Scottish Law Commission

DISCUSSION PAPER NO. 97

CONTRACT LAW

EXTRINSIC EVIDENCE, SUPERSESSION, AND THE ACTIO QUANTI MINORIS

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This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this Discussion Paper were submitted by 30 September 1994. All correspondence should be addressed to

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NOTES

1. In writing a later report on this subject, the Commission may find it useful to be able to refer to and attribute comments submitted in response to this paper. If no request for confidentiality is made, the Commission will assume that comments on the paper can be used in this way.

2. Those who wish copies, or further copies, of this discussion paper for the purpose of commenting on it should contact the Commission at the above address.

CONTRACT LAW

EXTRINSIC EVIDENCE, SUPERSESSION, AND THE ACTIO QUANTI MINORIS

CONTENTS

PART I - INTRODUCTION

Purpose of discussion paper

1.1 This discussion paper seeks comments on proposals for reform of the following rules of the existing law -

1. the rule that where a contract appears to have been embodied in writing, extrinsic evidence is not admissible for the purpose of proving additional terms
2. the rule that extrinsic evidence is not in general admissible for the purpose of interpreting the terms of a written contract
3. the rule that a contract is superseded by a subsequent conveyance or similar deed, and
4. the rule that a buyer of property other than goods coming under the Sale of Goods Act 1979 cannot, while retaining the property, obtain damages for a diminution in the value of the property caused by a breach of contract by the seller (ie the rule denying the possibility of an *actio quanti minoris*).

Background to discussion paper

1.2 **The admissibility of extrinsic evidence.** The law on the admissibility of extrinsic evidence in relation to contracts has for a long time been recognised as a source of difficulty. In 1980 the Commission consulted on the wider question of the admissibility of extrinsic evidence in relation to

documents generally.[1] Most of those who responded favoured some reform but the proposals in the memorandum have not yet been followed up in a report.

1.3 In 1983 the Commission recommended the introduction of a procedure for the rectification of certain documents, including any document intended to express or give effect to an agreement which failed to express accurately the common intention of the parties.[2] For the purposes of an application for rectification a court was to be entitled to have regard to all relevant evidence, whether written or oral. This recommendation was implemented by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.[3] Some cases which would formerly have turned on whether extrinsic evidence was admissible for the purpose of adding to or interpreting a contractual document could now be presented as cases for rectification. However there are cases where (a) the parties intended the written document to contain only some of the terms of their contract or (b) there is doubt about the proper interpretation of a term which has been accurately recorded in the document. In these cases the 1985 Act does not help.

1.4 In 1988 the Commission recommended the abolition of the last remaining requirements of

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[1]Memorandum No 46 on the *Law of Evidence* (1980) paras P.06 and P.07 and proposition 164.

[2]Report on *Rectification of Contractual and Other Documents* (Scot Law Com No 79).

[3]s 8.

proof by writ or oath.[1] This would, among other things, enable the subsequent variation of certain contracts to be proved by parole evidence in circumstances where at present proof is restricted to writ or oath. This recommendation has not yet been implemented. We hope that it will be implemented as soon as a legislative opportunity occurs and for this reason do not deal further in this discussion paper with the question of variation of contracts by subsequent agreement of the parties.

1.5 In July 1993 the Commission published a report on the *Formation of Contract*[2] which recommended that, for the purpose of deciding whether a contract had been concluded, statements and conduct of the parties should be interpreted in accordance with rules based on those in article 8 of the United Nations Convention on Contracts for the International Sale of Goods. This provides that

> "(1)...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 circumstances.

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[1]Report on *Requirements of Writing* (Scot Law Com No 112) para 3.19.

[2]*Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods* (Scot Law Com No 144).

(3) 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."

In our report we mentioned that two consultees had suggested that it would be undesirable to have different rules on the admissibility of evidence applying to formation and interpretation and we said that we intended to reconsider the rules on interpretation of contracts in a later discussion paper.[1] This we now do in part III of this paper.

1.6 Part of the background to this discussion paper is that there has been a movement away from restrictive rules of evidence in civil cases. The general approach now is to say that all relevant evidence ought to be admissible, for whatever weight it may have. The best recent illustration of this approach is the Civil Evidence (Scotland) Act 1988 which abolished the hearsay rule in civil cases. One of the arguments for that reform was that the law was reaching the stage where the exceptions to the rule were likely to become more important than the rule itself. The law on extrinsic evidence in relation to contracts has already reached that stage.

1.7 **Supersession of contract by conveyance.** In 1987 the Commission was made aware of the problems

[1] Para 2.6.

which were arising in relation to the supersession of contracts for the purchase of land or houses by the subsequent dispositions. The basic problem was that the law had got itself into a position where contracts were being superseded even in relation to matters which the contracts were intended to regulate even after the delivery of a disposition and which were not properly matters for inclusion in a disposition. The Commission decided to undertake an exercise on this subject but the preparation of a discussion paper was subsequently postponed in the hope that the position would be resolved by judicial decisions. This has not happened and the question of a legislative solution must now be considered.

1.8 **The actio quanti minoris.** A problem which is closely related to the one last mentioned is that even if an obligation in the contract does survive the delivery of a disposition the buyer may not be able to claim damages from the seller so long as the property is retained. Such a claim may be characterised as an *actio quanti minoris* and the existing law rejects anything of the nature of an *actio quanti minoris*. It was suggested as long ago as 1966 that this might be a fruitful topic for this Commission.[1] Recent developments have shown how well justified that suggestion was.

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[1]Stewart, "The *Actio Quanti Minoris*" 1966 JLSS 124 at p 132.

PART II - EXTRINSIC EVIDENCE OF ADDITIONAL TERMS

Introduction

2.1 The parties to a contract, within the limits of the general law,[1] have control over the terms expressed in their contract. They are like legislators making law for themselves. However, they do not always set out the terms of their contract in one document. There may be no agreed document at all (the contract being contained in an exchange of communications by any or all available means)[2] or there may be an agreed document which may or may not contain all the terms of the contract. Where there is an agreed document the parties may make it clear in the document that it does contain all the terms of the contract which have been agreed up to the time of execution. Or they may make it clear that it does not and that some terms of the contract are to be found elsewhere - for example, in a separate document containing standard terms. Or they may not say anything on this question in the document. It is this last situation with which we are mainly concerned in this part of the discussion paper. How does the law deal with the situation where there is an agreed document but it is not clear whether or not it contains all of the terms of the contract then agreed between the parties?

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[1]On such matters as illegal provisions, provisions contrary to public policy and provisions struck at by the Unfair Contract Terms Act 1977.

[2]Countless contracts are concluded by telephone, by fax, by informal letters, by face to face oral agreement or by some mixture of these methods. In some cases acceptance of an offer may be implied from the actings of one of the parties.

2.2 We have spoken so far of an agreed document but the problem with which we are concerned in this part of the paper can arise also in cases where there is what appears to be a written contract contained in two or more documents. In some cases the documents may be quite informal, such as an exchange of letters between the parties.

The existing law

2.3 The existing law consists of a general rule to which there are exceptions.[1]

2.4 **General rule.** The general rule is summed up in the following quotations.

> "Where parties agree to embody and do actually embody their contract in a formal written deed, then in determining what the contract really was... a court must look to the formal deed and to that deed alone...."[2]
>
> "It is a fundamental rule of evidence that a written contract ... cannot be varied by parole evidence intended to establish ... that

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[1]The existing law on the admissibility of extrinsic evidence in relation to documents is fully set out in chapter 15 of the research paper on *Evidence* prepared for the Commission by Sheriff Macphail (now a member of the Commission). The paper was published by the Commission in 1979 and was subsequently, with the Commission's approval, updated by the author and published in book form by the Law Society of Scotland in 1987. References to "Macphail" in this paper are to the 1987 book.

[2]*Inglis* v *Buttery* (1877) 5R 58 by Lord Gifford at p69; approved at 5R (HL) 87 by Lord Blackburn at p102. This was actually a case on the interpretation of contract terms but the statement quoted has been frequently cited in relation to the question of additional terms.

the writing does not correctly and completely set forth the terms of the contract....."[1]

Although the second quotation refers to parole evidence, and although the equivalent rule in English law is generally known as "the parol evidence rule",[2] it is generally accepted that the rule now relates to all extrinsic evidence and not just to parole evidence.[3] It seems clear, however, that the rule was at one time confined to the admissibility of parole evidence. There are cases, well into the second half of the nineteenth century, in which the courts, when faced with a party who founded on the terms of a contractual document, were quite willing to allow additional terms to be proved by writ or oath.[4] It is not clear how or when the change in the nature of the rule occurred but it may have been as a result of

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[1]*Lindsay* v *Craig* 1919 SC 139, by Lord Skerrington at p 144. This statement must now be read in the light of s 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 which provides for rectification of formal written documents which do not correctly set forth the terms agreed.

[2]See the Law Commission's report on *Law of Contract - The Parol Evidence Rule* (Law Com No 154, 1986).

[3]See Gloag, *Contract* (2nd ed 1929) p 367; Walker and Walker, *Evidence*, para 242; Macphail, *Evidence*, para 15.01. See also *Inglis* v *Buttery* (1878) 5R (HL) 87 where some of the disregarded evidence consisted of writings and *Norval* v *Abbey* 1939 SC 724 where it was held that a prior letter could not be considered.

[4]See eg *General Assembly of Baptist Churches* v *Taylor* (1841) 3D 1030; *Pattinson* v *Robertson* (1844) 6D 944, aff'd (1846) 5 Bell's App 259; *Alexander* v *Gillon* (1847) 9D 524. These cases are summarised in Appendix I. See also *Stewart* v *Clark* (1871) 9M 616.

the statements in *Inglis* v *Buttery*.[1] There may also have been some cross infection from the rule on the supersession of contracts by conveyances.[2] If the rule were only a rule which restricted proof of additional terms to proof by writ or oath this part of the discussion paper would be unnecessary because the matter would already be covered by the recommendation in our report on *Requirements of Writing* that all remaining requirements of proof by writ or oath should be abolished.[3] We will call the rule with which we are concerned in this part of the paper the "rule on proof of additional terms". By "additional terms" we mean any additional terms of the contract other than subsequent variations, whether the extra terms supplement, modify or contradict the terms in the document or documents. We have already dealt with the question of subsequent variations in our report on *Requirements of Writing* where we have recommended the abolition of any requirements that variations of written contracts (other than those, such as contracts relating to land, where writing is required for validity) have to be in writing and of any requirements that a variation of a written contract has to be proved by writ or oath.[4]

2.5 **Examples of operation of rule.** It is difficult to find good examples of the operation of the

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[1](1877) 5R 58; aff'd (1878) 5R (HL) 87.

[2]We discuss this rule in Part IV.

[3]Scot Law Com No 112 (1988) paras 3.17 and 3.18, recommendation 11 and clause 21 of the draft Bill appended.

[4]Scot Law Com No 112 (1988) paras 2.11 and 3.17 to 3.19.

general rule. Many of the cases commonly cited as examples turn out not to be when they are closely examined. Appendix I contains a list of cases of this nature, with summaries and comments. Some reflect the old view that additional terms could be proved by writ or oath. Some are cases on the subsequent variation of written contracts rather than on proof of additional contemporaneous terms. Some are cases on the construction of the admitted terms of a contract, rather than on attempts to prove additional terms. Some would almost certainly now be argued as cases on rectification[1]. We do not refer here or in Appendix I to cases on the supersession of a contract by a subsequent conveyance because such cases raise different issues.[2] We consider them separately in part IV of the discussion paper.

2.6 Even where a case is found which seems to be an example of the operation of the rule on proof of additional terms it is often complicated by uncertainty as to some important fact, or by the potential applicability of other rules, and is not a pure example. Immediately after each of the following examples we comment on some of these matters.

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[1]See *McGregor* v *Lord Strathallan* (1862) 24D 1006.

[2]In the typical supersession case the prior agreement is not denied, and does not need to be proved. The question for the court is whether an admitted agreement, in clear written terms, has been superseded by a subsequent conveyance. The rule on the proof of additional terms and the rule on supersession do, however, frequently get mixed together in the cases. It is quite common, for example, to find supersession cases cited in cases on proof of additional terms.

Example 1. The factor to the Marquis of Lothian occupied his house in his capacity as factor. He was on the roll of voters. An objector objected that, under the Representation of the People (Scotland) Act 1868, the factor was not entitled to be on the roll. Previous cases had decided that, under the law as it then was, people in this position were entitled to be on the roll if their tenure was not precarious and defeasible. It was not regarded as precarious and defeasible if it was on a yearly basis. In this case the written contract governing the factor's appointment provided that it could be recalled at any time by a writing under the hand of the Marquis. Standing alone this would have made the factor's tenure precarious and defeasible. However, the factor gave evidence that "he had a verbal agreement with the present Marquis" that the appointment could be terminated only by two months notice by either party before the term of Martinmas. If not so terminated it continued for another year. This evidence was not contradicted and the sheriff therefore allowed the factor's name to remain on the voters' roll. However, on appeal, the Registration Appeal Court upheld the objection. The court said that the written contract could not be qualified by the factor's parole testimony. Lord Ardmillan said (at p 19):- "Can one party to a contract prove by his own testimony anything that contradicts the contract? I do not think that he can. There is here no legal or competent evidence to qualify the provision in the factory as to

recall."[1]

Although this looks like an example of the operation of the rule on proof of additional terms there are several uncertainties. First, it is not clear from the report that the alleged separate agreement was entered into at the same time as the written contract and was not a subsequent variation. Secondly, it is not clear what would have happened if there had been other evidence. What would have been the position if, in addition to the factor's evidence, there had been parole evidence by the Marquis confirming the additional term? What would have been the position if there had been a written note signed by both parties saying that, notwithstanding the terms of the formal contract which they were about to execute, the following provision was to govern the termination of the appointment? Would the court have said that the additional term was still not proved because of the rule on extrinsic evidence? Or would it have said that the additional term was proved but that, as a matter of substantive law, and regardless of the intentions of the parties, it was superseded by the formal contract entered into a minute later? Or would it have allowed the additional term to have effect as the parties intended? There is no way of knowing. The case would have been a pure example of the operation of the rule on proof of additional terms if the Marquis had also given evidence of the additional contemporaneous term, if there had been a written note of it, and if the court had still said that all of this extrinsic evidence had to be

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[1] *Hilson* v *Otto* (1870) 9M 18.

disregarded.

Example 2. B, agents for a shipowner, were negotiating with Inglis, a firm of engineers and shipbuilders, for some work to be done on a ship. A memorandum of agreement prepared and signed by Inglis was sent to B for signature, but B refused to sign because a specification attached to the agreement contained the words "but if any new plating is required the same to be paid for extra". B wrote asking for these words to be deleted because they understood that the price quoted included all repairs and alterations necessary to class the ship A1 100 at Lloyds. Inglis wrote saying that they expected to "get the clause arranged as you desire it". After a further meeting during which certain representations were made by the ship's captain about the state of the existing plating,[1] Inglis agreed to delete the words objected to. The memorandum of agreement, with these words deleted and initialled, was then signed by B. A question later arose as to whether B was bound to pay for new plating which was found to be necessary. It was eventually held by the House of Lords, on a construction of the contract without reference to the deleted words or the prior agreement to delete them, that B was not bound to pay for the new plating. This aspect

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[1]These representations might well, if the case had arisen after section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 had come into force, have been founded on by Inglis as negligent misrepresentations inducing a contract. However, they probably had no remedy based on the misrepresentations under the law as it was in 1877. See the opinion of Lord Ormidale in (1877) 5R 58 at p 68.

> of the case was a pure question of interpretation. However, in the Court of Session, Lord Justice-Clerk Moncreiff had held that there was, in addition to the terms in the memorandum of agreement, "a specific agreement under the handwriting of the parties, which formed a condition of the contract, without which it never would have been executed" and which was to the effect that there would be no extra charge for new plating. The two letters vouching this additional term were "not communications prior to the contract" but were "contemporaneous writings essential to the contract itself." These views of the Lord Justice-Clerk were disapproved of by the House of Lords.[1]

One of the interesting features of this case is that the Lord Justice-Clerk seemed to stretch the evidence to find the specific written agreement to which he referred. It is doubtful whether a letter saying that one party expects to get a clause arranged as the other party desires can properly be regarded as an expression of concluded agreement. Moreover, an agreement to delete a clause saying that new plating is "to be paid for extra" is not the same as an express agreement that there is to be no extra charge for new plating. The agreement to delete could simply be the result of an assessment by each party that the rest of the contract would be construed in that party's favour. The case would have been a better example of the rule on proof of additional terms if the memorandum of agreement had said nothing at all, deleted or undeleted, about new plating but the parties had

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[1] *Inglis* v *Buttery* (1878) 5R (HL) 87.

signed a note immediately before the memorandum was signed saying that it was an additional term of the contract that the quoted price included the provision of any new plating required to bring the ship up to Lloyds' classification A1 100. If the court had disregarded this extrinsic evidence and had then construed the memorandum in Inglis' favour, as Lord Gifford did in the Court of Session, B would have been bound to make an extra payment for new plating even although both parties had expressly agreed that it was to be within the contract price.

Example 3. A brewing company wished to appoint R as their representative. At a meeting in Edinburgh it was agreed, according to R, that any appointment would be for a term of six months. Shortly thereafter the company wrote R a letter which said

> "With reference tc our recent meeting in Edinburgh, we are now in a position to appoint you to represent us in Glasgow and the West."

R wrote the next day accepting the terms in this letter. On the following day the company wrote proposing "that one month's written notice be given on either side before terminating the arrangement". R accepted this in writing. Three months later the company gave R a month's notice. He raised an action of damages for breach of contract, stating that at the meeting in Edinburgh "the engagement was fixed for a term of six months". It was held that he was not entitled to a proof of this averment.[1]

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[1]*Riemann* v *John Young & Co Ltd* 1895 2SLT 426.

Even if R had been allowed to prove, and had proved, that it had been expressly agreed at the meeting that the contract was to endure for a minimum period of six months, and that this was an additional term of the contract completed by the first two letters, it would have been arguable that this term had been varied by the later letters providing for a month's notice on either side. The case would have been a better example if the last two letters had not been written and if the court had still held that evidence of an additional term about the duration of the appointment was inadmissible.

Example 4. The lease of a farm was being negotiated. The landowners' factor sent the prospective tenants a form of offer for signature by them. They refused to sign because the form did not contain all the terms which had been agreed. They went to see the landowners' solicitors. Following a telephone call to the landowners' chairman, the landowners' solicitors were authorised to give to the prospective tenants a letter confirming the additional obligations undertaken by the landowners which did not appear in the formal offer. On the understanding that these additional obligations were part of the conditions of the contract the tenants signed the formal offer which was then accepted in writing by the landlords. The farm was later sold and a question then arose as to the extent of the landlords' obligations under the lease. It was held that the terms of the formal offer and acceptance could alone be

considered.[1]

At first sight this might look like a case where rectification under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 would now be the appropriate remedy. However, the formal document was intended to express or give effect to only part of the agreement between the parties, and did so accurately. The "intention of parties was that the missives should be completed as originally framed, and the matters referred to in the letter should rest upon the separate agreement which is confirmed by the letter".[2]This case is complicated by the fact that the dispute was with the purchaser of the farm who had agreed to relieve the original landlords of the obligations undertaken by them in the lease. The tenants were forced to argue that the additional terms were terms of the actual lease. They could not argue that they constituted a separate collateral agreement. The case is also complicated by the rule that leases of land for more than a year have to be *constituted* in writing, and cannot be partly written and partly oral[3]. The example would be a better one if the contract had related to the hire of moveable property, if the question had arisen between the original parties to it, and if the court had still held that written evidence of additional terms, which one party had insisted on receiving before signing the contract, had to be disregarded.

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[1]*Norval* v *Abbey* 1939 SC 724.

[2]See the opinion of Lord Wark at pp 729 and 730.

[3]See *Perdikou* v *Pattison* 1958 SLT 153.

Example 5. The lessor of a cafe entered into two written agreements with the lessees. One was a lease in ordinary form for a stipulated rent. The other related to the sale of the goodwill. The lessor claimed that there was a third oral agreement, entered into at the same time as the others and as part of the same composite transaction, whereby the lessees were to pay him the amount which he had to pay as owners' rates and property tax during the currency of the lease. He sued for payment of the amounts due under this agreement.[1] It was held (a) that the alleged agreement could not be proved by parole evidence because of the rule that "it is incompetent to contradict or to vary the terms of a written document by parole evidence" [2] (b) that the alleged additional term was not a collateral term but altered the rent which was one of the essentials of the lease and (c) that it would be pointless to allow a reference to the lessees' oath because at best that would establish a term of a lease for more than a year and that was something which required writing for its constitution. The court found it unnecessary to express a view on another argument to the effect that the additional agreement was entered into for an illegal purpose (to deceive the City Assessor as to the rent payable) and was for that reason unenforceable.

This case is complicated by the fact that it was concerned with what the court regarded as one of

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[1] *Perdikou* v *Pattison* 1958 SLT 153.

[2] Lord Justice-Clerk Thomson at p 157.

the essential terms of a lease for more than a year. This enabled the court to hold that the additional term would, in any event, have to be constituted in writing so that there was no point in allowing it to be referred to the defenders' oath. The case is also complicated by the argument that the agreement was illegal. It would have been a better example if it had been concerned with a lease for less than a year (which does not need to be constituted in writing) and if there had been no taint of illegality about the additional payments. If the court had then disallowed proof of the additional term then there would have been a good example of the operation of the rule.

2.7 **Exceptions.** There are many exceptions to the rules on the non-admissibility of extrinsic evidence in relation to documents generally. Indeed one of the main criticisms of the existing law is that there are so many exceptions of such vague scope that the general rules are hardly worth having.[1] Many of the exceptions relate to circumstances in which extrinsic evidence will be admitted for the purpose of interpreting a contract. We discuss them later.[2] Others relate, not to proof of additional terms of a contract, but to the question whether a valid contract exists at all.[3] In relation to the rule on proof of

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[1]See Macphail, para 15.37.

[2]See paras 3.13 to 3.38 below.

[3]It is, for example, well established that extrinsic evidence is admissible when it is sought to reduce a written contract on some ground of invalidity such as error or fraud. See Macphail, para S15.01; *Anderson* v *Lambie* 1954 SC (HL) 43, by Lord Reid at p 62. It is also recognised that

additional terms the most interesting and potentially important exception is for proof of collateral agreements.

2.8 *The exception for collateral agreements*. There is nothing to prevent two people from entering into different contracts, at about the same time, in relation to different matters. For example, the seller and purchaser of a house may enter into a written contract relating to the sale of the house and a separate unwritten contract relating to the sale of a lawnmower or relating to some work that the seller is to do for the purchaser or the purchaser is to do for the seller. Any rule restricting proof of additional terms of a written contract should clearly not be allowed to operate so as to restrict proof of some quite different contract. So the law recognises an exception for proof of collateral agreements.

> "By an exception to the general rule, agreements which are collateral to a writing may be proved by extrinsic evidence".[1]
>
> "On the other hand, there are cases, difficult to reconcile on any principle with those just cited [on proof of additional terms], in which it has been held that evidence of a verbal agreement on some point collateral to the

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extrinsic evidence is admissible to prove that a contract is subject to a suspensive condition which has not been purified and which has, therefore, prevented it from coming into being at all. See Walker and Walker, *Evidence*, para 264; *Dodds* v *Walker* (1822) 2S 81; *Abrahams & Sons* v *Robert Miller (Denny) Ltd* 1933 SC 171; *Norval* v *Abbey* 1939 SC 724, by Lord Wark at p 731; *The Royal Bank of Scotland plc* v *Melville* 1989 GWD 40-1872.

[1]Walker and Walker, *Evidence*, para 262.

written contract could be received".[1]
Again, it is quite difficult to find good examples. Some of the cases commonly cited as examples turn out not to be concerned with proof of contemporaneous collateral terms at all[2], or to be cases which are better discussed in relation to the supersession of missives by conveyances[3].

2.9 The case of *Garden* v *Earl of Aberdeen*[4] may be taken as an early example of the doctrine on collateral agreements, although it turned on the distinction between a collateral agreement and a subsequent variation rather than an additional contemporaneous term. Garden was the tenant of a farm. He alleged that a year before the end of the lease the landlord had agreed that if he, Garden, would remain in the farm to the end of the lease the landlord would make certain payments to him to reimburse him for losses suffered during the lease. The landlord pleaded that the tenant's averment could be proved only by writ or oath. The Lord Ordinary upheld this plea on the ground that the tenant was averring an alteration to a written lease. The tenant reclaimed and argued that the

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[1]Gloag, *Contract* (2d edn 1929) p 370.

[2]For example, *McAlister* v *Gemmil* (1862) 24D 956; aff'd (1863) 1M (HL) 1 was concerned with proof of a contract with another party. *Merrow & Fell* v *Hutchison & Brown* (1873) 10 SLR 338 was concerned with a subsequent variation of, or acquiescence in the breach of, a charterparty. *Kirkpatrick* v *Allanshaw Coal Co* (1880) 8R 327 was concerned with a subsequent variation of a lease. None of these cases was concerned with proof of a contemporaneous collateral term.

[3]See paras 4.11 to 4.16 below.

[4](1893) 20R 896.

agreement was not an alteration of the lease but was a "collateral agreement to come into operation at the end of the lease".[1] The Second Division agreed with this view. They said that the alleged agreement was not "an alteration of a written contract by a parole agreement" but was "the constitution of an original and independent agreement by parole".[2] However, they also held that the agreement was innominate and unusual and, for that reason, could be proved only by writ or oath. This is clearly an unsatisfactory example for our purposes. It relates to events long after the initial contract was concluded and to requirements of proof by writ or oath which would disappear if our report on *Requirements of Writing*[3] were implemented. However, let us suppose that the alleged agreement had been a contemporaneous agreement, entered into at the same time as the lease, whereby the landlord was to pay to the tenant at the end of the lease certain sums calculated by reference to losses the tenant had made during the currency of the lease. If the court had taken the same view of the nature of the agreement then it would have characterised it as a collateral agreement and not as an additional term of the lease.

2.10 Gloag cites the case of *Renison* v *Bryce*[4] as an example of the exception for collateral agreements. Bryce had offered in writing to sell his business

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[1]At p 898.

[2]Lord Trayner at p 899.

[3]Scot Law Com No 112, 1988.

[4](1898) 25R 521.

to Renison in exchange for a capital sum and "shares in your proposed limited company to the extent of 1750 in preference shares of £1 each, fully paid up, and bearing interest at the rate of 7 1/2 per cent". Renison sent a written unqualified acceptance of this offer. Bryce refused to transfer his business when he discovered that the company formed by Renison had a share capital twice as large as had been agreed between the parties. Renison sued for specific implement of the contract contained in the written offer and acceptance. In his defences Bryce averred an express agreement, not mentioned in the offer or acceptance, that the capital of the company should not exceed £5000. The court allowed him a proof of this averment. The opinions do not refer, however, to the rule on proof of additional terms or to the exception for collateral agreements and it seems that the case was regarded as raising a question of construction. What was meant by "your proposed company"?

2.11 A better example of the exception, if only because the words "collateral undertaking" are actually used in the court's opinion, is *British Workman's and General Assurance Co Ltd* v *Wilkinson*[1]. The company sought interdict against an insurance agent who had left their service to prevent him from trying to induce their other agents to leave their service and their customers to transfer their insurances. The agent's written contract of employment did not contain any prohibition of this type of conduct but the contract had followed on a letter of application by the agent in which he had expressly agreed that, on

[1](1900) 8 SLT 67.

the termination of the engagement, he would "not interfere with the Company's agents, assurants, or business in any way whatever". Lord Kyllachy held that this was part of the contract.

> "It may not have been incorporated in the document which announced the respondent's appointment, and in doing so professed to set out the terms of employment. But it was included in his application, and was at least a collateral undertaking on the faith of which he must be held to have been employed."

2.12 The distinction between a collateral agreement and an additional term is not easy to grasp. In *Perdikou* v *Pattison*[1] the court held that an agreement for the payment of extra sums, over and above the rent, by the tenant to the landlord was not a collateral term.

> "Just what is a "collateral" matter may sometimes be a nice question but it certainly does not cover something which alters the effect of an express stipulation as to one of the essentials of a lease."[2]

Similarly, in *McGregor* v *Lord Strathallan* [3] an attempt by a tenant to prove that the landlord had entered into a separate agreement to provide new fences was regarded as just "an attempt to engraft on the lease a clause not to be found in it".[4] Some of the cases suggest that if provision is made on a matter in the document or documents which appear

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[1]1958 SLT 153. See example 5 above.

[2]Lord Justice-Clerk Thomson at p 157.

[3](1862) 24D 1006.

[4]By Lord Justice-Clerk Inglis at p 1010.

to contain the contract, then anything which qualifies or contradicts that provision cannot be regarded as collateral.[1]

2.13 *The exception for missing terms*. The exception for collateral agreements shades into the exception for missing terms which has been described as follows.

> "When a written contract has been acted upon, and it appears, as construed by the court, that one of the terms essential for its fulfilment as a concluded contract is not expressed in the writing, or is expressed only imperfectly or incompletely, and must necessarily have been the subject of oral agreement between the parties, the missing or incompletely expressed term may be proved by parole or other extrinsic evidence."[2]

2.14 The leading case on this exception is *McLeod* v *Urquhart*.[3] McLeod had given Urquhart a letter saying that if he enlisted as a private in his regiment he would have the lease of a certain farm on the expiry of the existing lease and at the existing rent. No duration was specified. Urquhart served in the regiment for six years and duly entered into possession of the farm for a period of nine years. Then McLeod tried to have him removed. Urquhart averred that McLeod had intimated by proclamation at local church doors that such young

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[1]See *Croudace* v *The Annandale Steamship Co Ltd* 1925 SLT 449 by Lord Constable at p 450 and *William Masson Ltd* v *Scottish Brewers Ltd* 1966 SC 9 by Lord Guthrie at pp 16-17.

[2]Walker and Walker, *Evidence*, para 263 (footnotes omitted).

[3](1808) Hume 840.

men as would enlist with him would receive leases for nineteen years and that he himself had expressly stipulated for a nineteen years' lease and had accepted the missive on that basis. He was allowed a proof of these averments, in which he was successful. The duration of the lease could hardly be regarded as a collateral matter. It seemed clear that the lease was meant to run for a period of years. So there was obviously something missing from the writing founded on.

2.15 Walker and Walker give as another example of this exception the rather similar case of *Russell* v *Freen*[1]. Here a tenant had entered into a lease on the basis of a written offer which made it clear that the duration of the lease was to be a number of years. The contract did not, however, specify a duration. After some years the tenant sought a declarator that the lease was not binding on him because it did not specify a duration. The court held that the offer had clearly been made by reference to advertisements which made it clear that the duration was to be eighteen years. This case, however, seems to be one on formation of the contract or interpretation of the contract. There was no averment of an express additional term.

2.16 Walker and Walker also cite the case of *Watters* v *Hunter*[2]. Here a contract was entered into by an exchange of letters for the lease of land for the purpose of bulb growing. The agreement was for a lease for two years but the letters did not specify a date of entry or a date of termination.

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[1](1835) 13S 752.

[2]1927 SC 310.

A question having arisen as to the date when the lease came to an end, the pursuer asked to be allowed to prove the date of entry by parole evidence. This request was granted by the court. It appears from the opinions of the court that the expectation was that evidence would be available as to the dates on which, and the periods for which, rent had actually been paid and that this would show the date which the parties themselves had regarded as the date of entry. The pursuer did not aver that there was any express additional term as to the date of entry and it appears that the case should properly be regarded as one on the construction of the contract in the light of the subsequent actings of the parties. Did the words "for two years" mean for two years from the date of the contract, or from the next term of Whitsunday or Martinmas thereafter, or from some other date? The view of the case as one on construction appears most clearly in the opinion of Lord Blackburn who said that

> "where the tenant in the interval between the date of the contract and the next term has entered and taken possession, and has thereafter paid his rent at intervals of six months dating from the date of entry, then the parties have construed the contract for themselves so far as the date of entry is concerned, and there is no necessity for them to come to the Court to fix it for them. I know of no rule of law which binds the Court to ignore an interpretation which the parties have put upon a lease..."[1]

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[1]At p 319.

2.17 In *McAllister* v *McGallagley*[1] Lord President Dunedin recognised the existence of an exception for the case where there was an averment

> "that there was one term of the bargain which was left, so far as the writing was concerned, unsettled, and that the settling of that term might be arranged verbally".

There is, however, a difficulty with this way of describing the exception. If there is not yet *consensus in idem* then there is no contract and we are not concerned with adding terms to a written contract which already exists but rather with asking whether a contract has been concluded by oral agreement on outstanding matters. If, on the other hand, there already is a completed written contract, then we are concerned with the subsequent variation of it by the addition of another term, unless the view is taken that an addition which merely fills a gap is not a variation. On either view we are not concerned with proof of a contemporaneous additional term.

2.18 Although the cases are not as satisfactory as could be wished it does seem that the courts have recognised that it would be wrong to exclude all evidence of additional terms where it is clear from the writings founded on that something has been missed out and where, because the contract has been acted upon, or for some other reason, it would be unnatural or unappealing to hold that there was no *consensus* and no contract.

> "Defence by appeal to a formal contract rests on its being assumed to contain the whole

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[1]1911 SC 112. This case is summarised in Appendix I.

agreement between parties. If its terms are such as to show that something is lacking or not fully covered, then no violence is done by asserting that the gap was filled by another agreement, albeit informal."[1]

It is difficult to know, however, when a court will hold that a contract can be operated according to the written terms, even if some additional provision might reasonably have been expected,[2] and when it will hold that something has obviously been omitted.

2.19 *Writing admittedly inaccurate.* Another exception to the rule on proof of additional terms is that proof of terms contradicting the terms in the writing will be allowed if the party founding on the writing admits that it does not contain a true account of the transaction.[3] This exception seems to be more important in relation to unilateral deeds such as bonds and dispositions than in relation to proof of additional contract terms. It has been used to justify proof of facts (such as amounts paid) inconsistent with the facts stated in the narrative of a formal unilateral deed[4] and proof that a unilateral deed was of a

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[1]See *McInally* v *Esso Petroleum Co Ltd* 1965 SLT (Notes) 13.

[2]See eg the case of *Pollock & Dickson* v *McAndrew* (1828) 7S 189 which is summarised and discussed in Appendix I.

[3]See Macphail, paras 15.16 -15.18; Walker and Walker, *Evidence*, para 266. The admission may be on record, or in the witness box, or on a reference to oath. There is some doubt as to whether an admission by writ will suffice. See Macphail, para 15.18.

[4]See eg *Hotson* v *Paul* (1831) 9S 685.

different nature from what it appeared to be.[1] However, the exception has been applied in relation to bilateral contractual documents[2] and it would seem to be reasonable on principle that, if a party founding on a written contractual document admits on record that it does not contain a complete or accurate record of the contract, proof should be allowed as to what the full and correct terms were, if this is disputed.

> "When both parties are agreed that the writing does not express the contract, and yet differ as to what the real contract is, then, unless evidence were admissible, there would be a complete *impasse* - no solution being possible."[3]

The assumption behind this statement is that the underlying principle is to give effect to the common contractual intention of the parties and that it would be unacceptable to hold them both to a writing which both agreed did not represent that intention.

2.20 Many cases where it is admitted by both parties that the writings do not accurately or completely express the terms of the contract between them would now be pleaded as cases on rectification under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. However this will not always be possible. The parties may say that the full agreement between

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[1]See eg *Miller* v *Oliphant* (1843) 5D 856.

[2]See eg *Grant's Trs* v *Morison* (1875) 2R 377; *Grant* v *Mackenzie* (1899) 1F 889.

[3]*Grant* v *Mackenzie* (1899) 1F 889, by Lord McLaren at p 894.

them was that there should be a document in certain terms and a side agreement containing other terms. In such a case the document may accurately and completely express everything that the parties agreed should be expressed in it.

2.21 **Does the existing law have any content?** The Law Commission for England and Wales have decided that it is not necessary to recommend legislation to try to reform or clarify the parol evidence rule in English law because the rule now has no content.[1] Their argument is interesting and it is worth examining it to see if it applies also to Scottish law.

2.22 In their earlier working paper on this subject the Law Commission had described the parol evidence rule as a rule which forbade the proof of certain matters.

> "The written contract may be an incomplete or inaccurate record of what the parties agreed, but the rule binds the parties to what was written: extrinsic evidence of terms which were agreed but which were, by accident or design, omitted from the written agreement, may not as a general rule be given; such evidence is shut out by the parol evidence rule."[2]

Their provisional conclusions were that the exceptions to the rule had so greatly reduced its scope as to lead to uncertainty in the existing

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[1]In their report on *The Parol Evidence Rule* (Law Com No 154, 1986)

[2]*The Parol Evidence Rule* (Working Paper No 70, 1976) p 4.

law; that the advantages that the rule may once have had in achieving certainty and finality had largely gone; that the rule sometimes prevented parties from proving the terms of their agreement; that the rejection of extrinsic evidence to add to, vary, contradict or subtract from the terms of a written contract should be justified not by the parol evidence rule but by the fact that the parties had agreed upon the writing as a record of all they wished to be bound by; that the abolition of the rule would produce the same result in many cases but in some cases might lead to a different and more just result; and that the parol evidence rule should be abolished.[1]

2.23 In the report on this subject some years later a differently constituted Commission concluded that

> "a parol evidence rule such as is described above, and which may have been applied to exclude or to deny effect to relevant evidence, no longer has either the width or the effect once attributed to it. In particular, no parol evidence rule today requires a court to exclude or ignore evidence which should be admitted or acted upon if the true contractual intention of the parties is to be ascertained and effect given to it".[2]

The Commission's view was that the rule was merely a circular statement to the effect that "when it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be as recorded in a particular document or documents, evidence will be

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[1]Working Paper No 70, para 44.

[2]Law Com No 154, para 1.7.

inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract". In this form the rule is just a statement that the terms of the contract are the terms of the contract. If the Scottish rule on proof of additional terms amounted to no more than this then it could safely be disregarded as a pointless rule devoid of practical content.

2.24 We do not think, however, that the Scottish rule on proof of additional terms can accurately be described as the English parol evidence rule has been described in the Law Commission's report. It is true that Lord Gifford's famous statements in *Inglis* v *Buttery*[1] are open to the criticism that they merely state the obvious. Before saying that

> "where parties agree to embody and do actually embody their contract in a formal written deed, then in determining what the contract really was...a Court must look to the formal deed and to that deed alone"

Lord Gifford had carefully asked what was the contract, and whether it was partly written and partly oral. Having considered the evidence of the negotiations which led to the contract, he had concluded that the parties had intended the formal document to contain "the whole of their agreement".[2] It was therefore not surprising that

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[1](1877) 5R 58 at p 69.

[2]He was able to reach an informed conclusion on this point because the court had allowed a proof before answer. However, the allowance of a proof before answer was later criticised in the House of Lords. See (1878) 5R 87 by Lord Gordon at pp 104 and 105. In many cases the court will be asked to rule on the admissibility of extrinsic evidence

he felt able to say that a court which had already decided that the whole contract was in one document should not look elsewhere for the terms of the contract.[1] However, Lord Gifford's statements are often cited out of context. In Scotland the rule on proof of additional terms is, or at least may be, applied when what appears to be a complete written contract is produced and founded on by one of the parties. There is no need for that party to prove that both parties intended that all the express terms of the contract should be as recorded in the document founded on.

2.25 It may be helpful to consider an example. Suppose that a person has agreed to take on hire a complicated piece of machinery. It is expressly agreed between the parties at the time of conclusion of the contract that certain necessary modifications, not obvious on inspection, will be carried out in a certain way by the lessors before the machinery is handed over. This agreement does not appear in the written lease in standard form which is handed to the lessee for signature. However both parties agree, in the presence of a number of witnesses, that it is to be an additional term of the contract between them. After the machinery has been delivered and operated for some time it becomes obvious that the modifications have not been properly carried out as agreed, with the

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without having had the opportunity of learning what actually happened.

[1]Similarly, a court which had already decided that the whole terms of the contract were those agreed orally by the parties at a particular meeting would not be entitled to look elsewhere for terms of the contract.

result that the lessee suffers a considerable loss. In an action for damages for breach of contract the lessors take their stand on the written agreement which says nothing about any modifications. They plead that extrinsic evidence is inadmissible to add to the terms of the written agreement. There is nothing in the Scottish authorities to suggest that the lessors have to prove that the written agreement was intended by both parties to contain all the express terms of the contract.

2.26 It may be that in England the mere production of the contractual document would not exclude evidence of an oral term if the lessee asserted that such a term had been agreed.[1] On the Scottish authorities, however, the court would probably rule that extrinsic evidence was inadmissible to prove the alleged additional term. Such a decision would be easily justified in legal terms. The court could refer to the "well-known rule of *Inglis* v *Buttery & Co*" which had been "repeatedly affirmed": it could point out that this was not a case where the defenders admitted on record, or by writ or oath, that the document did not contain a true account of the transaction but was a simple case where "the formal documents bear to express the terms of the lease into which the parties intended to enter" and where the defenders founded on those documents: it could say that this was not a case of a collateral agreement but was a case of terms which were alleged to be part of the leasing transaction itself: it could point out that this was not a case where there was obviously something missing from the contract: it could say that the pursuer was

[1]See Law Com No 154, para 2.12.

simply attempting to add terms "to the conditions expressed in the formal deed" and that that was "not permissible": it could add for good measure that it was "not to the point" to look outside the deed to find other terms of the contract between the parties and that "the formal deed, when executed, is the measure of that contract, and is the only competent evidence of the terms of the contract".[1] A judge with some feeling for justice might add that the result was one "which I cannot look upon with any favour" and that "I regret this result" but might nonetheless feel compelled to reach it.[2]

2.27 It may be that the Scottish courts could move the law forward by a creative use of the exceptions for collateral terms or missing terms, or by saying that the existing general rule, properly interpreted, applies only where it has already been decided, after considering all relevant evidence, that "the contract" (which must mean the *whole* contract) has been embodied in writing. It may be that in time Scottish law could reach, without legislative intervention, the position which, in the view of the Law Commission, English law has already reached. We do not think, however, that it would be safe to assume that the Scottish rule on proof of additional terms is at present a harmless circular statement without real content.

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[1]See *Norval* v *Abbey* 1939 SC 724. The phrases quoted are all from the opinion of Lord Wark.

[2]See the opinion of Lord Justice-Clerk Aitchison in the same case at pp 734 and 735.

Justifications for the existing law

2.28 It is, at first sight, very strange that a court should have, in effect, to say to a party "You aver that there is an additional express term of the contract which regulates the matter in dispute. That may well be true but we are not going to allow you to prove it." What can be the justification for a rule which seems to be so plainly liable to produce injustice and resentment?

2.29 One justification is that the rule gives effect to the intention of the parties. By embodying terms of their agreement in a formal document the parties meant that document to be the only record of the contract.

> "The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings, partly consisting of letters and partly of conversations."[1]

However, this justification is hardly applicable to cases where the writings founded on consist only of informal letters, or even of a letter on one side and an oral acceptance on the other, and yet the rule on proof of additional terms has been applied in such cases. More importantly, even in relation to formal documents the justification seems to assume that what is usually the case is always the case. The fact that a formal contractual document which says nothing about other contractual terms is usually intended as a complete record of the

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[1]Lord Gifford in *Inglis* v *Buttery* (1877) 5R 58 at p 69; aff'd (1878) 5R (HL) 87.

transaction does not justify the conclusion that it always is. There may be cases, as we have seen, where the parties clearly intend another contractual term or set of terms to have effect in addition to the terms set out in the apparently complete document. Indeed one party may have initially refused to sign the formal document because it did not contain all the terms agreed to and may only have signed when it was expressly agreed that the additional terms would have effect alongside those in the formal document. It would be most unconvincing to claim in such cases that the rule was "only carrying out the will of the parties".[1]

2.30 Another justification for the rule on proof of additional terms is that it concentrates the arguments of the parties, and the evidence led, on what is relevant. It prevents the parties from leading lengthy evidence of vague prior communings and understandings which form no part of the contract. It prevents them from leading evidence of preliminary negotiating positions which have been superseded by the final agreement. It is very understandable that the courts should be reluctant to allow parties to range at large over a great deal of irrelevant material. However, that is another problem, for which the remedy is the disallowance of irrelevant evidence. The rule with which we are concerned is a rule which disallows evidence of *relevant* averments of express contractual terms which have not been superseded. Abolishing the rule on proof of additional contractual terms would not oblige any court to

[1]Lord Gifford, at same citation.

admit evidence of prior communings or understandings or negotiating positions which were not averred to be express contractual terms, agreed to by both parties and still in force.

2.31 It seems highly probable that another justification for the rule, at least historically, was a distrust of parole evidence and a view that written legal documents could not be qualified or controlled by an inferior form of evidence. This view comes across most clearly in the early cases where the court was quite prepared to allow proof of additional terms by writ or oath. It survives in the rule that a subsequent variation of a written contract can be proved only by writ or oath. This justification does not warrant the exclusion of written evidence, as has happened in modern cases,[1] and it is out of line with modern views on the value of different types of evidence. Reference to oath is now discredited and few would now argue that the best way to get at the truth was to refuse to hear the evidence of potentially useful and reliable witnesses. We have already mentioned that we have recommended in an earlier report that all requirements of proof by writ or oath should be abolished.[2]

2.32 In some of the cases there are indications of another justification for the rule - that the parties have only themselves to blame if they leave important terms out of the written record of the

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[1]See in particular *Norval* v *Abbey* 1939 SC 724.

[2]See our report on *Requirements of Writing* (Scot Law Com No 112, 1988) paras 3.14 - 3.19.

contract.[1] They "ought" to have included them. There is a certain plausibility in this argument in relation to those contracts (such as leases for more than a year) which have to be constituted in writing but to apply it to ordinary contracts would be to introduce into the substantive law a novel rule - that a contract cannot be partly in writing - which would be at variance with existing principles and pernicious in its effects.

2.33 It is difficult to resist the suspicion that in some of the cases the rule is subconsciously justified on a fallacious basis. The word "contract", in everyday use, may mean (1) a document containing contractual terms or (2) the whole legally binding agreement between the parties. The word is often used in the first sense. People talk of sending the contract for signature, signing the contract and so on. In some of the cases judges clearly use the word in this sense.[2]

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[1]See eg *Walker* v *Caledonian Railway Co* (1858) 20D 1102 at p 1105.("If the pursuer stipulated for the constant employment of a certain number of horses during the period of three years, that was a most important part of the stipulation, and ought to have been embodied in the contract..."); *Muller & Co* v *Weber & Schaer* (1901) 3F 401 at p 406.("If the agreement of the parties was such as the defenders allege, it ought to have been reduced to writing".)

[2]See *Pattinson* v *Robertson* (1844) 6D 944 at p 951 where Lord Justice-Clerk Hope referred to the document as "the regular contract" and "the concluded contract" although it was admitted that there were other terms of the whole agreement between the parties which were not in the document. He was clearly using "contract" in its documentary sense. See also *Hilson* v *Otto* (1870) 9M 18 at p 19 where Lord Ardmillan, in asking whether one party to "a contract" could by his own testimony prove anything which contradicted "the contract", was

It would be very easy to slip into the fallacy of assuming that because something is obviously not a term of the contract (in sense 1) there is no point in allowing evidence to prove that it is a term of the contract (in sense 2).

2.34 The main justification for the rule on proof of additional contract terms is that it promotes certainty. The parties and their advisers know that the terms are the written terms and no others. Certainty is an important factor in contractual relations and there is, at first sight, force in this justification for the rule. However, the parties can always secure the advantage of certainty for themselves by including a provision in the final contractual document that it contains all the terms of the contract agreed up to that point and that any other agreements reached during the negotiations are superseded and cancelled. Where they do not include such a clause the question is whether the advantage of certainty is sufficient to outweigh the danger of injustice. We are not convinced that it is.

Criticisms of the existing law

2.35 The existing law can lead to manifest injustice. The parties may have expressly agreed that certain terms, although not embodied in the document which records most of the terms of their contract, are nonetheless to be additional terms of the contract. The existing law enables one of the parties to ignore the additional terms, found on

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using "contract" in its documentary sense. He was referring, as the next sentence of his opinion makes clear, to the deed of factory.

the document and plead that extrinsic evidence of the additional terms is inadmissible. This plea will have every chance of success.

2.36 The existing law has become unprincipled. It made some sort of sense in the days when the rule was an aspect of a general distrust of parole evidence and when proof of additional terms by writ or oath would be allowed. Then the rule was manifestly one about types of evidence. It may have been an unfortunate rule, liable to cause unjustice, but it was recognisable as a rule of evidence. It could be seen as a misguided application of the principle that the courts should decide on the basis of the best available evidence. The courts were saying "Your averment of the additional term is relevant, but we have a rule that parole evidence, which we regard as an inferior form of evidence, cannot control or qualify writings, and this means that proof of the additional term must be restricted to writ or oath." Now the rule is applied so as to exclude all evidence extrinsic to the document or documents founded on. The courts are now saying "Your averment of the additional term is relevant, but we have a rule that extrinsic evidence of it is inadmissible, and this means that it cannot be proved at all."[1] It is difficult to see this

[1]In some of the reported cases it has been held that averments of additional contract terms are irrelevant. In *Norval* v *Abbey* 1939 SC 724, for example, the sheriff decided that the tenants' averments were not "relevant and sufficient" to support their plea of additional terms. It is difficult to see, however, how an averment of an express term of a contract can be irrelevant if there is nothing in the pleadings to show that it has been superseded or that it would be ineffective

approach as an application of any recognisable or defensible principle of the law of evidence.[1]

2.37 The law is incoherent. There are rules on what contracts have to be constituted in writing. All other contracts, including the great majority of commercial contracts and everyday contracts relating to the supply of goods or services, do not need to be constituted in writing. They can, if the parties wish, be partly in writing and partly not in writing. That is one rule of law. Yet in the rule on proof of additional terms we have a rule which is at variance with this rule and which has the effect that, if a dispute arises, the court may refuse to recognise that a contract can be partly in writing and partly not in writing. It may, under the guise of applying a rule of evidence, deny effect to any part of the contract which is not in writing. The law is also incoherent in that there is one rule for contemporaneous variations and another for subsequent variations of written contract terms. If the parties vary their contract ten minutes after it has been concluded, proof of the variation will be allowed, but will be limited to proof by writ or oath. If the parties agree ten minutes before a written contractual document is signed that, notwithstanding what is in it, some

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because of the rules requiring certain contracts to be constituted in writing. In most contract cases the averments which are among the most relevant are averments as to what the terms of the contract are.

[1]Lord Justice-Clerk Moncreiff protested about this approach in *Inglis* v *Buttery* (1877) 5R 58 at p 64 but his protest, which may in that particular case have been based on a strained view of the facts, fell on deaf ears in the House of Lords. See (1878) 5R (HL) 87.

other term is to be binding on them, extrinsic evidence of the additional term will not now be allowed at all.[1]

2.38 Another criticism is that the scope of the exceptions to the rule on proof of additional contract terms is uncertain. It is particularly difficult to predict when a term will be regarded as a collateral agreement or when a court will be prepared to say that there is obviously a missing term in a contractual document or documents so that extrinsic evidence will be admissible.

Options for reform

2.39 **Do nothing.** One option is to do nothing on the ground either that the rule on proof of additional terms is a beneficial rule or that it is a rule which, properly interpreted, has no content. We do not think that the rule is a beneficial rule. Irrelevant evidence can be excluded anyway without the rule and, in so far as it operates to exclude relevant evidence, we think that it is a harmful rule, liable to produce injustice. Although certain statements of the rule, and in particular Lord Gifford's classic statement in *Inglis* v *Buttery*[2], suggest that it has no content and is merely a rule that the terms of the contract are the terms of the contract, we think, for the reasons given earlier, that it is unsafe to assume that the rule will always be interpreted and applied in this way. Very

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[1]See *Norval* v *Abbey* 1939 SC 724. *Stewart* v *Clark* (1871) 9M 616 is an example of the earlier law under which proof by writ or oath would have been allowed in both cases.

[2](1877) 5R 58 at p 69.

often its practical effect will be that a document which looks as if it contains all the terms of a contract will be treated as if it does contain all the terms of the contract. We would welcome views, but our preliminary conclusion is that doing nothing about this rule is not an attractive option.

2.40 **A presumption.** In this Commission's consultative memorandum on the law of evidence in 1980 consultees were asked whether the rule prohibiting the admission of extrinsic evidence in relation to documents should be

> "(a) abolished or
>
> (b) expressed and operated as a rebuttable presumption that when the terms of an agreement have been reduced to writing, that writing contains with exactness and completeness all those terms?"[1]

A majority of those who commented favoured option (b). A presumption has the merit of recognising the fact that usually the parties will intend a writing which records contractual terms to contain all of the contractual terms. However, the presumption would have to be to the effect that where a writing appears to contain all the terms of a contract then it will be presumed to contain all the terms of the contract. The formula in paragraph (b) above would require an inquiry into whether the terms had all been reduced to writing before the presumption that they had been completely reduced to writing could come into operation. There is on the Commission's files a draft provision which was prepared in

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[1]Memorandum No 46 on the *Law of Evidence* (1980) paras P.06 and P.07 and proposition 164.

connection with the early joint work of this Commission and the Law Commission for England and Wales on a draft contract code and which may serve to focus discussion. The provision is as follows.

> "(1) Where any of the terms of a contract are embodied in a document which has the appearance of containing all the express terms of the contract, it shall be presumed, unless the contrary is proved, that the document contains all the express terms of the contract; and similarly where any of the terms of a contract are embodied in two or more documents.
>
> (2) In a case falling within subsection (1) above, extrinsic evidence, whether oral or documentary, shall be admissible for the purpose of proving that the contract includes additional express terms, whether agreed to orally or in writing."

A presumption of this nature is said to be all that survives of the parol evidence rule in England and Wales. Professor Lord Wedderburn concluded in 1959 that

> "What the parol evidence rule has bequeathed to the modern law is a presumption - namely that a document which *looks* like a contract is to be treated as the *whole* contract."[1]

Noting that the presumption can be displaced by evidence, the Law Commission in its report on *The Parol Evidence Rule* [2] said that the above statement accurately reflected the practical effect of the parol evidence rule in English law. Other writers

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[1]Wedderburn, "Collateral Contracts" [1959] CLJ 58 at p 62.

[2]Law Com No 154 (1986) para 2.13.

have also seen the current English rule as no more than a rebuttable presumption.[1] In Germany

> "the drawing up of a written document containing legal declarations merely gives rise to a presumption that it is accurate and complete".[2]

Although the starting point is different this is also said to be the practical effect of French law in a great many cases.[3]

2.41 **Abolition.** The Law Commission for England and Wales, in its working paper on *The Parol Evidence Rule*[4] provisionally proposed the abolition of the rule.[5] The Law Reform Commission of British Columbia, after consultation, made a recommendation to the same effect.[6] In favour of this solution, rather than the introduction of a presumption, it

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[1]See Cheshire, Fifoot and Furmston's *Law of Contract* (12th edn 1991) p 125. See also Treitel, *The Law of Contract* (8th edn 1991) pp 178 -179. For a much earlier statement of the view that the English "rule" is no more than a rebuttable presumption, see *Gillespie Bros & Co* v *Cheney, Eggar & Co* [1896] 2 QB 59 at p 62. In Atiyah, *An Introduction to the Law of Contract* (4th edn 1989) p 202 the view of the rule as a presumption is linked to the scope of the exception for collateral contracts.

[2]Zweigert and Kötz, *An Introduction to Comparative Law* (translated by Tony Weir, 2d edn 1987) Vol II, p 92.

[3]Zweigert and Kötz at p 92.

[4]Working Paper No 70 (1976).

[5] As we have noted, a differently constituted Law Commission later concluded that the parol evidence rule, when properly interpreted, had no content and could safely be ignored. We do not think that a similar conclusion would be justified in Scotland.

[6]Report on *Parol Evidence Rule* (1979) pp 20-21.

rather than the introduction of a presumption, it may be said that anyone seeking to rely on an additional contract term would have to prove it in any event. A presumption would add nothing. It is therefore for consideration whether reform should take the form of a provision to the effect that any rule of law whereby extrinsic evidence of any express subsisting term of a contract is inadmissible or falls to be disregarded should cease to have effect.

2.42 A provision to the above effect would not allow evidence of prior communings or negotiating positions as such. There would have to be a relevant averment of an express term of the contract. The provision would not affect the law on those contracts which have to be constituted in writing. In their case the applicable rule is a rule on constitution, not on the admissibility of evidence. The provision would not allow evidence of a term which had been superseded and was no longer in force. A superseded term is no longer subsisting. We make provisional proposals on the question of supersession later in this paper[1] but that is a different matter. Finally, we are assuming that the recommendation in our report on *Requirements of Writing*[2] on the abolition of all remaining requirements of proof by writ or oath

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[1]See para 4.24 below.

[2]Scot Law Com No 112 (1988) recommendation 11. This recommendation was that (a) any enactment or rule of law that restricts proof of any matter to writ or oath should cease to have effect and (b) the procedure of reference to the oath of a party should be abolished.

will be implemented, so that the law would be coherent in not restricting or disallowing proof of additional contract terms, whether contemporaneous or subsequent.

Assessment and provisional proposal

2.43 We would not wish to underestimate in any way the advantages of having contracts reduced to final written form or the advantages of being able to rely on such contractual documents as the sole source of the terms of the contract where that is what the parties have intended. Where the parties take the trouble to prepare a contractual document we think that it is reasonable to suppose that in most cases their intention will have been to regard that document as containing all the express contractual terms agreed up to that point, even if the document does not contain a clause making this clear. The defect in the existing law is not that it proceeds on this basis but that it does so in a rigid way which leaves no room for exceptional cases, and which is therefore liable to produce manifest injustice. For this reason we think that the most appropriate reform would be the replacement of the present rule on proof of additional contract terms - which is in effect an irrebuttable presumption that a document which looks like a complete contract is the complete contract - with a rebuttable presumption to the same effect. Outright abolition of the rule would have the same effect but it would not contain the same overt recognition of the useful role of contractual documents and it would look like a more violent break with the existing law. We have taken into account that when we consulted on this

question in our 1980 memorandum on the law of evidence the balance of opinion was in favour of a rebuttable presumption, or a reformulation of the existing rule, rather than outright abolition.[1]

2.44 Our provisional proposal is therefore that

1. The existing rule whereby, when a document has been drawn up which appears to contain the terms of a contract, extrinsic evidence is inadmissible to prove an additional term of the contract should be replaced by a rebuttable presumption on the following lines.

"(1) Where any of the terms of a contract are embodied in a document which has the appearance of containing all the express terms of the contract, it shall be presumed, unless the contrary is proved, that the document contains all the express terms of the contract; and similarly where any of the terms of a contract are embodied in two or more documents.

(2) In a case falling within subsection (1) above, extrinsic evidence, whether oral or documentary, shall be admissible for the purpose of proving that the contract includes additional express terms, whether agreed to orally or in writing."

We invite views.

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[1]Memorandum No 46, *Law of Evidence* (1980) proposition 164.

Position of third parties.

2.45 We have considered whether the new presumption which we are proposing could give rise to unacceptable risks for third parties. Suppose, for example, that the rights under a formal written contract are being assigned. What would be the position if the assignee were to find that an undisclosed additional term modified the rights apparently acquired? This is not a new problem created by our proposal. It could arise already where, for example, the exception for collateral terms or the exception for missing terms applied or where the contract had been varied prior to the assignation. Under the existing law,in a question between the assignee and the other party to the contract which has been assigned, the assignee may be met by any defence which was available against the cedent at the time when the assignation was intimated[1]. *Assignatus utitur jure auctoris*. It is up to the assignee to ensure that the assignation includes any warranties necessary for the assignee's protection against the risks, which are far from negligible under the existing law, that the rights apparently assigned are not what they seem to be. We can see no reason why the position should be any different under our proposal. We did consider the possibility of a statutory provision

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[1]See *Redfearn* v *Ferrier, Somervail and Others* (1813) 1 Dow 15 (where the House of Lords distinguished between this type of case, involving the rights of the contracting parties as between themselves, and the type of case involving a latent trust asserted by someone who had never been a party to the contract); *Mangles* v *Dixon* (1852) 3 HLC 702; *Scottish Widows' Fund* v *Buist* (1876) 3R 1078; *Scottish Equitable Life Assurance Co* v *Buist* (1877) 4R 1076; aff'd (1878) 5R (HL) 64.

to the effect that third parties (such as those considering whether to take an assignation) should be entitled to assume that a document which appeared to contain the complete terms of a contract did not contain any additional terms unless any such additional terms had been brought to their attention before they had acted in reliance on the document. However, the law would be incoherent if there were to be one rule for additional terms and another for subsequent variations or the other risks to which assignees are already subject. Also, the results of such a solution could be unsatisfactory. The assignor might continue to be bound by the additional terms and yet these terms might not be severable from the terms in the main contractual document. There would be an inroad into the principle that the assignee has the same rights as the assignor. We have concluded that it would be unnecessary, and probably undesirable, to have a special statutory rule for the protection of third parties but we would welcome the views of consultees on this point.

PART III - EXTRINSIC EVIDENCE IN INTERPRETING CONTRACT TERMS

Introduction

3.1 We are concerned in this part of the discussion paper with the process of interpreting contracts. Even if a contractual document accurately expresses what the parties intended it to express, and therefore does not require rectification, and even if it contains all the terms of the contract, there may be a dispute about the meaning of a particular expression.[1] The objective in such a case is not to determine the general intentions or background purposes of the parties. It is not a question of deciding what the parties might have put into the contract if they had thought more about the matter.[2] It is a question of deciding the meaning of what they did put into the contract.

> "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?"[3]

That, however, does not take us very far. There are several different possible approaches to the ascertainment of meaning. The approach adopted will have a bearing on the type of evidence which will

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[1]By "expression" we mean any means which have been used to attempt to express meaning - including words, phrases, figures and symbols.

[2]See *Adamastos Shipping Co* v *Anglo-Saxon Petroleum Co* [1959] AC 133, by Lord Reid at p 174.

[3] *Wickman Machine Tools Sales Ltd v Schuler A.G.* [1974] AC 235 by Lord Simon of Glaisdale at p.263 quoting Norton on Deeds. See also *Cowan v Magistrates of Edinburgh* (1887) 14R 682 at p.686.

be relevant. If, to take an extreme example, the only principle of interpretation of written or spoken words were that words should be given their dictionary meaning then the only relevant evidence as to the meaning of a word would be evidence of dictionary meanings. If, on the other hand, the law recognised that the meaning of a word or phrase was the meaning which both parties, at the time when the contract was concluded, intended it to bear then evidence of that intention would be relevant if it were available. As there is an argument that all relevant evidence ought to be admissible, unless there is some strong reason why it should not be, and as there is no need to have special rules to make irrelevant evidence inadmissible, views about the relevancy of evidence will in turn have a bearing on any discussion of the admissibility of extrinsic evidence. In short, it is necessary to consider the principles governing the interpretation of contracts (a matter of substantive law) before considering questions relating to the admissibility of extrinsic evidence.

The principles of interpretation

3.2 An important question which has to be answered before there can be any useful discussion of the admissibility of extrinsic evidence in the interpretation of contracts is whether, in the interpretation of a contract, the meaning to be attributed to an expression is (a) the meaning which the party or parties using it intended it to bear or (b) the meaning which an objective observer would attribute to it or (c) sometimes the one and

sometimes the other.[1] The existing law of Scotland adopts the last solution. In discussing the law on this matter it is convenient to distinguish between the case where a contract consists of an offer and acceptance, which have not been followed by an agreed document setting out the contract terms, and the case where a contract has been embodied in an agreed document. In the first case it is possible to identify one party as the party making a statement or doing an act, and the question for consideration is the relevance, if any, of the intention of that party. In the second case both parties have agreed to the terms and the question for consideration is the relevance, if any, of their common intention.

3.3 **Contract not embodied in agreed document.** It is clear 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 be presumed to know of it, will prevail.[2] For example, a party offering to supply stone coping for a wall at so much per foot can make it clear in the offer that "foot" means

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[1]Another theoretical possibility is that the meaning of an expression could be taken to be the meaning which the addressee actually attached to it, but this can be ruled out from the start as a practical solution. As Gloag puts it, "it would paralyse all business relations if the law allowed the party to whom an offer was made to interpret that offer as he pleased". *Contract* (2d edn 1929) p 398.

[2]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.

linear foot and not square foot.[1] A church negotiating with a minister can use words or procedures in a special ecclesiastical sense which the minister, as a member of that church, can be presumed to know.[2] A party offering to transport the contents of a villa can make it clear, 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.[3] 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 estate of Dallas and not some other property which sometimes goes by that name.[4] There is no reason why one party to negotiations should not inform the other privately and orally that, for reasons of commercial secrecy, certain code words will be used for certain matters in all written communications. There is no reason why one party should not tell the other that in the schedule of prices attached to a tender the symbol "£" refers to thousands of pounds sterling rather than to single pounds. In all of these cases it is clear on principle that, if questions of the admissibility of evidence are left aside,[5] it is the meaning

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[1]See e g the facts of *Stuart* v *Kennedy* (1885) 13R 221.

[2]Cf *Arneil* v *Robertson* (1841) 3D 1150.

[3]*Sutton & Co* v *Ciceri & Co* (1890) 17R (HL) 40.

[4]*Houldsworth* v *Gordon Cumming* 1910 SC (HL) 49.

[5]It may be supposed, for example, that it is admitted on record or established by a reference to the defender's oath that the pursuer made it clear to the defender that a particular meaning was

assigned to the expression by the party using it which must prevail, provided that the other party knew of the sense in which the expression was used or could not have been unaware of it. Any other solution might involve the court in making for the parties a contract very different from the one they had made for themselves. However, if the other party did not know, and could not reasonably be expected to know, of the meaning assigned to an expression by the party using it, the law will adopt an objective approach to interpretation.

> "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."[1]

In such a case a court will take the view that

> "commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say".[2]

The expressions used would be given the meaning which it would be reasonable for someone in the position of the addressee to attach to them. As it would be unreasonable for the addressee to ignore an express statement by the other party that an expression was being used in a particular sense, the two approaches can be, and sometimes are, combined in one composite rule. It can be said that the object is to ascertain

> "what each would have led the other reasonably to assume were the acts that he was promising

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attached to a word used.

[1]Gloag, *Contract* (2d edn 1929) p 398.

[2]*Muirhead & Turnbull* v *Dickson* (1905) 7F 686 by Lord President Dunedin at p 694.

to do or to refrain from doing by the words in which the promises on his part were expressed"[1]

or that

"the language used by one party is to be construed in the sense in which it would be reasonably understood by the other"[2]

However, it is probably more helpful if the two approaches are kept separate because this makes clear the important, but limited, role played by the intention of the user in establishing the meaning to be attached to an expression.

3.4 Article 8 of the United Nations Convention on Contracts for the International Sale of Goods regulates these questions 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."

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[1] *Pioneer Shipping* v *B T P Tioxide* [1982] AC 724 by Lord Diplock at p 736.

[2] *Fowkes* v *Manchester and London Assurance Association* (1863) 3 B & S 917, by Lord Blackburn at p 929, quoted in Gloag, *Contract* (2d edn, 1929) at p 398 with the qualification that in cases involving the terms of contracts like charterparties which have been refined by judicial decisions over the years the addressee must be supposed to be conversant with the law.

In our report on the *Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods*[1] we recommended that a rule based on this provision should apply in relation to the question whether a contract had come into existence.[2] It would be desirable, although not absolutely essential,[3] to have the same rules applying to interpretation and formation of contracts. We think, therefore, that there would be advantages in setting out the basic rules on the interpretation of contracts (where the contracts are not embodied in an agreed writing) in terms based on article 8 (1) and (2) of the convention. This would not, we believe, involve any change in the substantive law but it would set out the governing principles more obviously and it would help to provide a firm basis for the consideration of the rules on the admissibility of extrinsic evidence.

3.5 **Contract embodied in agreed document.** Where a contract has been embodied in an agreed document it is often artificial to seek to attribute statements in it to one party rather than another and the substance of the above rules has to be expressed in a slightly different way. In this case the basic principle of the substantive law is that statements in the contract are to be interpreted in accordance with the shared common intention of the parties where that can be ascertained. Very often, of course, it cannot be ascertained. Again we are

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[1]Scot Law Com No 144 (1993).

[2]See paras 2.4 - 2.7 and para 3 of the draft Bill appended to the report.

[3]See Scot Law Com No 144 at p 10.

assuming that there are no difficulties as to the admissibility of evidence and that the shared common intention appears from the terms of the contract itself, or is admitted on record or is established by admissible evidence by virtue of one of the exceptions to the general rule excluding extrinsic evidence. If, for example, the parties have included an interpretation clause in their contract then it is clear that the meaning assigned to a word or phrase by that clause will prevail over, say, the ordinary dictionary meaning. Again, 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.[1] To attach any other meaning to the expression would be to make a new contract for the parties and to impose on them obligations which they had not agreed to undertake. Numbers are the least ambiguous of expressions. Yet where, in an English case, it was established by properly admitted evidence that the shared common intention of the parties was that the phrase "1,000 rabbits" in their agreed contractual document should mean "1,200 rabbits" that meaning prevailed.[2] "Whitsunday" in 1886 meant 15th May.[3]

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[1] *Hunter* v *Barron's Trs* (1886) 13R 883 (parties had attached special meaning to term "Whitsunday"); *The "Karen Oltmann"* [1976] 2 Ll L R 708. And see Gloag, *Contract* (2d edn 1929) p 37 - "if a judge, called upon to construe an ambiguous phrase, satisfies himself, by evidence admitted as proof of the surrounding circumstances, of what the real meaning of the parties was, he will usually construe the ambiguous phrase in accordance with that meaning".

[2] *Smith* v *Wilson* (1832) 3 B & Ad 728, where the properly admitted evidence was evidence of a local custom by reference to which the parties had contracted.

That was a clear legal meaning which would have been given to the term if used on its own. Where, however, it was clear from extrinsic evidence, which was held to be admissible, that the parties had used the term to mean 26th May, the parties' own meaning had to prevail.[1] The point was made firmly in a South African case.

> "The golden rule applicable to the interpretation of all contracts is to ascertain and to follow the intention of the parties; and, if the contract itself, or any evidence admissible under the circumstances, affords a definite indication of the meaning of the contracting parties, then it seems to me that a court should always give effect to that meaning."[2]

3.6 Discussion of the substantive law on the interpretation of agreed contractual documents is made difficult in Scotland by the disproportionate importance attached to the subsidiary rules on the admissibility of extrinsic evidence, but the true position is revealed by the recognition that the intention of the parties to a contract (which must mean their shared common intention)

> "may be referred to the oath of the defender, however clear the terms of the written

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[3]Now it means 28th May. Term and Quarter Days (Scotland) Act 1990, s1.

[1]*Hunter* v *Barron's Trs* (1886) 13R 883.

[2]*Joubert* v *Enslin*, 1910 AD 6 by Innes JA at pp 37-38

contract may be".[1]

There would be no point in allowing the intention of the parties to be established in this way unless, as a matter of substantive law, that intention was decisive. It seems too

> "that in a question as to the construction of a written contract it is always competent for one party to prove that the intention of the parties was what he avers it to be by the writ of the opposing party, provided that the writ is subsequent to the date of the contract..."[2]

This again shows the importance of the common intention of the parties in any case where that can be properly established.

3.7 The primacy, as a matter of substantive law, of the shared common intention of the parties at the time of contracting as to the meaning borne by expressions in their contract does not always emerge clearly in accounts of the Scottish law on the interpretation of contracts. This is partly because questions as to the admissibility of extrinsic evidence keep intruding, partly because most cases on the interpretation of contracts are cases in which there is no evidence as to the common intention of the parties,[3] and partly

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[1] Dickson, *Evidence* (3d edn) #1100; Gloag, *Contract* (2d edn 1929) p 376; Walker and Walker, *Evidence* p 290. See e g *Sinclair* v *McBeath* (1869) 7M 934.

[2] Gloag, *Contract* (2d edn 1929) pp 376 - 377, *Turner* v *MacMillan-Douglas* 1989 SLT 293.

[3] In a typical case the parties will not have addressed their minds to the problem which has arisen. One will say it is within the terms of the contract and the other will say that it is not. In such a case, in the absence of any averments that

because cases which recognise that the parties can attach their own meanings to their expressions are sometimes presented as exceptions to a rule that words bear their plain or ordinary meaning. It seems clear on principle that the basic rule ought to be that the parties determine the meaning of their expressions. Only where they have failed to do so, for example in an interpretation clause in the contract, should subsidiary rules come into operation. We think that it would be helpful if the basic rule as to the primacy of the parties' shared common intention, as a matter of substantive law, were to be clearly set out in a statutory provision. This would make explicit what is, we think, implicit in the existing law,[1] and would provide a sound basis for new rules on the admissibility of extrinsic evidence. It is particularly important to make it clear that in the interpretation of expressions in an agreed contractual document it is the *shared common intention* of the parties, where that can be ascertained, *as to the meaning of the expressions used in the contract* which matters and not the intention of one party alone, or the secret intentions of both parties, or the general purposes or background intentions of the parties. Contracts are made according to what people say, not

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the words in the contract are used in any special sense, a court has to try to give them their natural and ordinary meaning. For a recent example, see *M W Wilson (Lace) Ltd* v *Eagle Star Insurance Co Ltd* 1993 SLT 938.

[1]The true nature of the existing rule might be harder to discern if proof by writ or oath were to disappear as we have recommended in our report on *Requirements of Writing* (Scot Law Com No 112, 1988) paras 3.17 - 3.18.

according to what they think in their inmost minds. The search is for the meaning of what the parties said, not for what they meant to say. But the meaning of what contracting parties say is a matter which is within their control at the time of contracting.

3.8 There would be nothing unusual in placing the shared common intention of the parties as to the meaning of their words at the forefront of the substantive law on the interpretation of agreed contractual documents. The American Law Institute's *Restatement of the Law, Second* begins its treatment of this subject by providing that

> "Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning."[1]

The French civil code begins its treatment of the interpretation of contracts by providing that the interpreter should seek to determine what was the common intention of the contracting parties and should not just stop at the literal meaning of the words used.[2] The Italian civil code[3] and the Swiss code on obligations[4] have similar provisions.

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[1] *Contracts 2d* s 201.

[2] Art 1156. "On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes."

[3] See Criscuoli and Pugsley, *Italian Law of Contract* (1991) p 148. "Article 1362 provides that "contractual interpretation should seek to find the common intention of the parties, not merely the literal meaning of the words.""

[4] Art 18.

3.9 Where the shared common intention of the parties as to the meaning of an expression in an agreed contractual document cannot be ascertained, which will very often be the case, it is necessary to fall back on an objective interpretation and to give the expression the meaning which a reasonable third party would give to it in the circumstances.[1]

> "The matter seems really to come down to this - that the Court is to endeavour to place itself in the position of a reasonable and disinterested third party, duly instructed, if necessary, as to the law."[2]

This does not mean that the question is what a reasonable third party would have thought it sensible for the contract to have provided. The question is what a reasonable third party would regard as a sensible interpretation of the words the parties actually used. 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".[3]

At this stage various subsidiary rules of interpretation may come into play, such as the rules that the whole contract must be considered;

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[1]See eg *Glasgow Training Group (Motor Trade) Ltd* v *Lombard Continental plc* 1989 SLT 375 where Lord Clyde, in deciding whether the word "storm" in an insurance policy covered a particular type of weather, said that the criterion was "whether or not a person of ordinary common sense making the ordinary use of language... would have used the word 'storm' to describe the weather..."

[2]Gloag, *Contract* (2d edn 1929) pp 398 - 399.

[3]*Muir Construction Ltd* v *Hambly Ltd* 1990 SLT 830, by Lord Prosser at p 833.

that ordinary words should be given their ordinary meaning, technical words their technical meaning, and words with a defined legal meaning their defined legal meaning; that an interpretation which enables the contract to take effect should be preferred to one which renders it ineffective; and that where a list of items which are all of the same kind is followed by a general expression it may be appropriate to regard the general expression as applying only to items of the same kind as those in the preceding list.[1] These are all commonsense rules which any reasonable third party would apply. We do not think that it is necessary to set out subsidiary rules of interpretation of this kind in statute before dealing with the question of the admissibility of extrinsic evidence in the interpretation of contracts, although they would naturally feature in any codification of contract law. We do, however, think that it is necessary to establish clearly the substantive law on the relevance of the parties' intentions. Only when that has been done can there be any sensible discussion of the question of the admissibility of extrinsic evidence.

3.10 **Provisional proposal.** We suggest for consideration that

> **2(1) As an essential pre-requisite to reform of the rules on the admissibility of extrinsic evidence in the interpretation of contracts the substantive law on the approach to be**

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[1]See generally, Gloag, *Contract* (2d edn 1929) pp 399 - 406; Walker, *Contracts* (2d edn 1985) pp 413 - 419; McBryde, *Contract*, pp 426 - 434. In *SSHA v Wimpey Construction (UK) Ltd* 1986 SC (HL) 57 only one interpretation gave any content to the words in question. So that interpretation prevailed.

adopted to interpretation, and in particular on the role of the parties' intentions, should be clearly established.

(2) A suitable model (which we have already recommended for use in relation to the formation of contracts) is provided by article 8 (1) and (2) of the United Nations Convention on Contracts for the International Sale of Goods, although this could usefully be modified for the case of contracts embodied in an agreed document.

(3) It should accordingly be provided that, in interpreting any expression in a contract,

(a) where the expression has not been embodied in a document agreed by the parties then,

(i) the expression should be interpreted according to the intent of the party using it where the other party knew or could not have been unaware what that intent was

(ii) if the preceding paragraph is not applicable, an expression used by one party should be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances

(b) where the expression has been embodied in a document agreed by the parties then,

(i) the expression should be interpreted according to the shared common intention of the parties at the time when the contract was concluded

(ii) if the preceding paragraph is not applicable, the expression should be interpreted according to the understanding that a reasonable person (of the same kind as the parties where they are in the same business or profession) would have had in the same circumstances.

The admissibility of extrinsic evidence

3.11 **General rule.** The general rule is usually said to be that extrinsic evidence is inadmissible to interpret written contract terms.[1] However, there is some uneasiness at this way of stating the existing law. One leading textbook on evidence says that

> "the exceptions to this part of the Scottish rule are so numerous that little harm would probably result if the English method of statement [ie that, subject to exceptions, extrinsic evidence is admitted for the purpose of interpreting a writing] were to be adopted."[2]

Professor McBryde includes what is often regarded as an exception in his formulation of the rule itself when he says that

> "A contract is construed by considering the express terms of the contract and any admissible surrounding circumstances. It is inaccurate (despite some judicial dicta) to suggest that a contract is construed by

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[1]See Macphail, *Evidence*, para 15.01 and authorities there cited.

[2]Walker and Walker, *Evidence*, para 240.

looking at its terms and nothing else."[1]
We have some sympathy with these views but, for present purposes, we will assume that the traditional approach is correct and that the general rule is that extrinsic evidence is inadmissible for the purpose of interpreting expressions in a written contract.

3.12 The general rule stated above conceals two rules - (1) that extrinsic evidence of irrelevant matter is inadmissible and (2) that extrinsic evidence of relevant matter is inadmissible. The exclusion of extrinsic evidence of one party's secret intention, never communicated to the other, is an application of the first rule. Even if proved, one party's secret intention as to the meaning to be borne by an expression in the contract has no bearing on the issue. It is simply irrelevant. The exclusion of extrinsic evidence of the shared common intention of the parties, at the time of contracting, as to the meaning to be borne by an expression in their contract is an application of the second rule. We are concerned only with the second rule. There is no need to re-examine a rule excluding evidence of irrelevant matter. There is every need to re-examine a rule excluding evidence of something which is not only relevant but of crucial importance to a determination of the issue.

3.13 **Exceptions.** An unqualified rule which prevented a court from looking outside the terms of a written contract in interpreting expressions used in it would lead to such absurd and unreasonable

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[1] *Contract*, para 19-07.

results that the law would be brought into disrepute. It is therefore not difficult to understand why various exceptions to the general rule have been recognised. It is, however, very difficult to classify and state these exceptions in an accurate and comprehensible way. The existing law on this subject is notoriously obscure.

3.14 *Ambiguity*. The leading textbook on the Scottish law of evidence - Walker and Walker on *Evidence* - says that extrinsic evidence is generally admissible to clarify any ambiguity, whether latent or patent, subject to the qualification that evidence of direct declarations of intention or understanding is in general inadmissible.[1] The expression "ambiguity" is used to cover

> "any doubt as to the meaning of the words or their application to the facts"[2]

a definition which covers both the ambiguity (in a narrower sense) which arises when a word has more than one meaning and the uncertainty which arises when a word, the meaning of which is not in dispute, is difficult to apply to the facts because of its vagueness. As there will almost always be at least an element of doubt as to the meaning of words in a contract when one party claims that they mean one thing and the other claims that they mean another, the recognition of an exception for ambiguity in this wide sense leaves little room for the application of the general rule. Even the qualification relating to evidence of direct

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[1]Walker and Walker, *Evidence*, para 268.

[2]Walker and Walker, *Evidence*, para 267, footnote 58.

declarations of intention is limited because this type of evidence is said to be admissible where the ambiguity is of the type sometimes called equivocation, which arises

> "when the language of the writing, though intended to apply to one person or one thing only, is equally applicable in all its parts to two or more, and it is impossible to gather from the context which was intended".[1]

It will also be noted that, in the view of Walker and Walker, circumstantial or indirect evidence of intention (where that is relevant) is admissible in any case of ambiguity[2] and that intention (again where that is relevant) can always be established by a reference to the other party's oath.[3] What this means is that, in any case where there is room for genuine doubt about the meaning of an expression in a contract, all relevant extrinsic evidence is admissible unless (in a case other than one of equivocation) it is direct evidence of what the common intention of the parties was. Indirect evidence from which the common intention of the parties as to the meaning of a term can be inferred is admissible but (except in a case of equivocation) a joint minute signed by both parties immediately before executing the contract setting out their shared understanding as to the meaning of a term in it is inadmissible. It is difficult to see any sense in a law to this effect.

3.15 Not all authors state the exception for

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[1]Walker and Walker, *Evidence*, para 270.

[2]Para 271.

[3]Para 272 (b).

ambiguity as widely as do Walker and Walker. Some distinguish between patent and latent ambiguities. Gloag, for example, states that

> "there is a distinction - not always very satisfactory or easy to apply - between patent ambiguities (expressions in themselves susceptible of more than one meaning) and latent ambiguities (expressions which are apparently clear, but which are seen to be ambiguous from the surrounding circumstances, as disclosed by the contentions of the parties). In the latter case, evidence of intention is admissible."[1]

Professor David Walker draws the same distinction between patent and latent ambiguities and says that in the latter case, but not generally in the former,

> "the court is entitled to be informed, by parole evidence of circumstances, of what the parties intended, though not by parole evidence of what the parties stated as their intentions."[2]

He notes, however, that the distinction

> "has rarely, if ever, been strictly applied in Scottish cases."[3]

This is just as well because it is a fundamentally unsuitable distinction to use as the basis of a legal rule. Whether an expression is patently or latently ambiguous will depend on the intelligence, knowledge and experience of the person considering

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[1]*Contract* (2d edn, 1929) p 372.

[2]*Contracts* (2d edn 1985) para 24.13.

[3]Para 24.13.

it.[1] What is patent to one person is very often latent to another.

3.16 The distinction between patent and latent ambiguities appears to have been borrowed from English law early in the nineteenth century.[2] There is therefore a certain irony in the fact that it is now discredited in England, as indeed is the related distinction between direct and circumstantial evidence in this context. In a leading English case on the interpretation of contracts Lord Simon of Glaisdale said that

> "the 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

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[1]For example, a reference to something being done at "the meeting of the Licensing Board of 7th October" might seem unambiguous to a lay person but a solicitor experienced in licensing work would realise that it was ambiguous. It could mean done at the meeting on the 7th, excluding any adjournments, or it could mean done at the meeting on the 7th, including any continuation of that meeting on another day as a result of an adjournment. See *Tarditi* v *Drummond* 1989 SLT 555, where the court took into account that "when the parties entered into the missives they must have known that the meeting fixed for 7 October ... might well be adjourned."

[2]See *Morton* v *Hunter & Co* (1830) 4 W & S 379, by Lord Brougham at p 386-7; *Logan* v *Wright* (1831) 5 W & S 242, by Lord Brougham at p 247.

refinements."[1]

3.17 Although an exception for ambiguity, and particularly a wide exception of the kind derived from the authorities by Walker and Walker on *Evidence*, is welcome in that it enables the courts in many cases to obtain the relevant evidence which they need in order to apply the substantive law on the interpretation of contracts, the whole idea of basing legal rules on a distinction between expressions which appear to be ambiguous when the written contract alone is considered and expressions which do not is open to criticism. If it is accepted, as it surely must be, that the parties to a contract can use words, figures and other expressions in any way they like, then it follows that any expression in a contract is inherently capable of having a special meaning in addition to the meaning which it might appear to have if considered on its own. The word "interest" in relation to a sum of money might be thought at first sight to be completely unambiguous and yet both parties to a contract might have used it, to the knowledge of each other, ineptly but genuinely, to signify periodic payments consisting partly of repayments of capital and partly of interest.[2] In one case, which did not involve the admissibility of extrinsic evidence but was about whether or not there was a dispute worthy of being referred to an arbiter, Lord President Inglis robustly declared

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[1]*Wickman Machine Tools Sales Ltd* v *L Schuler AG* [1974] AC 235, at p 268.

[2]See *Sinclair* v *McBeath* (1868) 7M 934, where the court allowed a question as to the common intention of the parties in this respect to be referred to the defender's oath.

that even if the parties contended that the phrase "sharp fresh water sand" was open to construction

> "the Court knows that it is not. Sharp fresh water sand means one thing and one thing only."[1]

It may have been true in the context of that particular case that the interpretation advanced by one of the parties was so implausible as not to be worth sending to an arbiter. Nonetheless, in itself, the phrase "sharp fresh water sand" is capable of bearing several meanings. Even if we leave out of account the possibilities that the parties may have given the phrase a special definition, or may have used it in accordance with a trade usage,[2] it is clear that the phrase contains several uncertainties and a syntactical ambiguity. It would be easy to multiply examples of seemingly plain expressions which are actually ambiguous or uncertain but that would be superfluous. The point is simply that it is unwise to base a rule of law on a supposed distinction between expressions which, when a written contract is considered on its own, are ambiguous and those which are non-ambiguous. Meaning is inherently variable and dependent on context.

3.18 *Surrounding circumstances*. The general rule that extrinsic evidence is inadmissible in the interpretation of expressions in a contract is

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[1]*Parochial Board of Greenock v Coghill & Son* (1878) 5R 732 at p 734.

[2]There was a suggestion in the case cited that it was customary for contractors to grind up the stone chippings produced on site as a by-product of the stonemasons' work and to add this manufactured sand to the sand used for mixing with the lime.

subject to the sweeping exception that

> "it is always competent to lead evidence of the circumstances surrounding the parties at the time when the contract was made."[1]

This exception has been recognised and affirmed in many cases from the early nineteenth century until the present day. An early statement of the exception justified it on the basis of

> "every court of justice having a right to have all the information which was in the possession of the parties contracting, to place itself in the situation of the parties for the purpose of putting a construction upon the instrument to which they have become parties."[2]

In more recent cases judges have expressed the exception in such terms as

> "it is always legitimate to examine the circumstances under which a contract is entered into"[3], or
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> "you may...look at the surrounding circumstances and see what was the intention"[4], or
>
> "in interpreting a contract it is necessary to consider the admissible surrounding circumstances"[5], or
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> "evidence should be restricted to evidence of

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[1]Gloag, *Contract* (2d edn 1929) p 373.

[2]*Forlong* v *Taylor's Trs* (1838) 3 Sh & McL 177 at p 210.

[3]*Taylor* v *John Lewis Ltd* 1927 SC 891, by Lord Justice-Clerk Alness at p 897.

[4]Same case, by Lord Hunter at p 900.

[5]*Alloa Brewery Ltd* v *Investors in Industry plc* 1992 SLT 121, by Lord Morton of Shuna at p 122.

its factual background known to the parties at or before the date of the contract, including evidence of the genesis and objectively the aim of the transaction."[1]

In Walker and Walker on *Evidence* it is said that this exception does not come into operation if the court, having looked at the disputed expression in the contract without having regard to the surrounding circumstances, concludes that it is not ambiguous[2] but this qualification does not appear in many of the judicial statements of the exception and it seems contrary to principle. If the surrounding circumstances can have a bearing on the meaning of an expression, as is clearly the case, then it would be injudicious, if not foolish, to conclude that the meaning is clear and unambiguous without having regard to those circumstances.

3.19 The surrounding circumstances may include a course of dealing between the parties extending over some years. There have, for example, been several cases in which one party has agreed to supply the other's "requirements", or "usual requirements", for some commodity for a year at a fixed price per unit and where the court has considered evidence of the course of dealing between the parties in order to resolve a dispute about the meaning of the term.[3]

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[1]*British Coal Corporation* v *South of Scotland Electricity Board* 1991 SLT 302, by Lord Dervaird at p 310.

[2]*Evidence*, para 273.

[3]*Pillans* v *Reid* (1889) 17R 259; *Von Mehren* v *Edinburgh Roperie & Sailcloth Ltd* (1901) 4F 232; *Blacklock & Macarthur* v *Kirk* 1919 SC 57.

3.20 There are sub-exceptions to the exception for surrounding circumstances. These are very important in the present context because they relate to the cases where, in practice, extrinsic evidence is most likely to be excluded. It appears that evidence of surrounding circumstances will generally be regarded as inadmissible if it consists of evidence of (a) prior communings or negotiations (b) deletions or (c) subsequent conduct.

3.21 (a) Prior communings or negotiations. Although reference to prior communings and negotiations between the parties would sometimes be very helpful in establishing either their shared common intention as to the meaning to be borne by an expression used in their contract or, where that cannot be ascertained, the background of which a reasonable third party would wish to be informed before giving the expression an objective interpretation, it is generally said that evidence of such prior communings or negotiations is inadmissible. The leading case is *Inglis* v *Buttery*[1] where the House of Lords deplored the fact that evidence of prior communings had been admitted in the Court of Session for the purpose of construing

[1](1878) 5R (HL) 87. The case is discussed more fully in part II. See para 2.6 and Appendix I. An earlier case is *Miller* v *Miller* (1822) 1 Sh App 308 where, at p 317, the Lord Chancellor said that he could not conceive " that any thing can be more dangerous than the construing of deeds by the effect of letters and correspondence previous to the execution of them". His real objection, however, as is clear from p 319, was to the idea of a court ignoring the words of a contract and deciding what would have been reasonable in the circumstances for the parties to have put into their contract.

a provision in a contract for the repair of a ship. Lord Justice-Clerk Moncrieff in the Court of Session had taken the view that, as the court was entitled to be placed in the position in which the parties stood before they signed the contract, it was entitled to look at what was said and done during the prior communings or negotiations. The House of Lords thought this was wrong. Lord Blackburn said that

> "you are entitled to look at the surrounding circumstances to a great extent, but not at the communings".[1]

3.22 There are, however, sub-sub-exceptions. First, it is clear that prior negotiations or communings can be looked at if the written contract expressly refers to them for the purpose of giving a meaning to an expression. If, for example, a written contract said something like - "We guarantee that the ship will have the capacity to carry the goods referred to in our negotiations" - then clearly the negotiations could be considered.[2] There may be

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[1]At p 102.

[2]Cf *Mackill & Co* v *Wright Bros & Co* (1888) 16R (HL) 1. In this case there was only, at best, an implied reference but an express reference would clearly be an even stronger case. See also *The Temperance Halls Co-operative Building Society Ltd* v *The Glasgow Pavilion Co Ltd* (1908) 16 SLT 112, by Lord Low at p 114. In *Bovis Construction (Scotland) Ltd* v *Whatlings Construction Ltd* 1993 GWD 13-855 the pursuers argued that prior correspondence should be looked at because, among other reasons, some of the language in the contract referred to it. The defenders did not argue that the correspondence could not be looked and, in these circumstances, Lord Prosser held that it should be looked at. He observed that it was difficult to imagine a situation in which one could decide that past correspondence could not assist in

cases where the parties are taken to have impliedly referred to the prior negotiations in order to fix the meaning of an expression in a written contract. For example, if the written contract refers simply to "the licence" or "the pension", the parties may be supposed to be referring to the licence or pension about which they have been negotiating, and evidence of their negotiations will be admissible to show their state of knowledge.[1]

3.23 In the cases mentioned in the last paragraph there was an obvious uncertainty on the face of the contract. But even where the words of the contract are apparently clear, evidence of prior negotiations may be admitted in order to identify the true subject matter of the transaction. If, for example, a written contract states that one party agrees to renounce all claims against the other, evidence of prior negotiations would be admissible to show what claims the parties had in contemplation, even although the plain meaning of the words might cover all claims arising at any time in relation to any matter.[2] Again, if there is a dispute as to the identity of a property sold by a written contract, evidence of what happened during the negotiations will be admissible to

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interpretation without looking at it.

[1]See eg *Forlong* v *Taylor's Exrs* (1838) 3 Sh & Macl 177, by Lord Cottenham at p 210; *The Temperance Halls Co-operative Building Society Ltd* v *The Glasgow Pavilion Co Ltd* (1908) 16 SLT 112, by Lord Low at p 114.

[2]Cf *McAdam* v *Scott* (1912) 50 SLR 264. A similar example appears in Pothier, *Law of Obligations*, I,1,VII rule 8.

resolve it.[1]

3.24 It seems too that prior negotiations can be referred to in order to give a meaning to expressions which are technical expressions or are, for some other reason, not in plain English.[2] If, for example, the parties had got into the habit during their negotiations of using initials as an abbreviation for some lengthy name, and inadvertently used the initials, without explanation, in the final written contract, then there can be little doubt that the prior negotiations could be looked at to explain what the initials stood for.[3]

3.25 Another situation in which evidence of prior negotiations will be admissible is where it is averred that a contract, apparently complete in itself, forms part of a larger contract or series of contracts and falls to be interpreted in that

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[1]*Macdonald* v *Newall* (1898) 1F 68; *Houldsworth* v *Gordon-Cumming* 1910 SC (HL) 49. In the latter case Lord Chancellor Loreburn, after referring to the negotiations between the parties, said at p 51 - "these negotiations are crucial, and all that passed, either orally or in writing, is admissible in evidence to prove what was in fact the subject of sale..."

[2]This was recognised in *Inglis* v *Buttery* (1878) 5R (HL) 87 itself, by Lord Hatherley at p 90.

[3]Cf *Leverstop Ltd* v *Starling* 1993 GWD 23-1461 where the initials "LSSD" were used in a contract to stand for "Lloyds Syndicates' Survey Department". In this case the initials were translated into plain English "with the assistance of witnesses of experience in the market". If the parties had just made up their own abbreviation for something then that type of assistance would not be available.

light.[1]

3.26 What is less clear is whether evidence of prior negotiations would be admissible to show that the parties had assigned a particular meaning to an ordinary word or expression, such as an expression relating to time, which does not relate to the identification of the subject-matter of the contract. In one English case evidence of prior communings was admitted for this purpose.[2] Charterers had a vessel for two years with an option to redeliver "after 12 months trading". The question arose whether "after" meant (a) "on the expiry of" or (b) "at any time after the expiry of". Pre-contractual telexes made it clear that (a) was meant. The charterers argued that (b) was meant. Kerr J. accepted that authoritative English cases[3] prevented references to pre-contractual exchanges in order to resolve this kind of ambiguity. He therefore had to devise a new rule, which he expressed as follows.

> "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

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[1]See *Claddagh Steamship Co* v *Steven* 1919 SC (HL) 132.

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

[3]*Prenn v Simmonds* [1971] 1 WLR 1381; *Wickman Tools* v *Schuler* [1974] AC 235.

only."[1]

It is not clear whether a Scottish court would be able to reach the same result.[2] In one case, where the question was as to the time from which a tug was to be available to a charterer, Lord Craighill said that prior telegrams could be referred to for the purpose of ascertaining the surrounding circumstances but could not be used

> "for the purpose of discovering the intention of parties, or, in other words, of giving a colour to the language of the contract other than what it will bear according to the usual and natural interpretation."[3]

However, this was not a case where it could be said that the parties had negotiated on an agreed basis. If the pre-contractual telegrams had said, for example, "Please confirm that from 8th September in your letter means from the beginning of that day" and "We confirm that from 8th September means from the beginning of that day" it is hard to believe that a Scottish court would have refused to consider them.

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[1]At p. 713.

[2]In *Hunter* v *Livingston Development Corporation* 1986 SC (HL) 31 the parties had, during the negotiations, deliberately rejected the use of model form D and had chosen to use model form B. The court allowed reference to be made to the communings in support of an argument that, having rejected D, it was unlikely that the parties intended an ambiguous expression ("the works") in B to be interpreted in a way which would have had the same result as if D had been adopted.

[3]*Mackenzie* v *Liddell* (1883) 10R 705 at p 715. Lord Justice-Clerk Moncrieff concurred with Lord Craighill "excepting the passage in regard to the previous communings".

3.27 As the law is complicated, it may be useful to sum up the position we have reached in relation to the admissibility of evidence of prior negotiations in the interpretation of contracts.

General rule. Extrinsic evidence inadmissible.

Exception. Evidence of surrounding circumstances admissible.

Sub-exception. Evidence of prior negotiations inadmissible.

Sub-sub-exceptions. Evidence of prior negotiations admissible

(a) where negotiations expressly referred to in contract

(b) where negotiations impliedly referred to in contract

(c) to identify subject-matter of contract

(d) to explain technical expressions or expressions not in plain English

(e) to show contract forms part of larger contract in light of which it must be interpreted

(f) (possibly) to show that parties negotiated on an agreed basis as to

the meaning of an ambiguous term.

3.28 (b) Deletions. It sometimes happens that written contracts contain words, still legible, which have been deleted by the parties before the contract was executed. The question has arisen whether a court, in interpreting the contract, can have regard to the deleted words. It might be thought that this was not a question of the admissibility of extrinsic evidence at all, as the deleted words are there to be read in the contractual document intself. However, in *Inglis* v *Buttery*[1] the House of Lords held that deleted words fell to be treated in the same way as prior communings and that the court could not look at them in interpreting the contract. In that case the deleted words were -"but if any new plating is required, the same to be paid for extra" - and the fact that they were deleted suggested, although not conclusively, that any necessary new plating was to be supplied by the ship repairer within the contract price. Fortunately, the court managed to construe the contract in this sense without taking the deletion into account. In a later case[2] the Court of Session was faced with a situation in which the words "including interferences of Government Authorities or their officials" had been deleted from the clause relating to restraints of princes in a standard form of charterparty. The court took the deletion into account in deciding that the clause in its reduced form did not apply to the actions of customs authorities. Three

[1](1878) 5R (HL) 87.

[2]*Taylor* v *John Lewis Ltd* 1927 SC 891.

members of the court thought that *Inglis* v *Buttery* did not prevent the altered contract from being compared with the unaltered version as an aid to interpretation. It is difficult to resist the impression that the court was simply refusing to apply the earlier case in a situation where to apply it would have seemed unreasonable. It is not clear how a court would decide today if faced with a similar situation.[1]

3.29 (c) Subsequent conduct. The general rule is that a contract cannot be interpreted by reference to the subsequent conduct of the parties. Subsequent conduct, perhaps illogically, is not regarded as part of the "surrounding circumstances". This is clearly the rule in England,[2] and is probably also the general rule in Scotland.[3] There are, however, qualifications and exceptions.

3.30 One important qualification in Scottish law, which has no counterpart in English law, is that subsequent conduct cannot be regarded as including subsequent writings. Regard can be had to the subsequent writings of the parties. In *Turner* v

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[1]The sheriffs Walker refer to both decisions, point out that the circumstances appear to be almost identical, and say that "there is a doubt" as to the existing law. See *Evidence*, para 274. Professor David Walker in his book on *Contracts* (2d edn 1985 at para 24.9) submits that the course followed in *Taylor* is the better course. "The deliberate deletion of a word or phrase is as much an expression of intention as is an express statement."

[2]*Whitworth Street Estates Ltd* v *Miller* [1970] AC 583; *Wickman Tools* v *Schuler* [1974] AC 235.

[3] McBryde, *Contract*, para 19-13.

MacMillan-Douglas[1] the question was whether a contractual obligation to grant a right of access meant a right of access in favour of the purchasers of a property personally or a right in favour of them and their successors in title to the property. If the court had had to construe the contract on its own it would have held that only a personal right was covered. However subsequent writings of the parties proved that the intention of the parties at the time of contracting was that the right referred to was to be a right in favour of the purchasers and their successors in title. So this meaning prevailed. The court referred with approval to the statement in Gloag on *Contract* to the effect that

> "in a question as to the construction of a written contract it is always competent for one party to prove that the intention of the parties was what he avers it to be by the writ of the opposing party, provided that the writ is subsequent to the date of the contract... in question."[2]

There are other cases where a contract has been interpreted in the light of subsequent writings of the parties.[3]

3.31 Another qualification is that subsequent conduct may give rise to personal bar and may, in an appropriate case, prevent one party from

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[1]1989 SLT 293.

[2](2d edn 1929) p 376.

[3]See *Boyle & Co* v *Morton & Sons* (1903) 5F 416; *Hall* v *McWilliam* 1993 GWD 23-1457.

challenging an interpretation of the contract.[1]

3.32 Yet another qualification is that subsequent actings may be referred to where the question is not as to the interpretation of a term in the contract but as to the importation of a missing term.[2]

3.33 It is difficult to be sure what exceptions, properly so called, there are to the general rule so far as subsequent actings are concerned. There are several Scottish cases in which judges have had regard, or have said that they could properly have regard, to the subsequent actings of the parties in interpreting a contract.[3] However, it must be

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[1]See eg *Macdonald* v *Newall* (1898) 1F 68. It is the same in England. See *Whitworth Street Estates Ltd* v *Miller* 1970 AC 583 by Lord Wilberforce at p 615.

[2]*Macgill* v *Park* (1899) 2F 272; *McAllister* v *McGallagley* 1911 SC 112. It is the same in England. See *Mears* v *Safecar Security* [1982] 2 All ER 865.

[3]*Scott* v *Howard* (1881) 8R (HL) 59 by Lord Watson at p 67 ("if there had been any ambiguity ... I think they [ie subsequent actings] might have been legitimately referred to, to explain the ambiguity"); *Hunter* v *Barron's Trs* (1886) 13R 883 by Lord Craighill at p 892 ("the conduct of parties is, apart from express terms, the best interpretation we can have"); *Jopp's Trs* v *Edmond* (1888) 15R 271 by Lord Rutherfurd Clark at p 282 ("the contracts should be construed as the parties themselves construed them for a long course of years"); *Dowling* v *Henderson* (1890) 17R 921; *Mackenzie* v *Liddell* (1893) 10R 705 by Lord Craighill at p 714 ("the conduct of the defender immediately after the charter-party was signed supports, not that for which he now argues, but the pursuer's interpretation"); *Macgill* v *Park* (1899) 2F 272 by Lord President Balfour at p 275 ("It appears to me to be immaterial whether the practice [ie the subseqent actings] is treated as being evidence of the contract ... or as construing that

doubtful whether all of these earlier Scottish cases would now be followed in the light of the observations of the House of Lords in the English cases of *Whitworth Street Estates (Manchester) Ltd* v *James Miller & Partners Ltd*[1] and *Wickman Tools* v *Schuler*[2]. The House of Lords has, however, recognised that there are exceptions and similar exceptions may well be recognised in Scotland.

3.34 One exception, illogical but clearly recognised in both Scottish and English law, is for contracts of ancient date.[3]

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contract"); *North British Railway Co* v *Magistrates of Edinburgh* 1920 SC 409 by Lord President Strathclyde at p 425 ("This contract, construed by the parties' actings, means exactly what it says - neither more nor less."); *Welwood's Trs* v *Mungall* 1921 SC 911 by Lord Cullen at p 929 ("the question alway is, and must be, one of arriving at the true intention of the parties to the particular instrument which may be under consideration, and it is competent to show from the context of the deed, or from the explanatory actings of parties under it, or from both, that the words 'minister's stipend' have been used in their natural sense"); *Watters* v *Watters* 1927 SC 310; *AM Carmichael Ltd* v *Lord Advocate* 1948 SLT (Notes) 88; *Smith* v *Johnstone* 1949 SLT (Notes) 11; *Hylander's Exr* v *H & K Modes Ltd* 1957 SLT (Sh Ct) 69, where Sheriff A G Walker noted the conflicting views on this question but said that if it were permissible to look at subsequent actings they confirmed the interpretation at which he had arrived independently of them.

[1][1970] AC 583.

[2][1974] AC 235.

[3]See *Heriot's Hospital* v *McDonald* (1830) 4 W & S 98; *Clyde Navigation Trs* v *Laird & Son* (1883) 10R(HL) 77; *Wickman Tools Ltd* v *Schuler* [1974] AC 235.

3.35 There is probably an exception allowing evidence of subsequent possession of land to be used to interpret an ambiguous description in a title but this exception is, at best, of very limited application in contract law.[1]

3.36 There may be an exception in Scottish law for cases where there is a legal rule of interpretation which applies in the absence of an indication of a contrary intention. In deciding whether there was a contrary intention the courts may be free to have regard to subsequent actings. An exception to this effect makes sense of a strong line of Scottish cases which have never been expressly overruled. For example, a legal rule that "Whitsunday" normally meant a certain date was displaced by evidence of subsequent actings which made it clear that the parties must have intended it to bear another date.[2] A legal rule that an obligation to relieve of public burdens normally did not refer to burdens under future legislation was displaced by evidence of subsequent actings which made it clear that the parties intended the obligation to cover all burdens, including those under future legislation.[3] And, similarly, a legal rule that an obligation to relieve of minister's stipend did not normally cover augmentations of stipend was

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[1]See Gloag, *Contract*, (2d edn 1929) 376; McBryde, *Contract*, 425 and the comments in *Wickman Tools Ltd* v *Schuler* [1974] AC 235 on the leading English case of *Watcham* v *Att Gen of South African Protectorate* [1919] AC 533 which is cited by Gloag as authority.

[2]*Hunter* v *Barron's Trs* (1886) 13R 883.

[3]*North British Railway Co* v *Magistrates of Edinburgh* 1920 SC 409.

displaced by evidence of subsequent actings which made it clear that the parties intended the obligation to cover stipend as it might be from time to time.[1] The difficulty with this exception is that if it makes sense then the general rule does not.

3.37 There may be other exceptions.[2] The law is obscure.

3.38 *Custom or usage*. Evidence of a custom or usage of trade is admissible to explain technical terms or ambiguous, or possibly ambiguous, expressions.[3] This is an important exception to the rule excluding extrinsic evidence for the purpose of interpreting expressions in written contracts.

3.39 **Criticisms of the existing law.** The most obvious criticism of the existing law is that it is complicated, uncertain and obscure. However, a more fundamental criticism is that the courts have attempted to achieve a sensible result by inappropriate means. It is the very inappropriateness of the means which leads to the complexity, uncertainty and obscurity.

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[1]*Welwood's Trs* v *Mungall* 1921 SC 911. See, in particular, the explanation by Lord President Clyde at p 926 where he said that some rules of interpretation were just "presumptive ... and may yield to evidence of contrary user".

[2]See McBryde, *Contract*, 425. In the *Wickman Tools* case Lord Wilberforce was more prepared than Lord Simon to recognise that there might be exceptions to the general rule, eg for cases of latent ambiguity.

[3]*Sworn Securities Ltd* v *Chilcott* 1977 SC 53 at p 73.

3.40 The sensible result which the courts are seeking to achieve is the exclusion of evidence of unhelpful, irrelevant matter. They want, quite rightly, to rule out evidence of the parties' secret, subjective intentions and evidence of prior positions or subsequent positions which have nothing to do with the meaning of expressions used in the contract. The inappropriate means chosen to achieve this result is the adoption of a rule that extrinsic evidence is generally inadmissible in the interpretation of written contracts. That is inappropriate for two reasons. First, it is of no help in relation to oral contracts. Yet in relation to them too it is desirable to exclude evidence of irrelevant matter, such as a party's secret subjective intention. Secondly, it has the unfortunate side effect of also excluding evidence which may be highly relevant and important, such as evidence of an express agreement between the parties immediately before the execution of their written contract that an expression in it is to bear a particular meaning. This unfortunate side effect is countered by sweeping exceptions which weaken the rule to such an extent that it almost ceases to have any effect except in relation to prior communings and subsequent actings. Even in those two cases there are exceptions which, as we have seen, are extensive.

3.41 **Provisional proposal for reform.** An alternative approach would be to make it clear that, as a matter of substantive law, the secret, subjective intentions of the parties are completely irrelevant. We have already made a proposal

designed to achieve this result.[1] Once this has been done it is for consideration whether the rule on the admissibility of evidence could not simply be that all *relevant* evidence is admissible. This is the approach adopted in the United Nations Convention on Contracts for the International Sale of Goods, which we have already used as a model in relation to the law on the formation of contracts. Article 8(3) of the Convention provides as follows.

> "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."

That could be adapted for our purposes by adding after "party" the words "or the shared common intention of the parties". The main difference from the existing law of Scotland would be in relation to prior negotiations and subsequent conduct. It will be noted, however, that it is only relevant circumstances of the case which can be looked at, and that they are only to be given "due consideration". Moreover, under the Convention and under the proposal which we have made earlier, the intent of a party is not of any importance unless the other party knew or could not have been unaware what that intent was.

3.42 As a matter of principle it must, we think, be right to have regard, so far as possible, to all relevant circumstances before deciding how a

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[1] See para 3.10 above.

disputed expression in a contract should be interpreted. If that is not done there is a risk of injustice. There is a risk of imposing on the parties a contract which is different from the one which they in fact made. Given the scope of the existing exceptions to the general rule on extrinsic evidence, the important question is whether there would be such serious practical disadvantages in admitting evidence of *relevant* prior communings or subsequent actings as to outweigh the obvious considerations of justice and principle in favour of admitting all relevant evidence. No-one would wish to increase the cost and complexity of legal proceedings by a change in the law which would allow an uncontrollable flood of evidence as to prior negotiations or subsequent communings to be led. So long as the evidence was confined to evidence of relevant circumstances we do not believe that, if the substantive law were clarified as we have suggested, there would be serious practical disadvantages. The difficulty would be in applying a test of relevancy with sufficient rigour. To ease the task of the courts in this respect we considered recommending that rules of court should provide that anyone wishing to lead extrinsic evidence for the purpose of interpreting an expression in a contract would be required to include specific averments as to the expression to be interpreted, as to the meaning which the expression is alleged to bear and as to the facts which support that meaning. However, after further consideration, we provisionally concluded that this would be unnecessary. It seemed

to us that existing principles[1], which judges could be expected to apply rigorously if the law on the admissibility of extrinsic evidence were changed, would be sufficient. We would, however, welcome views on this point.

3.43 Our provisional proposal, on which we invite views, is therefore as follows.

> **3. In determining, for the purpose of the rule suggested in proposition 2 above, the intent of a party, or the shared common intention of the parties, or the understanding a reasonable person would have had, due consideration should be given to all relevant circumstances of the case including, where relevant, the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.**

Position of third parties.

3.44 We considered whether there was a need for a special statutory protection for third parties so that they could not be prejudiced by unusual

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[1]See *Sutton & Co* v *Ciceri & Co* 1890 17R (HL) 40 by Lord Watson at p 43. "The present case appears to me to illustrate the impropriety of permitting general evidence to be led as to the meaning of words of contract without a distinct averment on record as to the particular words to which the proof is to be directed, and the precise technical or trade meaning which the person making the averment desires to attribute to them. The consequence of disregarding that rule is, that the bulk of the evidence in this case, whilst it might be of some use to a person about to compile a dictionary, is not of the slightest use in construing the contract of the parties....There is very little of that evidence relevant..."

meanings being assigned to expressions in a contract on which they might have relied. The considerations here are similar to those which we discussed earlier in relation to proof of additional contract terms[1] and for similar reasons we do not believe that any special statutory protection would be necessary. Third parties already take the risk that one of the many exceptions to the extrinsic evidence rule would apply. It would be better to expect them to take steps to protect themselves where necessary than to have a rule which meant that the same contract might be interpreted in different ways in proceedings between different parties.

Conveyances

3.45 For some purposes dispositions and other conveyances are regarded as contracts. This is not the place to discuss the merits of that approach. We do not intend, however, our proposals on the interpretation of contracts to extend to dispositions and other conveyances. In relation to such documents it is of paramount importance that third parties, including the Keeper of the Registers of Scotland, should be able to rely on what is said in them. The balance between certainty and justice seems to us to be different in such cases. We think therefore that it should be made clear that for this particular purpose dispositions and other conveyances are not to be regarded as contracts or as documents containing contractual terms.

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[1]See para 2.45 above.

4. For the purpose of the above proposals on the interpretation of contracts, a disposition or other unilateral document which is intended to operate, whether or not in conjunction with some step such as registration, as a conveyance of property or as a title to property is not to be regarded as a contract or as a document containing contractual terms.

PART IV - SUPERSESSION OF CONTRACT BY CONVEYANCE

The existing law

4.1 **General rule.** The rule with which we are concerned in this part of the discussion paper is that, where a contract is followed by a conveyance or other deed which is intended to implement it or give effect to it, the contract is superseded by the conveyance or other deed. The rule receives its widest application in relation to missives for the purchase of houses and dispositions in implement of those missives. The classic statement of the rule was by Lord Watson in *Lee* v *Alexander*[1]. He said that

> "According to the law of Scotland, the execution of a formal conveyance, even when it expressly bears to be in implement of a previous contract, supersedes that contract *in toto*, and the conveyance thenceforth becomes the sole measure of the rights and liabilities of the contracting parties".

This statement must be qualified in one obvious respect. It is not the mere execution of a conveyance which supersedes the prior contract. The conveyance is executed by the disponer alone prior to the settlement of the transaction. If the contract fell at that stage the disponee would have no contractual right to delivery of the disposition and the disponer would have no contractual right to

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[1](1893) 10R (HL) 91 at p 96. This was actually a case on the *construction* of a disposition but, as so often happens, the remarks of a judge have been taken out of context and applied as if they were a statutory provision.

payment of the price. The supersession rule is unsatisfactory but it is not quite as daft as that. It is the delivery and acceptance of the conveyance which bring about the supersession. Lord Watson expressed the rule more accurately ten years later in *Orr* v *Mitchell*[1].

> "Where a disposition in implement of sale has been delivered to and accepted by the purchaser it becomes the sole measure of the contracting parties' rights, and supersedes all previous communings and contracts however formal."[2]

In this form the rule remains in full force. The most recent book on conveyancing states simply that

> "when the disposition is delivered, the missives are superseded *in toto*".[3]

4.2 The rule, however, is not limited to conveyances. It applies to leases and possibly to other formal documents intended to implement or give effect to prior contracts.[4] In such cases the supersession will occur when the formal document takes effect, which, in the case of a mutual document, will generally be when the document is

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[1](1893) 20R (HL) 27 at p 29.

[2]Again this was a case on construction, not supersession of a contract term. The question was what had been conveyed and, in answering that question, it is obvious that a court will look only to the conveyance. Again, however, the statement is often taken out of context.

[3]Gretton and Reid, *Conveyancing*, (1993) p 334. We are grateful to the authors for allowing us to see the relevant pages of their book prior to publication.

[4]See eg *Robertson's Trs* v *Lindsay* (1873) 1R 323 by Lord Deas at p 327 (lease).

executed.[1] In its application to mutual documents the supersession rule is particularly liable to become confused with the rule on proof of additional terms which we considered in Part II. It is not always clear whether a court is deciding a case on the ground that proof of an additional term is inadmissible or on the ground that the alleged term, even if proved or admitted, has been superseded by the execution of a formal document.[2]

4.3 **Nature of rule.** The supersession rule is not a rule of the law of evidence like the rule on proof of additional terms which we have considered in Part II of this paper. It does not say that certain things can be proved only in a certain way or that certain evidence is inadmissible. It is a rule of the substantive law. It says that certain contract terms, even if admitted by both parties to have been agreed, no longer have any legal effect. In a typical supersession case there is no dispute

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[1]See *Robertson's Trs* v *Lindsay*, above, by Lord President Inglis at p 326. "In the ordinary case mutual contracts do not require delivery." See also *Korner* v *Shennan* 1950 SC 697. (Supersession of earlier agreement by formal lease took effect only from date of lease.)

[2]See eg *Claddagh Steamship Co* v *Steven & Co* 1919 SC (HL) 132 where the Court of Session seemed to treat the case as one on the proof of additional terms and the House of Lords seemed to treat it as one on the supersession of a contract by formal documents. Interestingly, the House of Lords held that supersession had not occurred because the intention of the parties was that the formal documents were not to supersede the earlier contract but were only to be "pieces of machinery" for carrying it out. The case is hard to reconcile with other supersession cases. See also *Norval* v *Abbey* 1939 SC 724 where the opinions are mostly about proof of additional terms but there are references also to the supersession ground.

as to what the relevant contractual terms are. The dispute is as to whether they are still in force. The party who wishes to escape from their effect does not deny their existence and plead that extrinsic evidence of them is inadmissible, but pleads that they have been superseded.[1]

4.4 The rule with which we are concerned is not a rule on the supersession of prior communings, which are not in themselves contractual terms, by contracts. There is no need for a rule of law to supersede prior communings which are not contractual terms. They are never binding in the first place. There may be a question as to whether they can be referred to for the purposes of interpretation but that is a separate question which we have considered in Part III of this paper. The rule with which we are here concerned relates to the supersession of contracts by conveyances or other documents intended to implement or give effect to those contracts, not to the supersession of prior communings by contracts.

4.5 **Scope of rule.** Gloag thought that the rule applied only to those matters which fell within the proper scope of a disposition.

> "The rule ... holds with regard to questions such as the nature and extent of the subjects conveyed, which fall within the province of the conveyance.... It does not, it is submitted, hold with regard to conditions of the contract which would not, in the ordinary

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[1]See eg *Winston* v *Patrick* 1980 SC 246 where the defenders pleaded that "said missives having thereby been superseded, the defenders should be assoilzied".

course of business, find any place or mention in a conveyance intended merely to transfer or complete the right to property passing under the contract."[1]

There was authority for this view in the case of *Jamieson* v *Welsh*[2] where the Lord Ordinary had held that a disposition had superseded the missives in relation to fittings such as grates, gas-brackets and finger plates. The Inner House reversed the decision. Lord McLaren said that

"The Lord Ordinary's proposition would be sound if qualified to this extent, that it is not competent to go behind a deed of conveyance which exhausts the subject-matter of the contract, but in the case of a deed which either bears to be in part performance, or can be shewn by comparison to be only a part performance, the contract subsists until performance is complete".[3]

Lord Kinnear agreed. He said that

"when a disposition has been delivered and accepted in performance of a contract for the sale and purchase of land, it is final and conclusive as the expression of intention of the parties in regard to all rights which it is intended and adapted to carry....The disposition is a written instrument for its own purposes, and has nothing to do with the

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[1]*Contract* (2nd ed, 1929) p 368. See also Burns, *Conveyancing Practice* (4th edn) pp 324 - 325 and Reid, "Prior Communings and Conveyancing Practice", 1981 JLSS 414.

[2](1900) 3F 176.

[3]At p 181. Emphasis added.

sale of corporeal moveables..."[1]

It will be noted that, although made in a case concerning moveable fittings, these statements were general in scope and must have appeared to Gloag to provide ample justification for his view. Gloag's view was referred to with approval in a sheriff court case in 1966 where it was held that a warranty that there were no outstanding local authority notices survived the delivery of the disposition. "It does not," the sheriff said, "offend against the disposition to return to the missives on a matter the disposition is not concerned with."[2] However, this is not the way the law has been applied since the case of *Winston* v *Patrick*.[3] As this case has been the cause of much of the difficulty recently experienced in this area of the law it must be carefully examined.

4.6 The pursuers in *Winston* v *Patrick* had bought a house from the defenders. The missives included a clause whereby the sellers warranted that "all statutory and local authority requirements in connection with the subjects of sale... have been fulfilled". The pursuers claimed that, after entry and the delivery of the disposition, they discovered that an extension to the house had not been built in accordance with the requirements of the local buildings authority and was defective. They claimed damages. They pleaded that the defenders were obliged to construct the extension "in accordance with their obligation in the said

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[1]At p 182. Emphasis added.

[2]*Bradley* v *Scott* 1966 SLT (Sh Ct) 25 at p 26.

[3]1980 SC 246.

missives" and, having failed to do so, were in breach of contract. The defenders pleaded that the pursuers' averments were irrelevant and that the missives had been superseded by the disposition. The sheriff repelled these pleas and allowed the parties a proof of their averments. On appeal the sheriff-principal held that the pursuers' averments were irrelevant and dismissed the action. This was affirmed by the Second Division of the Court of Session.

4.7 The case was decided in the Court of Session on a narrow point of pleading. The court held that the clause in question did not oblige the defenders to do anything. It was simply a warranty. The pursuers' plea that the defenders were obliged to construct was therefore based on a fallacy. That was "the short answer to the case".[1] So far, *Winston* v *Patrick* is authority only for the unremarkable proposition that pursuers who plead that defenders are in breach of contract for failing to do X cannot succeed if the contract does not oblige the defenders to do X. However, in deference to the arguments presented, the court proceeded to make some observations on the supersession rule. These observations make it clear that the pursuers would not have succeeded even if they had pleaded a breach of the warranty instead of a breach of a non-existent obligation to do something.

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[1]Lord Justice-Clerk Wheatley, delivering the opinion of the Second Division, at p 249.

4.8 The court referred first to Lord Watson's statement in *Lee* v *Alexander*[1] that "the execution of a formal conveyance, even when it expressly bears to be in implement of a previous contract, supersedes that contract *in toto*". It said that it was "accepted" (presumably by counsel in the case) that this was the applicable general rule. It was also accepted that there were exceptions to the rule.

> "Examples of these were (a) where the missives incorporated obligations in relation to moveables which would not be appropriate to be included in a disposition of heritage, (b) where in the missives there was a collateral obligation distinct from the obligation to convey the heritage, and (c) where there was an agreement in writing either in the missives or in a separate document or in the disposition itself that a personal obligation included in the missives would subsist and remain in force even if it was not included in terms in the disposition."[2]

Counsel for the pursuers argued that these exceptions could be extended to cover the case where the evidence showed that the parties intended that one or more of the obligations in the missives would remain in force after the delivery of the disposition. In this case such an intention could be implied. The only purpose of including a warranty as to the standard of construction was to give the pursuers a right of action if at a later date it was discovered that the warranty was not fulfilled. The pursuers had expressly averred that

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[1](1883) 10R (HL) 91 at p 96.

[2]Lord Justice-Clerk Wheatley at p 249.

it was not normal conveyancing practice to include such warranties in the disposition.[1] The court said that this argument could not be sustained. In none of the reported cases had it ever been suggested that a presumed intention was the test for deciding whether an obligation in the missives which was not repeated in the disposition constituted an exception to the general rule. The court clearly did not regard the supersession rule as being confined to matters within the proper province of a disposition. It regarded it as a rule of quite general scope, subject to a few exceptions. This case, the court said, did not come within any of the recognised exceptions. In particular, it did not involve a collateral obligation.

> "In the instant case... there was no obligation to carry out future work on the premises but simply a warranty that certain works had been carried out in the past. There was no personal or collateral obligation here to be carried into the future and so the general rule applied."[2]

These observations on the supersession rule and the exceptions to it, although not necessary for the decision of the case, have since been accepted as authoritative by Outer House judges and sheriffs.

4.9 *Winston* v *Patrick* caused consternation and uncertainty. It caused consternation because it applied the supersession rule in a way in which it

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[1]This averment had been added by amendment before the appeal to the Court of Session.

[2]Lord Justice-Clerk Wheatley at p 250.

had been assumed that it would not be applied.[1] It caused uncertainty because it left the scope of the exceptions unclear. Were the exceptions mentioned by Lord Wheatley the only exceptions? What did they mean?

4.10 Before leaving the question of the scope of the rule we should note that it has been held not to apply where a contract in the form of articles of roup is followed by a conveyance.[2] There appears to be no reason for this possible limitation on the scope of the rule other than the chance development of the case law.

Exceptions

4.11 Lord Wheatley in *Winston* v *Patrick* mentioned three exceptions to the supersession rule - (a) obligations in relation to moveables (b) collateral obligations and (c) personal obligations covered by an agreement in writing "either in the missives or in a separate document or in the disposition itself" providing for their survival. The view has been expressed that these exceptions are

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[1]See Reid, "Prior Communings and Conveyancing Practice" 1981 JLSS 414 and para above; Gretton and Reid, *Conveyancing* (1993) p 336. ("No case this century has caused more surprise and worry to the conveyancing profession...")

[2]*Young* v *McKellar* 1909 SC 1340.

exhaustive,[1] and certainly it is difficult to explain the way in which the warranty was dealt with in *Winston* v *Patrick* if any much wider exception exists.

4.12 Obligations in relation to moveables. The scope of this exception is clear. Typically it would cover obligations relating to such things as garden furniture and moveable fittings.[2] One curious thing about the exception is its unprincipled nature. Obligations relating to moveables are not the only kind of obligations "which would not be appropriate to be included in a disposition of heritage".[3] Another curious thing about this exception is that it seems to be just an example of the second exception for collateral obligations.[4]

4.13 Collateral obligations. The scope of this exception is not clear. Lord Wheatley referred in *Winston* v *Patrick* to a collateral obligation in the missives "distinct from the obligation to convey the heritage".[5] It might be thought that this would cover the type of obligation which arises from a contractual warranty as to, for example, the condition of the subjects or compliance with local

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[1]By Lord Milligan in *Taylor* v *McLeod* 1990 SLT 194 at p 199 and *Porch* v *McLeod* 1992 SLT 661 at p 663 and by Sheriff Gordon in *Greaves* v *Abercromby* 1989 SCLR 11 at pp 14 and 15.

[2]As in *Jamieson* v *Welsh* (1900) 3F 176.

[3]*Winston* v *Patrick* 1980 SC 246 at p 249.

[4]As is pointed out in Gretton and Reid, *Conveyancing* (1993) p 337.

[5]At p 249.

authority planning or building requirements. Such an obligation is clearly distinct from the obligation to convey the heritage.[1] Yet, as we have seen, it was precisely this type of obligation which was held not to be collateral in *Winston* v *Patrick*.

4.14 An attempt has been made to confine *Winston* v *Patrick* within narrow bounds by saying that it merely holds that a warranty as to the state of affairs at the time of conclusion of the missives cannot be collateral.[2] A warranty relating to some future date, such as the date of entry, may be collateral, as of course may be an obligation actually to do something in the future.[3] It is difficult, however, to see any basis for this distinction other than some obscure statements in *Winston* v *Patrick* itself which come dangerously close to the heresy that a contractual warranty as to an existing state of affairs cannot give rise to a continuing obligation. The distinction certainly derives no support from the ordinary meaning of the word "collateral". A more principled view would be

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[1]See *Bradley* v *Scott* 1966 SLT (Sh Ct) 25 where, in relation to a warranty that there were no outstanding local authority notices, the sheriff said that it did not "offend against the disposition to return to the missives on a matter the disposition is not concerned with" and *Bourton* v *Claydon* 1990 SLT (Sh Ct) 7 where the sheriff held that a provision in the missives that the central heating system would be in good order at the date of entry was a collateral obligation which had nothing to do with the conveyance of heritage.

[2]See *Taylor* v *McLeod* 1990 SLT 194 by Lord Milligan at p 198.

[3]See Gretton and Reid, *Conveyancing* (1993) pp 341 - 342.

that obligations deriving from warranties as to the state or condition of the property are either always collateral, on the ground that they are distinct from the obligation to convey, or always non-collateral, on the ground that they relate to the heritable property sold and are a normal and intrinsic part of the sale. Not surprisingly, the position in relation to provisions in the missives as to the state or condition of the subjects remains confused and uncertain. As Gretton and Reid note

> "the standard clause: "the central heating system will be in good working order at the date of entry" has on separate occasions been held both to be collateral[1] and also not to be collateral[2]".

4.15 The exception for collateral obligations clearly covers obligations to deliver moveables[3], to build on the property sold,[4] to do other work on the property[5] or to reimburse certain expenditure.[6]

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[1]*Jones* v *Heenan* 1988 SLT (Sh Ct) 53; *Taylor* v *McLeod* 1990 SLT 194.

[2]*Jamieson* v *Stewart* 1989 SLT (Sh Ct) 13; *Parker* v *O'Brien* 1992 SLT (Sh Ct) 31.

[3]*Jamieson* v *Welsh* (1900) 3F 176.

[4]See eg *McKillop* v *Mutual Securities Ltd* 1945 SC 166; *Hardwick* v *Gebbie* 1991 SLT 258; *King* v *Gebbie* 1993 SLT 512.

[5]See eg *Pena* v *Ray* 1987 SC 1; *Jones* v *Heenan* 1988 SLT (Sh Ct) 53.

[6]See eg *Central Govan Housing Association Ltd* v *R Maguire Cook & Co* 1988 SLT 386; *Wood* v *Edwards* 1988 SLT (Sh Ct) 17.

4.16 Personal obligations covered by an agreement in writing. The scope of this exception is also unclear. Lord Wheatley envisaged that the writing might be either in the missives or in a separate document or in the disposition itself. At first sight it might seem that the exception is simply a recognition of the principle of freedom of contract and an expression of the idea that the supersession rule is not mere formalism but is an attempt to give effect to the intentions of the parties.[1] What, however, does the word "personal" mean in this context? It could be meant to cover all obligations other than real burdens, but that seems unlikely as a real burden could not be created by the missives alone. It could, in the context, be mere surplusage. If real burdens are left out of account, all obligations are personal obligations. On this view a clause in the missives providing for obligations arising under them (other than those fully implemented by the settlement of the transaction) to survive the delivery of the disposition, or to survive for a stated period, would be effective even if not repeated in the disposition and even if the obligations in question were not collateral. This view was accepted in some cases decided after the decision in *Winston* v *Patrick* where non-supersession clauses in the missives were regarded as effective.[2] There are, however, sheriff court cases where it was held that once missives had been followed by the delivery of the disposition they could not be looked at even to

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[1]See *Jamieson* v *Stewart* 1989 SLT (Sh Ct) 13 by Sheriff-Principal Caplan at p 16.

[2]See *Jamieson* v *Stewart* above; *Taylor* v *McLeod* 1990 SLT 194.

see if they contained a non-supersession clause[1]. These cases seem to depend on the proposition that the supersession rule is a rule of the law of evidence, which seems doubtful. More recently some judges have taken the view that the word "personal" in Lord Wheatley's statement of the exception for personal obligations covered by a written non-supersession clause is not mere surplusage but is meant to denote a limited class of obligations. The difficulty is to know what that class could be if "personal obligations" are to be different from "collateral obligations", which survive even without a non-supersession clause.[2] One suggestion is that personal obligations are "obligations relating to the parties personally as opposed to obligations relating directly to the subjects of sale".[3] It has been held that an obligation to exhibit evidence of the grant of certain consents to building operations together with certificates of completion was not a personal obligation and could not be preserved by a non-supersession clause in the missives.[4] The obligation arising under a warranty that all necessary consents and warrants

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[1]*Finlayson* v *McRobb* 1987 SLT (Sh Ct) 150; *Wood* v *Edwards* 1988 SLT (Sh Ct) 17.

[2]See *Taylor* v *McLeod* 1990 SLT 194 where Lord Milligan pointed out, at p 199, that if the third exception is to add materially to the second exception "what must be envisaged is a non-collateral but personal obligation in the missives coupled with the agreement in writing". See also *Greaves* v *Abercromby* 1989 SCLR 11 where Sheriff Gordon clearly had some difficulty in distinguishing between collateral and personal obligations.

[3]Gretton and Reid, *Conveyancing* (1993) p 339.

[4]*Greaves* v *Abercromby*, above.

had been obtained and complied with has also been held not to be a personal obligation capable of being preserved by a non-supersession clause in the missives.[1]

4.17 The result of the cases which have denied effect to non-supersession clauses in the missives alone is that conveyancers, to ensure the survival of conditions in the missives which might not be regarded by a court as collateral, have been forced to repeat them in the disposition or at least refer to them in a non-supersession clause in the disposition. It has even been suggested that a non-supersession clause in the disposition may not be effective to preserve an obligation which is not "personal" because, in *Winston* v *Patrick*, this word qualifies written agreements in the disposition as well as those in the missives.[2]

Criticisms of the existing law

4.18 The supersession rule as it is currently applied often fails to give effect to the intention of the parties. This is most obvious when express non-supersession clauses in the missives are denied effect, but it is often almost equally clear in cases where there is no non-supersession clause. Warranties as to the state or condition of the subjects sold or as to the adequacy or efficiency

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[1] *Porch* v *McLeod*, above.

[2] Gretton and Reid, *Conveyancing* (1993) pp 339 - 340. See also the comment by Mr Reid on *Greaves* v *Abercromby* 1989 SCLR 11. In that case Sheriff Gordon said that "The supersession rule requires that any obligation which is to survive the missives should be repeated in the disposition."

of central heating systems, lifts or other appliances will generally be intended to give rise to a right of action after entry. Yet, under the existing law, there is no guarantee that they will survive the delivery of the disposition.

4.19 The supersession rule as it is, or may be, currently applied obliges cautious conveyancers to insert clauses in dispositions which do not properly belong there and which have nothing to do with the actual conveyance of the property. This is contrary to public policy. An important object of law reform in relation to conveyancing in the last hundred and fifty years has been to try to cut out unnecessary words in dispositions.

4.20 The supersession rule, as it is currently applied, is productive of doubt and unnecessary litigation. It tempts sellers who have voluntarily granted certain warranties, or agreed to certain conditions, to take their stand on a technical argument that the disposition has superseded the missives and force the purchaser to litigate, with uncertain prospects of success.

4.21 The supersession rule is unnecessary. There is no need for a special rule to achieve the result that obligations in missives which are fully implemented come to an end. This result is achieved by the general principle of contract law that contractual obligations are discharged by performance. A person who is obliged to deliver or pay, and who duly delivers or pays, is not bound to deliver or pay again. Similarly, there is no need for a special rule to ensure that obligations which, properly construed, are limited in time do

not survive that time. So an obligation in missives which, on a proper interpretation of the contract, relates only to the period prior to settlement of the transaction and does not confer any right of action after that date, will not survive that date whether or not there is a special supersession rule. There is no need for the supersession rule to bring about the result that a clause in the missives which, properly construed, does not create any contractual obligation, but merely narrates something, does not survive as a source of obligation after the delivery of the disposition. There is simply no obligation which can survive.[1] Again, there is no need for a special supersession rule to bring about the result that, in order to decide what has been conveyed, one looks to the conveyance. There is simply no point in looking anywhere else. Missives do not convey property. Of course, it may be necessary in some cases to interpret the conveyance. Whether it is permissible to have regard to prior communings for this purpose is another question which we have considered in an earlier part of this paper.[2]

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[1]See *Wood* v *Edwards* 1988 SLT (Sh Ct) 17 at p 21 (observations on proper interpretation of a clause beginning "It is understood"). See also *Parker* v *O'Brien* 1992 SLT (Sh Ct) 31 in which a clause beginning " The seller will warrant" was held to give rise, not to a present warranty, but only to an obligation to grant a warranty in the future. One possible explanation of *Winston* v *Patrick* 1980 SC 246 is that the court interpreted the relevant clause (which, however, expressly used the word "warrants") as a mere narrative clause.

[2]See Part III above.

Proposal for reform

4.22 The law on the supersession of contracts by conveyances is thoroughly unsatisfactory. There is a clear need for reform. The object of any reform should, in our view, be to make it easier for contracting parties and their legal advisers to achieve the results they want to achieve, provided those results are not unfair, unreasonable or contrary to public policy. We can see nothing unfair, unreasonable or contrary to public policy in allowing parties to ensure, without undue difficulty, that freely negotiated contractual provisions as to, for example, the state or condition of the property sold or any of its appliances, systems or fixtures, survive the delivery of the disposition. The basic principle is freedom of contract. At the very least it should be made clear that non-supersession clauses in missives or other contracts are effective.

4.23 A slightly more difficult question is whether the basic rule, in the absence of a non-supersession clause, should be survival or non-survival. Either way the parties would be able to contract out of the basic rule. It seems to us that it is more reasonable to have a rule that contractual obligations which are inherently capable of surviving[1] and which are not covered by provisions in the conveyance, do survive unless the parties provide otherwise. This, we think, is more likely to correspond to the intention of the

[1]Those which are discharged by performance would be inherently incapable of surviving.

parties. Very often it would be reasonable for the parties to agree that certain obligations should survive only for a stated time or that they should be subject to conditions such as notification of defects by the buyer within a certain time after taking entry, but that would be a matter for negotiation.

4.24 We therefore make the following proposal, on which we invite views.

5. It should be provided that

(a) any rule of law whereby, regardless of the intentions of the parties, terms of a contract are superseded by the execution or delivery of a conveyance or other deed intended to implement or give effect to that contract in whole or in part should cease to have effect, but that

(b) the conveyance or other deed should supersede the contract in so far as it implements or gives effect to the contract.

PART V - THE ACTIO QUANTI MINORIS

Introduction

5.1 There is another problem connected with the supersession rule which would still cause difficulty if that rule were abolished or kept within proper bounds. Even if a provision in the missives survived the delivery of the disposition, and even if the seller were clearly in breach of that provision, it might not be possible for the buyer to claim damages while retaining the property. This is because of an unfortunate rule of Scottish law whereby a buyer of property, other than moveable property coming within the Sale of Goods Act 1979, cannot generally, while keeping the property, claim damages for breach of contract by the seller. The usual way of stating this rule is to say that Scottish law has rejected the *actio quanti minoris*. There is no such problem in relation to the sale of goods because the Sale of Goods Act 1979 (following the Sale of Goods Act 1893) expressly allows the buyer to retain the goods and claim damages which, in the case of breach of a warranty of quality, will be based *prima facie* on the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.[1]

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[1]Ss 11(5) and 53. In the report which we published jointly with the Law Commission for England and Wales on the *Sale and Supply of Goods* (Law Com No 160; Scot Law Com 104, 1987) we recommended changes in the treatment of conditions and warranties in the Sale of Goods Act as it applies to Scotland, but these recommendations do not affect the present point.

The development of the law

5.2 One factor which may have contributed to the peculiar state of the Scottish common law on this point is confusion between two doctrines derived from Roman law - one of which deserved to be rejected and the other of which did not.[1] Both were called the *actio quanti minoris* by Scottish pleaders and writers, because they both involved the idea of an abatement in the price, and this is what appears to have led to the confusion.[2]

5.3 The doctrine which deserved to be rejected was based on the idea of equality in exchange developed by the Spanish natural law scholars, like Covarruvias and Molina, who were so influential in the 16th and early 17th centuries in developing the conceptual foundations of modern European contract law.[3] Building on an exiguous Roman law text[4] and the philosophical ideas of Thomas Aquinas, these scholars came to the conclusion that a remedy ought

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[1]See Evans-Jones, "The History of the Actio Quanti Minoris in Scotland" 1991 JR 190 and Stewart, "The *Actio Quanti Minoris*" 1966 JLSS 124.

[2]The name *actio quanti minoris* is used in relation to one type of remedy in, for example, *Fairie* v *Inglis* (1669) M 14231 and *Menzies* v *MacHarg* (1760) M 14165 and in relation to another quite different remedy in, for example, *Seaton* v *Carmichael and Findlay* (1680) M 14234.

[3]See Gordley, *The Philosophical Origins of Modern Contract Doctrine (1991)*.

[4] In Justinian's Code 4.44.2. This said that if a thing was sold for less than it was worth it was equitable *(humanum)* that the seller should have the land back on restoring the price. "Less than it was worth" was explained as meaning less than half the true value. C4.44.8.

to be available, at least in theory, in any case where property was bought or sold at other than its true value.[1] This had nothing to do with breach of contract. It had to do with a simple comparison of price and value, and with whether one party had suffered harm, or lesion, or *laesio enormis*. The doctrines of the Spanish natural lawyers were taken over by northern European lawyers of the 17th and 18th centuries, including influential writers like Grotius and Pothier, and became part of the common stock of legal ideas in continental Europe.[2] Roman-Dutch law, in particular, developed an elaborate theory of *laesio enormis*.[3] However, there were obvious difficulties in the concept of true value, and the idea of automatic relief for a disparity between price and true value did not fit at all well with the ideas of freedom of contract which later became dominant. General relief for lesion was rejected by the framers of the French civil code and by German law reformers of the late 18th and 19th centuries.[4] Only traces of this idea now survive in modern legal systems. It was this idea of a general relief for lesion resulting from a difference between price and true value, regardless of breach of contract, which was rightly rejected

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[1]See Gordley at pp 94 - 102.

[2]See Gordley at p 71 and pp94 - 102.

[3]See Dias, "*Laesio Enormis*: The Roman-Dutch Story" in Daube (ed) *Studies in the Roman Law of Sale* (1959) at p 46. The doctrine survived in the provinces of Natal and the Transvaal until abolished by statute in 1952.

[4]See Gordley at pp 201 - 203. There is, however, a curious survival in article 1674 of the French civil code which provides relief for the seller of immoveable property who has suffered lesion of more than seven twelfths of its value.

in Scotland. It was rejected at a very early stage. Stair referred to the Roman rule on *laesio enormis* but said that the Roman rule was not followed by "our custom". He then referred to the opinion of Grotius, who favoured a requirement of equality in exchange, but said that in freely negotiated sales the price fixed by the parties ought to rule.[1]

5.4 The other doctrine was that a buyer of goods which turned out to be defective might keep the goods and claim a reduction of the price. This was the supposed *actio quanti minoris* of the Roman law, although there was for centuries controversy among Roman law scholars about the role of that remedy in the later Roman law, and indeed about whether there was only one *actio quanti minoris*.[2] Nowadays we would analyse the buyer's claim as one based on breach of contract, usually breach of an implied term as to quality or fitness for purpose, but the early sources simply talk in terms of defects or latent defects or "insufficiency". Stair may be partly to blame for the rejection of the idea that the buyer could retain the goods and claim damages. He mentions that in his day latent defects in goods were sufficient "to abate or take down the price" but that the buyer would be held to have acquiesced in the defects and homologated the contract unless "when the insufficiency appeared, the thing bought be offered to be restored".[3] However, the first

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[1]Stair, 1.10.14. See also 1.9. 10.

[2]See Stein, "Medieval Discussions of the Buyer's Actions for Physical Defects" in *Studies in the Roman Law of Sale* (Daube, ed, 1959) at pp 102-111.

[3]1.10.15.

case which he cites for this proposition was one in which the purchaser of a horse, who was being sued for the price, was claiming to be entitled to return the horse and refuse to pay the price altogether. One of several grounds of decision was that the offer of restitution came too late as the defender had received the horse a year before "since the which time he had made no such offer".[1] This was not a case where the buyer was trying to keep the horse and claim damages or a diminution in the price. The only other case cited by Stair in this passage was one in which the purchaser of a parcel of skins, who claimed that on delivery they were "spoiled and eaten with rats" and that he had had to resell them at a great loss, was claiming an abatement of the price as a defence to an action on a bond he had granted.[2] The court allowed the defence to be referred to the pursuer's oath. The case was mainly concerned with whether any defects in the goods were in fact latent and with the method of proof. There is no suggestion in the reports that it was not possible to claim an abatement of the price for breach of contract if the goods were not returned. Other cases show that in the 17th and 18th centuries Scottish law accepted that a buyer could claim damages for defective goods even if they were not returned.[3]

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[1]*Brown* v *Nicholson* (1629) M 8940. The case was complicated by a plea of minority and lesion.

[2]*Paton* v *Lockhart* (1675) M 14232. The report of this case is not very satisfactory.

[3]There is a very helpful analysis of the cases in Stewart, "The *Actio Quanti Minoris*" 1966 JLSS 124 at pp126-127. See also Evans-Jones in 1991 JR 190 at pp 196-198. The buyer, of course, had to prove the defects in the goods and, if at a distance from the seller, might be expected to take

Erskine, however, in a passage in which he appears to switch between two meanings of "insufficiency" (insufficiency in the sense of latent defects amounting to breach of the seller's implied warranties; and insufficiency in the sense of a simple lack of value) doubted the availability of a claim for abatement of the price.[1] This confused passage may have contributed to the unfortunate later developments in the law.

5.5 In 1821-22 Baron Hume was giving his students a clear account of the distinction between the two doctrines mentioned above. After dealing with what we would now call implied warranties of title and fitness for purpose, and the remedies for their breach, he turned to the question of the value of the property sold.

> "As to its being worth the price that has been taken for it, or being a fair and equal bargain - this the seller is not, in our practice, by any means obliged to warrant, though in the Roman he was, and in case of enorm lesion might by this *actio quanti minoris* be compelled to submit to a rectification of the bargain, and a due abatement of the price. Our custom ...refuses to give any relief from mere unequal or

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steps, on discovering the defects, to show them to a magistrate or obtain written statements from witnesses. See *Mitchell* v *Bisset* (1694) M 14236. See also Bankton (Inst. I.19.1.2) who accepted that the buyer had an *actio quanti minoris* in the sense of a claim for abatement of the price in cases of latent "insufficiency" but mentioned the need for "protestation" in order to stop retention amounting to homologation.

[1]Inst. III.3.10.

> disadvantageous bargains (where there is no further ground of challenge) and leaves it on every man's own prudence and sagacity to defend him from such misfortunes."[1]

This was a clear, and carefully limited, rejection of the doctrine which deserved to be rejected. It is a pity, however, that Hume chose to call it the *actio quanti minoris*. Hume did not properly address the other question - whether a buyer who had to, or who chose to, retain the property could claim damages for breach of any express or implied warranty. [2] Bell, however, in his *Commentaries*, said that if the buyer had used the goods before the defect was discovered "an abatement may be claimed in the price" and that if the buyer was barred from rejecting defective goods because of delay "he may be allowed relief by abatement on making out a strong case of defect".[3] It seems clear that, at least in relation to moveables, the buyer's normal remedy was to reject the defective goods, promptly and with due regard to the

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[1]*Baron Hume's Lectures Vol II*, Stair Soc Vol 13, at pp 47-48.

[2]See *Lectures* Vol II at pp 43-47. Evans-Jones, in 1991 JR 190 at p 205 gives reasons for supposing that Hume would not have excluded such a remedy. Certainly, if it had then been regarded as contrary to some fundamental principle, Hume would hardly have written as he did of the buyer's remedies for breach of warrandice by the seller. He also states very clearly that the buyer of heritable property who finds that the seller is in breach of contract in not discharging a heritable bond is not bound to reject the property but can keep the property and insist on the bond's being discharged or claim an appropriate abatement of the price.

[3]*Commentaries* (5th ed 1826) Vol I at pp 438 and 439. The 5th edition was the last edition prepared by Bell himself.

interests of the seller, and either refuse to pay the price or claim its return if it had already been paid. The impression gained from reading Erskine, Hume and Bell is that the law on the buyer's remedies where the goods were retained was in the course of development but that there was not, in the first half of the 19th century, any fundamental principle that a buyer who retained the property could not claim damages.

5.6 Confusion crept in later in the 19th century. Judges began to say that the *actio quanti minoris*, by which they meant a claim for damages by a buyer who was retaining the property sold, was repudiated by the law of Scotland.[1] The classic 19th century statement, which has been frequently cited, was by Lord President Inglis in *McCormick* v *Rittmeyer*.[2]

> "When a purchaser receives delivery of goods as in fulfilment of a contract of sale, and thereafter finds that the goods are not conform to order, his only remedy is to reject the goods and rescind the contract. If he has paid the price, his claim is for repayment of the price.... The purchaser is not entitled to retain the goods and demand an abatement from the contract price corresponding to the disconformity of the goods to order, for this would be to substitute a new and different contract for the contract of sale which was originally made by the parties, or it would resolve into a claim of the nature of the

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[1]See eg *Amaan* v *Handyside and Henderson* (1865) 3M 526. The cases are reviewed in Stewart, "The *Actio Quanti Minoris*" 1966 JLSS 124 at pp 127-128.

[2](1869) 7M 854 at p 858.

actio quanti minoris which our law entirely rejects."

It is not clear why allowing a claim for damages for breach of contract should be regarded as substituting a new contract for the one made by the parties. Nor is it clear that Scots law had rejected the *actio quanti minoris* in the sense of a claim for damages for breach of contract by a buyer who retained defective goods or, if it had, why it should have done so. In some later 19th century cases judges appeared to have doubts about the extent of the supposed denial of the buyer's right to retain the property and claim damages[1] but these doubts were not sufficient to change the general rule and, in relation to moveables, the opportunity for a fundamental judicial reconsideration was cut off when the law was reformed by the Sale of Goods Act 1893. This, as we have seen, allowed the buyer to retain the goods and claim damages for breach of contract.

5.7 We have described the development of the law in some detail because there is a detectable note of satisfaction in some of the statements in the cases to the effect that Scots law has rejected the *actio quanti minoris*. There is indeed cause for satisfaction in the early rejection of an automatic remedy for *laesio enormis* based on a simple disparity between price and value. Lawyers in some other countries took much longer to see the need for this. However, there is no cause for satisfaction in the rejection, possibly because of a confusion, of the idea that a buyer may retain the property and claim damages for breach of

[1]See Stewart in 1966 JLSS at pp 128-130.

contract by the seller.

The existing law

5.8 **General rule.** In cases other than those coming under the Sale of Goods Act the general rule is that a buyer who claims that there has been a breach of contract by the seller is not entitled to retain the property and claim damages based on a diminution in the value of the property.[1]

5.9 **Exceptions.** There are several exceptions to the general rule and some possible exceptions on which the law is in a state of doubt.[2]

5.10 *Restitution impossible.* Where the breach of contract involves a latent defect and where, when the defect is discovered, it is impossible for the buyer to restore the property, an action for damages is competent. This exception covers, for example, cases where a building has been erected on the land sold[3], or where minerals have been partially worked.[4]

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[1]See Gloag, *Contract* (2d ed, 1929) pp 608 and 614-615; Walker, *Civil Remedies* (1974) pp 742, 744, 749-751; McBryde, *Contract* (1987) pp 444 - 447. The most recent judicial review of the law is by Sheriff Principal Nicholson in *Fortune* v *Fraser* 1993 SCLR 470.

[2]See Stewart at 1966 JLSS 124; McBryde, *Contract* (1987) pp 446-447; Reid, "The Actio Quanti Minoris and Conveyancing Practice" 1988 JLSS 285.

[3]See *Louttit's Trs* v *Highland Railway Co*(1892) 19R 791 by Lord McLaren at p 800.

[4]See *Bald* v *Scott* (1847) 10D 289.

5.11 *Collateral obligations*. Where the buyer is claiming damages for breach of an obligation which is collateral to the contract of sale the claim is not affected by the retention of the property. This exception covers, for example, a claim for damages for breach of a contract to construct a building where the contract was collateral to a contract for the sale of land which the buyer was retaining[1]. It is not thought that it would cover breach of a warranty relating to the condition or quality of the subjects sold. That is precisely the sort of breach to which the rejection of the *actio quanti minoris* typically applies.[2] The meaning of "collateral" is not necessarily the same in this context as in the context of the supersession rule which we have considered in part IV.

5.12 *Warrandice*. A claim for damages under the warrandice clause in a disposition is not affected by the rejection of the *actio quanti minoris*. Indeed the purchaser's only remedy is the claim for damages.[3]

5.13 *Contracting out*. The parties can agree between themselves that the buyer is to be entitled to retain the subjects and claim damages for breach by the seller.[4]

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[1]See *McKillop* v *Mutual Securities Ltd*1945 SC 166; *Hoey* v *Butler* 1975 SC 87; *Hardwick* v *Gebbie* 1991 SLT 258.

[2]See, however, *Bradley* v *Scott* 1966 SLT (Sh Ct) 25.

[3]*Welsh* v *Russell* (1894) 21R 769.

[4]*McCormick* v *Rittmeyer* (1869) 7M 854; *Tainsh* v *McLaughlin* 1990 SLT (Sh Ct) 102 (Clause in missives made it clear that the purchasers could found on

5.14 *Fraud*. There is doubt as to whether the buyer can claim damages for breach of contract, while retaining the subjects, if the seller has been fraudulent - for example, if the seller knew that a contractual warranty was false. Although there are statements in earlier cases which suggest the existence of such an exception[1], it has been rejected, after a careful analysis of the authorities, in the most recent case on the subject.[2]

5.15 *Damages not based on diminution of value*. In some cases the buyer may have incurred expense in rectifying the defects which are the subject of the claim for damages for breach of contract and may claim damages based on the amount of this expenditure rather than on the difference between the value of the subjects with the defects and the value which they would have had if they had conformed to contract. It has been held that a claim of this kind is not an *actio quanti minoris*.[3]

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warranty relating to mains services without having to reconvey the subjects.) *Jamieson* v *Stewart* 1989 SLT (Sh Ct) 13 may also be a case of this kind although Sheriff Principal Caplan said at p 17 that "The parties have not in reality contracted out of the *actio quanti minoris* so much as created a warranty separate from the sale contract itself."

[1]See *Wood* v *Magistrates of Edinburgh* (1886) 13R 1006 at p 1011; *Finlayson* v *McRobb* 1987 (Sh Ct) 150 at p 152; *Widdowson* v *Hunter* 1989 SLT 478 at p 481.

[2]*Fortune* v *Fraser* 1993 SCLR 470. We understand that the decision of the Sheriff Principal in this case has been appealed.

[3]*Bourton* v *Clayton* 1990 SLT (Sh Ct) 7. See also *Hardwick* v *Gebbie* 1991 SLT 258 at p 265.

However, this view has not been taken in all cases.[1] The position remains unclear. Even if this exception were to be recognised it would not be of any assistance to a buyer in a case where the breach of contract did not involve a remediable defect.

Assessment of the existing law

5.16 **Justifications.** Apart from a very dubious tradition, the only justifications which appear to have been advanced for the existing Scottish rule are (a) that a buyer who elects to retain the property has acquiesced in the breach of contract and (b) that to allow a claim for damages based on the diminution in value resulting from non-conformity to contract would be to make a new contract for the parties. Neither is in the slightest degree persuasive. So far as the first justification is concerned, it is patently unrealistic to say that a buyer who intimates a claim for damages promptly is acquiescing in a breach of contract simply because he or she retains the property sold. So far as the second justification is concerned, a court which allows a claim for damages for breach of a contract for the

[1] See *Finlayson* v *McRobb* 1987 SLT (Sh Ct) 150 where the sheriff regarded a claim for damages for breach of a warranty on this basis as incorrect and as a sort of disguised attempt to use an *actio quanti minoris*. This approach was criticised in *Tainsh* v *McLaughlin* 1990 SLT (Sh Ct) 102. However, in *Parker* v *O'Brien* 1992 SLT (Sh Ct) 31 Sheriff Principal Nicholson said that the claim in that case, which was for the cost of repairing damage resulting from alleged non-compliance with a warranty, was "an illegitimate attempt to use an *actio quanti minoris* in circumstances where it is not applicable" and that he agreed with *Finlayson* v *McRobb* in this respect.

sale of goods, in a case where the buyer retains the goods, is not making a new contract for the parties and no-one would suggest that it was, whatever the measure of damages used. The position is no different in the case of a sale of land or a house.

5.17 **Criticisms.** The existing law is unrealistic in its application to house sales. A buyer may be unwilling, for perfectly good and understandable reasons, to reconvey a house and start looking for another one. The seller, who may have bought another house, may be even more unwilling to take the house back and repay the price. It is not realistic to insist that the normal remedy for a buyer in any case of breach of contract by the seller is to reconvey the house and claim a return of the price. The real effect of the existing rule is to deny a remedy for breach of contract to buyers of houses unless they can bring themselves within one of the exceptions. This is inconsistent with the general policy of the law on contract which is that every breach causing loss gives rise to a right to damages. The lack of consistency between the law on sale of goods and the law on sale of other property is impossible to justify. There is, so far as we are aware, no suggestion that the buyer's right under the Sale of Goods Act 1979 to retain the goods and claim damages, based if need be on the difference in value between conforming and non-conforming goods, is in any way unreasonable or open to criticism. A similar right is recognised under the United Nations Convention on Contracts for the International Sale of Goods which now governs a great deal of international

trade.[1] It seems clear that the remedy for the present incoherence in the law is to alter the rule applying to sales of property other than goods.

Proposal for reform.

5.18 What is required is the simple correction of an aberration. It would not, however, be wise to frame any remedial provision in terms of the *actio quanti minoris*. Quite apart from the undesirability of using a dead foreign language in legislation there is the fact that the meaning of that term has been a source of dispute for centuries. It ought, however, to be possible to reverse the rejection of the so-called *actio quanti minoris* by other means. What we suggest, for consideration and comment, is that it should be provided by statute that:-

> **6. Any rule of law whereby in a contract of sale, other than a sale of goods, the buyer is precluded from obtaining damages for a breach of the contract unless the property is returned to the seller should cease to have effect.**

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[1]Article 45 gives the buyer a general right to damages for any loss suffered as a consequence of breach by the seller. Article 50 gives the buyer a specific right to an abatement of the price if the goods do not conform with the contract.

PART VI SUMMARY OF PROPOSALS

1. The existing rule whereby, when a document has been drawn up which appears to contain the terms of a contract, extrinsic evidence is inadmissible to prove an additional term of the contract should be replaced by a rebuttable presumption on the following lines.

> "(1) Where any of the terms of a contract are embodied in a document which has the appearance of containing all the express terms of the contract, it shall be presumed, unless the contrary is proved, that the document contains all the express terms of the contract; and similarly where any of the terms of a contract are embodied in two or more documents.
>
> (2) In a case falling within subsection (1) above, extrinsic evidence, whether oral or documentary, shall be admissible for the purpose of proving that the contract includes additional express terms, whether agreed to orally or in writing."

2(1) As an essential pre-requisite to reform of the rules on the admissibility of extrinsic evidence in the interpretation of contracts the substantive law on the approach to be adopted to interpretation, and in particular on the role of the parties' intentions, should be clearly established.

(2) A suitable model (which we have already recommended for use in relation to the formation of contracts) is provided by article 8 (1) and (2) of the United Nations Convention on Contracts for the International Sale of Goods, although this could

usefully be modified for the case of contracts embodied in an agreed document.

(3) It should accordingly be provided that, in interpreting any expression in a contract,

(a) where the expression has not been embodied in a document agreed by the parties then,

(i) the expression should be interpreted according to the intent of the party using it where the other party knew or could not have been unaware what that intent was

(ii) if the preceding paragraph is not applicable, an expression used by one party should be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances

(b) where the expression has been embodied in a document agreed by the parties then,

(i) the expression should be interpreted according to the shared common intention of the parties at the time when the contract was concluded

(ii) if the preceding paragraph is not applicable, the expression should be interpreted according to the understanding that a reasonable person (of the same kind as the parties where they are in the same business or profession) would have had in the same circumstances.

3. In determining, for the purpose of the rule suggested in proposition 2 above, the intent of a

party, or the shared common intention of the parties, or the understanding a reasonable person would have had, due consideration should be given to all relevant circumstances of the case including, where relevant, the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

4. For the purpose of the above proposals on the interpretation of contracts, a disposition or other unilateral document which is intended to operate, whether or not in conjunction with some step such as registration, as a conveyance of property or as a title to property is not to be regarded as a contract or as a document containing contractual terms.

5. It should be provided that

(a) any rule of law whereby, regardless of the intentions of the parties, terms of a contract are superseded by the execution or delivery of a conveyance or other deed intended to implement or give effect to that contract in whole or in part should cease to have effect, but that

(b) the conveyance or other deed should supersede the contract in so far as it implements or gives effect to the contract.

6. Any rule of law whereby in a contract of sale, other than a sale of goods, the buyer is precluded from obtaining damages for a breach of the contract unless the property is returned to the seller should cease to have effect.

APPENDIX

CASES SOMETIMES CITED AS EXAMPLES OF THE APPLICATION OF THE RULE ON PROOF OF ADDITIONAL TERMS WHICH ARE NOT SUCH EXAMPLES

Pollock and Dickson v *McAndrew* (1828) 7S 189

Summary. M sent a written offer to P and D offering to supply cast iron pipes of a certain description at a certain price per yard, the price to be payable in cash. The offer was accepted. The contract so concluded did not say anything about the quantity to be supplied. Some pipes were delivered under the contract but then M stopped deliveries because the price was not being paid. P and D raised an action to have M ordained to supply further pipes. They claimed that M knew that they needed the pipes for a project which required 240 yards and that he had agreed to supply 240 yards. When M denied this they asked to be allowed a proof by parole. The Lord Ordinary refused and was upheld by the Second Division. The result was that M was not bound to supply any more pipes.

Comment. This looks like a case on proof of an additional term. However, it was never made entirely clear what P and D wanted to prove. The court eventually proceeded on the assumption that their case was that the whole contract was the offer and acceptance but that, in order to remedy an obvious defect in it, it should be construed as if it provided for the supply of 240 yards of pipes. The court treated the case as one on the construction of the contract. As the contract was clear, and as it could take effect as an open quantity contract providing for cash on delivery

and "leaving each party free to stop when they choose", there was no room for the admission of parole evidence. Lord Glenlee noted, at p 191, that the position might have been different if P and D had averred a prior contract. It seemed, however, that their case was that the accepted offer was "the ultimate result of the bargain, and was intended to fix the whole terms of it."

Effect of Commission's proposals. The pursuers would be expected to focus their averments more clearly. They would be allowed to attempt to prove *sufficiently specific* averments as to an additional term or as to the interpretation of a particular expression in the contract. Beyond that it is impossible to say what the effect of the Commission's proposals would be. We do not know the strength of the evidence.

Law v *Gibsone* (1835) 13S 396

Summary. A tenant claimed that the landowner had agreed to an abatement of the rent payable under the written lease. It was held that it was not competent to prove such an agreement by parole evidence.

Comment. The case is about an alleged subsequent variation of a written contract relating to heritable property, not about proof of an additional contemporaneous term.

Effect of Commission's recommendations. Cases on the subsequent variation of leases would not be affected by the proposals in this discussion paper.

General Assembly of Baptist Churches v *Taylor* (1841) 3D 1030

Summary. The pursuers had been left a legacy out of an estate on which the defender was the executor. In response to a claim that the estate should have included the balance of the price outstanding on the sale of a property, the defender alleged (a) that the contract for the sale of the property had been subject to a condition that the price had to be paid within six years (b) that the price had not been so paid (c) that he had insisted that "by this failure, the bargain was cancelled" (d) that the buyer had agreed to this and (e) that the contract had therefore been cancelled and replaced by another one. The written missives contained no condition that the price had to be paid within six years. It was held that it was "not competent now to prove the existence of such a condition by parole testimony".

Comment. The additional term was just part of the background. The real issue was whether the contract had been cancelled by agreement between the parties. In any event the court did not say that the additional term could not be proved but only that it could not be proved by parole evidence.

Effect of Commission's proposals. Cases on the cancellation of contracts would not be affected by the proposals in this discussion paper.

Pattinson v *Robertson* (1844) 6D 944, aff'd (1846) 5 Bell's App 259.

Summary. P had sold his share of his deceased father's succession. He sued the buyer for the

outstanding balance of the price, founding on a written contract. The buyer claimed that there was a separate term, not embodied in the written contract, that in certain events there was to be a restriction in the amount of the price and a postponement of any demand for payment. It was held that he could prove this only by written evidence, not by parole evidence.

Comment. This is not an example of the rule on proof of additional terms as it is currently understood because the court was prepared to allow proof by written evidence.

Effect of Commission's proposals. Under the proposals on proof of additional terms in this discussion paper the defender could attempt to prove an additional contemporaneous term by any relevant evidence.

Alexander v *Gillon* (1847) 9D 524

Summary. A landlord claimed from the incoming tenant of a farm the value of the summer fallow left by the outgoing tenant. The tenant's defence was that the written lease contained no obligation to this effect. However the landlord averred that, in accordance with the usual custom in that part of the country, the tenant had undertaken a separate obligation which had not been included in the lease. After considering the whole evidence, including parole evidence, the Lord Ordinary found that it was sufficiently proved that the tenant had agreed to pay the sum. The landlord reclaimed and the Second Division held that, as there was "no written evidence sufficient to prove such an

obligation as a separate and independent agreement," the landlord was not entitled to recover the sum claimed. Lord Medwyn dissented. He thought that there was enough written evidence. He added frankly:-

> "The mala fides of the defence seems to me to be clear. It may perhaps influence my opinion."

Comment. Again, this is not an example of the operation of the rule on proof of additional terms as it is now understood because the court would have decided differently if there had been "proper and sufficient written evidence of the obligation undertaken by the tenant" (Lord Justice-Clerk Hope at p534).

Effect of Commission's proposals. Under the Commission's proposals the result would depend entirely on the weight of the evidence of a separate agreement.

Dumbarton Glass Co v *Coatsworth* (1847) 9D 732

Summary. A glass-maker became bound by a written contract to serve the pursuers for 7 years at a certain wage. After 5 years the pursuers reduced his wages significantly. He continued to work for them for some time and then, still within the 7 year period, gave two weeks notice and left to work for another company. The pursuers applied to the sheriff for his summary apprehension and imprisonment until he found caution to return and serve out the rest of the 7 year period. The employee argued that he had been entitled to regard the contract as at an end when his wages were

reduced. The employers replied that he had agreed to the reduction. The court held that any variation of the written contract could only be proved by writing and, as no such proof was offered by the employers, found for the employee.

Comment. This is a case on subsequent variation, not on proof of additional terms.

Effect of Commission's proposals. The proposals in this discussion paper are not concerned with subsequent variations of contracts. That has been dealt with in our report on the *Requirements of Writing*.

Walker v *Caledonian Railway Co* (1858) 20D 1102.
Summary. The railway company had invited tenders for the supply of horse haulage for moving carriages around at various stations on their line. The pursuer averred that during preliminary discussions he had been shown a list of the stations where horses would be needed and of the number of horses to be sent to each. He had made a copy of this list. He claimed that the contract was entered into with "special reference to this document." After the preliminary discussions the pursuer sent a written offer to the defenders in the following terms.

> "I make offer to supply you with horses for haulage upon your line at the different stations shewn, or to be hereafter shewn to me; also to increase the number of horses, from time to time, as may be required, for the sum of six shillings and eightpence sterling each horse and man per day, to commence upon

Wednesday the 11th July current, and to continue binding upon both parties for three years."

There were other terms about stables and free transport for the horses on the defenders' line but nothing about a minimum number of horses. The offer was accepted in writing by the company, with the qualification that the company was to have the "power to declare the same at an end at any time during the said three years, in the event of inefficient performance." The report of the case does not refer to any written acceptance by the pursuer of this qualification, but the contract came into effect and was performed for some time without complaint. Then the company reduced the number of horses they required and gave notice that horses would no longer be required at all at some stations. The pursuer objected and threatened to withdraw all his horses, which he eventually did. He then raised an action for damages for breach of contract.

The pursuer averred that he "entered into this contract, as did also the defenders, on the distinct footing and understanding, that the whole haulage therein stipulated for, was to be continued to the pursuer for the stipulated period". The defenders averred that they never bound themselves to employ any specified number of horses and that this was well known in the trade. They said that the pursuer had been shown the previous contractor's accounts for one week to give him "some idea of the then existing state of the demand, and the stations to which the horses would require to be sent. It was distinctly understood that the pursuer was to furnish such a number of

horses as might be required, and at such stations as might be pointed out to him, and that the number of horses, and the stations at which they were to be employed, might be increased or diminished as the state of the traffic required." They argued that the pursuer's case, as laid, was "not relevant". The letters between the parties constituted the contract and it could not be affected by the pursuer's averments of the understanding on which it was entered into. On the legal construction of the letters taken alone the pursuer had no relevant case of breach of contract. The Lord Ordinary, after hearing the parties, allowed the pursuer to lodge a draft issue. He said that he was not prepared to throw the action out at that stage. The defenders' pleas "as to what constituted the contract, and the construction to be given to it" would be reserved "for direction at the trial". The defenders reclaimed. The Second Division invited the pursuer to propose draft issues. The pursuer proposed as the first issue

> "Whether the defenders contracted with the pursuer to perform the horse haulage work at the stations upon the line of the Caledonian Railway, specified in the schedule hereunto annexed, for three years from 11th July 1855, at the rate of 6s. 8d. sterling for each horse and man per day?"

The schedule contained the list referred to in the pursuer's pleadings. The court refused to allow this issue to go to a jury. The contract was in the written offer and acceptance. It did not refer to the list. The list was, by the pursuer's own admission, part of the communings "before the offer and the acceptance were framed". He did not aver any misrepresentation. It was "incompetent to prove

what may alter or control a contract reduced to writing".

Comment. At first sight this looks like an attempt to prove an additional term. However, on closer inspection of the pursuer's averments it becomes clear that he was not averring that there was any separate term which was agreed between the parties at the same time as, or on any occasion prior to, the conclusion of the contract based on his written offer. His averments were really as to the "footing and understanding" on which the contract was entered into. The case is perhaps best regarded as one on the construction of the contract and as an attempt to prove prior communings as part of the surrounding circumstances for this purpose. Indeed, in the pursuer's argument to the Second Division, it was said that the purpose of examining witnesses would be "to prove the circumstances under which [the contract] was entered into, so that it might be judged of from the same point of view as it was looked on by the parties when it was entered into". The case was complicated by the fact that it was proposed to send it to a jury. This type of case would not now be sent to a jury. (Court of Session Act 1988 s11). Finally, although the Second Division treated the case as one involving a written contract, it is at least arguable that it was not of this nature. The written acceptance was qualified and, so far as the report discloses, may well have been accepted by conduct on the part of the pursuer.

Effect of Commission's proposals. The pursuer, if presenting his case as a question of construction, would be expected to make specific averments as to

the expressions to be interpreted, as to the meaning he alleged they bore, and as to facts supporting that meaning. He ought not be allowed to rest on vague averments as to the footing on which the contract was entered into. It seems most unlikely, on the wording of the offer and on the facts revealed in the report, that the pursuer would have fared any better under the Commission's proposals.

McGregor v *Lord Strathallan* (1862) 24D 1002

Summary. A farmer alleged (a) that he had offered a certain rent for a farm on the footing that he was to be liable for putting the fences into proper repair and keeping them in repair (b) that the landlord had said that he would erect new fences but that the rent would have to be increased accordingly (c) that this was agreed (d) that the formal lease, which was based on a standard printed form, said nothing about the landlord's obligation and imposed an obligation on the tenant to keep the fences in good condition and (e) that he had not been allowed any opportunity to consider the import or effect of the provisions in the lease. A question having arisen as to responsibility for the adequacy of the fencing it was held that the terms of the written lease could alone be considered. "No doubt he has stated that there was a separate verbal agreement with the landlord as to the fences. But that statement is entirely irrelevant, and could not be admitted to proof, because it is an attempt to engraft on the lease a clause not to be found in it; for it is said that this verbal agreement was coeval with the lease."

Comment. This case would almost certainly now be presented as a case for rectification. The farmer's case was, in essence, that the formal lease did not accurately express the common intention of the parties at the date when it was made.

Effect of Commission's proposals. If the tenant's case had been that the parties had agreed that part of their contract should be embodied in a lease in standard form and that there should be a separate agreement about the provision of the new fencing then, under the proposals in this discussion paper, he would be entitled to attempt to prove that.

Wallace v *Henderson* (1867) 5M 270

Summary. The debtor under a heritable bond claimed that the creditor had agreed orally that it would not be called up until a certain condition had been fulfilled. The creditor called up the bond. It was held that the debtor could not be allowed to prove the alleged oral agreement. This "would be to control a written document by parole evidence"(p274). "It would be quite out of the question ... to allow evidence of a verbal agreement to qualify the written document." (p275).

Comment. This was a case of an alleged subsequent variation of the terms of a written heritable bond, not an attempt to prove an additional contemporaneous term. If a similar case arose today in relation to a standard security it would be governed by section 16 of the Conveyancing and Feudal Reform (Scotland) Act 1970 which lays down the formal requirements for subsequent variation.

Effect of Commission's proposals. The proposals in this discussion paper would not affect cases on the subsequent variation of standard securities.

Lee v *Alexander* (1883) 10R (HL) 91

Summary. The question in this case was whether a disposition of certain interests in land conveyed the mid-superiority of a parcel of land. It was held that it did not. The case contains a famous statement by Lord Watson (at p 96) that "the execution of a formal conveyance, even when it expressly bears to be in implement of a previous contract, supersedes that contract *in toto*, and the conveyance thenceforth becomes the sole measure of the rights and liabilities of the contracting parties".

Comment. Although this case is sometimes cited in cases on proof of additional terms it was actually decided on a pure question of construction of a disposition.

Effect of Commission's proposals. The proposals in this discussion paper would not have affected the result of this case.

Skinner v *Lord Saltoun* (1886) 13R 823

Summary. A tenant averred that a deviation from the terms of a written 19 year lease had been orally approved by the landlord's factor.

Comment. This is another case on an alleged subsequent variation of a lease.

Effect of Commission's proposals. This type of case would not be affected by the proposals in this discussion paper.

Barr's Trs v *Shearer* (1886) 13R 1055

Summary. The trustees of a deceased partner claimed his share of the partnership assets. The other partners averred that the deceased had entered into an obligation, subsequent to the partnership agreement, to pay a certain sum to the partnership in certain events. It was held that the alleged obligation was in part meaningless and for the rest not shown to be applicable to any events which had occurred. One of the pursuer's arguments was that it was "incompetent to prove *prout de jure* a verbal agreement to vary a written contract". It is not clear how important this point was because the court seemed to be of the view that the alleged agreement, even if proved, would not have affected the outcome, but Lord Shand did say that there was "no relevant case stated to entitle the defenders to parole proof of an obligation, by means of which to cut down this contract of copartnery".

Comment. At best this is a case on subsequent variation of a written contract.

Effect of Commission's proposals. This type of case would not be affected by the proposals in this discussion paper.

Turnbull v *Oliver* (1891) 19R 154

Summary. A tenant claimed that the landlord had agreed orally to an abatement of the rent due under

the written lease. It was held that this could not be proved by parole testimony.

Comment. This is another case on subsequent variation.

Effect of Commission's proposals. None.

Hamilton and Baird v *Lewis* (1893) 21R 120

Summary. An action was settled by a written contract in the form of a joint minute. One of the parties claimed that the contract had been varied by a subsequent oral agreement. It was held that a variation of the terms of the written contract could not be proved by parole.

Comment. This is another case of an alleged subsequent variation of a written contract.

Effect of Commission's proposals. None.

Muller & Co v *Weber & Schaer* (1901) 3F 401

Summary. The pursuers sued for damages for a failure by the defenders to deliver quantities of indiarubber allegedly sold to them. The contracts were recorded in brief mercantile notes, signed by the defenders, in the form

> "We have this day sold to you" a certain quantity for delivery within a certain period at a certain price per pound "less 1/2 % for you".

The defenders averred that the contracts, although recorded as sales, were really contracts for the supply of goods to the pursuers under a prior

commercial agency agreement entered into between the parties, under which the pursuers were to act for the defenders in handling orders from one major customer. The 1/2 % referred to was the pursuers' commission. They had suspended deliveries because the pursuers had violated the terms of this agency agreement. The Lord Ordinary felt bound to hold that this commercial agency agreement was an innominate and unusual agreement which could be proved only by writ or oath. The First Division agreed with the result but on the different ground that the defenders' proposal was "to displace the effect of these documents constituting or recording contracts of sale, and to substitute for these another and a wholly different contract" (Lord President Balfour at p406). This could not be done otherwise than by writ or oath because of a sort of "extension of the principle of the Trust Act,1696" (Lord McLaren at p407).

Comment. The defenders, as Lord Mclaren noted (at p 407), were attempting not "to add to or vary the contract" but to prove that it was a contract of a different type and part of a much wider commercial agreement between the parties. The case is an example of the ill-effects, in an international commercial transaction, of a supposed rule on proof by writ or oath . We say "supposed rule" because the notion that a contract which is apparently a contract of sale cannot be proved to be another type of contract except by writ or oath is hard to reconcile with a whole series of cases on security transactions masquerading as sales. See Walker and Walker, *Evidence*, p 272.

Effect of Commission's proposals. The proposals in

this discussion paper would not affect this type of case. However, if recommendation 11 in the Commission's report on *Requirements of Writing* were implemented all requirements of proof by writ or oath would be abolished.

McAllister v *McGallagley* 1911 SC 112

Summary. A pawnbroker's business was being sold. The written offer to buy stipulated that the the seller was to leave the price on loan to the buyer at 8% interest a year. The buyer was to grant bills for the amount of the loan. The buyer was also to take over the lease of the premises, which had ten years still to run. The offer was accepted by a simple written unqualified acceptance. It said nothing about the duration of the loan or about the time when the bills were to be payable. The buyer granted promissory notes payable on demand. After five years the seller demanded payment of the price and charged the buyer on the promissory notes. The buyer averred that at a meeting about a week before the date of the offer it had been agreed between the parties that payment of the price was to be postponed until the expiry of the lease. The Lord Ordinary held that this was a relevant averment but restricted proof to proof by writ or oath. On appeal the First Division held that the averment was irrelevant and that the charge on the promissory notes was in order.

Comment. The interesting thing about this case is that the court found the averment irrelevant. It did not decide that evidence of the additional term was inadmissible. This seems correct. The contract, in so far as it provided for the granting of bills, had been implemented, and superseded, by the

granting and acceptance of the bills. Thereafter the bills fell to be enforced according to their terms. The court, however, reached its conclusion as to relevancy by a more complicated and roundabout route. Lord President Dunedin treated the case as turning on the terms of the underlying contract as to the duration of the loan. He viewed the buyer's averment as nothing more than an averment of "preliminary communications" or "negotiations" or the "footing" on which the bargain was gone into. As such it was irrelevant. This seemed to pay scant respect to what the averment actually was. The buyer had actually averred an agreement which was an express condition of the sale. Whether he would have been able to prove that is, of course, another matter. Lord President Dunedin then said that the averment could be regarded as an averment that a term of the contract (as to the duration of the loan) had been left to be settled later. If the question of duration had arisen before the contract had been acted on there would have been no *consensus* and no contract. However, on this view, it was clear that the term had been settled by the granting of bills payable on demand. The case could also, the Lord President said, be regarded as raising a question of construction. Could the words "remaining on loan" mean remaining on loan until the end of the lease? This, too, he thought, could be answered by looking to the subsequent conduct of the parties. The granting of bills payable on demand indicated that the intention was that the loan should be repayable when the seller required it. Lord Kinnear treated the question as relating to the term of the bills, not the duration of the actual loan. (The buyer had averred no specific agreement as to the

term of the bills. So, on Lord Kinnear's view, the question of proof of an additional term did "not require to be decided now". See p 120.) The writings were silent as to the term of the bills and, if the matter had been raised at the time when the writings were executed, "there would have been no *consensus in idem*, and, therefore, no contract at all" (p 120) but the parties had solved that question for themselves by granting and accepting bills payable on demand and "it must be presumed that they carried out their own intention when the bills were granted in the form in which they now stand". (p 120). The third member of the court, Lord Johnston, said that he would have regarded the averment as relevant and would have allowed a proof at large on the ground that it was a case of "explaining an ambiguous agreement and supplying a necessary term which is awanting" (pp121 - 122) but he nonetheless felt able to concur. The ratio of this case is not easy to ascertain but it seems clear that it did not turn on any rule disallowing proof of a relevant averment of an additional contemporaneous term of a contract.

Effect of Commission's proposals. The pursuer in this case could now attempt to have the bills rectified under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 on the ground that they did not express accurately the common intention of the parties. If the pursuer did not attempt rectification, or failed in that attempt, then under the Commission's proposal 5(b) the bills would simply supersede the contract and would take effect according to their terms.

Lavan v *Gavin Aird & Co* 1919 SC 345

Summary. A debtor raised an action for recall of arrestments on a decree for a lump sum, claiming that the creditors had agreed to accept payment by instalments. It was held that this could not be proved by parole evidence.

Comment. This was not a case on contract. Even if it had been, it would have been a case on subsequent variation.

Effect of Commission's proposals. None.