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The Law of Obligations in Scots Law

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Abstract

A historical study of the structure of the law of obligations in Scots law, with especial reference to the law of contract.

Keywords:

Scots law. History. Law of obligations. Law of contract. Specific contracts. Commercial contracts. Consumer contracts. European contract law.

Section I – *Position of the Law of Obligations in Scotland.*

Hector L MacQueen

A. Introduction

Discussing the structure of the law is problematic for a non-codal system such as Scots law. The Scots law of contract is essentially non-statutory, that is, according to conventional understanding within the system, to be found in the decisions of the courts and so judge-made. The truth of the matter historically, however, is that the law of contract has been shaped most by the writings of jurists who themselves were usually borrowing their concepts and organisation of material from elsewhere – the European *ius commune* to begin with, later the English common law – even if they sometimes put upon that material their own “spin”, whether drawn from domestic sources of law or their own original reasoning. It is very rare indeed to find a case in which a court invents new contract doctrine. Normally the focus of the case is upon the dispute before it and the rules of law with which that dispute is to be resolved. These rules are usually seen as already in existence, justified by reference to relevant authority within the system, and seldom needing to be considered against a wider background of the structure of the law of contract, let alone the law of obligations or, for that matter, the whole of private and commercial law. Indeed, when a court is asked to develop what would be new doctrine, it will usually say that the question is one to be answered by the legislature.¹

The only way in which a Scots lawyer might begin to think about issues of structure, or taxonomy, is when writing about or teaching the law. There is a long-standing tradition in Scots private law of books that cover the whole of the law in a structured and systematic way, much of it reflecting another tradition in university law teaching, namely the coverage of private law in a long course entitled “Scots Law” or “The Law of Scotland”.² This discussion of the position of the law of obligations in Scotland will be based upon a mainly historical analysis of these books, from which it will become apparent that there is indeed a strong, if not universal, Scottish perception of a law of obligations of which a general law of contract forms part, along with rules on particular contracts and on other forms of obligation, most notably the laws of delict and unjustified enrichment.³

The most significant of the books are the so-called “Institutional writings” of the seventeenth and eighteenth centuries, the massive tomes produced by James Dalrymple Viscount Stair in 1681 (2nd edition 1693), Andrew McDouall Lord Bankton in 1751-53, and John Erskine (Professor of Scots Law at Edinburgh University 1737-65) in 1773. These works, entitled either *Institutions* or *Institutes* of the law of Scotland, were typically structured around the Roman law concepts of Persons, Things and Actions, although not uncritically so. At the beginning of the nineteenth century George Joseph Bell, a successor of Erskine in the Edinburgh chair of Scots Law between 1822 and 1839, first published between 1800 and 1804 what became known as his *Commentaries on Mercantile Jurisprudence*,

¹ *Lloyds TSB Foundation v Lloyds Banking Group* [2011] CSIH 87, 2012 SC 259; discussed further below, section II.B and C.

² For a historical overview of Scottish legal literature in general see *David M Walker, The Scottish Jurists*, 1985. I have generally used the most recent editions of the works cited while cross-checking with earlier ones as appropriate. See the bibliography appended to this article for details.

³ It may be said that the teaching tradition which produced this perception is today under threat because processes of “semesterisation” and “modularisation” in universities lead to balkanisation of private law studies.

which examined the law through the highly practical lens provided by debt enforcement procedures and bankruptcy. Despite this departure from the institutional tradition, the book is usually classed amongst the Institutional writings as one of the formal sources of Scots law where statute and precedent are silent. All the Institutional writings apart from Bankton enjoyed numerous editions well into the nineteenth century and exercised significant influence in the development of the law.

As university professors, Erskine and Bell each taught a Scots Law course; and each produced from this experience a book entitled *Principles of the Law of Scotland*: Erskine first in 1754, Bell in 1829. These books were shorter and more concise than their major works mentioned above, but otherwise broadly followed an institutional structure. Each book had a long life: the tenth and last edition of Bell's *Principles* appeared in 1899, while the twenty-first and last edition of Erskine's *Principles* appeared as late as 1911. The latter remained the leading teaching text, while Bell's *Principles* became more of a practitioner's *vade mecum*. Also influential were the lectures on Scots law delivered by David Hume, Professor of Scots Law at Edinburgh from 1786 to 1822, although they were not published in his lifetime, or indeed until the mid-twentieth century;⁴ but copies long circulated in manuscript and they helped to shape contemporary understanding of the law beside the published works of his fellow professors.

Erskine's *Principles* was eventually replaced as the leading student text by William Gloag and Robert Candlish Henderson's *Introduction to the Law of Scotland*, first published in 1927 and now in its thirteenth edition, published in 2012.⁵ It was therefore not displaced by the *Short Commentary on the Law of Scotland* by T B Smith, published in 1962, or by David M Walker's multi-volume *Principles of Scottish Private Law* (first published 1970), despite the latter running to four editions, the last of which appeared in 1988.⁶ It is also worth noting the tradition of multi-volume encyclopaedias of Scots law, which began in the late nineteenth century. It is now represented by the *Stair Memorial Encyclopaedia*, of which T B Smith was the founding General Editor. While the alphabetically ordered treatment of different legal topics does not lend itself to systematic analysis of the law's taxonomy in general, Smith made strenuous efforts to minimise its impact on private law by arranging for the provision of two volume-length articles on Property and Obligations, the latter of which has a significant bearing upon the present contribution.

B. General contract law in general law of obligations or in a special law

In this section I will show that writers and teachers of Scots law have for the most part worked on the basis that there is a general law of obligations within which a general law of contract is to be placed for expository purposes.

B.I Stair

The beginning of the modern Scottish approach, and perhaps the only serious attempt at its philosophical justification, is to be found in Stair's *Institutions*. This is not the place for an

⁴ Hume's Lectures were edited by G C H Paton and published in six volumes by the Stair Society between 1939 and 1958.

⁵ Gloag was Regius Professor of Law at Glasgow, while Henderson held the Edinburgh chair of Scots Law.

⁶ In 1962 Smith was Professor of Civil Law at Edinburgh, while in 1970 Walker held the Glasgow Regius chair.

elaborate treatment of the theory of law underpinning Stair's extraordinary work.⁷ He was a Protestant natural lawyer who saw positive law as flowing from equity, albeit only imperfectly. Law was a "rational discipline, having principles from whence its conclusions may be deduced".⁸ The principles of equity, which were the efficient cause of rights and laws, were man's obedience to God; the freedom of man otherwise; which, however, being in his power, man might constrain by voluntary engagement with others. The three principles of positive law, which were the final causes or ends for which laws were made and rights established, were society, property and commerce. The principle of obedience produced those positive law obligations not resulting from voluntary engagement, i.e. what we would now call the law of delict (tort) and the law of unjustified enrichment (restitution), as well as much of family law. Freedom led to personal liberty of action outside these obediencial obligations, and also to the right of what Stair called "dominion" over other things and creatures, i.e. property; while voluntary engagement produced the law of promises and contracts, which Stair termed "conventional obligations".

"The formal and proper object of law," Stair continued, "are the rights of men."⁹ Stair built his work around this central idea of rights, beginning with the constitution and nature of rights; then their transfer from one person to another; and finally their enforcement. He began his substantive discussion with a chapter on liberty, and then in his third chapter he analysed "Obligations in General". "Rights called personal or obligations," wrote Stair, "being in nature and time for the most part anterior to, and inductive of, rights real of dominion and property, do therefore come under consideration next unto liberty."¹⁰ Here he made what continues to be a fundamental distinction in Scots law between personal and real rights, or between obligations and property. He followed Roman law in his general definition of an obligation:

"Obligation is a legal tie by which we may be necessitate or constrained to pay, or perform something. This tie lieth upon the debtor; and the power of making use of it in the creditor is the personal right itself, which is a power given by the law, to exact from persons that which they are due."¹¹

In this chapter on obligations in general, however, Stair rejected the fourfold Roman distinction of obligations as *ex contractu*, *quasi ex contractu*, *ex maleficio* and *quasi ex maleficio*, in favour of the distinction he had already drawn between obediencial and conventional obligations. Stair went on to discuss the distinctions between natural and civil obligations, between principal and accessory obligations, and between pure and conditional obligations; but this is as far as he goes with the idea of obligations in general at this point.

Thereafter Stair treats particular heads of obligation, beginning with the obediencial conjugal and parent-child obligations and the closely related obligations between tutors and

⁷ A luminous recent analysis is *MacCormick*, Stair and the Natural Law Tradition: Still Relevant? in *H L MacQueen* (ed), *Miscellany VI*, Stair Society, vol 54, 2009, 1ff. See also *Reid*, Thomas Aquinas and Viscount Stair: the Influence of Scholastic Moral Theology on Stair's Account of Restitution and Recompense, *Journal of Legal History* 2008, 189ff.

⁸ *Stair*, *Institutions*, I,1,17.

⁹ *Stair*, *Institutions*, I,1,22.

¹⁰ *Stair*, *Institutions*, I,3,1.

¹¹ *Stair*, *Institutions*, I,3,1. It should be noted (as Stair does) that there is a very old tradition in Scotland where an obligation is seen as a unilateral undertaking, usually written. This sense survived until at least the mid-nineteenth century.

curators, on the one hand, and pupil and minor children, on the other. Then he deals with unjustified enrichment (restitution and recompense, including *negotiorum gestio*) and delict (reparation). All of these are clearly labelled as obediencial in nature. Finally Stair arrives at a chapter entitled “Obligations Conventional, by Promise, Paction, and Contract”, which is followed with six chapters on the particular contracts of loan, mandate, custody, sale, location and society (partnership). Stair next turns to “accessory obligations”, in a chapter which is essentially about personal securities (or caution, as it is usually termed in Scots law¹²). Stair concludes his treatment of obligations with a chapter entitled “Liberation from Obligations”, in which he describes how conventional obligations cease by contrary consent, discharge, renunciation, pacts *de non petendo*, payment or performance, consignation, acceptilation, compensation (i.e. set-off), retention, innovation and confusion.¹³ Stair thus follows his declared method of considering the various ways in which personal rights come into existence, including contract both in general and in its particular forms, before finishing with the more general question of how obligations come to an end. In all this, contract is clearly seen as part of the law of obligations, albeit as distinctive and multifaceted, and as separate from the law of property. Stair also touches upon the interaction of obligations: “Contract may intervene where there intercedes a natural and obediencial obligation ... yet where obediencial and conventional obligations are concurring, they are both obligatory”.¹⁴

B.II Erskine

Bankton, the next major institutional writer, largely followed Stair’s approach and order of treatment, and will not be further discussed. Erskine, however, adopted a more traditionally Romanist structure in his account of the law of obligations, albeit one in which contract was highlighted as the chief exemplar of an obligation.¹⁵ Yet in substance he too largely followed Stair, picking up the vital distinction between real and personal rights,¹⁶ and giving an account of obligations in general covering the same ground as Stair.¹⁷ Erskine also used the distinction between obediencial and conventional obligations, treating under the former head the law of unjustified enrichment (restitution and recompense) and the law of delict (delinquency).¹⁸ The treatment is not however extensive. Then Erskine moved to obligations by contract, on which however he has only a general paragraph dealing with incapacity and invalidity by reason of error, fraud, and force and fear.¹⁹ He then moves on and, within a couple of paragraphs, describes the following particular contracts (loan, deposit, trust, and pledge). That these are the real contracts of Scots law in his view becomes apparent from his subsequent chapters which are more explicitly Roman in their structure: the first deals with “Obligations by word and by writing”,²⁰ and the next with “Obligations arising from consent, and of accessory obligations”.²¹ The obligations by consent include sale, permutation, location, freighting of a ship, insurance, society or copartnership, and mandate. Into this chapter Erskine also inserts discussions of the quasi contracts, i.e. *negotiorum gestio*, *indebiti solutio*, liability under the *Lex Rhodia*, and the right of division in relation to common property. The

¹² Stair also uses the term “surety”: *Stair*, Institutions, I,17,3-4.

¹³ *Stair*, Institutions, I,18.

¹⁴ *Stair*, Institutions, I,10,13.

¹⁵ *Erskine*, Institute, III,1-4. See also the similar approach in *Erskine*, Principles, III,1-4.

¹⁶ *Erskine*, Institute, III,1,2.

¹⁷ *Erskine*, Institute, III,1,3-7.

¹⁸ *Erskine*, Institute, III,1,8-15.

¹⁹ *Erskine*, Institute, III,1,16.

²⁰ *Erskine*, Institute, III,2. The chapter includes a long discussion of bills of exchange (ibid, III,2,25-38).

²¹ *Erskine*, Institute, III,3.

chapter continues with a discussion of accessory obligations, the major example of which is, as with Stair, the contract of caution but which also includes the obligation to pay interest. Erskine then turns to what he calls the “general properties of obligations”,²² which includes the question of impossibility, conditionality, implement and damages, and interpretation. Erskine’s final chapter is “Of the dissolution of obligations”, in which he goes through the grounds of extinction also set out by Stair.²³ Overall, then, Erskine’s approach is through the idea of a unified law of obligations, with contract in its different forms the most important instance of an obligation. But it cannot be said that his analysis has the power and intellectual coherence of Stair’s vision, or that he has a very well developed sense of a general law of contract. Erskine can be characterised as a Romanist positivist rather than as a philosophical natural lawyer.

B.III Hume and Bell

The next significant treatments – or perhaps non-treatments - of the law of obligations were by Erskine’s successors in the Edinburgh chair of Scots law, David Hume (1786-1822), and George Joseph Bell (1822-38). Under them the idea of a general law of obligations almost entirely disappears; even the idea of a general law of contract, only faintly apparent in Erskine, as we have seen above, was abandoned by Hume, although partially reinstated by Bell. It is also noteworthy that Bell’s fairly brief discussion of the general law of contract, first published in 1829, remained the sole published account of the topic for almost the next 100 years.

Despite being the nephew of the great philosopher of the same name, Hume professed to be sceptical of the value of philosophical generalisations about the nature and substance of law, at least for the beginning student of the subject. But he also challenged the utility of Roman law structures for his own times,²⁴ criticising in positivist vein Stair and Erskine’s Romanist definition of “obligation” as a legal tie by which one is bound to pay or perform something to another:

“[Obligation] may with more propriety be defined “that state of relation in which one person stands to another whereby law compels him to do something for the benefit of that other.” ... The criterion of a legal obligation then is that it may be performed and gives action.”²⁵

Aspects of Erskine’s structuring of the law were also criticised:

“Erskine, after the Roman Law, has divided contracts into either written or verbal, but there seems no room for this mode of classing them, as the same contract when applied to one subject may be perfectly good though verbal, whereas when applied to another it is perfectly ineffectual unless attended with all the legal solemnities.”²⁶

Hume argued that the objects of the law were not the Roman Persons, Things and Actions but rather, more simply, Rights and Actions (“the means of prosecuting and enforcing Rights in

²² *Erskine*, Institute, III,3,83.

²³ *Erskine*, Institute, III,4.

²⁴ *Hume*, Lectures, vol 1, 2-8. See also *ibid*, 357 (from lecture notes taken in session 1796-7).

²⁵ *Hume*, Lectures, vol 2, 276.

²⁶ *Hume*, Lectures, vol 2, 278.

the course of law”).²⁷ Although he recognised and utilised the concepts of real and personal rights, he did not dwell much upon the differences between them, beyond saying that real rights were about the relationships between a person and a thing while personal rights, or obligations, sprang from a person forming connections with other individuals.²⁸

Hume said even less than this about the sources of such personal rights. In earlier versions of his lectures Hume mentioned in passing and without direct comment Stair’s distinction between obediencial (called by Hume “natural”) and conventional obligations.²⁹ But later he simply said that personal rights arose from contract, delict, quasi-contract and quasi-delict – here, perhaps, surprisingly Romanist.³⁰ Hume offered no general account of contract law, commenting only that, of these sources of obligation, “contract is by far the most ample and important”.³¹ He then continued: “And here I will first direct your attention to the contract of sale, the most frequent and most necessary of them all.”³² There follows a lengthy treatment of sale, which in turn is followed by similarly long discussions of other particular contracts: location, charter party, loan, mandate, society, cautionary, and bills of exchange.³³ Up until about 1810 he also lectured on insurance.³⁴ There is no attempt in any of this to identify general principles or rules, and Roman categorisations beyond the labels attached to each of the particular contracts are ignored. Hume’s discussion of particular contracts is followed by a chapter on assignation of personal claims and four chapters on extinction of obligation by payment, compensation and retention, novation, and prescription.³⁵ The focus of these chapters is clearly on the contractual context. Only after they are complete does Hume turn to obligations *ex delicto*, obligations *quasi ex contractu*, and obligations *quasi ex delicto*.³⁶

Hume at least said of Stair that he did “propose what upon the whole is a just enough order of arrangement”,³⁷ and in some respects at least his own ordering of the law of personal rights was close to that of Stair.³⁸ In no sense could this be said of Hume’s successor Bell. His treatment of substantive law in the *Commentaries on Mercantile Jurisprudence* began with the law of property before moving on to “Creditors by personal obligation or contract”. The focus is on contract or unilateral voluntary obligations, with nothing on delict, unjustified enrichment or *negotiorum gestio*. Bell thus felt no need to discuss obligations in general.

²⁷ Hume, Lectures, vol 1, 9-10.

²⁸ Hume, Lectures, vol 1, 10-11; *ibid*, vol 2, 1-3.

²⁹ Hume, Lectures, vol 2, 277.

³⁰ Hume, Lectures, vol 2, 3.

³¹ Hume, Lectures, vol 2, 3.

³² Hume, Lectures, vol 2, 3.

³³ Hume, Lectures, vol 2, 3-55 (sale), 56-108 (location), 109-24 (charter party), 125-42 (loan), 143-70 (mandate), 171-96 (society), 197-227 (cautionary), 228-75 (bills).

³⁴ Hume, Lectures, vol 3, Appendix A (310-402). The context is almost entirely maritime, and the chapter also discusses charter parties, salvage and general average.

³⁵ Hume, Lectures, vol 3, 1-15 (assignation), 16-27 (extinction by payment), 28-59 (compensation and retention), 60-2 (novation), 63-119 (prescription; see also Appendix C at 420).

³⁶ Hume, Lectures, vol 3, 120-164 (delict), 165-85 (quasi contract: see also Appendix B at 403-19), 186-98 (quasi-delict). *Negotiorum gestio* and general average are treated under the head of quasi contract: see *ibid*, 176-81.

³⁷ Hume, Lectures, vol 1, 8.

³⁸ So, like *Stair*, Hume treats the obligations between husband and wife, parent and child, and guardian (tutor and curator) and ward, as the first set of topics within the law of obligations: Lectures, vol 1, 19-319. Next for Hume comes master and servant (*ibid*, 321-54), which for *Stair* was one of the contracts of location (*Stair*, Institutions, I,3,15; I,15). Hume however treats reparation, restitution and recompense after contracts.

The treatment of general contract law was also relatively brief compared to the mass of material on particular contracts.³⁹ Caution became simply a unilateral obligation rather than the main example of an accessory one; bills of exchange were also instances of unilateral obligations.⁴⁰ Sale, hire, carriage, agency and factory were dealt with under the heading “Mutual contracts”, and there were also chapters on maritime contracts and on insurance.⁴¹ Proprietary securities were dealt with only insofar as they affect heritable estates, that is, land.⁴²

If it is clear that in the *Commentaries* Bell abandoned the taxonomic basics of the previous century of Scots law, this could be explained by the distinct aims of his book, which was not to provide an account of the whole of private law, but to consider those aspects of it most relevant to bankruptcy. It is also clear, however, that in lecturing his Edinburgh students Bell likewise moved some way away from a general concept of an obligation. The first sentence of his *Principles* says: “The object of jurisprudence is the protection and enforcement of Civil Rights”, and there follows a very brief definition of real and personal rights. In his earliest editions Bell underlined his departure from Stair’s thinking:

“It signifies little in what order rights relative to things shall be considered, - whether Personal rights relative to things, or Real rights, be first taken: But some conveniencies in explanation seem to recommend an arrangement by which the Rights arising from Contract or Convention shall first be considered.”⁴³

The substantive discussion begins immediately thereafter with general contract law. There is no real attempt to explain the general idea of an obligation other than the old notion that an obligation was unilateral while a contract was mutual.⁴⁴ The particular contracts are all dealt with before at last we reach a few pages on “Obligations independent of convention”, which are sub-headed “Restitution”, “Recompense” and “Reparation”. Bell offers no explanation of why these topics are being treated as obligations save that each involves “invasions of right”. This part having been completed, Bell moves on to “Extinction of obligations”, covering all the usual ground in some detail.

Although this paper in general eschews speculation as to the sources of influence upon Scottish writers in their analysis of the law of obligations, it is worth noting the admiration which Bell had for the work of Pothier, in particular his *Traité des Obligations*. French-speaking from childhood, Bell had no need to rely on the English translation of Pothier’s treatise by W D Evans published in Britain in 1806. Bell’s *Principles* and *Commentaries* cite Pothier’s treatise on obligations frequently, as well as his as yet untranslated work on the other particular contracts such as sale, hire, partnership, deposit and charter party.⁴⁵ For Pothier too contract was the dominant form of obligation; his obligations treatise touches on other sources of obligation, by quasi-contracts, by injuries and negligence and by law, for only four of the 619 pages of the Evans translation.

³⁹ Bell, *Commentaries*, vol 1, 312-51.

⁴⁰ Bell, *Commentaries*, vol 1, 351-454.

⁴¹ Bell, *Commentaries*, vol 1, 454-677.

⁴² Bell, *Commentaries*, vol 1, 712-95.

⁴³ This statement appears in the introduction to the first, second and third editions of Bell’s *Principles*, but not the fourth (1836), the last to be published in Bell’s lifetime.

⁴⁴ See note 11 above.

⁴⁵ See Reid, *From Text-Book to Book of Authority: The Principles of George Joseph Bell*, *Edinburgh Law Review* (Edin LR) 2011, 6 ff, at 24-6.

B.IV The nineteenth century: a fallow period

The later nineteenth century saw the rise in Scotland, as in England, of the textbook on particular topics of law. There was very little, however, to sustain the idea of a law of obligations as distinct from a law of contract or a law of reparation or a law of particular contracts such as sale or partnership.⁴⁶ In 1847 Bell's son-in-law Patrick Shaw published *A Treatise on the Law of Obligations and Contracts*, saying in the preface that his aim was to systematise "the doctrines of Law in relation to Obligations and Contracts, which are scattered through [Bell's] works". In reality however this is a book on contract law (where obligations are generally mutual between the parties) and unilateral voluntary obligations.⁴⁷ There is a treatment of a single chapter's length of restitution, repetition, recompense, *negotiorum gestio* and reparation; but the chapter is headed "Implied obligations", hinting that even these rested in some obscure way on the consent of the parties. Shaw's derivative work apart, the general notions of obligation and contract were expounded in the nineteenth century only in the successive editions of the great institutional works of Stair, Erskine and Bell, and the *Principles* of the latter two writers as edited by others.

At the very end of the century there appeared the first Encyclopaedia of Scots Law, which included a fairly short article under the title "Obligation".⁴⁸ Its structure and content owed much to Stair, Erskine and Bell, with continued deployment of the distinction between personal and real rights, the use in some form of Stair's distinction between obediential and conventional obligations, and analysis of conditional obligations and of the extinction of obligations. But very little was done to link this brief discussion to fuller analyses of the substantive law of contract, delict and unjustified enrichment elsewhere in the volumes of the Encyclopaedia. The article did not reappear in the 1912 edition of the Encyclopaedia. But in 1930 the so-called "Dunedin Encyclopaedia" (named for its Consultative Editor, the judge Lord Dunedin) contained a slightly more detailed article on "Obligations" which again made use of Stair's division of obligations and discussed conditions and the extinction of obligations.⁴⁹

B.V Twentieth-century revival

The systematic presentation of obligations with contract law, both general and particular, having its place therein rather than dominating the whole field, came back to the fore with the twentieth-century renewal of the general work covering the whole of Scots law, aimed principally at law students but of course also of value to the practising profession. *Gloag & Henderson* from its first edition in 1927 has had as its third chapter (following accounts of sources of law and the legal system) "General Law of Obligations". This distinguishes between obligations by consent and other obligations, making some brief reference to Stair's concept of the obediential obligation and also explaining the difference between personal and real rights. The chapter specifically covers a number of topics such as conditions and joint and several liability; but until the 11th edition in 2001 extinction of obligations received its

⁴⁶ See e.g. *M P Brown*, *Treatise on the Law of Sale* (1821); *F W Clark*, *Treatise on the Law of Partnership and Joint-Stock Companies* (1866). *Brown* purported to follow *Pothier's* arrangement in his *Treatise on Sale: Brown*, *Sale*, preface, pp. vii-viii.

⁴⁷ *Shaw* thus maintains the ancient understanding of "obligation" in Scots law: see note 11 above.

⁴⁸ *Monteith Smith*, *Obligation*, in *J Chisholm* (ed), *Green's Encyclopaedia of the Law of Scotland*, vol 9 (1898), pp. 78ff. The volume also contains an article on *Obligations in Roman Law* by *J M Irvine*.

⁴⁹ *Black*, *Obligations*, in *Lord Dunedin, J L Wark and A C Black* (eds), *Encyclopaedia of the Law of Scotland*, vol 10 (1930), pp. 419ff.

own, separate chapter, followed by one on prescription. These came after several other chapters on the general law of contract and one on Quasi-Contract (which included *negotiorum gestio*). The chapters on extinction and prescription of obligations were followed by a series on particular contracts – Lease, Sale, Rights in Security, Caution, Master and Servant (now employment), Agency, Hiring and Deposit, Partnership, Company, Bills, Insurance, Carriage by Land and by Sea. Next were chapters on General Average and Salvage; Reparation; and Defamation. Thus Professors Gloag and Henderson divided contractual from other obligations; but unjustified enrichment was included in contract, and extinction and prescription were seen as chiefly relevant to contract.⁵⁰ Modern restructuring now places extinction in the chapter on the general law of obligations (although prescription retains its own chapter), while leases and rights in security are to be found in the Property section of the book. There has also been re-ordering of the other chapters on particular contracts and on unjustified enrichment.⁵¹

More coherent approaches emerged with the appearance of T B Smith's *Short Commentary* and David M Walker's *Principles of Scottish Private Law*. Smith drew heavily on Stair in seeing the core of private law as based upon the rights of a person over the objects of law, which were real and personal rights, that is, property and obligations. He highlighted the key distinction between contract and conveyance (the transfer of real rights). "It does not follow that, because a contract could be reduced on grounds of fraud or (in some cases) because of error, real rights transferred in pursuance of such a contract are also vulnerable, if they have subsequently transferred to an onerous third party."⁵² Smith's detailed discussion of obligations began with questions of the subject's internal classification. He divided the subject into three: (1) Obligations *ex lege* (which included Quasi-Contract including *negotiorum gestio*, as well as Strict Liability without Personal Fault (Quasi-Delict); (2) Delict (Liability for fault or *Culpa*); and (3) Voluntary Obligations (essentially contract and unilateral promise). Smith also touched on conditions as an aspect of general obligations law, but only lightly.

Smith became the first jurist to discuss concurrent and cumulative liability in the Scots law of obligations: "In general, it may be said, where an obediational duty is owed by A in delict, this duty remains due to B though A has entered into a contractual relationship with B – unless the terms of the contract restrict the delictual duty."⁵³ The rationale for the position was explained in a way that Stair would have recognised:

"It may be stressed that the categories of liability *ex lege* or those based on fault such as reparation or delict, restrict a person's freedom irrespective of his will, and therefore logically take priority in the hierarchy of obligations. Though contract may, as between the parties, modify the duties which the law would otherwise impose, unless they are so modified, they are not superseded merely because parties have entered into a contractual relationship. A person suffering damage as a result of *culpa* or fault may elect to base his action on reparation rather than contract."⁵⁴

⁵⁰ It is worth noting that *W M Gloag*, *The Law of Contract* (first published in 1914 and then in a further edition in 1929), also treated quasi-contract (including *negotiorum gestio*) in some detail, although not delict: see its chapter XVIII.

⁵¹ For which see further below, section I.D.

⁵² *T B Smith*, *A Short Commentary on the Law of Scotland*, 1962, 280.

⁵³ *Smith*, *Short Commentary*, 622.

⁵⁴ *Smith*, *Short Commentary*, 282.

Smith did not however consider the relationship between contract and unjustified enrichment, the latter of which seems not to have interested him very much. Extinction of obligation, including prescription, was considered only in the context of contract, and that quite briefly.

Walker's *Principles* is highly structured in form, with separate volumes devoted to Obligations and Property respectively.⁵⁵ The Obligations volume has a brief general introduction drawing on Stair's distinction between obediential and voluntary obligations, before turning to an elaborate treatment of the latter category (which includes promises as well as contract). The discussion of the general principles of contract leads on to a series of chapters on particular contracts (curiously, not including sale). Walker then moves on to obediential obligations, within which are treated the obligations of restitution, recompense, *negotiorum gestio*, general average and salvage as well as obligations of reparation arising from delict generally. Then particular delicts are considered, and finally there are chapters on obligations arising from, respectively, statute and court decrees. But there is little or no consideration of the interaction of the different heads of obligations

The *Stair Memorial Encyclopaedia* made an ambitious if not completely successful attempt to develop further an approach founded on the idea of a general law of obligations in its volume 15 (published in 1996). This contains a lengthy article "Obligations", the structure of which is based on that found in T B Smith's *Short Commentary*. The article too is subdivided into an introductory part followed by major sections on "Obligations arising by force of law" (which includes unjust enrichment, *negotiorum gestio* and strict liability delicts), "Obligations arising from a wrongful act" (delict involving a party's fault) and "Voluntary obligations". It concludes with a section on "Substitutionary redress" (i.e. damages). The introductory part is brief, explaining the major divisions in what follows, and then commenting on conditions, the parties to an obligation, the object of obligations and, finally, concurrent and cumulative liability. Extinction of obligations is treated independently in each of "Obligations arising from a wrongful act" and "Voluntary obligations". As the joint but independent work of several hands, the article lacks overall coherence, and is essentially a compilation of treatments of the various components of the law of obligations rather than a unified whole (unlike, say, the much more successful volume 18 on Property). A reissue of the Obligations volume is in development, however, and the aim is for a much more coherent treatment, with a detailed general analysis of the law of obligations as the introduction, and the different sources of obligation being treated thereafter in a fashion taking full account of their possible interaction and links to the general principles previously set out.

The general analysis in the reissued Stair Encyclopaedia volume will be by Dr Martin Hogg, who has already published what is the most significant contribution to the understanding of the Scots law of obligations since at least the work of T B Smith, and perhaps since the publication of Stair's *Institutions*. The book, entitled simply *Obligations*, was first published in 2003, and reached a second edition in 2006. Hogg devotes an initial chapter to the question, what is an obligation? The remainder of the book is concerned with the interactions between the different sources of obligation, i.e. concurrent and cumulative liability. It is by far the most sophisticated treatment yet to appear of that aspect of the law of obligations.

It should be briefly noted that it is not uncommon for the word "obligation" to be used in modern Scots law as a synonym or equivalent for the word "duty". It seems to be used in

⁵⁵ *D M Walker, Principles of Scottish Private Law*, 1st edn 1970; 4th edn 1988.

this way in, for example, the Prescription and Limitation (Scotland) Act 1973. But section 15(2) of that Act carefully provides:

“In this ... Act, unless the context otherwise requires, any reference to an obligation or to a right includes a reference to the right or, as the case may be, to the obligation (if any), correlative thereto.”

C. General contract law integrated in the law of obligations or (partly) in a separate previous chapter

As the foregoing discussion should have made clear, for those writers such as Stair, Erskine, T B Smith, David Walker and Martin Hogg, general contract law is an integrated part of the law of obligations. *Gloag & Henderson* has also maintained this approach through thirteen editions under various editorial hands from 1927 to 2012. With its single volume on Obligations within which the general law of contract is surveyed along with the law of delict and enrichment, the *Stair Memorial Encyclopaedia* ensures that this approach remains the dominant one in the exposition of the modern law as a systematic whole, the one that would be followed should (*per impossibile*) Scots private law ever be codified.

For George Joseph Bell and his follower Patrick Shaw, however, contract was the principal form of obligation, and the general law on matters such as conditions and extinction of obligation was best approached through the medium of contract law. Other sources of obligation such as quasi-contract and delict could be given separate but fairly brief consideration apart from contract. In this, as already noted, they may have been influenced by Pothier’s treatise on the law of obligations. The approach has also informed the writers of the major modern books on the law of contract, such as Gloag, Walker and W W McBryde.⁵⁶ Student texts on contract do discuss in a little more detail in their opening chapters the place of their subject within the broader fields of obligations and, indeed, private law;⁵⁷ but otherwise contract law is treated by and large as a self-supporting structure.

D. General and special law of obligations/contract law (Where are the following areas being dealt with: principle of negotiorum gestio, unjust enrichment, tort law, securities law)

The discussion in section I.A also shows that the law of delict and unjustified enrichment have always been seen as part of the law of obligations in Scotland, although quite frequently as a relatively minor part compared with contract. The characterisation of enrichment obligations as quasi-contracts was, with the notable exception of Stair, standard until late in the twentieth century, when it was first successfully challenged in articles by the late Peter Birks.⁵⁸ The tenth edition of *Gloag & Henderson*, published in 1995, changed the title of the chapter on Quasi-Contract to “Unjustified Enrichment”, and moved it from within the chapters on general contract law, to a place after the chapters on particular contracts and immediately before the chapters on the law of delict; in other words, moving it from amongst the conventional and voluntary obligations to the obediential ones. The following year the *Stair Memorial Encyclopaedia* placed what it called “Unjust Enrichment” first amongst the

⁵⁶ For *Gloag* see above note 50; see also *D M Walker*, *The Law of Contracts and Related Obligations in Scotland*, 3rd edn, 1995; *W W McBryde*, *The Law of Contract in Scotland*, 3rd edn, 2007.

⁵⁷ *G Black*, *Woolman on Contract*, 4th edn, 2010, ch 1; *H L MacQueen & J M Thomson*, *Contract Law in Scotland*, 3rd edn, 2012, ch 1.

⁵⁸ *Birks*, *Six Questions in Search of an Answer: Unjust Enrichment in a Crisis of Identity*, *Juridical Review* (JR) 1985, 227ff; *Birks*, *Restitution: A View of the Scots Law*, *Current Legal Problems* 1985, 57ff.

“Obligations imposed by law”,⁵⁹ far away from the “Voluntary Obligations” section in which contract played the major part.⁶⁰

Negotiorum gestio was always located amongst the quasi-contracts by Scottish writers until almost the end of the twentieth century. Even for Stair, it was a major example of the obediencial obligation of recompense, for him one of the two categories of enrichment-based liability. The elimination of the concept of quasi-contract has led to some uncertainty about where to place *negotiorum gestio*. The *Stair Memorial Encyclopaedia* gave the subject separate treatment after, but not as part of, its account of unjust enrichment.⁶¹ *Gloag & Henderson* initially left *negotiorum gestio* as part of the relocated and otherwise substantially rewritten chapter on unjustified enrichment. But in its eleventh edition in 2001, new chapters were created in which *negotiorum gestio* was dealt with independently after a chapter on general average and salvage.⁶² This was criticised as displaying an excess of purism, and in the two subsequent editions (2007 and 2012), *negotiorum gestio* has returned to the unjustified enrichment fold, while general average and salvage have been consigned to the chapter on carriage of goods by sea. It must be said that this is more a matter of convenience than principle. A possible way forward may be through the principle against “unjustified impoverishment” which Martin Hogg identifies as underpinning *negotiorum gestio* and some aspects of pre-contractual liability.⁶³ This idea is also apparent in general average and salvage,⁶⁴ and it may be that in future the experiment made in the eleventh edition of *Gloag & Henderson* will be renewed in different form. A final point worthy of note in this context is that the thirteenth edition of *Gloag & Henderson* takes from the DCFR the name “Benevolent Intervention” instead of *negotiorum gestio*. It is understood that this approach will also be followed in the forthcoming reissue of the Obligations title in the *Stair Memorial Encyclopaedia*. That name could extend further to cover general average and salvage; but not, it is thought, the pre-contractual expenditure cases which Dr Hogg sees as also covered by his principle against unjustified impoverishment.

Proprietary securities tend now to be dealt with in property law as an aspect of real rights, although pledge was treated as a real contract by Stair, Bankton and Erskine. Hume and Bell began the process of removing proprietary securities from a contractual setting, and this was reinforced, if not completed, in the late nineteenth century by the appearance in 1897 of the massive treatise *Rights in Security* by William Gloag and James Mercer Irvine. Dr Andrew Steven comments of this work:

“The law of real security sits upon the axis of the law of obligations and the law of property. A balanced treatment is very difficult to maintain and it is probably correct to say that the authors consider the subject more from the obligations angle. For example, with regard to pledge, lien and hypothec there is no discussion about the exact point at which the respective real rights come into existence.”⁶⁵

Consistently with this view of its predecessor the chapter entitled “Rights in Security” in the first edition of *Gloag & Henderson* appeared amongst the ones on the particular contracts,

⁵⁹ R Black (ed), *The Laws of Scotland : Stair Memorial Encyclopaedia* (henceforth SME), vol 15, paras 10ff.

⁶⁰ SME, vol 15, paras 611ff.

⁶¹ SME, vol 15, paras 87ff.

⁶² *Gloag & Henderson*, 11th edn, 2001, chs 29 and 30.

⁶³ *MA Hogg*, *Obligations*, 2nd edn 2006, ch 5.

⁶⁴ See *MacQueen & Thomson*, *Contract*, paras 1.26-27.

⁶⁵ *Steven*, *One Hundred Years of Gloag and Irvine*, JR 1997 314ff, 320.

and it was only in the eleventh edition of 2001 that this chapter was reconstituted and moved to the Property section of the book. Modern books on contract still include discussion of the security right of lien as an aspect of the self-help remedies for breach of contract.⁶⁶

Personal securities, in particular cautionary obligations, continue generally to be treated within the law of obligations when not actually treated altogether independently. So in *Gloag & Henderson* the topic receives a chapter amongst the others on particular contracts.⁶⁷ This chapter highlights the notion that the obligation is accessory to another or principal obligation; but accessoriness is no longer to be found explained as a concept within the law of obligations as a whole, important though it is also in the law of securities and assignation.⁶⁸

E. Systematic position of consumer contract law and commercial contract law (e.g. special regulations and – if existing – where regarding B2B-contracts, B2C-contracts, P2P-contracts)

Commercial and consumer law today are principally areas of United Kingdom rather than either Scots or English law. This is reflected in both being areas of law over which the legislative competence of the devolved Scottish Parliament is very largely excluded by the Scotland Act 1998.⁶⁹ Many key areas are largely governed by the quasi-codifying UK statutes first passed in the late nineteenth or early twentieth centuries – the Bills of Exchange Act 1880, the Partnership Act 1890, the Sale of Goods Act 1893 (now the Sale of Goods Act 1979 as amended) and the Marine Insurance Act 1906. The aim of these statutes was generally to produce a unified law in the United Kingdom's single market; and that is also the justification for reserving them to the legislative competence of the United Kingdom Parliament.

The picture is however complicated by the distinctiveness of certain areas in Scotland where the common law continues to play a significant role. The law of hire, or location to use the traditional terminology derived from Roman law, is one example, albeit narrowed considerably in its scope by extensive legislation in the fields of employment and leases of land. Rights in security, debt enforcement and insolvency procedures are other topics in which the common law continues to be significant, albeit often supplemented by legislation which is sometimes of a basically UK character. The fundamental differences between the Scots and English law of property, and the absence of a distinct equitable jurisdiction in the Scottish courts, make unity in these areas impossible to achieve short of the abolition of either Scots or English law altogether. On the other hand, the common law of Scotland had relatively little to offer on such matters as companies, intellectual property and, when the time came, consumers; and in all these fields what we see now is United Kingdom legislation, with a significant amount of that actually resulting from the interventions of the European Union.

In considering the systematic position of commercial and consumer law, we must first note that neither legislators nor judges have concerned themselves with the issue of overall system. The quasi-codifying statutes already referred to do not add up to a commercial code,

⁶⁶ McBryde, *Contract*, paras 20.74-20.87; MacQueen & Thomson, *Contract*, paras 5.17-5.18; Black, Woolman on *Contract*, paras 10.10-11; See generally *A J M Steven*, Pledge and Lien (2008).

⁶⁷ *Gloag & Henderson*, 12th edition, ch 17; 13th edition, ch 16.

⁶⁸ See *Gloag & Henderson*, 12th edition, para 37.04; 13th edition, para 36.04; *R Anderson*, Assignation (2008), paras 2.01-21; *Steven*, Pledge and Lien, para 4.18.

⁶⁹ Scotland Act 1998 Schedule 5 Part II Head C.

and were never intended to do so. Each stands on its own, its inter-action with the rest of the law a matter for determination in particular cases where issues arise, and not otherwise. Once again, therefore, the only place in which there is any prospect of systematic consideration of these fields is in textbooks and teaching. In Scotland what was to begin with called Mercantile Law became a distinct subject in the university law curriculum in the late nineteenth and early twentieth centuries, typically covering sale of goods, rights of security in moveables, bills of exchange, insurance, carriage, agency, partnership and companies.⁷⁰ These were also the topics covered in the first student textbook, *A Popular Handbook of the Commercial Law of Scotland*, by W D Esslemont, published first in 1911 and having three further editions, in 1915, 1929 and 1946. Esslemont's work seems to have co-existed with Allan McNeil and John Lillie's *Mercantile Law of Scotland*, first published in 1923, the coverage of which was however similar. This book, which went through five more editions up to 1965,⁷¹ was a relatively slight work intended only for students, simply treating each subject in its own right and making no attempt to systematise or explain what held them together. Much more substantial was J J Gow's *Mercantile and Industrial Law of Scotland*, which came out in 1964 as a volume complementary to T B Smith's *Short Commentary* of 1962. It covered all the ground in *McNeil & Lillie*, and added in a treatment of intellectual property and employment law. But although Gow had a much stronger vision and grasp of unifying principles, both legal and commercial, his book had only one edition, and too frequently it becomes a compilation of the relevant law under each chapter heading rather than a systematic overview. The topical rather than systematic approach has held good for more recent student texts on what is now generally known as commercial law.⁷² Scots law has not so far been able to match the remarkable *Commercial Law* produced by Sir Roy Goode south of the border.

Consumer contract law is generally treated within texts on contract or commercial law, often in dedicated chapters. Only one book-length treatment of the subject exists, Cowan Ervine's *Consumer Law in Scotland*, first published in 1995 and now in its fourth edition (2008). His approach is to "deal with the protection afforded to private consumers of goods and services",⁷³ which has a strong contractual flavour; but the book is by no means confined to contractual questions, covering also delictual and criminal liability as well as regulatory issues. Ervine excludes financial services. A more systematic view of consumer law in its private law or obligations context may be possible after the passage of the so-called

⁷⁰ Glasgow University created a lectureship in Mercantile Law in 1894 and a chair in 1919, the course being aimed primarily at accountancy students (*D M Walker*, *A History of the School of Law, the University of Glasgow*, 1990, 66). A separate course of Mercantile Law first took place in session 1908-09 in Edinburgh University. A chair of Commercial and Political Economy and Mercantile Law had existed at the university since 1871, and was declared to be a Chair in Law as well as Arts in 1879; but its holder seems to have taught no law (all information from the annual Edinburgh University Calendars from 1870 on). In an innovation seen as significant at the time, Henry Aitken KC was appointed Lecturer in Mercantile Law at Edinburgh in 1908. Aitken's course seems to have been seen initially as an alternative to the Conveyancing course for those taking the LLB degree. See further *MacQueen*, *Lawyers' Edinburgh 1908-2008*, Book of the Old Edinburgh Club 2010, 27ff, 40.

⁷¹ 2nd edn 1929; 3rd edn 1937; 4th edn 1949; 5th edn 1956; 6th edn 1965. McNeil died in 1938 and thereafter Lillie took sole responsibility for the book. He died in 1983 aged 89.

⁷² See *C B Burns and J M Quar*, *Commercial Law of Scotland*, 1st edn 1966; 2nd edn 1973; *E A Marshall*, *Scots Mercantile Law*, 1st edn 1983; 2nd edn 1992; 3rd edn 1997; *A D M Forte* (ed), *Scots Commercial Law*, 1997; *F P Davidson and L J Macgregor*, *Commercial Law in Scotland*, 1st edn 2003; 2nd edn 2008. Note also *G Black* (ed), *Business Law in Scotland*, 1st edn 2008; 2nd edn 2011, which is however aimed at accountancy and business rather than law students, and so has a wider scope to its coverage.

⁷³ *W C H Ervine*, *Consumer Law in Scotland*, 1st edn, 1995, preface.

“Consumer Bill of Rights” through the United Kingdom Parliament in the course of 2013-2014. The aim of this legislation will be to draw together all major consumer protection law in a single statute, and to make civil enforceability a much more visible element in consumer protection. It remains to be seen how much can be achieved in this way.

Contracts between two or more private persons (P2P) have received no systematic attention in Scotland.

F. Function and criteria for the creation of contract types (e.g. referring to objects such as sale, rent and/or to protective function such as distance selling)

The classical accounts of the law took the categorisation of particular contracts from Roman law, even to the extent, in Erskine’s case, of grouping them as consensual, verbal, real and written.⁷⁴ These groupings had largely disappeared by the end of the eighteenth century, but the labels of particular contracts – sale, location, custody and deposit, mandate, society - continued to be drawn from Roman law. New categories such as insurance and bills of exchange could be readily accommodated as simply new kinds of contract, often closely linked with the maritime contracts which the writings of Hume and Bell in particular show to have become extremely important in Scotland around and in the decades after 1800. Some of the unity of the old Roman categories began to fall apart after this time: most notably with the breakout of the law of master and servant from an essentially domestic to an industrial and commercial context, becoming known in the later twentieth century as employment or labour law; but also with the rise of different forms of leasing both land and goods (including the hybrid hire-purchase) and increasing amounts of protective regulation of one kind or another. But the legislation which effected this regulation continued to use the names and terms of the contracts it touched: e.g. Employment Protection Acts, Rent Acts, Hire Purchase Acts.⁷⁵

Consumer protection legislation has tended to rely less on the labelling of contracts for its names, preferring instead to rely on contexts and/or aims: trade descriptions, consumer credit, unfair contract terms, to give some of the more obvious United Kingdom examples.⁷⁶ The consumer protection laws coming from the European Union have often been even more fact-specific as to their intended goal: time shares, package holidays, distance selling, contracts concluded off business premises, electronic commerce, unfair commercial practices, to give some of the more recent examples.⁷⁷ This in part accounts for the difficulty of fitting these pieces of legislation in more general accounts, whether of consumer or of contract law.

⁷⁴ See section I.A above.

⁷⁵ See too *D Brodie*, *The Contract of Employment*, 2008, highlighting the continuing significance of the common law, especially in its contractual aspects.

⁷⁶ See the Trade Descriptions Act 1968 (now repealed); Consumer Credit Act 1974; Unfair Contract Terms Act 1977.

⁷⁷ See Council Directive (EEC) 90/314, implemented in the UK by the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288; Parliament and Council Directive (EC) 94/47, implemented by the Timeshare Act 1992 as amended by the Timeshare Regulations 1997, SI 1997/1081; Parliament and Council Directive 2000/31/EC, implemented by Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013; Parliament and Council Directive 2005/29/EC, implemented by Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277; European Parliament and Council Directive 2011/83/EU (the Consumer Rights Directive, replacing Council Directive (EEC) 85/577, and Council Directive (EC) 97/7). The substance of the two replaced directives is still implemented by, respectively, the Cancellation of Contracts made in a Consumer’s Home or Place of Work etc Regulations 2008 (SI 2008/1816), and the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334, as amended by SI 2005/689, SI 2008/1277, SI 2009/209).

G. “Guiding-model” of a contract type for the whole contract law (e.g. sales law or employment contracts). In particular, which role have continuing obligations and cooperation or “network” contracts?

T B Smith once described sale as “the master contract from which argument by analogy was frequently made”.⁷⁸ Even his use of the past tense here is misleading so far as Scots law is concerned. Although sale may provide the commonest examples used by writers and teachers in expounding contract law, it is difficult to see the subject historically as providing any sort of guiding model. Sale is not even necessarily treated first amongst the particular contracts by the earliest institutional writers. It is true that Hume, who gives no account of general contract law, begins with sale in his treatment of particular contracts;⁷⁹ but there is no real sense in his exposition, or in later chapters, that this is a “guiding model” around or upon which either the general law or the law of other forms of contract is built. Sale has gained some prominence since it was placed first amongst the particular contracts by Bell in his *Principles*, an approach followed also (from the second edition of 1933) in *Gloag & Henderson*.⁸⁰ But in Walker’s *Principles*, as already noted,⁸¹ there is no independent treatment of sale amongst the particular contracts. Books on commercial law often, but not invariably, give sale of goods a position at or very nearly at the start of the book, hinting that this is the core of commerce and commercial transactions in general;⁸² but such a pattern of exposition is by no means invariable.⁸³

The issue of long-term and “network” contracts has received no systematic attention in Scotland.

H. To what extent are the rules guided around the individual contract relationship and to what extent around guiding market behaviour (“prevention” etc.)?

Stair’s emphasis on engagement as a way in which persons exercised their fundamental right of liberty meant that for him freedom and sanctity of contract were also fundamental. “There is nothing more natural than to stand to the faith of our pactions,” he wrote.⁸⁴ In a famous aphorism he also said that “every paction produceth action”,⁸⁵ with “even *pactum corvinum de haereditate viventis* .. binding with us.”⁸⁶ The major exception to the general rule of

But these will in turn be replaced in the near future, possibly in the form of primary legislation under the “Consumer Bill of Rights”.

⁷⁸ *Smith*, Short Commentary, 297 (the context being an argument that since sale contracts were *bonae fidei*, so good faith was a general concept in the law of contract).

⁷⁹ See above, section I.B.III.

⁸⁰ In the first edition lease contracts were treated before sale of goods.

⁸¹ See section I.B.V above. Sale is dealt with in the property section of *Walker*, *Principles* (vol 3, book 5.33).

⁸² *J J Gow*, *The Mercantile and Industrial Law of Scotland*, 1964, ch 2 (following chapter on general principles of voluntary obligations); *Burns and Quar*, *Commercial Law of Scotland*, ch 2 (following chapter on contract); *Forte* (ed), *Scots Commercial Law*, ch 2 (following chapter on resolution of commercial disputes); *Davidson and Macgregor*, *Commercial Law in Scotland*, ch 1.

⁸³ *Lillie*, *Mercantile Law*, ch 4 (after chapters on contract, agency, rights in security over moveables); *Marshall*, *Scots Mercantile Law*, ch 4 (after chapters on agency, partnership and companies); *Black* (ed), *Business Law in Scotland*, ch 5 (after chapters on sources of law, structure of legal system, business regulation and contract law).

⁸⁴ *Stair*, *Institutions*, I,1,21.

⁸⁵ *Stair*, *Institutions*, I,10,7.

⁸⁶ *Stair*, *Institutions*, I,10,8. A *pactum corvinum de haereditate viventis* is a “crow-like” bargain about the inheritance of a still-living person.

enforceability was the *pactum de quota litis*.⁸⁷ Stair also minimised the role of requirements of form to be found in Scots law.⁸⁸ Only if a contract was impossible or illegal, or if a party was incapable, compelled by another, or made an error about the “substantials” of the agreement, might it be struck down.⁸⁹ Fraud and extortion were wrongs which gave rise to the obediential obligation of reparation, which could be set off against the obligations arising under any resultant contract rather than striking it down.⁹⁰ There was no doctrine of equality of exchange beyond what the parties agreed, although there might be abatement of price for the latent insufficiency of goods sold, and penalty or similar clauses “ought to be and are reduced to the just interest, whatever the parties’ agreement be”.⁹¹ Innominate contracts were enforceable, the “only profitable distinction” from nominate contracts being that “in all contracts, not only that which is expressed must be performed, but that which is necessarily consequent and implied; but in nominate contracts, law hath determined these implications.”⁹²

Erskine took a similar line: “By our law all contracts, even innominate, are equally obligatory on both parties from the date, so that neither party can resale.”⁹³ Hume too rejected Romanist distinctions between nominate and innominate contracts: “These distinctions are all done away with us.”⁹⁴ There was some emergence in the later eighteenth and early nineteenth centuries of an idea that freedom and sanctity of contract, being themselves based on public policy (rather than the free will which Stair had predicated), must yield to weightier concerns of the same public policy, for example in the preservation of an individual’s freedom to trade or practise a profession.⁹⁵ But this was balanced by an increasingly restrictive approach to fraud and error as grounds for escaping from a contract,⁹⁶ and in general Scots common law has shared its English counterpart’s aversion to playing a regulatory role over contractual freedom.⁹⁷ It has usually needed legislation to achieve protection for employees, consumers and other potentially disadvantaged contracting parties.

II. Topic: Supranational Law and National Legislation

A. Orientation at international bodies of regulation (e.g. CISG, Unidroit, PECL)?

The United Kingdom has not so far ratified the Vienna Convention on the International Sale of Goods 1980, which thus forms no part of the law in Scotland (or in England & Wales, or

⁸⁷ *Stair*, Institutions, I,10,8.

⁸⁸ *Stair*, Institutions, I,10,9 and 11.

⁸⁹ *Stair*, Institutions, I,10,13.

⁹⁰ *Stair*, Institutions, I,9,8-14.

⁹¹ *Stair*, Institutions, I,10,14-15.

⁹² *Stair*, Institutions, I,10,12.

⁹³ *Erskine*, Institute, III,1,35.

⁹⁴ *Hume*, Lectures, vol 2, 277. Contracts which were both innominate *and* unusual were subject to some constraints of proof until the relevant rule was abolished by the Requirements of Writing (Scotland) Act 1995 s 11. See for an account of the pre-1995 law *W W McBryde*, *The Law of Contract in Scotland*, 1st edn, 1987, paras 27.22-24. For a subsequent deployment of the concept of an innominate contract in relation to software licences, see *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd* 1996 SLT 604.

⁹⁵ *McBryde*, *Contract*, paras 19.06-13; Stein, *The General Notions of Contract and Property in Eighteenth Century Scottish Thought*, JR 1963, 1ff.

⁹⁶ See *McBryde*, *Contract*, paras 1.19-20, chs 14 and 15; *D Reid*, *Fraud in Scots Private Law*, Edinburgh University PhD thesis, 2012.

⁹⁷ *Thomson*, *Judicial Control of Unfair Terms*, in *K Reid/R Zimmermann* (eds), *A History of Private Law in Scotland*, 2000, vol 2, ch 6.

Northern Ireland). Proposals for ratification have always foundered on the steadfast opposition of City of London interests. Over the years, there have been calls from other quarters in the United Kingdom for ratification of the CISG. As the Scottish Law Commission commented in its 1993 Report on Formation of Contracts:

“The Scottish Law Commission, when consulted as part of the consultation exercises carried out by the Department of Trade in 1980 and by the Department of Trade and Industry in 1989, recommended that the United Kingdom should become a party to the Convention. The English Law Commission has also given a favourable response.”⁹⁸

The Scottish Law Commission saw “obvious advantages for Scottish traders, lawyers and arbiters in having our internal law the same as the law which is now widely applied throughout the world in relation to contracts for the international sale of goods”.⁹⁹ In the absence of ratification, the Commission therefore considered whether the more general rules on contract formation in the CISG could be adopted as part of the general law of Scotland on the formation of contracts. The resultant recommendation, that this should be done, remains unimplemented despite generally favourable reactions from the Scottish legal community at the time.

There continues to be interest in Scotland in Article 93 CISG, which provides:

“(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this convention is to extend to all its territorial units or only to one or more of them.”

The question of interpretation which may arise is whether, given that the Sale of Goods Act 1979 is largely a UK measure, the relatively few distinctly Scottish provisions in the legislation, plus the differences in the common laws of contract which the 1979 Act allows to continue, would be enough to make Scotland a territorial unit within which there exists a sale of goods law different from that of the rest of the United Kingdom so that Article 93 could be applied.

The Unidroit Principles of International Commercial Contracts and the Lando Principles of European Contract Law (PECL) are referred to in textbooks, but have so far not been cited at all in the Scottish courts.¹⁰⁰ Since the beginning of 2010, however, the Scottish Law Commission has been engaged in a review of contract law in the light of the Draft Common Frame of Reference. The Commission’s Eighth Programme of Law Reform states:

⁹⁸ Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods (Scot Law Com No 144: 1993), para 1.7. See also *Forte* The UN CISG: Reason and Unreason in the UK, Baltimore LR 1996-7, 51ff.

⁹⁹ Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods (Scot Law Com No 144: 1993), para 1.7.

¹⁰⁰ See *McBryde*, Contract, and *MacQueen & Thomson*, Contract, both passim. There has been little reference in the English courts either, the one notable example being provided by the House of Lords in *Director-General of Fair Trading v First National Bank* [2002] 1 AC 481 (where however the court did not find the PECL of much assistance in determining the meaning of good faith in the Unfair Terms in Consumer Contracts etc Regulations 1999, which implements the Unfair Terms Directive in the UK).

“We propose to review the law of contract in the light of the publication in 2009 of the Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law (the DCFR). The DCFR provides a contemporary statement of contract law, based on comparative research from across the European Union and written in accessible and non-archaic English. The DCFR has a considerable amount to offer in the law reform process. It may be seen as an instrument to provide an important area of Scots law with a systematic health check, giving a basis for treatment where the law is found to be ailing or otherwise in need of remedial treatment. The DCFR is at least a good working platform for a series of discrete and relatively limited projects on contract law, akin in some ways to our work on trusts and having significance for the well-being of the Scottish economy.”¹⁰¹

The first phase of the Commission’s work in this project has been a return to four unimplemented Reports on contract law, published in the 1990s. These dealt with the topics of formation, interpretation, remedies for breach of contract and penalty clauses. In all of them reference was made to the Unidroit Principles and the PECL. The Commission has so far published two Discussion Papers, on interpretation and formation,¹⁰² and work is now proceeding on remedies for breach of contract, including penalty clauses. These Discussion Papers refer in detail, not only to the DCFR, but also to the Unidroit Principles and the PECL. The same method will be followed in the Discussion Paper on remedies for breach. Reports on all the Discussion Papers may be anticipated by late 2014, which will perhaps reveal the extent to which the DCFR and its predecessors may have an influence on the future development of contract law in Scotland.

The Discussion Paper on formation of contract also referred in detail to the European Commission Proposal for a Common European Sales Law (CESL),¹⁰³ since its rules on formation constituted a refinement in some respects of those in the DCFR. It is less likely that the CESL rules on breach will be used in the same manner, since they are more geared towards sale than to contract law in general. The Scottish and English Law Commission have also published a critical analysis of the CESL proposal as an “Advice to the United Kingdom Government” on the subject, which appeared just a month after the Proposal itself.¹⁰⁴ This argued that the most significant problem to be addressed from a single market perspective was that of on-line consumer contracting, and suggested that the proposal should be re-worked to tackle the issue more directly. The Advice was doubtful about the likely take-up in the business-to-business context; but it recommended that if the CESL were to come into force, the UK Government should make it available for domestic as well as cross-border transactions and should not insist in the B2B context that one of the parties must be a small or medium-sized enterprise (SME). The United Kingdom Government came out against the CESL proposal on 13 November 2012.¹⁰⁵ City of London interests are as resolutely opposed

¹⁰¹ Scottish Law Commission, Eighth Programme of Law Reform (Scot Law Com No 220, 2010), para 2.16.

¹⁰² Discussion Paper No 147 on Interpretation of Contract (2011); Discussion Paper No 154 on Formation of Contract (2012).

¹⁰³ Brussels, 11 October 2011, COM(2011) 635 final..

¹⁰⁴ Law Commission and Scottish Law Commission, An Optional Common European Sales Law: Advantages and Problems; Advice to the UK Government, published only online at <http://www.scotlawcom.gov.uk/news/advice-on-european-sales-law> (10 November 2011).

¹⁰⁵ For the UK Government response see <https://consult.justice.gov.uk/digital-communications/common-european-sales-law>. Note the summary of Scottish views at paras 23 and 24.

to it as they have been to the CISG, but again the view emerging from Scotland has been more nuanced.¹⁰⁶

The Scottish Law Commission has made use of the DCFR in projects on moveable security, trusts and positive prescription as well as contract law. In its joint work with the English Law Commission on insurance, use has also been made of the Principles of European Insurance Contract Law.¹⁰⁷

One side-effect of the Scottish Law Commission work with the DCFR and associated instruments is a gradually growing awareness of them in the Scottish legal profession. This has been reflected in at least one case currently before the courts in Scotland, *Lloyds TSB Foundation v Lloyds Banking Group*.¹⁰⁸ Space precludes any detailed treatment, but one important issue in the case is whether Scots contract law has any general rule on change of circumstances allowing the court to modify the terms of a contract.¹⁰⁹ The answer so far has been a clear negative, but the case is now subject to an appeal to the UK Supreme Court due to be heard on 27 and 28 November 2012. At the level below, the First Division of the Inner House of the Court of Session, counsel for the party in whose interest it would be to invoke a change of circumstances doctrine pointed the court to the proposal for such a rule in European contract law based upon its existence in other systems of contract law in the European Union. The court invoked the work of the Scottish Law Commission in its comments:

“We were referred to a Feasibility Study (dated 3 May 2011) by the Commission Expert Group on European Contract Law on a possible Future Instrument in European Contract Law. This includes an article (Article 92) on obligations and remedies of the parties to a sales contract which provides for a situation in which performance of an obligation under such a contract has become excessively onerous because of an exceptional change of circumstances. This proposal, which appears to relate only to contracts of sale, is not uncontroversial. The Scottish Law Commission has responded with the observation that it is "not convinced of the utility of Article 92". The Commission noted that, "there is no doctrine of equitable adjustment in Scots law to deal with change of circumstances, as distinct from the law of frustration". While it appears that certain European jurisdictions do have some form of equitable adjustment of contracts, there is, as yet, no foundation for it, as a generality, in Scots law. It would be beyond the proper scope of judicial power to develop it in any way which would assist the respondent in this case.”¹¹⁰

¹⁰⁶ See the position paper on the proposed CESL by the Council of Bars and Law Societies of Europe dated 07.09.2012 and accessible at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/07092012_EN_CCBE_Pos1_1347546312.pdf. It reveals divisions of opinion between the English and Northern Irish professional bodies, on the one hand, and the Scottish ones, on the other.

¹⁰⁷ See Report on Prescription and Title to Moveable Property (Scot Law Com No 228: 2012); Scottish Law Commission Discussion Paper No 148 on Supplementary and Miscellaneous Issues relating to Trust Law (2011); Scottish Law Commission Discussion Paper No 151 on Moveable Transactions (2011); and Law Commission and Scottish Law Commission Joint Consultation Paper on Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties (LCCP 204/SLCDP 155: 2012).

¹⁰⁸ [2011] CSIH 87, 2012 SC 259; reversing the Lord Ordinary (Glennie) at [2011] CSOH 105, 2012 SLT 13.

¹⁰⁹ See further Gillian Black's contribution to this volume.

¹¹⁰ [2011] CSIH 87, 2012 SC 259, para 29.

While then the appeal to European comparisons and developments was unsuccessful in this instance, it was not dismissed out of hand as inappropriate for consideration by a Scottish court. Rather, the finding was that the particular development required for Scots law to recognise any doctrine of change of circumstances was for the legislature rather than the court.¹¹¹

B. Transfer of directives within the law code?

European Union Directives are generally transposed into law in the United Kingdom by way of Regulations made under the European Communities Act 1972 (the legislation under which the Westminster Parliament authorised the United Kingdom's membership of what was then the European Communities from 1 January 1973). While this may involve amendment of existing primary legislation – for example, of the Sale of Goods Act 1979 as a result of the Consumer Sales Directive 1999, or of the Timeshare Act 1992¹¹² as a result of the Timeshare Directive 1994 – the more usual form is for the Regulations to be “stand-alone”, and for the integration of the new rules with the old to be left to lawyers and courts to work out for themselves should any questions arise. Thus for example the Package Travel, Package Holidays and Package Tours Regulations 1992 implement Council Directive (EEC) 90/314 and the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008 and the Consumer Protection (Distance Selling) Regulations 2000 as amended implement respectively Council Directive (EEC) 85/577 and Council Directive (EC) 97/7. These Directives have in their turn now been replaced by European Parliament and Council Directive 2011/83/EU (the Consumer Rights Directive), and in due course therefore the Regulations will be replaced by new legislation, possibly embodied in the Consumer Bill of Rights promised for 2013.

The approach is to be explained by the concern which arose after the *Francovich* decision of the European Court of Justice in the mid-1990s,¹¹³ under which a Member State may be found liable in damages to an individual who has suffered loss or damage as a result of the Member State's failure to transpose a sufficiently clear and unconditional Directive into domestic law. This led in the United Kingdom to the practice of “copy out”; that is, the practice of simply transliterating the text of Directives into domestic legal form, resisting the “gold plating” of rewriting them so as to produce a harmonious match of domestic and European rules.

The approach can lead to messiness. The prime examples are the co-existence of two regimes on unfair contract terms: one being the Unfair Contract Terms Act 1977 and the other the Unfair Terms in Consumer Contracts Regulations 1999 implementing Council Directive (EC) 93/13. But the amendment of the Sale of Goods Act 1979 as a result of the Consumer Sales Directive left the consumer buyer of faulty goods with two ways of terminating the contract of sale, either within a short period after the sale or following the failure of the seller to repair or replace the goods. The messiness does not seem to have led

¹¹¹ On the limited use made of comparative law by the Scottish courts see *MacQueen*, *Mixing It? Comparative Law in the Scottish Courts*, *European Review of Private Law* 2003, 735ff.

¹¹² By the Timeshare Regulations 1997, SI 1997/1081.

¹¹³ C6/90 *Francovich v Italy* [1991] ECR I-5357.

to serious issues in any reported litigation, but it is not clear how it may have affected the advice which lawyers have given to prospective clients, whether consumers or traders.¹¹⁴

The absurdities thus produced are of course anathema to the souls of Law Commissioners, and the Scottish and English Commissions have jointly made efforts to remove the present anomalies in both consumer remedies and unfair terms law.¹¹⁵ It is hoped that the expected Consumer Bill of Rights will end at least these two difficulties more or less along the lines recommended by the Commissions. But it is significant that in so far as these may involve “gold plating” they have already been the subject of criticism in consultation and published comment.¹¹⁶

C. Frequent extended “voluntary” transfer in contract law?

“Voluntary” transfer of concepts from other systems into the Scots law of obligations and contracts is not really a characteristic of the modern system. This is well illustrated by the reluctance of the First Division of the Court of Session to contemplate a general doctrine of change of circumstances in *Lloyds TSB Foundation v Lloyds Banking Group*,¹¹⁷ even although such a doctrine existed in other legal systems in the European Union. Also important, although not stated, was the fact that no such doctrine is recognised in the English law of contract. Had the court been invited to recognise as part of Scots law a doctrine that already formed part of English law the outcome might have been different. So in another recent case, the First Division accepted with little discussion that the English doctrine of “knowing receipt” formed part of the Scots law of fiduciary obligations of restitution.¹¹⁸ Such uncritical borrowing from English law has long been familiar in Scots contract law. Examples are however comparatively few and date mostly from the nineteenth century: undue influence, misrepresentation, repudiation and anticipatory breach, and frustration are probably the main ones. Native concepts originally of relatively broad scope have also been restricted because of their apparent difference from English law: examples include fraud, third party rights, and the limitation of specific implement as an entitlement of a contracting party.

A paradoxical example of conceptual transfer is provided by the concept of good faith in contract law. It is arguable that such a concept once informed the Scots law of obligations, perhaps more in the refusal to allow bad faith to succeed than in the imposition of obligations to behave in good faith, but deploying objective standards of behaviour nonetheless.¹¹⁹ By the end of the nineteenth century, even this concept had faded in the face of ideals of *laissez faire*, freedom and sanctity of contract. But the European Union’s contract law Directives

¹¹⁴ See for example *Douglas v Glenvarigill Co Ltd* [2010] CSOH 14, 2010 SLT 634.

¹¹⁵ Report on Unfair Terms in Contracts (Law Com No 292; Scot Law Com No 199: 2005); Law Commission and Scottish Law Commission Joint Issues Paper, Unfair Terms in Consumer Contracts: a New Approach? (2012).

¹¹⁶ See e.g. *Waters*, Implementing the Unfair Terms Directive in Accessible Language: an Impossible Challenge?, *Journal of International Banking and Financial Law* 2012, 605ff; *Macdonald*, The ‘Core Exemption’ from the Fairness Test in Unfair Terms Legislation, *Journal of Contract Law* 2012, 000ff. The Law Commissions expect to report on the issues in the spring of 2013.

¹¹⁷ *Lloyds TSB Foundation v Lloyds Banking Group* [2011] CSIH 87, 2012 SC 259. See above, section II.B.

¹¹⁸ *Commonwealth Oil & Gas Co v Baxter* [2009] CSIH 75, 2010 SC 156; criticised by *Carr*, Equity Rising? *Edin LR* 2010, 273ff; *Whitty*, The ‘No Profit from Fraud’ Rule and the ‘Knowing Receipt’ Muddle, *Edin LR* 2013, 000ff.

¹¹⁹ See *McBryde*, Contract, paras 17.23-34 and further references there given.

brought the concept of good faith back into focus, notably but not exclusively in the Unfair Terms Directive. In a Scottish House of Lords case in 1997 the court referred to “the broad principle in the field of contract law of fair dealing in good faith” when striking down a guarantee of the business debts to a bank of the guarantor’s spouse.¹²⁰ The apparent breadth of this decision has since been severely restricted by the Scottish courts,¹²¹ and it has not been allowed to escape from the law of guarantees (cautionary obligations) into the rest of contract law. But what is worth noting is that the original House of Lords decision was not inspired by the arrival of good faith from the Continent so much as by the need to find some way to bring Scots law into line with the position reached by the House for English law in a decision some three years before the Scottish one.¹²² The English decision had however been based on the equitable doctrine of constructive notice to which there was no readily available equivalent in Scots law – hence the reaching for the concept of good faith. At the same time it should also be noted that the Scottish courts have resisted acceptance of the English courts’ elaboration of very specific rules on the steps to be followed by a bank in dealing with a potential guarantor who might be subjected to improper pressure from the debtor.¹²³ In this, at least, the Scottish courts have adhered to a tradition of looking at the overall fairness of a relationship rather than trying to regulate it in detail.

D. If 2. and/or 3. apply: Influence of this transfer on special areas and/or structure of the whole law code?

Again, this question is not really meaningful in the context of a non-codal system. As already noted, the messiness does not seem to have led to serious issues in any reported litigation.

¹²⁰ *Smith v Bank of Scotland* 1997 SC (HL) 111.

¹²¹ See in particular *Royal Bank of Scotland v Wilson* 2004 SC 153.

¹²² *Barclays Bank v O’Brien* [1994] 1 AC 180.

¹²³ See *Clydesdale Bank v Black* 2002 SC 555, not following *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773.

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