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Inequality, just price and bad bargains: contracting attitudes after the South Sea crash, 1720

In 1720, following the crash in South Sea stock, some doubted the legal and ethical enforceability of contracts concluded on the secondary market for the purchase of future South Sea stock. This article examines the argument of David Dalrymple who drew upon Civil Law, Natural Law and the notion of a just price to advocate for the annulment of these so called 'time bargains'. It demonstrates why Dalrymple's just price argument held a rhetorical relevance, as an ethical argument, even if the effectiveness of such a plea in both Scottish and English courts, during the early 18th century, is doubtful. Additionally, in setting out the context of his pamphlet and the wider debate, this article also draws attention to the emergence of a new ethical rhetoric of commerce and contracting, which argued against Dalrymple, and for the enforcement of these contracts. Lastly, this article contends that a wider conception of what constitutes the legal context of the South Sea crisis is needed, through which a deeper understanding can be gained of what role the law played in resolving the crisis and how political and ethical attitudes shaped the use of law, specifically contract law.

Introduction

Famously, in the autumn of 1720 the price of South Sea stock crashed spectacularly.[1] Less well-known is that there was a secondary market where buyers purchased futures (known as 'time bargains') on South Sea stock. Following the crash, many buyers were left with an obligation to pay eight times over the market value. As part of the debate about how to resolve the South Sea crisis, some asked if the enforcement of these secondary market

[1] Charles Mackay, *Extraordinary popular delusions and the madness of crowds*, London, 1841; William R Scott, *The Constitution and Finance of English, Scottish and Irish joint-stock companies to 1720*, vol 1, Cambridge, 1912; Lewis Melville, *The South Sea Bubble*, London, 1921, hereafter 'Melville, *South Sea*'; John Carswell, *The South Sea Bubble*, London, 1960; and Peter G Muir, Dickson, *The Financial Revolution in England: A Study in the Development of Public Credit 1688-1756*, London, 1967, hereafter 'Dickson, *Financial Revolution*'.

bargains was just and whether the courts or indeed Parliament should set them aside.[2] That year, in a pamphlet entitled, *Time Bargains tried by the Rules of Equity and Principles of*

[2] Those pamphlets in favour of either judicial or Parliamentary intervention include, Anon., *Queries, whether the South Sea contracts for time, and now depending unperformed, ought to be annulled or not?* London, 1720, 1; Anon., *The speech made by Eustace Budgell, Esq; at a general court of the South-Sea Company, in Merchant-Taylors Hall, on the twentieth of September, 1720,* London & Dublin, 1720; Anon., *Reasons for making void and annulling those fraudulent and usurious contracts, into which multitudes of unhappy persons have been drawn to the utter Ruin of themselves and Families, by the late Directors of the South-Sea Company, their Agents and Confederates*, London, 1720, 1; Anon., *Further reasons offer'd and fresh occasions given for making void and annulling fraudulent and usurious contracts*, London, 1721, 1; Anon., *Restitution: a law of the land, in relation to the third and fourth money subscriptions into the South-Sea Company,* London, 1721, 1-4; and E Budgell, *A letter to a friend in the country, occasioned by a report that there is a design still forming by the late directors of the South-Sea Company,* London, 1721, 21. The pamphlets analysed which were against the annulling of contracts within the secondary market, include: Anon., *Laws, Ex post Facto; or the Anulling of Legal Bargains, inconsistent with the British Constitution, and the Privileges of a Free People,* London, 1720, 1, hereafter 'Anon., *Ex post Facto*'; Anon., *The performance of Fair and Legal Contracts the Surest Method to support Publick and Private Credit*, London, 1720, 1, hereafter 'Anon., *Fair and legal contracts*'; Anon. (attr. J Way), *The case of contracts for the third and fourth subscriptions to the South-Sea Company, consider'd. In a letter to a member of Parliament*, London, 1720, 12-16, hereafter 'Way, *case of contracts*'; Anon., *A vindication of E----ce B-g--l, Esq; from the imputation of his being the author of a printed speech, said to be spoken at a general court of the South-Sea Company in Merchant-Taylor's Hall, on Friday, Sept. 30. 1720*, London, 1720, 11-13; Anon., *The case of the sellers of the third and fourth money-subscriptions (London, 1721)* hereafter, 'Anon., case of the sellars'*; Tradesman of the City, The nature of contracts consider'd as they relate to the third and fourth subscriptions etc.*, London, 1721, 13-14; and Anon.

Civil Law[3] David Dalrymple (1666?-1721) argued that inequality should render a contract unenforceable and give rise to several remedies. This pamphlet has been described as 'the first English securities regulation treatise'[4] and the 'most extensive and interesting document'[5] of the South Sea pamphlets. Some have even suggested that Dalrymple's pamphlet was the basis of the buyers' pleadings, when in 1722, these contracts were considered by the House of Lords in *Thomson v Harcourt*.[6] In retrospect, Dalrymple's pamphlet is the most comprehensive, publicly available, argument as to why Parliament's intervention was justified. There were, of course, others who saw Parliamentary intervention

(attr. Daniel Defoe), *A true state of the contracts relating to the third money-subscription taken by the South-Sea Company*, London, 1721, 14-15, hereafter 'Defoe, *True state*'; and Anon., (attr. John Blunt), *A true state of the South-Sea scheme, as it was first form'd, with several alterations made in it before the Act of Parliament pass'd etc.*, London, 1722; repr. 1733, hereafter 'Blunt, *A true state*'.

[3] The Signet Library in Edinburgh holds a copy: SPEC 347.751 and the University of London Library, Special Collections, also holds a copy: [G.L.] 1720 5737, hereafter 'Dalrymple, 'Time Bargains''.

[4] Stuart Banner, *Anglo-American Securities Regulation: Cultural and Political Roots*, Cambridge, 1998, 83, hereafter 'Banner, *Anglo-American*'.

[5] Gary S Shea, 'Sir George Caswall v the Duke of Portland: Financial contracts and litigation in the wake of the South Sea Bubble' in Jeremy Atack & Larry Neal, eds., *The Origin and Development of Financial Markets and Institutions: From the Seventeenth Century to Present*, Cambridge, 2009, 121-160, 123, hereafter 'Shea, 'George Caswall''..

[6] *Henry Thomson v Richard Harcourt* (1722) I Brown 193 1 ER 508. See Larry Neal, "The Evolution of Self-and State Regulation of the London Stock Exchange, 1688-1878" in Debin Ma & Jan Luiten van Zanden, eds., *Law and Long-Term Economic Change: A Eurasian Perspective*, Stanford, 2011, 300-323, 304. Although the evidence for this is somewhat sparse.

as an unwarrantable interference with the private rights of sellers.[7] In spite of this Dalrymple's pamphlet, as well as the debate he contributed to, has been somewhat neglected.

There has also been a neglect in terms of understanding the legal context within which the South Sea crisis was resolved. Gary Shea has noted, that there 'has been no extensive description of the legal environment or aftermath of the South Sea Bubble.'[8] Although there has been some consideration of the South Sea bubble's legal legacy, this is generally from the perspective of market regulation or corporate law rather than considering the contemporary contractual issues or more general matters of private law which the crash affected.[9] This means, for example, the large scale cancelling of secondary market contracts is missed or overlooked in some key economic literature about the development of a commercial society

[7] Specifically: Act for making several provisions to restore the publick credit, which suffers by the frauds and mismanagement of the late directors of the South-Sea company, and others, 6 Geo 1, c 4 in Danby Pickering, ed., *The Statutes at Large from the Fifth to the Ninth Year of King George I,* Cambridge, Joseph Bentham, 1765, vol XIV p 360ff , hereafter 'Pickering, *Statutes*'.

[8] Shea, 'Sir George Caswall', 122.

[9] William Searle Holdsworth, 'English Corporation Law in the 16th and 17th Centuries' 31(4) *Yale Law Journal* (1922) 382-407; Robert Harris, 'The Bubble Act: Its Passage and Its Effects on Business Organization' 54(3) *The Journal of Economic History* (1994), 610-627; Banner, *Anglo-American*; Jeremy Atack & Larry Neal, eds., *The origins and development of financial markets and institutions: from the seventeenth century to the present*, Cambridge, 2009; Erik F Gerding, *Law, Bubbles, and Financial Regulation*, London, 2013, 62-136. Some exceptions being: Patrick S Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford, 1979; John L Barton, 'The enforcement of hard bargains' 103 (1) *LQR* (1987) 118, hereafter 'Barton, 'Hard Bargains''; Alfred W B Simpson, 'The Horwitz Thesis and the History of Contracts' 46 (3) *The University of Chicago Law Review* (1979) 533-601, hereafter 'Simpson, 'Horwitz Thesis'; and Shea, 'George Caswall'.

in 18th century Britain.[10] This being said, Stuart Banner has considered some of the legal aspects which relate to the secondary market for South Sea stock, concluding that overall 'Parliament and the courts declined repeated opportunities to curb securities trading. As a result, transactions of all sorts, including the options and time bargains complained of, continued to be unimpeded by the legislature and enforced by courts.'[11] Banner's analysis, however, is primarily focused upon attitudes towards jobstockers and the regulation of jobstocking, with some reference to the limited case reports which record some of the post-crash South Sea litigation. He is not, however, concerned with determining wider legal attitudes towards time bargains and their enforceability or whether just price arguments had any weight within English legal thought in the early 18th century. Nor does he consider contracting parties' ethical attitudes towards South Sea time bargains and the resultant inequality they created. If wider attitudes towards time bargains are considered within the literature, it is normally from the perspective of whether those attitudes were rational or irrational in terms of the market information available to investors.[12] But as Shea has noted,

[10] For example, see Douglas North & Barry R Weingast, 'Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England' XLIX (4) *The Journal of Economic History* (1989), 803-832, 826; Douglas North, John Wallis & Barry Robert Weingast, *Violence and Social Orders: a Conceptual Framework for Interpreting Record Human History*, Cambridge, 2009, 200-204.

[11] Banner, *Anglo-American* 87.

[12] Peter M Garber, *Famous First Bubbles: the Fundamentals of Early Manias*, London, 2001; Julian Hoppit, 'The Myths of the South Sea Bubble' 12 *Transactions of the Royal Historical Society* (2002), 141-165, hereafter Hoppit, 'The Myths'; Gary S Shea, 'Financial market analysis can go mad (in the search for irrational behaviour during the South Sea Bubble)' 60(4) *Economic History Review* (2007),

'The arguments in the great majority of polemical literature and emphasis in debates in Parliament and in private correspondence concerning the South Sea Scheme were not so much about possible earnings, profits, and payouts; the arguments were most about private property rights, legal rights, control of public finance, control of parliament and the very control of government…'[13] It should also be added that the pamphlets concerning time bargains, including Dalrymple's, do not only consider the legality or political dimensions of bad bargains but also their ethical implications and whether a 'gentleman' would take steps to enforce such bargains. Thus, there is not only a need to understand the legal environment following the crash with relation to private law rights and the secondary market: there is also a need to place the legal rules concerning time bargains into a wider context, which includes contracting parties ethical and political attitudes towards what was permissible and what was appropriate for them when they found themselves on the winning side of a bad bargain.

The Scheme: From Subjects to Speculators

It is useful to set out, in very broad terms, the background to the South Sea scheme. In 1711, the South Sea Company was established as a joint-stock company with a monopoly on trading rights in South America.[14] In reality, this was more of an aspiration than anything else. At the time, Britain was at war with Spain who controlled trade to the Spanish Indies. However, in 1714 Britain signed the Treaty of Utrecht and legally gained from Spain the right to trade, known as the *asiento*. In theory, this gave Britain permission to slave trading for 30 years (at the expense of the French who, prior to 1713, held these rights) but in reality,

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742-765, hereafter 'Shea, Financial market analysis'; and Helen J Paul, *The South Sea Bubble: an Economic History of its Origins and Consequences*, Oxford, 2011, hereafter 'Paul, South Sea'.

[13] Shea, 'George Caswall', 122.

[14] Richard Dale, *The First Crash Lessons from the South Sea Bubble*, Princeton, 2004, Ch 2; Paul, *South Sea* Ch 2.

this never materialised.[15] Trade, however, was only part of the South Sea scheme. The company also had the long-term purpose of reorganising the national debt of Britain and selling shares to the general public. In 1720, British sovereign debt was around £48,000,000. Sir John Blunt, secretary of the Sword Blade Bank (a major creditor of the government),[16] inspired by John Law's exploits in France,[17] proposed that the government sell some parts of the national debt to the South Sea Co. In turn, the South Sea Co would raise funds from selling shares to the public. This amounted to a transfer of debt from the government to the general public - it was a reallocation of liability and risk with important consequences for the political consciousness of Britain where subjects became shareholders and the government a joint-stock company.[18] Of course, the whole scheme ended in failure: sometime between the

[15] Melville, *South Sea*, 19-29.

[16] Howard Erskine-Hill, 'Blunt, Sir John, first baronet' in *Oxford Dictionary of National Biography*, 2004; online 2008.

[17] Anon., "The secret history of the South-Sea scheme" in *A collection of several pieces of Mr John Toland*, London, 1726, 404–47, 407.

[18] Caroline Robbins, *The Eighteenth-Century Commonwealthman Studies in the Transmission, Development and Circumstance of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies*, Cambridge, Mass., 1959, hereafter 'Robbins, *Commonwealthman*'; Dickson, *Financial Revolution*; Albert O Hirschman, *The Passions and Interests: Political Arguments for Capitalism before its Triumph*, Princeton, 1977, hereafter 'Hirschman, *Passions*'; John G A Pocock, *The Machiavellian moment: Florentine political thought and the Atlantic republican tradition*, Princeton, 1975; repr. 2003, 423-461, hereafter, 'Pocock, *Machiavellian moment*'; John G A Pocock, *Virtue, Commerce, and History*, Cambridge, 1985, Ch 5, hereafter 'Pocock, *Virtue*'; Robert Harris, *Industrializing English Law: Entrepreneurship and Business Organization*, Cambridge, 2000, 71-73; Julian Hoppit, 'Compulsion, Compensation and Property Rights in Britain, 1688-1833' 210(1) *Past & Present* (2011), 93-128.

spring and autumn of 1720 the price of South Sea stock rose to around £1,000 per share becoming virtually worthless by the Christmas of that year. By 1721, Parliament passed legislation completely restructuring the South Sea Co and effectively reconstituting the rights, value and desirability of South Sea shares. In terms of time bargains, the 1721 legislation did implement what Dalrymple had called for, it stated that: all contracts had to be registered with the South Sea Co and those which were unperformed and unregistered with the company by 29 September 1721 were null and void.[19] The effect of this legislation is hard to gauge but its significance is obvious: Parliament was prepared to intervene directly into the private transactions of individuals concluded on the secondary market.

David Dalrymple: Advocate and Politician

Dalrymple was born c.1666 and was the fifth son[20] of James Dalrymple, the first Viscount Stair.[21] He studied at what is now the University of Edinburgh, completing his studies in 1677, with Mr James Pillan as his regent. Dalzel notes that out of 64 listed to graduate, only 23 graduated that year.[22] Darlymple does not appear to have graduated, possibly because he refused to take The Test Oath which was extended in 1677 to those wishing to graduate in

[19] Act for making several provisions to restore the publick credit, which suffers by the frauds and mismanagement of the late directors of the South-Sea company, and others, 6 Geo 1, c 4 in Pickering, *Statutes* vol XIV, 360ff.

[20] In 1714, William Forbes published, with the aid of David Dalrymple's older brother Hew (1652-1733), a brief biography of Viscount Stair. In this biography, David is identified as Viscount Stair's 5th son: W Forbes, *Journal of the Session* … (1704) xxxviii.

[21] James B Paul, ed., *The Scots Peerage*, Edinburgh, 1904-1914, 1991, vol 8, 114-164.

[22] Andrew Dalzel, *History of the University of Edinburgh*, Edinburgh, repr. 1862, vol 2, 207.

Scotland.[23] He spent most of the 1680s in the Dutch Providences,[24] matriculating at the University of Leiden in 1682 and perhaps taking private lessons in a *collegium* to study Natural Law. In addition, he probably enjoyed (and benefited from) a wide network in the Netherlands given his father's connections. Moreover, he would have surely profited intellectually, given it was the golden age of university education in the United Provinces, with the emergence of the *usus modernus* and related literature.[25] Studying in the Netherlands was particularly attractive for Scots during this period but it was also, at times, necessary for political reasons. That was certainly the case for Dalrymple's father: James Dalrymple, Viscount Stair who was exiled in Leiden from 1682 to 1688.[26] During his political career, Dalrymple's legal expertise was often called upon by various committees and commissions who requested his help with the drafting of Parliamentary bills or to advise on the legality of

[23] University of Edinburgh Archives, Ms. IN1/ADS/STA/1/1 at 63.

[24] James Bogle, ed, *The Coltness Collections* Edinburgh, 1842, 78; Alexander Grant Mackay, *Memoir of Sir James Dalrymple, first Viscount Stair, Edinburgh*, 1873, 190; Ginny Gardner, *The Scottish Exile Community in the Netherlands, 1660-1690: 'shaken Together in the Bag of Affliction'*, Edinburgh, 2004, 118, hereafter 'Gardner, *Exile Community*'.

[25] Hilde de Ridder-Synoens & Walter Rüegg, ed., *A History of the University in Europe: Volume 2, Universities in Early Modern Europe, Cambridge, 1500-1800*, 601-2; Paul Neve, 'Disputations of Scots Students Attending Universities in the Northern Netherlands' in William M Gordon and T D Fergus, eds., *Legal History in the Making*, London, 1991, 95-108. He was certainly in Utrecht in 1686: Gardner, *Scottish Exile Community in the Netherlands*, 118, hereafter 'Gardner, *Scottish Exile Community in the Netherland*.

[26] Gardner, *Exile Community*.

proposed legislation.[27] Nevertheless, and despite holding the part-political part-legal office of Lord Advocate at different times in his career, he is remembered first and foremost as a politician as a member of the Scottish Parliament for Culross from 1698 until 1707 and from 1707 to 1721 a member of Parliament for Haddington. In 1706, he was nominated by Queen Anne (and approved by the Scottish Parliament) as one of the Scottish commissioners tasked with negotiating the Treaty of Union,[28] specifically as a commissioner of the Treasury.[29] Generally associated with the Court Party before the Union, Dalrymple's political allegiance within the UK Parliament and the Whig Ministry was far from straightforward and provides an important context for the arguments he makes in his South Sea pamphlet.[30]

Dalrymple's Politics: Whigs and Civic Humanism

Despite promoting the Union in 1707, Dalrymple is said to have become disillusioned in the years following; 'frequently and publicly' declaring 'how much he was grieved, and repented having been so instrumental in promoting the Union.'[31] Some of this disillusionment may be linked to his frustration that Westminster in the years following the Union, in his opinion, encroached upon the terms of the 1707 Treaty but also surely due to his Whig opposition to

[27] David Wilkinson, 'Dalrymple, Hon. Sir David, 1st Bt. (c.1665-1721), of Hailes, Haddington' in D Hayton, E Cruickshanks, S Handley, eds, *The History of Parliament: the House of Commons 1690-1715*, Cambridge, 2002, hereafter 'Wilkinson, 'Dalrymple''.

[28] J Murray Graham, ed., *Annals and correspondence of the Viscount and the first and second Earls of Stair*, Edinburgh, 1875, vol I, 216.

[29] George Chalmers, ed., *The History of the Union between England and Scotland, A Collection of Original Papers Relating Thereto. By Daniel Defoe*, London, 1786.

[30] Above.

[31] Anthony Aufrere, ed, *The Lockhart Papers*, Edinburgh, 1817, 22.

the Ministry.[32] Against this background, Dalrymple's South Sea pamphlet can be understood as an example of a disaffected or opposition Whig who could be aligned with the Country party in some instances and therefore amenable to civic humanist arguments.[33] For example, his opposition in the years before 1720 to the confiscation of nobility's estates following the Jacobite Rebellion of 1715, to lay patronage and the Church of Scotland and his rule of law objections to the Treason Act of 1708 could be framed as a general concern to retain an active political community within Scotland and the autonomy of institutions which maintained the independence of political participants. Such a characterisation would certainly fit with the intellectual and institutional context of Scots lawyers at this time.[34] It also mirrors the post-Union circumstances of civic Scotland[35] as well as the rhetoric adopted by

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[32] Wilkinson, 'Dalrymple'.

[33] For discussion of this type of Whig during the reign of George I, see: Nicholas Phillipson, 'Politeness and politics in the reigns of Anne and the early Hanoverians' in John G A Pocock, ed., *The Varieties of British Political Thoughts 1500-1800*, Cambridge, 1993, 211-245, 228ff, hereafter 'Phillipson, 'Politeness''.

[34] John W Cairns, 'The Formation of the Scottish Legal Mind in the Eighteenth Century: Themes of Humanism and Enlightenment in the Admission of Advocates' in Neil MacCormick & Peter Birks, eds, *The Legal Mind: Essays for Tony Honore*, Oxford, 1986, 254- 277. Also see: J Robertson, 'The Scottish Enlightenment and the civic tradition' and John Pocock, 'Cambridge paradigms and Scotch philosophers: a study of the relations between the civic humanist and the civil jurisprudential interpretation of the eighteenth-century social thought' in István Hont & Michael Ignatieff, eds, *Wealth and Virtue: The Shaping of the Political Economy in the Scottish Enlightenment*, Cambridge, 1983, 137-178 and 235-252, hereafter, 'Hont, *Wealth and Virtue*' ; K Haakonssen, *Natural law and Moral Philosophy: from Grotius to the Scottish Enlightenment*, Cambridge, 1996, 63-98.

[35] Nicholas Phillipson, 'Towards a definition of the Scottish Enlightenment' in Paul Fritz & David Williams, eds., *City and society in the 18th century*, Toronto, 1973, 125–47; P Jones, 'The Scottish

opposition Whigs in *Cato's Letters* for example.[36] More generally such a reading is unsurprising given the political and ideological climate of England and Ireland in the early 18th century.[37] To suggest this, however, is not to say that he was always consistent or a card-carrying 'civic humanist' whatever that might be. Dalrymple's political views are complex and not easily summarised. *Prima facie*, he does not offer an outright rejection of money; you might, however, otherwise expect such an argument from a civic humanist who would be concerned with ensuring a citizen's independence from material wealth and the corrupting effects that money has upon a citizen's ability to make decisions in the interests of the political community as a whole rather than on the basis of self-interest and personal (financial) security. Additionally, in terms of political allegiances go, Dalrymple was a Whig - probably associated most closely with Queensberry and the Court in the years preceding the Union - becoming increasingly distant from the Ministry and Walpole's policies as his Westminster career matured.[38] Furthermore, he voted in favour of the Septennial Act 1716 which lengthened the Parliamentary terms and therefore consolidated power within the government rather than Parliament or the citizenry. Nor does any of this suggest, that in comparison to Dalrymple's politics, the parameters of civic humanism are clear or have ever been paradigmatically defined. What it does suppose, however, is that there was a collection

professoriate and the polite academy, 1720-46' in Hont *Wealth and Virtue*, 89-118; Phillipson, 'Politiness' 211-245.

[36] John Trenchard & Thomas Gordon, *Cato's Letters or Essays or Liberty, Civil and Religious, and Other Important Subjects, 4 vols (1720-1723)*, Carmel, repr. 1995.

[37] Robbins, *Commonwealthman*; Hirschman, *Passions and Interests*; Pocock, *Machiavellian Moment*: 423-461; and Pocock, *Virtue*, 103-123.

[38] Which is linked, it would appear, to the fortunes of his nephew John Darlymple (1673-1747), second Earl of Stair.

of ideas and arguments within what we might now call 'civic humanism', which Dalrymple drew from at specific moments in order to substantiate his position. It also helps to explain, as will be discussed below, why he presented his legal analysis of bad bargains in this manner; specifically, how it was possible for him to argue that a just price doctrine remained relevant to buyers, sellers and Parliament even if it was not strictly applicable to a court.

Parliament's Solution: Dalrymple & the Bubble

Dalrymple was a member of the 1720 Parliament which voted in favour of the South Sea scheme. He was also, importantly, involved in the post-crash Parliamentary debates.[39] It is not clear from his correspondence nor the Parliamentary records whether he was in favour of the scheme. However, it is highly likely that Dalrymple bought South Sea shares, he certainly had purchased shares in the *Compagnie française pour le commerce des Indes orientales* (the French East India Company) which suggests, at the very least, he was active in buying stocks.[40] Nevertheless, whether he had shares or not his family certainly did; several letters from family members to Dalrymple confirm he arranged on their behalf the purchase of cash stock and time bargains.[41] In a letter dated 4 May 1721 addressed to Dalrymple from his older brother, Hew Dalrymple, Lord President of the Court of Session, he considers the renegotiation of his time bargains – Hew was both a buyer and a seller. Hew also mentions a forthcoming debate in Parliament concerning the validity of, *inter alia*, time bargains. Specifically, Hew speaks of obtaining 'easier terms' in relation to his obligations, saying that he proposes to be lenient with his debtors and hopes that his creditors will also be lenient

[39] It would be interesting if he did support the South Sea scheme given that he previously purchased stock in the Company for Scotland, who led the failed Darien scheme in Panama: John Hill Burton, ed, *The Darien papers*, Edinburgh, 1849, 377. He held £400 worth of shares.

[40] NLS Ms 25276 f103-120.

[41] NLS Ms 25276 f98; Ms 25276 f100; NAS GD110/894-896.

with him. It also appears from this letter that Dalrymple had advised Hew to delay the performance of his bargains because he anticipated Parliamentary intervention in relation to such bargains. Although Dalrymple was right in suggesting this,[42] it was not until 10 August 1721 that the Bill was passed by the Lords and received Royal Assent.[43]

Dalrymple is specifically mentioned in the House of Commons Journal on 5 July 1721 following the crisis. Parliament was in the final stages of preparing Robert Walpole's Bill which sought to restore public credit and restructure the South Sea Co. Part of this Bill aimed to transfer stock held in the South Sea Co to the Bank of England and the East India Co. Other parts of the Bill gave the South Sea Co specific debt relief in relation to millions of pounds owed to the government. In terms of the secondary market and related contracts, three things are of note. First, it said 'all contracts for the sale or purchase of subscriptions or stock of the South Sea Company or any other company or corporation, or pretended company or corporation, which shall be unperformed, or not compounded on or before 29 next, be entered in book to be kept for that purpose...before November 1 next, or else to be void;…'[44] Second, it also stated that all contracts for the sale and purchase of any subscription or stock which is unperformed before 29 September 1721 is null and void if the seller, or the person on whose behalf such a contract was made, was not at the time of the contract, or within six days after,

[42] It is unfortunate that we do not have Dalrymple's side of the correspondence. No partner correspondence to Hew's letters can be found in NAS GD110/1254.

[43] Act for making several provisions to restore the publick credit, which suffers by the frauds and mismanagement of the late directors of the South-Sea company, and others, 6 Geo 1, c 4 in Pickering, *Statutes* vol XIV, 360ff. See also Melville, *South Sea Bubble*, 252 ff.

[44] Act for making several provisions to restore the publick credit, which suffers by the frauds and mismanagement of the late directors of the South-Sea company, and others 6, Geo 1, c 4 VIII in Pickering, *Statutes* vol XIV, 367.

actually possessed of, or entitled in his, her, or their own right, to such subscription or stock. Third, the Act also stated that no execution should be given by any court in any action brought upon any contract for the sale or purchase of any subscription or stock of the South Sea Co until after 29 September. Having agreed on the terms of the Bill, it was resolved that a committee, of which Dalrymple was one, to draw up an address to accompany the Bill when it was delivered to the King.[45]

Further mention of Dalrymple is made on 17 July 1721.[46] John Aislabie along with other former directors of the South Sea Co had petitioned the House of Lords. The Lords were considering a Bill which would raise money to pay disappointed subscribers through the confiscation of South Sea director's personal estates. The Bill was aimed at 'making good the Loss and Damage sustained by the said Company; and for disabling such of the said Persons as are living to hold Office or Place of Trust under the Crown, or to sit or vote in Parliament, for the future…' On 19 July, Aislabie made a speech to the Lords where he argued first that he had committed no crime and second that the proposed confiscation of his estate was unlawful. He said this 'way of dealing with an English Subject is unknown to the Laws of England: I say, my Lords, first to punish, and then inquire, the Law abhors.'[47] He went on 'My Lords, the laws are our birthright, and the guide and measure of all our actions; but where is the law that I have broken? Or, indeed, where is the Crime, or the Fact that is supp'd to be a Crime, and which is to be published' by a Law made ex post facto? A Law, my Lords, that dispenses with the very Forms of Judicature, and sets up a Tribunal unheard before in any free Country!'[48] In preparation for Aislabie's submissions, the House of Lords had asked

[45] *Journals of the House of Commons, 1688-1834*, vol 19, 8 December 1720 – 29 July 1721, 632

[46] Above, 632.

[47] Anon., *Speech of the right honourable John Aislabie*, London, J Roberts, 1721, 3.

[48] Above, 18.

the Commons on 17 July to provide additional information relating to the investigation carried out by the Secrecy Committee into the South Sea Co and to respond to the petition. The Commons appointed Dalrymple along with 30 other lawyers to search for precedents in relation to the proposed confiscation Bill.[49] In light of Dalrymple's previous objections to the confiscation of Scots estates following the 1715 Rebellion and his criticism of the directors of the South Sea Co in his pamphlet he no doubt appeared useful and willing to the Commons.

Although Dalrymple was involved with the 1721 legislation which restructured the South Sea Co and related contracts, he published this pamphlet sometime around November or December 1720. As well as mentioning the need to find a solution 'before Christmas' the substantive content of the pamphlet fits with the context of what happened during November and December 1720. Following the sharp dip in price of South Sea stock in the autumn of 1720 uncertainty grew as to the validity of cash subscription contracts with the South Sea company in the run up to the winter Parliamentary session.[50] There was a considerable debate at this time which concerned the validity of contracts made with the South Sea Co and outside Parliament discussion about the enforceability of contracts relating to South Sea stock which were concluded on the secondary market. At Walpole's request, Parliament passed a resolution on 19 December 1720 which stated that 'all subscriptions of public Debts and incumbrances, and other contracts made with the South-Sea Company, by virtue of an act made last session, remain in the represent state, unless altered for the ease and relief of the proprietors by a General Court of the South-Sea Company, or set aside by due course of law.'[51] From the perspective of South Sea contracts, the resolution was a temporary reassurance that Parliament would not interfere with subscribers' contracts but it did say 'that

[49] *Journals of the House of Commons, 1688-1834*, vol 19, 8 December 1720 – 29 July 1721, 632.

[50] Shea, "Financial market analysis".

[51] William Cobbett, *Cobbett's Parliamentary History of England*, London, 1811, vol 7, 690.

if any injustice was done to the subscribers, they were, by the Resolution in question, left at liberty to seek their relief by law…'[52] This was, nevertheless, a short-term fix that sought to stabilise the economy but which did not answer the question of why the crisis had happened and how Ministry proposed to resolve matters. Nor did it say anything about time bargains or related contracts. As noted above, it was not until the July of 1721 that Parliament eventually passed legislation which restructured the South Sea Co and also deemed secondary market contracts relating to South Sea stock null and void, if they were unperformed by 29 September 1721 and not registered with the company. This is the immediate context of Dalrymple's pamphlet; that is, he published it during the intervening period, between the political and legal uncertainty about secondary market contracts which followed Walpole's winter resolution of 1720 and the legislation passed in the summer of 1721 which clarified their legal status.

The Pamphlet: Wrongs and Remedies

It may be helpful to sketch out Dalrymple's argument and sources before looking at it in more detail. It is split into three parts. First, he starts with the general principle: Natural Law and Civil Law require an exact equality within a bargain. Secondly, he moves to consider how this principle affects three different configurations of contracting parties: (i) a contract with the directors of the South Sea Company who have been responsible for intentionally inflating the price of the shares beyond their true value; (ii) where a contract has been formed with the directors who were ignorant of the true price of the shares; and (iii) when shares were purchased from an innocent third party who was neither involved in the price inflation or the company. Additionally, he then speaks of how several transactions which delayed payment were usurious and thus unenforceable. Thirdly, he refutes four counter arguments

[52] Above, 690.

which assert that these time bargains are valid. Throughout his argument he makes reference to Voet, Grotius and classical writers, such as Cicero. When speaking of usury, he makes reference to various acts of the English parliament and invokes the typical criticism that "money of its own nature is barren, and can produce nothing."[53] In contrast to most of the pamphlets, he often quotes freely from Latin texts and offers precise references.

Darlymple's argument is that 'there ought to be an exact Equality observed' within contracts.[54] In support of this proposition he cites, Grotius (2.12.8)[55] and the Civil Law doctrine of *laesio enormis* (C 4 44 2).[56] He adds to this a citation of Voet.[57] Accordingly, where there is inequality either the buyer is obliged to restore to the seller what he has gained or the seller must return to the buyer what he has gained. He goes on to argue that in addition to the remedy of *laesio enormis*, Civil Law provides other actions in such situations including payment of a top-up from the buyer, reduction in price due to a breach of implied warranty or reduction of the contract due to fraud or error. He works on the assertion that there are two ways to determine the true value of a thing and thus identify an imbalance. Firstly, by the quality of the thing sold and secondly, 'the general opinion of the World about the thing sold…'. If people are in error as to the value of the thing sold then 'no one of these People

[53] Dalrymple, 'Time Bargains', 31.

[54] Above, 5.

[55] Above, 7-8.

[56] Above, 8.

[57] Above, 9 [Commentary on the Digest, l.18. tit.5 § 7].

are obliged to fulfil the Bargains they made while they were led into them by this Error…'[58] The authority he offers for this statement is, again, Grotius.[59]

After describing the general principles and their remedies he considers three scenarios.[60] The first scenario is when a bargain was struck with the directors who intentionally inflated the price of the shares beyond their true value. The second scenario is when a bargain was struck with the directors who were ignorant of the true price of the shares. The third scenario is when a buyer purchased from an innocent third party who was neither involved with price inflation or the South Sea Co. In response to the first scenario, there is an action of *dolus* against whoever was responsible for the misinformation. In terms of the second, he argues that there was a defect in the thing sold therefore the purchaser is entitled to an action of *quanti minoris* against the seller. Considering the third, he says it was formed on the presumption of value, which was erroneous and so the contract is void.

However, it is of note that each of these actions could be explained not necessarily on the basis of inequality itself but in terms of fraud, quality or error. On this view, the real trigger or relevant factor is the fraud, quality of goods or the error. This is particularly important when there is no latent defect that the seller should have been aware of or any form of intentional fraud. In other words, where there is no fault or error, i.e. you have an innocent seller, then on this analysis, the buyer has no remedy. However, when it comes to the scenario of the innocent seller and error, Dalrymple says first that 'The Buyer, by the Law of Nature, which requires an exact Equality in all Contracts, is free from his Bargain in as far as the Price exceeds the real Value of the Thing bought; *and* because he was in an Error when

[58] Above, 9-10.

[59] Hugo Grotius, *The Rights of War and Peace*, 1625, repr. 2005, Carmel, 2.11.6, hereafter 'Grotius, *The Rights of War and Peace*'.

[60] Dalrymple, 'Time Bargains', 10-18.

he promised so much for it…'.[61] First, he stresses that inequality in of itself frees the buyer from the contract but then quickly follows, secondly, by adding that it was also an error suggesting that this can be a co-existent ground of challenge in such situations. He goes on to say that the error is relevant because of the inequality: 'His Promise therefore being founded in Presumptions *facti quod non ita se habet*, is in it self void, and by the Civil Law, the Buyer is certainly Free, because the Laesio or Loss he sustantins by the Bargain, is *ultra dimidum valoris rei venditae*.'[62] Dalrymple's approach here suggests that rhetorically he wishes to stress that a remedy of *laesio enormis* is possible. However, it also suggestions that he understands, in reality, a buyer would need to plead error alongside *laesio enormis*. Arguably, Dalrymple is fully aware that the practice of law in Scotland, at least, if not also England & Wales, would only award a remedy if there was inequality *plus* an error or he was conscious that this point was far from clear in both jurisdictions. Nevertheless, and what is significant, is that he is keen to stress that inequality is the reason for these actions – *dolus*, *quanti minoris* and error – and, whether feasible or not, he argues firstly that inequality alone renders the contract void. This raises the question of why Dalrymple choose to make this argument but first it is useful to place his argument in context by English and Scots law in the 1720s.

Just price in English and Scottish legal thought

It is difficult to find an operative doctrine of just price in the law of England and Wales or in the law of Scotland in the early to mid-eighteenth century. In terms of the law practised in England and Wales, Lord Nottingham's statement in *Nott v Hill* is fairly clear: 'by the Civil

[61] Above, 12.

[62] Above.

Law a Bargain of Double the Value shall be avoided, and wish'd it were so in England.'[63] Although there is some suggestion in contemporary literature that in early eighteenth century the Chancery had the jurisdiction to 'set aside contracts that had the effect of bringing about very large enrichments'[64] on the whole commentators agree that there was no just price doctrine in English law in 17th or 18th centuries.[65] Overall, it is thought that interpreting such cases otherwise is problematic not only because of the inconsistency of these decisions but particularly because a plea concerning inadequacy was often combined with other factors such as fraud, unconscionability or undue influence.[66] It may, however, be suggested that the Scottish context is more pertinent to Dalrymple. Scotland also appears, however, during this

[63] 22 ER 875 (1682) 2 Ch. Cas. 120.

[64] Stephen Waddams, 'Good Faith, Good Conscience, and the Taking of Unfair Advantage' in Andrew Dyson, James Goudkamp, Frederick Wilmot-Smith, eds., *Defences in Contract*, Oxford, 2017, 63-86, 66. For additional comment see, Michael Lobban, "Consideration" in William R Cornish et al, eds, *The Oxford History of the Laws of England: Volume XII: 1820–1914 Private Law*, Oxford, 2010, 358-359, 374ff.

[65] Barton, 'Hard Bargains', 126–127; Warren Swain and Karen Fairweather, 'Usury and the judicial regulation of financial transactions in seventeenth- and eighteenth-century England' in Mel Kenny, James Devenney & Lorna Fox-O'Mahony, eds., *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable*, Cambridge, 2010, 147-165, 159, hereafter 'Swain and Fairweather, 'Usury''; Warren Swain, 'Reshaping Contractual Unfairness in England 1670-1900' 35(2) *Journal of Legal History* (2014) 120-142, 127 fn 68 hereafter 'Reshaping Contractual Unfairness'.

[66] Simpson, 'Horwitz Thesis'; Barton, 'Hard Bargains' 126–127; Swain and Fairweather, 'Usury' 159; Swain, 'Reshaping Contractual Unfairness' 127 fn 68. Also see J Fonblanque, ed., *A Treatise of Equity*, Dublin, Bryne, Moore, Jones, Lynch & Watts, 1793), vol 1, 115-116.

period, to reject the notion that inequality alone would render a contract unenforceable.[67] But Scots did consider the general principle of just price within their legal writing, which offers some insight into Dalrymple's approach.

Importantly, Dot Reid has shown that the principle of equality was central to Viscount Stair's (1619-1695) legal analysis, found in his *Institutions of the Law of Scotland* originally written 1662 c. and subsequently printed in 1681 and 1693.[68] She drew attention to the imprint of Aristotelian notions of justice and equity within Stair's *Institutions* but noted that 'by the time Stair was writing the Aristotelian concept of inequality does not demand equal in exchange. Instead within the obligation of recompense, equality is translated into onerosity and it reinforces the difference legal consequences which arise from onerous and gratuitous transactions.'[69] She has also shown how these ideas of equality materialised within the decisions of the Court of Session in Scotland through the various doctrines or remedies, such

[67] William M Gordon, "Sale" in Kenneth Reid & Reinhard Zimmermann, eds., *A History of Private Law in Scotland, vol 2*, Oxford, 2000, 305-332, hereafter 'Reid, *A History of Private Law*'; Joe Thomson, 'Judicial control of Unfair Contract Terms' Reid, *A History of Private Law*, 158-174, 166-174, hereafter 'Thomson, 'Judicial control''; R Evans-Jones, "Sale" in Reinhard Zimmermann, Kenneth Reid, and Danie Visser, eds., *Mixed Legal Systems in Comparative Perspective*, Oxford, 2005, 273-300, 286 ff.

[68] Dot Reid, 'Thomas Aquinas and Viscount Stair: the influence of scholastic moral theology on Stair's account of restitution and recompense' 29(2) *Journal of Legal History* (2008) 189-214, hereafter 'Reid, 'Thomas Aquinas''; Dot Reid, "Fraud in Scots law" (unpublished, PhD thesis, University of Edinburgh, 2012), hereafter, 'Reid, 'Fraud in Scots Law''; and Dot Reid, 'The Doctrine of Presumptive Fraud in Scots Law' 34(3) *Journal of Legal History* (2013) 307-326, hereafter 'Reid, 'Presumptive Fraud''.

[69] Reid, 'Thomas Aquinas', 209.

as presumptive fraud, donation, recompense and restitution.[70] Therefore, equality as a concept was important in terms of legal explanation but only materialised in terms of a remedy when coupled with a plea relating defective consent, minority, mistaken payments, fraud etc. On this basis, it could be said that the notion of equality informed the Scots doctrines of donation or situations where there had been a gratuitous transaction or that it explained how the concept of fraud extended in the seventeenth century to include more than intentional fraud. However, its role was secondary in legal analysis and would not, importantly, cover situations like those of the South Sea speculators, unless these additional factors could be plead alongside inequality.[71] Hence, it is generally accepted within the secondary literature relating to Stair that despite using equality as a guide to organise rules and doctrines of the *Institutions*, he rejected[72] the notion that mere inequality alone gave rise to a remedy.[73]

A good example of how Scots approached *laesio enormis* during this period can be found William Forbes (1668?-1745) unfinished work, sometimes referred to as *The Great Body of Law* drafted sometime around 1708 to 1742.[74] In similar terms to Dalrymple, he echoes Grotius asking: 'whether there is a moral necessity to keep Equality in Contracts so as in the case of an unequal Bargain the gainer ought to repair the Loser? H Grotius (de § j.x p

[70] Reid, 'Presumptive Fraud'.

[71] Reid, 'Thomas Aquinas; 208.

[72] James Dalrymple, Viscount of Stair, *The Institutions of the Law of Scotland*, 2nd edn, 1693, repr 1981, 1.10.14.

[73] Thomson, 'Judicial Control' 168; Reid, 'Thomas Aquinas' 209; Reid, 'Fraud in Scots Law' 66-68; M Hogg, *Promises and Contract Law: Comparative Perspectives*, Cambridge, 2011, 139.

[74] GUL MS Gen 1246-52, hereafter 'Forbes, *Great Body*'.

Lib. 2 Cap. 12 § jj. stands for the Affirmative in all permutatory contracts.'[75] Unsurprisingly, he comes to the same conclusion as Stair with regard to the difficulty in specifying what is equality in any one transaction, saying 'Equality hath no determine Rule, but depends upon their [the parties] own Opinions and affections as to the things agreed for.'[76] Forbes's account demonstrates a jurist wrestling with the propositions of Natural Law he found in Grotius and the practical statements of law he found in Stair. He notes situations where equality plays a role, saying where there are penalties or irritancy clauses in a contract it is important to ensure equality in the bargain and goes on to note that 'in Contracts any Advantage one takes of another by Fraud or Guile, as in using unjust balances, giving false or counterfeit coin, putting off insufficient ware or Good where of the insufficiency is latent and not obvious to the Contracter's Eye' equality is to be repaired. In general, however, he makes clear that 'our law more justly act not to annul or rescind contracts' when it is not possible to say there has been any advantage taken, such as fraud.[77] In this discussion, Forbes acknowledges the Civil Law doctrine of *enorm lesion* and treats it almost synonymously with what Natural Law requires but indicates that Scots law has departed from these principles in practice citing the case of *Fairle v Inglis*, 23 June 1669. The rejection of *laesio enormis* is more definitive in later legal writing and with less discussion than you find in Forbes. For example, the judge and jurist, Lord Bankton (1685-1760), writing in the early 1750s[78] and

[75] Forbes, *Great Body* f782.

[76] Forbes, *Great Body* f782.

[77] Forbes, *Great Body* f782.

[78] Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights […]*, vols 3, 1st edn, 1751-1753, repr. 1993-1995, 1.19.3.

also by the jurist John Erskine (1695-1768) in his posthumously published *Institute* of 1773[79] make little reference to the principle, and make clear the doctrine is not applied during this period.

Dalrymple's pamphlet, if taken as a direct description of the law as applied in Scotland, is at best inconsistent and at worse misleading. Darlymple does not appear to be drawing directly from case law of the Court of Session or Stair's *Institutions* when he came to advance his argument. Rather he was pulling directly from an understanding of what Natural Law required and what was virtuous in contrast to what the law of Scotland or England and Wales required. This makes Dalrymple's use of it noteworthy and strongly suggests that his Natural Law argument is more normative than descriptive of the law practiced in 18th century Scotland or England and Wales. As an idea or principle, it may have been familiar to 18th century lawyers but, as a reality, it was not a functioning doctrine of contract law applied by either Scots or English courts in the early 18th century (if it ever was).[80]

Courts: Natural Law and Roman Law

Dalrymple's use of a just price argument strongly suggests that his pamphlet is more of a normatively aspirational argument than descriptive of the law or legal practice. Of course, as an idea or principle, it may have been familiar to 18th century lawyers but, as a reality, it was not a functioning doctrine of contract law applied by either Scots or English courts in the early

[79] John Erskine, *An Institute of the Law of Scotland*, Edinburgh, 1773, repr. K Reid ed., Edinburgh, 2014, IV.1.27.

[80] Simpson, 'Horwitz Thesis', 561-564; Thomson, 'Judicial control of Unfair Contract Terms' 166-174; David Ibbeston, *A Historical Introduction to the Law of Obligations*, 2001, 210, hereafter 'Ibbeston, *Obligations*'; and Swain, 'Reshaping Contractual Unfairness'.

18th century (if it ever was).[81] However, its latency does not necessarily mean complete legal irrelevance. Indeed, what should be stressed is that for a lawyer, like Dalrymple, the line between Natural Law and positive law or between what the law is and what the law ought to be, was not always divided neatly.[82] Additionally, he appears to have understood the question of time bargains enforceability as a novel legal question or something which is liable to a great deal of legal uncertainty with regard to their enforceability.[83] If framed in this manner, it is possible that Dalrymple understood his argument as potentially relevant as a plea in a court or as generative of a judicial remedy with regard to time bargains because there was no clear legal proposition on this specific question, i.e. there was a gap in the law. It could, therefore, be suggested that Dalrymple was influenced by his father's understanding of the power inherent in the Court of Session in Scotland, and the development of legal doctrine which Viscount Stair elaborated upon throughout his legal career.[84] That being so, Dalrymple could have understood his normative argument as being, in some ways, legally relevant, at least that is, if his father's notion of equity were to be adopted: you could make a direct appeal in judicial argument and pleadings to Natural Law, which Stair often equated with equity, and on that basis a judge determines the outcome of a novel case. As John Ford has described, in seventeenth century, Scots lawyers differed in their understanding of both the authority of texts used by lawyers,[85]

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[81] Simpson, 'Horwitz Thesis', 561-564; Thomson, 'Judicial control of Unfair Contract Terms' 166-174; Ibbeston, *Obligations*, 210; and Swain, 'Reshaping Contractual Unfairness'125-26.

[82] Neil MacCormick, 'Law and Enlightenment' in R H Campbell & A S Skinner, (eds), *The Origins and Nature of the Scottish Enlightenment*, Edinburgh, 1982, 150-66.

[83] Dalrymple, 'Time Bargains' 4.

[84] John D Ford, *Law and Opinion during the Seventeenth Century*, Oxford, 2007, 473-539, hereafter 'Ford, *Law and Opinion*'.

[85] Ford, *Law and Opinion, passim.*

as well as the institutional authority of the Court of Session and role of judges.[86] Influential lawyers such as Sir George Mackenzie, for example, would only appeal to equity indirectly through the use of learned lawyers, whereas Stair was argued that a judge could appeal, in making a decision, directly to equity.[87]

If this is the case, what is interesting is that Dalrymple, unlike his father, demonstrates a legal humanist conception of equity or Natural Law, due to his veneration of Civil Law (Roman law). Dalrymple treats Civil Law (or Roman Law) almost as equivalent to, or the clearest expression of, Natural Law. Dalrymple's near contemporaries, such as Forbes and Sir Francis Grant (1658/63-1726) also treated Civil Law as the epitome of Natural Law's jurification. In his 1715 *Law, Religion and Education, considered; in Three Essays […],* Grant said "…God, for the Good of Man, erected and excited the Roman Empire, to give Laws to the World, so excellent, that the like, as to the Bulk thereof, were never made by humane power."[88] He went on, "They have such natural and civil Equity, Humanity, and Utility, that all, everywhere recur to them."[89] Forbes said of Civil Law that it 'is so agreeable to right reason that the very people who shook [sic] off the Roman yoke, yield to be governed by their Laws: and even those who the Romans never reached, acknowledge the power and Authority thereof. The Wars of the Roman were often unjust, but their Laws seem to have be dictated by justice

[86] John D Ford, 'Protestations to Parliament for Remeid of Law' 88(1) *The Scottish Historical Review* (2009) 57-107.

[87] BL Ms 18,236: G Mackenzie, *A Discourse on the 4 First Chapters of the Digest to Show the Excellence and usefullnese of the Civil Law* f96-103. BL Ms 18,236: G MacKenzie, *A Discourse on the 4 First Chapters of the Digest to Show the Excellence and usefullnese of the Civil Law* f96-103.

[88] Sir Francis Grant, Lord Cullen, *Law, religion, and education* (Edinburgh, Andrew Anderson, 1715) 11-12.

[89] Ibid, 12.

itself; and therefore, ought also always to be observed by Mankind, unless they banish from Society that Virtue which is the strongest support of it. For by these Laws, Natural Reason and Equity are applied to all the variety of transactions between Man and Man.'[90] Equating Natural Law with Civil Law or indeed suggesting Civil Law had divine origins is a trope of early modern juristic writing[91] but in the early 18th century it was subject to criticism from philosophers, such as Gershom Carmichael.[92] Nonetheless, Forbes, Grant and Dalrymple offer a form of what could be called civic humanist jurisprudence, which was not just scholarly in its approach but revered Civil Law as the best example of Natural Law translated into practical jurisprudence.

Parliament: Natural Law and Common Law

It is suggested here, however, that even if Dalrymple saw his argument as being a plausible plea in either the Court of Session or the Chancery Courts, it is very clear from the pamphlet that his argument is directed towards Parliament and is situated within the political debates about whether Parliament should legislate or not. As will be demonstrated, it potentially gains more relevance and leverage as a political argument. Moreover, he makes clear that he is not appealing to any particular domestic approach either from Scotland or England & Wales, i.e. consuetudinary law, and was prepared to contradict established legal thinking if it did not

[90] Forbes, *Great Body*, f14.

[91] Donald R Kelley, "Law" in J H Burns & M Goldie (eds), *The Cambridge History of Political Thought* 1450-1700, Cambridge, 1991, 66-85 at 68-69.

[92] John Moore & Michael Silverthorne (eds), *Natural Rights on the Threshold of the Scottish Enlightenment: The Writings of Gershow Carmichael* (2002) 15-16. See too, Christian Thomasius (1665-1728) who made similar criticisms: Fabian Grunert, Thomas Ahnert, & Ian Hunter, eds., *Christian Thomasius, Essays on Church, State, and Politics*, Carmel, 2007, 30 ff.

cohere with Natural Law. He says in the pamphlet that rather than appeal to a solution from within the Common Law (by which he appears to mean the Common Law of England & Wales and not the Ius Commune or Consuetudinary Law) he will appeal to 'Laws of Nature and Nations, and the universal Rules of Equity…'[93] Of course, Dalrymple would be fully aware that Equity, as a jurisdiction, was part of the law of England and Wales. However, he appeals to 'equity' in the sense of a transcending legal order rather than a defined jurisdiction or particular remedy offered by a specified court. Additionally, Dalrymple treats the Laws of Nature (*ius naturale*), the Law of Nations (*ius gentium*) and the Rules of Equity as sources of law which were superior to the Common Law (positive law) rather than taking the Common Law as an expression of Natural Law. In general terms, such an understanding of the relationship between positive law and Natural Law is commonplace in early modern literature. It is also something which Scots and English lawyers at this time would have been familiar with in terms of terminology and import.[94] But what was not commonplace was the suggestion of an evident contradiction between what Natural Law required and what the Common Law allowed, and his call for Parliament to therefore intervene. Both of these points are worth examining in more detail as they explain also the translation of Dalrymple's Natural Law argument into the political debate concerning time bargains and the South Sea bubble.

[93] Dalrymple, 'Time Bargains' 5.

[94] D J Ibbeston, 'Natural Law and Common Law' 5 *EdinLR* (2001) 4-20, hereafter 'Ibbeston, 'Natural Law''; Julia Rudlolph, *Common Law and Enlightenment in England, 1689-1750*, Woodbridge, 2013, 164-201; R H Helmholz, *Natural Law in Court*, Cambridge, 2015, 82-94; and M Lobban, 'Theory in History: Postivistism, Natural Law and Conjectural History in Seventeenth- and Eighteenth-century English Legal Thought' in M Del Mar & M Lobban, eds., *Law in Theory and History: New Essay on a Neglected Dialogue*, Oxford, 2016, 204-229.

First, Dalrymple stresses a contraction between Natural Law and the Common Law.[95] Unlike many lawyers at this time, he does not try to assimilate each with the other or explain away the tension,[96] and those who advocated the enforcement of time bargains claimed the Common Law protected their interests. His approach contrasts with the general formula of English lawyers of the time who would present the Common Law as related to or a form of Natural Law[97] and unsurprisingly his political opponents. Hence, rather than add a rhetorical gloss to the rules of the Common Law or use Natural Law as common-sense platitude,[98] Dalrymple says, quoting Cicero, that men should 'follow that which right reason informs him to be good and equitable…and deny his aid and countenance to Civil Laws' which are contrary.[99] In this argument, Dalrymple makes clear that 'the Common Law and Customs of England' oblige 'the encouragement of Trade and Commerce' and therefore not to enquire

[95] Dalrymple, 'Time Bargains' 8; 26.

[96] Or it could be said that Dalrymple was making use of an earlier understanding of the relationship between the Common Law and Equity in English law, see various entries in Egbert Koops & Willem J Zwalve, *Law & Equity: Approaches in Roman Law and Common Law*, Leiden, 2014. Also see Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England*, Oxford, 2010. However, it is important to note that there was no established or accepted or defined notion of Equity in the early modern period - it was debated intensely by Coke and Ellesmere. Moreover, it would be surprising if Dalrymple was making use of it given his education was predominantly in Scotland and the Dutch Provinces.

[97] Above.

[98] Ibbeston, 'Natural Law', 8.

[99] Dalrymple, 'Time Bargains', 8. Cicero, *De Officiis: With an English Translation by Walter Miller*: *Leob Classical Library*, Cambridge, 1913, III.68, hereafter 'Cicero, *De Officiis*' (which is quoted in Grotius, *The Rights of War and Peace*, 2.11.2).

too strictly into the 'equality of Private Peoples Bargains' but to allow 'Man to make the best Bargain for himself'.[100] However, the 'Laws of Nature and Equity' require that 'no respect' should be given to the 'Laws of any particular Country' which do not follow Natural Law. Therefore, Dalrymple adopts a hierarchy of laws that paints the Common Law's approach to trade as inequitable. This is not found in comparative arguments made by English lawyers who nevertheless drew upon Natural Law or Equity.[101] In other words, according to Dalrymple Natural Law trumps the Common Law (positive law) and emphasises the moral shortcomings of the Common Law's approach to trade and commerce.

Secondly, despite this conflict between the Common Law and Natural Law, Darlymple's argument is not a straightforward refutation of Common Law's validity in the sense of arguing that it is not law because it fails to express Natural Law. Dalrymple is prepared to make a familiar concession: that for the sake of utility and efficiency exact equality is not insisted upon by the Laws of Nations.[102] He quotes Grotius who stressed that Roman law did not require every minor inequality be adjusted due to the litigation and inconvenience this would cause, only those contracts for half the just value.[103] Also the argument that Natural Law should trump Common Law is not directed by Dalrymple towards a court or judge as authority. It is a plea to Parliament to legislate and an appeal to the ethics of individual sellers based on a conception of Natural Law. How then should his argument be understood?

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[100] Darlymple, 'Time Bargains', 8.

[101] See Richard H Helmholz, 'Natural Law and Human Rights in English Law: From Bracton to Blackstone' 3(1) *Ave Maria Law Review*, 2005, 1-22.

[102] Jan Hallebeek, 'Some Remarks on Laesio Enormis and Proportionality in Roman-Dutch Law and Calvinistic Commercial Ethics' 21(1) *Fundamina* (2015) 14-32.

[103] Dalrymple, 'Time Bargains' 8 ff. Grotius, *The Rights of War and Peace*, 2.11.2.

Dalrymple's argument may be best characterised as an appeal to the conscience or virtue of a (honest) seller of South Sea stock, which is political rather than legal. He has a conception of how individuals should use their private law rights within a community. Hence, he makes a plea to members of Parliament to act for the common good rather than an attempt to undermine the Common Law's authority. His specific references taken from Grotius and Cicero suggest that Dalrymple understands, in this instance, that Natural Law guides individuals as to right action no matter what the positive law might suggest. Dalrymple's quotations from Cicero (via Grotius) supports this reading of his argument: 'Now the law disposes of sharp practices in one way, philosophers in another: the law deals with them as far as it can lay its strong arm upon them; philosophers, as far as they can be apprehended by reason and conscience.'[104] Additionally, this quote from Grotius does not make an explicit refutation of positive law rather when a civil law (by which he means positive law) is contrary to Natural Law you should opt to follow the former. However, Dalrymple is not necessarily saying the positive law should be changed or is invalid or has no authority. Rather Grotius's gloss on Cicero, which Dalrymple quotes, says "therefore they who are not subject to the Civil Laws, but are above them, ought to follow that which right Reason informs them to be good and equitable, and so too ought those who are subject to the Laws, when the Affair that is transacting is what relates to Justice and Honesty, provided that the Laws are silent in the Case, and neither grant nor take away our Right, but only, for some certain Considerations, deny their Aid and Countenance to it."[105] Grotius's principle is in the positive not the negative: you should not follow what the civil law *allows* or *permits* but do what is good and equitable. You do not need to follow what the civil law (positive law)

[104] Cicero, *De Officiis* III.68.

[105] Grotius, *The Rights of War and Peace*, 2.12.2.

requires in these circumstances but are by Natural Law required to be 'above it.' Or at least this is what Dalrymple's use of Grotius amounts to in his pamphlet.

Although Dalrymple sees a clear directive from Natural Law that sellers should not insist upon their bargains, he does not trust individuals to always act in accordance with Natural Law. His focus upon individual (ethical) decision making continues towards the end of the pamphlet. Dalrymple says, 'I hope the Justness of my Way of reasoning will easily appear to every Man who is not a Seller'. Whereas he says he does not know of "any argument" which he could make to a Seller to set-aside the bargain because he has "Self-Interest on his side" (and by implication the Common Law). Dalrymple's solution is therefore an Act of Parliament, which will compel the Seller to set-aside the bargain. He warns if Parliament does not respond there will be thousands of cases brought to court and 'when a Man's Interest is concern'd, he is easily persuaded, and clever Attorneys will soon find Arguments to persuade the Seller, that his Case is different from every one of those Cases in which Judgment is given.'[106] Approaching Natural Law in this manner suggests, again, that Dalrymple's contribution was not framed by a nationalist rhetoric or a radical theological use of Natural Law. He was appealing to the concept of personal virtue and asking Parliament to ensure such behaviour through legislation. He was using Natural Law and his just price argument in a political debate and with political aims. Although his legal argument was at the very least speculative and arguable, it carries far more weigh and is more persuasive when framed in an ethical and political argument about what virtuous for an individual to do and what is best for the common good.

[106] Dalrymple, 'Time Bargains', 41.

Time Bargains: Sellers and Commerce

Dalrymple's pamphlet, when translated into the context of the political debate rather than any specific legal debate, emerges as notable mixture of political and Natural Law arguments, linked, in some ways, to the rhetoric of civic humanism of the early 18th century. As argued, it is this mixture which shapes how he conceptualises contracts and how he justifies Parliamentary intervention into what is otherwise a private bargain. In contrast, his interlocutors evidence a divergent approach of contract, liberty and the role of Parliament. Dalrymple, himself, summarises and considers four opposing arguments in favour of time bargain's validity, which can be found within the pamphlet debate. First, that these time bargains were equal at the time of entering into the transaction but through the passage of time, and through no fault of the seller, have now become unequal. For example, this argument is made in a pamphlet attributed to Daniel Defoe: [107]

> And this, I think, will be very plain, if we look back to the time when these Contracts were made, and things then stood thus […] it was then agreed by common Consent, as it were, that Paper should pass for Money, without regard to the Rules of Prudence or Proportion…I do not mention this, as if these Change should make any Difference between Debtor and Creditor on legal Contracts, which are not depending but executed in the most material Part, viz. the Payment of Money; but only state this Case to shew how unreasonable it would be to set such Contracts aside between Buyer and Seller and thereby expose the Seller to the full Demand of the buyer.

Dalrymple responds that the opinion of the world at the time of purchase should not necessarily determine whether there was equality between parties. He argues, in the

[107] Above, 15-16.

alternative, that the value of the stock and the equality of the exchange should be fixed by the quality of the goods when the opinion of the world is at fault, particularly given that the opinion of the world can be led into error so easily. It is only when the opinion of the world changes for good reason that one should take it as an indication of the value of the thing sold. Dalrymple therefore tries to argue that this is about quality rather than a natural change in the value following the conclusion of the contract. Notably, however he does not respond to the point that parties willing consented to the deal and were not concerned with questions of equality at that time.

Second, and related to the first, is the argument that someone who entered a time bargain bought a chance and they simply lost.[108] That being so it is irrelevant if they say they can longer afford to pay the agreed price.[109] Indeed, several pamphlets turn the argument around placing fault on the side of the buyer, saying for example, 'As for the Inability of some to make good their Contracts, themselves ought to have thought of that before they contract yet this is not the Case with every body that now pretends so.'[110] Others made the argument that to annul the contracts would penalise sellers who merely made an agreement and committed no crime, for example, one pamphlet argued: '[If the contracts were annulled, the seller would] be worse dealt with than State-Criminals, who are not to be executed by a Law ex post Facto; and that in favour of Persons who by the same Contracts have voluntarily consented to part with it. Now how can this be consistent with the Rules of common Justice and Honestly, or with that Liberty of dealing, which t'is necessary every Man should have in these Cases?'[111] In a pamphlet attributed to Defoe it is argued that, if these contracts were set

[108] Way, *The case of contracts* 12-14; Anon., *Fair and legal contracts*, 1.

[109] Way, *The case of contracts*, 12-14

[110] Anon., *The case of the sellers*, 16.

[111] Defoe, *A true state*, 20

aside ‘the Persons of the most Prudence, Caution, and Moderation in their View would be injured’ whereas ‘Had Men been contented in any Bounds of Reason; had they not push’d on with Ambition, which is plain, could never be gratified, we had not groan under present Misfortunes.’ He therefore asks ‘And are such extravagant Gamesters to be encouraged?’[112] In his pamphlet, John Blunt went further saying: [113]

> These Bubbles were the more pernicious, in that they were generally traded in by the lower part of the People, whose Circumstances would not permit them to buy South-Sea Stock or Subscriptions; but being infects with the Epidemical Disease of becoming rich on a sudden, deserted their Shops and Trades, and their usual Methods of Industry, and were stripped of what by their former Diligence and Frugality they had acquired.

Dalrymple agrees that a chance was voluntarily purchased but he argues that only those experienced in dealing with chance should be held to the bargain. He argues that those inexperienced in dealing with chance have been exploited here.

Thirdly, every man should be left to determine the best bargain and it is not for anyone else to say, particularly Parliament, otherwise.[114] Defoe says, for example: [115]

> a Contract being a mutual Engagement between (at least) two Parties, nothing can be done to discharge or alter such Contract, without the concurrence of both

[112] Defoe, *A true state*, 22.

[113] Blunt, *The true state*, 77.

[114] Dalrymple, ‘Time Bargains’ 26 ff.

[115] Above, 7.

> Parties…therefore the Consent of both Parties is necessary to this…[to do otherwise] is contrary to the very Nature and Obligation of a Contract, with always leaves each Party to judge for himself what is best for him.

Another pamphlet argues that the stock is akin to property, saying 'whatever a British Subject has Right to by an Act of Parliament, is undoubtedly his Property, and Consequently he can Dispose upon it as he pleases, provide he does it in a legal Way…and therefore whatever Bargain, or Contract was made thereon, must be Good, and cannot be meddled with by the Legislative, without Sapping the very Foundations of Property.'[116] Dalrymple does not refute this directly but argues that in this situation people have been 'stock jobbing' and operating nefariously which means the best bargain was not possible. In these situations, he argues, it is harmful for trade or the nation to respect the bargain of private individuals.

Fourthly, that due to the scale of the buying and selling, it will be too difficult to determine who has gained what and it will merely do more harm to commerce and credit to inquire into every transaction and set aside contracts otherwise fairly made.[117] An example, in a pamphlet entitled, *The performance of Fair and Legal Contracts, the Surest Method to support Public and Private Credit* the author says: [118]

> That Reforming of Private Credit is a necessary Means to make Public Credit flourish, is an acceptable Maxim: but the vacating of Fair Contracts, or, in other words, the Confounding of private Property in order to restore private Credit, is endeavouring to

[116] Anon., *Laws, Ex post Facto*, 1.

[117] Above, 24

[118] Anon. (London, 1721) 1. Similar arguments are made in *Ex post Facto*; Defoe, A *true state*, 22-23; Anon., *The case of the sellers*, 1.

> attain the End by destroying the Means: For what is private Credit, but the mutual Confidence one Man places in the Probity of another, when he trusts the with his Property…To break then through those Laws will destroy that Confidence upon which Private Credit depends.

To this Dalrymple responds that not all bargains will be able to be righted, but there will be some and it will be possible to determine the true value. Additionally, that to allow large scale inequality such as this will do more harm to public credit than setting them aside because people have time bargains "hanging over" their heads, they will not enter into other transactions. They will also not trust one and other for concern that they have entered into an unequal bargain. Moreover, it will make job-stockers 'too rich'[119], ruin honest families and lead to 'thousands of Vexatious Law-Suits…'[120]

New Rhetoric: Commerce and Contracts

Whether Dalrymple's retorts are convincing is of less concern for present purposes when one considers the nature of the language, rhetoric and ideas of the debate. These arguments give legal historians an insight into early 18th century extra-legal attitudes to contracts, which appear similar to those found in the 19th century. On the one hand, Dalrymple stresses the importance of Classical sources; the relevance of Natural Law; the deception of sellers, the unworthiness 'stock-jobbers'; the dangers of gentlemen 'becoming too rich'; and the ruin of honest families.[121] On the other hand, the counter arguments stress the equal chance both parties took upon entering the contract; the necessity for both parties to be cautious and

[119] Dalrymple, 'Time Bargains', 30.

[120] Above, 41.

[121] Dalrymple, 'Time Bargains', 30.

prudent when forming a contract; that trade and commerce require each to be left to his own when striking a bargain; the importance of Parliament respecting the bargain agreed by individuals; and the role of contractual performance within the larger economy of credit and confidence. Although the doctrine and practice of law in England & Wales and Scotland did not use this language to explain itself, the counter arguments to the proposed large-scale (Parliamentary) annulment of contracts captures the emergence of a political, economic and social rhetoric or collection of arguments about the nature of contracts which contrasts with the civic humanist arguments of Dalrymple as well as the ideas of Natural Law found in early modern jurists. It is arguably a new rhetoric which would become central to contract law's justification, explanation and language in the years that followed. Although lawyers in the early 18th century may not have necessarily drawn from the same normative register or understood contracts in this manner, non-lawyers such as Defoe or Blunt did.

Furthermore, that these ideas about contract's purpose and normativity emerged in a quasi-economic-political debate in the early 18th century during a period of political and economic transition suggests a parallel understanding of contracts emerged at this time. During this period, the relationship between the government, the economy and trade were being re-assessed and reconfigured and a new discourse of commerce emerged. It would appear then that as part this wider debate a relatively distinctive and coherent understanding of contracts materialises; that is, an understanding which is not theological or legal but rather a political economic understanding. It is not systematic or orderly but it is a discourse that sees contracts through a new paradigm of commerce, laying stress upon individuals as the best judge of price and terms, the need to respect for parties' bargains as an important constitutional right, that the loser should take responsibility for the bad bargain they struck and the overall importance of contracts to the stability of commerce and government. Traces

or examples of such arguments may be found in legal material[122] or at earlier points in legal history[123] but their combination within the pamphlet debate suggests a movement towards a more coherent and developed extra-legal understanding of contracts.

John Pocock has said that writers such as Defoe 'recognised that, in the credit economy…property had become not only mobile but speculative: what one owned was promises, and not merely the functioning but the intelligibility of society depended upon the success of a program of reification.'[124] In addition, it should be added that if the government's success (including its ability to fund an army) was dependent on public perceptions of credit then contracts or promises were just as important as corporeal and heritable property. In terms of the attitudes to contracts in the early 18th century, Pocock's observation about the language and ideas of the broader political and social context is instructive. The counter arguments which Dalrymple speak to were addressing the new context of government, commerce and contracts. The polity, therefore, had to be educated on how speculate, how to rationally determine creditworthiness, to keep promises not only

[122] For example, Ibbeston draws attention to the unpublished treatise of Sir Jeffrey Gilbert (1674-1726) (BL Hargrave MMS 265 & 266) written in the early 1700s, which "has a good claim to be the first serious work on…[contractual liability]" in England. Gilbert frames contracts as reciprocal agreements where there is an exchange of property, rights or benefits. Ibbeston, *Obligations*, 217. However, see David Lieberman, 'Contract before "Freedom of Contract"' in Harry Scheiber (ed), *The State and Freedom of Contract*, Stanford, 1998, 89-121, for a general account of English contractual thought in the eighteenth century, which stresses that 'the lines of influence and connection' between the development of legal thinking and eighteenth century intellectual change 'are much less firm and self-evident than is suggested in standard legal histories.' (89).

[123] Importantly, for example, Grotius, i.e Hugo Grotius, *The Free Sea*, 1609, repr. 2004.

[124] Pocock, *Virtue*, 113.

because of honour or virtue but also because of public confidence. There was a displacement of other-regarding contractual ethics, advocated by the likes of Dalrymple and based on a reading of natural law and notions of virtue, by a self-regarding, self-disciplining contractual ethics. This new rhetoric spoke of controlling passions and impulses and being punished for 'foolishness' in commerce; it required that the causes of bubbles and crashes, or bulls and bears, be studied and understood, connecting individual private ethics to political stability and the public credit; and, overall, it was imperative within this new rhetoric that the speculating and contracting public were self-disciplined, watchful and prudent.[125]

If promises and contracts were now akin to property within the new social, political and economic structure of 18th century Britain then setting a contract aside due to mere inequality or for the common good or because it was virtuous was reckless and politically dangerous to the stability of the government. In this context, you did not need to appeal to Divine Law, Natural Law, positive law or indeed virtue to justify a contract's enforcement; you could appeal to the political economic ideas of Defoe and others: prudence, self-control, and the connection between individual contracts and political stability. The justification which you might find in Natural Law would appear outstep or tone deaf to the climate and language of 18th commerce and politics, even if did still retained prestige within legal discourse. In fact, some of Natural Law's principles could appear contrary to the narrative of a rational (self-interested) creditor and a reliable (trustworthy) debtor, when you use notions such as *laesio enormis* and appeal to virtue. Those against the large-scale annulment of bad bargains deployed arguments and ideas which were contrary to Dalrymple's idea that an honest, just gentleman would follow the requirements of Natural Law and waive his or her

[125] This reading supports, to an extent, Hirschman's wider interpretation of the intellectual context from which modern notions of capitalism emerged: Hirschman, *Passions and Interests*, *passim*.

legal right to performance. For those in favour of enforcement, they argued that it was the fault of the loser to end up with such a debt and the entitlement of the winner to insistent their legal right of performance. It was characterised as some sort of constitutional right, to enforce your contract, and argued that commerce and the government depended upon its enforcement.

Conclusion

Analysing Dalrymple's pamphlet and the debate concerning the enforceability of time bargains goes part of the way towards understanding the legal and ethical context within which the South Sea bubble crisis was resolved. In terms of Dalrymple's pamphlet itself, three general conclusions can be made. First, from the point of view of legal attitudes the argument is noteworthy in suggesting, *inter alia*, that no matter what the Common Law might allow Natural Law and Equity decrees that these contracts should not be performed. Other pamphlets asserted that it would be unfair to enforce the contracts but often lacked any specific legal argument and certainly did not juxtapose the Common Law with Natural Law. Second, in terms of the history of contractual thought in Europe Dalrymple's use of the ancient legal idea of *iustum pretium* is notable because it appears somewhat out of date or at the very least speculative in terms of a legal argument which could be used in a Scots or English court. To say it is speculative does not mean to say that his argument was disingenuous or frivolous but rather it suggests that there is more to his argument and intentions which only becomes clear when it is read against the legal and intellectual context of the 1720s. Of course, it could be said that he adopts a rather ambitious interpretation of the law due to the unprecedented circumstances of the South Sea bubble or simply because as a Scots lawyer he was somewhat unfamiliar with what arguments would work in the Chancery Court. But as has been argued, in spite of being legal in tone Dalrymple has express political intentions, i.e. because the Common Law would allow the enforcement of these contracts, he

wanted Parliament to intervene and render these contracts void. Reading Dalrymple's pamphlet in this light suggests it is a normative and political argument rather than a specifically legal argument. Lastly, his pamphlet is important because it gives voice to a civic humanist ethic with regard to how a gentleman should use his contractual rights and therefore acts as a counterpoint to the individualistic-prudence orientated rhetoric of other pamphlets which advocate a different contracting ethics. The key point, therefore, is that in spite of the specifics of his legal argument being somewhat out dated it is when taken as a political argument that the pamphlet takes on a new significance. In terms of how the legal environment should be characterised and understood, the analysis above also attempts to demonstrate that by adopting a wider conception of what constitutes the legal context of the South Sea crisis, a deeper understanding can be gained of what role the law played in resolving the crisis and how political and ethical attitudes shaped the use of law, specifically contract law. Hence, integrating legal history into general histories of the South Sea bubble is not just about how legal rules and regulation of markets hindered or enabled preference satisfaction for rational agents. It is also about understanding how private law also constitutes the legal environment and how contemporary legal understandings of specific doctrines of private law shape practice. And importantly, for the study of law in early 18th century, an examination of the ethical and political attitudes held by lawyers, politicians and investors about what was a permissible use of your legal rights is significant to how we understand the legal environment within which the South Sea crisis was resolved.