



Rahmatian, A. (2018) The role of institutional writers in Scots law. *Juridical Review*, 2018(1), pp. 42-63.

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Deposited on: 01 December 2017

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The Role of Institutional Writers in Scots Law

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1. The phenomenon of the institutional writer in Scots law

In the law of Scotland, the institutional writer as a source of legal authority still features prominently. It is therefore worth reassessing the function of the institutional writer in Scottish legal reality today. The idea of the ‘institutional writer’ is a theoretical notion and the product of a historical development.

One may start with a working definition of ‘institutional writer’:¹ An institutional writer is an author of a comprehensive systematic treatise of an area of law, and sometimes this even comprises a whole national legal system. Institutional writers are essentially textbook writers and commentators and their works are supposed to be principally descriptive: they present the law systematically and comprehensively as it was (or was perceived to be) at a given time period, for the purpose of legal education at universities,² for supporting the courts of law and, perhaps, for the preservation of a certain legal system. The organisation of these writings is more or less based on the *Institutes* of Roman Law³ and their system,⁴ and has evolved from commentaries and textbooks on the *Pandects* of Justinian.⁵

The development of institutional writing went through several stages. First, legal literature concerned the study of Roman Law as the principal intellectual foundation of legal systems and institutions in general.⁶ The jurists sought to provide a scientific commentary to the *Corpus Iuris* and thereby delivered a foundation for what was to become the idea of a Romanised common law of Europe, the *ius commune*. Later such works discussed the differences between Roman Law and the local law of European countries and regions. The local law was expounded and reinterpreted in the light of the concepts and system of Roman

¹ On the term ‘institution’ or ‘institute’, see John Cairns, “Institutional Writings in Scotland Reconsidered”, in: Albert Kiralfy and Hector L. MacQueen (eds.), *New Perspectives in Scottish Legal History* (London: Frank Cass, 1984), pp. 76-117, at pp. 79-80.

² John Cairns, “Blackstone, An English Institutist: Legal Literature and the Rise of the Nation State”, (2004) 4 (3) *O.J.L.S.* 318-360, at 336.

³ See e.g. Alan Watson, *The Making of the Civil Law* (Cambridge, MA and London: Harvard University Press, 1981), p. 62. This section follows in part Andreas Rahmatian, *Lord Kames: Legal and Social Theorist* (Edinburgh: Edinburgh University Press, 2015), pp. 213-214.

⁴ On the system of the *Institutes* of Gaius and of Justinian, see e.g. Witold Wołodkiewicz, *Les origines romaines de la systématique du droit civil contemporain* (Wrocław, Warszawa: Wydawnictwo Polskiej Akademii Nauk - Accademia Polacca Delle Scienze, Roma; conferenze e studi no. 76, 1978), pp. 21-27.

⁵ Klaus Luig, “The Institutes of National Law in the Seventeenth and Eighteenth Centuries”, (1972) *J.R.* 193-226, at 198; Cairns, “Blackstone, An English Institutist”, (2004) 4 (3) *O.J.L.S.* 326.

⁶ For the following see especially Luig, “The Institutes of National Law in the Seventeenth and Eighteenth Centuries”, (1972) *J.R.* 195-198, Cairns, “Institutional Writings in Scotland Reconsidered”, in: *New Perspectives in Scottish Legal History* (1984), pp. 76-80.

Law during the period of the older *usus modernus*, in the sixteenth and seventeenth centuries. The jurists tried to reconcile and combine Roman and local laws – an important example for Scotland is Craig’s *Jus Feudale*.⁷ During a third stage, lawyers also started concentrating on the discussion of specific legal systems without connecting them with the *ius commune* as such, but their commentaries were coloured by concepts of the *ius commune*.

At the end of the period of the *usus modernus*, institutional writing entered its last stage: now the separate legal systems of the independent European principalities were studied, and this new *ius modernum*, or *ius novissimum*, thus the study of indigenous legal sources, emerged within legal science as a distinct subject. From the late seventeenth century onwards, treatises would also be written in the local language, and no longer in Latin.⁸ Roman Law as positive law could not claim prevalence over national laws, but institutional writings helped organising national legal systems, either by resorting to Roman Law concepts or by emulating, to some extent, Roman law thinking when otherwise indigenous legal sources were presented.⁹ They also prepared legal unification and codification and in this way contributed to the gradual formation of nation states in the late seventeenth and eighteenth centuries.¹⁰ Their importance faded with the advent of the Natural Law codifications of the Enlightenment period, the Prussian ALR (1794), the French Code Civil (1804) and the Austrian ABGB (1811),¹¹ and later codification projects during the nineteenth century. On the European Continent the authors of *Institutes* are only of historical interest today.

In Scotland, the situation of institutional writings is significantly different from Continental Europe. Institutional legal literature and the importance of *Institutes* developed from the late seventeenth century mainly in parallel with European countries until about the second half of the eighteenth century.¹² Scottish institutional literature obtained the role of authoritative texts with normative quality as a third source of law alongside the statutes and case law, a role which these texts theoretically still have today.¹³ This development was characteristic of the late seventeenth and eighteenth century, but started with jurists of the

⁷ John Cairns, T. David Fergus, and Hector L. MacQueen, (1990), “Legal Humanism in Renaissance Scotland”, (1990) 11(1), J.L.H., 40-69, at 50-52, 59; Hélène David, Introduction à l’étude du droit écossais (Paris: Librairie générale de droit et de jurisprudence R. Pichon et R. Durand-Auzias, 1972), p. 311; Watson, *The Making of the Civil Law* (1981), pp. 56-58.

⁸ Cairns, “Institutional Writings in Scotland Reconsidered”, in: *New Perspectives in Scottish Legal History* (1984), p. 77.

⁹ Discussion in relation to France, Germany, Italy, Spain and other countries, see Luig, “The Institutes of National Law in the Seventeenth and Eighteenth Centuries”, (1972) J.R. 201, 203 *et seq.*, Cairns, “Institutional Writings in Scotland Reconsidered”, in: *New Perspectives in Scottish Legal History* (1984), pp. 81-88.

¹⁰ Cairns, “Blackstone, An English Institutist”, (2004) 4 (3) O.J.L.S. 321-322. On England in particular (with reference to Blackstone), *ibid.*, 328-331.

¹¹ Luig, “The Institutes of National Law in the Seventeenth and Eighteenth Centuries”, (1972) J.R. 194; Franz Wieacker, *A History of Private Law in Europe*, tr. T. Weir (Oxford: Clarendon Press, 1995) pp. 257, 260; Frederic H. Lawson, *A Common Lawyer Looks at the Civil Law* (Westport, Connecticut: Greenwood Press, 1977), p. 34; Watson, *The Making of the Civil Law* (1981), pp. 107-110, 118-119.

¹² Major differences were that university training in law (mostly in Roman law) took place outside Scotland and judicial precedent played a remarkably greater role in institutional writing, already with Stair himself, see Watson, *The Making of the Civil Law* (1981), pp. 34-35.

¹³ Compare David, Introduction à l’étude du droit écossais (1972), p. 295.

early seventeenth century, like Robert Burnet who wrote the preface to the first printed edition of Thomas Craig's *Ius feudale* (1655).¹⁴ It is therefore appropriate to talk of authors expounding Scots law according to an institutional system as 'institutional writers', to distinguish them from the 'Institutionalists',¹⁵ the now historic writers of *Institutes* on the European Continent. The term 'institutional writers' denotes here that the Scottish authors followed more or less the system of the *Institutes* of Justinian, although to what extent they really did has sometimes been debated.¹⁶

There are several reasons for this different development in Scotland, but none of them give an entirely cogent explanation. An important aspect was certainly the fact that under the Act of Union of 1707, Scotland lost its Parliament as its independent legislative body, but its specific substantive Scots private and criminal laws were preserved,¹⁷ and, in part, its separate judicatures.¹⁸ Codification of Scots law in the form of statutory measures was in reality out of question, but a unification of Scots and English law had never been attempted either. By the time the union with England was formed, Scots law had already obtained its distinctive shape.¹⁹ The institutional writers came to fulfil the role as academic systematisers, even codifiers (in the sense of a digest), of large and comprehensive areas of Scots law, and with their systematic scientific expositions helped preserving a distinctive local (or national) law.²⁰

In some measure this assessment relies on hindsight. Stair (*The Institutions of the Law of Scotland*, 1st ed. 1681, 2nd ed. 1693²¹) and Mackenzie (*The Institutions of the Law of Scotland*, 1st ed. 1684) who published their works before 1707, were representatives of the late phase of institutional writing as it also happened on the European Continent. They were not primarily concerned with a deliberate foundation or preservation of Scots law in lieu of legislative codification. Stair may have had in mind not only instruction, but also the protection of Scots law within the Cromwellian Union between England and Scotland, when

¹⁴ John D. Ford, *Law and Opinion in Scotland during the Seventeenth Century* (Oxford: Hart Publishing, 2007), pp. 35-36.

¹⁵ Luig, "The Institutes of National Law in the Seventeenth and Eighteenth Centuries", (1972) J.R. 226, calls all these authors 'Institutionalists'. Lawson, *A Common Lawyer Looks at the Civil Law* (1977), pp. 73, 76, refers to Scottish and Continental European authors (for example Grotius, Stair, Pothier) equally as 'institutional writers'.

¹⁶ See, e.g., the discussion between Watson and Reid regarding Bell's *Principles*, Kenneth G. C. Reid, "From Text-Book to Book of Authority: The Principles of George Joseph Bell", (2011) 15(1) Edin.L.R. 6-32, at 20, Alan Watson, *Legal Transplants. An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974), pp. 38-39.

¹⁷ Act of Union 1707, Art. XVIII, preservation of the Scottish feudal system, Art. XX.

¹⁸ Act of Union 1707, Art. XIX. On the development of the final appeal from the Scottish Court of Session to the British House of Lords in civil cases after 1707, see e.g. A. J. MacLean, "The 1707 Union: Scots Law and the House of Lords", in Albert Kiralfy and Hector L. MacQueen (eds.), *New Perspectives in Scottish Legal History* (London: Frank Cass, 1984), pp. 50-75, at p. 50.

¹⁹ Cairns, "Institutional Writings in Scotland Reconsidered", in: *New Perspectives in Scottish Legal History* (1984), p. 89.

²⁰ Cairns, "Blackstone, An English Institutist", (2004) 4 (3) O.J.L.S. 324.

²¹ This is the edition used (as its reprint of 1981) in the following: James Viscount of Stair, *The Institutions of the Law of Scotland*, David M. Walker (ed.) (Edinburgh and Glasgow: The University Presses of Edinburgh and Glasgow, 1981) (1st ed. 1681). On the two editions, see Ford, *Law and Opinion in Scotland during the Seventeenth Century* (2007), pp. 73-74, 84, 374, 402-403.

he wrote his *Institutions* in the 1660s.²² He sought to place Scots law on a philosophical basis but less so than earlier jurists, and he maintained that law must derive from a lawgiver, not from a group of legal experts.²³ However, had Scotland remained independent, the institutional works may well have contributed to a codification of the national law, in a similar way as the Natural Law codifications in Prussia, France and Austria. The institutional writers would then have been of interest to historians only, like Argou (*Institution au Droit François*, 1692)²⁴ or Domat (*Les lois civiles dans leur ordre naturel*, 1689)²⁵ in France, and Stryk (*Specimen usus moderni Pandectarum*, 1690) or Struve (*Jurisprudentia Romano-Germanica forensis*, 1670) in Germany.²⁶

The Scottish institutional writers of the eighteenth century seemed to have taken the distinct national law of Scotland within Britain for granted, and did not specifically see their endeavours as a preservation of Scots law against ‘intrusions’ of English law. Erskine deals with this matter at the beginning of his *Principles of the Law of Scotland* (1st ed. 1754) in judicious terms:²⁷

‘That law which is thus superadded to the law of nature by the legislative power of any sovereign state is called civil, and sometimes positive, or municipal. ...

The municipal law of Scotland may be divided, after the example of the Romans, into written and unwritten. ...

To conclude this account of the municipal law of Scotland, it must be observed, that notwithstanding the Treaty of Union in 1707, by which the kingdoms of England and Scotland were made one nation, under one king and one parliament, all the laws of Scotland concerning private right, whether statutory or customary, are reserved entire, not to suffer any alteration, but for the evident utility of the subject.’

Bankton’s discussion on this point is substantially the same.²⁸ Kames²⁹ was interested in developing and expounding a historically informed scientific system (a ‘regular institute of the common law of this island’) that compares Scots and English law and distils the best ideas of legal thinkers of each jurisdiction as a basis for a possible harmonisation.³⁰ He also

²² Gordon M. Hutton (1981), “Purposes and Pattern of the Institutions: Stair’s Aim in writing the Institutions”, in: David M. Walker (ed.) *Stair Tercentenary Studies* (Edinburgh: The Stair Society, 1981) (Vol. 33), pp. 79-87, at 82, Cairns, “Institutional Writings in Scotland Reconsidered”, in: *New Perspectives in Scottish Legal History* (1984), p. 90.

²³ Ford, *Law and Opinion in Scotland during the Seventeenth Century* (2007), pp. 571-572.

²⁴ Watson, *The Making of the Civil Law* (1981), pp. 67-68; Cairns, “Institutional Writings in Scotland Reconsidered”, in: *New Perspectives in Scottish Legal History* (1984), pp. 86-87.

²⁵ Jean Domat, *The Civil Law in its Natural Order: Together with the Publick Law*, trans. William Strahan, Vol. 1 (London: J. Bettenham, for E. Bell, 1722 [etc.] – facsimile edition, Clark, NJ: Lawbook Exchange, 2008) (1st ed. 1689).

²⁶ Wieacker, *A History of Private Law in Europe* (1995), pp. 170-171; Watson, *The Making of the Civil Law* (1981), pp. 78, 81.

²⁷ John Erskine of Carnock, *An Institute of the Law of Scotland*, Vol. 1, William W. McBryde (ed.) (Edinburgh: The Law Society of Scotland/Butterworths, 1989) (1st ed. 1773), I.1.18, I.1.30, I.1.48, pp. 7, 11, 48.

²⁸ Bankton, *Lord Bankton* (Andrew McDouall), *An Institute of the Laws of Scotland*, vol. 1, William M. Gordon (ed.) (Edinburgh: The Stair Society, 1993) (1st ed. 1751) (facsimile reprint), I.1.46, I.1.54, pp. 20, 23.

²⁹ On the question whether Lord Kames is regarded as an institutional writer at all, see below under 3.

³⁰ Kames, *Lord Kames* (Henry Home), *Historical Law-Tracts*, 2nd ed. (Edinburgh: Kincaid, Millar and Bell, 1761 - facsimile edition: Birmingham, USA: Legal Classics Library, 1988), Preface, pp. xiv-xv.

criticised Stair and the institutional writers in general that they were ‘not always concordant’ or sufficiently ‘systematic’. However, Kames referred to Stair as ‘our capital writer on law’ and he mentioned ‘the works of our later writers’.³¹ Some of these writers he presumably had in mind were what we call ‘institutional writers’ today, but at that time the modern notion of ‘institutional writer’ hardly existed.³²

Even the last representatives of classical institutional writing of Scots law, Bell and Baron Hume, produced their works mainly as textbooks for the purpose of instructing students, and not as a deliberate act of preservation of Scots law within the United Kingdom. When in Victorian times the influence of English law in Scotland rose to a hitherto unprecedented level,³³ so that Scots institutional writing could have been prompted to emphasise the task of preserving ‘traditional’ Scots law, institutional writing actually waned.

The modern idea of ‘institutional writer’ for Scots law emerged only in the nineteenth century³⁴ after institutional writing was largely completed, although reprints and updates of popular works continued to be made (for example editions of Bell’s *Principles*, the tenth edition in 1899, edited by W. Guthrie was the last edition). The importance of the institutional writers gained a real boost after the second world war with the reform of legal education at Scottish universities and the increased prominence of Scottish legal nationalism.³⁵

It is not easy to establish what the criteria to obtain this accolade of an institutional writer in modern Scots law are. When Hélène David defined in 1972 from a French perspective what ‘institutional writers’ were, she exaggerated:³⁶

‘Les Auteurs d’Institutes, ce sont les grands écrivains du Droit écossais. ... leur qualité d’Auteur d’Institute leur vient de leur valeur propre et du fait qu’à cause de cette valeur, les

³¹ Kames, Lord Kames (Henry Home), *Elucidations Respecting the Common and Statute Law of Scotland* (Edinburgh: W. Creech, T. Cadell, 1777 - facsimile edition: Introduction by John V. Price, London: Routledge / Thoemmes Press, 1993), Preface, p. vii.

³² John W. G. Blackie, “Stair’s later Reputation as a Jurist”, in: David M. Walker (ed.), *Stair Tercentenary Studies* (Vol. 33) (Edinburgh: The Stair Society, 1981), pp. 207-227, at p. 209.

³³ See e.g. William M. Gordon, “Scotland as a Mixed Jurisdiction”, in: William M. Gordon, *Roman Law, Scots Law and Legal History. Selected Essays*, (Edinburgh Studies in Law, Vol. 4) (Edinburgh: Edinburgh University Press, 2007) pp. 343-351, at pp. 348-349.

³⁴ Blackie, “Stair’s later Reputation as a Jurist”, in: *Stair Tercentenary Studies* (1981), p. 210; Cairns, “Institutional Writings in Scotland Reconsidered”, in: *New Perspectives in Scottish Legal History* (1984), p. 102.

³⁵ Thomas B. Smith, *A Short Commentary on the Law of Scotland* (Edinburgh: W. Green, 1962), pp. 32-33, 113, and see especially p. 33: ‘Without adequate legal literature Scots law will not survive as a coherent and rational system. ... There is, of course, the danger that latent specialties of English law may not be apparent to the Scottish practitioner, and, if comparative techniques are invoked to solve Scottish legal problems, it is highly undesirable to refer to one foreign system only.’ On T. B. Smith and Scottish legal nationalism, see e.g. George L. Gretton, “The Rational and the National: Thomas Broun Smith”, in: E. Reid and D Carey Miller (eds.), *A Mixed Legal System in Transition* (Edinburgh: Edinburgh University Press, 2005) pp. 30-43, at pp. 30, 32, Hector MacQueen, “Two Toms and an Ideology for Scots Law: T. B. Smith and Lord Cooper of Culross”, in: E. Reid and D Carey Miller (eds.), *A Mixed Legal System in Transition* (Edinburgh: Edinburgh University Press, 2005) pp. 44-72. On legal nationalists and Scottish national identity, see Hector MacQueen, (2013), “Public Law, Private Law, and National Identity”, in: N. Walker, C. Mac Amhlaigh, C. Michelon (eds.), *After Public Law* (Oxford: Oxford University Press, 2013) pp. 168-198, at pp. 168, 184-185, with a discussion of critics of legal nationalism.

³⁶ David, *Introduction à l’étude du droit écossais* (1972), p. 295.

juristes écossais considèrent leur écrits avec un respect spécial et leur reconnaissent une autorité presque absolue : ils sont en quelque sorte les prophètes du Droit écossais.’

T. B. Smith, the principal academic figure of Scottish legal nationalism,³⁷ may well have had some influence³⁸ on Mme David’s somewhat overstated position of institutional writers,³⁹ but it is true that these old (and out-dated) textbooks, and in some cases, published lectures, have a certain normative, authoritative force. How this status has been gained, is far from transparent. From a prosaic viewpoint one can say that institutional writers are ‘made’ by the courts. If the Scottish courts, especially at higher instance, refer approvingly to a Scots legal writer between the 1680s and the 1830s, and they do that in relation to different passages of the work in question, and over an extended period of time, at least for a few decades, the author in question becomes established as an institutional writer. It is also desirable that these references are made fairly frequently as part of a *ratio decidendi* and not only within an *obiter dictum*, and that there is a noticeable indication that the court’s decision was clearly influenced, or guided, by the opinion which the writer expressed in his work. However, in reality it is hard to ascertain a writer’s reputation, as direct evidence is difficult to obtain. Writers not overtly stated in decisions may also be highly regarded, and that an increase in citations does not necessarily indicate a rise in the writer’s reputation.⁴⁰ Problems could theoretically also arise where an institutional writer was involved in the handing down of a judgment which endorsed his work (such as Stair⁴¹), but normally it has been presumed, tacitly, that an institutional writer must be long dead.⁴²

Recognition of authoritative standing by the courts is, however, not inevitably a demanding academic standard for obtaining institutional status. It is not necessary that the work has to include particular topics or expounds comprehensively an area of Scots law, and it does not have to show a specific systematic structure.⁴³ Thus the criteria the courts apply when they grant a text institutional status do not follow closely any theoretical criteria and are at least as much driven by tradition and convenience as by rational standards. This is also one reason why it is fairly difficult to agree on a generally accepted canon of institutional writers in Scots law.

³⁷ Kenneth G. C. Reid, “While One Hundred Remain: T B Smith and the Progress of Scots Law”, in: E. Reid and D Carey Miller (eds.), *A Mixed Legal System in Transition* (Edinburgh: Edinburgh University Press, 2005), pp. 1-29, at pp. 5, 10-13, 16.

³⁸ He wrote the preface to David’s book, see David, *Introduction à l’étude du droit écossais* (1972), pp. I-II.

³⁹ Compare T. B. Smith, *A Short Commentary on the Law of Scotland* (1962), pp. 32-33, especially at p. 32: ‘The present writer would submit that the authority of an institutional writer is approximately equal to that of a decision by a Division of the Inner House of the Court of Session ...’. David M. Walker, *The Scottish Legal System*, 7th ed. (Edinburgh: W. Green/Sweet and Maxwell, 1997), p. 457, agrees.

⁴⁰ Blackie, “Stair’s later Reputation as a Jurist”, in: *Stair Tercentenary Studies* (1981), p. 208.

⁴¹ David M. Walker, “Introduction” to: David M. Walker (ed.), *James Viscount of Stair, The Institutions of the Law of Scotland* (Edinburgh, Glasgow: The University Presses of Edinburgh and Glasgow, 1981) pp.1-65, at pp. 12-13, 38. Stair would not have regarded case law as precedents in the sense of a *stare decisis*.

⁴² Compare David, *Introduction à l’étude du droit écossais* (1972), p. 304, T. B. Smith, *A Short Commentary on the Law of Scotland* (1962), p. 33.

⁴³ Cairns, “Institutional Writings in Scotland Reconsidered”, in: *New Perspectives in Scottish Legal History* (1984), pp. 102-103.

Yet, loose as these criteria may be, not every writer who produces a systematic compendium of law qualifies as an institutional writer. An interesting example is Lawson's distinction between Blackstone and Stair: Blackstone's commentaries have never quite become a book of authority (at least in England), because one 'one always tries to go behind Blackstone to see what are *his* authorities', and only if one finds nothing, then one may rely on Blackstone himself. But 'one can go no further back than Stair, if one is searching for ultimate authority on Scots law'.⁴⁴ That can lead courts misinterpreting Stair as they do not regard earlier writers Stair cites to understand more fully Stair's position.⁴⁵ The discussion highlights two important points:

First, the content, systematic quality and pedagogical accessibility or user-friendliness of a text is important, but not decisive in granting the status of an institutional text. The legal context and culture in which the work has been written and used is at least equally important. In the more Civil Law-oriented tradition of Scotland (until the early nineteenth century) the courts would accord academic legal writing or 'doctrine' in effect an authoritative force and the quality of a secondary source of law (after statutes and court decisions), as it was the case in Continental European jurisdictions and continues to be.⁴⁶ So if Blackstone had written his *Commentaries* on Scots Law and in Scotland, he would likely to have been considered as an institutional writer.⁴⁷ It is possible that this greater deference to written texts, especially where a root in moral theology can be made out,⁴⁸ originated from the Scottish Presbyterian tradition. The focus on accounting and on written commercial and moral accountability (also through diaries) certainly does.⁴⁹ In England, the sources of law have traditionally been only Acts of Parliament and the precedents of the courts, and academic doctrine was entirely irrelevant, although this extreme position has weakened considerably in the last forty years or so.⁵⁰

Secondly, the accessibility of earlier sources which the writer in question seems to rely on plays a certain role: earlier court decisions, infinitely more authoritative than doctrine

⁴⁴ Lawson, *A Common Lawyer Looks at the Civil Law* (1977), p. 74.

⁴⁵ See, for example, J. T. Cameron (later Lord Coulsfield) on the omission of the House of Lords in *Carmichael's Executrix v. Carmichael*, 1920 SC (HL) 195 to consider Stair's reference to the Spanish Civilian writer Luis de Molina (1535-1600), in Stair, *Institutions*, Book I, 10, 5 on *jus quaesitum tertio*, which would have explained the true meaning and scope of Stair's statement, see John Taylor Cameron, "*Jus Quaesitum Tertio*: The True Meaning of Stair I.x.5", (1961) J.R. 103-118, at 104, 112. See also, more generally, Thomas Richter, "Did Stair Know Pufendorf?", (2003) 7(3) Edin.L.R. 367-378, at 371, 374. However, despite the merits of academic elucidations, the courts decide not only about the quality of a writer as being institutional, but also about the ambit of his dicta.

⁴⁶ E.g. Franz Bydliniski, *Juristische Methodenlehre und Rechtsbegriff*, 2nd ed. (Wien-New York: Springer, 1991) pp. 60-76, 221, 483-496, though in his discussion the relevance of doctrine appears characteristically rather indirect, as assistance for legal, especially statutory, interpretation.

⁴⁷ Cairns, "Blackstone, An English Institutist", (2004) 4 (3) O.J.L.S. 359.

⁴⁸ That is so in the case of Stair, see Dot Reid, "Thomas Aquinas and Viscount Stair: the Influence of Scholastic Moral Theology on Stair's Account of Restitution and Recompense", (2008) 29(2) J.L.H., 189-214, at 190, 197-199, 203.

⁴⁹ Alistair Mutch, *Religion and National Identity: Governing Scottish Presbyterianism in the Eighteenth Century* (Edinburgh: Edinburgh University Press, 2015), pp. 169-172.

⁵⁰ E.g. James Holland, and Julian Webb, *Learning Legal Rules*, 6th ed. (Oxford: Oxford University Press, 2006), p. 40.

could ever be in the Common Law system of England, would be used to destabilise rather than establish an academic writer's authority. In the case of Stair, there is far less earlier authority available,⁵¹ especially case reports.⁵²

Furthermore, as a normative decision of the tradition of Scots legal practice, any Scots law before Stair is, from a doctrinal (not historical!) point of view, irrelevant: Stair, 'one of Scotland's most eminent scholars and statesmen, has been universally acknowledged as the genius who first established Scots law as a complete and coherent rational system, and the most complete master of jurisprudence that Scotland has ever produced'.⁵³ Such an assessment does not only close debate, but can also prevent necessary legal development. Modern legal reality in Scotland is, however, fortunately quite different.

2. The – agreed? – list of institutional writers in Scots law

The only writers who are generally regarded as having unquestionably the highest institutional status in Scots law throughout the centuries are Stair, Erskine and Bell, representing the seventeenth, eighteenth and nineteenth centuries, respectively.⁵⁴ Stair is viewed as taking the lead, and judicial pronouncements confirm his legal authority: Stair's opinion, if not contradicted, is taken as ascertaining the Law of Scotland.⁵⁵ A more comprehensive term than institutional writers would be 'authoritative legal writers', which could include authors such as Kames who did not follow the institutional model, provided one is willing to regard Kames as an institutional or authoritative writer at all.

Recognition as institutional writer may have been furthered by the author's statements that he aspired to be one himself. Lord Bankton placed himself firmly in the tradition of Scots institutional writers when he first set out in the Preface to his *Institute* the genealogy of eminent legal authors with approval and praise, Craig ('The learned Sir Thomas Craig's excellent Book'), Stair ('The only performance upon our law, that can be called an intire

⁵¹ David M. Walker, "The Background of the Institutions", in: David M. Walker (ed.), *Stair Tercentenary Studies* (Vol. 33) (Edinburgh: The Stair Society, 1981), pp. 69-78, at pp. 69-71.

⁵² Ford, *Law and Opinion in Scotland during the Seventeenth Century* (2007), pp. 398-400.

⁵³ Hutton, "Purposes and Pattern of the Institutions: Stair's Aim in writing the Institutions", in: *Stair Tercentenary Studies* (Vol. 33), David Walker (ed.) (Edinburgh: The Stair Society, 1981), pp. 1-68, at p. 1. Stair himself would presumably not have claimed that authoritative status for his *Institutions*, see William M. Gordon, "Risk in Sale – From Roman Law to Scots Law", in: William M. Gordon, *Roman Law, Scots Law and Legal History. Selected Essays* (Edinburgh Studies in Law, Vol. 4) (Edinburgh: Edinburgh University Press, 2007), pp. 164-176, at p. 167. However, Stair sought to produce a reliable and authoritative guide to Scots law for the legal profession as a means for consolidating the law of Scotland, and his *Institutions* obtained quickly a status similar to Thomas Craig's *Ius feudale*, despite Stair's disagreement with Craig, see Ford, *Law and Opinion in Scotland during the Seventeenth Century* (2007), pp. 180, 240-241, 404.

⁵⁴ Compare David, *Introduction à l'étude du droit écossais* (1972), pp. 198-199, T. B. Smith, *A Short Commentary on the Law of Scotland* (1962), p. 32, Watson, *Legal Transplants. An Approach to Comparative Law* (1974), p. 38. See also Walker, *The Scottish Legal System* (1997), p. 457, with further references, and Walker, "Introduction" to: James Viscount of Stair, *The Institutions of The Law of Scotland* (1981), p. 40.

⁵⁵ *Drew v. Drew* (1870) 9 M. 163, 167 per Lord Benholme. See also Walker, "Introduction" to: James Viscount of Stair, *The Institutions of The Law of Scotland* (1981), pp. 39-41.

system of it in civil rights, is the viscount of Stair's Institutions. That great judge and lawier worthily filled the chair of lord president of the court of session'), Mackenzie, Forbes ('that I may omit none that have wrote systematically upon our laws').⁵⁶ Lord Bankton then stated what prompted him to write the *Institute*:⁵⁷

'I have, for many years, assiduously practised at the bar; and not finding that any of my contemporaries, who are better qualified for a performance of this kind, were likely to undertake it, I employed my leisure hours ... in composing the work now offered to the public ...'

In this work, I have followed the general method of the viscount of Stair in his Institutions, because, in my apprehension, it is most just and natural, and therefore a good model.'

Erskine's edition of his *Institute* stressed that it was 'in the Order of Sir George Mackenzie's Institutions'.⁵⁸ It did not harm Erskine's recognition as an institutional writer that he did not follow Stair's system, but the order of Mackenzie's *Institutions*, although the latter work is not granted institutional status⁵⁹ and although Erskine's decision to follow Mackenzie was apparently regarded as unfortunate.⁶⁰ It was arguably not so relevant which system the author used, as long as he used a system and structured accordingly a comprehensive treatise of the whole law or a large part of it.

Stair's organisation of the *Institutions* is quite unusual when compared with the more Roman/Justinian organisation in contemporary works of the *usus modernus* on the European Continent, for example Georg Adam Struve's *Jurisprudentia Romano-Germanica Forensis* in Germany, an enormously successful textbook of the *usus modernus* which went through numerous editions for about a century after its first publication in 1670.⁶¹ While Bankton followed Stair and Erskine followed Mackenzie, Bell departed from the more Justinian model of older writers quite considerably and devised his own practical structure for his *Principles*.⁶² In whichever way an author actually implements it, professing to follow and uphold a tradition of learned writing may have helped the author in being admitted to that tradition as one of its representatives in due course.

Today, according to Walker, the list of institutional writers on civil matters always includes (with those works that are regarded as authoritative) Craig (*Jus Feudale*, 1655), Stair (*The Institutions of the Law of Scotland*, 1681), Andrew McDouall, Lord Bankton (*An Institute of the Laws of Scotland*, 3 vols. 1751-53), Erskine (*An Institute of the Law of Scotland*, 2 vols. 1773) and Bell (*Commentaries on the Law of Scotland and the Principles of*

⁵⁶ Bankton, *An Institute of the Laws of Scotland*, vol. 1, Preface (1993), p. v. The old spelling and capitalisation are retained.

⁵⁷ Bankton, *An Institute of the Laws of Scotland*, vol. 1, Preface (1993), p. vi.

⁵⁸ Erskine, *An Institute of the Law of Scotland*, Vol. 1 (1989), Title page.

⁵⁹ Watson, *Legal Transplants. An Approach to Comparative Law* (1974), p. 38, Hector MacQueen, 'Mackenzie's Institutions in Scottish Legal History', (1984) 29 *Journal of the Law Society of Scotland*, 498-501, at 498.

⁶⁰ That appears to be the view of Baron David Hume, G. Campbell H. Paton (ed.), *Baron David Hume's Lectures. 1786-1822*, Vol. 1 (Edinburgh: J. Skinner, printed for the Stair Society, 1939), pp. 8-9.

⁶¹ Wieacker, *A History of Private Law in Europe* (1995), p. 171.

⁶² Reid, (2011), "From Text-Book to Book of Authority: The Principles of George Joseph Bell", (2011) 15(1) *Edin.L.R.* 19-21, Watson, *Legal Transplants. An Approach to Comparative Law* (1974), pp. 38-39.

Mercantile Jurisprudence, 1804, and *Principles of the Law of Scotland*, 1829). However, Mackenzie's *Institutions of the Law of Scotland*, 1684, and Kames's *Principles of Equity*, 1760, are not normally included.

In criminal law the agreed institutional writers are Mackenzie (*The Law and Customs of Scotland in Matters Criminal*, 1678), Baron Hume (*Commentaries on the Law of Scotland respecting Crimes*, 2 vols., 1797), Alison (*Principles of the Criminal Law of Scotland*, 1832, and *Practice of the Criminal Law of Scotland*, 1833).⁶³ This list is repeated in other modern works on Scots law and its history.⁶⁴

Who is or is not considered as an institutional writer is substantially determined by the treatment of the writer's works in the courts of law over a period of time.⁶⁵ But inclusion in the list of institutional writers has apparently also been influenced by the preferences of contemporary or near contemporary academics. When Lord Wilberforce said that Erskine's *Principles* have, beside his *Institute*, also institutional status,⁶⁶ it was said that he had been mistaken:⁶⁷ Erskine's *Principles* are not to be considered as institutional because they were written as a student textbook.⁶⁸ But this argument is not stringent; Bell's *Principles* were also written as a textbook for students,⁶⁹ and so was predecessor of all institutional textbooks, the *Institutes* of Gaius, written c. AD 160. In fact, the reason why the writings of the institutional writers are regarded as texts of authority is *because* they were conceived as comprehensive textbooks and have subsequently been judged by legal practice as fulfilling this role to (generally) high satisfaction. There is no rationally comprehensible set of criteria, based on an objective notion of 'institutional writing', which determines when a work is to be admitted to the circle of authoritative legal texts.⁷⁰ T. B. Smith admits that '[n]o definition can be given of *when* a writer becomes institutional'.⁷¹

⁶³ Walker, *The Scottish Legal System* (1997), pp. 456-457.

⁶⁴ E.g. Robin M. White, and Ian D. Willock, *The Scottish Legal System*, 3rd ed. (Edinburgh and London: LexisNexis/Butterworth, 2003) 136. An outline of the various works within the circle of institutional writings, see e.g. G. Campbell Paton, "Comparison between the Institutions and other Institutional Writing", in: David M. Walker (ed.), *Stair Tercentenary Studies* (Edinburgh: The Stair Society, Vol. 33, 1981), pp. 201-207 at pp. 202-207. Cairns, "Institutional Writings in Scotland Reconsidered", in: *New Perspectives in Scottish Legal History* (1984), pp. 89-94, also broadly accepts this list, but raises the question whether other works, such as Forbes's *Great Body of the Law of Scotland* (which remained unpublished at the time), or James Innes's *Idea Juris Scotici*, could be regarded as institutional writings in principle.

⁶⁵ See e.g. the detailed discussion of the perhaps authoritative status of Hume's *Lectures* as opposed to his (higher ranking) *Commentaries*, in *Fortington v. Lord Kinnaird* 1942 S.C. 239, at 253 per Lord President Normand.

⁶⁶ In *Wills' Trs. v. Cairngorm School Ltd.* 1976 S.C. (H.L.) 30 at 117.

⁶⁷ Walker, *The Scottish Legal System* (1997), p. 458, note 68: 'this is inaccurate'. In fact one has to qualify an assessment of Lord Wilberforce's statement in any case because he says: 'The Institutional writers of authority whose work appeared before 1772 were Craig, Stair, Bankton and Erskine's Principles. Erskine's Institute appeared in 1773 but must have been completed in 1768 when he died and no doubt reflected the law as then understood.', *Wills' Trs. v. Cairngorm School Ltd.* 1976 S.C. (H.L.) 30 at 117.

⁶⁸ Walker, *The Scottish Legal System* (1997), p. 458.

⁶⁹ Bell was Professor of Scots Law at Edinburgh University from 1822, see Kenneth G. C. Reid, "George Joseph Bell's inaugural lecture", (2014) 18(3) *Edin.L.R.* 341-357, at 343.

⁷⁰ Cairns, "Institutional Writings in Scotland Reconsidered", in: *New Perspectives in Scottish Legal History* (1984), p. 103.

⁷¹ T. B. Smith, *A Short Commentary on the Law of Scotland* (1962), p. 32, original emphasis.

One cannot detect a conclusive and independently verifiable set of rational criteria according to which institutional status could be conferred on an author, so, not surprisingly, the list of institutional writers in Scots law has been variable. But availability and quality were factors of significance.

Availability of a text is relevant to the recognition of that author as an institutional writer. New editions of institutional texts,⁷² as well as better accessibility through internet databases⁷³ can here be remarkably influential even today. Brevity and ease of use were important factors, so for example Mackenzie's *Institutions* (which were short, particularly in comparison to Stair's *Institutions*),⁷⁴ or Erskine's *Institute*,⁷⁵ could even have been an advantage. Reference by the courts to Hume's *Lectures* has much increased with their publication by the Stair Society between 1939 and 1958.⁷⁶ But Lord President Normand said in *Fortington v. Lord Kinnaird*: 'The publication of the lectures a century after [Hume's] death by the Stair Society, for which we should be grateful, cannot be held to have made available to us and our successors a new and authoritative source of Scots law.'⁷⁷

Quality of work is founded on a subjective judgement which may be reinforced, or counteracted, by tradition. This can lead to the situation that an older, methodically and systematically less advanced work is nevertheless considered as more authoritative. Erskine is generally regarded as more authoritative than Bankton, and Stair more than the other two. For example, a comparison of Stair's, Bankton's and Erskine's discussion of the basic concepts of property,⁷⁸ shows that Stair and Bankton are more similar in style, while Erskine's approach differs from them as it is more 'modern' and methodical, with more clarity and intellectual analysis. Erskine is dryer and more 'classical', closer to the distant style of a modern textbook writer, and secular, while Stair and Bankton expound the material in the rich prolix style of baroque writers that is imbued with theological discussions, here about the initial community of things and the origin of property.⁷⁹ Theology does not seem to harm authoritative status, but philosophy generally does, unless it is built upon a theological foundation.⁸⁰ That

⁷² E.g. the recent edition of the 4th ed. of Bell's *Principles* (1839): George J. Bell, K. G. C. Reid (ed.) *Principles of the Law of Scotland* (1839), 4th ed., facsimile edition (Edinburgh: Edinburgh Legal Education Trust, 2010).

⁷³ E.g. Historical Texts, at: <http://historicaltexts.jisc.ac.uk/>.

⁷⁴ See Watson, *Legal Transplants. An Approach to Comparative Law* (1974), p. 94, on the reception of Blackstone's 'portable' *Commentaries* in America.

⁷⁵ Blackie, "Stair's later Reputation as a Jurist", in: *Stair Tercentenary Studies* (1981), p. 214.

⁷⁶ Baron David Hume, *Lectures. 1786-1822*, Vols. 1-6 (1939-1958), ed. G. Campbell H. Paton.

⁷⁷ 1942 S.C. 239, at 254.

⁷⁸ Stair, *Institutions*, Book II, Title 1 (1981: 289), Bankton, *Institute*, Book II, Title 1 (1993/1751: 503), Erskine, *Book II, Title 1* (1989: 249).

⁷⁹ Stair, *Institutions*, II.1.1, II.1.5 (1981: 289, 294), Bankton, *Institute*, II.1.2 (1993/1751: 503-504). Erskine ventures into this area only very briefly at the beginning of his *Institute*, I.1.13 (1989: 5).

⁸⁰ As is the case with Stair, see D. Reid, "Thomas Aquinas and Viscount Stair: the Influence of Scholastic Moral Theology on Stair's Account of Restitution and Recompense", (2008) 29(2) *J.L.H.* 196-200, 202: Stair's philosophical element in his *Institutions* was acceptable because it was influenced by 'long-established', that is, Aristotelian, philosophy approved by the Scholastic reception in the Church (Thomas Aquinas), and at the same time founded on Christian theology, whereby the interest for scholastic theology was particularly great among the Scottish Presbyterians. This distinctive approach may have been a contributing reason why Stair had no influence on the European continent. See Klaus Luig, "Stair's from a foreign standpoint", in: David M. Walker

depends, however, on the time and person in question: Stair's theological framework⁸¹ rather undermined his authority for some time.⁸² Where a text assumes a philosophical angle in its own right, such as many writings by Kames,⁸³ a more elementary text prevails and disqualifies the intellectually more demanding 'philosophical' text from becoming institutional.⁸⁴

One may state that in order to qualify for institutional status, a work has to bring itself within a tradition of institutional writing (loosely following the *usus modernus* of the seventeenth century), no matter how useful the adopted system is for the exposition of the subject-matter in question. At the same time the work should show a certain unoriginal quality, coupled with comprehensiveness, so as to invite students and practitioners to use it frequently: or, put more directly, legal practitioners are not interested in ingenious elaborations of legal theory, but in a user-friendly handbook. That also assists the work in the elevation of its status if it has been conceived by the author as an 'Institute', even if published posthumously (such as Erskine's *Institute*); the publication as lectures, such as Hume's *Lectures*, or Adam Smith's *Lectures on Jurisprudence* (if they had been available earlier⁸⁵) would be far less beneficial. Thus by and large the classical texts do not differ much from the idea of modern comprehensive textbooks, save for the fact that they did not have to be concerned about a pedagogically convincing presentation, and usually they were not.

However, there seems to have been agreement that textbooks of modern authors of the twentieth or the twenty-first century, whether dead or alive, would never be conferred institutional status; in fact they would have theoretically no authority at all.⁸⁶ Thus Gloag and Henderson's *Law of Scotland*,⁸⁷ Rankine on *Leases*⁸⁸ and McBryde's *Law of Contract in Scotland*⁸⁹ were supposedly irrelevant to the debate among the judiciary. It is doubtful whether this now rather dated academic opinion was ever accurate in this generality. In any

(ed.), *Stair Tercentenary Studies* (Edinburgh: The Stair Society, Vol. 33, 1981), pp. 239-250, at pp. 239-240, discussing the fact that Stair did not attract any attention outside Scotland.

⁸¹ For example, Stair considered the obligation of restitution by reference to God's moral law, not following from positive law, see Stair, *Institutions*, Book I.7.1, and Bonnie Holligan, "Ownership and Obligation: Restitution, Vindication and the Recovery of Moveables in Stair's *Institutions*", (2017) 21(2) *Edin.L.R.* 169-191, at 186.

⁸² And his religious-political associations, see Hector MacQueen, (1992), "Stair's later Reputation as a Jurist: The Contribution of William Forbes", in: William M. Gordon (ed.), *Miscellany Three* (Edinburgh: The Stair Society, Vol. 39, 1992), pp. 173-194, at pp. 174-175, 192-193.

⁸³ See below under 3.

⁸⁴ Cairns, "Institutional Writings in Scotland Reconsidered", in: *New Perspectives in Scottish Legal History* (1984), p. 107.

⁸⁵ Adam Smith, *Lectures on Jurisprudence*, Ronald L. Meek et al. (eds) (The Glasgow Edition of the Works and Correspondence of Adam Smith, vol. 5) (Oxford: Oxford University Press, 1978) (original manuscripts from 1762-63 and 1766). The 1766 report was published in 1896, the 1762-63 report in 1978 for the first time.

⁸⁶ T. B. Smith, *A Short Commentary on the Law of Scotland* (1962), p. 33, Walker, *The Scottish Legal System*, (1997), p. 458.

⁸⁷ William M. Gloag and Candlish Henderson, *The Law of Scotland*, 14th ed., General eds. H. MacQueen and Lord Eassie (R. D. Mackay) (Edinburgh: Thomson Reuters/W. Green, 2017).

⁸⁸ John Rankine, *A Treatise on the Law of Leases in Scotland*, 3rd ed. (Edinburgh: W. Green, 1916).

⁸⁹ William M. McBryde, *The Law of Contract in Scotland*, 3rd ed. (Edinburgh: Thomson/W. Green McBryde, 2007).

case, the reality today is very different.⁹⁰ Before we examine the authority such modern works actually exercise, and what the quality of that authority could be,⁹¹ it is necessary to look at an early challenger of the orthodox idea of institutional writing: Lord Kames.

3. The exception proving the rule? Lord Kames

Lord Kames is the most prominent among the classical Scots jurists who is generally not recognised as an institutional writer.⁹² A rather formalist explanation for not considering Kames as an institutional writer is that he did not venture to discuss in any of his works the whole of the law in the structure of an ‘Institute’, unlike Stair or Erskine.⁹³ This also applies to the work which comes closest to an institutional text, the *Principles of Equity* (1st edition 1760). This work is a systematic account of a specific body of law – equity – and its jurisprudential discussion. Kames was proud of this work,⁹⁴ and he may well have regarded it as an ‘institute’,⁹⁵ at least in an untechnical sense. But several obstacles stand against the recognition of this work as being of institutional quality.⁹⁶ First, it is not entirely certain what Scots lawyers would regard as ‘equity’ within Scots law: in contrast to England, it is not a clearly distinct body of law. Kames himself was aware of the difficulties in ascertaining the boundary between common law and equity:⁹⁷

‘... in Scotland, and other countries where equity and common law are united in one court, the boundary varies imperceptibly; for what originally is a rule in equity, loses its character when it is fully established in practice; and then it is considered as common law ...’

So it remains questionable for what exactly the *Principles of Equity* are meant to be authoritative. One may regard the concept of equity in Scots law as a broader concept of ‘equity’, as an application of a kind of *ars aequi*⁹⁸ that does not really commensurate with the

⁹⁰ See e.g. *Morgan Guaranty Trust Company of New York v Lothian Regional Council*, 1995 S.C. 151, at 157, acknowledging the relevance of modern academic opinion in the context on whether the error of law rule applies so as to exclude the operation of the *condictio indebiti*.

⁹¹ Below under 4 and 5.

⁹² Compare T. B. Smith, *A Short Commentary on the Law of Scotland* (1962), p. 32, Walker, *The Scottish Legal System*, (1997), p. 456, more recently, Daniel J. Carr, “Introduction”, in: Daniel J. Carr (ed.), *Lord Kames: Principles of Equity*, 3rd ed. (Edinburgh: Edinburgh Legal Education Trust (Old Studies in Scots Law, Vol. 4), 2013), pp. v-xlv, at xxxiii-xxxv. See discussion on Kames as (almost) an institutional writer by Rahmatian, *Lord Kames: Legal and Social Theorist* (2015), p. 213, on which the following section is based.

⁹³ See e.g. David, *Introduction à l’étude du droit écossais* (1972), p. 368.

⁹⁴ Ian Simpson Ross, *Lord Kames and the Scotland of his Day* (Oxford: Clarendon Press, 1972), p. 243.

⁹⁵ Compare Kames, *Lord Kames (Henry Home), Principles of Equity. The Third Edition* (Edinburgh, London: J. Bell, W. Creech and T. Cadell, 1778 - facsimile edition: Introduction by Andreas Rahmatian, Clark, New Jersey: The Lawbook Exchange, 2011), Preface, p. xiii.

⁹⁶ Cairns, “Institutional Writings in Scotland Reconsidered”, in: *New Perspectives in Scottish Legal History* (1984), p. 101.

⁹⁷ Kames, *Principles of Equity* (2011), p. 27.

⁹⁸ Following from the Digest D 1,1,1 (Ulpian quoting Celsus): ‘*Ius est ars boni et aequi*’.

technical meaning of ‘equity’ in English law, but has to be understood on its own terms.⁹⁹ In this way one can delineate the ambit of the *Principles of Equity*. But this treatise is also an abstract conception of legal theory and not only a practical exposition of legal rules which practitioners would look out for. Secondly, the *Principles of Equity* seek to give a systematic, scientific, philosophical account of what Kames perceived to be the rules of equity within Scots law. They are not an expository manual or digest of what the law supposedly was when Kames prepared the work.¹⁰⁰

‘But if a court of equity be governed by rules, why are not these brought to light in a system? One would imagine, that such a system should not be useful only, but necessary; and yet writers, far from aiming at a system, have not even defined with any accuracy what equity is, not what are its limits and extent.’

And:¹⁰¹

‘The first I shall insist on is of the greatest moment, namely, Whether a court of equity be, or *ought to be*, governed by any general rules? To determine every particular case according to what is just, equal, and salutary, taking in all circumstances, is undoubtedly the idea of a court of equity in its perfection ... but men are liable to prejudice and error, and for that reason cannot safely be trusted with unlimited powers. Hence the *necessity of establishing rules*, to preserve uniformity of judgement in matters of equity as well as of common law ...’

With regard to the purpose of the *Principles of Equity* and the type of reader Kames wants to reach, he says:¹⁰²

‘This treatise is dedicated to the studious in general, such as are fond to improve their minds by every exercise of the rational faculties. [...] Writers upon law are too much confined in their views: their works, calculated for lawyers only, are involved in a cloud of obscure words and terms of art, a language perfectly unknown, except to those of the profession. Thus it happens, that the knowledge of law, like the hidden mysteries of some Pagan Deity, is confined to its votaries [...]. But such superstition, whatever unhappy progress it may have made in religion, never can prevail in law ...’

I dedicate my work to every lover of science; having endeavoured to explain the subject in a manner that requires in the reader no particular knowledge of municipal law. In that view I have avoided terms of art ...’

Several important aspects emerge from these passages. Kames wanted to bring the law into a rational, scientific system. That does not necessarily distinguish him from the institutional writers, but the fact that he devised his own system in an area of the law which was not unanimously regarded as an existing, separate system hampered considerably the chances of the *Principles of Equity* to be received as an institutional work.

⁹⁹ Andreas Rahmatian, “Introduction: Lord Kames and his Principles of Equity” in: Kames, Lord Kames (Henry Home), *Principles of Equity*. The Third Edition (Edinburgh, London: J. Bell, W. Creech and T. Cadell, 1778 - facsimile edition: Clark, New Jersey: The Lawbook Exchange, 2011), pp. I-LXV, at pp. XII, XXXIII, Rahmatian, *Lord Kames: Legal and Social Theorist* (2015), p. 272.

¹⁰⁰ Kames, *Principles of Equity*, Introduction (2011), p. 2.

¹⁰¹ Kames, *Principles of Equity*, Introduction (2011), pp. 19-20, emphasis added.

¹⁰² Kames, *Principles of Equity*, Introduction (2011), p. 37, 39.

In Kames's Enlightenment idea of a legal science that required a systematic discussion of the law, though not a system necessarily based on legal tradition, the older institutional writers naturally fared badly. But it is obvious that even the critical spirit Kames was willing to recognise special legal writers and their authoritative force. Those who would probably have fulfilled best Kames's demand for systematic academic treatment were, however, the last institutional writers in the early nineteenth century, after Kames's death, such as Bell.

There is also the issue whether and to what extent Kames's structure of the *Principles of Equity* is really convincing,¹⁰³ which does not further the use of this work as a manual for practitioners. Moreover, Kames's account of the rules of equity is prescriptive as much as descriptive; he is a lawyer describing how the law is *and* an applied legal philosopher suggesting how the law ought to be. The rules of equity he seeks to establish are not just descriptions but normative as they are distilled from the existing law as guidance for the student and the practitioner. That sets Kames apart from institutional writers and textbook writers in general. In fact, however, works by Kames are occasionally referred to in Scottish court decisions up to the present time, and interestingly not only the *Principles of Equity*, but also his *Historical Law-Tracts*, which are ostensibly a work of comparative legal history, not an institutional text.¹⁰⁴

The authoritative writer, and especially the institutional writer, must appear to expound the law as it is, not as he wants it to be, although that does not apply so strictly in practice.¹⁰⁵ The authoritative (institutional) writer is not supposed to suggest legal development, as Kames however did, but should describe accurately and comprehensively the *status quo*. It is then up to subsequent generations of lawyers whether they apply the text in a way that effectively confers normative force on it. More pointedly one could say, one loses the chance of becoming an institutional writer if one appears to be too original or speculative. Critical comments about systematic shortcomings in institutional writing tend to undermine, rather than confirm, the writer's own authority and prevent his work, such as Kames's, from becoming authoritative. Later institutional writers indeed had misgivings about Kames's approach and accused him of numerous inaccuracies, from their position not without reason.¹⁰⁶

Finally, the *Principles of Equity* were also supposedly directed towards the general educated reader, not towards the specialist lawyer only. Kames wanted to extract general principles which may transcend the municipal law of Scotland, and he also claimed (with not much success) that he avoided the use of too technical language to make the work more accessible to the general public. However, the Enlightenment idea of explaining and educating is not normally welcomed by a class of lawyers who might see threatened their

¹⁰³ Rahmatian, "Introduction: Lord Kames and his Principles of Equity" (2011), pp. XXXVIII-XXXIX, Rahmatian, *Lord Kames: Legal and Social Theorist* (2015), p. 285.

¹⁰⁴ Rahmatian, *Lord Kames: Legal and Social Theorist* (2015), p. 216-217.

¹⁰⁵ See discussion under 4. below.

¹⁰⁶ Carr, "Introduction", in: Daniel J. Carr (ed.), *Lord Kames: Principles of Equity* (2013), pp. xxxiii-xxxvii.

position and indispensability as experts: works that the non-specialist could understand would rather be suspicious, though Kames's *Principles of Equity* are in fact hardly more accessible. In any case, the opinion of the Scottish judiciary about the authority of the *Principles of Equity* and of Kames's work in general has certainly been varied: one can find all shades of approval and disapproval from Lord President Inglis: 'The principles of equity as systematised by Lord Kames I look upon as the equity law of Scotland'¹⁰⁷ to Lord Dunedin's statement in the *Gordon Peerage* case (1929): 'He is an authority, though rather a wild one.'¹⁰⁸

Kames's approach in the *Principles of Equity* is characteristic of all his work. Perhaps the sharpest summary of his position can be found in the *Preface* to his last work on law, the *Elucidations* (1777).¹⁰⁹

'No science affords more opportunity for exerting the reasoning faculty, than that of law; and yet, in no other science is authority so prevalent. What are our law-books but a mass of naked propositions, drawn chiefly from the decisions of our supreme courts, rarely connected either with premises or consequences? ... Our law-students, trained to rely upon authority, seldom think of questioning what they read: they husband their reasoning faculty, as if it would rust by exercise.

Nor is the exercise of reasoning promoted in any degree by public professors. ...

In other sciences reason begins to make a figure: Why should it be excluded from the science of law? The authority of men of eminence has deservedly great weight ... But authority ought to be subservient to reason ...

Were law taught as a rational science, its principles unfolded, and its connection with manners and politics, it would prove an enticing study to every person who has an appetite for knowledge. ...

As my intention is only to give examples of reasoning, free from the shackles of authority, I pretend not to say what our law actually is, but what it ought to be.'

When preferring scientific reasoning over authority, Kames places himself in direct conflict with the supposed purpose of institutional writing. He also criticises existing writers of authority, so for example Mackenzie for having adopted in his *Institutions* the Roman law division of contracts, although 'there is not the slightest foundation in our law for such a division.'¹¹⁰ Later generations of lawyers have therefore considered Kames's account of the law as not fully reliable. Or, as Baron Hume said about Kames in 1821:¹¹¹

'It is right ... to mention to the young student, that we cannot in every instance rely upon his doctrines (ingenious and instructive though they always are) as a faithful picture of the actual state of practice. His impressions of what the law ought to be the law were so lively on some occasions as to influence his judgment of what was truly done or meant on the Bench.'

¹⁰⁷ *Kennedy v. Stewart* (1889) 16 R 421, at 430.

¹⁰⁸ Quoted in David M. Walker, "Equity in Scots Law", (1954) 66 J.R. 103-147, at 117.

¹⁰⁹ Kames, *Elucidations Respecting the Common and Statute Law of Scotland* (1993), Preface, pp. vii-viii, x, xiii. The old spelling has been retained in this and the following quotations.

¹¹⁰ Kames, *Elucidations Respecting the Common and Statute Law of Scotland* (1993), Preface, p. x.

¹¹¹ From Baron Hume's *Lectures 1786-1822*, quoted in Ross, *Lord Kames and the Scotland of his Day* (1972), p. 32.

Kames does not shy away from the consequences of his position, here again in the *Principles of Equity*:¹¹²

‘... what I conjecture chiefly influenced the judges, was the authority of Lord Stair; which could not fail to have great weight ... Men, who in early youth have sucked in a maxim whether of law or of religion, are impregnable by argument. Much superior to that of reason must the authority be, which can operate a conversion. In matters arbitrary and doubtful, I cheerfully submit to the authority of eminent writers, to that especially of Lord Stair, who is our capital writer on law. But neither reason nor common sense will justify such deference, with regard to points that are resolvable into principles.’

It is not surprising that this Kantian ‘*Sapere aude!* Habe den Muth dich deines eigenen Verstandes zu bedienen!’¹¹³ is at odds with the conservative approach of institutional writing that ostensibly roots itself in older authority. However, when furthering the development of a truly modern Scottish legal system, one will often side with Kames’s position, and one should avoid any worshipping of the institutional writers. So when it has been said that Stair was ‘the genius who first established Scots law as a complete and coherent rational system, and the most complete master of jurisprudence that Scotland has ever produced’,¹¹⁴ one hopes, with due respect to Stair and with all appreciation of his unquestionable merits at the time, that this is not the final word. Furthermore, if the *epitheton ornans* of ‘genius’ means creativity – the ability to dismantle and reconfigure in new ways patterns and systems of thought and to challenge existing wisdom – then Kames surpasses all institutional writers by far because he was *not* one of them. Even if Kames saw himself as an institutional writer of some kind, he would have rejected strongly uncritical acceptance of authority as a prerequisite of institutional writing.

4. A new role for old institutional writers

Some authors have assigned the institutional writers, especially Stair,¹¹⁵ the role of preserving Scots law against English law,¹¹⁶ a role which they did not envisage in the way it has been understood in the twentieth century. This interpretation of the function of the institutional writers, as preservers of a notion of Scots law, is static and inflexible. Many areas of the law, also core private law, have developed further in the last two hundred years. Nevertheless, the

¹¹² Kames, *Principles of Equity*, Book I, chapter 4 (2011), p. 301.

¹¹³ Immanuel Kant, “Was ist Aufklärung?”, in: *Was ist Aufklärung? Beiträge aus der Berlinischen Monatsschrift* (1784) - facsimile edition, Norbert Hinske (ed.) (Darmstadt: Wissenschaftliche Buchgesellschaft, 1973), pp. 452-465, at p. 452.

¹¹⁴ Hutton, “Stair’s Public Career”, in: *Stair Tercentenary Studies* (1981), p. 1.

¹¹⁵ Compare David, *Introduction à l’étude du droit écossais* (1972), p. 299: ‘Sans Stair ... le droit écossais aurait disparu dans le droit anglais.’

¹¹⁶ This is especially the narrative of Scottish legal nationalism: see Lord Cooper, Thomas Cooper, *The Scottish Legal Tradition*, S. C. Styles (ed.) (Edinburgh: The Saltire Society and the Stair Society, 1991) (originally published 1949), pp. 87-89, Thomas B. Smith, “Strange Gods: The Crisis of Scots Law as a Civilian System”, in: Thomas B. Smith, *Studies Critical and Comparative* (Edinburgh: W. Green and Oceana Publications, 1962), pp. 72, 81, 88.

disappearance of Scots law is most doubtful, arguably even more so after devolution. The influence or ‘intrusion’ of English law is in good measure the consequence of reasonable borrowings from English law adapted to the Scots legal system if Scots law itself has no solution to offer,¹¹⁷ also because a small jurisdiction and marketplace may not generate enough case law or be sufficiently relevant for international commercial transactions. An authoritative restatement that could deal with gaps in the present system would be a codification of areas of Scots law,¹¹⁸ either as an academic restatement, or, perhaps better in the long run, as the formal enactment of a code. But in such an endeavour it would often be unsatisfactory to rely on outdated textbooks of the institutional writers. The need to accept influences from other legal systems and concepts is an inevitable reality for a country that is currently part of the European Union, and according to the wishes of the present Scottish government, will try to remain in it. An overly strong emphasis on the use of the institutional writers, a rather historicising and romanticising approach,¹¹⁹ would stifle the development of Scots law.

On the other hand, it would be unwise to discard the institutional writers altogether. One would caricature the institutional writers if one depicted them as nothing but outmoded unimaginative conservative plodders with no spark of inventiveness. An example is Bell, being still a relevant source and also an imaginative writer: some areas of the law have not changed significantly over a long period of time, for example the law of accession, *negotiorum gestio* and cautionary obligations. Here it is entirely appropriate to rely substantially on an institutional writer, such as Bell. Institutional writers also acted as modifiers and possibly modernisers of the law, though less conspicuously than Kames.

Bell’s discussion of cautionary obligations in his *Principles* (§§ 245-304) and the subsequent treatment by later writers of Bell’s account illustrates the first point of the institutional writer as still being a relevant source. Modern standard textbooks on commercial law, such as Forte’s *Scots Commercial Law*,¹²⁰ and Davidson and Macgregor’s *Commercial Law in Scotland*¹²¹ cite Bell when they discuss cautionary obligations.¹²² This is not what one would normally expect to see in a modern student textbook almost two hundred years later. Reference is made, for example, to the general definition of cautionary obligations, the definition of proper and improper cautionary and to the benefit of division among co-cautioners which Bell set out neatly.¹²³

¹¹⁷ This is in part what Kames also envisaged, *Historical Law-Tracts*, Preface (1761), pp. xiv-xv.

¹¹⁸ Hector MacQueen, “Quo vadis?”, (2017) 1 J.R. 9-19, at 14-15, 18.

¹¹⁹ Lindsay Farmer, *Criminal Law, Tradition and Legal Order. Crime and the Genius of Scots Law, 1747 to the Present* (Cambridge: Cambridge University Press, 1997), pp. 36-38.

¹²⁰ See Angelo D. M. Forte, *Scots Commercial Law* (Edinburgh: Butterworths/LexisNexis, 1997), pp. 202, 205 (here once also reference to Bell’s *Commentaries*), 207. The whole section is only eight pages long.

¹²¹ Fraser Davidson, Laura Macgregor, *et al.*, *Commercial Law in Scotland*, 4th ed. (Edinburgh: W. Green *et al.*, 2016), p. 202 (here once also reference to Bell’s *Commentaries*).

¹²² See also other student textbooks, e.g. Nicole Busby *et al.*, *Scots Law: A Student Guide* (Haywards Heath: Tottel, 2006), pp. 353, 356: Bell’s *Principles* are cited three times in a text that is less than four pages long.

¹²³ Bell, *Principles of the Law of Scotland* (2010), §§ 245, 246, 267.

Bell's treatment of the Scots law of common property in his *Principles* (§§ 1072-1085) is an example of the second point: imaginative institutional writers could play an active role in the development of the law. The rules on common property and its relationship to common interest¹²⁴ are said to have been invented, or at least substantially shaped, by Bell.¹²⁵ Bell's discussion of error in his *Principles* (§ 11) has also been regarded as a milestone in the development of the Scots law of error,¹²⁶ but recent research has shown that his contribution was really confined to a minor synthesis of this area.¹²⁷

5. Are there any modern institutional writers?

There has been the emergence of modern, contemporary writers of authority in Scotland. They are not regarded as technically institutional writers because they will not have written an 'institute' in the classical sense. But they have significant influence on the way in which the opinion of the courts has been formed. This is irrespective of the orthodox tradition that such authors are not supposed to have any relevance at all because they are for the most part not dead. These modern authoritative writers are usually renowned academics, and their importance can be made out easily when one looks into court judgments handed down in the last few years only. Fairly recent good examples are the two Outer House cases *Ewen Ross Alexander v. Skene Investments (Aberdeen) Ltd*¹²⁸ and *Pinocraven Construction (Guernsey) v. Taddei and Taddei*,¹²⁹ where in the first case the authoritative, though not technically institutional, writers Goudy, *On Bankruptcy* (1914), Reid and Blackie, *Personal Bar* (2008), Stewart, *Law of Diligence* (1898) and Gretton, *Law of Inhibition* (1996) were cited, and in the second decision Gloag, *Law of Contract* (1929), Rennie and Cusine, *Missives* (1999), McBryde, *Law of Contract* (2007), MacQueen and Thomson, *Contract Law in Scotland* (2007) were referred to, among others.

Research has shed light on the influence of the institutional writers, especially Stair, on the opinions that judges delivered during the nineteenth century.¹³⁰ However, institutional writers are still relevant and referred to in decisions of the Scottish Courts during the twentieth century and up to now. To a limited extent they are part of the living law today. In the following short case survey the focus is on Stair, Erskine and Bell who are generally

¹²⁴ See Bell, *Principles of the Law of Scotland* (2010), § 1086.

¹²⁵ Reid, "From Text-Book to Book of Authority: The Principles of George Joseph Bell", (2011) 15(1) *Edin.L.R.* 32. See also Kenneth G. C. Reid (and contributors), *The Law of Property in Scotland* (Edinburgh: Butterworth, 1996), paras. 356-358.

¹²⁶ That is the view of Peter Stein, *Fault in the formation of contract in Roman law and Scots Law* (Edinburgh: Oliver and Boyd, 1958), p. 183.

¹²⁷ John MacLeod, "Before Bell: The Roots of Error in the Scots law of Contract", (2010) 14(3) *Edin.L.R.* 385-417, at 415-417.

¹²⁸ [2011] *CSOH* 144.

¹²⁹ [2012] *CSOH* 18.

¹³⁰ Blackie, "Stair's later Reputation as a Jurist", in: *Stair Tercentenary Studies* (1981), p. 219-227.

acknowledged now as the most important institutional writers. The survey looks at Scottish Court judgments in the last five years (January 2012-January 2017) to establish the relevance of these institutional writers for the decisions. At the same time it ascertains whether modern textbook authors have also been cited in these decisions. During this five year period, Stair was referred to almost 20 times,¹³¹ Erskine 20 times,¹³² and Bell (*Principles and Commentaries*) almost 25 times,¹³³ whereby these cases often referred to all three institutional writers. The Supreme Court case *Morris v. Rae* even cited Pothier alongside the Scottish institutional writers.¹³⁴ At the same time almost all cases referred to some of the modern most important Scottish textbooks, such as Carey Miller, *Corporeal Moveables in Scots Law*, Gloag, *The Law of Contract*, Gloag and Henderson, *The Law of Scotland*, Gordon, *The Criminal Law of Scotland*, Gretton, *The Law of Inhibition and Adjudication*, McBryde, *The Law of Contract in Scotland*, Reid, *The Law of Property in Scotland*, Stewart, *Law of Diligence*, Walker and Walker, *The Law of Evidence in Scotland*. At least some of these texts have quasi-institutional status in practice, although they were written after the end of the period of institutional writing (early nineteenth century), and many are textbooks written by contemporary Scottish academics.

¹³¹ *Sandison v Coope*, 2016 Rep. L.R. 70; *X v A (No.2)* 2016 S.L.T. (Sh Ct) 411; *MacMillan v T Leith Developments Ltd (In receivership and in liquidation)* [2016] CSOH 19; *Gray v MacNeil's Executor*, 2016 S.L.T. (Sh Ct) 250; *Canning v Glasgow Caledonian University*, 2016 S.L.T. (Sh Ct) 56; *Macallans v W Burrell Homes Ltd*, 2015 S.L.T. (Sh Ct) 243; *Menking, Petitioner*, 2015 S.L.T. (Lyon Ct) 21; *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP* [2014] CSIH 79 (2nd instance); *UK Acorn Finance Ltd v Smith*, 2014 Hous. L.R. 50; *Grove Investments Ltd v Cape Building Products Ltd* [2014] CSIH 43; *Burton v Keeper of the Registers of Scotland*, 2014 S.L.T. (Lands Tr) 69; *Thomson v Mooney* [2013] CSIH 115; *Holdich v Lothian Health Board* [2013] CSOH 197; *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP* [2013] CSOH 80; *Smith v Sabre Insurance Co Ltd* [2013] CSIH 28; *Regus (Maxim) Ltd v Bank of Scotland Plc* [2013] CSIH 12; *Wills v Strategic Procurement (UK) Ltd* [2013] CSOH 26; *Morris v Rae* [2012] UKSC 50.

¹³² *Re Baronetcy of Pringle of Stichill* [2016] UKPC 16; *MacLeod's Legal Representatives v Highland Health Board* [2016] CSIH 25; *Donnelly v Royal Bank of Scotland Plc*, 2016 S.L.T. (Sh Ct) 307; *MacMillan v T Leith Developments Ltd (In receivership and in liquidation)* [2016] CSOH 19; *William Tracey Ltd v SP Transmission Plc* [2016] CSOH 14; *Canning v Glasgow Caledonian University*, 2016 S.L.T. (Sh Ct) 56; *G, Petitioner* [2015] CSIH 51; *Menking, Petitioner*, 2015 S.L.T. (Lyon Ct) 21; *Cumbernauld Housing Partnership Ltd v Davies* [2015] CSIH 22; *Stork Technical Services (RBG) Ltd v Ross's Executor*, 2015 S.L.T. 160; *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP* [2014] CSIH 79; *Dryburgh v Scotts Media Tax Ltd* [2014] CSIH 45; *P v O*, 2014 Hous. L.R. 44; *Holdich v Lothian Health Board* [2013] CSOH 197; *Bavaire v Sir Robert McAlpine Ltd* [2013] CSIH 98; *Regus (Maxim) Ltd v Bank of Scotland Plc* [2013] CSIH 12; *Morris v Rae* [2012] UKSC 50; *Anton v South Ayrshire Council* [2012] CSOH 80; *Joint Administrators of Rangers Football Club Plc, Noters* [2012] CSOH 55; *Turner v Turner* [2012] CSOH 41.

¹³³ *Cullen v Advocate General for Scotland* [2016] CSOH 170; *Re Baronetcy of Pringle of Stichill* [2016] UKPC 16; *Scottish Parliamentary Corporate Body v Sovereign Indigenous Peoples of Scotland* [2016] CSOH 65; *X v A (No.2)*, 2016 S.L.T. (Sh Ct) 411; *Canning v Glasgow Caledonian University*, 2016 S.L.T. (Sh Ct) 56; *Menking, Petitioner*, 2015 S.L.T. (Lyon Ct) 21; *Stork Technical Services (RBG) Ltd v Ross's Executor*, 2015 S.L.T. 160; *Munro v Finlayson*, 2015 S.L.T. (Sh Ct) 123; *MacGillivray v Crofting Commission*, 2015 S.L.T. (Land Ct) 163; *Lormor Ltd v Glasgow City Council* [2014] CSIH 80; *Mirza v Salim* [2014] CSIH 51; *John Pollock and Sons Ltd v Robert Rennie (A Firm)*, 2014 S.L.T. (Land Ct) 86; *Miller Homes Ltd v Keeper of the Registers of Scotland*, 2014 S.L.T. (Lands Tr) 79; *P v O*, 2014 Hous. L.R. 44; *Highlands and Islands Airports Ltd v Shetland Islands Council* [2014] CSOH 17; *Holdich v Lothian Health Board* [2013] CSOH 197; *Joint Liquidators of the Scottish Coal Co Ltd, Noters* [2013] CSIH 108; *MacDonald v Aberdeenshire Council* [2013] CSIH 83; *Regus (Maxim) Ltd v Bank of Scotland Plc* [2013] CSIH 12; *Joint Administrators of Heritable Bank Plc v Winding Up Board of Landsbanki Islands HF* [2013] UKSC 13; *Playfair Investments Ltd v McElvogue* [2012] CSOH 148; *Morris v Rae* [2012] UKSC 50; *ICL Tech Ltd v Johnston Oils Ltd* [2012] CSOH 62; *Turner v Turner* [2012] CSOH 41.

¹³⁴ *Morris v Rae* [2012] UKSC, paras. 19, 43, 44, 46, 47, 50 (alongside Stair).

Even this very brief survey shows that academic writers of substantial and comprehensive textbooks exercise a certain influence in Scottish judicial practice, whether they are formally recognised as institutional writers or not. Characteristically, institutional writers and modern writers of authority appear alongside one another; a particular hierarchy cannot really be made out. There is not too much veneration for institutional writers or a noticeable disregard for modern authors: legal practice is pragmatic. As long as the text is felt to be comprehensive and authoritative, it is likely to be used by practitioners and in the courts. The institutional writers have had this attribute of being authoritative and comprehensive, but judges keep a healthy distance to these rather ancient texts: to treat them as not merely an authoritative account of the law of their time but as the definitive source of ideas about how Scots law should respond to modern problems would make the law inflexible.¹³⁵ Recent contemporary high quality research at Scottish universities produces modern texts which can now easily complement, and over time probably also supersede, the classical institutional writers, unless one deliberately adheres to an ultimately inflexible antiquarianism in legal interpretation.

6. Modern academic conceptualisations and the judicial response

Since modern academic textbooks do enter the jurisprudential consciousness of the courts and legal practitioners in Scotland, similar to the situation in Civil Law systems, one should also look at the possible influence of academic conceptualisations in the law as well. The example that shall illustrate this situation is George Gretton's fairly recent conceptualisation of the Scottish trust.¹³⁶ The concept of the English trust cannot be used in Scots law because it rests on a different notion of property rights. The division into legal and equitable ownership, the essence of the concept of the English trust,¹³⁷ is unknown to the Roman-law based idea of *dominium* or ownership in Scots property law. Thus the Scottish trust shares with its English counterpart not much more than the name.

Taking Stair's definition as a starting point – 'the property of the thing intrusted, be it land or moveables, is in the person of the intrusted, else it is not proper trust'¹³⁸ – Gretton sees the beneficiary's interest in the trust property as a personal, not proprietary, right against the trustee. However, beside the general patrimony (the sum total of a person's assets and

¹³⁵ See (with regard to Stair and institutional writers generally) Robert J Reed, Lord Reed, *Triremes and Steamships: Scholars, Judges, and the Use of the Past: The Scrymgeour Lecture 2015*, University of Dundee, available at: <https://www.supremecourt.uk/docs/speech-151030.pdf>.

¹³⁶ In particular, George Gretton, "Trusts without Equity", (2000) 49 I.C.L.Q., 599-620, at 599.

¹³⁷ See e.g. Simon Gardner, *An Introduction to the Law of Trusts*, 3rd ed. (Oxford: Oxford University Press, 2011), pp. 2, 17-19, 212-213.

¹³⁸ Stair, *Institutions*, I.13.7 (1981), p. 234.

liabilities, the ‘estate’¹³⁹) that every person has, Gretton postulates a special patrimony¹⁴⁰ which the trust property constitutes. Trustee and beneficiary have each their own general patrimony, as everyone. In addition, there is the segregated special patrimony of the trust property which is held by the trustee as owner of the trust property. The beneficiary has a personal right against the trustee (being part of his own general patrimony), enforceable against the special patrimony. In case of the trust’s insolvency, the beneficiary’s claims are postponed to the claims of the general creditors of the trust. In case of the trustee’s insolvency in his personal capacity, his creditors have claims against his general patrimony only.¹⁴¹ This conception goes beyond the normal *fiducia* in that, unlike the *fiducia*, it does allow real subrogation to the trust property, so the proceeds of sale obtained for trust property sold form part of the trust patrimony.¹⁴² But it does not have to resort to a conception of dual (legal/equitable) ownership and define the beneficiary’s rights as being proprietary to explain the effects of the trust, in particular, that the trustee’s creditors cannot seize the trust property. Gretton’s explanation (or conceptualisation) of the Scottish trust is intriguing and may be convincing, and a Discussion Paper of the Scottish Law Commission considered the idea of dual patrimony (general and special patrimony), but did not see the need for an enactment of this theory by legislation.¹⁴³

However, there does not seem to be any judicial pronouncement as yet which has endorsed this academic conception.¹⁴⁴ Theoretically it is therefore irrelevant to Scots law as practised at the moment. But if it entered the thinking of the courts (and this is also a generational matter), it would become part of Scots law, absorbed in the precedent of a court case. In such a situation, the academic text would have the same effect as that of a classical institutional writer, without being named as such. In reality the distinction between ‘institutional’ writing and modern texts which have been given authoritative force becomes ever more blurred.

This single example could only point towards the need for a further study about the authoritative importance of modern academic writing in Scots law and the way in which it manifests itself. It will be necessary to ascertain the forms of use of academic texts in court decisions and in argument to the bench – are the texts illustrative and confirming of the law or

¹³⁹ On the term ‘patrimony’ – an academic term – see George Gretton, “Scotland: The Evolution of the Trust in a Semi-Civilian System”, in: R. Helmholz and R. Zimmermann (eds), *Itinera Fiduciae. Trust and Treuhand in Historical Perspective* (Berlin: Duncker & Humblot, 1998), pp. 507-542, at p. 511.

¹⁴⁰ In the tradition of the *dos* or the *peculium* of Roman law, see Max Kaser, Rolf Knütel, *Römisches Privatrecht*, 17th ed. (München: C. H. Beck, 2003), pp. 94, 369, 378.

¹⁴¹ Gretton, “Trusts without Equity” (2000) 49 I.C.L.Q., 609-613.

¹⁴² Gretton, “Scotland: The Evolution of the Trust in a Semi-Civilian System”, in: *Itinera Fiduciae* (1998), p. 511.

¹⁴³ Scottish Law Commission, *Discussion Paper on Liability of Trustees to Third Parties* (DP 138), May 2008, pt. 1.3-1.11.

¹⁴⁴ A fairly recent chance for the courts to be more explicit about the nature of trust property under a Scottish trust was the Supreme Court Decision of *Lehman Brothers International (Europe) v. CRC Credit Fund Ltd* [2012] UKSC 6, [2012] Bus LR 667, paras. 8-14, about the question of client money held on trust by a financial institution. Lord Hope did get into the nature of the Scottish trust in this context and defined the Scottish trust as a *fiducia*, but did not adopt the general/special patrimony analysis.

decisive and authoritative? While these questions go well beyond the scope of this article, one can nevertheless presume that with an increased amount of case law and modern academic doctrine available, the classical institutional writers will gradually fade into history. Codification of private law¹⁴⁵ or criminal law in Scotland,¹⁴⁶ if desired, would hasten this development. But there is no indication that the power of doctrinal writing as an authoritative source will disappear from Scots legal practice.

7. Conclusion

In contrast to the continental European legal systems, institutional writers are still part of the living law in Scotland. The traditional academic position – more precisely, the probably prevalent academic view between the 1960s and 1990s – that ‘the authority of an institutional writer is approximately equal to that of a decision by a Division of the Inner House of the Court of Session’¹⁴⁷ is exaggerated, but perhaps a somewhat dated opinion nowadays anyway. However, institutional writers clearly have an important influence when judicial opinion is formed; their views appear wrapped into court decisions. Contrary to H el ene David’s opinion, the institutional writers are not ‘en quelque sorte les proph etes du Droit  cossais’, but rather seek to provide comprehensive digests of a perceived *status quo* of the law in systematic form. So they look backwards, not forward, as prophets would do; and where a writer does look into the future, suggesting how the law *ought to be* – Lord Kames being the best classical example – they do not gain institutional status. But in contemporary Scottish court decisions classical institutional writers appear alongside modern authoritative academic writers who have always existed during the nineteenth and twentieth centuries, and increasingly so since the 1960s. Theoretically there is some ranking – the classical institutional writers have more weight – but in reality there is not much difference in effect between a modern authoritative textbook and the text of an institutional writer. The flexible pragmatic approach of the judiciary must be welcomed; it ensures a development of the law. It would be wrong to instrumentalise the institutional writers for a nationalistic narrative or to entrench them in an overemphasis of real or constructed legal tradition and history. Legal history can be living history, but not in form of conservative antiquarianism. Thus the institutional writers should be treated with respect, but not with reverence.

¹⁴⁵ See discussion of arguments in relation to the codification of Scots private law in Andreas Rahmatian, “Codification of Private Law in Scotland: Observations by a Civil Lawyer”, (2004), 8 Edin.L.R., 28-56, at 54-56.

¹⁴⁶ Eric Clive, “Codification of the Criminal Law”, in: James Chalmers, Fiona Leverick and Lindsay Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh: Edinburgh University Press, 2010), pp. 54-69, at p. 54.

¹⁴⁷ That is the view of T. B. Smith, *A Short Commentary on the Law of Scotland* (1962), p. 32. Walker, *The Scottish Legal System* (1997), p. 457, shares this view.