

SCOTTISH LAW COMMISSION
(Scot Law Com No 152)



Report on Three Bad Rules in Contract Law

Laid before Parliament by the Lord Advocate under section 3(2)
of the Law Commissions Act 1965

*Ordered by the House of Commons to be printed
10th January 1996*

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

The Honourable Lord Davidson, *Chairman*
Dr E M Clive
Mr W A Nimmo Smith QC
Professor K G C Reid
Mr N R Whitty

The Secretary of the Commission is Mr K F Barclay. Its offices are at 140 Causewayside, Edinburgh, EH9 1PR.

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ISBN 0 10 206496 2

Scottish Law Commission

Items 1 and 2 of our First Programme of Law Reform

Three Bad Rules in Contract Law

To: The Lord Mackay of Drumadoon, QC
Her Majesty's Advocate

We have the honour to submit a Report on Three Bad Rules in Contract Law.

(Signed) C K DAVIDSON, *Chairman*
E M CLIVE
W A NIMMO SMITH
K G C REID
N R WHITTY

KENNETH F BARCLAY, *Secretary*
24 November 1995

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Part I Introduction

Scope of report

1.1 In this report we recommend the abolition of three bad rules of Scottish contract law. They all have common but unhelpful names. The first is commonly called the parole evidence rule, although it has nothing to do with parole evidence. The second is commonly called the *Winston v Patrick* rule, although it ante-dates that case by a hundred years.¹ The third is commonly called the rule against the *actio quanti minoris*, although few now know what those words mean.

1.2 The so-called parole evidence rule is the rule that where a contract appears to have been embodied entirely in writing, extrinsic evidence, whether written or oral, is not admissible for the purpose of proving additional terms. Its effect is to prevent a party from proving a term of the contract which has been expressly agreed and which is still in force. It enables one party to a contract to found on some of its terms only and to prevent the other party from proving other terms. We will refer to this rule as the rule on proof of additional terms.

1.3 The so-called *Winston v Patrick* rule is the rule that a contract is entirely superseded by a subsequent conveyance or similar deed, even if the parties intended some of its terms to survive and even if it contains terms which are not suitable for insertion in a conveyancing deed. We will refer to this rule as the supersession rule.

1.4 The so-called rule against the *actio quanti minoris* is the rule that a buyer of certain types of property cannot, while retaining the property, obtain damages for a breach of contract by the seller.

1.5 These three rules have pernicious effects and we regard their reform as a matter of urgency.

Consultation

1.6 In 1994 the Commission published a discussion paper on the above topics.² Consultation revealed strong support for reform. The Commission is very grateful to those who submitted comments on the provisional proposals in the discussion paper.³

1.7 The discussion paper also dealt with the rule that extrinsic evidence is not in general admissible for the purpose of interpreting the terms of a written contract. We make no recommendation in this report for immediate reform of that rule. There are so many exceptions to it that it does not usually lead to harmful results. The main criticism of the law in this area is that it is unnecessarily complicated and difficult, not that it causes injustice in

¹ *Winston v Patrick* 1980 SC 246 merely gave further effect to a rule which had been established since at least *Lee v Alexander* (1883) 10R (HL) 91.

² Discussion Paper No 97, *Contract Law: Extrinsic Evidence, Supersession, and the Actio Quanti Minoris*.

³ A list of those who submitted comments is in Appendix B.

practice. Reform of this rule is therefore less urgent than reform of the three rules mentioned above. We believe that reform would be desirable at some stage, and we are fortified in this belief by the generally positive responses to the proposals on this topic in the discussion paper, but consultation revealed a few areas of potential difficulty and we would like to have an opportunity for further consideration and for further comparative research. We therefore intend to return to this topic in a later report.

Part II Restriction on proof of contract terms

The general rule

2.1 We are concerned in this part of the report with the situation in which a contract appears to be, but is not, contained entirely in a written document.¹ The general rule under the existing law is that extrinsic evidence is not admissible to prove the terms which are not in the written document. So if one of the parties founds on the terms in the written document, and denies that there are any other terms, a court will not allow the other party to prove those terms of the contract which are not in the written document.

Example 1. A factor (F) entered into a contract of employment with a landowner (L), whereby F would be the factor on L's estate. In the presence of witnesses, L presented F with a written contractual document for signature. F noticed that it provided for the contract to be terminated by one month's notice by L. Before signing, he asked whether it could be agreed that the contract would be on a yearly basis and that the one month's notice had to be given prior to the term of Martinmas in any year. He said that he was not prepared to take the job unless this was clearly agreed. L agreed that this would be an additional term of the contract. Relying on the fact that there were witnesses to this agreement, F signed the document presented to him. In court proceedings some time later F wished to lead evidence of the additional term as to the yearly basis of the contract. The court would not allow him to do so, holding that extrinsic evidence was not admissible to add to or qualify the terms of the written document.²

Example 2. A hirer (H) entered into a contract with an owner (O) whereby H agreed to hire a valuable piece of machinery from O. O's solicitors sent H a form of offer for signature. H refused to sign because the form did not contain certain terms which he wanted to be part of the contract. He went to see O's solicitors, who telephoned O for instructions. O authorised the solicitors to give H a letter confirming O's agreement to the additional terms which did not appear in the formal offer. The letter was duly handed over and, on the understanding that these additional terms were part of the contract, H signed the formal offer which was then accepted in writing by O. A question later arose as to the extent of O's obligations under the contract. O founded on the formal offer and acceptance. The court held that the

¹ The same rules apply where the contract appears to be in two or more related documents, such as an offer and acceptance, but for the sake of simplicity we will concentrate on the case of a single written document.

² Example suggested by *Hilson v Otto* (1870) 9M 18, where the facts were not quite so clear cut. See also *Riemann v John Young & Co Ltd* (1895) 2 SLT 426 and the English case of *Evans v Roe and Others* (1872) L.R. 7 C.P. 138. In cases where the written document is intended to contain the **whole** contract but does not accurately reflect the parties' agreement the appropriate remedy would be to seek to have the document rectified under s 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. In the example in the text the written document accurately reflects what the parties intended to be in it. The problem is not that the document is inaccurate but rather that there is an additional term which neither party intended to be in it.

terms of the formal offer and acceptance could alone be considered. It could not lead evidence of the additional terms set out in the letter from O's solicitors.³

Exceptions

2.2 The general rule mentioned above is subject to several exceptions.

2.3 *Collateral agreements.* There is an exception for collateral agreements.

"By an exception to the general rule, agreements which are collateral to a writing may be proved by extrinsic evidence".⁴

Gloag⁵ cites the case of *Renison v Bryce*⁶ as an example of this exception. A person who had transferred a business in exchange for shares in a proposed company was allowed to prove a separate agreement, not mentioned in the written offer and acceptance relating to the transfer of the business, that the share capital of the proposed company should not exceed a certain amount.

2.4 Another example of the exception is *British Workman's and General Assurance Co Ltd v Wilkinson*.⁷ 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 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 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."

2.5 The distinction between a collateral agreement and an additional term is not easy to grasp. It might be thought, for example, that a separate agreement between a landlord and a tenant whereby the landlord agreed to provide certain new fences could be a collateral agreement. However, in one case⁸ an attempt by a tenant to prove such a separate agreement was regarded as just "an attempt to engraft on the lease a clause not to be found in it".⁹

2.6 *Missing terms.* 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 but where it is also clear that there has been a completed contract.¹⁰

³ Example suggested by *Norval v Abbey* 1939 SC 724 where the contract related to the lease of a farm.

⁴ Walker and Walker, *Evidence*, para 262.

⁵ *Contract* (2d ed 1929) p 370.

⁶ (1898) 25R 521.

⁷ (1900) 8 SLT 67.

⁸ *McGregor v Lord Strathallan* (1862) 24D 1006.

⁹ By Lord Justice-Clerk Inglis at 1010.

¹⁰ See the analysis in Discussion Paper No 97 at paras 2.14 to 2.17. The leading cases are *McLeod v Urquhart* (1808) Hume 840; *Russell v Freen* (1835) 13S 752; *McAllister v McGallagley* 1911 SC 112 and *Watters v Hunter* 1927 SC 310.

"Defence by appeal to a formal contract rests on its being assumed to contain the whole 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."¹¹

The clearest case would be where the document itself said that it did not contain all the terms of the contract already agreed between the parties. Where the document is silent on this point it will often be difficult to know whether a court will hold that its terms show that it does not contain the complete contract.¹² Although described as illustrating an exception to the rule on proof of additional terms,¹³ these cases of missing terms are more properly regarded as cases where the rule simply does not come into operation in the first place. The rule applies only where the document in question appears to contain the whole terms of the contract. If the document does not appear to do so, the rule restricting proof does not apply and there is no need for any exception.

2.7 *Writing admittedly inaccurate.* Another exception to the rule restricting 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.¹⁴

"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."¹⁵

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.

2.8 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 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.

Does the existing law have any content?

2.9 English law has a "parol evidence rule" similar to the one described above. The English Law Commission 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

¹¹ See *McNally v Esso Petroleum Co Ltd* 1965 SLT (Notes) 13. *McClymont v McCubbin* 1995 SLT 1248 seems also to be a case of this type.

¹² See eg *Pollock & Dickson v McAndrew* (1828) 7S 189 where there was a contract for the supply of cast-iron pipes at a certain price per yard. The written offer, which was accepted by the buyers, said nothing about quantity. It might have been thought that there was a missing term as to the quantity of pipes to be supplied but the court preferred to regard the contract as one for the supply of an undetermined number of pipes "leaving each party free to stop when they choose" and refused to allow extrinsic evidence that the supplier had agreed to supply 240 yards. The pleadings in this case were not, however, very satisfactory. See the comments in Discussion Paper No 97 at pp 136-137.

¹³ See eg Walker and Walker, *Evidence*, pp 276-278.

¹⁴ See Macphail, *Evidence*, paras 15.16-15.18; Walker and Walker, *Evidence*, para 266.

¹⁵ *Grant v Mackenzie* (1899) 1F 889, by Lord McLaren at 894.

content.¹⁶ Their argument is interesting and it is worth examining it to see if it applies also to Scottish law.

2.10 In their earlier working paper on this subject the English 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."¹⁷

Their provisional conclusions were that the exceptions to the rule had so greatly reduced its scope as to lead to uncertainty in the existing 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.¹⁸

2.11 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".¹⁹

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 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.

2.12 We do not think, however, that the Scottish rule restricting proof of additional terms can accurately be described in the same way as the English parol evidence rule has been described in the Law Commission's report. In Scotland the rule restricting proof of additional terms is 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.

¹⁶ In their report on *The Parol Evidence Rule* (Law Com No 154, 1986).

¹⁷ *The Parol Evidence Rule* (Working Paper No 70, 1976) p 4.

¹⁸ Working Paper No 70, para 44.

¹⁹ Law Com No 154, para 1.7.

2.13 It may be that the Scottish courts could move the law forward by a creative use of the exception for collateral 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 whole contract has been embodied in writing. It would not, however, be safe to assume that the Scottish rule on proof of additional terms is at present a harmless circular statement without real content.

Supposed justifications for the existing law

2.14 It is difficult to see any justification for a rule which prevents a party from proving a valid and subsisting term of a contract and which is plainly liable to produce injustice and resentment.

2.15 One supposed 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."²⁰

However, this justification is hardly applicable to cases where the writings founded on consist only of informal letters 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 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 which he or she wanted to see in it 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".²¹

2.16 Another justification for the rule on proof of additional terms is that it prevents the parties from leading irrelevant evidence of communings and understandings which form no part of the contract. We have a great deal of sympathy with this justification. Clearly, it is not desirable to allow irrelevant evidence of non-contractual communings to be led. However, the difficulty is that the existing rule excludes not only irrelevant evidence of communings but also relevant evidence of expressly agreed contractual terms. The result can be manifest injustice. We do not think that that price is worth paying for an incidental advantage which could be more directly secured. The real remedy for attempts to lead

²⁰ Lord Gifford in *Inglis v Buttery* (1877) 5R 58 at 69; aff'd (1878) 5R (HL) 87. Much of the confusion in this area of the law is caused by the fact that the word "contract" is commonly used in two senses. It may be used in a popular sense, to signify a document, as in the sentence "I return the contract, duly signed on page four". Or it may be used in a juridical sense, to mean the agreement between the parties which produces rights and obligations for them.

²¹ Lord Gifford, at same citation.

evidence of mere communings is to disallow such evidence on the ground that it is irrelevant.

2.17 It seems that another justification for the rule, at least historically, was a distrust of parole evidence as such. This view comes across most clearly in a whole series of early cases where the court was quite prepared to allow proof of additional terms by writ or oath.²² This justification is out of line with modern views on the value of different types of evidence. The days when many matters could be proved only by writ or oath have gone. The last remaining requirements of proof by writ or oath were abolished by the Requirements of Writing (Scotland) Act 1995.²³

2.18 In some of the cases there are indications of another supposed justification for the rule – that the parties have only themselves to blame if they leave important terms out of the written record of the contract.²⁴ They "ought" to have included them. However, in the case of the vast majority of ordinary contracts which do not require writing for formal validity, there is simply no such obligation. There is nothing, for example, to stop parties from agreeing price by fax and quantity by telephone. To introduce into the substantive law a novel rule – that a contract cannot be partly in writing – would be at variance with existing principles and pernicious in its effects.

2.19 Another supposed justification for the rule on proof of additional contract terms is that, notwithstanding the scope of the exceptions to the rule, it promotes certainty. However, the parties to a contract 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. Where they do not include such a clause the question is whether the advantage of certainty requires a rule which is as rigid in its effects and is liable to cause injustice as the rule of the existing law. We do not believe that it does. We will suggest later that a rebuttable presumption would combine the advantage of certainty with the possibility of avoiding injustice.

Criticisms of the existing law

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

²² 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; *Stewart v Clark* (1871) 9M 616.

²³ Section 11.

²⁴ See eg *Walker v Caledonian Railway Co* (1858) 20D 1102 at 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 406. ("If the agreement of the parties was such as the defenders allege, it ought to have been reduced to writing".)

2.21 The existing law has become unprincipled. It was based on some sort of principle 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. It is difficult to see the principle on which it is based when it is used to exclude all evidence of additional terms.

2.22 The law is incoherent in that the substantive law recognises that most contracts can be constituted partly in writing if the parties so wish, while the law on proof of additional terms can operate in certain cases to deny effect to any part of the contract which is not in writing.

2.23 The law is also incoherent in that there is one rule for subsequent variations of written contract terms and another for contemporaneous additions. If the parties vary their written contract ten minutes after it has been concluded, the variation may be proved by any means.²⁵ If the parties agree ten minutes before a written contractual document is signed that, notwithstanding what is in it, some other term is to be binding on them, extrinsic evidence of the additional term will not be allowed.²⁶

2.24 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.

Earlier proposals for reform

2.25 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?²⁷

A majority of those who commented favoured option (b).

2.26 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 all been reduced to writing could come into operation.

²⁵ Section 11 of the Requirements of Writing (Scotland) Act 1995 has abolished all requirements of proof by writ or oath. If the contract is of the type which requires writing for formal validity then, under section 1(6) of the Act, the variation must be in writing to be formally valid, but that is a different matter.

²⁶ See *Noroal v Abbey* 1939 SC 724.

²⁷ Memorandum No 46 on the *Law of Evidence* (1980) paras P.06 and P.07 and proposition 164.

Proposal in Discussion Paper

2.27 In Discussion Paper No 97 we sought views on the options of (a) doing nothing (b) introducing a rebuttable presumption that a document which appeared to contain all the express terms of a contract actually did so and (c) abolishing the rule on proof of additional terms and not replacing it by any presumption. Our provisional preference was for the introduction of a rebuttable presumption. A presumption of this nature is said to be all that survives of the parol evidence rule in England and Wales.²⁸ In Germany

"the drawing up of a written document containing legal declarations merely gives rise to a presumption that it is accurate and complete".²⁹

Although the starting point is different this is also said to be the practical effect of French law in a great many cases.³⁰

Results of consultation

2.28 There was strong support for reform of the law on proof of additional terms. Only two consultees opposed reform. Of those who favoured reform the majority supported the idea of a rebuttable presumption rather than outright abolition of the rule.

2.29 Consultees raised one or two points which they considered could usefully be clarified. One related to "entire contract" clauses – that is, clauses which provide that a written document executed by the parties to the contract contains all the terms of the contract agreed by the parties at the time of execution. Some consultees thought that any statutory provision should deal expressly with the effect of such clauses. This may be useful for purposes of clarification of the scope of any new provision. However, it is not strictly necessary. "Entire contract" clauses do not in our view raise questions of evidence so much as questions of substance. The "entire contract" clause is either an accurate reflection of the agreement between the parties or it is not. If it is, then the terms of the document necessarily supersede any prior terms and, as a matter of substance, the only terms of the contract as at the time of execution are the terms set out in the written document. Evidence of a prior term would simply be evidence of a superseded term and, as such, would be irrelevant. If, on the other hand, the "entire contract" clause is not an accurate reflection of the agreement between the parties then the remedy is rectification. Of course, an "entire contract" clause may also be challengeable under the common law on fraud or under the Unfair Contract Terms Act 1977 or the Unfair Terms in Consumer Contracts Regulations 1994. However, if unrectifiable and unchallengeable, it ought simply to take effect according to its terms. Nonetheless, although we do not consider that any special provision on "entire contract" clauses is necessary, the very fact that this issue was raised by some consultees suggests that there could be value in including a provision, for the avoidance of doubt, preserving the effect of such clauses.

²⁸ Wedderburn, "Collateral Contracts" [1959] CLJ 58 at 62; the Law Commission, Report on *The Parol Evidence Rule* (Law Com No 154, 1986) para 2.13. 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 62.

²⁹ Zweigert and Kötz, *An Introduction to Comparative Law* (translated by Tony Weir, 2d edn 1987) Vol II, p92.

³⁰ Zweigert and Kötz at p 92.

2.30 A few consultees raised questions as to the effect of our provisional proposal in relation to those contracts which require to be in writing for formal validity. This is a separate question. The fact that additional terms can be proved does not mean that they are formally valid.³¹ The position under our proposal is the same as if, under the existing law, an additional term had been admitted by the parties to the contract, or proved by virtue of one of the exceptions to the existing rule. Our proposal goes only to proof and not to formal validity. It seems clear, for example, that any term of a contract for the creation, variation or extinction of an interest in land should have to comply with the provisions of the Requirements of Writing (Scotland) Act 1995.³² The draft Bill attached to this report contains an express provision to resolve any doubt there may be on this point.³³

2.31 Similarly, the fact that an additional term could be more easily proved in some cases than under the existing law would not alter in any way the effect of the term once proved. If something requires to be registered before it will affect real rights then that will be the case whether it is proved under restrictive rules of evidence or less restrictive rules of evidence. Ease of proof does not have any bearing on effect once proved.

2.32 Two consultees thought that a new provision should not be expressed in terms of a document having the appearance of containing all the terms of the contract. They suggested alternative formulations which were expressed in terms of documents which did, or were intended by the parties to, contain all the terms. However, the drawback of such formulations is that they leave no room for any rule on additional terms. If a document actually does contain all the terms of the contract, or if it is intended by the parties to do so, which will usually come to the same thing, then there are no additional terms to prove. The existing rule applies only where a writing appears to, but does not in fact, contain all the express terms of a contract. That should also be the sphere of operation of any presumption. Presumptions are always based on appearances, never on the very facts which have to be established.

2.33 In the discussion paper we considered whether the new presumption which we were proposing could give rise to unacceptable risks for third parties, such as assignees. We noted, however, that this was not a new problem under our proposal. It could arise already where, for example, the parties to the contract admitted the additional term or where the exception for collateral terms or the exception for missing terms applied or where the contract had been varied after it had been entered into. 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.³⁴ 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

³¹ See *Perdikou v Pattison* 1958 SLT 153 where the court held that it would be pointless to allow the existence of an additional term of a lease for more than a year to be referred to the oath of the party denying it because at best that would establish something which required writing for its constitution.

³² Section 1 of the Act requires writing for the constitution of "a contract" for any of these matters. It does not say that writing is required for only some of the terms of such a contract. It would still be open to argue, however, that particular additional terms constituted a separate agreement, or unilateral obligation, for something which did not require writing.

³³ Clause 1(4).

³⁴ See *Redfearn v Ferrier, Somervail and Others* (1813) 1 Dow 15.

proposal. We did consider the possibility of a statutory provision 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 collateral terms and subsequent variations and the other risks to which assignees are already subject. There would be an inroad into the principle that the assignee has the same rights as the assignor. We concluded that it would be unnecessary, and probably undesirable, to have a special statutory rule for the protection of third parties but we specifically invited the views of consultees on this point. Of those who responded, only the Faculty of Advocates thought that there should be a special rule for third parties. We have considered the question again in the light of the Faculty's response but have concluded that, while there are arguments both ways, the balance of the arguments is in favour of making no change in this respect. All that is being changed is the ease of proof of certain terms which already are additional terms. We do not believe that a change of this nature justifies a special rule on the effect of terms proved in one way which would not apply to terms which were admitted by both parties to the original contract or which were proved because of the operation of one of the exceptions to the existing rule.

Assessment and recommendation

2.34 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 an apparently complete 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, in those cases where no exception applies, 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 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. Two separate consultations, in 1980³⁵ and again in 1994,³⁶ produced majority support for a rebuttable presumption rather than outright abolition of the rule on proof of additional terms.

2.35 The existing rule restricting proof of additional terms and the exceptions to it apply also to unilateral voluntary obligations, such as bonds.³⁷ The policy considerations appear to us to be the same and, although our consultation was limited to contracts, we think that the new rules should apply also to unilateral voluntary obligations.

³⁵ On Memorandum No 46, *Law of Evidence* (1980) proposition 164.

³⁶ On Discussion Paper No 97.

³⁷ See Walker and Walker, *Evidence*, para 249.

2.36 We therefore recommend that:

1. (1) The existing strict rule which restricts proof of additional contract terms when a contract appears to be contained entirely in a written document or documents should be replaced by a rebuttable presumption.

(2) 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 should 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.

(3) Where the presumption applies,³⁸ extrinsic evidence, whether oral or documentary, should be admissible for the purpose of proving that a contract includes additional express terms, whether agreed to orally or in writing.

(4) It should be made clear that the new provision is without prejudice (a) to the effect of an express provision in a document that it contains all the express terms of a contract between the parties and (b) to the effect of any enactment on constitution or formal validity.

(5) The above rules should apply also to unilateral voluntary obligations.

(Draft Bill, clause 1)

2.37 The rule being changed here is a rule of the law of evidence. We think that the change should take effect only in relation to proceedings commenced after the new legislation comes into force. New rules of evidence are sometimes applied to proceedings which have been begun but in which evidence has not yet been heard. That is appropriate where there is some special reason for introducing the new evidential rule as quickly as possible. We do not believe that there is any such special reason in relation to the rule on proof of additional terms.

³⁸ Where the presumption does not apply – that is, where the document does not appear to contain all the contract terms – extrinsic evidence would be admissible anyway. See para 2.6 above. It is useful to include the reference to the presumption in order to give content to the word "additional" and to make it clear that it means additional to those which appear in the document or documents.

Part III Supersession of contract by conveyance

The existing law

3.1 **General rule.** The rule with which we are concerned in this part of the report is that, where a contract is followed by a conveyance or other formal deed in implement of it, the contract is superseded by the conveyance or other deed. The rule receives its most common 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 payment of the price. 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*.²

"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."³

In this form the rule remains in full force.⁴

3.2 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.⁵ In such cases the supersession will occur when the formal document takes effect, which, in the case of a document containing the terms of a mutual contract, will generally be when the document is executed.⁶ In its application to such documents the supersession rule is particularly liable to become confused with, and to overlap, the rule on proof of additional terms which we considered in Part II. It is not always clear whether a court is deciding a

¹ (1883) 10R (HL) 91 at 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.

² (1893) 20R (HL) 27 at 29.

³ 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.

⁴ See eg *Aberdeen Rubber Ltd v Knowles & Sons (Fruiterers) Ltd* 1994 SLT 663 (IH) and 1995 SLT 870 (HL). See also Cusine and Rennie, *Missives* (1993) pp 139-154; Gretton and Reid, *Conveyancing*, (1993) p 334.

⁵ See eg *Robertson's Trs v Lindsay* (1873) 1R 323 by Lord Deas at 327 (lease).

⁶ See *Robertson's Trs v Lindsay*, above, by Lord President Inglis at 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.)

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.⁷ This is why, in our view, reform of these two rules must be considered together.

3.3 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 above. 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 or proved by admissible evidence to have been agreed, no longer have any legal effect. In a typical supersession case there is no dispute 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.⁸

3.4 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.⁹ 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 with which we are not here concerned. 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 non-contractual prior communings by contracts.

3.5 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 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."¹⁰

There was authority for this view in the case of *Jamieson v Welsh*¹¹ 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

⁷ 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.

⁸ See eg *Winston v Patrick* 1980 SC 246 where the defenders pleaded that "said missives having thereby been superseded, the defenders should be assoilzied".

⁹ See eg *Aberdeen Rubber Ltd v Knowles & Sons (Fruiterers) Ltd* 1994 SLT 663 at 670 and 1995 SLT 870 at 874-875 where it was pointed out that the prior communings had no contractual effect and "formed no part of the contract between the parties".

¹⁰ *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.

¹¹ (1900) 3F 176.

"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".¹²

Lord Kinear 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 sale of corporeal moveables..."¹³

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."¹⁴ However, this is not the way the law has been applied since the case of *Winston v Patrick*.¹⁵ 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.

3.6 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 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.

3.7 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".¹⁶ 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

¹² At 181.

¹³ At 182.

¹⁴ *Bradley v Scott* 1966 SLT (Sh Ct) 25 and 26.

¹⁵ 1980 SC 246.

¹⁶ Lord Justice-Clerk Wheatley, delivering the opinion of the Second Division, at 249.

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.

3.8 The court referred first to Lord Watson's statement in *Lee v Alexander*¹⁷ 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."¹⁸

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 it was not normal conveyancing practice to include such warranties in the disposition.¹⁹ 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."²⁰

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.

3.9 *Winston v Patrick* caused consternation and uncertainty. It caused consternation because it applied the supersession rule in a way in which it had been assumed that it would not be applied.²¹ It caused uncertainty because it left the scope of the exceptions unclear.

¹⁷ (1883) 10R (HL) 91 at 96.

¹⁸ Lord Justice-Clerk Wheatley at 249.

¹⁹ This averment had been added by amendment before the appeal to the Court of Session.

²⁰ Lord Justice-Clerk Wheatley at 250. The court might conceivably have found it easier to reach a sensible decision if it had talked of collateral terms rather than collateral obligations.

²¹ See Reid, "Prior Communings and Conveyancing Practice" 1981 JLSS 414 and para 3.5 above; Cusine and Rennie, *Missives* (1993) pp 142-143; Gretton and Reid, *Conveyancing* (1993) p 336. ("No case this century has caused more surprise and worry to the conveyancing profession ...")

Were the exceptions mentioned by Lord Wheatley the only exceptions? What did they mean?

3.10 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.²² 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

3.11 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 exhaustive,²³ 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.

3.12 **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.²⁴ 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".²⁵ Another curious thing about this exception is that it seems to be just an example of the second exception for collateral obligations.²⁶

3.13 **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".²⁷ 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 authority planning or building requirements. Such an obligation is clearly distinct from the obligation to convey the heritage.²⁸ Yet, as we have seen, it was precisely this type of obligation which was held not to be collateral in *Winston v Patrick*.

3.14 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.²⁹ 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

²² *Young v McKellar* 1909 SC 1340.

²³ By Lord Milligan in *Taylor v McLeod* 1990 SLT 194 at 199 and *Porch v McLeod* 1992 SLT 661 at 663 and by Sheriff Gordon in *Greaves v Abercromby* 1989 SCLR 11 at 14 and 15.

²⁴ As in *Jamieson v Welsh* (1900) 3F 176.

²⁵ *Winston v Patrick* 1980 SC 246 at 249.

²⁶ As is pointed out in Cusine and Rennie, *Missives* (1993) p 145 and in Gretton and Reid, *Conveyancing* (1993) p 337.

²⁷ At 249.

²⁸ 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 Clayton* 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.

²⁹ See *Taylor v McLeod* 1990 SLT 194 by Lord Milligan at 198.

in the future.³⁰ 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 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 heading system will be in good working order at the date of entry" has on separate occasions been held both to be collateral³¹ and also not to be collateral."³²

3.15 The exception for collateral obligations has been held to cover obligations to deliver moveables,³³ to build on the property sold,³⁴ to do other work on the property³⁵ or to reimburse certain expenditure.³⁶ It has also been held to cover a clause in missives giving the lessee under a proposed lease an option to purchase.³⁷

3.16 **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.³⁸ 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 more 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.³⁹ 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 see if they contained a non-supersession clause.⁴⁰ More recently some judges have taken the view that the word

³⁰ See Gretton and Reid, *Conveyancing* (1993) pp 341-342.

³¹ *Jones v Heenan* 1988 SLT (Sh Ct) 53; *Taylor v McLeod* 1990 SLT 194.

³² *Jamieson v Stewart* 1989 SLT (Sh Ct) 13; *Parker v O'Brien* 1992 SLT (Sh Ct) 31.

³³ *Jamieson v Welsh* (1900) 3F 176.

³⁴ See eg *McKillop v Mutual Securities Ltd* 1945 SC 166; *Hardwick v Gebbie* 1991 SLT 258; *King v Gebbie* 1993 SLT 512.

³⁵ See eg *Pena v Ray* 1987 SC 1; *Jones v Heenan* 1988 SLT (Sh Ct) 53.

³⁶ See eg *Central Govan Housing Association Ltd v R Maguire Cook & Co* 1988 SLT 386; *Wood v Edwards* 1988 SLT (Sh Ct) 17.

³⁷ *Meek v Bell* 1993 GWD 20-1238.

³⁸ See *Jamieson v Stewart* 1989 SLT (Sh Ct) 13 by Sheriff-Principal Caplan at 16.

³⁹ See *Jamieson v Stewart* above; *Taylor v McLeod* 1990 SLT 194.

⁴⁰ *Finlayson v McRobb* 1987 SLT (Sh Ct) 150; *Wood v Edwards* 1988 SLT (Sh Ct) 17. These cases seem to be based on the rule on proof of additional terms (a rule of evidence) rather than on the supersession rule (a rule of the substantive law), which demonstrates the need to reform both rules simultaneously.

"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.⁴¹ One suggestion is that personal obligations are "obligations relating to the parties personally as opposed to obligations relating directly to the subjects of sale".⁴² 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.⁴³ The obligation arising under a warranty that all necessary consents and warrants 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.⁴⁴

3.17 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.⁴⁵

Criticisms of the existing law

3.18 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 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.

3.19 The supersession rule has given rise to great uncertainty in the law. Nobody is sure what the law is. Solicitors are unable to give clear and confident advice. The uncertainty in the law has been the subject of strong criticism.⁴⁶

3.20 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.

⁴¹ See *Taylor v McLeod* 1990 SLT 194 where Lord Milligan pointed out, at 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.

⁴² Gretton and Reid, *Conveyancing* (1993) p 339.

⁴³ *Greaves v Abercromby*, above.

⁴⁴ *Porch v McLeod*, above.

⁴⁵ Gretton and Reid, *Conveyancing* (1993) pp 339-340. See also the note to *Greaves v Abercromby* 1989 SCLR 11.

⁴⁶ The law "is muddled and unclear and clarification is needed urgently". Cusine and Rennie, *Missives* (1993) p 151.

3.21 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.

3.22 The supersession rule in its current form is unnecessary. It goes too far. There can be no objection to a rule that a conveyance supersedes a contract in so far as it implements it. That is just a statement of the obvious. It is a general principle of contract law that contractual obligations are discharged by performance. A person who is obliged to deliver or pay or convey, and who duly delivers or pays or conveys, is not bound to deliver or pay or convey again. However, it is not necessary to extend that obvious rule to terms of the contract which are not implemented by the conveyance.

Assessment of existing law

3.23 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.

3.24 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 surviving⁴⁷ and which are not covered by provisions in the conveyance, do survive unless the parties agree otherwise. This, we think, is more likely to correspond to the intention of the 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.

Proposal in Discussion Paper

3.25 In Discussion Paper No 97 we suggested that any rule of law whereby, regardless of the intentions of the parties, terms of a contract were 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 the conveyance or other deed should supersede the contract in so far as it implemented or gave effect to the contract.

⁴⁷ Those which are discharged by performance would be inherently incapable of surviving.

Results of consultation

3.26 There was unanimous support for reform of the supersession rule and we were left in no doubt that the law as it has developed since *Winston v Patrick*⁴⁸ is causing great practical inconvenience. Most consultees supported the specific proposal for reform made in the discussion paper. However, the Law Society of Scotland thought that an express provision that the conveyance or other deed superseded the contract in so far as it implemented it or gave effect to it might leave room for an argument that clauses in missives which conveyancers would not normally regard as having been dealt with by the disposition would be superseded. Another commentator pointed out that the second part of our proposal was unnecessary because implemented obligations would come to an end anyway. We accept these points. The draft Bill appended to this report does not include any express provision that certain terms are superseded. On the other hand it would be a mistake to go too far in the other direction and to give the impression that the whole contract, including implemented terms, necessarily survives the execution or delivery or a conveyance. That would be very confusing. The defect in the existing law is not that the conveyance supersedes the contract in so far as it implements it. The defect is that it is taken to supersede the contract entirely and therefore to cause unimplemented or unfulfilled⁴⁹ terms to fall. We think therefore that it would be useful to make it clear that it is only unimplemented or otherwise unfulfilled terms which are not superseded.

3.27 Two consultees⁵⁰ suggested that the reference to deeds "intended to implement or give effect to" the contract was too narrow. They thought that this formula would not cover cases where the deed was merely intended to record the terms of an earlier less formal contract which was already complete in itself. We think, however, that cases where a formal document is intended to record the whole terms of a prior, less formal, contract but does so wrongly are cases where rectification would be the appropriate remedy. Cases where the parties intend a formal document to record (rather than implement) only part of their contract would, we think, raise questions of proof of additional terms rather than questions of supersession and would be covered by the recommendations in Part II.

3.28 One consultee referred to the problem which arises when the disposition and the missives deal with the same matter but in different terms. For example, the missives may refer to 9 acres and the disposition to 10. Or the missives may provide for one type of warrandice and the disposition may grant another. We think that rectification, or in certain cases partial reduction, is the appropriate remedy for such cases.⁵¹

Recommendation

3.29 Taking into account the comments by consultees on our earlier proposal we now recommend that:

⁴⁸ 1980 SC 246.

⁴⁹ We use the term "unfulfilled" to cover provisions such as warranties that a certain state of affairs exists. Strictly speaking, such provisions are not implemented. The warranty is either true or not true. If true it is fulfilled. If untrue it is unfulfilled.

⁵⁰ The Faculty of Advocates and the Keeper of the Registers of Scotland.

⁵¹ See *Aberdeen Rubber Ltd v Knowles & Sons (Fruiterers) Ltd* 1995 SLT 870.

2. (1) The rule of law whereby, regardless of the intentions of the parties, a contract is entirely superseded by the execution, or delivery and acceptance, of a conveyance or other formal deed in implement of it should cease to have effect.

(2) Accordingly, unless the parties agree otherwise, any unimplemented or unfulfilled term of a contract should not be superseded by virtue only of the execution, or delivery and acceptance, of a deed in implement of the contract.

(Draft Bill, clause 2)

3.30 We think that the new rule should apply only to contracts made on or after the date of commencement of the new legislation. The rule can be regarded for this purpose as a rule on the termination of contractual obligations. Parties may have contracted on the basis of the present rule. We do not think it is necessary to have any statutory provision on the methods by which the parties might contract into supersession if that is their wish. This can be left to the good sense of the parties and normal principles of contract law.

3.31 Abolition of the supersession rule could be an incomplete reform if the rule on proof of additional terms, which we considered in Part II, is not reformed or abolished at the same time. There is a real danger that, in certain cases where a contract has been followed by a conveyance or other formal deed in implement of it, courts might regard the later deed as a document apparently complete in its terms and, if the rule on proof of additional terms is not reformed, might hold that extrinsic evidence of additional terms is inadmissible. Of course, the exception for collateral terms could provide some relief. However, the concept of the collateral term has given rise to difficulties already and it would be better not to have to rely on it.

Part IV Bar on damages when property retained

Introduction

4.1 There is another problem connected with the supersession rule which would still cause difficulty if that rule were abolished. Even if a provision in the missives survived the delivery of the disposition and could be proved, 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.¹ This is because of an unfortunate rule of Scottish law whereby a buyer of a 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*. However, as that term has been surrounded by confusion throughout its history it is probably better avoided in a consideration of possible law reform. The problem with which we are here concerned does not arise in relation to the sale of goods because the Sale of Goods Act 1979 (following the Sale of Goods Act 1893) allows the buyer to retain the goods and claim damages which, in the case of breach of a term as to quality, will normally be based 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 conformed to contract.²

The development of the law

4.2 In the Discussion Paper we reviewed the troubled development of the Scottish common law on this point and concluded that the present state of the law may well have been the result of a confusion between two quite different rules of the Roman law.³ 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 given rise to at least some of the later difficulty.⁴ For present purposes it is enough to note that in 1869 the law was settled in its present unfortunate form by the following statement in the case of *McCormick v Rittyer*.⁵

"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

¹ See *Fortune v Fraser* 1995 SCLR 121.

² Ss 15B and 53A. These provisions were inserted by the Sale and Supply of Goods Act 1994. The earlier provisions in ss 11 and 53 were to the same effect but were expressed in terms more appropriate for English law than for Scottish law.

³ See Evans-Jones, "The History of the *Actio Quanti Minoris* in Scotland" 1991 JR 190; Stewart, "The *Actio Quanti Minoris*" 1966 JLSS 124; Discussion Paper No 97 paras 5.2-5.7.

⁴ 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.

⁵ (1869) 7M 854 by Lord President Inglis at 858.

the contract of sale which was originally made by the parties, or it would resolve into a claim of the nature of the *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 damages⁶ 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.

The existing law

4.3 **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.⁷

4.4 **Exceptions.** There are several exceptions to the general rule and some possible exceptions on which the law is in a state of doubt.⁸

4.5 *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 in substantially the form in which it was conveyed, an action for damages is competent. This exception covers, for example, cases where a building has been erected on the land sold,⁹ or where minerals have been partially worked.¹⁰

4.6 *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.¹¹ 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.¹² The meaning of "collateral" is not necessarily the same in this context as in the context of the supersession rule which we have considered earlier.

⁶ See Stewart in 1966 JLSS at 128-130.

⁷ 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 in *Fortune v Fraser* 1995 SCLR 121.

⁸ See Stewart at 1966 JLSS 124; McBryde, *Contract* (1987) pp 446-447; Reid, "The *Actio Quanti Minoris* and Conveyancing Practice" 1988 JLSS 285.

⁹ See *Louttit's Trs v Highland Railway Co* (1892) 19R 791 by Lord McLaren at 800.

¹⁰ See *Bald v Scott* (1847) 10D 289.

¹¹ See *McKillop v Mutual Securities Ltd* 1945 SC 166; *Hoey v Butler* 1975 SC 87; *Hardwick v Gebbie* 1991 SLT 258.

¹² See *Fortune v Fraser* 1995 SCLR 121.

4.7 *Warrantice*. A claim for damages under the warrantice 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.¹³

4.8 *Contracting out*. The parties can agree between themselves that the buyer is to be entitled to retain the subjects and claim damages for breach the seller.¹⁴

4.9 *Fraud*. Although it was at one time thought that there might be an exception for cases where the seller had been fraudulent,¹⁵ it has now been made clear that there is no such exception.¹⁶

4.10 *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* and is therefore competent.¹⁷ However, this view has not been taken in all cases.¹⁸ 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

4.11 **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 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 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.

¹³ *Welsh v Russell* (1894) 21R 769.

¹⁴ *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 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."

¹⁵ See *Wood v Magistrates of Edinburgh* (1886) 13R 1006 at 1011; *Finlayson v McRobb* 1987 SLT (Sh Ct) 150 at 152; *Widdowson v Hunter* 1989 SLT 478 at 481.

¹⁶ *Fortune v Fraser* 1995 SCLR 121.

¹⁷ *Bourton v Clayton* 1990 SLT (Sh Ct) 7. See also *Hardwick v Gebbie* 1991 SLT 258 at 265.

¹⁸ 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.

4.12 **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. 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.

4.13 The existing law on the subject of the *actio quanti minoris* was strongly criticised by Lord Osborne in his dissenting opinion in *Fortune v Fraser*.¹⁹ He said that he had much sympathy with the submission that the prohibition against the *actio quanti minoris* should be seen as a peculiarity of the non-statutory law of sale which unnecessarily and undesirably restricted the range of remedies available to a dissatisfied purchaser.

"Whatever may have been seen as the justification of the prohibition in earlier days – and my careful reading of the classic statement of the prohibition in *McCormick & Co Rittmeyer & Co* leaves me in some doubt as to what that was supposed to be – in modern commercial conditions it is to be seen as a principle possessing no positive value and unnecessarily restricting the freedom of contracting parties.... I would characterise the present situation as one in which a principle of questionable ancestry, contrary to the general principles of the law of contract, denies a purchaser the remedy of damages without rescission, within the area of its operation, without contemporary justification."²⁰

There has been particular concern about the potential effects of the decision in *Fortune v Fraser* in relation to sales of incorporeal moveables.²¹

Proposal in Discussion Paper

4.14 In Discussion Paper No 97 we suggested that it should be provided by statute that 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.

Results of consultation

4.15 There was unanimous support for reform on the above lines from all those who commented on the proposal. Two consultees would have preferred, however, a positive statement that damages could be recovered for the loss caused by any breach of contract. We think that a sweeping positive statement of that type would be better in a general

¹⁹ 1995 SCLR 121 at 144-145.

²⁰ At 144-145.

²¹ See Sellar, "Can Scots Law Cope with the Sale of Incorporeal Moveables?" 1994 SLT (News) 195.

restatement or codification of contract law. Our concern here is to remedy an unfortunate rule rather than lay down general principles of contract law and we think that it would be safer to do so in the limited way suggested in the discussion paper. The Court of Session judges suggested that the provision would not need to refer to the sale of goods. It could be quite general in scope and the fact that it stated the existing law in relation to sale of goods would not matter. The Law Society of Scotland saw some danger in the reference to sale of goods which, they thought, might be read as going further than was intended. We are grateful for these points. We think that the best course would be to have a general provision referring to "any rule of law" preventing the recovery of damages if the buyer does not reject the property and rescind the contract.²² As there is no such rule of law in relation to sale of goods under the Sale of Goods Act 1979 the provision would automatically not apply to that situation.

Recommendation

4.16 We therefore recommend that:

3. Any rule of law whereby in a contract of sale the buyer is precluded from obtaining damages for a breach of the contract if the buyer does not reject the property and rescind the contract should cease to have effect.

(Draft Bill, clause 3)

4.17 We considered whether the recommendation should apply to contracts of barter or excambion. However, we are not aware that the common law rule has ever been applied to such contracts. All the discussions of it are in terms of contracts of sale. The very nature of the *actio quanti minoris*, which relates essentially to an abatement of the price, suggests that the common law rule would not naturally have applied to contracts of barter or excambion. If the common law rule is abolished we think it is inconceivable that it would be resurrected later for contracts of barter or excambion. We therefore do not consider it necessary to mention such contracts in our recommendation or in the draft Bill.

4.18 So far as commencement is concerned we think that the new rule should apply only in relation to contracts made on or after the date of commencement of the new legislation. We considered applying it to proceedings commenced after that date, on the ground that the rule is concerned with a remedy rather than with substantive law, but rejected that solution because of the consideration that parties might conceivably have contracted in reliance on the existing law.

²² These words reflect the words used by Lord President Inglis in *McCormick v Rittmeyer* (1869) 7M 854 at 858 when he said that the buyer's only remedy was "to reject the goods and rescind the contract". We do not assume that the buyer would necessarily obtain damages, or even want to claim damages, if the contract was rescinded. The price might not have been paid and the end of the obligation to pay might be sufficient for the buyer. Or the buyer might be content to recover the price if it had been paid. In selecting the words quoted we are merely identifying the rule which is being changed.

Part V List of Recommendations

1.
 - (1) The existing strict rule which restricts proof of additional contract terms when a contract appears to be contained entirely in a written document or documents should be replaced by a rebuttable presumption.
 - (2) 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 should 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.
 - (3) Where the presumption applies, extrinsic evidence, whether oral or documentary, should be admissible for the purpose of proving that a contract includes additional express terms, whether agreed to orally or in writing.
 - (4) It should be made clear that the new provision is without prejudice (a) to the effect of an express provision in a document that it contains all the express terms of a contract between the parties and (b) to the effect of any enactment on constitution or formal validity.
 - (5) The above rules should apply also to unilateral voluntary obligations.

Paragraph 2.36; Clause 1.

2.
 - (1) The rule of law whereby, regardless of the intentions of the parties, a contract is entirely superseded by the execution, or delivery and acceptance, of a conveyance or other formal deed in implement of it should cease to have effect.
 - (2) Accordingly, unless the parties agree otherwise, any unimplemented or unfulfilled term of a contract should not be superseded by virtue only of the execution, or delivery and acceptance, of a deed in implement of the contract.

Paragraph 3.29; Clause 2.

3. Any rule of law whereby in a contract of sale the buyer is precluded from obtaining damages for a breach of the contract if the buyer does not reject the property and rescind the contract should cease to have effect.

Paragraph 4.16; Clause 3.

Appendix A

Contract (Scotland) Bill

ARRANGEMENT OF CLAUSES

Clause

1. Extrinsic evidence of additional contract term etc.
2. Supersession.
3. Damages for breach of contract of sale.
4. Short title, extent etc.

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Reform the law of Scotland relating to the admissibility of extrinsic evidence to prove an additional term of a contract or unilateral voluntary obligation, to the supersession of a contract by a deed executed in implement of it and to the obtaining of damages for breach of contract of sale; and for connected purposes.

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

Extrinsic evidence of additional contract term etc.

1.-(1) Where a document appears (or two or more documents appear) to comprise all the express terms of a contract or unilateral voluntary obligation, it shall be presumed, unless the contrary is proved, that the document does (or the documents do) comprise all the express terms of the contract or unilateral voluntary obligation.

(2) Extrinsic oral or documentary evidence shall be admissible to prove, for the purposes of subsection (1) above, that the contract or unilateral voluntary obligation includes additional express terms (whether or not written terms).

(3) Notwithstanding the foregoing provisions of this section, where one of the terms in the document (or in the documents) is to the effect that the document does (or the documents do) comprise all the express terms of the contract or unilateral voluntary obligation, that term shall be conclusive in the matter.

(4) This section is without prejudice to any enactment which makes provision as respects the constitution, or formalities of execution, of a contract or unilateral voluntary obligation.

Supersession.

2.-(1) Where a deed is executed in implement, or purportedly in implement, of a contract, an unimplemented, or otherwise unfulfilled, term of the contract shall not be taken to be superseded by virtue only of that execution or of the delivery and acceptance of the deed.

(2) Subsection (1) above is without prejudice to any agreement which the parties to a contract may reach (whether or not an agreement incorporated into the contract) as to supersession of the contract.

Damages for breach of contracts of sale.

3. Any rule of law which precludes the buyer in a contract of sale of property from obtaining damages for breach of that contract by the seller unless the buyer rejects the property and rescinds the contract shall cease to have effect.

Short title, extent etc.

4.-(1) This Act may be cited as the Contract (Scotland) Act 1995.

(2) This Act shall come into force at the end of that period of three months which begins with the day on which the Act is passed.

(3) Section 1 of this Act applies only for the purposes of proceedings commenced on or after, and sections 2 and 3 only as respects contracts entered into on or after, the date on which this Act comes into force.

(4) This Act extends to Scotland only.

EXPLANATORY NOTES

Clause 1

Clause 1 deals with the rule restricting proof of additional contract terms which is criticised in Part II of the report.

Under the existing law there is a strict rule that where a document appears to contain all the express terms of a contract or unilateral voluntary obligation extrinsic evidence is inadmissible to prove other terms. This rule can result in injustice. Its effect is to allow one party to a contract to found on only some of the terms of the contract and to prevent the other party from proving other terms which were expressly agreed between the parties.

Clause 1 replaces the existing rule with a rebuttable presumption. The clause is concerned with proof of the contents of a contract or obligation. It is not concerned with the interpretation of contracts or obligations.

Subsection (1)

This subsection introduces a rebuttable presumption that a document which appears to contain all the express terms of a contract or unilateral voluntary obligation does contain the complete terms. It applies also to cases where the contract or obligation is contained in two or more documents, such as an offer and acceptance.

Subsection (2)

This subsection makes it clear that extrinsic evidence is admissible to rebut the presumption and to prove that the contract or obligation contains additional express terms. If the document does not appear to contain all the express terms then the restrictive rule of the existing law does not apply and extrinsic evidence is admissible under the existing law. See paragraph 2.6 of the report.

Subsection (3)

This subsection is inserted only for the avoidance of doubt. See paragraph 2.29 of the report. If the document includes an "entire contract" clause, saying that the document contains all the terms of the contract agreed up to the time of execution of the document, and if that clause is not rectifiable or challengeable, then it must be conclusive. Evidence of any prior term would be irrelevant because all such terms would be superseded by the contract as a matter of substantive law.

Subsection (4)

This subsection is also inserted for the avoidance of doubt. See paragraph 2.30 of the report. Clause 1 deals with evidence, not constitution or formal validity.

Clause 2

This clause is intended to reverse the effects of *Winston v Patrick* 1980 SC 246. That case, which is discussed and criticised in Part III of the report, held that where a contract, such as a contract for the purchase of a house, is followed by a conveyance in implementation of it, the conveyancing deed supersedes the whole contract, including terms which have nothing to do with the actual conveyance of the property and which the parties intended to survive the delivery of the conveyancing deed. There are exceptions to the existing rule but they have been narrowly interpreted and have given rise to difficulty and uncertainty.

Subsection (1)

This subsection establishes the basic rule that unimplemented or unfulfilled terms of the contract are not superseded merely by virtue of the execution, or delivery and acceptance, of a conveyancing deed. The word "unfulfilled" is used to cover terms such as warranties as to an existing state of affairs which do not require any performance or implementation.

Subsection (2)

This subsection makes it clear that the parties can contract out of the basic rule and can provide that certain terms, or all terms, of the contract will be superseded by the conveyance.

Clause 3

Clause 3 is intended to abolish the rule, sometimes called the rule against the *actio quanti minoris*, that a buyer of property cannot, while retaining the property, claim damages for breach of contract by the seller. This anomalous rule is discussed in Part IV of the report. There is no such rule in relation to sale of goods (Sale of Goods Act 1979 ss 15B and 53A). So the clause has no application in relation to goods as defined in that Act. The clause does, however, apply to the sale of land or houses or incorporeal moveable property, such as shares. It means that the buyer of, say, a house or a business can claim damages for breach of contract even although he or she has no wish to reconvey the house or business to the seller.

Clause 4

The only subsection requiring explanation is subsection (3). The reason why clause 1 applies to proceedings commenced on or after the date when the new legislation comes into force is that it deals with a rule of evidence. Clauses 2 and 3 deal with rules of the substantive law and therefore apply only to contracts entered into on or after the date when the Act comes into force.

Appendix B

List of those who submitted comments on Discussion Paper No 97

Centre for Research into Law Reform, University of Glasgow.
Committee of Scottish Clearing Bankers.
Convention of Scottish Local Authorities.
Council of Mortgage Lenders.
Court of Session Judges.
Faculty of Advocates.
Faculty of Law, University of Aberdeen.
Faculty of Procurators in Paisley.
Professor W M Gordon, School of Law, University of Glasgow.
Law Society of Scotland.
Macgregor & Co., Solicitors and Estate Agents, Nairn.
Registers of Scotland.
Sheriffs' Association.
Professor K G C Reid, Department of Private Law, University of Edinburgh.
Professor J M Thomson, School of Law, University of Glasgow.
Wright, Johnston & Mackenzie, Solicitors, Edinburgh.