SCOTTISH LAW COMMISSION

MEMORANDUM No: 35
CONSTITUTION AND PROOF OF VOLUNTARY OBLIGATIONS:

UNILATERAL PROMISES

10 March 1977

This Memorandum is published for comment and criticism, and does not represent the final views of the Scottish Law Commission.

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A: INTRODUCTION

1. General

1. This Memorandum is one of a series of six in which we consider possible reforms in the law relating to the constitution and proof of voluntary obligations. In it we discuss one of the categories of voluntary obligations known to Scots law, the unilateral binding promise, and how it differs from the other principal category of voluntary obligation, the contract. We do not in the present Memorandum deal with the question of the formalities with which promises relating to certain matters must comply (e.g. tested or holograph writ) or, except in passing, with the question of restrictions on how promises may be proved (e.g. proof by writ or oath). These matters are discussed in our accompanying Memorandum No.39. The subject of stipulations or promises made by parties to contracts in favour of third parties (*jus quaesitum tertio*) is considered separately in Memorandum No.38. In Memorandum No.37 we deal with certain factors which may preclude the coming into existence of an obligation in spite of the actual or apparent making of a promise or reaching of agreement (e.g. pre-existing illegality or impossibility, the disguising of a transaction in the form of another). Of the other Memoranda in the series, No.36 is concerned with the creation of voluntary obligations through the institution of the contract; and No.34 is a general introduction to the complete series, containing a summary of the provisional proposals made in all the Memoranda. We wish to stress that the topics considered in these individual Memoranda are very closely interrelated and that the Memoranda in the series should therefore be looked upon as dealing merely with different aspects of a single branch of the law.

2. Contracts and unilateral binding promises

2. Scots law recognises that binding voluntary obligations may be created in two separate ways.

(i) Through a contract: an agreement between two (or more) persons which the law recognises as creating, altering or extinguishing the legal rights and duties of the parties thereto[1] (and in certain cases, at least as far as the conferring of rights is concerned, those of third parties[2]).

(ii) Through a unilateral promise made by one person in favour of another. In this case agreement between the parties to confer rights and impose duties is not essential for the obligation to come into being, though of course the benefit promised cannot be forced upon the promisee against his will. The performance of the act promised may well require the promisee's acquiescence or cooperation, but the existence of the obligation is not dependent upon his consent and may even come into existence without his knowledge.[3]

3. A contract in most cases will impose duties and confer rights upon both (or all) parties to it, and the parties' respective rights and duties will be the counterparts each of the other. In a contract of sale, for example, the seller is *inter alia* bound to deliver the article sold, and entitled to receive the price; the buyer is *inter alia* bound to pay the price, and entitled to receive delivery of the thing. But a contract may also be such that the duties thereby imposed upon, or the undertakings made by, one party are not met with corresponding duties imposed upon, or undertakings made by, the other. This can be seen in the following two separate situations:

[1] See Gloag, *Law of Contract*, 2nd edition, p.8.

[2] We consider the doctrine of *jus quaesitum tertio* in our accompanying Memorandum No.38.

[3] Stair, I.10.4; Smith *A Short Commentary on the Law of Scotland*, pp. 742-53; *Studies Critical and Comparative*, pp.168-82; Walker, *Principles of Scottish Private Law* 2nd ed. pp. 522-3; Ashton-Cross "Bare Promise in Scots Law" 1957 Jur. Rev. 138.

(a) A and B agree that if A rescues a hostage being held by a group of terrorists B will pay him £1000. Such a contract (provided it can be proved in the appropriate manner) imposes upon B the duty to pay the £1000 if A succeeds in rescuing the hostage but imposes no duty upon A actually to attempt to do so.

(b) A and B agree that B, although by statute entitled to make use of A's harbour facilities without paying therefor, will make ex gratia payments to A for the use of those facilities. Such a contract (provided it can be proved in the appropriate manner) imposes upon B the duty to pay the agreed sums[4] but imposes upon A no duty (except to receive the payment).[5]

4. In English law neither situation (a) nor situation (b), until payment or performance had been made, would give rise to enforceable legal rights and duties. Because of the existence of the doctrine that a binding contract requires that valuable consideration pass from the promisee in exchange for the promisor's undertaking, situation (b) could give rise to no legal obligation on the part of B (unless his promise had been made in a deed under seal), while situation (a) would mature into a binding contract only when A had performed the task (or perhaps when he had embarked upon it), his efforts in that regard providing the valuable consideration flowing from him in return for B's promise. In Scots law, on the other hand, there would in both situations be a valid contract once the parties had reached their agreement (though proof of that agreement, in case of dispute might, in both situations be restricted to writ or oath). Thus in Scotland a contract is binding whether the obligation imposed upon a party to it is gratuitous (i.e. without counterpart from the other party) or onerous (i.e. undertaken in return for a counterprestation from the other party).

[4] Wick Harbour Trs. v. The Admiralty 1921, 2 S.L.T. 109.

[5] Smith, Short Commentary, p.494, footnote 55; cf. Douglas-Hamilton v. Duke and Duchess of Hamilton's Trs. 1961 S.C. 205 per Lord President Clyde at p.221.

5. A unilateral binding promise gives rise to a legal obligation on the part of the promisor without the necessity of the promisor and promisee having come to any agreement about the subject-matter of the promise. Thus a binding promise can be made in favour of someone who is unaware of it, or is incapable of agreeing to it, or is not yet in existence (e.g. an unborn child; a company not yet incorporated).[6] The obligation to which such a promise gives rise (unless it forms part of a larger, composite transaction) is unilateral, in that it is the creation of the will of the promisor alone; this is so even though the promised performance is stipulated to be conditional upon some act or abstention by the promisee. For example:-

(a) B promises A that if the latter rescues a hostage being held by a group of terrorists, B will pay him £1000

(b) B promises A that if the latter will cease paying court to his (B's) daughter, B will pay him £1000

(c) B promises A that if the latter within seven days pays him £10,000, B will convey his house to A.

Such promises are unilateral and gratuitous and are not converted into bilateral and onerous contracts merely because the promisee in his turn either (a) promises to fulfil the condition or (b) actually does fulfil it.[7] The juristic nature of the obligation and its character as onerous or gratuitous is determined once and for all when it first comes into existence: if at that stage the content of the obligation is not the product of the agreement of the parties there is not then, and there will not subsequently be, a contract between them in relation to the promised performance.

[6] Stair, I.10.4. The promisee must, of course, be in existence and be aware of the promise before he can claim performance of the obligation. See Walker, Principles of Scottish Private Law, 2nd edition, pp. 522-3.

[7] Millar v. Tremamondo (1771) Mor. 12395; Smith v. Oliver 1911 S.C. 103. See also Forbes v. Knox 1957 S.L.T. 102 at p.103, and Lord Normand, "Consideration in the Law of Scotland" (1939) 55 L.Q.R. 358, esp. at pp. 362-5.

6. It will be appreciated that the distinction between a contract and a conditional unilateral promise will often on the facts of a particular case be a difficult one to draw.[8] It cannot be assumed that because an obligation is gratuitous it has its source in a unilateral promise; nor that because the creditor of an obligation has performed (or will perform) some act for the benefit of the debtor that that obligation is contractual in origin. Yet the distinction while not always easy to draw, is important, for in not a few areas the legal consequences vary according to whether the obligation in question has its source in a contract or in a unilateral promise; and the fundamental question of whether a legally binding obligation has come into existence at all (as well as the subsidiary question of _when_ and _where_ it came into being) may depend upon the classification of the parties as contractors or as debtor and creditor under a unilateral promise.[9]

7. Scots law, then, accepts that a binding obligation may come into existence through a simple unilateral declaration by the promisor. At least since the time of Stair the law of Scotland, diverging in this respect from the laws of most other civil law systems of Western Europe, has not required, before an obligation is recognised as coming into being, that the promisee accept the benefit of the promise made in his favour; it has consequently seen no need, as other systems have, to resort to the device of a presumed acceptance by the beneficiary in order to hold the promisor to his undertaking.[10] Stair expressed his view of the law in the following terms:[11]

> "But a promise is that which is simple and pure, and hath not implied in it as a condition, the acceptance of another. In this Grotius differs; holding 'that acceptance is necessary to every conventional obligation in equity, without consideration of positive law;' and to prevent that obvious objection, that promises are made to absents, infants, idiots, or

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[8] Cf. paras. 3(a) and 5(a), _supra_.

[9] See paras. 21-26, _infra_.

[10] See e.g. Smith, _Studies Critical and Comparative_, pp. 168-182, esp. at pp. 171-3.

[11] I.10.4.

"persons not yet born, who cannot accept, and therefore such promises would ever be revokable, till their acceptation, which some of them can never do: he answereth, that the civil law only holdeth, that such offers cannot be revoked, until these be of such capacity as to accept or refuse. Promises are now commonly held obligatory; the canon law hath taken off the exception of the civil law, de nudo pacto. It is true, if he in whose favour they are made, accept not, they become void, not by the negative non-acceptance, but by the contrary rejection. For as the will of the promiser constitutes a right in the other, so the other's will, by renouncing and rejecting that right, voids it, and makes it return."

Somewhat more recently, in a case concerning the question whether or not a certain document was in law a promisory note, Lord Justice-Clerk Inglis, after expressly approving this passage, went on to say:[12]

"A promise is a pure and simple expression of the will of the party undertaking the obligation, requiring no acceptance, and still less requiring mutual consent ... It appears to me that when a party, in terms of this letter, agrees to pay £100 ... he is making a promise, and that by the bare act of his will thus expressed he undertakes an obligation to pay, which requires no acceptance ..."

In the same case Lord Neaves[13] described a legally binding promise as being the "expression of the serious engagement by the person promising that he will do the thing promised" and as "a serious declaration by which the person pledges his faith that he will do a certain thing."

8. The value of the doctrine of the binding force of the unilateral promise may be thought to lie principally in its consonance with, and its according of effect to, the generally accepted moral standard that seriously intended promises should be kept - omne verbum de ore fideli, cadit in debitum[14] - and more particularly in enabling the law to deal justly, effectively and without straining the concepts of the law of mutual contracts, with such situations as offers accompanied by promises to keep them open for a specified time, promises

[12] Macfarlane v. Johnston (1864) 2M.1210 at 1213.

[13] At p.1214.

[14] See Stair, Inst., I.10.7.

made subject to a condition of performance by the promisee (such as promises of reward), and the jus quaesitum tertio.[15] In England, where a unilateral promise is not regarded as legally binding, unless made in a deed under seal, proposals have from time to time been made to accord recognition in certain cases to unilateral declarations of will. Thus, for example the Law Revision Committee in its Sixth Interim Report[16] stated:

> "It appears to us to be undesirable and contrary to business practice that a man who has been promised a period, either expressly defined or until the happening of a certain event, in which to decide whether to accept or to decline an offer cannot rely upon being able to accept it at any time within that period ... It may be noted here that according to the law of most foreign countries a promisor is bound by such a promise. It is particularly undesirable that on such a point the English law should accept a lower moral standard."

More recently, the Law Commission for England and Wales has put forward provisional proposals for the recognition, in certain circumstances, of the binding character of promises.[17]

9. In some cases it may be difficult in Scots law to decide whether a statement or proposal made by a party should be classified as a binding promise or as an offer which will give rise to a legally enforceable obligation only if accepted.[18] The use of the words "promise" and "agree" will not be treated by the court as conclusively settling the matter.[19] Where the doubt which exists cannot be resolved by reference to the actings of the parties and the circumstances surrounding them, the statement will generally be presumed to be an offer requiring acceptance, particularly where the transaction is one of

[15] See Smith, Short Commentary, pp. 746-51. Jus quaesitum tertio is discussed in detail in our accompanying Memorandum No.38.

[16] 1937 Cmd. 5449, para. 38.

[17] Working Paper No.60: Firm Offers.

[18] Allan v. Collier (1664) Mor.9248; Macfarlane v. Johnston (1864) 2M.1210 per Lord Justice Clerk Inglis at 1212 and Lord Neaves at 1214; Goldston v. Young (1868) 7M.188 per Lord President Inglis at 191; Malcolm v. Campbell (1891) 19R.278; Morton's Trs. v. Aged Christian Friends Society (1899) 2F.82.

[19] Macfarlane v. Johnston (1864) 2M.1210.

a business or commercial character.[20] It may equally be a matter of difficulty to distinguish between a unilateral promise and a mere representation or statement of future intention or desire[21] or a warning as to the speaker's future conduct[22] or an "honourable understanding".[23] Nevertheless, in appropriate cases the unilateral promise is clearly recognised as giving rise to a binding obligation,[24] but one which, though it may generally be constituted without recourse to formalities of any kind, must be proved by writ or oath[25] unless perhaps it is linked to an onerous transaction.[26] In our accompanying Memorandum 39[27] we consider whether the present rule whereby proof of certain types of voluntary obligation is restricted to the writ or oath of the debtor should be retained.

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20 Malcolm v. Campbell (1891) 19R.278.

21 Scott v. Dawson (1862) 24D.440; Gray v. Johnston 1928 S.C. 659, per Lord Justice Clerk Alness.

22 Mackersy v. Davis & Sons Ltd. (1895) 22R.368.

23 Ritchie v. Cowan & Kinghorn (1901) 3F.1071.

24 See paras. 10-20 infra.

25 Millar v. Tremamondo (1771) Mor.12395; Hallet v. Ryrie (1907) 15 S.L.T. 367; Smith v. Oliver 1911 S.C. 103; Gray v. Johnston 1928 S.C.659.

26 Gloag, Contract, 2nd ed., p.52 fn.2; see also Memorandum No.38, para. 47.

27 Para. 53 et seqq.

B: EXAMPLES OF UNILATERAL PROMISES

10. A unilateral promise may have as its subject-matter any act or forbearance which could be the subject of a contract. Examples are to be found of promises to guarantee a third party's debts,[1] to leave a legacy or make a will in particular terms,[2] to convey heritage[3] to pay an annuity[4] and to make a donation.[5] Two instances of unilateral promises in operation seem to merit separate consideration. These are (a) promises of payment if a condition of performance is fulfilled, and (b) promises made in connexion with offers and acceptances, e.g. a promise to keep an offer open for a certain period (or indefinitely), a promise to accept an offer which has been made (or if one is made in certain terms or within a certain time). We consider separately in Memorandum No.38 the doctrine of *jus quaesitum tertio*.

1. Promise of payment if a condition of performance if fulfilled

11. If A makes to B a statement to the effect that if the latter rescues a hostage being held by a group of terrorists A will pay him £1000, or a statement to the effect that if B clears an area of ground and makes it ready for building work to start A will pay him £5000 or a statement to the effect that if B marries A's daughter A will pay him £1000, these proposals may be construed either as offers to pay, acceptance of which is required before A will be legally bound, or as immediately binding promises to pay conditional upon B's performance of the act stipulated.[6] In none of the situations specified, it may be noted, does B undertake to perform the act mentioned, nor is such an undertaking sought:

[1] *Fortune* v. *Young* 1918 S.C.1.

[2] *Hallet* v. *Ryrie* (1907) 15 S.L.T. 367; *Smith* v. *Oliver* 1911 S.C. 103.

[3] *Ferguson* v. *Paterson* (1748) Mor.8440; *Goldston* v. *Young* (1868) 7M.188 per Lord President Inglis at 191 and Lord Kinloch at 193; *Malcolm* v. *Campbell* (1891) 19R.278.

[4] *McQueen* v. *McTavish* 3rd March 1812, F.C.

[5] *Denny's Trs.* v. *Magistrates of Dumbarton* 1945 S.C. 147.

[6] See paras. 3 and 5 *supra*, and Memorandum No.36, paras. 34-36.

A's proposal is that he should pay B if the latter performs the act, not if he merely undertakes to do so. Where A's statement is regarded by the law as an offer a problem exists as to whether A should be entitled to withdraw it after B has commenced performance but before completion thereof. In Memorandum No.36 we make proposals which, in our view, would solve this problem in a reasonably satisfactory manner in a contractual context,[7] though we do not consider that a contractual form is usually appropriate for this type of undertaking.

12. English law, because of the existence of the doctrine of consideration does not recognise the validity of the unilateral promise as a means of creating a legal obligation, unless the promise is made in a deed under seal. Consequently, where a person proposes to pay a sum of money to another if that other performs a particular act, the proposal in English law must be construed as an offer which ripens into a binding obligation only when the act called for is performed, such performance amounting both to acceptance of the offer and the valuable consideration flowing from oferee to offeror in return for the latter's offer to pay. This analysis of the situation can be seen in operation in Carlill v. Carbolic Smoke Ball Co.[8] In Scots law, on the other hand, because of the absence of the doctrine of consideration and the consequent recognition of the unilateral promise as a source of legally binding obligations, such proposals to pay on the performance by the addressee of an act, which the latter did not in return undertake to perform, were up to the last decade of the nineteenth century normally treated as conditional promises. If the promisee performed

[7] See Memorandum No.36, paras. 56, 57, where we suggest, as one possibility that offers in general might be made irrevocable for a reasonable time after they are made; and para. 36 where we make proposals, restricted to offers of this particular type, on the assumption that offers in general should remain revocable.

[8] [1892] 2 Q.B.484; [1893] 1 Q.B.256. In Scots law in such a case if the proposal were treated as an offer rather than a conditional promise, then performance of the act called for would be analyzed not as the actual acceptance which brings a contract into being, but as conduct from which acceptance of the offer is inferred. See Memorandum No.36, paras. 32-36.

the act called for the promisor was bound to pay, not because an offer made by him had been accepted, but because the condition attached to his promise had been purified.[9] Since the decision in Carlill's case, however, the judicial tendency in Scotland, through the influence of that case, has been to regard statements of the kind under discussion as offers, acceptance of which by the addressee is implied from his performance of the act called for.[10] One reason, apart altogether from the persuasive influence of Carlill with its highly memorable facts, for the adoption of this attitude may be the restriction on the proof of gratuitous obligations to the writ or oath of the promisor. Whether an obligation is gratuitous is determined while matters are still entire; and a unilateral obligation assumed by a promisor without the reciprocal assumption of an obligation by the promisee does not cease to be gratuitous merely because the promised benefit is stated to be conditional upon an act or forbearance by the promisee or even because the promisee has actually fulfilled the conditions adjected to the promise.[11] We have already stated[12] that in our accompanying Memorandum No.39 we consider whether proof by writ or oath of certain categories of voluntary obligations, including those which are gratuitous, should continue to be required.

13. We are provisionally of the view that if the present rule whereby proof by writ or oath is essential in the case of promises made subject to a condition of performance by the promisee were to be abolished, this would remove any necessity for statements of the type illustrated in paragraph 11 to be construed as offers giving rise to no binding obligation until

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[9] See e.g. Millar v. Tremamondo (1771) Mor.12395; Petrie v. Earl of Airlie (1834) 13 S.68.

[10] Law v. Newnes (1894) 21R.1027; Hunter v. Hunter (1904) 7 F.136; Hunter v. General Accident Corp. 1909 S.C.344, 1909 S.C. (H.L.) 30.

[11] Millar v. Tremamondo (1771) Mor.12395; Smith v. Oliver 1911 S.C. 103; Gray v. Johnston 1928 S.C. 659; Forbes v. Knox 1957 S.L.T. 102.

[12] Para. 9 supra.

met by an acceptance, usually to be inferred from performance of the act called for. It is our opinion that contracts are primarily and predominantly means whereby parties agree to undertake mutual obligations and that it serves no useful purpose e.g. in cases of promises of reward, to squeeze situations of an entirely different character into the contract mould when there is to hand another legal institution which, with the removal of restrictions on proof, is capable of dealing with them satisfactorily and without resort to fiction. Where a seriously intended statement is made by one party to the effect that he will confer a benefit upon another if that other performs a particular act, but where the statement does not seek or indeed contemplate an acceptance or a reciprocal undertaking from that other to perform the act in question, the statement in our view should be regarded in law as a conditional promise which, once made,[13] binds the promisor and obliges him to confer the benfit on purification of the condition. Where, however, ex facie of the statement, no acceptance and no undertaking to perform is sought from the other party if it is alleged that an acceptance or a reciprocal undertaking was contemplated, and was understood by the other party to be contemplated, the onus of proving this should lie upon the party alleging it.

14. Where the proposal made by the first party does seek or contemplate acceptance or an undertaking by the other to perform the act stipulated we accept that that undertaking may be implied from the latter's conduct, including his performance of, or his beginning to perform, the act. Thus, if A, a manufacturer, is aware that B, a businessman, intends to visit a number of South American capitals during his visit to that Continent, he may write to the latter in Buenos Aires stating that he will pay him the sum of £5000 for a report on marketing prospects for A's product in Venezuela. This may be construed as an offer to B, the latter's acceptance of which may be inferred from his proceeding to Venezuela and beginning to draw up a report. The

[13] We consider in Memorandum No.39, para. 53 whether formalities should require to be complied with in the making of such a promise.

same statement by A could also be construed as a conditional promise, in which case B's travelling to Venezuela and starting work on a report would not result in the conclusion of a contract nor oblige him to complete the task. It would merely amount to his beginning to fulfil a potestative condition, which he would not be obliged to complete if, say, business reasons made it expedient for him to cut short his stay in Venezuela. We appreciate that in circumstances such as these the distinction between an offer which contemplates acceptance and the undertaking of a reciprocal obligation and a promise subject to condition which does not, may be a very narrow one and that it might be a task of very great difficulty for a court to determine the category appropriate to a particular statement. Nevertheless it is our view that situations in which a statement is made which _ex facie_ does not contemplate or seek an acceptance or an undertaking from the addressee to perform the act stipulated therein[14] are sufficiently common to justify our proposal that such statements should be classified as conditional promises and not as offers and that if it is alleged that acceptance or an undertaking to perform was contemplated, and was understood by the other party to be contemplated, the onus of proving this should lie on the party alleging it. We consider later in this Memorandum a number of the practical consequences of this classification.[15] Comments are invited on the proposals made in this and the preceding paragraphs.

2. <u>Promises made in connexion with offers and acceptances</u>

15. An offer may have adjected to it a promise by the offeror not to withdraw or revoke his offer for a specified period. Similarly, a promise may be made to a person contemplating the submission of an offer to the effect that if his offer is made in certain terms and within a certain time it will be accepted.

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[14]Examples are given in paras. 11 and 12, _supra_.
[15]_Infra_, paras. 21-26.

Again, an offeree may promise to submit an acceptance within a certain time of an offer already made to him. Under English law such promises are not legally binding unless the promise is made in a deed under seal or unless the promisee has provided valuable consideration for the promisor's undertaking.[16] In Scotland a promise to keep an offer open or to accept an offer which has been made, or if one is made, is, like any seriously intended promise, binding upon the promisor.[17] However, it may be the case, though there appears to be no authority on this particular point, that such a promise, as with any gratuitous unilateral obligation, must under the present law be proved by the writ or oath of the promisor.[18]

16. It is arguable that if the offer in relation to which the promise not to withdraw, or to accept, is made concerns the transfer of heritable property (or perhaps any matter in respect of which agreements must be constituted in probative form) the promise itself must be either tested or holograph. This proposition may perhaps be supported by a passage in the opinion of the Lord Ordinary (Lord Fraser) in the case of Littlejohn v. Hadwen.[19] Here the defender offered to sell a heritable estate to the pursuer. The offer was neither holograph nor tested. Some time later the defender undertook to keep his offer open for ten days. Within that period the pursuer sent to the defender a probative acceptance. The defender refused to convey the estate, whereupon the pursuer raised an action for specific implement. The Lord Ordinary assoilzied the defender on the ground that as his offer was not in probative form

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[16] See e.g. Working Paper No.60 of the Law Commission of England and Wales, paras. 14-18.

[17] Marshall v. Blackwood 1747 Elchies voce Sale, No.6; Littlejohn v. Hadwen (1882) 20 S.L.R.5.

[18] It is possible, however, that such promises would be regarded as forming part of a larger onerous transaction, and so not required to be proved by writ or oath. See Gloag, Contract, 2nd ed., p.52; but cf. Gow, The Mercantile and Industrial Law of Scotland, p.11.

[19] (1882) 20 S.L.R. 5.

there was no properly constituted contract of sale between the parties with the result that the defender still enjoyed a locus poenitentiae. The defender, however, had also argued that, in spite of his promise to keep the offer open for ten days, he was nevertheless entitled to revoke it, and had in fact done so, before the expiry of that period. The Lord Ordinary rejected this argument in the following terms:[20]

> "The Lord Ordinary is of opinion that the defender was not entitled to withdraw his offer before the expiry of the ten days; that it was an obligation, no doubt unilateral, but still binding upon the offeror during the appointed period."

After referring to Bell's Principles and his Treatise on the Law of Sale in support of this statement Lord Fraser went on to say:[21]

> "But undoubtedly the learned author is correct in stating that a gratuitous unilateral obligation, or promise, or offer, if written in the appointed manner, will be enforced according to the law of Scotland."

17. One possible interpretation of this dictum is that the promise to keep the offer open required in this case, because the transaction to which the offer related concerned heritable property, to be expressed in probative writ. A competing interpretation is that the conditional clause referring to writing "in the appointed manner" governs only the noun "offer" which immediately precedes it and not also the expressions "gratuitous unilateral obligation" and "promise". On the assumption that the first interpretation is the correct one, it can be argued that it should be accepted as representing the existing law of Scotland only on one of the two possible views of the nature of the legal consequences which flow from attaching to an offer a promise to keep it open.

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20 (1882) 20 S.L.R. 5 at 7.

21 (1882) 20 S.L.R. 5 at 7. Emphasis supplied.

18. One view is that such an arrangement leaves the offer in existence as such, but gives rise to an additional separate obligation to keep that offer open for the time specified. If the offeree accepted the offer within that period but the offeror failed to fulfil the duties incumbent upon him, the offeree would have the normal remedies for breach of a voluntary obligation, including (in appropriate cases) specific implement[22] and damages. Even if the offeror informed the offeree before expiry of the time limit that he had withdrawn his offer, the offeree would be entitled to ignore the anticipatory breach by the offeror of his obligation to keep his offer open, and to continue to act on the assumption that the obligation would be honoured.[23] If the offeree, on the other hand, acquiesced in the offeror's notification of withdrawal of the offer, e.g. because he had already sold and delivered the object of the offer to a third party, the offeree would be entitled to sue for damages for breach of the separate obligation to keep the offer open. To succeed in such an action, based as it is on breach of an obligation distinct from the offer which it accompanied, there would appear to be no reason why the offeree should be required to establish either that he actually did perform the formality of accepting the offer, or that he would have accepted it had it remained open.[24] However, in the absence of proof of an intention to accept, or the incurring of expense in securing reports as a preliminary to deciding whether to accept, the offer, any damages awarded for breach of the obligation to keep it open would, it is thought, be minimal. On this analysis of the meaning and legal effect of a promise to keep an offer open, it can be argued that there is little justification for an alleged requirement in the present law that

[22] Which would take the form of requiring the offeror to treat the acceptance as concluding a contractual obligation.

[23] This is merely a specific application of the general rules governing the innocent party's rights on anticipatory breach of contract. See White & Carter (Councils) Ltd v. McGregor 1962 S.C. (H.L.) 1.

[24] Cf. Graham v. Pollock (1763) Mor.14198.

such a promise made in connexion with an offer to sell heritage should be probative in form. The obligation to keep the offer open is separate and distinct from the subject matter of the offer itself, and there might therefore seem to be no reason why the formalities required in the constitution of this independent obligation should vary according to the nature of the offer in respect of which it is made.

19. The other possible interpretation of an offer coupled with a promise not to revoke it, is that the offer ceases to have an independent existence, the offer being converted into a composite promise combining the terms of the original offer and the original promise. Thus, an offer by A to sell his house to B for £20,000 containing, or accompanied by, an undertaking to keep the offer open for seven days, would amount on this view of the law to a promise by A to convey the house to B if the latter notified him within seven days and tendered, or expressed willingness to pay, £20,000. In other words, the terms of the original offer and the period of irrevocability stated in the original promise become conditions attached to the new composite promise. There no longer remains an offer to be accepted: the only question is whether the promisee has fulfilled the potestative conditions to which his entitlement to the house was subject.[25] It may well be that this view of the legal effect of a promise to keep an offer open was accepted by the House of Lords in Marshall v. Blackwood;[26] it was, at least, strongly urged by the successful respondents in that case.[27] On this analysis, it would seem to be the case that, since a unilateral promise to convey heritage must to be legally binding be tested or holograph,[28]

[25] See Ferguson v. Paterson (1748) Mor.8440; Goldston v. Young (1868) 7M.188 at 191 per Lord President Inglis; Malcolm v. Campbell (1891) 19R.278.

[26] 1747 Elchies voce Sale, No.6; 1749 H.L. Journal, vol. 27, p.339; Morrison's Supplement, 8 May 1749.

[27] Referred to in Littlejohn v. Hadwen (1882) 20 S.L.R. 5 at 7,8.

[28] Goldston v. Young (1868) 7M.188 at 191.

before a valid conditional unilateral promise can come into being through amalgamation of the original offer and the original promise not to revoke it, both that offer (whose terms are converted into conditions of the promise) and that promise to keep it open (the period mentioned in which is also converted into a condition of the promise) must be in probative form.

20. It is, thus, uncertain under the existing law whether a promise to keep open an offer relating to heritage must itself be constituted in holograph or tested writ. Though there appears to be no authority on the point, the same rule would presumably apply to a promise to accept an offer relating to heritage, and to a promise to keep open, or to accept, an offer on any other matter in respect of which probative writ is required. We think that the uncertainty surrounding the formalities required in the constitution of such promises should be resolved. It can be argued, on the one hand, that there is no sufficient reason why the fact that an offer relates to heritage (or any other matter in respect of which obligations must be constituted in probative writ) should entail the consequence that the accompanying promise must be tested or holograph: the obligation to keep the offer open, or to accept the offer, is separate and distinct from the subject-matter of the offer itself and the formalities required in the constitution of this independent obligation should not vary according to the nature of the offer in respect of which it happens to be made. On the other hand, the view might be taken that promises of this type are so closely linked with the offers which they accompany that they should require to comply with the same formalities as are insisted upon in the case of the offers themselves. We invite comments on whether a promise to keep an offer open, or to accept an offer, should require in order to be validly constituted to comply with the same requirements of form (if any) as the offer in respect of which it is made.

C. PROMISE AND OFFER

21. In the present section of this Memorandum we consider a number of the principal distinctions between unilateral promises and offers. It is largely because of the differences in their legal consequences that the proper classification of a proposal as a promise or as an offer, which may be a matter of the greatest difficulty, may also frequently be one of the utmost importance.

22. A seriously intended promise, once validly made,[1] results in the imposition upon the promisor of a legal obligation enforceable according to its terms by the person to whom or for whose benefit it was made. An obligation having been created in this way, it follows that a purported revocation of his promise by the promisor is ineffective. On the other hand, an offer under the present law may be withdrawn or revoked by the offeror by intimation to the offeree at any time before acceptance.[2] In an accompanying Memorandum we ask whether Scots law should adopt the attitude found in a number of European legal systems to the effect that an offer, once made, should not be capable of revocation until the expiry of a reasonable time.[3] However, even if such a change in the law regarding the revocability of offers were to come about, it would still remain the case that a promisor would be bound as soon as his promise was made, whereas an offeror would not be bound (except to the extent of keeping his offer open for a reasonable time) until he received an acceptance from the offeree.

23. Acceptance of an offer may in appropriate circumstances be implied from an offeree's performance of the act called for in the offeror's proposal as the offeree's part of the bargain.[4] However, an offeree's conduct even though exactly

[1] We consider infra, para. 27, the question whether a promise, in order to be legally enforceable, requires to be communicated to the promisee.

[2] See Memorandum No.36, para. 53.

[3] See Memorandum No.36, paras. 56-57.

[4] See Memorandum No.36, para. 34.

complying with the terms of the offer, cannot be regarded as inferring acceptance thereof if the offeree in acting as he did was in ignorance of the existence of the offer.[5] In the case of a unilateral promise to pay or to confer some benefit upon the promisee conditional upon performance of some act by the latter, conduct by the promisee which meets the terms of the promise would result in his being legally entitled to the benefit promised even though he had no knowledge of the promise when he acted as he did. His fulfilment of the conditions adjected to the promisor's obligation is what is relevant, and not his awareness of the effect of what he was doing. We have already proposed[6] that where a seriously intended statement is made to the effect that a payment will be made or a benefit conferred if the addressee performs a particular act and where no acceptance or undertaking to perform the act is sought or contemplated, this should in Scots law be regarded as a conditional promise and not as an offer requiring acceptance. One major consequence of this proposal would be that in most cases where a party fulfilled the terms of a reward advertisement, but in ignorance of its existence, he would nevertheless be entitled to the payment mentioned therein, always provided that he was a member of the class or group to which the advertisement was directed. As regards the few remaining cases in which the proposal to pay in return for conduct cannot, for whatever reason, be treated otherwise than as an offer, we think it should remain the law that no contract comes into being.[7]

24. An offer may be accepted only by the person or persons to whom it is addressed.[8] The offeree cannot effectively assign the offer to a third party and so confer on the latter the power to make an acceptance binding upon the offeror. There is no reason why the beneficiary of a unilateral promise, on the

[5] See Memorandum No.36, para. 27.

[6] Para. 13, supra.

[7] See Memorandum No.36, para. 27.

[8] See Memorandum No.36, para. 26.

other hand, should not, even without the promisor's consent, assign to a third party his right to the benefit promised, thereby enabling the latter if necessary to compel performance in his favour by the promisor.[9] In the case of a promise made conditional upon the performance of some act by the promisee in person it would seem, on general principle, that while the promisee may assign his rights to a third party, he cannot compel the promisor to accept that third party's performance as a valid purification of the condition to which the promise was subject, at least if there was an element of delectus personae in that performance.[10]

25. Under the present law an offer generally lapses and ceases to be open for acceptance on the death of either offeror or offeree, probably also on the insanity or bankruptcy of the offeror, and possibly on the insanity or bankruptcy of the offeree.[11] In the case of a unilateral promise, however, (including a promise to keep an offer open) since a binding obligation comes into being as soon as it is made, the supervening death, insanity or bankruptcy of either promisor or promisee would not automatically affect its existence or enforceability. The executor, curator bonis or trustee in bankruptcy of the deceased, insane or insolvent party would succeed to his rights or liabilities under the promise, as to his rights and liabilities of other descriptions. In Memorandum No.36 we propose[12] that the existing rules governing the lapse of offers in situations of this type be modified with a view to increasing the number of occasions on which an offer will survive the death, insanity or bankruptcy of offeror or offeree. Nevertheless, even if our proposal were implemented offers would still frequently lapse in these circumstances; consequently, the distinction between offers and unilateral promises would remain of great importance.

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[9] Stair, III.1.3,16; Erskine, III.5.2; Bell's Principles para. 1459.

[10] Cf. Hoey v. McEwan & Auld (1867) 5M.814; Grierson & Co. v. Forbes & Co. (1895) 22 R.812; Berlitz Schools v. Duchene (1903) 6F.181.

[11] See Memorandum No.36, paras. 62-64.

[12] Loc. cit.

26. Where the debtor in an obligation claims that he assumed that obligation under the influence of essential error, he is more likely to succeed in an action of reduction if the obligation flows from a gratuitous unilateral promise than if it flows from a mutual contract.[13] In the latter case the error will generally be held to be relevant only if shared, or induced, by the other party to the contract.[14] However, where the obligation derives from a unilateral promise the promisor may be granted relief even where his error is not induced by, or shared by, the promisee.[15]

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[13] Smith, A Short Commentary on the Law of Scotland, p.753; Walker, Principles, 2nd edition, p.584; Hunter v. Bradford Property Trust 1970 S.L.T. 173 esp. at pp. 186, 188, 191 (H.L.)

[14] Smith, loc. cit.; Walker, op. cit., pp. 580-85.

[15] Dickson v. Halbert (1854) 16D.586; Purdon v. Rowat's Trs. (1856) 19D.206; McLaurin v. Stafford (1875) 3R.265; McCaig's Trs. v. Glasgow University (1904) 6F.918; Sinclair v. Sinclair 1949 S.L.T. (Notes) 16. Cf. Bathgate v. Rosie 1976 S.L.T. (Sh. Ct.) 16.

D: COMMUNICATION AND DELIVERY

27. It is not a prerequisite to the constitution of a binding obligation through a unilateral promise that the promisee should accept the benefit promised.[1] Of course, if the promisee actually rejects the benefit sought to be conferred upon him, the promisor's obligation towards the promisee will be extinguished,[2] as will also be the case if the promisee fails to seek performance by the promisor of his obligation before expiry of the prescriptive period.[3] Communication of the promise to the promisee would also seem not to be essential to the creation of the obligation,[4] though clearly the promise must have come to the promisee's attention before he can claim performance; and failure by the promisor to communicate his intention to the promisee may well be evidence that the former has not passed from the stage of contemplation or consideration to the stage of engagement.[5] Where the promise is made in a written document the general rule is that the granter is not regarded as having finally and irrevocably committed himself while he retains possession of the document.[6] Delivery to the promisee or to a third party is deemed essential to establish a concluded intention on the part of the promisor to assume the obligation, except where the document itself contains a clause expressly dispensing with the need for delivery, or where the promise written therein is in favour of the granter's children, or where the document is one which the promisor might be expected to wish to keep because of an interest reserved by him in the subject matter thereof, or where the writing has been registered for publication.[7] Our understanding of these rules is that they are not substantive requirements essential to the conferring of a benefit by a written document, but are

[1] Stair, I.10.4; para. 7, supra.

[2] Stair, loc. cit.

[3] Prescription and Limitation (Scotland) Act 1973, s.6(1) and Schedule 1, para. 1(g).

[4] Stair, I.10.4.

[5] Burr v. Bo'ness Police Commissioners (1896) 24 R.148; Shaw v. Muir's Exrx. (1892) 19R.997.

[6] Bell's Principles, para. 23; Shaw v. Muir's Exrx. (1892) 19R.997.

[7] Erskine, III.2.44; Bell's Principles, para.24.

rather means of establishing that the granter genuinely intended to confer the benefit and had passed from the stage of mere contemplation to the stage of engagement. In appropriate cases it would be open to a court to hold that the granter's intention in this regard had been sufficiently established even though delivery of the document had not taken place. We are not aware that the law on the subject of communication or delivery has given rise to difficulties in practice. We would, however, welcome views on whether clarification or improvement is desirable and, if so, in what respects.

E. SUMMARY OF PROVISIONAL PROPOSALS AND OTHER MATTERS ON WHICH COMMENTS ARE INVITED

1. (a) Where a seriously intended statement is made by one party to the effect that he will confer a benefit upon another if that other performs a particular act, but where the statement does not seek or contemplate an acceptance or a reciprocal undertaking from that other to perform the act in question, the statement should be regarded in law as a conditional promise which, once made, binds the promisor and obliges him to confer the benefit on purification of the condition.

   (b) Where, ex facie of the statement, no acceptance and no undertaking to perform is sought from the other party, if it is alleged that acceptance or a reciprocal undertaking was contemplated, the onus of proving this should lie on the party alleging it. (Paras. 13 and 14).

2. Should a promise to keep an offer open or to accept an offer which has been made, or if one is made, require in order to be validly constituted to comply with the same requirements of form (if any) as the offer in relation to which it is made? (Para. 20).

3. Does the present law relating to acceptance, communication and delivery in the formation of obligations through unilateral promises stand in need of clarification or alteration and, if so, in what respects? (Para. 27).