

SCOTTISH LAW COMMISSION
(Scot Law Com No 160)

Report on Interpretation in Private Law

Laid before Parliament by the Lord Advocate under section 3(1)(e) of the Law Commissions Act 1965

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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SCOTTISH LAW COMMISSION

Item No 3 of our Fifth Programme of Law Reform

Report on Interpretation in Private Law

To: The Rt Hon the Lord Hardie of Blackford, QC

Her Majesty's Advocate

We have the honour to submit a Report on Interpretation in Private Law.

(Signed) BRIAN GILL, *Chairman*

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J G S MACLEAN, *Secretary*

5 August 1997

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Part I Introduction

Purposes of report

1.1 The main purpose of this report is to reform the law on the use of extrinsic evidence in the interpretation of writings. An incidental, but essential, purpose is a restatement and clarification of some of the more important rules on the interpretation of expressions used in private law contexts. The second objective is essential because the rules on the admissibility of extrinsic evidence cannot be reformed in a safe and satisfactory way unless the major substantive rules on interpretation are themselves as clear as possible. The question whether there are good reasons for restrictions on the admissibility of evidence can be assessed only when it is known what would be regarded as irrelevant, and hence inadmissible anyway, in the absence of any special restrictions.

The need for reform

1.2 The existing law on the use of extrinsic evidence in the interpretation of writings is notoriously complicated.¹ The basic rule that extrinsic evidence is inadmissible is subject to so many overlapping exceptions that it almost ceases to exist as a general rule. The law on this subject is confused, unsatisfactory and in need of reform.²

1.3 It would be technically possible to confine reform to a short and simple Bill abolishing the existing restrictive rules on the admissibility of extrinsic evidence for purposes of interpretation. However, there would be a risk in doing this. Many problems in the substantive law on interpretation are masked at present by the restrictive evidential rules. If statutory reform were confined to the law of evidence there would be a danger of looseness and uncertainty at least in an interim period until the courts had had an opportunity to clarify and strengthen the substantive law. That is why we think that there is also a need for a statutory clarification and strengthening of the substantive law at this time.

Scope of report

1.4 The report deals with the interpretation of expressions actually used by parties, in whatever medium, in contracts, conveyances, wills and other juridical acts.

1.5 *Interpretation and application.* There is a distinction between interpretation and application which is particularly important in relation to the relevance of subsequent events and conduct.³ Interpretation is the process of deciding what an expression means. As we will see later, subsequent conduct is in general irrelevant to that process. Application is the process of applying the accepted or determined meaning to the facts. Subsequent events and conduct may be highly relevant to that process. Many ordinary contracts fall to be applied to fact situations which vary over time and which may depend on the conduct of

¹ See Walker and Walker, *Evidence*, Chap XXI.

² See Part 8.

³ See *Hiram Walker & Sons Inc v The Drambuie Liqueur Co* 1997 GWD 7-261.

one of the parties. For example, a person may be obliged to pay wages at so much per hour for work done. Or a party to a contract with a bank or building society may be obliged to pay interest at a rate to be determined by the bank or building society from time to time. Or a person may be obliged to furnish goods in quantities to be ordered by the other party to the contract from time to time. In all of these cases the interpretation of the contract may be straightforward. Its meaning may be perfectly clear from the beginning. But its application will depend on subsequent conduct. Many other similar examples could be given.

1.6 *Interpretation and implied terms.* The report is concerned with the interpretation of terms, not the implication of terms. Some of the Scottish Institutional writers⁴ and some civil codes⁵ have rules on the implication of terms in the middle of rules on interpretation. However, the implication of terms is a different matter from the interpretation of terms and is not covered in this report.

1.7 *Expressions.* The report deals with "expressions" rather than "words" because questions may arise as to the interpretation of signs, figures or symbols of various kinds.

1.8 *Importance of what parties said.* The report is concerned with the interpretation of expressions actually used by parties as part of the juridical act in question. Pleaders have sometimes attempted to ignore the expressions used and to lead evidence of general underlying intention.⁶ Such attempts have been stoutly resisted by the courts.

"The question to be answered always is, "What is the meaning of what the parties have said?" not, "What did the parties mean to say?"⁷

"It [is] important to distinguish between an overall view of what would be sensible, and what, when looking at specific words in an existing provision, is a sensible interpretation of those words."⁸

In this report we are concerned only with the meaning to be attributed to expressions actually forming part of the juridical act in question. We are not concerned with the meaning which a party might have wished to express but did not.

1.9 *Medium does not matter.* The report deals with the interpretation of expressions whatever the medium in which they are made or recorded. It is not confined to writings. Most reported cases on interpretation have been concerned with writings, for fairly obvious reasons. However, there have been exceptions.⁹ It would, in our view, be wrong to have one set of rules on the interpretation of written expressions and another set of rules on the interpretation of other expressions. Many contracts are entered into orally. Often they are entered into by telephone and the expressions used by the parties are recorded. Technological advances in the area of electronic data interchange make rules of interpretation which are restricted to writing old-fashioned and inappropriate to present and likely future conditions.

⁴ See Bankton, *Institute* I.11.55 rule 10 - "all deeds imply the obligations incident by law to such kind of contracts, tho' nothing of them is mentioned therein"; Bell *Principles* (4th edn, 1834) 205 rule 6 - "in the several contracts, sale, location, &c. the naturalia of the particular contract are tacitly part of the agreement".

⁵ See eg French Civil Code, art 1160.

⁶ See eg *Cowan v Magistrates of Edinburgh* (1887) 14R 682.

⁷ *Wickman Machine Tool Sales Ltd v Schuler A.G.* [1974] AC 235 by Lord Simon of Glaisdale at 263.

⁸ *Muir Construction Ltd v Hambly Ltd* 1990 SLT 830 by Lord Prosser at 833.

⁹ See eg *Muirhead & Turnbull v Dickson* (1905) 7F 686.

1.10 *Juridical acts.* The report deals with expressions used in contracts, conveyances, wills and other similar private law contexts. It is convenient to have a term to cover all the cases with which we are concerned. We cannot use "deeds" as that is, in normal legal usage, confined to writings. We will refer therefore to "juridical acts", by which we mean any act of the will or intention (other than a legislative or judicial act) which has, or is intended to have, a legal effect.¹⁰ A juridical act will include a contract; a grant, assignation or renunciation of a right; a discharge of an obligation; a conveyance of property; a declaration of trust; a will or other testamentary deed; a grant of consent to what would otherwise be an invasion of a legal right; a notice required by law for any purpose; and an acceptance of office as an arbiter, trustee or guardian. We are concerned only with acts which contain expressions capable of interpretation. We are not concerned with purely factual or physical acts. We exclude legislative acts¹¹ from the term "juridical act" because special considerations, and to some extent, special rules of interpretation apply to legislative acts.¹² We also exclude judicial acts¹³ because the interpretation of court judgments may also involve special considerations.¹⁴ We are not here concerned with questions of validity or effectiveness. Juridical acts may be invalid for various reasons, formal or substantial. Rules of law governing particular juridical acts may require something additional, such as delivery or registration or possession, before they will be effective. These are separate questions. Here we are concerned only with interpretation.

1.11 Because the term "juridical act" is not such a familiar term of art in Scottish law as, say, "contract" or "delict" we think that it should be defined in the legislation on interpretation.¹⁵

Policy considerations

1.12 Four main policy considerations underlie our recommendations.

1. The same rules of interpretation ought to apply, unless there is good reason to the contrary, whatever the nature of the juridical act and whatever the medium used.
2. The rules of the substantive law on interpretation ought to be such that it is possible to determine what facts and circumstances the interpreter can properly take into consideration, whether the interpreter is or is not a court.
3. Third parties ought not to be affected by secret meanings attached to expressions in juridical acts.

¹⁰ The French term is "*acte juridique*". Sometimes this idea is expressed in English by "legal transaction". See eg the Age of Legal Capacity (Scotland) Act 1991 ss 1 and 9. However, the word "transaction" has to be artificially extended if it is to cover unilateral acts.

¹¹ Including acts of subordinate legislation.

¹² Eg the rule that recourse can be had to the Parliamentary debates in certain circumstances. See *Pepper v Hart* [1993] AC 593.

¹³ We use the word "acts" in a broad and non-technical sense here and not, for example, in the technical sense in which it is used in the expression "Acts and Decrees".

¹⁴ We intend, however, acts of arbiters to be within the proposed rules. There is no reason why the rules of interpretation we recommend later should not apply to acts of arbiters. The draft Bill makes this clear. See clause 3.

¹⁵ See the Draft Bill, clause 3.

4. Relevant evidence should be admissible and irrelevant evidence should be inadmissible.

1.13 If effect can be given to these policy considerations in an acceptable manner then the result will, we believe, be a more principled and efficient set of rules both on interpretation as a matter of substantive law and on the admissibility of evidence.

1.14 A more general background policy consideration is the desirability of developing Scottish private law in a coherent way. We are enjoined by the Law Commissions Act 1965 to keep the law under review "with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies ... and generally the simplification and modernisation of the law".¹⁶ The proposals made in this paper form part of that review. They are consistent with the recommendations made in other reports, including in particular our reports on the *Formation of Contract*¹⁷ and on *Three Bad Rules in Contract Law*.¹⁸

Comparative law

1.15 *Different approaches.* The interpretation of juridical acts is, on the surface of things, one of the fault lines between civilian systems and systems heavily influenced by English law. In the development of Roman law there appears to have been a progression from an objective to a more subjective approach to interpretation.¹⁹ In the early Roman law the emphasis was on outward form. In the Byzantine period the emphasis was more on subjective intention. In the intervening classical period there was something of a "happy equilibrium" between the two approaches.²⁰ The writers who influenced the content of the major European civil codes placed the emphasis on the actual will, in accordance with the theory which was then dominant.²¹ This emphasis found its way into, and is still apparent in, a number of civil codes.²² By contrast English law has, at least since the early nineteenth century, placed the emphasis on the ordinary, objectively determined meaning of the words used and has discouraged attempts to seek actual intention.²³

1.16 The earlier Scottish Institutional writers used civilian sources extensively²⁴ but, with the exception of Kames,²⁵ adopted a balanced rather than an excessively subjective

¹⁶ Section 3(1).

¹⁷ Scot Law Com No 144 (1993) (not yet implemented).

¹⁸ Scot Law Com No 152 (1996) (implemented by the Contract (Scotland) Act 1997).

¹⁹ See Kaser, *Roman Private Law* (Dannenbring's translation, 2d edn) § 8, I; Pringsheim, "Animus in Roman Law" (1933) 49 LQR 43 and 379.

²⁰ See Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 634.

²¹ Pothier's first rule of interpretation was that the interpreter should consider the general intention of the contracting parties rather than follow the literal meaning of the words. §91. The German Pandectists adopted a similar approach. See Kaser, cited above.

²² See eg the French Civil Code, art 1156; the German BGB, § 133; the Italian Civil Code, art 1362.

²³ The classic statement is by Lord Wensleydale in *Grey v Pearson* (1857) 6 HL Cas 61 at 106 - "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument ...".

²⁴ See Stair, *Institutions* IV. 42. 20 and 21; Bankton, *Institute* I. 11. 53-61; IV.45.15; IV.45.25-30; Erskine, *Institute* III.3.87.

²⁵ Kames is pure subjectivity. Equity "endeavours to reach will, which is the substantial part; and if, from the end and purpose of the engagement, from collateral circumstances, or from other satisfying evidence, will can be ascertained, it is justly made the rule, however it may differ from the words". *Principles of Equity*, (1825 edn) 133.

approach.²⁶ Since the early nineteenth century the Scottish approach has been similar to the English, and English cases on interpretation have been freely cited in Scottish textbooks.²⁷

1.17 *Differences should not be exaggerated.* Appearances can, however, be deceptive and it is probable that there is less of a difference in the two approaches, as they actually operate, than might appear from a superficial reading of isolated provisions of the codes and isolated judicial statements.

1.18 The provisions on interpretation in certain civil codes are not so subjective as they might appear at first sight. Some of them apply only to contracts, where there is more room for an approach based on common intention. Even there, the common intention of the parties is not the same as their individual subjective intentions. And the apparently subjective initial provisions are supplemented by other, more objective, provisions.²⁸ It is well recognised in civilian systems that there often is no ascertainable common intention of the parties to a contract; that judges cannot be allowed, under the guise of interpretation, to rewrite a juridical act; and that the interests of those who rely on the apparent content of a juridical act cannot simply be ignored.²⁹ Modern German law, for example,

"tends to follow a more objective, or normative, approach; the emphasis is not so much on what a party may have meant, but on how a reasonable man would have understood his declaration. There is no room for an inquiry into the 'true intention' of the parties if the justifiable reliance of the addressee deserves protection."³⁰

1.19 On the other hand it is well recognised in English law, and in the systems which have been heavily influenced by it, that there are cases where it would be absurd to ignore a special meaning which the parties to a contract had attached, by mutual agreement, to an expression; or to ignore the apparent actual intention of a testator where there was no other way of resolving an ambiguity as to the identity of a legatee; or to ignore the context of an expression or the circumstances surrounding the making of a juridical act. It is most certainly not the case that the literal meaning of an expression is always followed.

1.20 The truth is that there is a tension, inherent in the very nature of the interpretative process, between the objective and the subjective approaches. The lesson to be drawn from

²⁶ Stair, for example, gives the following as his fourth and fifth rules of interpretation (IV.42.21.)

"Fourthly, *Plus valet quod agitur, quam quod simulate concipitur*: more respect is to be had to what appears by the writ, to have been the interest and design of the parties, than to what the style appears. (Underlining added.)

Fifthly, *In claris non est locus conjecturis*. This is a correctory to the former rules, that judges may not arbitrarily interpret writs, or give them a sense inconsistent with their clear words."

Bankton states the first rule of interpretation as being that "In interpretation of writings, the Intention of the parties, express or implied, must be the rule." (IV.45.50) But he then comments immediately that "The first rule of interpretation is the express tenor of the deed, and the intention of parties thence appearing". (Underlining added.)

²⁷ This was already apparent in Bell's *Principles* (4th edn 1839). For the influence of English law on South African law in this area, see Lewis, "Interpretation of Contracts" in *Southern Cross: Civil Law and Common Law in South Africa* (Zimmermann and Visser, eds) at 195.

²⁸ See eg French Civil Code, arts 1158-1162; Italian Civil Code, arts 1363, 1366-1371; German BGB, § 157. There is a particularly interesting discussion of the subjective and objective approaches in Italian law in Criscuoli and Pugsley, *Italian Law of Contract*, 145-151.

²⁹ See Marty & Raynaud, II, *Les Obligations*, para 218; Mazeaud, *Leçons de Droit Civil; Successions, Liberalités* (2nd edn) 282; Cohn, *Manual of German Law* (2nd edn) 82; Zimmermann, *The Law of Obligations*, cited above, 636-637; Criscuoli and Pugsley, *Italian Law of Contract*, 148.

³⁰ Zimmermann, *The Law of Obligations* (cited above) 636. See also Horn, Kötz and Leser, *German Private and Commercial Law* (transl by Weir) 75-76.

comparative law is that a pragmatic way has to be found to accommodate this tension, so that the law can operate fairly and predictably.

1.21 *Rules of preference for cases of doubt.* Most European countries make use of rules of preference or canons of construction many of which are derived, ultimately, from Justinian's Digest. Paradoxically, more use seems to be made of these rules of preference in English and Scottish law than in some more heavily civilian countries.³¹

1.22 *International instruments.* In the preparation of this report we have found the relevant provisions from the Unidroit *Principles of International Contracts*, and from the United Nations *Convention on Contracts for the International Sale of Goods* particularly useful.

Consultation

1.23 We published a discussion paper on *Interpretation in Private Law* in August 1996.³² We are grateful to those who submitted comments on it.³³ We are also grateful to the members of our advisory group on contract law who considered a preliminary draft of the discussion paper and gave us the benefit of their experience and advice.³⁴ At no stage, either in the advisory group's discussion or in subsequent consultation, did anyone seek to defend the existing rules on the admissibility of extrinsic evidence in the interpretation of juridical acts. A few commentators on the discussion paper doubted the need for, or potential utility of, a full statutory restatement of the rules on interpretation.³⁵ Others, including the Faculty of Advocates, the Law Society of Scotland and academic commentators, welcomed the proposed rules and the approach of the discussion paper.

General assessment

1.24 We have carefully considered the views expressed on consultation. We are fortified in the view that the existing law on the admissibility of extrinsic evidence in the interpretation of juridical acts is badly in need of reform. We remain of the view that the best way of reforming it is to clarify the core rules of the substantive law on interpretation so as to make it clear what is and what is not relevant and then to provide that all relevant evidence is admissible notwithstanding that it is extrinsic evidence. However, we do not now think that it is necessary to recommend a complete statutory restatement of the whole of the law on interpretation including all the canons of construction or rules of preference for cases of doubt.

³¹ In Germany the drafters of the BGB largely abandoned the canons of construction of the *ius commune*, preferring to let construction depend on the circumstances of each case and the requirements of good faith. See Zimmerman, *The Law of Obligations* 638.

³² Discussion Paper No 101, 1996. We had already consulted on the rules affecting contracts in our Discussion Paper on *Contract Law: Extrinsic Evidence, Supersession and the Actio Quanti Minoris* (Scot Law Com No 97, 1994). Some respondents to that discussion paper thought that the problem ought to be addressed more generally. In our report on *Three Bad Rules in Contract Law* (Scot Law Com No 152, 1996) para 1.7 we said that we would return to the topic of interpretation in a later report. This we now do.

³³ A list of those who submitted comments is given in Appendix C.

³⁴ A list of those who attended the relevant meeting is given in Appendix C.

³⁵ The Lord President, Professor Colin Reid and Mr Craig Connal. In the light of these comments we do not now recommend any statutory restatement of the so-called "canons of construction". See Part 6 of this report. The legislation on substantive law which we now recommend is confined to the minimum necessary to pave the way for the reform of the law on the admissibility of extrinsic evidence.

Recommendation

1.25 We recommend that:

- 1. There should be legislation to clarify the substantive law on the interpretation of contracts, conveyances, testamentary dispositions and other juridical acts and to reform the law on the admissibility of extrinsic evidence for that purpose.**

(Draft Bill, clauses 1 to 3.)

Part 2 General Rule

Introduction

2.1 The question with which we are concerned in this part is whether the general rule for the interpretation of expressions in juridical acts should be based on an objective or a subjective approach. Under an objective approach the general rule would be that an expression should be interpreted as a reasonable third party would interpret it in its context and factual matrix.¹ Under a subjective approach the general rule would be that an expression used by a party should be interpreted in the way that that party intended, even if that required an unnatural meaning, which would not be apparent from the terms of the juridical act in its context and surrounding circumstances, to be given to the expression.

Existing law

2.2 *Conveyancing deeds.* In relation to dispositions, feu contracts and other conveyancing deeds which appear on the Register of Sasines an objective approach is adopted. In the typical case of a disposition,

"a purchaser is entitled to rely on the faith of the record. He is not concerned with the intention of the person who created the burden."²

Similar policy considerations would undoubtedly lead to the same conclusion in relation to documents submitted in support of an application for registration in the Land Register. However, even in relation to conveyancing deeds on which third parties may have to rely, the adoption of an objective approach does not mean that expressions have to be interpreted without reference to surrounding circumstances.³

2.3 *Contracts in general.* The position is the same in relation to contracts where the special exception which we consider later⁴ does not apply. The subjective intention of the party who uses an expression is irrelevant, if the other party does not know and cannot reasonably be expected to know of that intention.⁵ The approach is to ask what meaning a reasonable person would give to the expression in its context⁶ and, if there is any ambiguity,⁷ surrounding circumstances.⁸

¹ This is not the same as a literal approach. A reasonable third party, interpreting an expression in its context and factual matrix, would not necessarily give it its literal meaning. Indeed such a third party might have no difficulty in dismissing a literal meaning out of hand. See eg *Watson v Neuffert* (1863) 1M 1110 at 1114 where Lord Justice-Clerk Inglis rejected the literal meaning of a provision as "a most violent and forced construction".

² *Hunter v Fox* 1964 SC (HL) 95 by Lord Reid at 99.

³ See eg *Logans v Wright* (1831) 5 W & S 242 at 246; *Buchanan v Andrew* (1873) 11M (HL) 13; *Burnett v Great North of Scotland Railway Co* (1884) 12R (HL) 25 at 28; *Hunter v Fox*, above.

⁴ See Part 3.

⁵ *Gloag, Contract* (2nd edn 1929) 398; *Muirhead & Turnbull v Dickson* (1905) 7F 686 at 694.

⁶ See eg *Glen's Trs v Lancashire and Yorkshire Accident Insurance Co Ltd* (1906) 8F 915 (where the context made it clear that the word "not" had been inserted by mistake); *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Ltd* [1959] AC 133 (where the context required "bill of lading" to be interpreted as "charterparty"). The context includes punctuation: *Turnbull's Trs v The Lord Advocate* 1918 SC (HL) 88.

2.4 *Testamentary writings.* In relation to wills and other testamentary writings it is often said that the object of interpretation is to discover the intention of the testator; but it is the intention expressed in the deed which is alone relevant.⁹ The intention expressed in the deed will as a general rule be interpreted objectively. Under the existing law this result is achieved by saying that most types of extrinsic evidence, including evidence as to the meaning which the testator assigned to a particular expression, will generally be regarded as inadmissible¹⁰ but it would be possible to obtain the same results by saying that the true question is as to the meaning which a reasonable person would place on the words used by the testator in the will or other document, having regard to the context¹¹ and, in appropriate cases, the surrounding circumstances.¹²

2.5 *Other juridical acts.* The same objective approach is taken to the interpretation of other juridical acts. The need for an objective approach is manifest in the case of negotiable instruments and bills of lading, which are meant to pass from person to person.¹³ It is equally manifest in the case of other shipping documents or juridical acts which are inherently capable of conferring rights on third parties.¹⁴ The courts have also adopted an objective approach in relation to such miscellaneous juridical acts as assignments,¹⁵ articles of roup drawn up for a judicial sale,¹⁶ or scrip notes containing an obligation to deliver goods.¹⁷

Assessment of existing law

2.6 *Importance of reliance interests.* Juridical acts, by definition, have legal effects. Generally speaking they affect the legal position not only of the granter but also of other persons. It is therefore not surprising that the general approach of the existing law is to adopt an objective approach to the question of interpretation. Those whose rights and obligations are liable to be affected by a juridical act ought to be able to assume that the expressions used in it have a normal and reasonable meaning in the context and circumstances in which they were used. They should not be liable to find that their position has been affected by a secret meaning attached to an expression by the user of it. In most cases the policy of protecting reasonable reliance interests can be put into effect by looking at the juridical act from the point of view of

⁷ On the need for ambiguity before there can be reference to surrounding circumstances under the existing law, see *Parochial Board of Greenock v Coghill & Son* (1878) 5R 732 at 734; *Gillingham v Solway Holdings Ltd* 1989 GWD 12-509; *M W Wilson (Lace) Ltd v Eagle Star Insurance Co Ltd* 1993 SLT 938 at 947; *Brennan v Robertson's Exrs* 1995 GWD 19-1087.

⁸ See Gloag, *Contract* (2nd edn 1929) 398 - 399; McBryde, *Contract* 422 ("A contract is construed by considering the express terms of the contract and any admissible surrounding circumstances"); *Forlong v Taylor's Trs* (1838) 3 S & McL 177 at 210; *Mackill & Co v Wright Bros & Co* (1888) 16R (HL) 1 at 6; *Taylor v John Lewis Ltd* 1927 SC 891 at 897; *Alloa Brewery Ltd v Investors in Industry plc* 1992 SLT 121 at 122; *Stewart Milne Group Ltd v Skateraw Development Co Ltd* 1995 GWD 1650 (where a stipulation "was unintelligible without an explanation of the context in which it was made").

⁹ See *Stair*, IV.42.21; *Blair v Blair* (1849) 12D 97 at 108; *Spencer's Trs v Ruggles* 1981 SC 289.

¹⁰ See generally Walker and Walker, *Evidence* 293; *Farquhar v Farquhar's Exrs* (1875) 3R 71 at 73; *Trs of Free Church of Scotland v Maitland* (1887) 14R 333 esp. at 344 ("evidence to prove intention as an independent fact is inadmissible"); *Devlin's Trs v Breen* 1945 SC (HL) 27 esp. at 38.

¹¹ See eg *Hunter v Nisbett* (1839) 2D 16; *Easson v Thomson's Trs* (1879) 7R 251; *Elrick's Trs v Robinson* 1932 SC 448; *Scott's Trs v Smart* 1954 SC 12; *Borthwick's Trs v Borthwick* 1955 SC 227 at 231.

¹² See eg *McGowan v Anstruther's Trs* (1827) 5S 297; *Milne v Scott* (1880) 8R 83; *Trs of Free Church of Scotland v Maitland* (1887) 14R 333; *Nasmyth's Trs v NSPCC* 1914 SC (HL) 76; *Craw's Trs v Blacklock* 1920 SC 22; *Cathcart's Trs v Bruce* 1923 SLT 722; *Scott's Trs v Smart* 1954 SC 12; *Fortunato's J F v Fortunato* 1981 SLT 277; *McGinn's Exrs v McGinn* 1994 SLT 2.

¹³ See eg *Miramar Maritime Corp v Holborn Oil Trading Ltd* [1984] AC 677 at 682.

¹⁴ At present sea waybills and ship's delivery orders. See the Carriage of Goods by Sea Act 1992, which allows the category to be expanded by regulations to cover other documents and also non-documentary techniques.

¹⁵ *Brownlee v Robb* 1907 SC 1302. See also *Robertson's Trs v Riddell* 1911 SC 14.

¹⁶ *Stevenson v Moncrieff* (1845) 7D 418.

¹⁷ *Mackenzie v Dunlop* (1856) 3 Macq 10.

an objective third party. There is room for a qualification to this approach in relation to certain contracts.¹⁸ So far as the general rule applicable to juridical acts is concerned the objective approach seems sensible and satisfactory. All consultees agreed with this approach. The Faculty of Advocates, for example, said

"The Faculty favours an objective approach to interpretation. While juridical acts . . . are manifestations of will or intention, the objective approach to interpreting the external act is a robust approach which has the social benefit of certainty."

2.7 *Importance of context and surrounding circumstances.* There is also clearly merit in the existing emphasis on considering expressions in the context of the whole juridical act and, where appropriate, in the light of surrounding circumstances. The emphasis on internal context is clearly important and appears in most laws on interpretation. The emphasis on looking at the surrounding circumstances is also important. A reference in a contract or disposition to property of a certain description, or to certain boundary features, or to obligations to construct or maintain, may be understandable only in the light of information as to the actual physical characteristics of the property in question.¹⁹ A reference in a feu-contract to mineral workings may be capable of being understood only against the background of the type of mining operations carried on in the area at the time.²⁰ A provision restricting an employee from carrying on business in a certain town for a certain time after leaving his employment may have to be interpreted by reference to the type of business in which his employer is engaged.²¹ A contract to sell "my stock" at current market value might be void for uncertainty if it had to be interpreted without regard to surrounding circumstances. The word "francs" in a contract might mean French francs or Belgian francs. Reference to the surrounding circumstances might make it clear that the term should be interpreted one way or the other.²²

2.8 *Tension between two approaches.* Although there are clear advantages in the objective approach there is nonetheless an unavoidable tension in the law between the objective and the subjective approaches. In the case of registered conveyancing deeds which affect the rights of third parties, the tension must be relieved, if at all, only by means of rectification.²³ The objective approach must clearly be preferred at the interpretation stage. It would not be acceptable to have on the record a deed which said one thing but which, because of some secret mental reservation by the granter, really meant another. In the case of many contracts, the tension can be resolved not only by rectification in appropriate cases but also, where third parties are not involved, by recognising an exception to the objective approach at the interpretation stage so as to allow a special meaning given to an expression by one party to the knowledge of the other, or by both parties, to receive effect.

2.9 It is in relation to wills and other testamentary writings that the tension between the objective and the subjective approaches is most apparent. There is sometimes a strong temptation to try to give effect to the testator's actual intention.²⁴ The argument for giving effect

¹⁸ See Part 3. The special qualification for certain contracts is not an exception to the underlying policy of protecting reasonable reliance interests. It is just that in relation to certain contracts it is only the parties who have reliance interests to be protected.

¹⁹ See eg *McClymont v McCubbin* 1995 SLT 1248 (a rectification case); *Stewart Milne Group Ltd v Skateraw Development Co Ltd* 1995 GWD 1650.

²⁰ *Buchanan v Andrew* (1873) 11M (HL) 13.

²¹ *Watson v Seuffert* (1863) 1M 1110.

²² This point is covered expressly in art 1159 of the French Civil Code and art 1368 of the Italian Civil Code.

²³ Under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 8.

²⁴ See eg *Farquhar v Farquhar's Exrs* (1875) 3R 71 at 73; *Livingston v Livingston* (1864) 3M 20.

to the testator's actual intention is strongest where a solicitor, or someone else asked to prepare a will, has made a mistake and has demonstrably failed to give effect to the testator's instructions.²⁵ However, the remedy for this situation is to allow rectification of the will. That is not possible at present²⁶, but we have recommended in our report on *Succession* that it should be possible in the narrow type of case just mentioned.²⁷ The argument for giving effect to the testator's actual intention is also strong where a description of a beneficiary or bequest, when read in the light of the admissible surrounding circumstances, is equally applicable to two or more persons or things. If the testator's actual intention corresponds to one of the two possible meanings, it is arguable that the actual intention should prevail to this limited extent. There is an exception for this case in the existing law and we recommend later that it should continue to be recognised.²⁸

2.10 In other testamentary cases there are practical objections to giving effect to actual intention. One objection is that actual intention at the time of death is a matter of conjecture. Another is that an executor could not safely proceed to administer an estate on the basis of a testamentary writing if the meaning of an apparently clear expression was liable to change depending on whether certain witnesses chose to come forward and recall conversations they had had with the deceased. There would also be a danger of fraud and abuse if the clear meaning of a will could be changed to anything at all by the concocted evidence of witnesses as to what the testator had said. There is also a more general practical consideration. It is in the interests of everyone that language should have a settled meaning so far as possible. It is probably better that in a few cases the actual wishes of testators should be frustrated than that the advantage to all of knowing that words generally mean what they say should be lost. It is in this context that the maxim "Hard cases make bad law" seems particularly apposite.

2.11 We would not, therefore, suggest any change in direction so far as the results reached by the existing law in testamentary cases are concerned. We think, however, that it is unsatisfactory to seek to achieve these results by means of the law of evidence. To say that the objective of the process of interpretation is to discover the meaning which the testator intended to give to an expression, and then to say that only certain restricted types of evidence are admissible, is open to two objections. First, it raises the question why relevant evidence should be excluded.²⁹ Secondly, it frames the law in terms of court proceedings. It is not only in court proceedings that wills have to be interpreted.

2.12 *Ambiguity as a requirement for considering surrounding circumstances.* An important question is whether a new general rule on interpretation should allow reference to surrounding

²⁵ See eg *Keiller v Thomson's Trs* (1824) 3S 279 where the "Judges were clearly of opinion that ... the name Williamson must have been erroneously transcribed, instead of Wedderspoon, by the clerk who had copied it from the holograph will".

²⁶ Section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 does not apply to testamentary documents. See s 8(6).

²⁷ Scot Law Com No 124, 1990, paras 4.21 to 4.28. The main recommendation was that "Provision should be made for the judicial rectification of a will prepared by someone other than the testator where the court is satisfied that the will is so expressed that it fails to give effect to the testator's instructions".

²⁸ See Part 4.

²⁹ See eg *Farquhar v Farquhar's Exrs* (1875) 3R 71 at 73 - "in judging of a question of intention it is a strong thing to leave out of view altogether that which may be the best evidence of the subject".

circumstances only where there is ambiguity. This is the existing law.³⁰ The word "ambiguity" in this context is used in a wide sense, to cover not only the case where it is immediately obvious that an expression is capable of two meanings but also cases where the expression is unclear or uncertain.³¹

2.13 A requirement of ambiguity is illogical. Meaning sometimes depends on the surrounding circumstances and it is therefore unprincipled to refuse to look at the surrounding circumstances because the apparent meaning is clear. It may only become obvious that there is an ambiguity after the admissible surrounding circumstances have been considered: there may be a latent ambiguity. A requirement of ambiguity is unnecessary. If there is any properly arguable dispute about the meaning of an expression it is likely that there will be an ambiguity. If there is no properly arguable dispute the interpreter will have little difficulty in coming to a conclusion in any event. Against the requirement of ambiguity it may also be said that it complicates the process of interpretation by requiring the interpreter to go through a rather artificial extra stage.

2.14 In the discussion paper we left this question open and invited views. Among those who commented specifically on this issue the balance of opinion was in favour of removing the requirement of ambiguity. Professor McBryde said this.

"The concept of ambiguity is rather elusive. When there is a dispute there are at least two interpretations being advanced. Whether or not there is an ambiguity would appear to depend on questions about the literal meaning of the words and the plausibility of each argument. Except in a clear case ... it is almost impossible to predict whether or not a judge will hold that there is an ambiguity."

The Faculty of Advocates made similar comments.

"There is something artificial in applying a test of ambiguity to many cases where more than one interpretation is arguable. The Court in such circumstances has to decide whether the arguability of an opposing interpretation is such as to amount to ambiguity. It is difficult for the Court to be consistent in its approach to such a test."

Having considered the matter further in the light of the comments received on consultation we have concluded that there should be no requirement of ambiguity as such before surrounding circumstances can be considered. However, we think that it would be useful to make it clear that, if neither party to a dispute founds on surrounding circumstances, they do not have to be considered. We suggest therefore that reference to surrounding circumstances should be permissive and not obligatory. To make such reference obligatory would greatly increase the practical difficulty of the interpretation process and would run the risk of introducing a requirement of evidence in a great many cases where it would serve no useful purpose.

³⁰ See Walker and Walker, *Evidence* 282 - 286; *Parochial Board of Greenock v Coghill & Son* (1878) 5R 732 at 734; *Nasmyth's Trs v NSPCC* 1914 SC (HL) 76 at 82, 83, 84; *Fortunato's J F v Fortunato* 1981 SLT 277; *Gillingham v Solway Holdings Ltd* 1989 GWD 12-509; *M W Wilson (Lace) Ltd v Eagle Star Insurance Co Ltd* 1993 SLT 938 at 947; *Brennan v Robertson's Exrs* 1995 GWD 19-1087.

³¹ Walker and Walker, *Evidence* 282 and 290.

Context and surrounding circumstances

2.15 *Difference.* The difference between context and surrounding circumstances is not always clear in current usage. The terms are often used in an overlapping way. By "context" we mean the rest of the juridical act. So context refers primarily to material forming part of the juridical act or imported into it by reference - the material into which the particular expression has been woven. By "surrounding circumstances" we mean facts external to the juridical act - the background to it or factual matrix within which it is entered into.

2.16 *Meaning of "context".* The draft Bill does not define context. The view of the draftsman, which we accept, is that its ordinary or dictionary meaning is sufficiently clear. The context of an expression in a juridical act consists of the parts of the juridical act which precede or follow it.³² One of the most important rules of interpretation is that all the terms must be read together.

"The meaning of any expression is to be arrived at on a consideration of the context and of its relation to the whole deed. ... Even if words are used which are not, in any ordinary sense, ambiguous, yet if it is clear that the party used them throughout the contract with an exceptional meaning, they will be read with that meaning wherever they occur."³³

The rule appears prominently in the French and Italian civil codes and in the American *Restatement* and *Unidroit Principles of International Commercial Contracts*.³⁴ An important consequence of the rule is that expressions in a juridical act must be read in the light of any interpretation clause contained in the juridical act itself.³⁵ A particular application of the rule is that a mere false description will not prevent a provision from taking effect if it is clear from the context what is intended (*falsa demonstratio non nocet*).³⁶

2.17 We would not regard deleted terms (whether or not still visible) or rejected terms as part of the surviving context. To allow reference to them for the purposes of the general rule on interpretation would be to open up too much room for speculation and cause the benefits of the objective approach to be lost. Deleted or rejected terms might, however, be relevant for the purposes of the special rule for certain contracts which we recommend later.³⁷ The use which can properly be made of deletions in the existing law is a matter of doubt.³⁸

2.18 A juridical act may itself widen its context for the purposes of interpretation. It may import context. It may, for example, provide that it is to be interpreted in the light of a standard glossary of technical terms produced by a professional organisation. Or it may refer to the way something was defined in a document forming part of the prior negotiations

³² The Shorter Oxford Dictionary defines context as "the parts which immediately precede or follow any particular passage or text and determine its meaning". Chambers 20th Century Dictionary defines context as "the parts of a discourse or treatise which precede and follow a special passage and may fix its meaning". Chambers also gives the meanings "associated surroundings, setting" but, as our recommendations and draft Bill refer specifically to surrounding circumstances, those meanings are excluded by implication.

³³ Gloag, *Contract* (2nd edn 1929) 399, referring to *Martin v Kelso* (1853) 15D 950 in support of the second proposition.

³⁴ See French Civil Code, art 1161; Italian Civil Code, art 1363; Restatement §202 (2); Unidroit Principles, art 4.4.

³⁵ The importance of applying clear definition clauses was stressed by the Centre for Research into Law Reform in its comments on the discussion paper.

³⁶ *Stair Memorial Encyclopaedia* Vol 25, para 824.

³⁷ See para 8.14.

³⁸ Contrast *Inglis v Buttery* (1878) 5R (HL) 87 with *Taylor v John Lewis Ltd* 1927 SC 891. See also *Timber Shipping Co SA v London & Overseas Freighters Ltd* [1972] AC 1 by Lord Reid at 15-16.

or in a prior juridical act. A reference in a juridical act to "the purposes previously stipulated" imports a previous stipulation into the context.³⁹ A reference in a contractual document to "your proposals regarding the limitation of damages" brings these proposals into the context.⁴⁰ A reference in a disposition to a decree-arbitral to which the disposition is designed to give effect makes that decree-arbitral part of the context of expressions used in the disposition.⁴¹ To allow material imported by reference to be regarded as part of the context is not to let in secret meanings, because the fact that there is an extended context is apparent from the juridical act itself.

2.19 *Meaning of surrounding circumstances.* The circumstances surrounding a juridical act will include any usages or practices in the relevant field of activity.⁴²

2.20 The benefits of an objective approach would, however, be lost if the surrounding circumstances which could be taken into account in applying the general rule⁴³ included direct statements of intention by the granter of, or a party to, the juridical act in question. It seems clear on principle, although opinion was reserved on the point in a recent case,⁴⁴ that such statements should not be regarded as part of the surrounding circumstances which it is permissible to take into account for the purposes of the general rule.⁴⁵ They are not part of the factual matrix.

2.21 The same applies to prior instructions, communings or negotiations leading up to the juridical act. These are not "surrounding" circumstances at all so much as circumstances which are actually part of the process of formulating the juridical act. They are part of the negotiating history rather than part of the factual matrix. Surrounding circumstances, for the purpose of the proposed rule, must be confined to those which surround, and are external to, the process of preparation of the juridical act itself.⁴⁶ In relation to a disposition, for example, they would include the physical characteristics of the property and its surroundings. In relation to a will they would include the nature of the testator's estate and family circumstances. They would not include a letter of instructions to a solicitor.

2.22 The approach suggested in the preceding two paragraphs is consistent with the results reached under the existing law where, in general, evidence of statements of intention and of

³⁹ *The Temperance Halls Co-operative Building Society v The Glasgow Pavilion Co Ltd* (1908) 16 SLT 112.

⁴⁰ *Bovis Construction Ltd v Whatlings Construction Ltd* 1994 SLT 865 at 870.

⁴¹ *Earl of Fife v Great North of Scotland Railway Co* (1901) 3F (HL) 2.

⁴² In the discussion paper we proposed that the hypothetical reasonable person should be described as a person familiar with the field of activity concerned. However, having taken into account comments made by Professor McBryde and the Faculty of Advocates, we now think that this is unnecessary and potentially troublesome because it might require the interpreter to receive expert evidence about practices in the field of activity even where neither party considered that they were relevant. For the existing law on the admissibility of evidence of custom or usage of trade to show that words have been used in a special sense, see Walker and Walker, *Evidence* 299; Gloag, *Contract* (2d ed 1929) 365, 381 - 382; McBryde, *Contract* 432 - 434.

⁴³ It should be noted that the limitations discussed here in relation to the general rule would not apply for the purposes of the two special rules considered later for certain expressions in contracts and testamentary writings.

⁴⁴ *Dunedin Property Management Services Ltd v Glamis Property Co Ltd* 1993 GWD 31-2006.

⁴⁵ In *Dunedin Property Management Services Ltd v Glamis Property Co Ltd* 1993 GWD 31-2006 opinion was reserved on arguments that, in construing a disposition, "the only extrinsic evidence which could be led was that of circumstances such as physical configuration and not that as to parties' actual intentions".

⁴⁶ In *McAdam v Scott* (1912) 50 SLR 264 at 266 Lord Kinnear explained "surrounding circumstances" as meaning the facts to which the transaction related.

instructions, prior communings and negotiations is inadmissible.⁴⁷ It was generally approved by consultees. The Royal Faculty of Procurators in Glasgow suggested that there should only be a reference to context and no reference to surrounding circumstances. This was on the basis that the hypothetical reasonable person would be supposed to be familiar with the field of activity concerned. However, we have decided not to include that element in the general part of the rule.⁴⁸ While we see the force of the Royal Faculty's point that two concepts should not be used where one would suffice we think that, given the way the rule is now framed, it would be dangerously limiting to omit the reference to surrounding circumstances.

2.23 It is unclear under the existing law whether, or in what circumstances, reference may be made to other writings of the granter or of the parties, not falling within the category of statements of intention, instructions, prior communings or negotiations.⁴⁹ To what extent can such writings, or other non-written juridical acts, properly be regarded as part of the surrounding circumstances? This, we think, must be a question of fact and degree. A will which was made and revoked many years previously would not normally be regarded as part of the circumstances surrounding the making of a new will. On the other hand a will might be part of a whole estate planning scheme including contemporaneous trust deeds and other documents and in such circumstances it might be quite natural and reasonable to regard the other documents as part of the surrounding circumstances.⁵⁰ Similarly, a contract might be part of a network of contemporaneous contracts and it might be unrealistic to regard the other contracts as not being part of the surrounding circumstances.⁵¹ Even a disposition may have to be construed in the light of some other closely related writing but this would, we think, be exceptional.⁵² The same considerations apply to contemporaneous maps or plans.⁵³

2.24 *Subsequent conduct.* One of the few questions to give rise to a difference of view on consultation was the relevance of subsequent conduct in the interpretation of juridical acts.

2.25 It seems clear on principle that subsequent conduct of the granter of, or parties to, a juridical act should not be regarded as part of the surrounding circumstances. That expression refers to the circumstances surrounding the act at the time when it was done. Later conduct cannot be part of the factual matrix within which the juridical act was done.

2.26 That, however, is not the end of the question. It would be possible to provide specifically that in interpreting an expression in a juridical act, regard could be had to subsequent conduct as well as to the circumstances surrounding the juridical act at the time when it was entered into. One objection to such a course is that subsequent conduct cannot

⁴⁷ See Walker and Walker, *Evidence* 286 - 295. *Miller v Miller* (1822) 1 Sh App 308 at 317; *Blair v Blair* (1849) 12D 97; *Inglis v Buttery* (1878) 5R (HL) 87; *Trs of Free Church of Scotland v Maitland* (1887) 14R 333; *Prenn v Simmonds* [1971] 1 WLR 1381; *British Coal Corporation v SSEB* 1991 SLT 302 at 310.

⁴⁸ See footnote 42 above.

⁴⁹ See *Wedderspoon v Thomson's Trs* (1824) 3S 396 (terms of earlier wills and codicils considered); *Devlin's Trs v Breen* 1945 SC (HL) 27 (evidence of revoked settlements inadmissible).

⁵⁰ See eg *Livingston v Livingston* (1864) 3M 20; *Catton v Mackenzie* (1870) 8M 1049.

⁵¹ See eg *Claddagh Steamship Co v Steven & Co* 1919 SC (HL) 132; *Modern Engineering v Gilbert-Ash* [1974] AC 689 at 696 - 697.

⁵² See eg *Duke of Fife v Great North of Scotland Railway* (1901) 3F (HL) 2 (disposition construed in light of decree arbitral which preceded it). In *Dunedin Property Management Services Ltd v Glamis Property Co Ltd* 1993 GWD 31-2006 the court said that, even if there had been an ambiguity (which there was not) leases could not be used in considering the extent of property covered by a disposition.

⁵³ See eg *Luss Estates Ltd v B P Oil Grangemouth Refinery Ltd* 1987 SLT 201, where reference to a contemporaneous ordnance survey map was an important factor in the construction of a feu contract of 1837.

affect the view which would reasonably have taken as to the meaning of an expression immediately after the juridical act. To allow subsequent conduct to be taken into account in the application of the general rule would mean that an expression which was supposed to be objectively construed would have a meaning which varied over time. Another objection is that to allow reference to subsequent conduct would lead to uncertainty and expense.

2.27 The existing Scottish law on this point is not clear.⁵⁴ The many Scottish cases allowing reference to subsequent conduct to establish the common intention of the parties at the time of the contract⁵⁵ now have to be read in the light of observations in more recent English House of Lords cases, which cast doubt on them.⁵⁶ In the discussion paper we provisionally suggested that, for the purposes of a new rule on the interpretation of juridical acts in general, subsequent conduct should be left out of account.⁵⁷

2.28 Two consultees⁵⁸ expressed doubts on the question of subsequent conduct. They referred to two types of case. One was the case where a term such as "the development" was used in a contract and where the question later arose whether this meant the development as at the time of the contract or the development as it was in fact from time to time. The other was the case where the parties to a contract proceeded over a prolonged period on the basis that a particular term was to be interpreted in a particular way. The consultees suggested that in such cases justice might not be done between the parties unless the interpreter looked at what happened after the contract.

2.29 We have found this a difficult question. However, we think that, unless it is varied, the meaning of a juridical act ought to be consistent over time. We remain therefore of the view that subsequent conduct ought not in general to affect interpretation where an objective test is applied. It may, however, be relevant in the interpretation of certain contracts where it is claimed that one party (or each party) used an expression in a particular sense which was known to the other.⁵⁹ Subsequent conduct may cast a light backwards for this purpose.

2.30 Subsequent conduct may be relevant for purposes other than interpretation. For example, it may be highly relevant when it comes to applying an expression the meaning of which is agreed or has been determined.⁶⁰ A contract for work to be done on houses forming part of "the development or any subsequent extension of the development" could only be applied by looking to see what had in fact happened. The same would apply in other cases

⁵⁴ The point was left open in *R & J Dempster Ltd v The Motherwell Bridge and Engineering Co Ltd* 1964 SC 308 at 332.

⁵⁵ *Heriot's Hospital v McDonald* (1830) 4 W & S 98; *Scott v Howard* (1881) 8R (HL) 59 at 67; *Clyde Navigation Trs v Laird & Son* (1883) 10R (HL) 77; *Hunter v Barron's Trs* (1886) 13R 883 at 892; *Jopp's Trs v Edmond* (1888) 15R 271 at 282; *Dowling v Henderson* (1890) 17R 921; *Mackenzie v Liddell* (1893) 10R 705 at 714; *Macgill v Park* (1899) 2F 272 at 275; *North British Railway Co v Magistrates of Edinburgh* 1920 SC 409 at 425; *Welwood's Trs v Mungall* 1921 SC 911 at 929; *Watters v Watters* 1927 SC 310; *A M Carmichael Ltd v Lord Advocate* 1948 SLT (Notes) 88; *Smith v Johnstone* 1949 SLT (Notes) 11. See also *Hylander's Exr v H & K Modes Ltd* 1957 SLT (Sh Ct) 69.

⁵⁶ *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583; *Wickman Tools Ltd v Schuler* [1974] AC 235.

⁵⁷ This is subject to the preservation of special rules of interpretation for particular types of expression. See Part 7 below. Some of these rules may allow reference to subsequent possession to explain an expression.

⁵⁸ Professor McBryde and Mr Craig Connal. Professor McBryde, however, expressly approved of the general rule that subsequent conduct should be irrelevant. His concern was confined to a particular type of case. Mr Connal too expressed his concern in a qualified way.

⁵⁹ See para 8.13 below.

⁶⁰ See para 1.5 above.

where a contract referred to something and made it clear expressly or impliedly that its content or extent might vary over time depending on the subsequent conduct of the parties or one of them. There are many contracts of this nature.

2.31 Subsequent conduct may in some cases amount to a variation of a contract. It may also affect a party's legal position in other ways. For example, where a seller delivers too many goods under a contract for the sale of goods, and the buyer accepts the whole quantity, the buyer must pay for the excess goods at the contract price.⁶¹ The conduct of the parties in delivering and accepting an excessive quantity does not mean that the contract has to be re-interpreted. It just means that a new legal rule comes into operation. Similarly, in situations not covered by the Sale of Goods Act, the conduct of the parties outwith the scope of the contract or other juridical act in question may give rise to other rights based on implied contract or unjustified enrichment. The subsequent conduct of a party may also amount to a waiver of rights or may personally bar that party from insisting on a particular interpretation of a juridical act.⁶²

2.32 In many cases the true explanation of subsequent conduct inconsistent with the meaning which an objective observer would give to a contract will be that the parties have simply ignored or departed from the terms of their contract. The appropriate legal effect of the subsequent conduct in such cases will be one of the legal effects mentioned in the preceding paragraph and not any effect on the way a reasonable person would interpret the original contract.

2.33 In the existing law, evidence of subsequent conduct is admissible for the purpose of interpreting writings of ancient date.⁶³ This seems both vague and unprincipled. It is not clear where the dividing line between old and ancient lies. And it is not clear why the matters which can relevantly be taken into consideration should be affected by the age of a juridical act which falls to be interpreted objectively. Our provisional view in the discussion paper was that there was no need to reproduce an exception for ancient writs, and this was supported on consultation.⁶⁴

2.34 In the case of certain types of expression in conveyancing deeds affecting land (such as descriptions of barony lands⁶⁵ and possibly expressions creating servitudes or similar rights⁶⁶) subsequent possession may be relevant under the existing law, and useful, for the purposes of interpretation. We recommend later that special rules of interpretation for particular types of expression should be preserved.⁶⁷

⁶¹ Sale of Goods Act 1979, s.30(3).

⁶² See eg *Macdonald v Newall* (1898) 1F 68.

⁶³ See Walker and Walker, *Evidence* 295 - 296.

⁶⁴ The Faculty of Advocates, however, thought that the rule, although unprincipled, still had utility in some cases and should be retained. They pointed out that its application would diminish with the spread of registration of title.

⁶⁵ See eg *Buchanan and Geils v Lord Advocate* (1882) 9R 1218 at 1234; *Mather v Alexander* 1926 SC 139 at 146; *Luss Estates Ltd v B P Oil Grangemouth Refinery Ltd* 1981 SLT 97 at 100 (sequel at 1982 SLT 457 and 1987 SLT 201).

⁶⁶ See *Boyd v Hamilton* 1907 SC 912. But the result in this case seems inconsistent with *Baird v Fortune* (1861) 4 Macq 127.

⁶⁷ See para 7.8 below.

Nature and purpose of act

2.35 Under the existing law, the nature and purpose of a transaction, in so far as these can be objectively ascertained, are regarded as relevant and important in the interpretation of contracts and other juridical acts.⁶⁸ These are not surrounding circumstances as they are inherent in the transaction itself. They could perhaps be regarded as part of the context - as a sort of implied preamble - but this seems artificial. It is simpler and clearer to regard them as separate matters to be taken into account.

Recommendation

2.36 We recommend the following general rule on the interpretation of expressions in juridical acts.

2. **(1) It should be provided that the general rule on the interpretation of an expression in a juridical act is that the expression is given the meaning which would reasonably be given to it in its context, having regard where appropriate to**

(a) the surrounding circumstances; and

(b) in so far as they can be objectively ascertained, the nature and purpose of the juridical act.

(2) For the purposes of this rule the surrounding circumstances do not include -

(a) statements of intention;

(b) instructions, communings or negotiations forming part of the process of preparation of the juridical act;

(c) conduct subsequent to the juridical act.

(Draft Bill, Schedule, para 1.)

⁶⁸ See eg *Adamastos Shipping Co Ltd v Saxon Petroleum Co Ltd* [1959] AC 133 (court can look at broad purpose and intent of parties - what, objectively considered, they were obviously trying to do); *Prenn v Simmonds* [1971] 1 WLR 1385 (court can look at genesis and, objectively, the aim of the transaction); *Antaios Compania Naviera SA v Salen Rederierna AB* 1985 AC 191 at 201 (court should have regard to "business commonsense"); *Alloa Brewery Co Ltd v Investors in Industry plc* 1992 SLT 121 (genesis and objectively ascertained aim of transaction); *City of Glasgow District Council v Doyle* 1993 SLT 604 (purpose of transaction considered); *Eurocopy (Scotland) plc v Lothian Health Board* 1995 SLT 1356 (contract construed in accordance with its apparent commercial purpose). Note also art. 1158 of the French Civil Code and art. 1369 of the Italian Civil Code.

Part 3 Contracts

Introduction

3.1 The general rule set out above is suitable for most cases on the interpretation of contracts. Often the question of interpretation which arises is one to which the parties did not direct their attention at the stage of entering into the contract.¹ In such circumstances there is no point in seeking to discover the parties' actual intentions as to the meaning of an expression.

3.2 Even where one party had a clear intention as to the meaning to be given to an expression, there can be no question of seeking to give effect to that intention if it was not communicated to the other party.

"A party who has made an offer in terms calculated to convey a particular impression cannot refuse performance on the easy plea that he did not mean what he said."²

This rule applies also where both parties happened to have the same undisclosed intention.³

"[C]ommercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say."⁴

There may, however, be cases where it would be wrong to apply a completely objective interpretation to contracts. Contracts are different from many other juridical acts because the legal position of third parties is not usually affected. The parties operate in a sealed-off legal area and there is no reason why they should not use an expression in any way which they have determined between themselves and no obvious reason why the law should refuse to give effect to that meaning if it can be established and if third parties have not relied on it.

Existing law

3.3 It is accepted in the existing law that a party using an expression in an offer or acceptance can assign a meaning to that expression and that this meaning, if the other party knew of it or could reasonably be assumed to know of it, will prevail.⁵ For example, a party offering to transport the contents of a villa can make it clear to the other party, in the negotiations leading up to the offer, that a reference in the offer to "statuary" does not include pots and other objects made of fired clay, and that meaning will then rule.⁶ Again, a party offering to sell the estate of Dallas can make it clear in the advertisements and negotiations that "the estate of Dallas" is intended to mean the estate marked on an identified plan as the

¹ See McBryde, *Contract* 420.

² Gloag, *Contract* (2nd edn 1929) 398.

³ See *New Hampshire Insurance Co v MGN Ltd*, *The Times*, 25 July 1995.

⁴ *Muirhead & Turnbull v Dickson* (1905) 7F 686 by Lord President Dunedin at 694.

⁵ We are here talking of the substantive law, on the assumption that there are no difficulties as to the admissibility of evidence. It may be supposed, for example, that all relevant facts are admitted on record.

⁶ *Sutton & Co v Ciceri & Co* (1890) 17R (HL) 40.

estate of Dallas and not some other property which sometimes goes by that name and that meaning will then prevail.⁷ Other examples of the same kind could be given.⁸

3.4 It is probably also the case that if it is admitted, or proved by admissible evidence, that the parties contracted on an agreed basis as to the meaning of a particular expression then that meaning will rule. Where, for example, it was clear from extrinsic evidence, which was held to be admissible, that the parties had used the term "Whitsunday" in an unusual sense, to mean 26th May, that meaning had to prevail.⁹

3.5 In a more recent English case there was a contractual option to redeliver a chartered vessel "after 12 months trading". The question arose whether this meant "on the expiry of" or "at any time after the expiry of". Pre-contractual telexes made it clear that the parties had used the expression to mean "on the expiry of". Kerr J. allowed reference to be made to the pre-contractual exchanges.

"If a contract contains words which, in their context, are fairly capable of bearing more than one meaning and if it is alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the Court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only."¹⁰

International models

3.6 Article 8 of the United Nations Convention on Contracts for the International Sale of Goods provides as follows.

"(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstance."

This rule appears to us to be the same, for all practical purposes, as the existing Scottish law.

3.7 The Unidroit *Principles of International Commercial Contracts* published in 1994 contains the following rules.¹¹

Article 4.1

(1) A contract shall be interpreted according to the common intention of the parties.

⁷ *Houldsworth v Gordon Cumming* 1910 SC (HL) 49. See also *Macdonald v Newall* (1898) 1F 68. (One party made known to the other the meaning which was being attached to "the property known as the Royal Hotel".)

⁸ See our Discussion Paper No 97 on *Contract Law: Extrinsic Evidence, Supersession and the Actio Quanti Minoris* (1994), para 3.3.

⁹ *Hunter v Barron's Trs* (1886) 13R 883.

¹⁰ *The "Karen Oltmann"* [1976] 2 Ll L R 708 at 713.

¹¹ Articles 4.1 and 4.2. We understand that there will be similar provisions in the new *Principles of European Contract Law* being prepared by the Lando Commission on European Contract Law.

- (2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

Article 4.2

- (1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.
- (2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

At first sight article 4.1 seems significantly different from article 8 of the United Nations Convention. However, the solutions in the two instruments would appear to come to much the same in their practical operation, particularly when article 4.2 of the Unidroit principles is taken into account.¹²

Earlier recommendation

3.8 We have already recommended in our report on the *Formation of Contract*¹³ the adoption of a solution based on article 8 of the United Nations Convention in relation to the question whether a contract has come into existence. As several consultees pointed out at that time, it is useful to have the same or similar rules for formation and interpretation of contracts.

Example. A trader, by fax, offers to sell 50 pounds of tea to a retailer at £x per ton. This would be the normal price for a pound, not a ton. The retailer telephones the trader to check the position and is told that the word "ton" is a mistake for "pound". The retailer accepts the faxed offer by fax without mentioning the telephone conversation.

A court applying the rule we have recommended for the formation of contracts would conclude that a contract had been entered into for the purchase of 50 pounds of tea at a price of £x per pound.¹⁴ It would clearly be absurd to then apply a different rule at the interpretation stage and to hold that, once it has been decided that there is a contract, "ton" must mean "ton" because that is how it would be interpreted on an objective view. Rectification would be a possibility but it ought not to be necessary to rectify a contract of this nature, which has no continuing effect, if the desired result can be achieved by interpretation.

Proposal in discussion paper

3.9 In our discussion paper, after taking into account views expressed by our Advisory Group on Contract Law, we put forward the following proposal.

¹² The principle in article 4.2(1) is one which any reasonable person would apply in interpreting a contract.

¹³ Scot Law Com No 144 (1993).

¹⁴ The same result would probably be reached under the existing law because the mistake was "brought under the other party's notice before acceptance". See *Seaton Brick and Tile Co Ltd v Mitchell* (1900) 2F 550 at 556.

- (1) An expression in a contract is interpreted in accordance with the general rule on interpretation except in so far as it is established that the following rule applies.
- (2) An expression in a contract which is used by one party in a particular sense (whether or not it is also used in that sense by the other party or any other party) is interpreted in that sense if the other party, or all the other parties, at the time of contracting knew or could not have been unaware that it was being used in that sense.

Suggested modifications

3.10 There may be cases where it can be established that each party knew the other was using an expression in a different sense. If the difference is sufficiently important then, on the application of the rules on the formation of contract, it will prevent consensus and prevent a contract coming into existence. However, as one of the commentators on the discussion paper¹⁵ pointed out, there could be a difficulty if the expression in question is not so important as to prevent a contract from coming into existence. The special rule could be said to "apply" but it applies in such a way that it fails to produce a result. We think that it should be made clear that in such a situation the general rule on objective interpretation comes into operation. We would accordingly modify our proposal by using the words "has effect" instead of "applies". If the special rule produces no effect then the general rule will apply.

3.11 We would also modify the words "could not have been unaware". The Faculty of Advocates suggested that the meaning of this phrase should be clarified. Having considered the matter carefully we have concluded that the phrase should be replaced by words which more accurately reflect the intended policy.

3.12 The phrase "could not have been unaware" is derived from the United Nations Convention on Contracts for the International Sale of Goods¹⁶ which in turn took it over from the Uniform Law on International Sales which was concluded at the Hague in 1964.¹⁷ The intention was to add an element of constructive knowledge but to do so in a way which avoided some of the possible implications of the formula "ought to have known", particularly the possible implication that there was some duty of inquiry on the party in question.¹⁸ We have no doubt that this is the correct policy.¹⁹ A person should not be able to found on the fact, say, that he had not read a particular sentence in a letter or appreciated the significance of a plan, if the letter or plan had been fairly brought under his notice and if

¹⁵ Professor Colin Reid.

¹⁶ See articles 8 (interpretation), 35 and 40 (non-conformities of which buyer or seller "knew or could not have been unaware").

¹⁷ The text of the Uniform Law is set out in a schedule to the Uniform Law on International Sales Act 1967. The formula is also used in article 4.2 of the *Unidroit Principles of International Commercial Contracts*.

¹⁸ See the Acts of the Hague Conference on this subject in 1964 at pp 129-130, 287, 302. The formula was originally "ought to have known" but this was deliberately watered down. In his book on the *Uniform Law for International Sales under the 1980 United Nations Convention* (2nd edn 1991) at para 229 Professor Honnold explains that "The facts one 'ought to have known' include those facts that would be disclosed by an investigation or inquiry that the party should make. But an obligation based on facts of which one 'could not have been unaware' does not impose a duty to investigate - these are the facts that are before the eyes of one who can see. This expression is used at various places in the Convention slightly to lighten the burden of proving that facts that were before the eyes reached the mind."

¹⁹ It is probably the existing law. See *Sutton & Co v Ciceri & Co* (1890) 17R (HL) 40 by Lord Herschell at 42 and *Houldsworth v Gordon Cumming* 1910 SC (HL) 49 by Lord Kinneir at 56.

it could reasonably have been assumed at the time of contracting that he would have read and understood. However, as a matter of drafting, the formula "could not have been unaware" is defective.²⁰ It says the same thing twice and adds nothing. A person could in fact have been unaware of something because, contrary to all reasonable expectations, he had not noticed it or had placed some highly unusual and unwarranted interpretation on the information presented to him.²¹ In spite of the respectable pedigree of the phrase "could not have been unaware" we would prefer to implement the agreed policy by using a more accurate expression. We would prefer to refer to the situation where the party, at the time of contracting, knew or could reasonably have been assumed to know that the expression was being used in a special sense.²²

Comments on proposed rule

3.13 This proposed rule covers not only the situation where one party uses an expression in a particular way which is known, or could reasonably be assumed to be known, to the other party but also the situation where the parties use an expression in a particular way by common intent. We do not believe that it is necessary to have a separate rule to cover this situation.

Example. A document setting out the terms of a multilateral contract has been drawn up by the solicitors for the parties. At a meeting to read over and execute the contract one of the proposed signatories points out that an expression is ambiguous. He asks whether he is right in assuming that it bears a certain meaning. All those present agree that it must be taken as bearing that meaning, which is not necessarily the one which a court would assign to it if it were interpreted on its own. One party asks whether the contract should be altered to make the meaning of the expression clear but all agree that this is unnecessary and that the terms of the contract should remain unaltered. The parties' common understanding of the meaning of the expression is noted in the minutes of the meeting. On this basis the contract is signed.

Here all the parties are, at the time of conclusion of the contract, using the expression, to the knowledge of each other, in a particular way. It follows that each one of them is using it in a sense of which the others are aware. The case is covered by the proposed rule.

3.14 There may be cases where one party has a shrewd suspicion that the other party must be using an expression in a particular sense, but where it cannot be established that the first party knew, or could reasonably have been assumed to know, of this. In such a case the contract will be interpreted according to the usual objective rule.

²⁰ There is an unexpressed supposition in the phrase. For completeness it should probably say something like "could not, if normally attentive and perceptive, have been unaware".

²¹ For example, in *Houldsworth*, above, the buyer might have unreasonably assumed that the plan which was meant to be definitive, and which any reasonable person would have assumed to be definitive, was merely a rough guide for the use of viewers walking round part of the estate.

²² See the Schedule to the draft Bill, paragraph 2(2). The question is what could reasonably have been assumed at the time of contracting by someone in the position of the other parties, not what could reasonably be assumed at the time of the interpretation process by a court or interpreter who might by that time be in possession of evidence not available to the other contracting parties as to the mental state of the party in question.

Scope of special rule

3.15 When we consulted on the interpretation of contracts in 1994 there was a strong view, expressed by several consultees, that the rule for ordinary commercial contracts should not apply to contracts which operated as, or formed the basis of, a registered title in relation to land. We agree with this view. We suggest therefore that the normal objective approach to interpretation, and not the special rule for contracts, should apply to contracts recorded, or intended by the parties to be recorded, in the Register of Sasines or presented, or intended by the parties to be presented, in support of an application for registration in the Land Register. The faith of the records and the reliance interests of third parties are of paramount importance in such cases. We think that the objective interpretation ought to apply even as between the parties to the contract. The close link between such contracts and the public land registers takes them out of the realm of ordinary contracts which affect only the parties to them.

3.16 One consultee suggested in response to our Discussion Paper No 97 that contracts which are registered for execution should be subject to the normal objective approach. Such contracts, it was suggested, operate in effect as court decrees and it seemed inappropriate that their meaning should be affected by secret understandings between the parties. We were initially attracted by this argument. However, on reflection, and after discussion with our Advisory Group on Contract Law, we have concluded that it cannot reasonably be supported. A clause of consent to registration may be inserted without much thought. Registration may never be used as a basis for execution. In any event it is just a short route to execution and it would be anomalous if an unregistered contract which was enforced by the longer route of a court decree were to be given a different effect from that given to a contract in the same terms, concluded in the same circumstances, but registered for execution. There are other registers of documents, such as the Companies Register, in relation to which it could be suggested that the objective rule on interpretation should apply. There is, however, a danger of over-complication and our preference would be to cover such other cases by the rule mentioned in the next paragraph.

3.17 So far as other contracts are concerned, the governing principle is, we would suggest, that the rights and obligations of those who are not parties to the contract²³ but who have reasonably relied²⁴ on the ordinary meaning which would be attached to any expression in it ought not to be affected by a special meaning attached to the expression. This result could possibly be achieved by the normal application of the principle of personal bar but it is of sufficient importance to justify special mention in the proposed new rule.

3.18 It is important that parties who want certainty above all else should be able to protect themselves against reference to anything extraneous to their contractual documents if they so wish. We considered, therefore, an express provision to make it clear that the parties could opt out of the special rules for contracts and into the objective general rule. However, we do not think that any such express provision is necessary. The parties have control of the meanings of the terms they use and can provide that they are to be interpreted in any way they wish.

²³ For this purpose we regard an assignee as a party to the contract.

²⁴ A person could not be said to have relied "reasonably" on the general meaning of an expression if he knew or ought to have known that a special meaning had been attached to it.

Results of consultation

3.19 Views were mixed on the need for a special rule for contracts. The Law Society of Scotland thought that it was unnecessary "because of the application of international conventions which apply where necessary". However, we do not find this reasoning persuasive. The United Kingdom has not as yet ratified the United Nations Convention on Contracts for the International Sale of Goods. Even if it did, that Convention would only cover certain cases with an international element and similar problems could occur in purely domestic cases. The question is best approached on its merits. If the special rule, which in substance exists in the present law, is a good one, it should be taken into the new rules. If it is a bad one it should be rejected. The Royal Faculty of Procurators in Glasgow also had reservations about the proposed special rule because it might "cause disputes to be protracted, if one party tried to argue that a word was being used in a special sense and this was being denied by the other party". However, it would not be sufficient for one party to argue that he had used a word in a special sense. That by itself would be irrelevant. It would also be necessary to establish that, at the time of contracting, the other party knew, or could reasonably be assumed to have known, that the word was being used in that sense. The Centre for Research into Law Reform of the University of Glasgow thought that

"if a contracting party intends a particular expression to have a particular meaning and this is not the ordinary meaning which a reasonable person would apply having regard to the general rule then it is up to that person to ensure that the particular expression is given the appropriate and unusual definition in a definition section of the contract."

That is a perfectly reasonable view in relation to most formal contracts. There may, however, be special situations where it does not apply - for example, where for their own purposes the parties wish to use coded expressions in their contract. And it expects too much of parties to less formal contracts. The Faculty of Advocates approved of the special rule for contracts but noted that it would often require reference to be made to prior communings. This would be possible under our recommendations. Where the special rule applies then nothing in the general rule applies. So the limitations on surrounding circumstances do not apply.

3.20 In our view a special rule for contracts on the above lines is essential in the interests of justice and coherence in the law. Such a rule would be in line with the existing law of Scotland and with internationally accepted principles.

Recommendation

3.21 We recommend that:

3. **3.(1) An expression in a contract should be interpreted in accordance with the general rule on interpretation unless the following rule has effect.**
 - (2) **An expression in a contract which is used by one party in a particular sense (whether or not it is also used in that sense by any other party) should be interpreted in that sense if every other party at the time of contracting knew, or could reasonably have been assumed to know, that it was being used in that sense.**

(3) Paragraph (2) does not apply,

(a) to a contract which is recorded, or intended by the parties to be recorded, in the Register of Sasines or which is presented, or intended by the parties to be presented, in support of an application for registration in the Land Register; or

(b) in any question with a person, not being a party to the contract, who has reasonably relied on the meaning which would be given to the expression by the application of the general rule.

(Draft Bill, Schedule, para 2.)

Part 4 Wills

Introduction

4.1 We have suggested above¹ that the objective approach is in general satisfactory for the interpretation of testamentary writings. Such writings do not operate in a closed area in the way in which certain contracts do. They affect the rights and interests of people other than the granters of them. Executors and their advisers have to have a reasonably secure basis on which to distribute the estate. We think, therefore, that the general rule suggested above ought to be applicable to the interpretation of testamentary writings. That general rule already provides for expressions to be construed in their context and allows reference to be made to surrounding circumstances.² It already makes it clear that surrounding circumstances do not include statements of intention.³ There is, however, a case for a special exception in certain cases of ambiguity which cannot be otherwise resolved. Such an exception is recognised in the existing law.

Existing law

4.2 In the existing law there is an exception which allows evidence, of a type which would not normally be admissible, of the actual intention of a testator as to the meaning of an expression.⁴ The exception applies in cases of latent ambiguity where a description of the beneficiary or of the thing bequeathed is equally applicable to two or more persons or things.

4.3 The type of situation in which the exception might apply can be illustrated by several cases.

In *Wedderspoon v Thomson's Trs*⁵ a legacy of £500 was left to "Janet Keiller or Williamson, confectioner in Dundee". There was no such person. The question was whether the legacy should go to Agnes Keiller or Wedderspoon, confectioner in Dundee or to Janet Keiller or Whitton, housewife in Broughty Ferry. The court considered evidence that Agnes Keiller or Wedderspoon was known to and was in regular correspondence with the testator who called her Mrs Wedderspoon. It also considered the terms of earlier holograph wills and codicils which indicated that the testator had intended to provide something for Mrs Wedderspoon and that he was unsure of her first name. The court concluded that "no other person could be meant except the claimant", Mrs Wedderspoon, and that "the name Williamson must have

¹ Paras 2.9 - 2.11.

² To this extent application of the general rule would already achieve some of the results achieved in English law by the Administration of Justice Act 1982, s 21. That section altered English law, on the recommendation of the Law Reform Committee, to enable evidence of surrounding circumstances to be used to show that the testator's language was ambiguous. See the Law Reform Committee, 19th Report, *Interpretation of Wills* (1973, Cmnd 5301).

³ This is also the position in English law under s 21 of the Administration of Justice Act 1982.

⁴ See Walker and Walker, *Evidence* 286 - 288, 293; McLaren, *Wills and Succession* (3rd edn, 1894) Vol I, 723; Smith, *A Short Commentary on the Law of Scotland* 426; Walker, *Principles of Scottish Private Law* (3rd edn, 1983) Vol IV, 165; Gloag and Henderson, *The Law of Scotland* (10th edn, 1995) 773.

⁵ (1824) 3S 396.

been erroneously transcribed, instead of Wedderspoon, by the clerk who had copied it from the holograph will".

In *Keiller v Thomson's Trs*⁶, which involved the same will but a different beneficiary, a legacy was left to "William Keiller, confectioner in Dundee". There was no such person. The legacy was claimed by William Keiller, a confectioner in Montrose. William Keiller had only become a confectioner a few months before the testator's death and had set up business in Montrose from the beginning. The court concluded that the circumstances were not sufficient to establish that William Keiller, confectioner in Montrose, was the "person described by the said testator as William Keiller, confectioner in Dundee". At this stage James Keiller, a confectioner in Dundee, and a friend and relation of the deceased, lodged a claim and William Keiller of Montrose "retired from the competition". The court allowed the claim of James Keiller.

In *Cathcart's Trs v Bruce*⁷ a legacy was left to the children of "General Alexander Fairlie Bruce". There was no such person. There was a General Alexander James Bruce. There was also a Mr Alexander Fairlie Bruce. The Lord Ordinary considered the surrounding circumstances, including the fact that General Bruce was related to the testator and was alive at the date of the will whereas Mr Bruce was not (and might therefore have been more properly described as the "late" Mr Alexander Fairlie Bruce). In the circumstances the Lord Ordinary considered that General Bruce was the legatee. However, the Lord Ordinary was confirmed in this impression by a letter written by the testator's wife to the testator's solicitors in connection with the will in which she referred to General Bruce's sons as "young men". This fitted General Bruce's sons better than Mr Bruce's sons, who were aged between 34 and 50.

In *Nasmyth's Trs v The National Society for the Prevention of Cruelty to Children*⁸ a legacy had been left by a Scottish testator, domiciled and resident in Scotland, to the National Society for the Prevention of Cruelty to Children. The legacy was claimed by the society of that name which was based in London and by the Scottish National Society for the Prevention of Cruelty to Children. The Court of Session, after considering evidence which showed that it was more likely that the testator would have wished to benefit the Scottish society, held that it should take the legacy. The House of Lords reversed this decision. Several of the judges thought there was no ambiguity (even although several judges in Edinburgh thought it meant one thing and several judges in London thought it meant another).⁹ All thought that, in any event, there was not sufficient evidence to show that the testator intended to benefit any society other than the one which he had accurately described in his will.

Assessment of existing law

4.4 Cases of clerical error where a solicitor or other third party has made a mistake in drawing up a will could be dealt with by rectification if our recommendation on rectification of

⁶ (1826) 4S 724.

⁷ 1923 SLT 722.

⁸ 1914 SC (HL) 76. For a criticism of this case as an example of "rigid legalism", see Zweigert and Kötz, *An Introduction to Comparative Law* (trans. by T Weir, 2nd edn, 1987), Vol 2 at 90.

⁹ See pp 82 - 83.

testamentary documents were implemented.¹⁰ Most other cases could be resolved, we suspect, by reference to the normal range of surrounding circumstances. However, there may be rare cases where, even after surrounding circumstances have been taken into account an expression is capable of applying to two or more persons or things. Indeed, there may be cases where it is only after the surrounding circumstances have been taken into account that it becomes clear that the testator's expression is ambiguous. The special exception for such cases has been referred to in Scottish textbooks for over a hundred years. It seems to have done no harm and may have been found useful. A similar exception was preserved in English law on the recommendation of the Law Reform Committee.¹¹

4.5 One possible justification for the exception is that there is not the same danger of doing violence to ordinary language if a special exception is recognised for what will often be a proper name. There is no ordinary meaning of James Keiller or Agnes Williamson which has to be protected from misuse. Also, there are not the same practical difficulties if the exception is confined to unresolved ambiguities in the identification of beneficiaries or bequests and if the choice is limited to one of the objectively possible names.

4.6 At present the exception applies in the case of latent but not patent ambiguities. The distinction between latent and patent ambiguities crept into Scottish law from England in the early nineteenth century.¹² We have not been able to find any persuasive explanation of its purpose in this context. It may be that in the case of a blatant patent ambiguity - so patent that it must have been obvious to the testator - the only reasonable conclusion is that the testator was playing games or leaving the choice of beneficiary or bequest to the executor. In such a case there will be no point in looking for the testator's actual intention or doing anything other than treating the bequest as void for uncertainty. If, for example, a testator left a bequest to "James Keiller, the confectioner" and added "(being either James Keiller, the confectioner in Dundee or James Keiller, the confectioner in Montrose)" then there is no point in looking further. It does not seem to be necessary, however, to have a special rule to solve that kind of case. So far as we can see, the distinction between latent and patent ambiguities in testamentary writings serves no useful purpose.¹³ Indeed in cases less blatant than the type of case just discussed the distinction seems to be positively harmful. The fact that an ambiguity which was not obvious to the testator is obvious to the interpreter ought not to prevent the application of a beneficent rule of interpretation.

Results of consultation

4.7 On consultation there was support for, and no disagreement with, our assessment and provisional proposal.

Recommendation

4.8 We recommend that:

¹⁰ See our Report on *Succession* (Scot Law Com No 124, 1990) para 4.28.

¹¹ See the Law Reform Committee, 19th Report, *Interpretation of Wills* (1973, Cmnd 5301) and the Administration of Justice Act 1982, s 21(2).

¹² See *Morton v Hunter & Co* (1830) 4 W & S 379 at 386 - 387; *Logan v Wright* (1831) 5 W & S 242 at 247; Walker and Walker, *Evidence* 285 - 286.

¹³ It has been abandoned in English law. See the Administration of Justice Act 1982, s 21(1)(b) and (c).

4. (1) An expression in a testamentary writing should be interpreted in accordance with the general rule on interpretation unless the following rule has effect.

(2) An expression in a testamentary writing which describes a beneficiary or a bequest in terms which are applicable to two or more persons or things should be interpreted as applying to such one of those persons or things as corresponds with the intention of the testator.

(Draft Bill, Schedule, para 3.)

Part 5 Ordinary Words and Technical Words

Introduction

5.1 In this part of the report we consider two general rules which are recognised in the existing law. We ask whether they should be included in a statutory restatement of the law on interpretation and conclude that, in the new context created by the general rule of interpretation proposed above, they are so obvious that they would add nothing.

Ordinary words

5.2 One of the most commonly stated rules of interpretation is that ordinary words are presumed to bear their ordinary meaning.¹

"The most general rule of construction - without which, indeed, all interpretation would be impossible - is that ordinary words are to be taken as used in their ordinary meaning, if there is nothing in the context or in the rest of the contract to imply the contrary."²

The contrary may be implied if, for example, the result would be "some absurdity, or some repugnance or inconsistency with the rest of the instrument".³

Technical or legal expressions

5.3 A corollary of the rule on ordinary words is the rule that technical expressions or expressions with an established legal meaning are normally taken to bear their technical or legal meaning when used in a context where that meaning is appropriate. This is well-established in the existing law.⁴ Technical meanings are likely to be particularly important in specialised areas such as shipping, construction, agriculture or finance. In the existing law it is well recognised that extrinsic evidence is admissible for the purpose of explaining the meaning of technical expressions.⁵

¹ See Walker and Walker, *Evidence* 283; *MW Wilson (Lace) Ltd v Eagle Start Insurance Co Ltd* 1993 SLT 938, by Lord Kirkwood at 947. "The general rule of construction of a contract is that the words used are to be given their ordinary and natural meaning."

² Gloag, *Contract* (2nd edn, 1929) 399.

³ *Grey v Pearson* (1857) 6 HL Cas 61 at 106. See also *Caledonian Ry Co v North British Ry* (1881) 8R (HL) 23 at 31.

⁴ McLaren, *Wills and Succession* (3rd edn, 1894) 377. See also Gloag, *Contract* (2nd edn, 1929), 400; McBryde, *Contract* 432 - 434; Walker and Walker, *Evidence* 283. Contrast *Hunter v Nisbett* (1839) 2D 16 (where the technical meaning of the word "heirs" was departed from because the context so required) with *Blair v Blair* (1849) 12D 97 (where the word "heirs" was given its recognised legal meaning). And, on the interpretation of terms such as "heirs" and "issue", see *Wright's Trs v Callender* 1993 SLT 556.

⁵ Walker and Walker, *Evidence* 289 - 290; *Inglis v Buttery* (1878) 5R (HL) 87 at 90. For a recent example, see *Leverstop Ltd v Starling* 1993 GWD 23-1461 where "witnesses of experience in the market" gave assistance as to the meaning of the expression "LSSD" (which referred to "Lloyds Syndicates' Survey Department").

Assessment and conclusion

5.4 The above rules seem eminently reasonable at first sight and, in the context of the cases where they have been cited, have no doubt been found useful. However, the question for us is whether they would be worth reproducing in a statutory restatement which already contained the general rule recommended above. That general rule already provides for expressions to have the meaning which would reasonably be given to them in their context, regard being had where appropriate to the surrounding circumstances and to the nature and purpose of the juridical act. It would not be reasonable to give ordinary words an extraordinary meaning, if the context or surrounding circumstances did not justify this. It would not be reasonable to give technical words a non-technical meaning, if it was clear from the context and surrounding circumstances and from the nature and purpose of the juridical act that they were being used in a technical way. The surrounding circumstances would include any usages or practices in the particular field of activity in question. We also suggest later that there should be a saving provision for expressions which have a fixed legal meaning.⁶ To say, in addition to all that, that an interpreter should begin by giving ordinary words their ordinary meaning and, in an appropriate context, technical words their technical meaning would hardly seem to be necessary.

5.5 The rule on ordinary words and technical expressions is deceptively simple. It seems to imply that ordinary words have only one ordinary meaning and that technical expressions have only one technical meaning. That is not always the case, as a reference to any dictionary shows. Indeed ordinary words may well have a technical or legal meaning when used in certain contexts. There are many situations in which the rule on ordinary words and technical expressions is not only trite but also unhelpful.

5.6 Any attempt to put the so-called golden rules on ordinary words and technical words into statutory form would also reveal hidden difficulties. These rules are sometimes described as presumptions, as can be seen from one of the above quotations, but that is inappropriate. The term "presumption" is better left for questions of fact where the presumption can be rebutted by proof to the contrary. However, the use of the word "presumption" is significant because it indicates that the ordinary or technical meaning can be departed from in certain cases. That is where the difficulty starts. It would be too narrow to say that the ordinary meaning of an ordinary word could be departed from only in cases where the ordinary meaning would lead to absurdity, repugnance or inconsistency. The context might well show clearly that an ordinary word was used throughout in a special meaning even although the ordinary meaning might not lead to absurdity, repugnance or inconsistency. However, even a reference to the context might be too narrow. A permissible reference to surrounding circumstances might show that the word was used in a special sense. However, even that would not exhaust the cases where the ordinary meaning might have to be departed from. If the case came under the special rule for contracts then effect would have to be given to a special meaning used by one party if the other party knew or could reasonably have been assumed to know of that meaning. What the rules on ordinary words and technical words come to is that the interpreter should use the ordinary meaning or technical meaning of words, as appropriate in the context and surrounding circumstances, unless the rules of interpretation suggest that some other meaning should be given to them. Again, this seems obvious. It is difficult to imagine what else the reasonable interpreter might be tempted to do. It would hardly be

⁶ See Part 7.

reasonable to start the interpretation process by deliberately reading ordinary words in extraordinary ways or by inventing strange meanings for technical terms or novel meanings for terms which already had a clear legal meaning.

5.7 We invited views on this question in our discussion paper. Views were mixed, as were the views expressed in our advisory group on contract law. It would be possible to go either way on this issue. On balance we conclude that a rule on ordinary words and technical words would add nothing of value to the other rules here recommended. We do not therefore recommend the inclusion of any such rule.

Part 6 Rules of Preference for Cases of Doubt

Introduction

6.1 In the process of interpreting an expression, or construing a juridical act as a whole, it may happen that doubt remains even after the application of the ordinary rules of interpretation. Over the centuries certain rules of preference¹ have been found useful in order to tip the balance one way or the other.² For example, there is a well-known preference for construing an expression, in case of doubt, against the party who put it forward and who had the opportunity to make it clear (the *contra proferentem* rule). There is also a preference for construing a juridical act in a way which gives effect to all its terms rather than in a way which denies effect to some of them. We set out these and other rules of preference in Appendix B to this report. In the discussion paper we dealt with these rules of preference at some length. Consultation made it clear, however, that there was a division of opinion as to the usefulness of including them in legislation. There was no disagreement, subject to one or two points of detail, with the range or content of what we set out.

To enact or not to enact?

6.2 The argument for legislation on this subject is that it would be useful to all those who have to refer to the law to set out the standard rules of preference in a clear, up to date and authoritative form.

6.3 There are several arguments against enactment. The first is that legislation is not necessary. The substantive rules of interpretation can be clarified and the rules on the admissibility of extrinsic evidence reformed without dealing with the rules of preference. To omit them from the draft Bill would not make them less available or less useful. Reasonable rules of preference for cases of doubt will continue to exist as aids to construction just as at present. They usefully supplement the general rule by providing guidance on what are reasonable approaches to take in certain types of case of doubt or difficulty. Any reasonable interpreter would apply them where appropriate.³ They are not inconsistent with the new rules on interpretation in the draft Bill and so are not affected by its abolition of inconsistent common law rules.⁴

6.4 A second argument against enacting the rules of preference is that this would be inappropriate.

¹ In the discussion paper we used the term "canons of construction". This attracted some adverse comment - "The rules should not be canonised" - and is perhaps less informative than "rules of preference".

² Many of them are derived from texts in Justinian's Digest. See Zimmermann, *The Law of Obligations* 637 - 642 and Appendix A to Discussion Paper No 101. Zimmermann notes that in one 18th century German work there were "no fewer than 100 different rules of interpretation".

³ See our Discussion Paper No 97 (1994) at para 3.9.

⁴ See clause 1(3) of the draft Bill. The fact that reasonable rules of preference for cases of doubt are perfectly consistent with the new general rule is sufficient to save such rules. Any which relate specifically to a particular type of expression would also be expressly saved by clause 1(2).

"It is not really for the legislator to instruct the judge [or other interpreter] in what is practically reasonable or to control his application of the law by technical rules which are virtually empty of content".⁵

6.5 A third argument against inclusion is that this would increase the risk of litigation on the meaning and effect of the various rules of preference. This risk exists already but, it might be argued, it would be significantly increased by the mere process of setting out familiar ideas in legislative form. Professor McBryde was firmly of this view. He said

"I dread the thought of the case law which would arise in the interpretation of each of the canons. And of the arguments in court as each possible canon is pled . . . The various rules of interpretation are given little or much weight according to the circumstances."

6.6 A fourth argument against inclusion is that it would create a risk of divergence between the new statutory rules and similar non-statutory rules. One possible divergence would be between the rules applied in Scotland and those applied in other countries where the rules of preference have not been embodied in legislation.⁶ This includes not only English-speaking countries but also, in relation to many of the rules, most continental European countries. Another possible divergence would be between the rules applied in the construction of juridical acts and those applied in the interpretation of legislation. This factor was regarded as particularly important by our Parliamentary draftsmen.

6.7 A fifth argument is that any attempt to enact the standard rules of preference would give rise to difficulties of a type which would serve only to demonstrate their unsuitability for legislation. It would, for example, be necessary to address the problem of conflict between two or more rules and the question of the relationship between the statutory list and the rules of preference recognised at common law.

6.8 Finally, there is the simple but cogent point that it is not desirable to increase the length of any statute unnecessarily.

Assessment and conclusion

6.9 Views on the question of enacting the standard rules of preference differed both within the Advisory Group and on consultation. Several influential consultees supported the idea of a statutory restatement.⁷ Our own view has fluctuated. On balance, however, we think that the arguments for omission outweigh the arguments for inclusion. This does not mean that we think that the standard rules of preference are not useful. We simply consider that they should remain available in a non-legislative form.

⁵ Zweigert and Kötz, *An Introduction to Comparative Law* (trans by T Weir, 2nd edn, 1987) 430 - 431.

⁶ This argument was strongly put to us by the Lord President in his comments on the discussion paper.

⁷ Including the Faculty of Advocates, the Law Society of Scotland, the Royal Faculty of Procurators in Glasgow ("on balance") and the Centre for Research into Law Reform.

A non-statutory statement

6.10 For the record, and for any utility it may have, we set out in Appendix B a statement of the rules of preference which we would have recommended had we concluded that legislation on this subject was justified.

Part 7 Saving for Special Rules of Interpretation

Introduction

7.1 The rules which we have considered in this paper are general rules of interpretation. They are not intended to replace special rules relating to the interpretation of particular expressions or particular types of expression.¹

Special rules for particular expressions

7.2 There are many special statutory rules on the meanings of particular expressions used in private deeds or other private law contexts. For example, certain expressions relating to weights and measures have fixed statutory meanings;² the expressions "I assign the writs", "I assign the rents" and "I grant warrandice" have special statutory meanings when used in conveyancing deeds;³ a reference to "full age" in certain deeds is by statute a reference to the age of 18;⁴ and a reference to "Whitsunday" or "Martinmas" in certain deeds has a statutory meaning.⁵ There are also common law rules on the meaning of numerous expressions, particularly in the fields of succession and conveyancing. In succession there are, for example, special rules on the interpretation of certain terms descriptive of classes of beneficiaries, such as "heirs".⁶ In conveyancing there are, for example, special rules on the interpretation of terms like "common property" in the law of the tenement⁷ and of certain terms used in bounding descriptions, such as "bounded by the sea" or by a loch or by a public road.⁸ The rules which we suggest in this paper are intended to be without prejudice to any special rules for the interpretation of such particular expressions.

Special rules for particular types of expression

7.3 There are also special rules for the interpretation of particular types of expression. By rules relating to "particular type of expression" we mean to cover, first, those statutory provisions which provide that references, direct or indirect, and in whatever form, to a particular concept (such as "child" or "relative") are to be construed in a particular way⁹ and,

¹ Stair took the same approach. At the end of his treatment of interpretation he said (IV.42.22) "As to the meaning and interpretation of special clauses, they are congested in the Indexes of the Decisions of the Lords observed by me. The particulars would be tedious and unnecessary to be here repeated, but by these indexes and decisions, they will easily be cleared; especially these clauses which are most frequently controverted, such as clauses concerning conquest, succession, and irritancies."

² See eg *Thomson v Garioch* (1841) 3D 625 (meaning of "acre" fixed by statute).

³ Titles to Land Consolidation (Scotland) Act 1868, s 8.

⁴ Age of Majority (Scotland) Act 1969, s 1(2).

⁵ See the Term and Quarter Days (Scotland) Act 1990.

⁶ See eg *Blair v Blair* (1849) 12D 97; *Wright's Trs v Callender* 1993 SLT 556.

⁷ See *Marfield Properties v Secretary of State for the Environment* 1996 GWD 21-1217.

⁸ See eg *Magistrates of Musselburgh v Musselburgh Real Estate Co Ltd* (1904) 7F 308 at 315 - 317 and, generally, Gordon, *Scottish Land Law* (1989) 63 - 72.

⁹ See eg Adoption (Scotland) Act 1978, s 39; Law Reform (Parent and Child) (Scotland) Act 1986, s 1(2).

secondly, rules of the common law relating to expressions having a certain nature, such as expressions purporting to create real burdens.¹⁰

7.4 *Real burdens.* We considered recommending a change in the special rule for the interpretation of expressions purporting to create real burdens. Such expressions are interpreted in a particularly strict way under the existing law. Even in a case of ambiguity, surrounding circumstances will not be considered. There is no attempt to construe the deed containing the real burden in such a way as to give effect if possible to all its terms. Courts will quite readily hold the real burden to be ineffective because of uncertainty or ambiguity.

"The wording must be so clearly expressed that the extent of the burden can be ascertained by a purchaser without travelling beyond the four corners of his titles...

If the words are self-contradictory, or so obscure that one had to grope for the meaning, then the provision is ineffective. It is also ineffective if it is ambiguous or reasonably capable of having more than one meaning."¹¹

"There can be no benevolent construction in the sense of spelling a meaning out of obscure phraseology or preferring one of two or more reasonable possible meanings."¹²

The rules which we recommend in this report would change the law on the interpretation of real burdens if it were not for the saving for existing rules relating to the interpretation of particular types of expression.

7.5 There is no doubt that the rules on the interpretation of real burdens are anomalous. They appear to reflect a judicial unease with the concept of a burden on land binding on singular successors in perpetuity. The question is whether an anomalous rule of interpretation is the best way of dealing with the problem.

7.6 The strict rule on the interpretation of real burdens grew up at a time when there was no way of dealing with burdens which had become unreasonable or inappropriate or unduly burdensome compared with any benefit to the other party. Now there is.¹³ It is therefore arguable that the time is ripe for a re-examination of the merits of the strict construction rule. However, we do not think that this report is the place for such a re-examination. Our concern in this report is with general rules of interpretation, not with special rules for the interpretation of particular types of expression. A more appropriate place for reconsidering the rule on the

¹⁰ The saving for rules relating to particular types of expression might also save some of the standard rules of preference for cases of doubt in the construction of a juridical act. For example, it might be argued that the *contra proferentem* rule was a rule for the interpretation of a particular type of expression - namely, the type "supplied" by one party. It is not, however, necessary to rely on this argument, which would not apply to those rules of preference which relate to the juridical act as a whole or which express a preference for a particular result, to save the normal and reasonable rules of preference. They are simply not abolished because they are perfectly consistent with, and usefully supplement, the new rules.

¹¹ *Lothian Regional Council v Rennie* 1991 SC 212 at 222.

¹² *Hunter v Fox* 1964 SC (HL) 79 at 99.

¹³ Application can be made to the Lands Tribunal under the Conveyancing and Feudal Reform (Scotland) Act 1970, s 1 for the variation or discharge of land obligations. The Lands Tribunal can grant an order varying or discharging the obligation if, for example, it is unduly burdensome compared with any benefit which would result from its performance or if its existence impedes some reasonable use of the land.

interpretation of real burdens will be in our work on property law. We intend in the course of that work to produce a discussion paper on the law of real burdens generally.¹⁴

7.7 *Explanatory possession.* Under the existing law reference can be made to subsequent possession in construing certain types of expression in conveyancing deeds, such as descriptions of barony titles¹⁵ or other "general descriptions"¹⁶ or, possibly, descriptions of servitude rights.¹⁷ We do not intend our proposals to affect any such special rules. Nor do we think that this paper is the place to consider the precise nature and scope of any such rules.

Recommendation

7.8 Our proposal for a savings clause was supported by those consultees who commented on it. We recommend that:

5. **It should be made clear that the above rules are without prejudice to the effect of any enactment or rule of law on the interpretation of any particular expression or particular type of expression.**

(Draft Bill, clause 1(2).)

¹⁴ This will supplement and extend our consideration of the subject in the context of the abolition of the feudal system of land tenure.

¹⁵ See eg *Agnew v Lord Advocate* (1873) 11M 309; *Lord Advocate v Blantyre* (1879) 6R (HL) 72; *Buchanan and Geils v Lord Advocate* (1882) 9R 1218 at 1234; *Lord Advocate v Wemyss* (1899) 2F (HL) 1 esp. by Lord Watson at 9-10; *Mather v Alexander* 1926 SC 139 at 146; *Luss Estates Ltd v BP Oil Grangemouth Refinery Ltd* 1981 SLT 97 at 100 (sequel at 1982 SLT 457 and 1987 SLT 201).

¹⁶ See *Beneficial Bank plc v McConnachie* 1996 SLT 413 at 417.

¹⁷ *Boyd v Hamilton* 1907 SC 912. Contrast, however, *Baird v Fortune* (1861) 4 Macq 127 and *Fraser v Grant* (1866) 4M 596.

Part 8 Admissibility of Evidence

Introduction

8.1 The preceding parts of this paper have been concerned with a restatement and clarification of substantive rules of interpretation which apply whenever an expression in a juridical act is being interpreted. This part is concerned with rules on the admissibility of evidence which apply only in judicial and other proceedings.

Existing law

8.2 The general rule under the existing law is that it is

"incompetent to ... explain writings by parole or other extrinsic evidence".¹

However, the exceptions to the rule are so numerous and extensive that it has been said that little harm would probably result if the rule were turned round and expressed as a rule that extrinsic evidence is admissible subject to a few exceptions.² Extrinsic evidence means all evidence, written or oral, extraneous to the document in question.

8.3 The scope of the exceptions to the general rule is a matter of great uncertainty. On one view there is an exception for any case of latent ambiguity.³ However, the distinction between patent and latent ambiguities is not clear or satisfactory⁴ and forms an unsound basis for the structure of rules which is erected on it.⁵ The distinction appears to have been borrowed from English law early in the nineteenth century.⁶

8.4 Another view is that the distinction between latent and patent ambiguities is not important and that the key distinction is between direct and circumstantial evidence of intention.⁷ This distinction has to be applied along with a distinction between a particular type of ambiguity, called in England an "equivocation", and all other ambiguities.⁸ In relation to all ambiguities circumstantial evidence of intention is admissible: only in relation to equivocations is direct evidence of intention available.⁹ This approach appears to assume that, under the substantive rules on interpretation, intention is what matters and that the only question is how it can be proved. We doubt whether this assumption is justified. The authors who support the view that the distinction between direct and circumstantial evidence of intention is part of the law of Scotland add that

¹ Walker and Walker, *Evidence* 254.

² Walker and Walker, *Evidence* 255.

³ See eg Gloag, *Contract* (2nd edn 1929) 372; Walker, *Contracts* (2nd edn 1985) para 24.13.

⁴ Gloag says (at p 372) that the distinction between these two types of ambiguities is "not always very satisfactory or easy to apply". Walker says (at para 24.13) that it "has rarely, if ever, been strictly applied in Scottish cases".

⁵ We criticised the distinction in our Discussion Paper on *Contract Law: Extrinsic Evidence, Supersession and the Actio Quanti Minoris* (No 97, 1994) 73 -75.

⁶ See *Morton v Hunter & Co* (1830) 4 W & S 379 at 386-7; *Logan v Wright* (1831) 5 W & S 242 at 247.

⁷ Walker and Walker, *Evidence* 285 - 288.

⁸ An equivocation occurs when a term is equally applicable to two or more persons or things.

⁹ Walker and Walker, *Evidence* 285-288.

"In England, whence the doctrine was accepted, the distinction is arbitrarily made, and its origins seem to be obscure."¹⁰

8.5 These distinctions which are supposed to form the basis of the Scottish law on this subject have been severely criticised in a leading English case on the interpretation of contracts.

"[T]he distinction between the admissibility of direct and circumstantial evidence of intention seems to me to be quite unjustifiable in these days. And the distinctions between patent ambiguities, latent ambiguities and equivocations as regards admissibility of extrinsic evidence are based on outmoded and highly technical and artificial rules and introduce absurd refinements."¹¹

8.6 There is doubt as to the effect of section 11(1) of the Requirements of Writing (Scotland) Act 1995 which provides that any rule of law or any enactment whereby the proof of any matter is restricted to proof by writ or oath ceases to have effect. On one view this would now let in a great deal of oral evidence of intention in the interpretation of written documents.¹² However, on another view, the 1995 Act has made little difference in this area because the scope for proof of intention by writ or oath in matters of interpretation was always limited.¹³

8.7 Whatever view is taken on the above matters, it is generally accepted that the general rule excluding extrinsic evidence is subject to important specific exceptions. There is, for example, an exception for surrounding circumstances, which is subject to sub-exceptions, one of which is itself subject to five, or possibly six, sub-sub-exceptions.¹⁴ We analysed these exceptions, sub-exceptions and sub-sub-exceptions, as they apply to contracts, at some length in our discussion paper on *Contract Law: Extrinsic Evidence, Supersession and the Actio Quanti Minoris*¹⁵. Our assessment was that the law was complicated, uncertain and obscure. No-one has disagreed with this assessment.

8.8 The law on the admissibility of extrinsic evidence for purposes of interpretation may not be as bad in practice as it is in theory. Not only do the numerous exceptions enable justice to be done in most cases but also there may be a changing judicial climate which is impatient with technical restrictions on relevant evidence. We were told at the meeting of the Advisory Group on Contract Law that the law on the admissibility of extrinsic evidence in the interpretation of contracts is not now applied in practice with as much rigour as might be supposed from the textbooks and older cases. There is a predisposition now to get parties into court on the facts as soon as possible and to discourage preliminary argument as to the admissibility of evidence. There is a preference for deciding questions of interpretation with, rather than without, relevant information about the surrounding circumstances or factual matrix. But none of this weakens the case for reform. Good practice is not an argument for retaining bad law.

¹⁰ Walker and Walker, *Evidence* 287, footnote 4.

¹¹ See *Wickman Tools Ltd v Schuler AG* [1974] AC 235, by Lord Simon of Glaisdale at 268.

¹² In *Turner v MacMillan-Douglas* 1989 SLT 293 proof by subsequent writ was allowed in a question of interpretation. The court referred with approval to the statement in Gloag, *Contract*, (2nd edn 1929) 376 to the effect that proof of the parties' intention by subsequent writ was always competent. Under the 1995 Act anything which could formerly be proved only by writ can now be proved by any means.

¹³ See *Miller Construction Ltd v Trent Concrete Cladding Ltd* 1996 GWD 2-69 in which the *Turner* case was doubted.

¹⁴ See Discussion Paper No 97 (1994) paras 3.18 - 3.38.

¹⁵ See Discussion Paper No 97 (1994) paras 3.39 - 3.40.

The scope for a new approach

8.9 There ought, in our view, to be a general policy in favour of admitting relevant evidence and not admitting irrelevant evidence. There is scope for developing the law on these lines if the substantive law makes it reasonably clear what is relevant and what is irrelevant in the interpretation of expressions used in a private law context. The rules on interpretation which we have suggested above attempt to do this.

Rule proposed in discussion paper

8.10 We proposed in the discussion paper that the existing rules on the admissibility of extrinsic evidence in the interpretation of juridical acts should be replaced by a rule on the following lines.¹⁶

"In judicial or other proceedings on the interpretation of an expression in a juridical act evidence of any relevant matter is admissible."

Effect of concentrating on relevance of evidence

8.11 *In relation to general rule of interpretation.* Where the general objective rule applies the definition of "surrounding circumstances" would make it clear that some matters were not relevant. Evidence of statements of intention, or of instructions, communings or negotiations forming part of the preparation of the juridical act would not be relevant, unless these matters had been imported into the juridical act by reference and had become part of the context. Evidence of subsequent conduct would not be relevant.

8.12 *In relation to the special rule for certain contracts.* For the purposes of the special rule on the interpretation of certain contracts evidence that an expression was used by one party in a special sense which was known to the other party or all the other parties, or which they could reasonably have been assumed to know, would be relevant. Such evidence might include evidence of the communication of the special meaning by one party to the other, or to all the others, during the negotiation of the contract.¹⁷ However, evidence of subjective intention as such would still be irrelevant.

8.13 Similar considerations apply to the use of subsequent conduct in relation to the special rule for certain contracts. Evidence of subsequent conduct would be relevant if, but only if, it tended to establish that, at the time of contracting, an expression was used by one party in a particular sense of which the other party, or all the other parties, knew or could reasonably have been assumed to know. Often subsequent conduct would not meet this test of relevancy.

8.14 In applying the special rule, deletions or rejected terms could be taken into account in so far as they tended to establish that, at the time of contracting, an expression was used by one party in a particular sense of which the other party, or all the other parties, knew or could reasonably have been assumed to know.¹⁸

¹⁶ Discussion Paper No 101 (1996) para 7.10.

¹⁷ As in *Sutton & Co v Ciceri & Co* (1890) 17R (HL) 40 and *Houldsworth v Gordon Cumming* 1910 SC (HL) 49.

¹⁸ On deletions contrast *Inglis v Buttery* (1878) 5R (HL) 87 with *Taylor v John Lewis Ltd* 1927 SC 891. See also *Timber Shipping Co SA v London & Overseas Freighters Ltd* [1972] AC 1 by Lord Reid at 15-16. On rejected terms, see *Hunter v Livingston Development Corporation* 1986 SC (HL) 31. Here the parties had, during negotiations, deliberately rejected the use of model form D and had chosen to use model form B. The court allowed evidence to be led in support of an

8.15 In relation to contracts the international models to which we have referred appear to admit reference to such matters as negotiations and subsequent conduct on a liberal basis whether the rule being applied is that which relates to the actual intent of one party (of which the other knew or could not have been unaware) or that which relates to the view of the reasonable person. The United Nations Convention on Contracts for the International Sale of Goods provides, for example, that

"In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."¹⁹

This refers, however, only to "due consideration" and "relevant circumstances". It seems to us that on the objective approach it would rarely be appropriate to regard prior negotiations or subsequent conduct as relevant or to give them weighty consideration. The *Unidroit Principles of International Commercial Contracts* provide that in applying the rules on interpretation "regard shall be had to all the circumstances" including preliminary negotiations between the parties, practices which the parties have established between themselves, and the conduct of the parties subsequent to the conclusion of the contract.²⁰ The official comment on this article notes, however, that these three factors are likely to have greater weight in the application of the "subjective" test. We would respectfully agree. In any event it is clear from our discussions and consultations that there would be unease in Scotland about the practical implications of regarding prior negotiations or subsequent conduct as relevant to the application of the "objective" test, even in relation to contracts.

8.16 *In relation to the special rule for wills.* We have suggested that there should be a special exception for those cases where, in a testamentary writing, an expression describing a beneficiary or a bequest is applicable to two or more persons or things. In such a case, we have suggested, the expression should be interpreted as applying to such one of those persons or things as corresponds to the intention of the testator.²¹ It follows that in the application of this limited exception evidence of any matter, including letters of instruction to solicitors,²² should be regarded as relevant if it sheds light on the testator's actual intention.

8.17 *In relation to saved or unaffected rules on interpretation.* In relation to any rules of interpretation which were saved by, or simply unaffected by, the new legislation, all relevant evidence would be admissible. This is important in relation to some of the common law rules of preference for cases of doubt. For example, the *contra proferentem* rule may require evidence to be led of the negotiations leading up to the juridical act, so that it can be determined whether a term was "supplied" by one party to the other.

Results of consultation

8.18 The proposal to simplify the existing rules on the admissibility of extrinsic evidence was generally welcomed. The Faculty of Advocates, for example, said:

argument that, having rejected D, it was unlikely that the parties intended an ambiguous expression in B to be interpreted in a way which would have had the same result as if D had been adopted.

¹⁹ Article 8(3).

²⁰ Article 4.3.

²¹ Some problems could be solved by rectification if it were to be available in relation to testamentary writings. See our Report on *Succession* (Scot Law Com No 124, 1990) para 4.28.

²² As in *Cathcart's Trs v Bruce* 1923 SLT 722.

"The Faculty agrees with the Scottish Law Commission's approach of replacing complex evidential rules with substantive rules of interpretation. It welcomes the clarification of the law which results from the abolition of the rules of evidence relating to the explanation of writings by parole and other extrinsic evidence and its substitution by a rule that in judicial or other proceedings on the interpretation of an expression in a juridical act evidence of any relevant matter is admissible."

The Faculty considered, however, that where the special rule on contracts was to be applied there would often have to be reference to prior communings.²³ In practice the court would have to allow a proof before answer. The Faculty pointed out, however, that any problems in this respect might be reduced by the introduction of new court procedures such as those used in the Commercial Court to force parties to assess and disclose the nature of evidence in support of their cases at an early stage.

8.19 Two specific points were made on our provisional proposal. First, the Law Society of Scotland suggested that the proposed rule should not give any impression that there was admissibility in all circumstances including those where evidence had been obtained unlawfully, or was subject to privilege or was redundant. It was never our intention to suggest that in these respects the ordinary rules of evidence would not apply and we do not consider that a provision that evidence of any description is admissible notwithstanding that it is extrinsic evidence could reasonably be construed as having this effect. Secondly, the Royal Faculty of Procurators in Glasgow suggested that the proposed rule on the admissibility of evidence should be more tightly linked to the new substantive rules on interpretation. They suggested that evidence of any matter should be admissible provided that it was a matter which was relevant to any of the statutory rules of interpretation applicable to the juridical act in question. Such a formulation would be too narrow, however, because the new rule on the admissibility of relevant evidence should apply not only in relation to the new statutory rules but also in relation to saved or unaffected common law rules, such as the *contra proferentem* rule. There is also the possibility that a foreign substantive law might apply in a particular case. For these reasons it would not be appropriate to relate the rules of evidence only to the new Scottish statutory rules.

Recommendation

8.20 We remain of the view that a radical simplification of the rules on the admissibility of extrinsic evidence in relation to the interpretation of juridical acts is required and is possible. We are fortified in this view by the comments made on consultation. We recommend that:

- 6. It should be provided that evidence (of whatever nature) of any matter relevant to the interpretation of a juridical act is admissible notwithstanding that it is extrinsic evidence.**

(Draft Bill, clause 2.)

²³ This would be possible under the legislation we recommend. See para 8.12 above.

Part 9 Application and Extent

Application

9.1 *Rule on admissibility of extrinsic evidence.* The normal rule is that new rules of evidence apply to proceedings commenced after the Act introducing the new rules comes into force. The new rules of evidence apply no matter when the acts or events to which they relate took place. It would lead to unacceptable complications and risks of injustice if several different rules of evidence applied to different elements in the same case. We can see no reason for not applying the normal rule in the present context. This is what we proposed in the Discussion Paper. No-one disagreed. We therefore recommend that

7. (1) **The new rule on the admissibility of evidence should apply in any proceedings commenced on or after the date of commencement of the new legislation.**

(Draft Bill, clause 4(3).)

9.2 *Rules of interpretation.* There are strong arguments in favour of retrospective application of the rules on interpretation. Most of the rules we have recommended are simply a restatement of the existing law in a slightly different form. In most cases it would be unlikely that their application would produce any different results, although we would hope that the same results might be reached more easily. Even where a different result was produced (for example, because a court was prepared to look at surrounding circumstances even in the absence of an obvious ambiguity on the face of an expression) this would be likely to confirm rather than frustrate the expectations of the parties. We think therefore that the proposed rules on interpretation could safely be applied to juridical acts of any date.

9.3 There would be clear advantages in applying the rules retrospectively. First, if this were not done, the old rules would continue for a long time. Documents may have to be interpreted centuries after they have been drafted. It would be undesirable to have two sets of rules on interpretation continuing for the indefinite future. Secondly, the rules on interpretation and the rules on the admissibility of extrinsic evidence are closely related. We have already recommended that the new rule on the admissibility of extrinsic evidence should apply in any proceedings commenced on or after the date of commencement of the new legislation. It would apply no matter when the juridical acts in question were entered into. However, it would be undesirable to liberalise the rules of evidence in relation to pre-commencement juridical acts without also tightening up the substantive rules of interpretation.

9.4 In the Discussion Paper we suggested that the new rules on interpretation should apply whatever the date of the juridical act in question. No-one dissented and several consultees, including the Faculty of Advocates and the Law Society of Scotland, expressly agreed. We therefore recommend that

(2) The new substantive rules on interpretation should apply whatever the date of the juridical act in question.

(Draft Bill, clause 4(2).)

Extent

9.5 So far as extent is concerned the rules are intended to change only the law of Scotland. The Scottish substantive law on interpretation would apply to juridical acts governed by Scottish law, or whose interpretation was governed by Scottish law, no matter where proceedings took place.¹ The Scottish law on the admissibility of extrinsic evidence would apply to any proceedings in Scotland no matter what law governed the juridical act in question.² These results would follow from the background private international law and would not have to be provided for in the Bill. The Bill would need only an application to Scotland clause in normal form.³

¹ In the case of trusts and contracts this follows from the Recognition of Trusts Act 1987 and the Contracts (Applicable Law) Act 1990 respectively. In the case of other juridical acts it follows from general principles of private international law. See Anton, *Private International Law* (2nd edn 1990) at 610 (deeds relating to immoveables) and 686 (wills).

² See Anton 745 - 746.

³ See clause 4(5).

Part 10 List of Recommendations

1. There should be legislation to clarify the substantive law on the interpretation of contracts, conveyances and other juridical acts and to reform the law on the admissibility of extrinsic evidence for that purpose.

Para 1.25.
Draft Bill, clauses 1 to 3.

- 2.(1) It should be provided that the general rule on the interpretation of an expression in a juridical act is that the expression is given the meaning which would reasonably be given to it in its context, having regard where appropriate to

- (a) the surrounding circumstances; and

- (b) in so far as they can be objectively ascertained, the nature and purpose, of the juridical act.

- (2) For the purposes of this rule the surrounding circumstances should not include -

- (a) statements of intention;

- (b) instructions, communings or negotiations forming part of the process of preparation of the juridical act;

- (c) conduct subsequent to the juridical act.

Para 2.36.
Draft Bill, Schedule, para 1.

- 3.(1) An expression in a contract should be interpreted in accordance with the general rule on interpretation unless the following rule has effect.

- (2) An expression in a contract which is used by one party in a particular sense (whether or not it is also used in that sense by any other party) should be interpreted in that sense if every other party at the time of contracting knew or could reasonably have been assumed to know that it was being used in that sense.

- (3) Paragraph (2) does not apply,

- (a) to a contract which is recorded, or intended by the parties to be recorded, in the Register of Sasines or which is presented, or intended by the parties to be presented, in support of an application for registration in the Land Register;
or

- (b) in any question with a person, not being a party to the contract, who has reasonably relied on the meaning which would be given to the expression by the application of the general rule.

Para 3.21.
Draft Bill, Schedule, para 2.

4.(1) An expression in a testamentary writing should be interpreted in accordance with the general rule on interpretation unless the following rule has effect.

- (2) An expression in a testamentary writing which describes a beneficiary or a bequest in terms which are applicable to two or more persons or things should be interpreted as applying to such one of those persons or things as corresponds to the intention of the testator.

Para 4.8.
Draft Bill, Schedule, para 3.

5. It should be made clear that the above rules are without prejudice to the effect of any enactment or rule of law on the interpretation of any particular expression or particular type of expression.

Para 7.8.
Draft Bill, clause 1(2).

6. It should be provided that evidence (of whatever nature) of any matter relevant to the interpretation of a juridical act is admissible notwithstanding that it is extrinsic evidence.

Para 8.20.
Draft Bill, clause 2.

7.(1) The new rule on the admissibility of evidence should apply in any proceedings commenced on or after the date of commencement of the new legislation.

- (2) The new substantive rules on interpretation should apply whatever the date of the juridical act in question.

Paras 9.1 and 9.4.
Draft Bill, clause 4.

Appendix A

Private Law (Interpretation) (Scotland) Bill

ARRANGEMENT OF CLAUSES

Clause

1. Interpretation of juridical acts.
2. Admissibility of relevant extrinsic evidence.
3. Interpretation.
4. Short title, extent etc.

SCHEDULE:-

Rules for interpretation of juridical acts.

DRAFT
OF A
B I L L
TO

Provide rules for interpreting juridical acts and to make provision relating to the admissibility of extrinsic evidence for the purpose of interpreting juridical acts; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same,as follows:

1.- (1) The Schedule to this Act (rules for interpretation of juridical acts) shall have effect. Interpretation of juridical acts.

(2) The Schedule is without prejudice to any other enactment or rule of law which makes provision as respects the interpretation of an expression or a type of expression.

(3) Subject to subsection (2), any rule of law as to the interpretation of a juridical act which is in force before the commencement of this Act and is inconsistent with the rules in the Schedule shall cease to have effect.

2. Evidence of any description relevant to the interpretation of a juridical act shall be admissible notwithstanding that it is extrinsic evidence. Admissibility of relevant extrinsic evidence.

3. In this Act - Interpretation.

"judicial act" means any act of a court or tribunal established by law, but does not include the act of an arbiter whether appointed in pursuance of any enactment or otherwise;

"juridical act" means any act of will or intention which has, or which is intended by the maker of the act to have, legal effect, but does not include any legislative or judicial act;

"legislative act" includes subordinate legislation (within the meaning of the Interpretation Act 1978). 1978 c.30.

4.- (1) This Act may be cited as the Private Law (Interpretation) (Scotland) Act 1997. Short title, extent etc.

(2) This Act applies to every juridical act whenever made (including juridical acts made before the date on which this Act comes into force).

(3) Section 2 of this Act does not apply to proceedings instituted before the date on which the Act comes into force.

(4) This Act shall come into force at the end of the period of two months beginning with the day on which the Act is passed.

(5) This Act extends to Scotland only.

SCHEDULE

Section 1

RULES FOR INTERPRETATION OF JURIDICAL ACTS

General rule

1.- (1) Any expression which forms part of a juridical act shall have the meaning which would reasonably be given to it in its context; and in determining that meaning, regard may be had to-

- (a) the surrounding circumstances; and
- (b) in so far as they can be objectively ascertained, the nature and purpose of the juridical act.

(2) For the purposes of this rule the surrounding circumstances do not include-

- (a) statements of intention;
- (b) instructions, communings or negotiations forming part of the process of preparation of the juridical act;
- (c) conduct subsequent to the juridical act.

(3) The rule set out in sub-paragraph (1) above is referred to in this Schedule as "the general rule".

Contracts

2.- (1) Any expression which forms part of a contract shall be interpreted in accordance with the general rule unless the rule in sub-paragraph (2) below has effect.

(2) Subject to sub-paragraph (3) below, any expression forming part of a contract which is used by one party in a particular sense (whether or not it is also used in that sense by any other party) shall be interpreted in that sense if every other party at the time of contracting knew, or could reasonably have been assumed to know, that it was being used in that sense.

(3) Sub-paragraph (2) above does not apply-

- (a) to a contract which is recorded, or intended by the parties to be recorded, in the Register of Sasines or which is presented, or intended by the parties to be presented, in support of an application for registration in the Land Register; or

- (b) in any question with a person, not being a party to the contract, who has reasonably relied on the meaning which would be given to the expression by the application of the general rule.

Testamentary writings

3.- (1) Any expression in a testamentary writing shall be interpreted in accordance with the general rule unless the rule in sub-paragraph (2) below has effect

(2) Any expression in a testamentary writing which describes a beneficiary or a bequest in terms which are applicable to two or more persons or, as the case may be, things shall be interpreted as applying to such one of those persons or things as corresponds to the intention of the testator.

EXPLANATORY NOTES

Clause 1

Clause 1 introduces the new basic rules on the interpretation of contracts, conveyances, wills and other juridical acts. The enactment of these rules is necessary in order to pave the way for a safe and effective reform of the law on the admissibility of extrinsic evidence in the interpretation of legal writings.

Subsection (1)

This subsection gives effect to the Schedule to the Bill which contains the new basic rules on interpretation.

Subsection (2)

This subsection saves any special rules, whether derived from statute or common law, on the interpretation of particular expressions or types of expression. For example, when a statute says that the word "Whitsunday" is to be interpreted in a particular way when used in leases, that special meaning prevails and is not affected by anything in the Bill. Similarly, when the common law has developed special meanings for conveyancing descriptions like "bounded by the sea", those special meanings are not affected by the Bill. Special rules on the interpretation of particular types of expression, such as expressions creating real burdens, are also unaffected. See paragraphs 7.2 - 7.6 of the report. The Bill is concerned with general rules of interpretation, not with specific rules for particular expressions or types of expression.

Subsection (3)

This subsection makes it clear that the new general rules on interpretation replace any inconsistent general rules of the common law. Rules of the common law which are not inconsistent with the new rules, but which merely supplement them, are not affected. So the "canons of construction", or standard rules of preference for cases of doubt in the construction of a juridical act, are not affected by the Bill. A list of rules of preference of this kind is set out in Appendix B to the report. A well-known example is the *contra proferentem* rule which says that, in a case of doubt, terms should be construed against the party who supplied them. See paragraphs 6.1 - 6.10 of the report.

Clause 2

This short clause would bring about a much-needed reform in the law of Scotland. The existing rules on the admissibility of extrinsic evidence in the interpretation of legal writings are complex, obscure and unsatisfactory. The starting point of the existing law is that extrinsic evidence is not

admissible but there are many exceptions and sub-exceptions. Clause 2 substitutes a simple and principled rule - that all relevant evidence is admissible notwithstanding that it is extrinsic evidence. The basic rules on interpretation in the Schedule make clear what matters are relevant and what matters are not.

Clause 3

This clause defines the term "juridical act". A juridical act is any act of the will or intention which has, or is intended to have, legal effect. Common examples are contracts, conveyances and wills but there are many other types. See paragraph 1.10 of the report. The term does not, however, include any legislative or judicial act (terms which are themselves defined in the clause).

Clause 4

The important point to note in this clause is that subsection (2) applies the new rules on interpretation to juridical acts of any date, including those made before the date of commencement of the new legislation. The reason for this is that the new rules on the admissibility of evidence apply, and must apply, to proceedings brought on or after the date of commencement. See subsection (3). As many problems of interpretation are currently solved by resort to the existing restrictive rules of evidence there would be a gap in the law if the new substantive rules were not available in all cases. In fact, the results which would be reached under the new rules will almost always be the same as the results reached under the old law, although it ought to be possible to reach them much more easily. Where, unusually, a different result would be reached it would, under the new rules, be likely to be the result which the parties would have expected in any event. In short, retrospective application of the new rules is necessary and ought not to produce results which would be contrary to anyone's expectations. Subsections (1), (4) and (5) are standard and self-explanatory.

Schedule

The Schedule contains the basic rules on the interpretation of juridical acts. The general aim is not to change the underlying policy of the existing law but to restate the main rules of interpretation as rules of substantive law rather than as rules of evidence and to clear the way for the radical simplification of the law of evidence effected by clause 2 of the Bill.

General rule

Paragraph 1(1) states the general rule that an expression in a juridical act is to have the meaning which would reasonably be given to it in its context, having regard, where appropriate, to the surrounding circumstances and, in so far as they can be objectively ascertained, to the nature and purpose of the juridical act.

Paragraph 1(2) provides that surrounding circumstances do not include statements of intention; or instructions, communings or negotiations forming part of the process of the preparation of the juridical act; or conduct subsequent to the juridical act. Surrounding circumstances would, however, include any well-known trade practices or customs in the field of activity concerned and any usages adopted between the parties in previous similar transactions. See paragraphs 2.19 - 2.34 of the report. These rules reflect the same policy as the existing law. The benefits of the objective approach, in interpreting, say, a disposition, would be lost if reference could be made to prior communings.

Contracts

Paragraph 2 of the Schedule deals with the special rule for certain contracts which is discussed in Part III of the report.

Paragraph 2(1) provides that contracts are to be interpreted according to the general rule unless the special rule in sub-paragraph (2) has effect. The words "has effect" are used to indicate that even if sub-paragraph (2) could be said to apply to the situation in an abstract way, the general objective rule is not displaced unless sub-paragraph (2) actually produces a result. See paragraph 3.10 of the report.

Paragraph 2(2) states the special rule for contracts which applies where an expression is used by one party in a particular sense and at the time of contracting the other parties know, or could reasonably be assumed to know, that it is being used in that sense. This is probably the existing law in Scotland (see *Houldsworth v Gordon Cumming* 1910 SC (HL) 49) and is also the policy adopted (using a slightly different drafting formula) in recent international instruments like the United Nations Convention on Contracts for the International Sale of Goods.

Paragraph 2(3)(a) provides that an objective approach is to be taken to contracts destined for the Register of Sasines or for presentation in support of an application for registration in the Land Register. The need for the public to be able to rely on the ordinary meaning of terms appearing in these registers justifies this approach. An objective approach is also to be adopted (by virtue of sub-paragraph (3)(b)) in any question with third parties who have reasonably relied on the ordinary meaning of any expression in a contract.

Testamentary writings

Paragraph 3 of the Schedule deals with the special rule for testamentary writings which is discussed in Part 4 of the report.

Paragraph 3(1) provides that the general rule applies to testamentary writings unless the special rule in sub-paragraph (2) has effect. See above for the significance of "has effect".

Paragraph 3(2) provides that an expression in a testamentary writing which describes a beneficiary or bequest in terms which are equally applicable to two or more persons or things is to be interpreted in accordance with the actual intention of the testator. There is a very similar rule in the existing law. See paragraphs 4.2 - 4.6 of the report.

APPENDIX B

RULES OF PREFERENCE FOR CASES OF DOUBT IN THE CONSTRUCTION OF A JURIDICAL ACT

- (1) A construction of the juridical act which gives effect to all its terms is preferred to one which does not.
- (2) Where, in an onerous juridical act, terms supplied by one party are unclear, there is a preference for their interpretation against that party.
- (3) Where a list of items, all of which are members of the same class, is followed by a general term, there is a preference for interpreting the general term as applying only to items of the same class as those in the specific list.
- (4) A construction which gives effect to precise terms is preferred to one which gives effect to general language.
- (5) A construction which gives effect to operative or essential terms is preferred to one which is in accordance with narrative or incidental terms.
- (6) A construction which gives effect to separately negotiated terms is preferred to one which gives effect to standard terms not separately negotiated.
- (7) There is a preference for a construction which favours a result other than donation and which, in the case of a gratuitous unilateral act, favours the result least burdensome to the granter.
- (8) There is a preference for a construction in favour of freedom from burdens or restrictions.
- (9) There is a preference for a construction which leads to results which are lawful, fair and reasonable.
- (10) Where a juridical act is executed in two or more linguistic versions, and where it does not itself provide a rule for resolving discrepancies between them, there is, in case of discrepancy, a preference for construction according to the version in which the act was originally drawn up.

APPENDIX C

Members of Advisory Group on Contract Law who attended meeting on 11 June 1996 to consider draft discussion paper

Professor Robert Black, QC, University of Edinburgh
Dr Eric Clive, Scottish Law Commission (Chairman of the Group)
The Hon Lord Coulsfield, Senator of the College of Justice
Miss Laura Macgregor, Shepherd & Wedderburn, Edinburgh
Professor Hector MacQueen, University of Edinburgh
Ms Christine McLintock, McGrigor Donald, Edinburgh
Sheriff Principal Gordon Nicholson, QC, Edinburgh
Dr Hamish Patrick, Tods Murray, Edinburgh
Ms Lindy Patterson, Bird Semple, Edinburgh
Professor Kenneth Reid, Scottish Law Commission
Mr David Sellar, Advocate
Professor Joseph Thomson, University of Glasgow
Mr Niall Whitty, Scottish Law Commission
Mr James Wolffe, Advocate
In attendance: Dr David Nichols, Scottish Law Commission,
(Secretary to the Group)
Professor Carole Lewis, University of Witwatersrand,
South Africa (by invitation).

List of those who submitted written comments on Discussion Paper No 101

Centre for Research into Law Reform, Law School, University of Glasgow
Mr R Craig Connal, Solicitor, McGrigor Donald, Glasgow
The Faculty of Advocates
Professor W M Gordon, School of Law, University of Glasgow
The Law Society of Scotland
Professor W W McBryde, Department of Law, University of Dundee
Professor Colin T Reid, Department of Law, University of Dundee
The Right Honourable the Lord Rodger of Earlsferry, Lord President
The Royal Faculty of Procurators in Glasgow
The Women's National Commission