup>45</sup> The scope of the owner’s right to follow the thing is ambiguous: it is stated that the original owner would continue to have an action for restitution of the cow against the person who “received” it but it is unclear whether this refers to some subsisting right to recover the cow itself, or, as seems more likely, a personal claim against the person to whom the cow had originally been entrusted. As will be seen, the term “restitution” appears to encompass both an action for recovery of the thing and a personal claim to compensation for an unjustly received benefit.

### C. THE FIRST PRINTED EDITION OF THE *INSTITUTIONS*

#### (1) Stair’s Account of Restitution

Stair presents an account of property rights that is both responsive to and yet distinct

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*Important Cases Debated before them with the Acts of Sederunt* (1683) 750 and J Lauder of Fountainhall (ed), *The Decisions of the Lords of Council and Session, from June 6<sup>th</sup>, 1678, to July 30<sup>th</sup>, 1712* (1759) vol 1 80.

<sup>41</sup> R Sutherland (ed), *The Practiques of Sir Richard Maitland of Lethington* (2007) 177.

<sup>42</sup> (1625) Mor 14748. The case is mentioned by Stair: J Dalrymple, Viscount Stair, *The Institutions of the Law of Scotland* (1681) XXIV.7.

<sup>43</sup> “From whoever should be in possession”.

<sup>44</sup> On the development of spuilzie as a distinct form of possessory remedy in the sixteenth century, see M Godfrey, *Civil Justice in Renaissance Scotland: The Origins of a Central Court* (2009) 244-245.

<sup>45</sup> The decision seems to be based on a form of short acquisitive prescription rather than an evidential presumption from possession. Durie’s commentary refers to the effect of the decision being that “for two years possession the possessor should be counted proprietor and owner”. For an argument that the decision in *Brown* does represent an embryonic form of the presumption of ownership from possession, see A Simpson, “Positive Prescription of Moveables in Scots Law” (2009) 13(3) EdinLR 468.



from that of his Scots and European contemporaries. Its context is a Scottish intellectual tradition that Alasdair MacIntyre has described as “an ultimately unstable alliance of Calvinism and Aristotelianism”.<sup>46</sup> Recent textual survey has concluded that no single manuscript can currently be identified as providing an “authentic” version of what Stair actually wrote;<sup>47</sup> the present investigation is principally concerned with text included in the second printed edition of the *Institutions* that was, according to the analysis set out below, composed between 1688 and 1693.<sup>48</sup> For practical purposes, therefore, discussion begins with the first printed edition of the *Institutions*.

Stair’s treatment of the recovery of moveable property does not occur under the titles dealing with property.<sup>49</sup> Rather, these topics are dealt with under the law of obligations, under the heading “Restitution.”<sup>50</sup> Among others, Gordon has emphasised the impact of natural law thought, and in particular the prologomena to Grotius’ *De Jure Belli ac Pacis* on the structure of the *Institutions*;<sup>51</sup> Grotius’ title “Of the obligation that arises from property” was evidently an important influence on Stair’s treatment of restitution.<sup>52</sup> Both Stair and Grotius distinguish the obligation of restitution, which arises from the mere possession of another’s property, from those

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<sup>46</sup>A MacIntyre, *Whose Justice? Which Rationality?* (1988) 225.

<sup>47</sup> See A L M Wilson, “The Textual Tradition of Stair’s *Institutions*, With Reference to the Title “Of Liberty and Servitude””, in H L MacQueen (ed), *Miscellany Seven* (2015) 1. See also Ford, *Law and Opinion* (n 6) 59-73.

<sup>48</sup> See F(2) below.

<sup>49</sup> For example, Stair, *Institutions* (1681) Title XII (“Rights Real: where of Community, Possession, Property, Servitudes, and Pledges”).

<sup>50</sup> On the structure of the *Institutions*, and the central place given to restitution, see A H Campbell, *The Structure of Stair’s Institutions* (1954).

<sup>51</sup> See W M Gordon, “Stair’s use of Roman law” in A Harding (ed), *Law Making and Law Makers in British History* (1980) 120 at 125.

<sup>52</sup> Stair, *Institutions* (1681) 7.2; H Grotius, *The Rights of War and Peace*, trans and ed J Barbeyrac and R Tuck (2005) 2.10. Several of Stair’s citations and examples are drawn from Grotius, for example his reference to Deuteronomy 22.1 (at 7.3) and to D 16.3.31.1 (at 7.4.). His citations in the title are discussed in detail by A Wilson, *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* (PhD thesis 2008-2009, University of Edinburgh) 135-140. On Grotius’ influence on Stair, see W M Gordon, “Stair, Grotius and the sources of Stair’s *Institutions*”, in *Roman Law, Scots Law and Legal History: Selected Essays* (2007) 255, especially at 260-261, and D L Carey Miller, “Systems of Property: Grotius and Stair”, in D L Carey Miller and D W Meyers (eds), *Comparative and Historical Essays in Scots Law* (1992) 13.

arising from any wrong<sup>53</sup> or, according to Stair, voluntary engagement.<sup>54</sup> The obligation to make restitution arises in a wide range of situations, including to property found, recovered stolen property, property acquired *bona fide* from a non-owner and things that come into our hands without a cause (*quae cadunt in non causam*).<sup>55</sup>

There are several innovative aspects to Stair's account of restitution. In contrast to, for example, Grotius, he places obligations first in his scheme, before rights of property.<sup>56</sup> Moreover, in contrast to the position under the classical Roman law,<sup>57</sup> he argues that there is an obligation on a possessor to restore to its rightful owner property that belongs to another.<sup>58</sup> If a person buys the property of another *bona fide*, he or she must thus return it and pursue his or her seller in warrandice for its price.<sup>59</sup> On the basis of this obligation to restore, Stair distinguishes restitution from the real action of vindication.<sup>60</sup> This differs slightly from the way the obligation is conceived by Grotius, who seems to view it (at least as concerns return of things still in the possession of the obliged party) as more firmly derived from the right of ownership: it is "the Essence of property... that every Man who is possessed of another's goods, is obliged to restore them to the right Owner".<sup>61</sup> Stair's account,

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<sup>53</sup> Stair, *Institutions* (1681) 7.1; Grotius, *Rights of War and Peace* (n 51) 2.10.1.3. This contrasts with the earlier Scots law, which can be (very broadly) characterised as focusing on the existence of a wrong. See e.g. Balfour, *Practicks* (n 23) 522; A Harding, "Rights, Wrongs and Remedies in Medieval Scots Law", in H L MacQueen (ed), *Miscellany IV* (2002) 1.

<sup>54</sup> Stair, *Institutions* (1681) 7.1.

<sup>55</sup> Stair, *Institutions* (1681) 7.3-7.5. See R Evans Jones, *Unjustified Enrichment, Volume 1 Enrichment by deliberate conferral: Condictio* (2003) paras 1.12-1.13 and, on the modern law, ch 2.

<sup>56</sup> See further Campbell, *Structure* (n 49) 20-30.

<sup>57</sup> D 6.1.80. See Wenger, *Institutes* (n 11) 109.

<sup>58</sup> Stair, *Institutions* (1681) 7.2. The extent of the positive duties involved in restitution are not clear; Stair states that there is "no duty of Custody, or pains" (*Institutions* (1681) 7.3). Grotius, *Rights of War and Peace* (n 51) 2.10.1.2 seems to recognise a positive aspect to the obligation to restore: "if the Power of Property reached no farther than to have a Thing restored on demand, Property would have been too weakly secured..."

<sup>59</sup> Stair, *Institutions* (1681) 7.4; 7.11.

<sup>60</sup> *Ibid* 7.2.

<sup>61</sup> Grotius, *Rights of War and Peace* (n 51) 2.3.1.5. See also H Grotius, *The Jurisprudence of Holland*, trans R W Lee (1926; 1936) II.iii.4 ("ownership consists in the right to recover lost possession"). Both Stair and Grotius are careful to distinguish restoration of the thing itself from restoration of unjustly acquired profits (see Grotius, *Rights of War and Peace* 2.10.II.1).

however, extends to restitution of things that we may seem to have acquired ownership of (things that come into our hands without cause, money paid to us in error). Carey Miller appears to assume that ownership has not actually passed in such cases,<sup>62</sup> but this is contrary to contemporary understandings of the role of unjustified enrichment.<sup>63</sup> Rather than attempting to resolve this question, it is argued below that it was irrelevant to Stair's philosophical project to differentiate the unjustified acquisition of a right in a thing from the mere possession of that which is another's.

Like the *vindicatio*, the obligation to restore is closely connected to possession of the thing in question.<sup>64</sup> Once no longer in possession, the former possessor may be liable for any profits on the basis of recompense<sup>65</sup> but is no longer liable for the value of the thing itself.<sup>66</sup> There is an exception for fruits that have been consumed in good faith.<sup>67</sup> The obligation is owed to the rightful owner, rather than a party who has no right such as a robber.<sup>68</sup> The question of whether it would ever be appropriate to restore on the basis of an entitlement other than ownership is not explicitly addressed.<sup>69</sup>

From the "right of restitution" arises the action of exhibition and delivery, which involves the conveyance of any moveable thing, frequently writings, before a judge, where questions of right can be decided and delivery to the pursuer ordered.<sup>70</sup>

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<sup>62</sup> *Corporeal Moveables* (n 1) 235.

<sup>63</sup> See e.g. Reid, "Unjustified Enrichment" (n 1); Evans Jones, *Unjustified Enrichment* (n 54) paras 1.12-1.13 and ch 2.

<sup>64</sup> Stair, *Institutions* (1681) 7.2; 7.11. Although the obligation can, in some cases, continue after the possessor has parted with the thing (see 7.13), possession appears to play a crucial role and makes the obligation "more palpable". This is broadly in accordance with the traditional Scholastic approach, see J Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (1996) 53-62.

<sup>65</sup> Stair, *Institutions* (1681) 7.11.

<sup>66</sup> This is consistent with Grotius, *Rights of War and Peace* (n 51) 2.10.3. On the development of liability based on enrichment, see Hallebeek, *Unjust Enrichment* (n 63) 62-67.

<sup>67</sup> Stair, *Institutions* (1681) 7.12. This exception is rejected by Grotius, *Rights of War and Peace* (n 51) 2.10.5. Stair's approach appears remarkably clear compared with the distinctions drawn in the broader Civilian tradition; see Hallebeek, *Unjust Enrichment* (n 63) 67-73.

<sup>68</sup> Stair, *Institutions* (1681) 7.4. This follows Grotius, *Rights of War and Peace* (n 51) 2.10.2.2; it contrasts with the slightly more liberal approach that Hallebeek (*Unjust Enrichment* (n 63) 73-78) argues to have been prevalent in Scholastic thought.

<sup>69</sup> Stair, *Institutions* (1681) 12.38 suggests strongly that the action for recovery requires proof of ownership.

<sup>70</sup> Stair, *Institutions* (1681) 7.14.

This is curious because, although Stair emphasises the existence of a personal obligation on possessors, the results do not seem, in practice, to be substantially different from those obtained using the *vindicatio*. Scots law appears to follow an essentially Roman scheme, with the *actio ad exhibendum*<sup>71</sup> necessary to force a reluctant defender to produce the thing in order that the pursuer can seize it. However, Stair's account places the structures provided by the Roman law in a new theoretical and philosophical framework, that of natural law.

## **(2) Influence of moral theology and natural law thought**

The philosophy underlying Stair's concept of restitution, it is submitted, was heavily influenced by moral theology. Dot Reid has pointed to Protestant Scholasticism, and its influence at Glasgow University, as providing the intellectual context for Stair's work;<sup>72</sup> there are correspondences between Thomas Aquinas' account of restoration of property as necessary to preserve equality<sup>73</sup> and the circumstances in which Stair identifies an obligation of restitution.<sup>74</sup> Although broader debates about the natural law tradition in Reform theology are outwith the scope of the present article,<sup>75</sup> the Scholastic tendency to conflate various ways in which property might be unjustly acquired and to impose a moral duty to restore remained a feature of key Protestant teachings, for example those of John Calvin:<sup>76</sup> "let it be our constant aim faithfully to lend our counsel and aid to all so as to assist them in retaining their property".<sup>77</sup> Calvinist theology permeated Scots religious orthodoxy for much of Stair's lifetime.<sup>78</sup>

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<sup>71</sup> See ns 12 and 13 above.

<sup>72</sup> See Reid, "Thomas Aquinas" (n 5) at 202-205. See also MacIntyre, *Whose Justice?* (n 45) ch XII.

<sup>73</sup> Thomas Aquinas, *Summa Theologica* Trans Fathers of the English Dominican Province (1947-48) II II q 62 art 2 co. On Aquinas' concept of restitution, see Hallebeek, *Unjust Enrichment* (n 63) ch 1; G Dolezalek, "The Moral Theologians' Doctrine of Restitution and its Juridification in the Sixteenth and Seventeenth Centuries" (1992) *Acta Jur* 104.

<sup>74</sup> See Reid, "Thomas Aquinas" (n 5) 207-209.

<sup>75</sup> See n 4 above for further references.

<sup>76</sup> J Calvin, *The Institutes of the Christian Religion* trans H Beveridge (1845) 2 8 45: "But not to dwell too long in enumerating the different classes, we know that all the arts by which we obtain possession of the goods and money of our neighbours, for sincere affection substituting an eagerness to deceive or injure them in any way, are to be regarded as thefts. Though they may be obtained by an action at law, a different decision is given by God."

<sup>77</sup> *Ibid.*

<sup>78</sup> The possible influence of a Scottish Calvinist tradition is discussed at G(2) below.

Scholasticism also influenced Stair's acknowledged sources, importantly Grotius,<sup>79</sup> who states that "the very design of Property was to preserve an Equality, that is, that every Man might enjoy his own".<sup>80</sup>

Whether through Grotius, or directly, Scholastic thought thus informed Stair's work in several ways. However, as Feenstra comments, the Scholastics "did not care for the Roman distinction between *actiones in rem* and *actiones in personam*".<sup>81</sup> It was noted above that Stair's account covers obligations arising from what would, in the modern law, be understood as unjustified enrichment, and obligations arising from the fact of possession of property owned by another.<sup>82</sup> On a moral level, these cases are perhaps equivalent. From the point of view of the structure of private law, however, this is a potentially problematic move as it neglects the fundamental Roman distinction between recovery of possession based on a right of ownership and a personal liability to compensate.<sup>83</sup>

The owner's right to recover is further inextricably linked to an account of the origin of and justification for private property.<sup>84</sup> Against Grotius, Stair argues the obligation of restitution to be derived from natural law "written in our hearts"<sup>85</sup> by God rather than tacit consent or contract; "though there were no Positive Law, these Obligations would be binding".<sup>86</sup> Grotius' account of the obligation arising from property is linked to his vision of human society as a network of mutual rights and

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<sup>79</sup> For the influence of Scholastic thought on Grotius' account of restitution, see R Feenstra, "Grotius' Doctrine of Unjust Enrichment as a Source of Obligation: its Origin and its Influence in Roman-Dutch Law", in *Legal Scholarship and Doctrines of Private Law: 13th- 18th Centuries* (1996) 197 and Hallebeek, *Unjust Enrichment* (n 63) ch 5.

<sup>80</sup> Grotius, *Rights of War and Peace* (n 51) 2.10.2.1.

<sup>81</sup> Feenstra, "Unjust Enrichment" (n 78) 209.

<sup>82</sup> For example, Stair, *Institutions* (1681) 7.7 refers to things acquired on the basis of a cause which later ceases and restoration of payments made in error. For further discussion, see references at n 54.

<sup>83</sup> See Hallebeek, *Unjust Enrichment* (n 63) 81-85.

<sup>84</sup> This is a characteristic preoccupation of seventeenth-century natural law theorists such as Grotius but for discussion of similar debates at earlier points in the natural law tradition see e.g. B Tierney, *The Idea of Natural Rights* (1997) ch 6; J Hallebeek, "Thomas Aquinas' Theory of Property" (1987) 22 *IJ* 99.

<sup>85</sup> Stair, *Institutions* (1681) 7.1. The reference to the law written in men's hearts is of biblical origin (see *Romans* 2 14-15) and is a common motif in natural law thought. See e.g. Balfour, *Practicks* (n 23) 1.

<sup>86</sup> Stair, *Institutions* (1681) 7.1-7.2. Compare S F von Pufendorf, *Elements of Universal Jurisprudence*, trans and ed W A Oldfather and T Behme (1931, repr 2009) 1.5.25, where it is stated that natural law favours the ignorant *bona fide* purchaser.

obligations, arising from the (divinely created) sociable nature of humanity.<sup>87</sup> The maintenance of social order requires that we return that which is another's.<sup>88</sup> Stair's understanding of property is clearly influenced by Grotius' historical narrative,<sup>89</sup> but the source of the duty to restore is located in divine authority rather than human institution.<sup>90</sup>

There is a tension between the moral obligation of restitution and the need to protect commerce in moveable property, which may be transferred with very little in the way of evidence. Although Stair's formulation of a presumption of ownership in favour of the possessor<sup>91</sup> goes some way towards resolving this, relieving *bona fide* transferees of the need to establish their right, acquirers remain vulnerable to the loss of the property. The natural law understanding of property does not necessarily, however, imply that ownership must be absolutely protected. As laws of property developed in conjunction with, and for the benefit of, human society, they can be modified or restricted where this will be of public benefit.<sup>92</sup> Stair sets out that, for reasons of public expediency, the doctrine that transfer requires the owner's consent may be departed from:

albeit it be a good and solide rule, *Quod meum est, sine me alienum fieri nequit*, yet it hath the exception of publick sanction, or common custom, and so though it be not by the sole and proper consent of the owner, yet it is by the

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<sup>87</sup> “[F]or if the Power of Property reached no farther than to have a thing restored on demand, Property would have been too weakly secured and the keeping of it too expensive”, Grotius, *Rights of War and Peace* (n 51) 2.10.1.2. See further S Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (1991) ch 1. Compare S F von Pufendorf, *Of the Law of Nature and Nations*, trans B Kennett 4<sup>th</sup> edn (1729) IV.13.3.

<sup>88</sup> Grotius, *Rights of War and Peace* (n 51) Prolegomena 8.

<sup>89</sup> See for example his reference to “utility and common quietness sake”: Stair, *Institutions* (1681) 7.12. Stair's account of the development of property rights draws heavily on that of Grotius: compare *Institutions* (1681) 12.1 and Grotius, *Rights of War and Peace* (n 51) 2.2.2. On Grotius' historical approach, see Buckle, *Natural Law* (n 86) 35-52.

<sup>90</sup> Stair, *Institutions* (1681) 7.1: “of necessity they must have their Original from the Authority and Command of God...”

<sup>91</sup> On which see D L Carey Miller, “The Presumption Arising from Possession of Corporeal Moveable Property: Questioning Received Wisdom”, in A R C Simpson et al. (eds), *Continuity, Change and Pragmatism in the Law: Essays in Memory of Professor Angelo Forte* (2016) xx and Holligan, *Protection of Ownership* (n 16) 85-90.

<sup>92</sup> See for example Grotius, *Rights of War and Peace* (n 51) 2.2.2. i.

consent of that Society of people, or their Authority...<sup>93</sup>

Interestingly, this passage is far more reminiscent of Grotius' account of property as both flexible and a product of human society than the earlier description of restitution.<sup>94</sup> It leaves space for the development of rules protecting *bona fide* purchasers, particularly where this is required for the public good. Indeed, Stair's account of the presumption of ownership from possession further emphasises the role of custom in modifying rules "destructive to commerce".<sup>95</sup>

#### **D. MACKENZIE'S INSTITUTIONS**

The other important, although less comprehensive, general work of the period,<sup>96</sup> the *Institutions* of Sir George Mackenzie, begins with a statement of the "great influence" of the Civil law in Scotland, "except where Our own express Laws, or Customes, have receded from it".<sup>97</sup> In the first printed edition, Mackenzie does not discuss the obligation of restitution. His treatment of *bona fide* possession, although brief, is predicated on the assumption that the true owner can always recover the actual thing.<sup>98</sup> His description of a real action as "that whereby a Man pursues his Right against all singular Successors, as well as the person who was first obliged" would fit the *vindicatio*.<sup>99</sup> The only reference to the Scots procedure for claiming moveable property is the description of the action for exhibition and delivery, which is in similar terms to that of Stair.<sup>100</sup> It is implied that the pursuer in this action may crave delivery of moveable property, but no further detail is given.

However, in the 1688 edition of the *Institutions*, the Scots definition of a real action based on its availability against successors is contrasted with the "Civil law" definition of a real action as arising from a real right and founded in *dominium* or

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<sup>93</sup> Stair, *Institutions* (1681) 12.34; (1693) 2.1.34.

<sup>94</sup> Compare Grotius, *Jurisprudence* (n 60) 2.3.2.

<sup>95</sup> Stair, *Institutions* (1681) 24.7.

<sup>96</sup> On the place of the *Institutions* as part of a body of institutional writing in Scotland, see J W Cairns, "Institutional Writing in Scotland Reconsidered" (1983) 4 J Leg Hist 76 and on Mackenzie's account of the sources of legal authority in Scotland see H MacQueen, "Mackenzie's *Institutions* in Scottish Legal History" (1984) 29 JLSS 498.

<sup>97</sup> Sir G Mackenzie, *The Institutions of the Law of Scotland* (1684) 3-4.

<sup>98</sup> *Ibid* 82-83.

<sup>99</sup> *Ibid* 335.

<sup>100</sup> Mackenzie, *Institutions* (n 96) 341; 2nd edn (1688) 356.

property, the prime example being the *rei vindicatio*.<sup>101</sup> This change may reflect a desire to distinguish the Scots action for recovery from the Roman action founded in ownership, but it is not entirely clear.<sup>102</sup>

### **E. MACKENZIE'S *TREATISE ON ACTIONS***

The most significant indication of the disparity between Stair's view and the more conventional Civilian position is found in Mackenzie's *Treatise on Actions*. Little appears to be known about this unfinished work, which was printed after his death in his collected *Works*.<sup>103</sup> Ford dates the composition of the text to between 1683 and 1688;<sup>104</sup> this is consistent with the date of the latest authority referred to, *Chaplane v. Marjoribanks* in June 1687.<sup>105</sup> For present purposes, the text's main interest is that it contains a passage asserting the existence of an action for recovery based on ownership in Scots law.<sup>106</sup>

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<sup>101</sup> Mackenzie, *Institution* (n 96) 2<sup>nd</sup> edn (1688) 351.

<sup>102</sup> Mackenzie's *Treatise on Actions*, discussed below, characterises the Scots real action as being both concerned with pursuit of a thing that is ours and available against successors if they remain in possession: G Mackenzie, *The works of that eminent and learned lawyer, Sir George Mackenzie of Rosehaugh* (1716; 1722) vol II 494.

<sup>103</sup> Mackenzie, *Works* (n 101) vol II 494. The editor of the *Works* is asserted by Jackson to be Thomas Ruddiman: C Jackson, "Mackenzie, Sir George, of Rosehaugh (1636/1638–1691)", *Oxford Dictionary of National Biography* (online edn, 2007). However, D Duncan (*Thomas Ruddiman: A Study in Scottish Scholarship of the Early Eighteenth Century* (1965) 70) and F W Freeman ("The Intellectual Background of the Vernacular Revival before Burns" (1981) 16 *Studies in Scottish Literature* 160 at 162) attribute editing to the printer James Watson. A manuscript which corresponds extremely closely with the printed text but which contains an extra chapter on Entails is available in the National Library of Scotland: Adv. MS. 25.2.11. This is described in National Library of Scotland, *Summary Catalogue of the Advocates' Manuscripts* (1971) as dating from the 18<sup>th</sup> century, but little else is known about its provenance. It first appears in the Advocates Library catalogue in 1807. (Source: Personal Communication from Dr Ulrike Hogg, Senior Curator, Manuscripts and Archive Collections, National Library of Scotland).

<sup>104</sup> Ford, *Law and Opinion* (n 6) 507.

<sup>105</sup> Mackenzie, *Works* (n 101) 501-502; *Marjoribanks' Creditors* (1687) Mor 10241. The extra chapter in the manuscript version described above (n 102) was written after the passing of the Entail Act 1685 (RPS 1685/4/49); brief analysis does not disclose anything which would obviously date the chapter after 1688 but detailed investigation was beyond the scope of the article.

<sup>106</sup> There are other instances in which Stair directly contradicts comments made by Mackenzie: Ford, *Law and Opinion* (n 6) 522-523.



By our Law we call also these real Actions, by which we pursue for any Thing that is ours' and where the Action is competent against singular Successors if they be Possessors; and [...] in effect all our Declarators of Property are Vindications, whether we pursue for the Property of Lands, or particular Things which belong to us in Property, tho' the Possession of them be carried away to another, and the Actions for declaring the Property of Land, because of the more noble Signification, called only Declarators of Property; yet if my Horse had strayed from me, and were possessed by another, my Action for recovering him, is in effect a Declarator of Property, tho' we call such Actions for every Thing else (except Lands) Action for Recovery: But we still use in our Debates *rei vindicatio* ...<sup>107</sup>

On this account, the term “vindication” is indeed recognised in Scots law, and, moreover, an action for recovery of moveables is “in effect a Declarator of Property” and hence amounts to a vindication. As will be seen, this is in direct contradiction to both facets of Stair’s pronouncement: both the name and the nature of vindication are after all part of Scots legal discourse. Reference is made to Hope’s account of real rights, and the nature of the real right is expressly linked to the action it produces.<sup>108</sup>

Mackenzie considers what is necessary to prove ownership and concludes that, certainly on the part of the pursuer in an action of *rei vindicatio*, it will not be enough for the pursuer simply to libel that he or she was in possession, this is only appropriate in a case of spuilzie.<sup>109</sup> He discusses *Ramsay v Wilson*<sup>110</sup> as reported by Stair and, although he does not expressly deny the existence of a presumption of ownership from possession,<sup>111</sup> he criticises the decision for attending to the wrong facts. Consistent with an orthodox Civilian analysis, he identifies the main issues as being the location of ownership and the circumstances of the defender’s acquisition.

## **F. THE SECOND PRINTED EDITION OF THE *INSTITUTIONS***

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<sup>107</sup> Mackenzie, *Works* (n 101) vol II 494.

<sup>108</sup> *Ibid* 501-502.

<sup>109</sup> *Ibid* 503.

<sup>110</sup> On the history of the litigation in *Ramsay*, see A Murray, “The monuments of a family’: a collection of jewels associated with Elizabeth of Bohemia” (2001) 131 *Proceedings of the Society of Antiquaries of Scotland* 327. For further discussion of the ratio, see Simpson, “Positive Prescription” (n 44) 468-469.

<sup>111</sup> See n 90 above.

### (1) Rejection of the Real Action of Vindication

Stair's account of restitution in the second printed edition of the *Institutions* in 1693 is substantially similar to that of 1681. However, it includes an extra book, dealing with actions,<sup>112</sup> in which the following inference is drawn from the obligatory nature of restitution:

But we make not use of the name or nature of *Vindication*, whereby the Proprietar pursues the Possessor, or him who by *Fraud* ceases to possess, to suffer the Proprietar to take possession of his own, or to make up his damage by his fraud. This part of the action is rather *personal* than *real*, for reparation of the damage done by the fraudulent quitting possession. Yea, the conclusion of *Delivery*, doth not properly arise from *Vindication*, which concludes no such obligation on the haver, but only to be Passive, and not to hinder the Proprietar to take possession of his own.<sup>113</sup>

Stair argues that in Roman law “none could vindicate, but he who prov'd his Right of Property”; he appears to suggest that even proof of right did not allow recovery<sup>114</sup> until an action was introduced by the Praetor which rested on the fiction that the plaintiff had acquired by usucaption, presumably the *Actio Publiciana*.<sup>115</sup> Even then, in his view, Roman law still did not recognise a personal obligation on the possessor to restore.<sup>116</sup> Although Stair's concept of a “Real obligation upon Possessors, not having a Title sufficient to defend their Possession, to Restore or re-deliver”<sup>117</sup> does

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<sup>112</sup> On the decision to add an extra book, see discussion in Ford, *Law and Opinion* (n 6) 402-3.

<sup>113</sup> Stair, *Institutions* (1693) 4.3.45.

<sup>114</sup> *Institutions* (1693) 4.3.45 states “it was not sufficient to recover”; it is assumed here that “it” is a reference to the proof of right mentioned in the preceding sentence but given what appears to be a reference to the *Actio Publiciana* (discussed below) the text might make more sense if it is read as referring to the extension of recovery to those who could *not* prove right.

<sup>115</sup> The *Actio Publiciana* protected several categories of possessor who did not have quiritary (civil law) ownership, rather than affording a remedy not offered by the *vindicatio*; see M Kaser, *Roman Private Law*, trans. R Dannenbring 2nd edn (1968) 117.

<sup>116</sup> Stair, *Institutions* (1693) 4.3.45

<sup>117</sup> *Ibid.*

not fit well with the traditional civil law divide between property and obligation,<sup>118</sup> it is designed to ensure that a possessor is, as might be expected from the perspective of moral obligation, personally bound to restore.

A further significant addition is the clarification that the obligation to restore does not only extend to restoration to the owner but also to the “Lawful Possessor”.<sup>119</sup> This moves the action for recovery firmly away from the *vindicatio*’s basis in ownership and contrasts with the fundamental character of the restitutionary obligation set out by Grotius and even that described by Stair in the 1681 edition of the *Institutions*. The action for recovery of moveable property is therefore not a real action;<sup>120</sup> it is best characterised as a petitory action where something is sought from the defender.<sup>121</sup> An action based on the right of ownership would be a declaratory action, whereas the action for delivery can proceed from any right giving “Title and Interest” in recovery of the thing.<sup>122</sup>

The claim that “we make not use of the name or nature of *Vindication*” is particularly surprising. Even in Stair’s own reports of cases such as *Van Porten v Dick*<sup>123</sup> in his 1683 collected *Decisions*, the term *rei vindicatio* is frequently used.<sup>124</sup> It seems to be interchangeable with “restitution” in referring to an owner’s claim for recovery of moveable property against any possessor.<sup>125</sup> Analysis of the case law of the intervening period does not yield any evidence that the term had fallen into desuetude, or that the action allowing the recovery of moveable property had

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<sup>118</sup> It is described by Carey Miller (*Corporeal Moveables* (n 1) para 10.04) as having a “somewhat uncomfortable... hybrid quality”.

<sup>119</sup> Stair, *Institutions* (1693) 4.3.45.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.* 4.3.47. Stair contrasts petitory actions with those declaring a right (declaratory) or aimed only at the restoration of possession (possessory).

<sup>122</sup> Stair, *Institutions* (1693) 4.22.5.

<sup>123</sup> *Van Porten v Dick* (1680) reported in J Dalrymple Viscount Stair (ed), *The Decisions of the Lords of Council & Session in the Most Important Cases Debated before them with the Acts of Sederunt* (1683) 750 and J Lauder of Fountainhall (ed), *The Decisions of the Lords of Council and Session, from June 6<sup>th</sup>, 1678, to July 30<sup>th</sup>, 1712* (1759) vol 1 80.

<sup>124</sup> See e.g. Gilmour and Newbyth’s reports of *Ramsay v Wilson* (1666) Mor 9113; *Forsyth v Kilpatrick* (1680) Mor 9120; *Forbes v Ogilvy* (1685) Fountainhall, *Decisions* vol 1 359.

<sup>125</sup> In *Forbes v Ogilvy* (1685) Fountainhall, *Decisions* vol 1 359 an action is pursued “*rei vindicatione* for restitution” of a cup.

substantially changed.<sup>126</sup>

As for “the conclusion of delivery” not arising from vindication, it is true that the Roman *vindicatio* did not expressly mandate delivery of the thing but rather a pecuniary *condemnatio* if the thing was not restored.<sup>127</sup> The aim of the action, however, was certainly the restoration of the thing to the plaintiff. A text from Paul in the Digest states that restitution should occur either where the thing is or at the place where the action is brought.<sup>128</sup> If the possessor is in good faith, the plaintiff should bear the expense of transporting the thing to the site of judgment.<sup>129</sup> Although no express obligation of restoration was placed upon the possessor, it would be misleading to portray Roman law as unconcerned with the return of the thing to the owner.

## **(2) Relationship to Mackenzie’s *Treatise***

What is the relationship between Stair’s text and that of Mackenzie? Given Mackenzie’s death in 1691 before the publication of the second edition of Stair’s *Institutions* it is assumed that it is Stair’s treatment which is in response to Mackenzie’s (then unprinted) work.<sup>130</sup> Perhaps any correspondence between the two accounts is coincidental.<sup>131</sup> As the volume was edited and published after his death, it is in theory possible that the text in question was not written by Mackenzie himself but by a later editor, in which case the text might be in response to the 1693 edition of the *Institutions*.<sup>132</sup> However, given the text’s consistency with Mackenzie’s views on Roman law as “founded upon Justice and Equity”<sup>133</sup> and his tendency to “[try] wherever possible to show that the actions available in Scotland were modelled on

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<sup>126</sup> For an example of an action expressly referred to as a *rei vindicatio* in this period, see *Blair v Graeme* (1685) Mor Sup II 86.

<sup>127</sup> See Wenger, *Institutes* (n 11) 150-153.

<sup>128</sup> D 6.1.10.

<sup>129</sup> *Ibid* see also D 6.1.11.

<sup>130</sup> A similar assumption is made by Ford, *Law and Opinion* (n 6) 522-523.

<sup>131</sup> Given the close correspondence between the arguments discussed here, and also on other matters mentioned in Ford, *Law and Opinion* (n 6) 522-523 this seems unlikely.

<sup>132</sup> On the general difficulties of finding an “authentic” version of early modern printed texts and of ascertaining that any given text represented the final view of the author, see J Cairns, “The Moveable Text of Mackenzie: Biographical Problems for the Scottish Concept of Institutional Writing”, in J Cairns and O F Robinson (eds), *Critical Studies in Ancient Law, Comparative Law and Legal History* (2001) 234.

<sup>133</sup> See Ford, *Law and Opinion* (n 6) 494-495.

civilian remedies”,<sup>134</sup> there is no evidence to suggest that this is the case. While Stair’s account has proved more influential, it is interesting that doctrinal disagreement existed on such a fundamental issue; at least as regards historical accuracy, Stair’s depiction of Scots doctrine does not seem entirely convincing.

## G. MAKING SENSE OF STAIR

### (1) Legal Authority and the Place of Civil Law

Stair presents a distinctive view of what it means to be obliged in which legal norms can only be understood as part of a process of application of human reason and conscience “determining every rational being to that, which is congruous and convenient for the nature and condition thereof”.<sup>135</sup> The obligation of restitution is justified not by reference to positive legal texts or norms but the authority of God’s moral law; it would be binding “though there were no Positive Law”.<sup>136</sup> Possible differences in the views of Stair and Mackenzie concerning the nature of legal authority and the importance of Roman law have been explored in detail elsewhere;<sup>137</sup> the debate over the owner’s right to recover supports Ford’s thesis regarding Stair’s willingness to follow the dictates of conscience over learned authority.

Ford argues that Mackenzie assumed that lawyers would be able to resolve questions of private law through reliance on learned authority without resort to the laws of nature and nations: “[i]t was the local and learned sources that constituted the *corpora iuris* through which Mackenzie understood equity to flow like blood coursing through the veins of human bodies”.<sup>138</sup> Mackenzie’s engagement with the *vindicatio* is consistent with what many have identified as a reluctance to turn directly to natural

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<sup>134</sup> Ford, *Law and Opinion* (n 6) 516.

<sup>135</sup> Stair, *Institutions* (1693) 1.1.1. J Underwood Lewis, “The Moral Character of Positive Law in Viscount Stair’s *Institutions of the Law of Scotland* (1681): A Source for Rethinking the Nature of Legal Obligation” (1976) JR 127 characterises Stair’s account as a contention that certain obligations are logically implicit in the pursuit of certain ends – e.g. the security of property might be seen as implying a duty to respect property – but this is perhaps to underplay the theological foundations of Stair’s reasoning.

<sup>136</sup> Stair, *Institutions* (1693) 1.7.1.

<sup>137</sup> See e.g. H MacQueen, “Mackenzie’s *Institutions* in Scottish Legal History” (1984) 29 JLSS 498, especially at 501 and extensive discussion and further references in Ford, *Law and Opinion* (n 6) 538-539. On the role of custom based on judicial decision in Stair’s thought, see generally Ford, *ibid.*, especially 407-439.

<sup>138</sup> Ford, *Law and Opinion* (n 6) 498.

equity.<sup>139</sup> By contrast, for Stair, Ford asserts that the learned sources were not sources of constituted equity but examples of how equity could be constituted.<sup>140</sup> Stair's approach is characterised as involving "no sustained effort to show that the local remedies were built on Roman foundations and no effort at all to show that the practice of the session could be brought into line with later civilian theory".<sup>141</sup> His rejection of a vindictory remedy substantiates Ford's portrayal.

It is beyond the scope of this article to investigate fully the reasons for Stair's willingness to depart from the Roman rule, but a reasonable conjecture might be that this was linked to an understanding of legal debate as inseparable from a broader political debate about national identity and sovereignty.<sup>142</sup> On a very general level, it can be argued that Stair's work is concerned to set out Scots law as a distinctive body of custom in a way in which Mackenzie's was not.<sup>143</sup> His account of restitution may reflect his desire to secure the status of Scots law as a body of learning not simply derivative of Roman law.<sup>144</sup> Various other factors may also have influenced Stair's attitude to the civil law, including the fact that (unlike many advocates of the time) he did not travel abroad to study civil law before entering legal practice.<sup>145</sup> Whatever the reasons, the sources considered here reinforce Ford's contention that Stair may not have credited the Civil law with necessary or perhaps even probable authority.<sup>146</sup>

## **(2) Justifying Property: Ownership and Obligation**

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<sup>139</sup> See e.g. C Jackson, *Restoration Scotland, 1660-1690 Royalist Politics, Religion and Ideas* (2003) 139; Ford, *Law and Opinion* (n 6) 494-495; MacQueen, "Mackenzie's *Institutions*" (n 136).

<sup>140</sup> Ford, *Law and Opinion* (n 6) 499.

<sup>141</sup> *Ibid* 521.

<sup>142</sup> A point made by e.g. Ford, *Law and Opinion* (n 6) 27. For the political context to the debate between Stair and Mackenzie, see Jackson, *Restoration Scotland* (n 138), esp. ch 6.

<sup>143</sup> For an extremely thorough discussion of the intellectual and political context in which Stair wrote, see generally Ford, *Law and Opinion* (n 6). Ford concludes that Stair did contribute to a programme of national self-definition; "his contention was that the law of Scotland reflected the standing of the Scots among the independent nations of Europe" (567). See also Cairns, "Institutional Writings" (n 95) 90-91.

<sup>144</sup> This would accord with the approach to the civil law set out in *Institutions* (1693) 1.1.16; *Institutions* (1681) 1.15. See further W M Gordon, "Roman Law as a Source", in D M Walker (ed), *Stair Tercentenary Studies* (1981) 107.

<sup>145</sup> For discussion of this and further references, see Ford, *Law and Opinion* (n 6) 2-11.

<sup>146</sup> Ford, *Law and Opinion* (n 6) 419. This is consistent with a view of legal authority as emerging from a process of negotiation with sovereignty: see *ibid.* 539.

Stair's willingness to depart from the Roman law can only be understood in the context of a tradition of Scholastic and Natural Law thought in which the individual conscience<sup>147</sup> and the natural sociability of humanity play a crucial role in determining the scope of legal obligation; "the [natural law] theory of property is [...] inextricably linked with conceptions of human nature and society, of psychology and history, of action and obligation".<sup>148</sup> Although Mackenzie has been argued also to have written from a standpoint that was both "rational and religious",<sup>149</sup> one of the points which emerges from comparison of their views on restitution is that Stair was undertaking justificatory work which Mackenzie was not. It has been seen that both Stair and Grotius tied their account of restitution to a narrative about the origin of property and ownership. The idea of a "golden age" in which there was no private property in land appears to have long been a preoccupation of Stair's.<sup>150</sup> Stair's understanding of the development of private property as simultaneously a timeless and divinely mandated yet also historically conditioned process<sup>151</sup> is inseparable from his approach to legal authority and the precedence given to equity expressed in local custom "wrung out from the debates upon particular cases"<sup>152</sup> over fidelity to the Roman sources.

It is submitted that Stair's account of restitution should be interpreted in the light of understandings of property as an extension of the person, and a breach of property as a breach of a protected legal sphere. Like Grotius,<sup>153</sup> Stair's account of the development of private property begins with a natural individual right to life and liberty that extends to possession of "that which was possest by no other, in so far as

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<sup>147</sup> On the importance of conscience see Hallebeek, *Unjust Enrichment* (n 63) 82. On its role in medieval thought and contradictory place in Calvinist teachings see R A Greene, "Synderesis, the Spark of Conscience, in the English Renaissance" (1991) 52(2) *Journal of the History of Ideas* 195.

<sup>148</sup> Buckle, *Natural Law* (n 86) 3.

<sup>149</sup> O F Robinson, "Law, Morality and Sir George Mackenzie", in H MacQueen (ed), *Miscellany VI* (2009) 11 at 11.

<sup>150</sup> See Neilson (ed), "Scotstarvet's 'Trew Relation'" (1916) 13 *Scottish Historical Review* 280 at 282; Ford, *Law and Opinion* (n 6) 12-13.

<sup>151</sup> On the role of historical development in Stair's work, see N MacCormick, "The Rational Discipline of Law" (1981) *JR* 146. On the perennial problem of the origin and justification of private property rights in natural law theory, see Tierney, *Natural Rights* (n 83) ch 6.

<sup>152</sup> Stair, *Institutions* (1693) 1.1.15.

<sup>153</sup> See Buckle, *Natural Law* (n 86) ch 1.

his use required”.<sup>154</sup> The history of private property thus reflects the “story of extensions to the *suum* [(i.e. that which is one’s own)] by just processes”.<sup>155</sup> The protection of property through restitution is hence closely connected to protection of what Tuck refers to as an individual’s “sovereignty” over his or her moral world.<sup>156</sup> To deprive a person of his property is to injure his autonomy, in the sense of both of his bodily control over possessions and, more broadly, his ability to make choices about his mode of life.

It is not within the scope of this article to trace the historical development of such a view,<sup>157</sup> but the elision in the theological account of restitution between deprivation of a material thing and deprivation of a right is also closely connected to the theological debates that accompanied the development of a theory of subjective rights. When ownership is considered as merely one of a number of possible rights, the distinction between recovery based on ownership (*dominium*) and a right to recover possession (a species of *ius* which may also belong to those who have some other right to possession) recedes in importance.<sup>158</sup>

Stair’s approach can also be placed in a specifically Calvinist tradition involving an expanded theory of rights and liberties based on the Decalogue. Witte has traced the development of what he describes as a “Reformed theory of subjective rights”, beginning with Calvin’s account of political and civil duties;<sup>159</sup> enumeration of individual rights and duties relating to property continued to play an important role in Calvinist theology.

A useful example is the Larger Catechism, adopted by the General Assembly of the Church of Scotland in 1648.<sup>160</sup> Although an enforced Episcopalianism replaced

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<sup>154</sup> Stair, *Institutions* (1693) 2.1.29.

<sup>155</sup> Buckle, *Natural Law* (n 86) 32.

<sup>156</sup> R Tuck, *Natural Rights Theories: Their Origin and Development* (1979) 6.

<sup>157</sup> One view is that that such a development can be located with the Spanish Scholastics and particularly in the thought of Vitoria, see e.g. N Jansen, “Von der Restitutionslehre der Spanischen Spätscholastik zu einem europäischen Recht nichtvertraglicher Schuldverhältnisse?” (2012) 76 RZ 921 at 926. However, for criticism of this approach and further references see Tierney, *Natural Rights* (n 83) ch 11, especially at 261.

<sup>158</sup> On the debates over whether *dominium* could be a *ius*, see Tierney, *Natural Rights* (n 83) 259-260; Tuck, *Natural Rights* (n 155) 47; A Brett, *Liberty, Right and Nature* (1997) ch 4.

<sup>159</sup> Witte, *Reformation* (n 4).

<sup>160</sup> The Westminster Larger Catechism, available at [http://www.reformed.org/documents/wlc\\_w\\_proofs/](http://www.reformed.org/documents/wlc_w_proofs/).



Presbyterian doctrine after 1660,<sup>161</sup> the Catechism provides an indication of the theological climate that infused Scots intellectual and religious life for much of the seventeenth century.<sup>162</sup> The eighth commandment (“Thou shalt not steal”) is understood to give rise to numerous duties relating to fair dealing, rendering to everyone his due and making “restitution of goods unlawfully detained from the right owners thereof”. The forbidden sins include “all other unjust or sinful ways of taking or withholding from our neighbour what belongs to him, or of enriching ourselves”. This theological standpoint presents an entirely different perspective from the orthodoxies of the Civil law remedies; Stair’s rejection of the *vindicatio* is entirely consistent with the Calvinist construction of property rights as both a protected facet of individual liberty and a source of obligation. In this sense, it is also part of a philosophical reorientation of rights and justice around the figure of the individual legal subject.

## H. CONCLUSIONS

Stair presents a very different vision of law and rights, one in which the strictures of the Roman remedies are replaced by a general obligation to act in accordance with the dictates of natural reason, particularly in respect of proprietary rights: “God in his goodness hath given man more radiant Rays of Reason, and preserved it more after his Fall, about his rights of *meum* and *tuum* than in any other science or Knowledge”.<sup>163</sup> The debate over the place of the *vindicatio* illustrates the extent to which these more abstract questions had important doctrinal implications. As Ford suggests, Stair’s work “detached the law of Scotland from the philosophical base on which it had been placed by other jurists”.<sup>164</sup> Close analysis of Stair’s position further underlines his willingness to move away from Civilian orthodoxy.

The way in which Stair connects ownership and obligation is, in one sense, a

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<sup>161</sup> See Jackson, *Restoration Scotland* (n 138) ch 5.

<sup>162</sup> On the influence of Calvinist religious doctrine in the period, see generally S J Brown, “Religion and Society to c.1900” in T M Devine and J Wormald (eds), *The Oxford Handbook of Modern Scottish History* (2012) (DOI: 10.1093/oxfordhb/9780199563692.013.0005).

<sup>163</sup> Stair, *Institutions* (1693) 1.1.17.

<sup>164</sup> Ford, *Law and Opinion* (n 6) 572.

simple correlation of right and duty common in Humanist jurisprudence<sup>165</sup> and in modern Civilian systems.<sup>166</sup> Vindication and restitution are not, however simply “different ends of the same equation”;<sup>167</sup> under Stair’s scheme the right to recover is no longer a vindicatory remedy based firmly in ownership and the duty to restore is not confined to restoration of possession to the owner but may also involve restoration of an unjustly acquired right. Particularly in the light of the adherence of contemporaries such as Mackenzie to the Civilian sources, Stair’s contribution is remarkable in the extent to which it was willing to reject learned authority in favour of a view of justice based on protected individual rights. Compared to important influences such as Grotius, Stair’s account of restitution is especially radical in rejecting the close connection between ownership and the availability of the remedy of recovery.

Rather than offer a new doctrinal understanding of the recovery of moveables in Scots law, the aim of this article has been to situate Stair’s views within their particular historical and philosophical context. However, given Stair’s almost unique doctrinal status, this project also has implications in interpretation of the modern law. Although the weight of doctrinal authority justifies a focus on protection of the right of ownership, Stair’s account supports Gordon’s assertion that “[the owner’s claim to recover in Scots law] is not based as firmly on his ownership as it is in Roman law”.<sup>168</sup> If it were not for Stair’s influence,<sup>169</sup> the modern form of the right to recover<sup>170</sup> might be, like other Civilian systems, based much more firmly in the ownership of the pursuer.<sup>171</sup>

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<sup>165</sup> See Tuck, *Natural Rights* (n 153) 40-47.

<sup>166</sup> See Carey Miller, *Corporeal Moveables* (n 1) 226-227. On understandings of the “real obligation” to restore in German law (the “Dingliche Ansprüche”), see C K Sliwka, *Herausgabeansprüche als Teil des zivilrechtlichen Eigentumsrechts?* (2012) esp 534-535.

<sup>167</sup> Carey Miller, *Corporeal Moveables* (n 1) 227.

<sup>168</sup> Reid, *Property* (n 1) para 531 (Gordon).

<sup>169</sup> On the reasons for which, see H L MacQueen, “Stair's Later Reputation as a Jurist: the Contribution of William Forbes”, in W M Gordon (ed), *Miscellany Three* (1992) 173.

<sup>170</sup> On which see Reid, *Property* (n 1) para 158. Reid’s exposition was cited with approval in a recent case *Gray v MacNeil* [2016] SC LOC 8 at paras [49]-[50].

<sup>171</sup> Indeed, it might look something like the modern South African remedy described by Carey Miller in *The Acquisition and Protection of Ownership* (1986) para 11.1.2.

