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# *Perspectives on contract theory from a Mixed Legal System*

MARTIN HOGG\*

## *1. Introduction*

Is there anything that makes the contract theory of a mixed legal system distinctive from that of the Common Law? It is proposed, in attempting to answer this question, to take one such mixed legal system, Scots Law, and compare its theory of contract with the still largely dominant will theory of English Contract Law. It will be suggested that the origin of the contract theory of the mixed legal system of Scotland is itself mixed, and that this mixedness is not simply that of the traditional mix of Roman with Common Law that one would expect from a so-called mixed legal system, but also a mix of natural law, Aristotelian ideas, with a conception of law as a rational discipline emphasising the human will as a constituting obligational force. It will be further argued that the peculiar obligational framework of Scots Law gives its contract law distinctive characteristics, both conceptual and functional, from that of the Common Law.

The following observations are a contribution towards remedying a relative deficit in contract theory from the pen of Scottish thinkers over the past one hundred and fifty years or so. Whereas, over that period of time, admittedly many Common Law works have been published which have taken a purely and unashamedly practical approach to contract law, the Common Law has also benefited from a steady stream of important works on contract which have given due place to theoretical analysis.<sup>1</sup> By contrast, the few authors of the same period to have produced treatises on Scots contract law – William Gloag,<sup>2</sup> David Walker,<sup>3</sup> and W W McBryde<sup>4</sup> – all chose to

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<sup>1</sup> See, for instance, from the nineteenth century, J Newland, *Treatise on Contracts within the Jurisdiction of the Courts of Equity* (Philadelphia: Farrand & Co, 1806), S Comyn, *The Law of Contracts and Promises* (London: J Butterworth, 1807), H Colebrooke, *Treatise on Obligations and Contracts* (London: 1818), J Chitty, *Practical Treatise on the Law of Contracts* (London: S Sweet, 1826), C G Addison, *Treatise on the Law of Contracts and Liabilities Ex Contractu* (London: Benning & Co, 1847, two vols), S M Leake, *The Elements of the Law of Contracts* (London: Stevens & Sons, 1867), F Pollock, *Principles of Contract at Law and in Equity* (London: Stevens & Sons, 1876), and W Anson, *Principles of the English Law of Contract* (Oxford: Clarendon Press, 1879). In the past forty years or so, important modern contributions to contractual theory have included G Gilmore, *The Death of Contract* (Columbus, Ohio: Ohio State Univ Press, 1974), C Fried, *Contract as Promise* (Cambridge, Mass: Harvard Univ Press, 1981), P S Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986), and S Smith, *Contract Theory* (Oxford: OUP, 2004). See also P Benson (ed), *The Theory of Contract Law: New Essays* (Cambridge: CUP, 2001). In addition, there is a genre of economic analysis of contractual theory largely written with the Common Law in mind: see, for instance, P Bolton & M Dewatripont, *Contract Theory* (Cambridge, Mass: MIT Press, 2005).

<sup>2</sup> See, principally, W Gloag, *The Law of Contract* (Edinburgh: W Green & Son, 1914; 1929, 2<sup>nd</sup> ed; 2<sup>nd</sup> ed reprinted Collieston, Aberdeenshire: Caledonian Books, 1985).

<sup>3</sup> In the third edition of his work, *The law of contracts and related obligations in Scotland* (London: T & T Clark, 1995), Walker provides (at para 1.19 f) a brief summary of the principal theories of contract law, and states his preference for the ‘agreement theory’, dismissing most of the other theories for the reason that they have no support in Scottish authority.

<sup>4</sup> His principal work being *The Law of Contract in Scotland* (Edinburgh: W Green & Son, 2007, 3<sup>rd</sup> ed).

focus almost exclusively on practical aspects of the law. Though it is true that Scotland's most prominent recent legal theorist, the late Professor Sir Neil MacCormick, wrote about contract and promissory theory, he did so largely as part of a wider philosophical investigation into legal institutions rather than with regard to the law of obligations.<sup>5</sup> One finds somewhat more by way of jurisdiction specific contract theory in the writings of the late Sir T B Smith, and, more recently, a few writers from other jurisdictions have offered illuminating, if sporadic, observations on Scots contract theory,<sup>6</sup> but it remains the case that not since the seventeenth century when James Dalrymple, Viscount Stair, offered his own seminal views on the nature of law, including the law of obligations, has there been a distinctive and systematic attempt to analyse why precisely it is that contractual undertakings should be enforced within Scots Law. In what follows, the contributions of Stair and the major Scottish jurists who followed in his footsteps must therefore be considered.

Why should any of this be of interest to Common Lawyers? Evidently its primary utility is likely to be comparative. It is becoming more commonplace to set the various European legal systems in a comparative context, either from a desire simply to understand them better or, increasingly, with a view to harmonising them. In this regard, a deeper understanding of the differences in contract theory between different systems can help to make more sense of the varied characterisations of similar fact situations adopted by national legal systems. Secondly, and of more immediate practical relevance, a not insignificant number of contract cases are appealed from the Court of Session to the House of Lords, and the speeches of their Lordships in such appeals are subsequently commented upon and cited by English academics and judges. A recent example of this is the decision of their Lordships in *J & H Ritchie Ltd v Lloyd Ltd*,<sup>7</sup> commented upon in a number of English legal journals.<sup>8</sup> The author of one such commentary began his observations by remarking that there appeared to be no difference in the law applied in this Scottish appeal to that prevailing in England.<sup>9</sup> That observation was undoubtedly true in the context of the specific subject matter of that case, namely the application of a section of the Sale of Goods Act 1979, but it will be suggested below that there are in fact structural and theoretical differences between Scottish and English contract law, differences which have the potential to influence judicial outcomes in non-statutory contract cases, and differences of which it is therefore important for lawyers from both systems to be aware.

It is proposed in the rest of this paper firstly to outline the mixed nature of Scots contract theory through an examination of its historical origins, and secondly to examine certain characteristics of the modern law which reflect that contract theory. From this, certain conclusions will be drawn about the possible future of Scots as well as English contract theory.

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<sup>5</sup> See Professor Sir N MacCormick, *Legal Right and Social Democracy* (Oxford: Clarendon Press, 1982), especially ch 10 (on voluntary obligations); also *Institutions of Law* (Oxford: OUP, 2007), especially paras 7.2 and 13.5, where there is a brief discussion of contractual theory.

<sup>6</sup> Useful in this respect is Gerard Lubbe, 'Formation of Contract', in K Reid & R Zimmermann (ed), *A History of Private Law in Scotland* (Oxford: OUP, 2000, 2 vols), vol 2, pp 1 – 46.

<sup>7</sup> [2007] UKHL 9, [2007] 1 WLR 670.

<sup>8</sup> For instance, see K Low, 'Repair, rejection & rescission: an uneasy resolution', (2007) LQR 536 – 541; K Loi, 'Sale of goods in Scotland - repairing defects in the law: *J & H Ritchie Ltd v Lloyd Ltd*', [2007] JBL 807 – 814; M Bridge, 'Sale of goods in Scotland - a second tender: *J & H Ritchie Ltd v Lloyd Ltd*', [2007] JBL 814 – 819.

<sup>9</sup> K Low, 'Repair, rejection & rescission' (cit at fn 8), at 536.

## 2. *The nature and development of contract theory*

### (a) *The place of contract within the obligational framework*

The restatement of some basic obligational ideas will not, it is hoped, be out of place in this discussion, in highlighting some of the distinctions between Scots and Common Law obligations theory, particularly that of contract.

An obligation is seen in Scots Law, as it was in Roman Law, as a legal tie by which a party or parties are bound to a certain performance. Rather than the three obligations to which the Common Lawyer is used to recognising, five obligations are recognised in Scots private law, namely contract, promise (sometimes called unilateral promise), delict (the Common Law's tort), unjustified enrichment, and *negotiorum gestio* (the unauthorised management of another's affairs, or benevolent intervention as it is sometimes called). While the idea of an obligation may be Roman, the present obligational taxonomy derives from a native classification developed, though not in quite the modern terms just stated, by Stair, and not from the Roman Law's fourfold classification of obligations into contract, quasi-contract, delict and quasi-delict. While it is sometimes suggested that other obligations ought to be recognised by the law, such as pre-contractual liability (equating perhaps to the *culpa in contrahendo* of German Law),<sup>10</sup> or that new terminology should be developed to explain features of the existing law more logically, such as the concept of unjustified sacrifice,<sup>11</sup> the five obligations listed above remain the established ones within Scots private law.

There are obvious contrasts with the Common Law. Whereas English Law does permit a contract lacking mutual consideration to be made under seal, Scots Law gives a much more favoured position to the unreciprocated undertaking. This is self-evidently so by virtue of the separate obligation of promise, but in addition certain features of contract law (such as the enforceability of gratuitous contracts) reinforce this. The Common Lawyer will not recognise *negotiorum gestio* as an enforceable obligation, the Common Law being traditionally antagonistic to a claim for expenses connected with officious intermeddling. Such a claim was available under Roman Law, and was received with very little alteration into Scots Law.

Analytically, in Scots Law the distinct, albeit related, categories of obligation are each able to be described by reference to a general principle explaining liability within the obligation: for contract, *pacta sunt servanda* (agreements are to be enforced), an analogous notion operating in respect of promise (promises ought to be kept); for delict, reparation ought to be made for loss caused by wrongful conduct (*damnum injuria datum*); for unjustified enrichment, enrichments retained without justification must be disgorged;<sup>12</sup> and for *negotiorum gestio*, the reasonable expenses of unauthorised administration must be met. The Common Law, with its more recent tradition of recognising a unified law of obligations, has been reticent to accept that such fundamental principles might underlie the different obligations. One sees the effect of this reticence in the continued absence from English Law of a general action

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<sup>10</sup> Following the recovery permitted in *Walker v Milne* and the line of cases derived from it: see further below at section 3(d), and also at M Hogg, *Obligations* (Edinburgh: Avizandum, 2006, 2<sup>nd</sup> ed), hereinafter referred to as 'Hogg', paras 3.32 – 3.36, 5.13 – 5.20.

<sup>11</sup> As I myself have argued in Hogg, ch 5.

<sup>12</sup> A principle frequently stated by the courts as referable to Roman principles, especially the equitable maxim of the Roman jurist Pomponius '*nemo debet locupletari aliena jactura*': see, for instance, citation of the maxim by Lord President Hope in *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SC 151, at 155.

for the reparation of wrongful behaviour (such as is found in the general delictual action in Scots Law) and the difficulties which the principle of unjustified enrichment still has in finding general acceptance within the Common Law community. While no Scots lawyer would dream of questioning the value or very existence of unjustified enrichment as a discreet obligation, by contrast Common Lawyers continue to raise just such questions.<sup>13</sup> The only notable attempt to promote a ‘unifying principle’ approach to obligations in the Common Law has been Professor Atiyah’s rather unconvincing theory of a grand, unifying principle for the whole of the law obligations, namely that the existence of all obligations can be explained as stemming from either the conferral of a benefit or from the creation of detrimental reliance.<sup>14</sup> Such an attempt at an overarching general obligational principle has been eschewed in Scots Law, which has (sensibly it is suggested) contented itself with going no further than positing unifying causes of action for the separate obligations, and restating the traditionally held view that there is a division between voluntary and imposed obligations.

The division between obligations (which concern rights *in personam*) and property (which concerns rights *in rem*) is rigidly enforced in Scots Law. This means, for instance, that there is no question in Scotland of treating proprietary remedies as part of the law of unjustified enrichment, as English Law does when placing certain proprietary remedies within its remedial category of restitution.<sup>15</sup> All remedies within unjustified enrichment give rise to personal and not real rights.

In acknowledging the importance to the legal theory of Scots Law of its distinct obligations, it must not be forgotten however that there is most assuredly a degree of interaction between the five obligations recognised. At the present time, there is a growing appreciation of the principles and rules determining how such interaction occurs, especially whether and how concurrency of liability may arise between different obligations, and whether, for instance, there can be said to be any ‘hierarchy’ of obligations which ought to impact upon the proper determination of cases in which it is argued that a number of obligations might conceivably arise.<sup>16</sup> I have argued elsewhere that there are at least two separate hierarchical models of obligations which each express certain fundamental truths about the nature of the various obligations and which each influence, in certain cases, outcomes in cases which raise issues of concurrency or other interaction of obligations.<sup>17</sup>

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<sup>13</sup> See S Hedley, ‘Unjust Enrichment’: The Same Old Mistake?, in A Robertson (ed), *The Law of Obligations: Connections and Boundaries* (London: UCL Press, 2004).

<sup>14</sup> See Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986), ch 2.

<sup>15</sup> And there is no question of calling any of the categories of obligation after a remedy, as with the Common Law’s ‘restitution’.

<sup>16</sup> The notion of a hierarchy of obligations was promoted in modern times by T B Smith: see discussion *infra*. It is also discussed in Hogg, paras 1.75 – 1.77.

<sup>17</sup> One hierarchy places unjustified enrichment below contract, promise and delict, on the basis that valid contractual or promissory entitlements are a justification for the retention of an enrichment, and delictual claims are not (save very exceptionally) calculated by reference to any gain that may have been made by the wrongdoer. Another hierarchy places delict and unjustified enrichment above contract and promise, on the basis that delictual or enrichment liability is always operative in the background, arising as it does at law, unless specifically excluded by a voluntary undertaking. These two different hierarchies need not be seen as contradictory; rather, they each express fundamental ideas about the nature of the different obligations which are equally valid. Which of the two hierarchies informs thinking in a specific case will depend upon the issue raised by the facts of the case, e.g. whether a contractual clause excluding delictual liability is at issue. See on these hierarchical issues, Hogg, paras 1.75 to 1.77.

(b) *Stair's view of obligations, especially contract*

Any understanding of the nature of the Scots law of obligations, including the theory of Scots contract, must begin with the *Institutions of the Law of Scotland* of James Dalrymple, Viscount Stair, the first edition of which was published in 1681, a second following in 1693. Stair was largely responsible for providing the foundations of the native taxonomy of Scots obligations law outlined above, albeit that his precise classification and terminology is not exactly that of the modern law. Stair was also responsible for grounding Scots contract theory in a mix of natural law and reason.

Stair, like the Dutch jurists Pufendorf, Grotius and Gudelinus, belonged to the Northern School of reformed, early Enlightenment, natural lawyers. The common feature of the legal theory of this School is its blend of the medieval view of the importance of natural law as a superior body of rules with an early modern view of the importance of man as a rational being. Stair continually stresses in his writing both the importance of law as a rational discipline – law is “the dictate of reason”<sup>18</sup> – as well as man’s natural obedience to such law.<sup>19</sup> Furthermore, he sees a fundamental link between God and reason, in that God, even as a supremely free and potent being, chooses to act in a rational and reasonable way.<sup>20</sup> Man shares this adherence to the dictate of reason, an adherence which determines human behaviour.<sup>21</sup> This connection made by Stair between reason and the divine will is a theme running through his *Institutions* and explains the blend of natural law and will ideas which gives his contract theory its peculiar ‘mixed’ quality.

Stair expounds a fundamental connection between our human nature, reason, and justice, stating that “there is an inclination to observe and follow these dictates [of reason], which is justice”.<sup>22</sup> He cites in support of this view a passage of Ulpian from the Digest which states that justice is the unchangeable and continuous inclination to attribute to everyone his right.<sup>23</sup> This leads Stair on to mentioning, although only in passing, the Aristotelian typology of justice<sup>24</sup>:

“by the will, is not understood the faculty, but the inclination thereof, determined by the law, to give every one that which the law declareth to be due; and it is divided into distributive and commutative justice”.<sup>25</sup>

The reference to Aristotelian ideas of justice is worth noting, as Stair has sometimes been viewed simplistically as supporting a wholly will based theory of contract law. These remarks of Stair, at the very beginning of his *Institutions* (taken together with

<sup>18</sup> Inst 1,1,1. See, in a similar vein, Richard Hooker’s *Laws of Ecclesiastical Polity* (1593; reprinted frequently, incl Cambridge: CUP, 1989): “[t]he laws of well-doing are the dictates of right Reason.” (1.7.4)

<sup>19</sup> D M Walker, Introduction to the republished *Institutions of the Law of Scotland* (Edinburgh and Yale: Edinburgh & Yale University Presses, 1981), p 25.

<sup>20</sup> Inst 1,1,1.

<sup>21</sup> Man is thus determined to be “humble, penitent, careful and diligent for the preservation of himself and his kind” (Inst 1,1,1).

<sup>22</sup> Inst 1,1,2. This view would be explicitly contradicted by David Hume in his writings: “The sense of justice and injustice is not deriv’d from nature, but arises artificially, tho’ necessarily from education, and human conventions” (Hume, *Treatise*, 3.2.1.17).

<sup>23</sup> D.1.1.10.

<sup>24</sup> *Nicomachean Ethics*, Book V.

<sup>25</sup> Inst 1,1,2.

other passages noted below), support rather the idea of a blend in Stair's thinking of Aristotle, reason and the will, albeit (as Lubbe has argued) that while

“Stair discusses commutative justice, it, and the canonist notion of liberality, are not accorded a place in Stair's exposition of the fundamental principles of natural law but take on rather subdued roles in the face of the apotheosis of a third scholastic virtue, that of promise-keeping.”<sup>26</sup>

Examination of other passages will essentially confirm the view that Stair, while integrating Aristotelian notion of justice, chooses to give primacy to man's rational choices as commanding the respect of the law. This may be seen, for instance, in his discussion of so-called ‘permutative contracts’, where he prefers the parties' estimations of the value of their respective performances to any external estimation of the justice of the exchange.<sup>27</sup>

Stair's preference for the will over external considerations of justice is explicable in part by his characterisation of the duty to fulfil voluntary engagements (such as contract) as one of the ‘first principles’ of equity.<sup>28</sup> Stair's three principles of equity – the obedience of man to God, the freedom of man to dispose of himself in so far as not restrained by this obedience, and the ability of man to restrict his freedom by binding himself to voluntary engagements – are used to set out the major, non-Romanistic, division made by him between obediential and consensual obligations, or, as they are more usually called in the modern law, involuntary and voluntary obligations. The obedience man owes to God explains the basis, in Stair's view, of obediential obligations, for they arise “not by [man's] own consent or engagement, nor by the will of man, but by the will of God”.<sup>29</sup> Obediential obligations include those of reparation (or in modern Scots terms, delict) and of restitution and recompense, and remuneration (in modern terms, unjustified enrichment and *negotiorum gestio*). On the other hand, the freedom of man, though it is often abused by him,<sup>30</sup> is the origin of consensual obligations,<sup>31</sup> among them contract and the separate obligation of promise.

Stair's treatment of consensual obligations, particularly contract, is interesting in its blend of natural law and will approaches. Contract is identified as entirely consistent with the natural law, Stair commenting that “there is nothing more natural, than to stand to the fruit of our pactions”,<sup>32</sup> a reference likely being intended to a similarly expressed passage of Ulpian from the Digest.<sup>33</sup> When Stair begins the detailed discussion of “Obligations Conventional, by Promise, Paction and Contract”<sup>34</sup> in Book 1, Title 10, the stress is clearly upon contract as an exercise of the

<sup>26</sup> G Lubbe, ‘Formation of Contract’ (cit at fn 6), at p 16.

<sup>27</sup> See Inst 1,10,14.

<sup>28</sup> Inst 1,1,18.

<sup>29</sup> Inst 1,1,19.

<sup>30</sup> Inst 1,1,20.

<sup>31</sup> Inst 1,1,20.

<sup>32</sup> Inst 1,1,21.

<sup>33</sup> D.2.14.1 (originally Ulpian, Edict, Book 4): “*Huius edicti aequitas naturalis est. quid enim tam congruum fidei humanae, quam ea quae inter eos placuerent seruire?*” translated by Alan Watson as “There is a natural equity in this edict. For what so accords with human faith as that which men have decided among themselves to observe?”.

<sup>34</sup> Some debate has arisen as to whether Stair meant, in the title of Title 10, to suggest a distinction between contract and paction. The generally accepted view is that, while some earlier writers (such as

will. Conventional obligations are stated as arising “from the will of man, whereby our own will tieth us in that, wherein God hath left us free”,<sup>35</sup> and a little later as arising “from our will and consent”.<sup>36</sup> That much is consistent with the common view of Stair as a supporter of will theory. But a further interesting, sometimes overlooked, passage from the introduction to Title 10 is also worth quoting in full:

“[God] hath given that liberty in our power, that we may give it up to others, or restrain and engage it, whereby God obliges us to performance by mediation of our own will: yet such obligations, as to their original, are conventional, and not obediencial.”<sup>37</sup>

Why is this passage noteworthy? Because, while Stair begins by saying that our will may restrain or engage us, and that contracts are acts of the will, he continues by tying such acts of our will back to God’s will by saying that it is God who obliges us to perform contracts by the mediation [that is, the means] of our will. This perhaps seems, at first sight, rather odd. If contractual obligations are consensual, surely they should be seen as having binding force on account of our choice to enter into them? Not so, says Stair. They *originate* from our freely made choices, but they *bind* by virtue of their being an expression of the equitable principle of Man’s obedience to God, even if they are not obediencial obligations so-called. This makes sense if we remember Stair’s three principles of equity, mentioned above, which are (in order): the obedience of man to God, the freedom of man to dispose of himself in so far as not restrained by this obedience, and the ability of man to restrict his freedom by binding himself to voluntary engagements. The second and third of the principles follow on and flow from the first. Although man has freedom in those areas wherein he is not bound by God, if he chooses to give up that freedom and oblige himself, he is bound by virtue of the fact that obedience to such choices is essentially a form of derivative obedience to the will of God, who is the rational source of all law and thus of all obligations. Hence Stair can quite happily marry the idea that the ‘original’ (origin) of contracts is the will of man, with the idea that, having willed contractual obligations into being, man is then bound to obey them by virtue of the fact that it is God’s will that that they be honoured. This distinction between the source of contract, in Stair’s view, as lying in human choices and the exercise of human will, but the binding force of contract lying in the divine will that we honour our choices, is sometimes forgotten when Stair’s famous distinction between obediencial and consensual obligations is discussed. A proper appreciation of this point reminds us of the fusion of natural law, reason and human will which is found in Stair’s conception of law.

Stair continues his discussion of human will by making a point which has been much repeated and applied by courts down the centuries: that not every act of human will binds the actor to a legal duty. On the contrary, Stair identifies three acts or stages of the will, namely desire, resolution and engagement.<sup>38</sup> The distinction between these stages is readily appreciable, and easily applicable to common contractual cases. Thus, in a contract for the purchase of goods, the potential buyer

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Spottiswoode) may have intended such a distinction, Stair did not: see G Lubbe, ‘Formation of Contract’ (cit at fn 6), at p 10.

<sup>35</sup> Inst 1,10,1.

<sup>36</sup> Inst 1,10,1.

<sup>37</sup> Inst 1,10,1.

<sup>38</sup> Inst 1,10,2.



may form the desire to buy a particular good from seeing it displayed in a shop window. Having formed a desire to buy the good in question, he may resolve to act on that desire by stepping in to the shop and heading to the counter with the intention of purchasing the good. The final stage is reached when the buyer specifically requests to purchase the good and the shopkeeper agrees to sell it to him, both parties thereby engaging in the transaction. Desire, resolution and engagement thus easily match what we know from our own experience about many common contracts. The analytical distinction made by Stair in these three stages of the will has continued to be of use to the courts down to the modern era.<sup>39</sup> It remains the case that something more than merely willing to contract is required: the will must be manifested externally by some act of engagement.

Stair continues by providing a definition of contract as based upon agreement, a consent to be bound to some act: “*Pactum* or a paction ... is the consent of two or more parties, to some things to be performed by either of them; for it is not a consent in their opinions, but in their wills, to oblige any of them”. This definition proved fundamental for all subsequent Scots Law understanding of contracts, as it anchored the concept of contract in agreement, or *consensus in idem* (a Latin brocard to which Stair makes specific reference by citing the Digest<sup>40</sup>), a concept which has continued to be referred to by the courts down to the present age. Stair does not, as has often been the case in Common Law commentaries on contract, characterise contract as an exchange of promises. This idea of an exchange would have been unhelpful for Stair, as his treatment of contract sets out the Scottish rule that gratuitous contracts are as equally enforceable as onerous ones, there being no rule of mutual exchange or consideration in Scots Law.<sup>41</sup> Gratuitous contracts makes perfect sense in a system in which the validity of the unilateral promise is also recognised.<sup>42</sup> Agreement is of the essence of contract in Stair’s view, the bare pact (*nudum pactum*) being thus enforceable in Scots Law even though it had not been under Roman Law, a position Stair pithily summarises as meaning that “every paction produceth action.”<sup>43</sup>

In stating his view that all contracts are enforceable, Stair refers to the ‘common custom of nations’ for support and, importantly, also to the Canon Law. This is the first of a number of references to the Canon Law in his title on contract, such frequent references highlighting the influence exerted upon Stair by the Canonist position that promises seriously made should be honoured.<sup>44</sup> In adopting this view, Stair was largely influenced by the Spanish Scholastic School.<sup>45</sup> Apart from the Canon Law, in arguing that naked pactions and promises (he uses the latter term, for the most part, to mean the separate obligation of unilateral promise) are obligatory, Stair draws for support upon the law of nature, the Digest, Scripture, as well as commercial and mercantile considerations.<sup>46</sup> Stair rejects the contrary views of

<sup>39</sup> See the recent judicial use of Stair’s analysis in *Cawdor v Cawdor* 2007 SLT 152.

<sup>40</sup> D.2.14.1.2: “*durorum plurimumve in idem placitum consensus atque conventio*”.

<sup>41</sup> Inst 1,10,12.

<sup>42</sup> This is discussed further below.

<sup>43</sup> Inst 1,10,7.

<sup>44</sup> See further, on the influence of the Canon Law on Stair’s theory of contract and promise: D Sellar, ‘Promise’, in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (cit at fn 6), vol 2, at p 262f; H L MacQueen and W D Sellar, ‘Scots Law: Ius quaesitum tertio, Promise and Irrevocability’, in Eltjo Schrage (ed) *Ius Quaesitum Tertio* (Berlin: Duncker & Humblot, 2008) 357, at p 361f.

<sup>45</sup> See, for instance, D M Walker’s discussion of Stair’s sources in the Introduction to the 1981 reprint of the *Institutions* (cit at fn 19).

<sup>46</sup> Inst 1,10,10.

Grotius,<sup>47</sup> who required an acceptance before a unilateral promise might bind, and Connanus,<sup>48</sup> who held to the view that only undertakings met with a reciprocal cause were enforceable.

The acceptance of the validity of bare pacts, gratuitous contracts, and unilateral contracts, under Stair's direction, was to provide Scots Law with a very flexible and broad law of voluntary obligations. As remarked upon below, the unilateral promise in particular fits very well with the nature of many common transactions which are only with some difficulty forced by the Common Law into the straitjacket of bilateral contracts. Acceptance of the validity of promises also provided Stair with the means by which to characterise the third party right (*jus quaesitum tertio*), which he sees clearly as a species of "promise, though gratuitous, made in favour of a third party".<sup>49</sup> This early recognition in Scots Law of third party rights (by contrast with English Law's general acceptance of such only as recently as 1999) provided a simple and effective way of categorising and recognising the validity of a commonly encountered transaction.

What may one conclude of Stair's approach to contract law, and in particular the ground which he laid for later writers? First, he saw no fundamental division in law between reason, nature and the divine will, law being rather a fusion of them all. Second, his obligational framework and theory saw a place for justice, as embodied in the natural law and Christian morality, but ultimately subjected it to the value of honouring agreements and promises seriously made. As such, there was a melding of Aristotelian and will approaches, but with the will given pre-eminence. Third, his framework distinguished consensual and obediencial obligations, the former having their source in acts of the human will, while recognising that the binding force of both was due to the obedience due by man to God. Fourth, the Canon law's favouring of promises allowed Stair to recognise the enforcement of gratuitous contracts, unilateral promises, and third party rights. This provided Scots law with a territory of voluntary obligations much wider than that of the Common Law.

The genius of Stair's scheme set a mould for Scots Law from which later writers and the courts were loathe to depart, even if his theory of contract law as based upon reason, human will, and the moral importance of adhering to voluntary engagements, came gradually to be sheared of its natural law element. This development of Stair's theory by later writers is now explored.

(c) *The development of contract theory after Stair*

The history of contract theory after Stair may be neatly summed up as one of respect for Stair's classification of obligations, but with a gradual dissipation of the natural law element to leave a contract theory based upon a simple emphasis on the human will as the source of voluntary obligations.

At first, natural law thinking continued. Stair was followed by another Institutional writer, Andrew MacDowall (Lord Bankton), whose major contribution to the law was his *Institute of the Laws of Scotland* (the first volume being published in 1751). Following Stair, Bankton stresses man's nature as a rational being, and law as embodying that which is "just, right and good".<sup>50</sup> Where the law does not command

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<sup>47</sup> Inst 1,10,4.

<sup>48</sup> Inst 1,10,10.

<sup>49</sup> Inst I,10,5.

<sup>50</sup> Inst 1,1,1.

or forbid, Bankton states that the “freedom of man’s will”<sup>51</sup> is paramount. Bankton is however far from being entirely a rationalist, of the Humean School; on the contrary, like Stair, he has an extensive discussion of the law of nature.<sup>52</sup> Bankton also discusses the Aristotelian division between commutative and distributive justice,<sup>53</sup> although there is no specific citation of the Aristotelian source of this classification. Bankton equates commutative justice with the law of contract: “[c]ommutative justice is that which is incident to contract and mutual intercourse of negotiations among man.”<sup>54</sup> While at one point he seems to suggest that an equality in contractual performance must be observed,<sup>55</sup> elsewhere he specifically rejects the idea that a failure to observe the precepts of this species of justice gives rise to any actionable claim at law, thus elevating the human will over external criteria for judging contractual justice.<sup>56</sup>

Like Stair, Bankton says that conventional obligations arise “from the will of the parties”<sup>57</sup>. He also adopts the view that contract is based upon agreement.<sup>58</sup> Bankton thus began a pattern of acceptance of Stair’s ideas and legal structure which was to be continued by later writers. What is distinctive about Bankton is that he follows each of the subject headings of his work with a discussion of the English law on the same subject. For instance, he discusses the structure of the English law of obligations, saying that obligations in England “may be divided into such as arise from contract, or *quasi* contract; or from a delinquency and crime, or a *quasi* delinquency, as they are termed in the civil law.”<sup>59</sup> This may have been rather generous to the English taxonomy of the time. One suspects that Bankton may have been projecting on to the contemporary English Law a civilian structure which he thought it ought to have rather than one which it self consciously saw itself as possessing. One can only really confidently assert the beginnings of a proper concept of a law of obligations in English Law with the judgments of Lord Mansfield, appointed as a judge in 1756, some five years after Bankton’s first volume appeared.<sup>60</sup>

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<sup>51</sup> Inst 1,1,1.

<sup>52</sup> Inst 1,1,18 – 1,1,28. Like Stair, he sees nature and reason as intimately entwined: “This original [i.e. natural] law is frequently termed the law or dictate of reason, because by the use of reason, duly improv’d, the laws of nature may be discovered.” (Inst 1,1,24.)

<sup>53</sup> Inst 1,1,7.

<sup>54</sup> Inst 1,1,8.

<sup>55</sup> Bankton states that commutative justice means that “an equality must be observed in our contracts, and we must perform the terms of our contracts ... without distinction”. (Inst 1,1,10)

<sup>56</sup> Inst 1,4,12.

<sup>57</sup> Inst 1,11.

<sup>58</sup> Inst 1,11,1. Bankton states rather oddly that contract is the agreement of “one or more persons”, in contrast to the usual understanding, *pace* Stair, that contractual agreement requires the consent of two or more persons to be bound at law. One must conclude that Bankton had in mind to include gratuitous contracts, where only one party comes under any onerous duty, but the reference to the agreement of a sole party expresses that idea rather clumsily, as even in gratuitous contracts the recipient of the benefit must at the very least accept the offer in his favour and hence agree to what is offered.

<sup>59</sup> Inst 1,4,19.

<sup>60</sup> The seed planted by Lord Mansfield did not always find receptive soil. On the one hand, in the third edition of Chitty’s *Practical Treatise on the Law of Contracts* (London: S Sweet, 1841), it was still being asserted that “English lawyers generally use the word *obligation*, in reference to ... only a particular species of Contracts, that is, *Bonds*” (p 1). By contrast, one may note Colebrooke’s *Treatise on Obligations and Contracts* (1818, cit at fn 1), which contains a detailed discussion of obligations, and their various characteristics, with citation of the Digest, Pothier, as well as Erskine; S M Leake’s *The Elements of the Law of Contracts* (1867, cit at fn 1), containing an introduction setting contract within the wider obligational framework; and, Anson’s *Principles of the English Law of Contract*

A rough contemporary of Bankton was Henry Hume (Lord Kames), the last major Scots jurist who may be described as a natural lawyer. A specific concern of Kames was to refute the theory of the Scottish Enlightenment philosopher David Hume that justice is an entirely human creation and that there is no such thing as the natural law. In Kames's work, *Essays on the Principles of Morality and Natural Religion*, first published in 1751 (the same year as Bankton's first volume), he discusses and then flatly rejects Hume's view, expounded in his *Treatise of Human Nature*,<sup>61</sup> that "[t]he sense of justice and injustice is not deriv'd from nature, but arises artificially, tho' necessarily from education, and human conventions."<sup>62</sup> Kames gave a similar defence of man's natural intuition (his 'moral sense or conscience') of right and wrong in his later *Principles of Equity*.<sup>63</sup> Kames grounds both contract and promise in the natural law, saying they "hath also a solid foundation in human nature."<sup>64</sup> He refutes Hume's view that promises have neither moral value nor are intelligible to human beings without having been established by human convention. On the contrary, says Kames, promises and contracts are based upon our very human nature: "mutual trust and confidence, without which there can be no useful society, enter into the character of the human species." Thus, even though a promise made to someone might not be enforceable by anyone after that person's death, the promisor would suffer "reproach and blame" if he neglected to do that which he had promised.<sup>65</sup>

Corresponding to mutual trust and confidence are the principles of veracity and fidelity, without which the world would be overrun with fraud and deceit. Kames asserts that

"The performance of a deliberate promise has, in all ages, been considered as a duty. We have that sense of a promise, as what we are strictly bound to perform; and the breach of promise is attended with the same natural stings which attend other crimes, namely remorse, and a sense of merited punishment."<sup>66</sup>

Having grounded promise in human nature, and explained the consequences of breach of promise, he adds an interesting remark on the source of a promise's obligational force:

"Were there by nature no trust nor reliance upon promises, breach of promise would be a matter of indifferency. The reliance upon us, produced by our own act, constitutes the obligation. We feel ourselves bound to perform; we consider it as our duty."<sup>67</sup>

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(1879, cit at fn 1), which includes discussion (at pp 6-8) of the 'various modes' by which obligations originate, including from agreement, delict, quasi-contract, and breach of contract.

<sup>61</sup> First published in 1739.

<sup>62</sup> Hume, *Treatise*, 3.2.1.17, p 311

<sup>63</sup> *Principles of Equity* (Edinburgh: Kincaid & Bell, 1767, 2<sup>nd</sup> ed), pp 1-5. See also, for instance, pp 8 – 9: "That there is in mankind a common sense of what is right and wrong, and an uniformity of opinion, is a matter of fact, of which the only infallible proof is observation and experience".

<sup>64</sup> *Essays on the Principles of Morality and Natural Religion* (Edinburgh: J Bell, 1779, 3<sup>rd</sup> ed), p 75.

<sup>65</sup> *Principles of Equity*, p 16.

<sup>66</sup> *Essays*, p 77.

<sup>67</sup> *Essays*, p 78.

This is noteworthy as it seems to support a view of promise remarkably similar to that of reliance theorists. It is not a typical approach for a natural lawyer. Although Kames has been defending natural law theory, he does not here ground the obligational force of promise (or contract) in the duty of obedience we owe to God, and hence derivatively to others, as Stair would have it, but rather in the effect a promise has upon the party to whom it is made. This, it might be said, is a weaker argument for the force of promises, in that it could be said to exclude from the category of valid promises one which has yet to be relied upon because, for instance, the promisee has yet to hear of it or, even having heard of it, has yet to take any course of action which might cause him detriment were the promise to be avoided.

Kames's defence of promises and contracts, as binding primarily because they are expressions of fidelity which give rise to reliance is an unusual, from a Scottish perspective, justification of consensual obligations. It is not a reason advanced by other jurists writing specifically on Scots Law, although intention to create reliance, or knowledge of likely reliance, is crucial to the general theory of promises advanced by MacCormick.<sup>68</sup> When considering Kames's advancement of the importance of reliance it should be remembered that this is but one a number of reasons advanced by him for the force of promises.

The other notable jurists of the late eighteenth and nineteenth century have little to offer on contract theory. John Erskine, in his *Institute of the Law of Scotland* published in 1773, has almost nothing on the theory of contract.<sup>69</sup> George Bell makes equally scant mention of contract theory in his *Commentaries*.<sup>70</sup> Indeed, by the end of the eighteenth century, when the age of Enlightenment ideas was giving way to the age of Commerce, Scots contractual theory seems essentially to have gone into abeyance. The impression one gets is that Stair's view was so soundly entrenched and universally accepted that there was perceived to be no need to engage in any further theoretical debate. The priority for writers and the courts had come to lie in the practice of the law and the development of specific legal rules.

Practicality, rather than theory, was largely also the pattern in the twentieth century, with one notable exception. Thus, while in William Gloag's important work, *The Law of Contract*,<sup>71</sup> there are a number of issues of interest for a theory of contract, they are addressed not in any general philosophical way such as one might find in Stair or Kames, but rather through the author's treatment of a number of practical contractual issues which arose largely as a result of nineteenth century mercantile case law.<sup>72</sup> Gloag explains that a "contractual obligation must have as its basis the agreement of the parties", and provides citation from Pothier's *Treatise on Obligations*,<sup>73</sup> Stair, Erskine and Bell. Pothier is cited frequently in Gloag's work, as

<sup>68</sup> N MacCormick, *Legal Right and Social Democracy* (cit at fn 5), ch 10, especially at pp 202-3.

<sup>69</sup> His view that "[c]onsensual contracts are those, which, by Roman Law, might be perfected by consent alone, without the intervention either of things or of writing" both fails to express the proper breadth of contract in Scots Law as well as to mention the unenforceability in Roman Law of the very bare pact (*nudum pactum*) which he cites.

<sup>70</sup> He simply follows Stair and Bankton in noting that contract is an act of the human will and has its obligatory force for that reason: *Commentaries* (Edinburgh: T & T Clark, 1870, 7<sup>th</sup> ed), III.1.

<sup>71</sup> Cit at fn 2.

<sup>72</sup> For instance, the issue of whether an agreement which may have been intended by the parties to be enforceable, but in terms of which neither has any 'patrimonial interest' (which Gloag describes as a "right to property, or a right to use the property"), is one which the courts will enforce contractually: see Gloag, p 9.

<sup>73</sup> Pothier, 1.3: "A contract is a kind of agreement ... An agreement or a pact (for these are synonymous expressions is the assent of two or more persons, to form an engagement between them, or to dissolve or modify one already formed." The translation is that from the 1802 English edition published by

it features also in English writing and judgments of the period.<sup>74</sup> From an Anglophile such as Gloag, it is not surprising that one also finds a further definition of the nature of agreement from English Law, that of Sir Frederick Pollock.<sup>75</sup> In the later twentieth century, W W McBryde, in the pre-eminent current treatise of contract law, took a similarly practical approach, confining his few remarks on theory to pointing out that while Anglo-American Law concentrates on the idea of an exchange of promises, Scots Law has been characterised by stressing contract as a voluntarily constituted species of obligation along with the separate obligation of promise.

In the twentieth century, the name of Sir T B Smith stands out as having made the only notable contribution to the theory of contract. Smith was concerned (somewhat simplistically in the view of some) to promote the principled, civilian nature of Scots Law and its legal system, in opposition to what he saw as the overbearing influence of an unprincipled, alien Common Law. Smith's view of contract, and its wider place within the law of obligations, may be gleaned from his many articles, his *Short Commentary on the Law of Scotland*<sup>76</sup> and his *Studies Critical and Comparative*.<sup>77</sup> Smith was firmly of the view that the origins of the Scots law of obligations were civilian, both in terms of pure Roman sources and of the received law of the *ius commune* mediated through Continental jurists and the Canon Law.<sup>78</sup> English Law had later come to influence Scots Law, largely to its detriment, but this did not detract from the fact that Scots Law retained distinctive answers to some fundamental contractual questions: the doctrine of mutual consideration was rejected;<sup>79</sup> unilateral promises (or pollicitations as Smith frequently calls them)<sup>80</sup> were enforceable, as was a *jus quaesitum tertio*;<sup>81</sup> there was a distinctive and superior answer to the question of contractual error.<sup>82</sup> A role for the concept of *bona fides* was, *contra* English Law, to be welcomed. The sum of his writings on these important matters of contractual principle constitutes a legacy which, while not always followed by the courts, "continues to be used in teaching and academic legal research."<sup>83</sup>

Smith is noteworthy in asserting – it seems, the first Scots writer clearly to do so in these precise terms – that obligations can not only be classified according to whether they arise obedientially or voluntarily, but also according to their position in a hierarchy by which they should be accorded precedence. He posits the hierarchy as being (in order of precedence): (1) obligations founded on statute or an express rule of law based on public policy, i.e. *ex lege*; (2) those founded on fault, i.e. arising under reparation or delict; and (3) those founded on the will of the obligants, as in contract.

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Martin & Ogden (Newburn, North Carolina). Gloag quotes a portion of this passage in almost precisely the same terms, except for substituting 'rescind' for 'dissolve'.

<sup>74</sup> For a discussion of the influence of Pothier's will theory of contract in the development of English contract law, see D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: OUP, 1999), p 221 f.

<sup>75</sup> Gloag, p 6.

<sup>76</sup> Edinburgh: W Green & Son, 1962.

<sup>77</sup> Edinburgh: W Green & Son, 1962.

<sup>78</sup> "The Scottish law of obligations and moveable property is basically Romanistic" *Studies Critical*, p xiv.

<sup>79</sup> See *Studies Critical* at p xiv.

<sup>80</sup> See discussion in *Studies Critical* at pp 168 – 182. There has been a not inconsiderable debate among Scottish writers as to whether promise may be equated with the Roman *pollicitatio*.

<sup>81</sup> See *Studies Critical* at pp 183 – 197.

<sup>82</sup> See *Studies Critical* at pp 99 – 100, and *Short Commentary* at p 808 f.

<sup>83</sup> See H L MacQueen, 'Glory with Gloag or to the stake with Stair?', in E Reid and D Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the progress of Scots Law* (Edinburgh: EUP, 2005), at p 166.

Asserting the existence of such a hierarchy enables Smith to explain why, for instance, liability on the part of *A* to a third party *C* might exist in delict even though *A* had successfully restricted his liability to *B* in contract, the reason being that the liability to *C* “is owed under a more fundamental and general principle.”<sup>84</sup> It would be another thirty years before English Law would be sufficiently released from its straitjacket of privity to allow such an idea to flourish, so that Lord Lloyd could talk comfortably, in an English legal context, of tort as “the general law, out of which the parties may, if they can, contract”.<sup>85</sup> For Smith, such liability to a third party, and indeed the idea of concurrent liability in general, was far from a radical development of the law: it flowed from an understanding of the relative importance of different obligations within a unified law of obligations. The concept of such a hierarchy, although it is not as widely appreciated as it should be, is indeed a useful one, and can be used to explain a number of rules, and the answer to a number of questions, within the law of obligations.<sup>86</sup>

Not all of Smith’s conceptual discussion is helpful. He was, for instance, largely responsible for the promotion of the idea that a category of ‘unilateral contract’ exists within Scots law. I have argued elsewhere that the term ‘unilateral’ should be confined to describing obligations which require the participation of only one party in order to be constituted. So defined, promise alone can be unilateral in Scots terms; contract cannot, as it always requires the participation of two parties to constitute the obligation. If what is intended is a distinction between obligations where only one party comes under any duty of performance, the term gratuitous is preferable.<sup>87</sup> On that definition, both contract and promise may be gratuitous.

(d) *Conclusion on the structure of obligations and the development of contract theory*

Beginning with Stair, a distinctively Scottish view of contract law was developed by Scots writers, the key characteristics of which are as follows:

- (i) Contract was seen as one obligation within a coherent and unified law of obligations, an obligation being a legal tie by which a party or parties are bound to a specified performance. In seeing contract in this way, Scots Law was drawing upon its civilian heritage. Whilst nineteenth century Common Law literature plainly also recognises a law of obligations, this conceptualisation is a later development, and was to remain incomplete until a general acceptance of unjustified enrichment at the very end of the twentieth century.<sup>88</sup>

<sup>84</sup> *Studies Critical*, p 76.

<sup>85</sup> Lord Lloyd in *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1995] 3 All ER 307 at 315h-j.

<sup>86</sup> See further Hogg, at 1.75 – 1.79, 3.19 – 3.20.

<sup>87</sup> As with the meaning of unilateral, there is however an academic controversy concerning the idea of an obligation being gratuitous: does it mean an undertaking given without the ability to compel a counter performance, or does it mean merely one given without the *expectation* of receiving such a counter performance? On this point, see Hogg, at 1.16 – 1.17, 2.06 – 2.11. There is also controversy as to whether it is possible for an obligation to change character after its formation, along the lines of the English view that a unilateral contract can somehow morph into a synallagmatic one: see, for instance, Lord Diplock’s speech in *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 suggesting that this may occur.

<sup>88</sup> As noted earlier, some Common Lawyers continue remarkably to oppose unjustified enrichment being recognised within the law (see for instance, S Hedley, “Unjust Enrichment’: The Same Old Mistake?”, cit at fn 13).

- (ii) Stair set the mould for explaining the nature of contract (and indeed the other obligations). Contract arose from the acts of will of two or more parties to be bound at law to some engagement. Contract thus arose by consent. However, as explained above, in Stair's view all obligations ultimately derive their force from the duty of obedience that man owes to God.
- (iii) Stair recognised, as a natural lawyer, the requirements of justice, made plain to man both through his observations of the natural world and as revealed through Scripture. The dictates of justice were expressed in the rational discipline of law. So far as consensual obligations were concerned, justice was determined by what was voluntarily agreed by men as free and rational beings. Thus the will was given primacy over any external determination of the just ordering of voluntary obligations. This was supported by the value of adhering to promises, a virtue recognised by the Canon Law. In Stair, the natural law is welded to the human will, with the latter being determinative of the nature and content of the obligation.
- (iv) Because of the prominence given to the virtue of adhering to promises, unilateral promises and promises made in favour of third parties were to be given legal effect. In addition, the bare pact, unsupported by writing or by mutual consideration, was also to be enforced (with some exceptions made for specific circumstances requiring writing).
- (v) Stair's approach was followed by later writers who saw the origin of voluntary obligations as lying in an act of will of the parties. Kames's arguments present an interesting deviation in support of reliance theory, but this reasoning seems not to have been adopted by other writers. In the nineteenth and twentieth centuries, little further conceptualising of contract was engaged in by Scots writers. T B Smith provides a notable exception however, one of his important contributions to theory being the notion of a hierarchy of obligations.

The totality of this development by Scots writers produced a law of contract which had a clearly defined role within a wider law of obligations, was broad in nature (with no requirement of mutual consideration, and recognising a *jus quaesitum tertio*), and which essentially conceived of contract as an obligation deriving its existence from the manifested acts of will of the parties. It was a law of contract based upon a fundamental single principle, *pacta sunt servanda*, a principled approach absent in the Common Law. Eventually, as the eighteenth century progressed, Stair's overlaying of contract theory with the religious and natural law superstructure of his day withered away, but his division of obligations into voluntary and involuntary types was one which continued to be followed by the vast majority of commentators.

In the following section of this paper, an outline is given of some distinctive features of the modern Scots contract law which, it is suggested, are attributable to the distinctive history described above.

### 3. *Distinctive features of modern contract theory*

The foregoing discussion has suggested that Scots contract theory was established by Stair as a mixture of natural law and rationalism. A further characterisation of the nature of such contract theory as mixed can also be said to lie in the fact that the principles of modern contract law are derived both from the Common Law and from Romano-Civilian systems. Thus, the lack of a doctrine of mutual consideration, the existence of irrevocable (or firm) offers, and performance as the creditor's primary



right, are all examples of contractual rules having a civilian origin; a unified concept of breach, repudiation as breach, and self-help remedies for non-performance, are all aspects of the Common Law influence.<sup>89</sup> Two different types of mixture thus characterise the law.

A number of specific features of the modern law merit further development.

(a) *Ideas of ‘agreement’ and ‘promise’ in the characterisation of contract.*

One noteworthy feature of the modern law is the continued importance placed by the law upon the value of honouring a pledged performance. The value of so doing can be traced back to Stair’s emphasis upon keeping promises (in the wide sense of that term) which he derived from natural law, Canon Law, and Scripture. This importance of honouring what one has pledged is recognised in the modern law both through the way in which contract is characterised as well as through the continued existence of a separate obligation of unilateral promise, the existence of the latter obligation affecting the characterisation of the former.

In terms of the characterisation of contract, a pledged contractual performance must be honoured because it is said to be an objectively manifested act of the human will, usually analysed by the courts through the language of ‘agreement’. The courts have continually recognised contract as deriving its force from the agreement of parties having the capacity to contract, on all the essentials required at law. Agreement is concluded when the parties reach (as Stair, quoting from the Digest, put it) *consensus in idem*.<sup>90</sup> Judicial statements to this effect are commonplace. One may note, for instance, Lord Blackburn’s observation in *Walker v Alexander Hall & Co Ltd*<sup>91</sup> of the crucial feature of the case before him that “there was no *consensus in idem* between the parties”. More recently, one finds Lord Penrose remarking in *Elcap v Milne’s Executor*<sup>92</sup> that “[t]he pursuers’ averments are not apt to support contract. There is no reference to consensus”. In another decision, the Inner House remarked that “[t]here is no doubt that parties must achieve *consensus in idem* upon all the essential matters before there can be said to be a contract between them.”<sup>93</sup>

A bare agreement, even one complete in its terms, does not however have the force of law: the parties must in addition intend to be bound at law.<sup>94</sup> Such an intention was absent, for instance, in the facts of *Karoulias (WS) v The Drambuie Liqueur Co Ltd*,<sup>95</sup> where the court took the view that the parties had intended a signed written agreement before they considered themselves bound at law. In his judgment, Lord Clarke remarked that:

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<sup>89</sup> See further on this sense of the mixed nature of Scots contract law, H L MacQueen, *Scots Law and the Road to the New Ius Commune*, Ius Commune Lectures on European Private Law (Maastricht: METRO Institute, 2000; also published online as (2000) Electronic Journal of Comparative Law, 4(4)).

<sup>90</sup> See, for instance, the following: *Seed Shipping Co v Kelvin Shipping Co* (1924) 17 Ll L Rep. 170; *Pickard v Ritchie* 1986 SLT 466; *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd* 1996 SLT 604; “contract is an agreement”: *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, 2006 SC (HL) 1, at para 109; *Advice Centre for Mortgages Ltd v McNicoll* 2006 SLT 591.

<sup>91</sup> (1919) 1 Ll L Rep 661.

<sup>92</sup> 1999 SLT 58.

<sup>93</sup> *Avintair Ltd v Ryder Airline Services Ltd* 1994 SC 270, at 273.

<sup>94</sup> Thus Lord Prosser noted the importance of “consensus and an intention to conclude a contract”: *Dawson International plc v Coats Paton plc (No 2)* 1993 SLT 80.

<sup>95</sup> [2005] CSOH 112, 2005 SLT 813, 2005 SCLR 1014.

“while there may be complete agreement between parties, in the sense of negotiations being over, there may not yet necessarily be a binding agreement.”<sup>96</sup>

Referring to the earlier decision of the House of Lords in *Comex Houlder Driving Ltd v Colme Fishing Co*,<sup>97</sup> Lord Clarke emphasised that what is crucial is discerning ‘mutual assent’ by the parties to be bound at law. This puts the issue in modern terms, but the core idea goes back to Stair’s requirement that an act of will be manifested externally before contractual engagement can be said to be demonstrated. Indeed, the courts occasionally still make direct use of Stair’s analysis of the three stages of the will when deciding whether or not a party has reached the stage of intending a binding obligation, as may be seen from the citation of Stair’s analysis by the court in the promissory case of *Cawdor v Cawdor*.<sup>98</sup> Manifested assent is, as in the Common Law, judged objectively, a point usually emphasised by reference to the famous dictum of Lord President Dunedin in *Muirhead & Turnbull v Dickson* that “commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say.”<sup>99</sup> This professedly objective approach to analysing agreement has, however, not been theoretically developed much beyond this rather trite remark.<sup>100</sup> Some argue that an objective approach to contract formation presents a problem for will theory, because it undermines the idea that it is an actual meeting of the minds of the parties which is crucial. This is a somewhat shallow criticism, however. All instances of the will, at whichever of Stair’s stages of desire, resolution, or engagement, and in relation to whichever type of matter (whether contract or some other form of human transaction), can only ever be judged by some action or behaviour which is manifested to the world outside of the actor in question. Indeed, the very fact that it is engagement, in Stair’s terms, which is the crucial stage of the three stages of will for contractual formation, is surely suggestive of a process which must inevitably require to be judged from a perspective outside that of the mind of the party in question.

The existence of a separate obligation of promise doubtless influences a preference for the language of agreement when characterising the nature of contract rather than the oft encountered Common Law characterisation of contract as an ‘exchange of promises’,<sup>101</sup> although it is worth recalling that the enforceable right of a third party under a contract is usually still characterised in the modern law in promissory terms (in the narrow Scots Law sense), as it was by Stair.<sup>102</sup> This does not detract from the idea of contract as an agreement, but merely recognises that parties

<sup>96</sup> Para 50 of Lord Clarke’s judgment.

<sup>97</sup> 1987 SC (HL) 85.

<sup>98</sup> 2007 SLT 152.

<sup>99</sup> (1905) 7 F 686, at 694.

<sup>100</sup> See however some discussion in M Hogg and G Lubbe, ‘Formation of Contract’ in R Zimmermann and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford: OUP, 2004). I also consider the matter to some degree in Hogg, paras 1.47 – 1.53. Undeveloped in Scots theory is, for instance, the issue of what type of objectivity - what have been termed ‘promissor’, ‘promisee’, or ‘detached’/‘fly on the wall’ by Common Lawyers - is favoured by the courts. For views on the alleged different types of objectivity in English Law, see W Howarth, ‘The Meaning of Objectivity in Contract’ (1984) 100 LQR 265 – 281 and J P Vorster ‘A Comment on the Meaning of Objectivity in Contract’ (1987) 103 LQR 274 – 287.

<sup>101</sup> Even though such an analysis of contract might have found some support from Stair’s remark (at Inst 1, 10,5) that “[p]romises dependent upon acceptance may ... be made by way of offer”.

<sup>102</sup> Inst I,10,5.

may include within their agreement a unilateral, promissory undertaking in favour of a non-contracting party.

A further consequence of the existence of a separate obligation of promise is that one finds that the Scottish courts generally do not seek to force commercial or private transactions which have a unilateral characteristic into the straitjacket of contract law, as English Law sometimes does under the guise of so-called 'unilateral contracts'. Rather, a transaction which has the nature of a unilateral undertaking will (usually) be characterised as a promise. For example, undertakings given by parties when inviting offers are naturally analysed as promises. Thus, the undertakings viewed by the English court in both *Harvela Investments Ltd v Royal Trust Co of Canada*<sup>103</sup> and *Blackpool & Fylde Aero Club v Blackpool Borough Council*<sup>104</sup> as unilateral contracts would have been regarded in Scotland as instances of a promise, in *Harvela* to sell to the highest bidder and in *Blackpool* to consider all tenders submitted timeously.<sup>105</sup> In like fashion, undertakings to keep offers open for acceptance for a stated period of time are regarded in Scotland as binding promises, and there is no need to search for some elusive consideration in order to enforce the undertaking as a separate contract. Options contained within contracts, such as reversionary options to allow a seller of property the right to repurchase it, or options to purchase given to lessees, are also often regarded as promises.<sup>106</sup> Offers of reward would also, most naturally be classed as promises in Scotland, although in this particular instance one does find, under English influence, that the reported cases have followed the Common Law approach of regarding them as offers made to the world.<sup>107</sup> Other common examples of things which may be analysed as promises in Scotland include certain types of negotiable instrument, cheque guarantee cards, guarantees issued by manufacturers of goods to the ultimate consumer, and I.O.U.s.<sup>108</sup> Promise is thus able to provide the most appropriate legal framework for many commercial unilateral undertakings, and indeed for some private transactions too (although for non-commercial transactions, the requirement of a subscribed document acts as a limitation on its utility<sup>109</sup>).

A third way in which the existence of a separate obligation of promise has influenced contract law is as a disincentive for the law to develop a doctrine of

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<sup>103</sup> [1986] AC 207.

<sup>104</sup> [1990] 3 All ER 25.

<sup>105</sup> Although the difficulty with the *Blackpool* case would have been that the defendant had only expressly undertaken not to consider late tenders: the undertaking to consider timeously submitted tenders had to be inferred. Inferring a promise in Scots Law is a difficult matter, as promissory statements are usually construed strictly according to the precise form of words used.

<sup>106</sup> See, for instance, *Stone v Macdonald* 1979 SC 363, 1979 SLT 288. Alternatively some cases have seen such options as examples of 'firm offers', i.e. offers with a promise that the option will be granted if the offeree indicates a desire to do so: *Hamilton v Lochrane* (1899) 1 F 478. The drawback with the latter analysis is that the acceptance of the option might have to be in a specific form (if, for instance, the offer related to land), whereas the notification that a promissory option is being exercised needs no particular form (as the court concluded in *Stone v Macdonald*) Options are classed as unilateral contracts under English Law: see *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444.

<sup>107</sup> *Hunter v General Accident Corporation* 1909 SC 344, 1908 SLT 656 and *Hunter v Hunter* (1904) 7 F 136. Adoption of the English approach may make practical sense, given that many such offers of reward are made in a private context and would thus require (by virtue of the terms of the Requirements of Writing (Scotland) Act 1995) to be in subscribed writing in order for them to be valid.

<sup>108</sup> See further Hogg, 2.84.

<sup>109</sup> Non-business promises must be constituted in a document subscribed by the granter, or in a digitally signed electronic document: Requirements of Writing (Scotland) Act 1995, s1(2),(2A).

promissory estoppel such as is found in Common Law jurisdictions.<sup>110</sup> Because promises undertaken in a business context do not require to be constituted in any particular form, and can thus be made orally,<sup>111</sup> circumstances which in English law would require a court to prevent a party withdrawing from a commercial undertaking by virtue of the doctrine of promissory estoppel can instead be explained either as contractual in nature (no mutual consideration being required before a contract can be constituted) or else as demonstrating the presence of an enforceable promise. Thus, a statement that a party waives a contractual right can in Scotland be described as a promise.

(b) *The will-based theory of contract law*

The discussion in the previous section indicates that the discernment of an intention by the parties to be bound at law to an agreement remains pre-eminent in modern contractual thinking. Such thinking locates modern Scots theory within the will based camp of contract theory, an approach laid out by Stair in his characterisation of contract not simply in natural law, but also rational, will-based, terms. Such thinking is so entrenched in Scots contract theory that one finds almost no support, academic or judicial, in modern Scots Law for any competing contract theories, such as the reliance, transfer or relational theories commonly discussed in Common Law works on contract theory.

Given the continued pre-eminence of opinion in favour of will theory in Scots Law, it is interesting to ask whether the Scots obligational framework and the historical development outlined earlier make the defence of will theory any easier than in the Common Law. I want to suggest that the defence of will theory in Scots contract law is somewhat easier (although not all of the challenges usually mounted against will theory can be easily repelled within a Scottish theoretical context), and that this is so for four principal reasons.

Firstly, avoidance in modern Scots Law of the use of the idea of promise to explain the nature of contract means that the charge that it is inappropriate to use the idea of promise to explain contract (given that promise is a unilateral act whereas contract is bilateral) is evidently irrelevant. Scots law does indeed confine the language of promise to unilateral acts. This is so even in the one case where promissory language is used in a contractual context, namely to describe the nature of a *jus quaesitum tertio* in contract, because both of the contracting parties can be seen as making separate unilateral promises to the third party. So, given the absence of promissory language to describe the nature of contract in Scots Law, this first common objection to will theory is easier to dismiss than in the Common Law.

Secondly, as the history of contractual theory in Scots Law described above indicates, the origin of will theory can be traced to Stair's idea of law as the dictate of reason, and contract as an expression of the rational will. Its source is not much later, nineteenth century, mercantile free trade ideas, even if such ideas reinforced Stair's approach. Given this history, attacks on will theory which argue that such free trade ideology is outdated as a basis for explaining the underlying force of contracts have much less force. Admittedly, an alternative charge might be put that, if nineteenth century laissez-faire ideas are outmoded so far as contract theory is concerned, how much more so even more ancient, seventeenth century thinking. It might, however, be

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<sup>110</sup> Although Scots Law does have a developed doctrine of personal bar which operates in a number of different instances within the law: see J Blackie and E Reid, *Personal Bar* (Edinburgh: W Green, 2006).

<sup>111</sup> Requirements of Writing (Scotland) Act 1995, s1(2)(a)(ii).

rejoindered to such a charge that, unless we are to accept that ideas of honesty and fidelity which underpinned the thinking of Stair and those who followed him are somehow outdated, the moral imperative of performing what one has pledged to do is no less relevant for the modern era. Indeed, the fundamental importance of reasserting the idea of voluntary acceptance as a reason for enforcing obligations may perhaps be even greater in an era when modern psychology and sociology have blunted ideas of personal responsibility for individual actions. While it may be argued by some that the modern actor cannot be held accountable for his or her behaviour because the idea of free will (and thus responsibility) has been destroyed by post-modernist thinking, the advocate of the will theory of contract might reply that such post-modern notions are undermining the functioning of human society and need urgently to be countered by a re-emphasis upon the importance of enforcing voluntarily accepted duties.

Thirdly, it can be argued that will theory is more easily supported in Scots law because of the importance placed upon performance remedies (specific implement is the primary remedy in Scots Law, rather than damages), so Scots contract law can withstand the criticism that contracts are really only about making reparation for breach (as reliance theorists like Atiyah have argued<sup>112</sup>).

Lastly, Scots law's lack of a doctrine of mutual consideration means it is immune from any arguments that consideration undermines a will based approach because the law is actually about putting things in the correct form rather than enforcing the will of the parties. In a system with no mutual consideration requirement, the emphasis can be argued much more naturally to lie in enforcement of the will of the parties.

The peculiar history and nature of Scots contract theory does then make defence of will theory easier in relation to some of the common charges levelled against it. On the other hand, that peculiar nature cannot answer all the common charges against will theory. The problem of implied terms is not, for instance, tackled any more easily within a Scottish theoretical context. The charge is that many terms are implied without any reference to the will of the parties but rather, as one theory alleges, to give effect to Aristotelian virtues, such as justice and good faith.<sup>113</sup> There is no peculiarly Scottish response to this, although one consistent with the theory of contract law outlined above would be to point out that support for a will theory of contract need not entail the view that the entire content of a contract derives from the will of the parties. A defence of will theory need only entail that the process of formation of a contract depends upon the will of the parties, without the necessity of arguing that all of its terms do. In an age of increasing state regulation of private relationships, some of the content of contracts will inevitably be comprised of terms implied by courts, either under statute, or else at common law with regard to considerations other than the supposed intention of the parties in mind, considerations such as equity, good faith, and commercial practice.

Space does not permit, on this occasion, a discussion of the other common objections to will theory, but it is a matter about which more might be said from a mixed legal system perspective.

(c) *An absence of enthusiasm for other theories of contract*

Given the historical development of a Scots contract theory based originally upon a mixture of natural law and rationalism, pared back over time to an emphasis upon the

<sup>112</sup> See Atiyah, *Essays on Contract* (cit at fn 1), ch 2.

<sup>113</sup> J Gordley, *Foundations of Private Law* (Oxford: OUP, 2006), pp 376 – 379.

rational choices of the parties, it will be unsurprising that other competing theories of contract law – such as reliance, transfer and relational theories – have not found favour with Scottish jurists or judges.

It is remarkable that reliance theory has proved quite so beguiling to some contract theorists after so many years of unconvincing promotion and failed refinements, as it must surely be evident from even a cursory glance at the law as it actually operates that not all contract law is about protecting reasonable reliance, even if that may be a judicial motivation in some cases additional to that of enforcing agreements because they are voluntary acts of will. It simply cannot be the case, for instance, that when executory contracts, upon which neither party has yet to rely, are judicially enforced, as they are, courts are doing anything other than enforcing the contract because it is the valid and voluntarily assumed will of the parties to be bound to an obligation.<sup>114</sup> This point has even greater force in a mixed jurisdiction like Scotland when one considers remedial entitlement, for in Scots Law the primary obligation upon a party is to perform, not just to pay damages if the contract is broken, so that the notion that it is reliance based remedies which the courts prefer is simply not true. While in practice the exceptions to the situations where an order of specific implement will be granted by a Scottish court bring the practical application of that remedy very close to that of the specific performance remedy in England, the theoretical difference of the primacy of enforcement remedies in Scotland is not only a fundamental difference in contractual theory but also one which has practical effects. One such practical effect has been the enforcement by Scottish courts of ‘keep open’ provisions in leases in circumstances where English courts have maintained a somewhat obstinate refusal to enforce what seem, to this observer, clearly drafted and unambiguous contractual provisions.<sup>115</sup> English landlords studying the difference in outcome between these two lines of authority might well find a very profitable reason for choosing Scots Law as the *lex contractus* if not the *lex fori*.

Reliance theory in a Scottish context also struggles desperately in explaining the existence and enforcement of the separate obligation of promise, an obligation which requires no reliance to be given in the form of mutual consideration, nor even in the form of an acceptance of the promise, before the promisor is bound by his unilateral undertaking. Indeed, a binding promise may be made in favour even of a party not yet in existence, such as a limited company which has yet to be incorporated or a natural person who has yet to be born, cases where reliance on the promise can hardly exist on the part of the promisee. Similar points may be made about the rights of a *tertius* under a *jus quaesitum tertio*, who need only be informed of the existence of the contracting parties’ intention to confer a benefit upon him before the right to enforce it comes into being. Reliance plays no part in the constitution or enforcement of a *jus quaesitum tertio*; by contrast, under English Law, reliance by the third party does have a role to play, it being relevant to the question of whether the right conferred may be varied or extinguished.<sup>116</sup>

It will be evident why reliance theories simply do not work to explain the nature of voluntary obligations in Scots Law. Scots Law set its face at an early stage against the notion that any reliance was required before contractual or promissory

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<sup>114</sup> In attempting to explain away the enforcement of such executory contracts as aberrations, Atiyah has had to construct a skewed commentary of the law as he might wish it to be rather than as it actually is.

<sup>115</sup> Compare *Retail Park Investments v The Royal Bank of Scotland* 1996 SC 227 with *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.

<sup>116</sup> See s2(1) of the Act.

obligations may be enforced. That is not to say that reliance plays no part in Scottish contract law, for indeed it does (in the Common Law influenced rules on misrepresentation, for instance), but it cannot explain the underlying origin and force of voluntary obligations in the Scottish legal system.

In the absence of any better competing theories to explain contractual rights, the native variety of will theory developed by the Scottish writers and courts is generally considered to remain the best (albeit imperfect) explanation for contracts (and indeed promises) in Scots Law. As indicated, the major competing theory of contract – reliance theory – finds especial difficulties with certain peculiar features of Scots law (such as the rejection of a doctrine of mutual consideration, and the emphasis on performance) in explaining the nature of voluntary obligations.

(d) *The role of good faith in contract theory*

The antipathy of English law to good faith within contract theory or practice is well known, the words of Lord Ackner on the role which any such concept might have to play in pre-contractual negotiations having for some taken on an almost credal status:

“[T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations.”<sup>117</sup>

Some have perhaps slightly over-exaggerated the universal hostility of English law to the idea of good faith playing any role in contract law, for, as the more recent case of *Petromec Inc v Petroleo Brasileiro SA Petrobras*<sup>118</sup> demonstrates, the Common Law is willing in some circumstances to enforce duties drafted in terms of good faith performance. Moreover, the recent inclusion within the JCT Constructing Excellence Model Form Contract 2006 of an ‘overriding principle’ of collaboration specifying that the parties must work together with each other and all other project participants in a co-operative and collaborative manner ‘in good faith’, suggests that English Law is going to have rapidly to adjust to a commercial environment where parties may increasingly subject themselves to duties with a good faith character. A point blank refusal by the judiciary to accord such duties any meaningful content would put the courts at odds with commercial practice.

Has Scots Law shared the Common Law’s antipathy towards good faith playing any role in contract theory or practice? The picture for good faith should perhaps be rosier, for, unlike Lord Ackner’s pronouncement, the most oft quoted judicial statement on good faith in modern Scots Law is the much more positive reference of Lord Clyde in the House of Lords to the “broad principle in the field of contract law of fair dealing in good faith.”<sup>119</sup> This notion of good faith as a broad principle of contract law was affirmed in *obiter* remarks of Lord Hope, again in the House of Lords, that:

“good faith in Scottish contract law, as in South African law, is generally an underlying principle of an explanatory and legitimising nature rather than an active or creative nature.”<sup>120</sup>

<sup>117</sup> *Walford v Miles* [1992] 2 AC 128, at 138.

<sup>118</sup> [2006] 1 Lloyd’s Rep 121.

<sup>119</sup> *Smith v Bank of Scotland* 1997 SC (HL) 111, at 121B-C.

<sup>120</sup> *R v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 AC 1, para 60.

The precise nature, or role, which good faith has, or ought to have, in Scots Law (creative or explanatory) has been the subject of some academic debate ever since Lord Clyde made his rather enigmatic comment in *Smith*. Much of the debate hangs on the questions of whether good faith can explain more coherently existing aspects of Scots contract law and theory, and whether a greater and more explicit role should be afforded to good faith in guiding the future development of the law.

In relation to the first of these issues, whether good faith makes sense of aspects of the existing law, one test bed for this question is the area of pre-contractual theory, in particular liability for pre-contractual actings. Like the court in *Walford*, Scots Law has typically taken a fairly antagonistic attitude to the idea that, before a contract is concluded, negotiating parties might owe any duties to each other in respect of their actings.<sup>121</sup> The courts, in respecting the freedom to contract which is at the heart of the will theory of contract law, have regarded as a crucial concomitant to that freedom the further freedom *not* to contract. Thus, typically, no duties will be imposed in respect of contractual negotiations if losses are incurred by *A* in reliance upon the belief or expectation that a contract will be entered into with *B*, but such a contract fails to materialise. This is particularly so where no material benefit has accrued to *B* as a result of the alleged losses of *A*; where such a benefit has accrued, unjustified enrichment may provide some recovery for *A* if the benefit remains in the hands of *B*, or a court may hold that a letter of intent in fact constitutes a preliminary contract in force between the parties,<sup>122</sup> or exceptionally it may even hold a contract to have been concluded despite a failure to agree all its terms.<sup>123</sup>

One circumstance however where the desire to protect reliance has been allowed to afford relief for pre-contractual losses is a limited category of cases where recovery is allowed if one of the negotiating parties has impliedly held out to the other that there is a valid contract in place between them when, for whatever reason, such a valid contract does not yet exist. A line of cases, beginning with *Walker v Milne*,<sup>124</sup> has approved of a remedy for recovery of wasted pre-contractual expenditure incurred in such circumstances. The availability of the remedy has been restated in modern times as very limited, requiring that all the elements of the claim be clearly made out, and emphasising that it is an exceptional remedy unavailable if another claim might be made (for instance, in delict, for misrepresentation).<sup>125</sup>

Hector MacQueen has argued forcefully that this limited remedy for the recovery of pre-contractual expenditure is a manifestation of the protection afforded to good faith by contract law,<sup>126</sup> on the basis that it protects actions undertaken in good faith in reliance on an implied assurance as to the existence of a contract. On the other hand, it might be argued that it is merely an equitable exception to the formerly strict rules on the requirements of writing which has no more necessary connection to the idea of good faith than to other broad principles of law like equity, reasonableness, or reliance. The case for recognising the alleged golden thread of good faith running through contract theory, including at the pre-contractual stage, seems as yet unproven.

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<sup>121</sup> Leaving aside recognised avenues of recovery in delict: see Hogg, paras 3.37 – 3.62.

<sup>122</sup> *Robertson Group (Construction) Ltd v Amey-Miller (Edinburgh) Joint Venture* [2005] CSOH 60; affd [2005] CSIH 89.

<sup>123</sup> *Avintair Ltd v Ryder Airline Services Ltd* 1994 SC 270, 1994 SLT 613; *Moyarget Developments Ltd v Mathis* [2005] CSOH 136.

<sup>124</sup> (1823) 2 S 379.

<sup>125</sup> *Dawson International plc v Coats Paton plc* 1988 SLT 854; *Bank of Scotland v 3i plc* 1990 SC 215.

<sup>126</sup> H L MacQueen, 'Good Faith in the Scots Law of Contract: An Undisclosed Principle', in A D M Forte (ed), *Good Faith in Contract and Property* (Oxford: Hart, 1999), at pp 5 – 38.



Whatever the basis of the limited remedy for wasted pre-contractual expenditure, in protecting the reliance of the party erroneously believing a contract to be in place it may properly be viewed as one of those limited spheres where it is reliance theory which provides the rationale for the existence of the right (admittedly pre-contractual rather than contractual *stricto sensu*) rather than will theory.

#### (4) *The future for Scots and English contract theory*

The ways in which, after the Act of Union between Scotland and England in 1707, Scots law came under the influence of the Common Law have been documented elsewhere.<sup>127</sup> This influence was particularly felt in developments within commercial law during the nineteenth century, where, unsurprisingly perhaps, there was a desire both within the Court of Session and the House of Lords that free trade within Great Britain should not be hampered by legal distinctions. Such a desire led, on occasion, to a blind following of the Common Law in preference to the distinct native rules of Scots Law, but in the modern era the Scottish courts have become more sensitive to the need to ensure that legal harmonisation, where it occurs, does so by reference to native rather than transplanted legal reasoning.<sup>128</sup>

Scots contract law in particular was subject to English influence, although this influence has been less than in fields like commercial law, and has been felt in some areas more than other. Doubtless, a much higher degree of conformity between the two jurisdictions would have been achieved had the first joint project of the Scottish and English Law Commissions, a proposed joint Contract Code, borne fruit, but it did not.<sup>129</sup> Scots contract law has retained a number of distinctive features, discussed earlier – a separate obligation of promise, the absence of a doctrine of mutual consideration, an ancient recognition of *jus quaesitum tertio*, and an emphasis on performance in contract, to name but a few. At the same time, it has made a number of borrowings from the Common Law, a unified concept of breach, ‘self-help’ remedies for breach, the categorisation of repudiation as breach, and much of the doctrine of misrepresentation, among them. It would be encouraging to think that, after Scots law’s having borrowed such ideas from English law, it might offer something useful back by way of theoretical development to its southern neighbour. If that were to be the case, the abolition of the requirement of consideration would make for a good start. The continued existence of this doctrine seems to make little sense in the modern Common Law. It is defended by some on the basis that it both demonstrates seriousness of contractual intent and provides clear evidence of such intent. Yet might not seriousness of intent be demonstrated in other ways? One such way could be in a requirement that an obligation be in a particular form, a requirement which Scots Law also insists upon for some obligations.<sup>130</sup> Moreover

<sup>127</sup> See J Cairns, ‘Historical Introduction’, in K Reid and R Zimmermann, *A History of Private Law in Scotland* (cit at fn 6), vol 1.

<sup>128</sup> As, for instance, occurred when the Scottish courts in *Smith v Bank of Scotland* 1997 SC (HL) 111 reached the same result as English Law had in *Barclays Bank v O’Brien* [1994] 1 AC 180, without reference to the notion of ‘constructive notice’.

<sup>129</sup> MacQueen gives some detail about the work of this abortive project in ‘Glory with Gloag or to the Stake with Stair’ (cit at fn 83), at p 157f. The draft of the proposed Code was eventually published privately by its principal author, Professor Harvey McGregor QC: *Contract Code drawn up on behalf of the English Law Commission* (Milan: Giuffrè, 1993).

<sup>130</sup> For instance, to demonstrate the seriousness of intent of a promise made in a private (rather than a business) setting, subscribed writing is required before the promise is valid: Requirements of Writing (Scotland) Act 1995, s 1(2)(a)(ii).

may not one seriously intend to do something even without receiving anything in return? As for providing clear evidence of consent, it must be said that the lack of a doctrine of consideration in Scots Law does not appear to have created a crisis of certainty for the courts in deciding whether or not contracts exist. In fact, when questions of uncertainty surrounding contract formation arise before Scottish courts, they often do so in cases where mutual consideration has in fact been agreed but intention to contract is nonetheless held not to be present.<sup>131</sup>

Allied to the abolition of the consideration requirement, a further worthwhile development might be an acceptance by the Common Law that unilateral undertakings should be more widely recognised.<sup>132</sup> English Law already allows contracts made under seal to be used as vehicles for some unilateral undertakings, as well as recognising that certain situations may give rise to so-called unilateral contracts, a concept which should in theory be anathema to the Common Law. It would not be such a great leap to develop these exceptions into a general recognition that, unilateral undertakings being a universal and frequent feature of human behaviour, a properly ordered legal system ought to recognise this by giving these undertakings explicit and appropriate legal form. The last serious attempt to develop this view, made by Denning J in *Central London Property Trust Ltd v High Trees House Ltd*,<sup>133</sup> was interpreted in later cases simply as a form of estoppel rather than a substantive obligation, but perhaps the time has come for another attempt to be made.

Realistically speaking, however, any changes to the Common Law as a result of direct Scottish legal influence are unlikely. While, for instance, the general enforceability in England since 1999 of unilateral undertakings in the form of third party rights<sup>134</sup> might suggest that the Common Law is warming somewhat to the idea of enforcing rights without the need for mutual consideration, that development was not the result of the influence of Scots Law.<sup>135</sup> The Common Law remains largely antagonistic to adaptation as a result of outside influences (Lord Ackner's comments in *Walford* are far from an isolated example), even from its nearest neighbouring legal system, preferring to develop at its own pace and, as the example of third party rights shows, under its own initiative. Common Lawyers are not ignorant of Scots contract theory, as Atiyah's discussion of Stair's ideas in the former's essay *Promising and Natural Law* demonstrates, but a knowledge of ideas has very seldom translated into practical borrowing.

As for Scots Law, it would be encouraging to think that more time might be devoted by writers and the courts to contract theory. Whether this will be so will probably depend both on the willingness of the Law Schools to teach it, as well as on academics to write about it. It is certainly the case that, after a somewhat barren period lasting until the beginning of the 1980s,<sup>136</sup> there has been a renewed willingness among the Scottish legal academic community to undertake a serious root and branch review of the fundamentals of private law. This has transformed the

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<sup>131</sup> See, for one such case, *Aisling Developments v Persimmon Homes Ltd* [2008] CSOH 140.

<sup>132</sup> Indeed, without a consideration requirement in contract law, the enforcement of unilateral promises would logically follow (a point conceded by Smith: see *Contract Theory*, p 182).

<sup>133</sup> [1956] 1 All ER 256.

<sup>134</sup> Contracts (Rights of Third Parties) Act 1999.

<sup>135</sup> As a glance at the Report of the Law Commission will demonstrate, the comparative examination to the Scottish legal system was a small part of the debate, and the general impetus for reform was an internal one.

<sup>136</sup> The renaissance of academic legal thought in Scottish Universities is discussed by K Reid, 'While One Hundred Remain' in Reid & Carey Miller (eds), *A Mixed Legal System in Transition* (cit at fn 83), at pp 1- 29.

teaching and understanding of private law in Scotland. Moreover, recent involvement of Scottish academics in international projects involving other mixed legal systems has provided a greater ability to focus on theory in a way that Common Lawyers have historically enjoyed through the ability to debate doctrine within the wider English speaking Common Law world. The involvement in such projects, as well as the general harmonising tendencies of the European Union, raises the question of the potential impact of European harmonisation of private law on native contract law. While Scots Law has much by way of similar doctrine and rules to Continental contract systems, which would probably make any harmonisation easier than for English Law, some native aspects of the law would have to be yielded. For instance, the draft Common Frame of Reference, while recognising that unilateral promises may be enforced, appears to subsume them within its general treatment of contract rather than seeing them as a distinct obligation as Scots Law does.<sup>137</sup> The challenge, for a small mixed jurisdiction like Scotland, is whether, having built up a treasury of legal ideas and rules, it is willing to compromise and alter these in an environment where supranational harmonisation of laws has the potential to threaten national legal identity. The history of Scots law, with its borrowings from Roman, Roman Dutch, Canon, and Common Law sources, suggests that such an outward looking attitude should not be impossible to achieve, although the perennial question of political independence introduces an unknown variable into the equation of legal development.

Whatever else may be uncertain, it is clear that Scotland does indeed possess, within the family of European legal systems, a distinctive theory of contract law. This theory was established on a mixed basis of natural law and rationalism by Stair in the seventeenth century, a basis found, through the jettisoning of the natural law element, to be adaptable to the needs of a growing mercantile society. The established native theory has continued to command general acceptance among academics and practitioners, with the result that there has been little interest in looking to competing theories of contract law. Given such a history, it seems reasonable to suggest that it would be somewhat foolhardy, in the absence of any better general theory of contract law, to jettison an established theory which is perceived to continue both to meet the demands of practice and satisfactorily to explain the moral and legal force underlying contractual obligations.

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<sup>137</sup> *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Munich: Sellier, 2009), Book II, Art 1:103(2).