SCOTTISH LAW COMMISSION

MEMORANDUM No. 37

CONSTITUTION AND PROOF OF VOLUNTARY OBLIGATIONS:

ABORTIVE CONSTITUTION

10 March 1977

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

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A. INTRODUCTION

1. General

1. In Memoranda Nos. 35 and 36 we considered the positive factors required for the constitution of voluntary obligations through unilateral promises and contracts. It seems to us appropriate now to discuss some of the negative factors which preclude constitution of obligations in the sense ostensibly intended by the party or parties. Thus a declaration of will or apparent manifestation of consent may in fact result in dissent (dissensus as contrasted with consensus), or the purpose of an agreement or promise may be frustrated in limine by, for example, impossibility due to factors unknown to the parties at the time of agreement; or the expression of agreement may be merely simulated without obligatory intent (simulation) or the terms of apparent agreement may be intended to cloak some other form of legal transaction (dissimulation). In certain cases also, force and fear may completely vitiate or nullify the consent of a party. We are, in a separate but related exercise, engaged in a study of force and fear and the consequences thereof in the law of voluntary obligations. In that study we shall attempt to identify the circumstances in which force and fear operate to preclude the formation of obligation. We do not, therefore, explore this matter in the present Memorandum.

2. In considering dissent and situations which for convenience we designate pre-contractual frustration we shall deal with matters which have often been considered in the context of error - or in Anglo-American legal systems in the context of mistake. In due course we hope to circulate for comment a Memorandum dealing with vices of consent such as error, fraud and force and fear which justify annulment of obligations

which have been already constituted. In the present Memorandum we are concerned only with factors affecting the will which preclude the constitution of voluntary obligation altogether.

2. Restriction of the category of "error"

3. We find support in modern Scottish and comparative sources for the separation of consensual error - with which we are not concerned in this Memorandum - from error in a different and broader meaning, for example, dissensus and "pre-contractual frustration" or "pre-existing impossibility". Thus Dr. Gow observes of "consensual error" in The Mercantile and Industrial Law of Scotland:[1]

> "The current confusion of the law of error makes almost impossible any brief far less lucid exposition of the essentials of this plea. Two major difficulties, although there are many others besides, are (first) the far too wide use made of the term 'error' - 'to comprehend a number of situations to which different principles may apply - such as dissensus, common error, mutual error, unilateral error, error in expression, error calculi, error in fact, error in law, error in substantialibus and error in motive; and (secondly) that error stricto sensu (that is consensual error as distinct from, for example, dissensus, ...) was a remedy created with reference to our common law concepts of obligations which in principle ... require an obligation to be constituted by the probative writ of the obligant unless it forms part of a consensual contract."

Later[2] he comments:

> "Likewise dissensus does not in the result raise any questions of consensual error. If the obligation or engagement is not contained in formal writing, so that proof is at large, no one can say until all the evidence is in and the findings made whether there has been consensus or dissensus."

4. The late Professor R.W. Lee and Professor A.M. Honoré of Oxford drafted a digest or quasi-code, The South African Law of Obligations, which was much admired by the late Lord President Cooper. The note to the learned authors'

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[1] pp. 52-3.
[2] p.57

section 43 on "Mistake"[3] reads (in part):

> "This section postulates a transaction objectively complete from which one of the parties seeks to be released on the ground that his apparent intention does not coincide with his real intention. The annullability of the transaction does not exclude a claim based on enrichment ... It is essential to distinguish from cases coming under this section those in which there is absolutely no consensus ad idem. This is what the texts of the Roman Law commonly have in view when they speak of error whether it be ... in persona, in corpore or in negotio. Where there is good faith on both sides, there may be said in such cases to be error, each party being under a misapprehension as to the intention of the other. But it is better to speak of this not as error, but as want of consent - dissensus - malentendu."

The confusion between the senses in which the term "error" has been used probably explains why Stair, for example, is seemingly mainly concerned with dissensus[4] as a ground of nullity while Bell discusses[5] error as a ground for reduction of an ex facie valid contract:

> "The want of consent, where the obligation proceeds from error or force annuls the contract: But the nullity must be declared judicially. The contract ostensibly is valid and regular; and, ... it subsists till it be reduced."

Bell in considering the Roman law categories was influenced by Pothier in particular. Pothier was followed by later continental jurists in distinguishing between error which negatives consent and that which constitutes a vitiating factor. Subsequent developments in European legal systems have in effect restricted the concept of "error" to grounds for annulment. Factors such as total lack of agreement relate to an enquiry whether an obligation has been constituted or not.

5. In contemplation of a Uniform Law of International Sale, UNIDROIT commissioned the Max Planck Institute for Foreign and International Private Law to make a detailed comparative survey of the law relating to basic conditions of validity in contracts of sale. We have found the Institute's detailed Report

[3] pp. 11-12; sections 40-50 summarise the different effects of
[4] e.g. error, implied condition, ambiguity, mistake of law.
[5] See e.g. I.10.13.
Principles, note to sections 11-13 in 4th (1839) ed., the last to be edited by Bell himself.

Les Conditions de Validite au Fond des Contracts de Vente[6] and their collection of provisions of different legal systems[7] on matters of validity of very considerable general assistance - even though their essential concern was restricted to the contract of sale of corporeal moveables. The Report notes that legal systems which base contract on consent distinguish between error and total lack of consent. Lack of consent may prevent formation of contract, while account is taken of error only when it is certain that a contract exists. If offer meets acceptance in an objective sense, it is accepted in general that there is not a lack of consent. In the germanic systems of law (Germany, Austria and Switzerland) the distinction between and delimitation of error and dissensus is expressly recognised,[8] while in French and Italian law, attempts to treat certain serious examples of error as tantamount to lack of consent have not been adopted in case law or legal treatises. Following on this Report, UNIDROIT prepared the text of a Draft of a Law for the Unification of Certain Rules Relating to Validity of Contracts of International Sale of Goods.[9] Articles 3 and 4 are concerned with the interpretation of the contract, and article 5 provides:

> "There is no contract if, under the provisions of the preceding articles, an agreement between the parties cannot be established."

Article 6 provides for the conditions in which a party may avoid a contract for mistake. The commentary on articles 3, 4 and 5 states:[10]

> "The question of whether or not a contract may be avoided for mistake, fraud or threat is meaningful only after it has been established that there exists a contract and what meaning must be given to its terms."

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[6] U.D.P. 1963 Etudes XVI/B Validité Contrats de vente - Doc.1. The Report is reprinted in the UNIDROIT Year-Book 1966, pp.175-410.

[7] Voraussetzungen der Materiellen Gultigkeit von Kaufvertägen (V.P.R. 1963 Studies XVI/B Gultigkeit von Kaufverträgen - Dok.1).

[8] Thus a German court would have treated the case of Raffles v. Wichelhaus (1864) 2 H. & C. 906 (ambiguity regarding the ships named "Peerless") as a case of dissensus - not of error or mistake: E.J. Cohn Manual of German Law 2nd ed. p.85.

[9] Etude XVI/B Doc. 22, U.D.P. 1972.

[10] At p.21.

The draft law reflects the thinking of the Report which does not regard dissensus or impossibility as aspects of error.

3. Anglo-American common law

6. In the Anglo-American common law systems, though there are those who argue that strictly no law of mistake as such is recognised, there seems to be a trend comparable with that observed in systems derived from the Roman or Civil law to treat error as a ground for avoidance rather than of nullity. Thus the 1975 Tentative Draft No.10 of the American Law Institute's proposals on Chapter 12 (Mistake) of the Restatement (Second) of the Law of Contracts considers Mistake only in the context of "voidability". Dissensus, "the effect of misunderstanding", is dealt with in the Restatement in the context of "Formation". "Impracticability" and "frustration in limine" are distinguished from "mistake" and dealt with separately in another chapter. The foreword comments:

> "The result is to emphasise impracticability and frustration as distinguished from mistake simpliciter, an approach that some find unfamiliar. It is, however, supported by the academic work of recent years, and is believed to yield a more precise account of the results of the decisions than the older forms of statement."

7. In their work on comparative law, Einführung in die Rechtsvergleichung, Professors Zweigert and Kötz note that in the context of error (mistake) American law "does not make all the fine and sometimes strained distinctions of English law". They observe:[11]

> "By 'mistake' the Common Law means only such errors as are not caused by misstatements. In this area the doctrine of error in English law is particularly complex because the Common Law Courts and the Equity Courts treated cases of mistake differently, and these divergent rules still coexist in judicial decision and legal writing".

We are well aware that failure to appreciate the importance of the dichotomy between Law and Equity in English law has caused Scottish judges and legal authors in the past to invoke English authorities on mistake when dealing with problems of error in Scots law - and thereby confuse the latter system. It is apparent from recent English decisions and from statements of

[11] In vol. II, section 8(iv); translated by J.A. Weir as An Introduction to Comparative Law, to be published in 1977 by the North-Holland Publishing Co., Amsterdam.

the law in treatises such as those of Anson, Atiyah, and and Cheshire & Fifoot that there are considerable areas of uncertainty so far as the law of "mistake" is concerned. Indeed Professor Atiyah writes:[12]

> "Under the influence of continental jurists, English law has for many years included a doctrine of 'Mistake' in its law of contract, and chapters on Mistake will be found in all the books on the subject. In fact, however, there is much to be said for the view that there is really no room for any such doctrine in English law".

The problems treated by other English writers in the context of mistake, Atiyah largely disposes of in the context of offer and acceptance (i.e. formation of contract), initial impossibility and implied condition precedent.

8. Though the English law regarding mistake may not be settled, the prevalent trend seems to be expressed by Lord Denning M.R. in F.E. Rose Ltd. v. W.H. Pim Ltd.[13]

> "At the present day, since the fusion of law and equity, the position appears to be that when the parties to a contract are to all outward appearances in full and certain agreement, neither of them can set up his own mistake, or the mistake of both of them, so as to make the contract a nullity from the beginning. Even a common mistake as to the subject matter does not make it a nullity. Once the contract is outwardly complete, the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground."

The division of opinion in the Court of Appeal in Magee v. Pennine Insurance Ltd[14] still leaves it to some extent uncertain how far equity has superseded the English common law in the field of mistake affecting formation of contract. This the House of Lords alone can resolve.

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[12] An Introduction to the Law of Contract 2nd ed. p. 49.

[13] [1953] 2 Q.B. 450 at p.460.

[14] [1969] 2 Q.B. 507; Harris (1969) 32 M.L.R. 688; N.S. Marsh "Mistake in Contract: A Comparative Approach to an English Decision" Miscellanea W.J. Ganshof van der Meersch 1972 vol. II pp. 855-77.

However, the rôle of the common law of mistake seems now very restricted, and the rôle of equity to set aside objectively completed agreements is apparently correspondingly augmented. Such studies as "The Myth of Mistake in the English Law of Contract"[15] and "New Developments in Mistake of Identity"[16] suggest persuasively that the English law of mistake has now little influence on formation of contract, but that other doctrines corresponding to those operative in European systems and now increasingly in the United States are relevant at that stage. In the field of annulability for error English law may be more restricted in its approach than some of these systems - but this will concern us in a context other than that of constitution of obligation. For the present we merely note that there is support - though not unanimous support - in English treatises and decisions for virtual restriction of the concept of mistake to situations of annulment or other relief rather than to situations of nullity. Doctrines comparable to those accepted on the Continent and in the United States are invoked to deal with dissent, ambiguity and to a lesser extent "pre-contractual frustration".

9. Though we have found some of the analysis and classification of "mistake" in recent English decisions and legal writing - whether in treatises or journals - most helpful in clarifying our own thinking we stress two factors which make them unreliable as a template for Scottish solutions. First, English law accepts a "consensual" approach to title to corporeal moveables, so that if an ostensible contract e.g. for the sale of a car is "void" on grounds of mistake a bona fide third party purchaser would not get good title and would be liable to the original owner in the tort of conversion. The courts have therefore a strong predisposition to restrict the scope of "mistake" at common law. This consensual approach contrasts with the position in most European systems where, notwithstanding nullity or annulment of a contract under which corporal moveables

[15] C.J. Slade (1954) 70 L.Q.R. 385.
[16] J.C. Hall (1961) 18 Camb. L.J. 86.

are transferred from the original owner, the rules of property law protect at least the onerous bona fide transferee who has taken possession. In our Memorandum No.27[17] we doubt whether even in contemporary Scots law contractual error operates as a vitium reale where bona fide acquisition of real rights in corporeal moveables is concerned, transfer of which at common law requires tradition (traditio). In any event we have suggested for consideration solutions based on principles of property law rather than on those of obligations. However, these solutions would not extend to assignees or personal rights. Secondly, the dichotomy which the English legal system makes between the scope of the common law and the exercise of Equity jurisdiction does not correspond to the categories of absolute and relative nullity in civil law systems. Whereas the solutions reached in particular fact situations by English law may often seem just, the methods by which the solutions are reached are not necessarily appropriate for adoption.

4. Scots Law

10. It is impossible to harmonise in a convincing manner the institutional and judicial pronouncements on error in the broadest sense, and it is only in the past twenty years that Scottish legal writers[18] have tended to distinguish between what they call (1) "mutual error" (i.e. dissensus)(2) "common error" i.e. a fundamental misapprehension shared by both (or all) contracting parties and (3) other cases of error which may occasion nullity or reduction of obligation. Aspects of error falling into the third category are outwith the scope of this Memorandum, but we must consider the two categories which are relevant to preclude constitution of obligation.

11. Leaving aside the problems of induced "essential error", we consider first what place dissensus (mutual error) has and

[17] Corporeal Moveables: Protection of the Onerous Bona Fide Acquirer of Another's Property.

[18] Gow, The Mercantile and Industrial Law of Scotland, pp.52-58; Smith, A Short Commentary on the Law of Scotland, pp. 808-828; Walker, Principles of Scottish Private Law, 2nd ed., pp. 577-8, 581-3.

should have in the Scots law regarding constitution of obligation and then consider what scope what we provisionally call "pre-contractual frustration" or impossibility (common error) should have in the same context. Linked with these problems are those concerning the adjustment of rights of parties who erroneously believed that they had entered an obligatory relationship. Certain aspects of what has been designated error in persona may also affect constitution of obligation, and we discuss these in the course of our consideration of dissensus.

B. DISSENSUS

12. Stair, Erskine and Bankton[19] state a very broad theory that where there is error in the substantials, there is no true consent. In the 18th century no clear distinction was drawn between unilateral error and bilateral error or between dissensus and common error, though these two types of bilateral error are essentially different in nature. When Bell[20] discusses error, however, he seemingly is considering it in the context of an ex facie regular and valid contract which subsists until it is reduced. His classification of error which has often been approved judicially - in particular by Lord Watson in Stewart v. Kennedy[21] - was seemingly related, as Gloag appreciated, to annulment rather than nullity of contract[22] and therefore presumably was concerned with error as a vice of consent rather than as an impediment to constitution of obligation. As Professors Gloag and Walker have pointed out an obligation which is a nullity need not, and cannot, be reduced.[23] In a legal system which accepts an entirely subjective theory of consensus, clearly if one contracting party thinks, however unreasonably, that the actual terms of a contract should be construed in one way and the other party assumes that they are to be construed otherwise there is no consensus - but dissensus. This may possibly have been the generalised view of some earlier Scottish authority, but in a system where written obligations were the normal expression of agreement in matters of importance an objective construction of the writ itself

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[19] Stair I.9.9., IV.40.24; Erskine III.1.16; Bankton I.23.63, I.19.6.

[20] Principles 4th ed., note to sections 11, 12 and 13.

[21] (1890) 17R. (H.L.) 25 at p.27.

[22] Contract 2nd ed., pp. 442 footnote 3.

[23] Gloag op. cit. pp. 441-2; Walker Civil Remedies p.139. It may, however, be expedient even in cases of nullity to reduce a writ e.g. a disposition recorded in the Register of Sasines - Stobie v. Smith 1921 S.C. 894. A consensual contract which is not constituted or evidenced by writ cannot be reduced.

ultimately tended to prevail.[24] Eventually consensus and dissensus have come to be tested by objective construction of an obligation by reference to the writing, oral communications and other conduct whereby the obligation was allegedly constituted.[25] However, in some cases not even objective construction can overcome latent dissensus - where apparently clear words conceal ambiguity. Moreover, much as in construing a will, the Court has to put itself in the place of the parties, taking account of their knowledge and the meanings which they attach to words.[26]

13. The UNIDROIT Draft Law for the Unification of Certain Rules Relating to Validity of Contracts of International Sale of Goods[27] puts forward rules of construction to apply in cases where it is alleged that an apparent agreement is affected by latent ambiguity or latent mutual misunderstanding; and it is only where the application of these rules does not succeed in placing a definite meaning upon the words used that no contract is held to exist.[28] Article 3 of the Draft Law is in the following terms:

> "1. Statements by and acts of the parties shall be interpreted according to their actual common intent, where such an intent can be established.
> 2. If the actual common intent of the parties cannot be established, statements by and acts of the parties shall be interpreted according to the intent of one of the parties, where such an intent can be established and the other knew or ought to have known what that intent was.
> 3. If neither of the preceding paragraphs is applicable, the statements by and the acts of the parties shall be interpreted according to the intent that reasonable persons would have had in the same situa-

[24] The conflict between the subjective and objective tests of consensus is possibly best illustrated by the division of opinion in the Court of Session in the case of Stewart v. Kennedy, (1889) 16 R.857, (1890) 17 R. (H.L.) 25.

[25] See, e.g. Muirhead & Turnbull v. Dickson (1905) 7F.686 esp. per Lord President Dunedin at p.694.

[26] See, e.g. Sutton & Co. v. Ciceri & Co. (1890) 17 R. (H.L.) 40, esp. per Lord Herschell at p.40 and Lord Watson at p.43; Charrington & Co. v. Wooder [1914] A.C. 71 esp. per Lord Kinnear at p.80 and Lord Dunedin at p.82; Reardon Smith Line v. Hansen-Tangen [1976] 3 All. E.R. 570 (H.L.).

[27] Etude XVI/B, Doc. 22, U.D.P. 1972.

[28] Draft Law, Art. 6, and para. 5, supra.

"tion as the parties."[29]

14. A provision such as that embodied in paragraph 1 of Article 3 is, in our view, of value in making it clear that it is not the mere objective existence of a material latent ambiguity that does, or may, vitiate an agreement. For legal consequences to ensue it is necessary that each party, at the time of conclusion of the arrangement, should actually have had a different meaning in mind. Thus, the fact that there are two ships named "Peerless"[30] should not affect the validity of a contract for the sale of cargo to be shipped on the "Peerless" where both buyer and seller have the same ship in mind; nor should an agreement for the sale of coping-stone be affected by the fact that the agreed price per foot could refer either to superficial or lineal feet,[31] where both parties in fact intend superficial feet. We think it likely that this represents the existing law of Scotland, but that, for the avoidance of doubt, the enactment of a statutory provision to this effect might be desirable. Comments are invited.

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[29] A somewhat similar solution is to be found in the American Law Institute's Restatement (Second) of Contracts, Tentative draft no.1 (1964), chapter 3, section 21A, where it is provided:

"(1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and

(a) neither party knows or has reason to know the meaning attached by the other; or
(b) each party knows or each party has reason to know the meaning attached by the other.

(2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if

(a) the party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or
(b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party."

[30] Raffles v. Wichelhaus (1864) 2 H. & C. 906.

[31] Stuart & Co. v. Kennedy (1885) 13 R. 221.

15. Paragraph 2 of Article 3 also embodies a principle which, in our view, merits adoption. It seems to us right that where one party is known by the other to have attached a particular meaning to an expression capable of bearing that meaning then for the purposes of their agreement that meaning should be attributed to the expression in question. And if one party has, to the knowledge of the other attributed to the words and actings of the parties a particular signification (e.g. as constituting between them a contract of a particular type or with a particular content) that signification should be attached to those words and actings, provided they are capable of bearing it, even though a competing interpretation of those words and actings is also possible. Thus, if the seller of cargo to be shipped on the vessel "Peerless" knows that the buyer has in mind "Peerless I" and does not inform him that he, the seller, is referring to "Peerless II" there should be a valid contract of sale with delivery to be made on "Peerless I". Similarly, a contract should come into existence for the sale of coping-stones at the stated price per superficial foot where the buyer knows that the seller is referring to superficial and not to lineal feet. This is probably already the law of Scotland: in Sutton & Co. v. Ciceri & Co.[32] it was held by the House of Lords that where an offer was made containing an ambiguous expression, the offeree informed the offeror of his understanding of the expression, and the offeror, although replying to other points made by the offeree, did not refer again to this matter, a contract was concluded which should be construed in the sense contended for by the offeree. It may also already be the law that where one party does not have actual knowledge but ought to know of the meaning attributed by the other party to the ambiguous expression a contract comes into being, the terms of which are as understood by the second party. This seems to have been the view taken by Lord Shand in Stuart & Co. v. Kennedy,[33] where the court in fact held that, because of the existence of an irresolvable ambiguity, there was no consensus in idem and consequently

[32](1890) 17 R. (H.L.) 40. See especially per Lord Herschell at pp. 41-2, Lord Watson at pp. 43-4, and Lord Morris at p.45.

[33](1885) 13 R. 221 at p.223.

no contract. Lord Shand concurred in this decision, but went on to say:

> "The only difficulty I have had lies in this, that it may not be enough to shew that there was no consensus. The one party may be in a position to say that it was the other party's own fault that he did not know [scil. of the meaning attached by the first to the expression used] - that his ignorance arose from his own carelessness ... [B]ut I cannot say that on the facts as proved the defender is to be barred from pleading his ignorance."

16. We think that it might beneficially be provided, for the avoidance of doubt, that where the meaning ascribed to an expression or the signification attached to the words and actings of the parties by one party is known to, or ought to have been known to, the other and where the expression is or the words and actings are capable of bearing that meaning or signification, then a contract in that sense should be regarded as having been concluded. Where a party did not have actual knowledge of the other party's understanding of the expression or of the effect of the words and actings, but ought to have known it, an alternative solution may be put forward for consideration. It might in this case be provided that, if otherwise it would have been held that in consequence of the ambiguity or misunderstanding there was no consensus between the parties and hence no contract, this should remain the situation, but the party who ought to have known of the other's meaning should be liable to the latter for and to the extent of any actual loss suffered by him through acting in reliance upon the existence of a contract. In other words, no contract would come into being, but the party who negligently failed to appreciate the other's understanding of the expression used would be bound to compensate that other for any actual loss or expenditure incurred by him on the faith of their putative agreement. We invite comments on these matters.

17. As regards paragraph 3 of Article 3 of the Draft Uniform Law, we are less convinced that the provision therein contained is one which should be introduced into Scots law. Where, because of an ambiguity in the expressions used by them or because of a mutual misunderstanding over the signification of the words and actings used by them the parties are genuinely at cross-purposes on a matter which is material to their proposed agreement, we doubt

whether they should be held bound to a contract bearing the meaning that would have been attached to the ambiguous expression or attributed to the words and actings by "reasonable persons". This is to impose upon at least one of the parties obligations which he did not undertake. In many situations of the type under discussion we think that a party who attached to an expression a meaning or attributed to words and actings a signification different from that of "reasonable persons" would be held bound to a contract in those terms by virtue of the operation of the rule outlined in the preceding paragraph: he knew or ought to have known of the meaning attached to the ambiguous expression or of the signification attributed to the words and actings by the other party to the agreement. In those, probably few, cases in which the party could not be said to be at fault in failing to appreciate the meaning attributed to their agreement by the other, we see no good reason for holding him bound to a contract bearing that meaning merely because "reasonable persons" would have interpreted it in that way. He, ex hypothesi, genuinely did not; nor, again ex hypothesi, is it the case that he ought to have known that the other party did. Furthermore, it is only in circumstances where the parties have genuinely differed in the meaning or signification to be attached to an expression or to words and actings capable of bearing those different meanings or significations that rules such as those under consideration could come into play. A court would require to be convinced that the meaning contended for by a party was a possible one, and that he actually did use the expression in that meaning or actually did attribute that signification to the words and actings when the alleged agreement was concluded. Only then would the existence of the ambiguity or misunderstanding become legally relevant and the door be opened for the possible application of the rules described in this and the foregoing paragraph. The fact that "reasonable persons" would interpret an expression in a given way or would ascribe a particular signification to words and actings would be a factor which would make it more difficult for a party to establish to the satisfaction of the court that he genuinely attached a different meaning to the expression, or attributed a different signification to the words and actings. For these reasons, we think that while the

principles to be found in paragraphs 1 and 2 of Article 3 of the Draft Law might beneficially be embodied in a statutory provision, there should not be introduced into Scots law a rule similar to that found in paragraph 3. Comments are invited.

18. Under the present law, if the circumstances are such that it is not possible to solve the problem by attaching to an ambiguous expression or to particular words and actings the meaning or signification which was, or ought to have been, known by one party to have been in the mind of the other, the result is that since the parties have not achieved consensus in idem, no contract comes into existence, provided at least that the matter on which the parties are at cross-purposes is one of importance.[34] In Wilson v. Marquis of Breadlabane[35] the negotiations between the parties had led the pursuer to believe that a contract for the sale of bullocks at £15 per head had been concluded, while the defender was under the impression that the agreed price was £13 per head. Lord Justice-Clerk Inglis expressed his view of the legal consequences in the following terms:[36]

> "In order to the constitution of a contract of sale, there must be consensus in idem placitum. If one party thought that the price was fixed, and the other not, and each believed a different thing to be the contract, there could be no consensus in idem placitum. Looking to the whole circumstances, I am quite unable to bring myself to believe that either party has stated what was untrue. My belief is that each is honest in his account of the matter; and that being so, the result I have arrived at is, that there was no contract as to the price. Then what is the legal result? If the question had arisen rebus integris, there would have been no contract ... But, res non sunt integrae. Both parties went on with the sale ... [The defender] insists on his right to the cattle as bought and paid for. The cattle are held and used by the defender on that footing ... There is no contract price. I think there is nothing for it, but that the defender must pay the value."[37]

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[34] We consider infra, para. 20 what meaning should be ascribed to "importance" in this context.

[35] (1859) 21 D. 957.

[36] At pp. 963-4.

[37] The interlocutor pronounced by the court reads, in part (p.965): "Find that, as regards the price of the said bullocks, there was a misunderstanding between the parties, and no consensus in idem placitum, so that rebus integris both parties would have been free ..."

In Stuart & Co. v. Kennedy,[38] in which the parties were at issue over whether the price for the supply of coping-stone was 1s.9d. per lineal or per superficial foot, the First Division confirmed the view of the law that had been taken in the earlier case. Lord President Inglis said:[39]

> "Now the Sheriff thinks that there has been an entire misunderstanding as to what price was to be charged. He thinks both parties are perfectly honest in their statements, that the one party honestly believed the charge was to be by lineal foot, the other believed with equal honesty that it was to be by superficial foot. If that is so ... I think he is right in holding that the rule of the case of Wilson must apply ... If there is no consensus in idem placitum, the effect of course is, that there is no contract at all, and that parties are as free as they were before they had had any negotiations. But if something has followed, if the contract is partly or wholly performed, you cannot then undo the contract and hold both parties free. Now, here, coping to the extent of 394 feet, or more than half of the whole, has been delivered and received. That being so, res non sunt integrae, the contract cannot be resolved or undone, and therefore we must see that there should be some kind of performance on the other side. To determine what that is to be, we revert to the rule of Wilson's case, and hold that the actual value of the subject delivered, as that is ascertained by the market price, is the measure of the defender's liability."

19. We are of the view that the law, as seen in operation in these two cases, in its result is broadly satisfactory and that no change in that result is called for. Some clarification of the principles involved may, however, be desirable. If the parties, because of a genuine and irresolvable misunderstanding or ambiguity, are at cross-purposes on a material point, they have not succeeded in reaching agreement, no contract should be held to exist and restitution of any property delivered or repetition of any money paid should take place. Where, however, goods have been delivered or services have been performed on the faith of the putative agreement in circumstances in which restitution is impracticable or impossible or is not desired by the parties, the party who has benefited from the supply of the goods or the rendering of the services should be bound to pay for them to the extent that he has been enriched thereby - in quantum lucratus est. This is merely an application to the particular case of a contract void because of

[38](1885) 13 R. 221.

[39]At pp. 222-3.

dissensus of the general principles of the law of recompense.[40] It is possible to interpret passages in the opinions delivered in Wilson v. Marquis of Breadalbane[41] and Stuart & Co. v. Kennedy[42] as placing the defenders' right to payment on the basis not of recompense and quantum lucratus, but of quantum meruit. While in cases involving the supply of goods there is little if any difference in the result of adopting either approach, in that the extent of the defender's enrichment can best and perhaps only be measured by the market value of the goods supplied, we think that in principle the defender's liability should be quantum lucratus and not quantum meruit. Payment on the latter basis is due in cases of implied contract - where there is or is by law deemed to be a valid agreement between parties, but no mention is made in it of the price to be paid for the services rendered. The law then adopts the attitude that the parties must have tacitly agreed that payment should be on the basis of the market value of the services - quantum meruit. In the case of a contract which, because of dissensus, is absolutely null, there is no subsisting agreement into which such a term can be implied. It is therefore our view that the obligations of the party benefited by the supply of goods or services in such a case should be founded not upon implied contract and quantum meruit but upon principles of unjustified enrichment (quasi-contract) and quantum lucratus. We invite comment on this matter.

20. If an irresolvable ambiguity or misunderstanding is capable, because of the absence of mutual consent which it necessarily entails, of precluding the formation of a contract, it is clearly a matter of importance to determine in what circumstances it has or should have this effect. It would, we think, be intolerable if the existence of any ambiguity, no matter on how trivial an aspect of the parties' arrangement,

[40] See e.g. Smith, Short Commentary, pp. 627-31; Walker, Principles of Scottish Private Law, 2nd ed., pp. 1011-1015.

[41] (1859) 21 D. 957.

[42] (1885) 13 R. 221.

were to lead to the conclusion that there was no consensus in idem and hence no contract. From the cases which we have already mentioned[43] it is apparent that mutual misunderstanding as regards price is of sufficient importance to prevent the conclusion of a contract. The same is true in the case of an ambiguity in respect of the subject-matter of the contract.[44] It is thought that it would equally be held that no contract came into existence where the irresolvable ambiguity related to the nature of the contract supposedly entered into, as where one party claimed that the result of their negotiations was a contract of hire and the other a contract for services, and it is impossible for the court, on the evidence led, to say that the view of either one of them is objectively correct.[45]

21. These examples of cases in which an irresolvable ambiguity or misunderstanding would - and, we think, should - have the effect of precluding the formation of a contract correspond with three of the five categories of "error in substantials"

[43] Para. 18, supra.

[44] Houldsworth v. Gordon Cumming 1910 S.C. (H.L.) at 52 per Lord Loreburn L.C. and at 62 per Lord Shaw of Dunfermline. The English case of Raffles v. Wichelhaus (1864) 2 H. & C. 906 should probably also be regarded as falling under this heading: although the parties were at one as regards the quality and quantity of the cotton to be sold, there was an irresolvable ambiguity affecting the contractual provisions regarding delivery, viz. whether it was to be carried on "Peerless I" or "Peerless II". The effect of this was that the seller thought the contract was in respect of cotton to be shipped from Bombay in December, while the buyer thought it related to cotton to be shipped in October. There was thus dissensus regarding the question whether the subject-matter of the contract was October cotton or December cotton.

[45] Cf. Mathieson v. Quigley 1952 S.C. (H.L.) 38 where the defenders' offer contemplated a contract of locatio rei and the pursuer's "acceptance" contemplated a contract of locatio operis faciendi. It was held that there was no consensus in idem and hence no contract. In Ferguson v. Dawson [1976] 3 All E.R. 817 (C.A.) the court, on the evidence led, was able to resolve the ambiguity or misunderstanding and to hold (Lawton L.J. dissenting) that the contract between the parties was one of service and not a labour-only subcontract. In the case of a contract not of one of the nominate types (e.g. sale, hire, deposit, gift, service, etc.) but tailor-made by the parties, an ambiguity or misunderstanding could, it is thought, relate to the nature of the contract only if any terms which would require to be implied into it by the law to give it commercial or practical efficacy would differ materially on the understanding of one party from those requiring to be so implied on the view of the other as to the essential nature of their arrangement. Cf. Liverpool City Council v. Irwin [1976] 2 W.L.R. 562 at 567-8 per Lord Wilberforce and at 579-81 per Lord Edmund-Davies.

described by Bell[46] and approved by Lord Watson in Stewart v. Kennedy[47] in the following terms:

> "I concur ... as to the accuracy of the general doctrine laid down by Professor Bell ... to the effect that error in substantials such as will invalidate consent given to a contract or obligation must be in relation to either (1) its subject-matter; (2) the persons undertaking or to whom it is undertaken; (3) the price or consideration; (4) the quality of the thing engaged for, if expressly or tacitly essential; or (5) the nature of the contract or engagement supposed to be entered into. I believe that these five categories will be found to embrace all the forms of essential error ..."

It is for consideration whether an irresolvable misunderstanding falling within the two remaining categories - i.e. as to the persons undertaking the obligation, and the quality of the thing engaged for - should equally prevent the conclusion of a contract, and also whether an ambiguity or misunderstanding should be capable of having that effect though not falling within one of these five categories.

22. As regards ambiguity or misunderstanding in relation to the quality (or qualities) of the subject-matter, our provisional view is that this should render the contract absolutely null if, but only if, the presence or absence of the quality in respect of which mutual and irresolvable misunderstanding exists was by both parties regarded, expressly or tacitly, as essential to, and as an actual part of, their bargain. The effect of this would be that where, for example, of two parties negotiating the sale (or hire) of a piece of machinery one believed that the equipment in question would maintain 100 horse-power, and the other that it would maintain 150 horse-power, the first question to be asked would be: is it possible for the court in the light of the words and actings of the parties (including any intention known by one of them to be in the mind of the other)

[46] Principles, para. 11.

[47] (1890) 17 R. (H.L.) 25 at pp. 28-29. The case itself was concerned not with dissensus, but with the effect of unilateral essential error.

to say that an agreement in particular terms (including the horse-power of the machine) was arrived at? If so, the court will recognise that agreement even though one of the parties claims that his intention or understanding or belief was otherwise.[48] Again, if the court is able to say that both parties were agreed upon the sale of a particular and identified piece of machinery and that their agreement as concluded was for the sale of the machine as it stood and contained no provision at all on its horse-power a valid contract will be held to exist for the sale of the machinery as it stands, and their conflicting views as to its horse-power being merely collateral to the agreement which the court had decided they actually made, would not be effective to bar the conclusion of the contract. Where, however, the court concluded that the negotiations ultimately resulted in a situation in which one party undertook to buy a machine of 150 horse-power and the other undertook to sell a machine of 100 horse-power, the result would be irresolvable misunderstanding or dissensus - failure of offer and acceptance to meet - and, consequently, no contract. The outcome would be the same where it transpired that the buyer undertook to buy a machine of 150 horse-power and the seller undertook to sell a particular and identified machine as it stood which in fact would maintain only 100 horse-power: here, too, there is no consensus in idem. In other words, our provisional proposal is that it is when a misunderstanding or ambiguity regarding the quality of the subject-matter cannot be resolved, by reference to the words and actings of the parties, in favour of one or other of them, and where, in addition, that ambiguity or misunderstanding in fact amounts, because the presence or absence of the quality is expressly or impliedly considered by the parties as essential to (and a part of) the contract, to a failure to agree on the subject-matter of the contract, then a contract should be held not to exist. Comments are invited.

23. In the case of misunderstanding in relation to the person or persons undertaking the obligation our view is that it is only in very limited circumstances that it could or should be held that no contract has come into existence. The

[48] We are not in this Memorandum concerned with grounds of reduction or rescission.

mere fact that a party believes that the person with whom he has concluded an agreement is someone other than he in fact is and that the first party would not have been willing to contract with the other had he known the truth does not negative the existence of consensus in idem and so prevent the formation of a contract.[49] Consent is given even though it has been extracted only through fraudulent misrepresentation as to one's identity. On the other hand, there is no consensus, and hence can be no contract, where a person purports to accept an offer which has not been made to him:[50] if A addresses an offer to B no contract results if an "acceptance" is made by C, even if C impersonates B. It is equally clear that if no offer has been made then no words or actings by B can be regarded as amounting to an acceptance which concludes a contract between A and B: there is, by definition, nothing to accept. It is thought that this is one possible explanation of the case of Morrisson v. Robertson,[51] in which Telford, falsely representing himself to be the authorised agent (and son) of a reputable and creditworthy farmer and to be acting on his behalf induced Morrisson to part with two cows, the price to be paid at a later date. Telford then sold and delivered the cows to Robertson, an innocent third party. It was held that Morrisson was entitled to recover the cows from Robertson. The underlying reason for this is, we think, that there was no contract of sale between Morrisson and any other person under which ownership of the cows could have passed. No offer to buy them had been made by the reputable farmer, Wilson of Bonnyrigg, or on his behalf: Telford was not his agent and had no intention at any stage of acting in that capacity. Equally no offer to buy cows was made by Telford personally: he did not at any point say, or lead Morrisson

[49] The contract, in the circumstances outlined, may be liable to annulment on the grounds of error, misrepresentation or fraud, but it is not void ab initio for lack of consent. See e.g. MacLeod v. Kerr 1965 S.C. 253; Phillips v. Brooks [1919] 2 K.B. 243; Lewis v. Averay [1972] 1 Q.B. 198; contra: Ingram v. Little [1961] 1 Q.B. 31. See Slade, "The Myth of Mistake in the English Law of Contract" (1954) 70 L.Q.R. 385; Hall, "New Developments in Mistake of Identity" (1961) 18 Camb. L.J. 86.

[50] See our accompanying Memorandum No.36, para. 26.

[51] 1908 S.C. 332.

to believe, that he himself was the purchaser of the cattle. There was, therefore, no offer to buy which Morrisson could accept, and hence no sale under which Morrisson could have been divested of his title to the cows. The position was stated clearly by Lord McLaren:[52]

> "If Telford, the man who committed the fraud, had by false representations as to his own character and credit obtained the cows from the pursuer on credit, then I think that would have been the case of a sale which, although liable to reduction, would stand good until reduced. But then that was not at all the nature of the case. The pursuer never sold his cows to Telford. He believed that he was selling the cows to a man Wilson of Bonnyrigg, whom he knew to be a person of reasonably good credit ... This belief that he was selling the cows to Wilson was induced by the fraudulent statement of Telford that he was Wilson's son. It is perfectly plain that in such circumstances there was no contract between Telford and the pursuer, because Telford did not propose to buy the cows for himself ... Neither was there any sale of the cows by the pursuer to Mr Wilson, Bonnyrigg. Wilson knew nothing about them, and never authorised the purchase; the whole story was an invention. There being no sale either to Wilson or to Telford, and there being no other party concerned in the business in hand, it follows that there was no contract of sale at all, and there being no contract of sale the pursuer remaimed the undivested owner of his cows ... "

24. In our view it should be the law - as it may already be - that a misunderstanding in relation to the identity of a party should prevent the formation of a contract only in cases (a) where an "acceptance" is made (whether fraudulently, negligently or innocently) by a person to whom the offer in question was not directed, and (b) where an "acceptance" is made or actings from which acceptance might be inferred are performed in circumstances in which either no offer at all has in fact been made or no offer has been made by the person to whom the "acceptance" is directed. Such provisions would entail the consequence that where the offeror and offeree are actually in each other's presence the offeror's belief that the offeree was someone other than he in fact was would not normally prevent the conclusion of a contract: it would be only very rarely, it is thought, that a court would be able

to hold that the offer was not in fact made to the person present before the offeror. The offeror's mistaken belief regarding the identity of the offeree would not, except in unusual circumstances, render nugatory the offer and acceptance, but would in appropriate circumstances mean that the resulting contract was liable to annulment by reason of error. Similarly where an offeree accepts an offer under a misapprehension as to the identity of the offeror, only where it can be said that his acceptance was made not to the person who made the offer but to the person whom he erroneously believed to be the offeror, would no contract exist. It is, clearly, difficult to envisage a situation - except, perhaps, in a case involving identical twins[52] - in which a court would hold this to be the case where the parties are physically present together. In these circumstances also then, a contract would normally be held to have been concluded, but one which might well be open to annulment on account of the offeree's error. We invite comments on the views expressed in this and the preceding paragraph.

25. We think that the vast majority of the ambiguities or misunderstandings which should be regarded as having the effect of precluding the constitution of an obligation would fall within Bell's five categories of "error in substantials".[53] However, it is possible to envisage an ambiguity or misunderstanding which is of sufficient materiality to render it desirable that no obligation should come into existence, yet which cannot, or cannot easily, be classified under any one of these five headings. Thus, for example, in some cases, an ambiguity relating to time of performance[54] or a misunderstanding affecting place of performance (e.g. delivery of goods sold) might be of such importance that no obligation should be regarded as coming into being. While ambiguities of this character

[52] See Shakespeare, Comedy of Errors.
[53] See para. 21, supra.
[54] Cf. Raffles v. Wichelhaus (1864) 2 H. & C. 906.

might often reasonably be characterised as affecting the subject-matter of the obligation or the quality (or qualities) of the subject-matter[55] we think that it might nevertheless be beneficial for the avoidance of doubt, to provide that an ambiguity not falling within one of Bell's five categories should have the effect of precluding the constitution of an obligation if the matter in respect of which the ambiguity or misunderstanding exists is, by both the parties, regarded expressly or tacitly, as essential to the obligation thought to exist between them. Comments are invited.

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55 See para. 22, supra.

C. ERROR IN DECLARATION

26. Where an offer is expressed in terms which do not accurately reflect the intention of the offeror - as where, by a slip of the tongue or of the pen, an offer is expressed to relate to the offeree's goat instead of his boat, or where the offer price is expressed as £1000 instead of £100 - it seems that under the present law an acceptance will not result in the conclusion of a contract, provided that the offeree was aware of the fact that the offer in the terms in which it reached him was not a true reflection of the offeror's intention.[56] Thus, if parties have been negotiating for the sale of a boat an offer expressed to relate to a goat would not be open to acceptance so as to conclude a contract for the sale of a goat, but would be capable of acceptance as an offer for the boat if it could in all the circumstances be held that by the word "goat" both parties understood the word "boat".[57] Similarly, where an offeree has refused an offer of £75 but has let it be known that he would accept £100, a communication from the offeror mentioning £1000 would not, on acceptance, conclude a contract at the higher figure.[58] Whether a contract came into existence at £100 would, again, depend upon whether there was proved to be consensus in idem on the lower figure. If, on the other hand, the offeree does not know that the offer as made to him contained a slip of the tongue or of the pen, we think that an acceptance by him in good faith should result in the conclusion of a contract, though one which might, in appropriate circumstances, be liable to annulment on the ground of consensual error.[59] In cases of the kind under discussion our

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[57] Gloag, Contract, 2nd ed., p.437.

[58] Cf. paras. 13-15, supra.

Gloag, Contract, 2nd ed., p. 437; Smith, Short Commentary, p.827.

[59] In Sword v. Sinclair (1771) Mor. 14241, 8 Aug. 1771 F.C., an offer to sell tea was made by the seller's agent and accepted at 2s.8d. per pound, instead of 3s.8d.. The seller, when he discovered the mistake, refused to deliver the tea. The buyer sued for breach of contract, but the seller was assoilzied. It is not clear whether the reason for the court's decision was that the contract was void for lack of consensus or that it should be annulled because of the seller's error in pretio. The latter interpretation is favoured by Gloag (Contract, 2nd ed., p.438) and is, in our view, preferable. A somewhat different view of the case was taken by Lord Dunpark in Steel's Trs. v. Bradley Homes (Scotland) Ltd. 1972 S.C. 48 at p.55.

view is that a contract should be held to exist, or not to exist, on the basis of the application of the same principles as determine whether a contract comes into being in the case of an offer made in jest.[60]

27. Quite different from situations such as those just mentioned are cases in which the offeror genuinely intended to make his offer in the terms in which it was couched, but had formed that intention because of a mistaken appreciation of the facts or an arithmetical error. The most common examples of this are where a contractor submits a tender which, because of a mistake in his calculations, is lower than it would otherwise have been.[61] In such cases it seems clear that a contract may come into being irrespective of the offeror's miscalculation. Where his miscalculation is obvious ex facie of the offer (as where the contract is to be by schedule rates and there is merely an error in computing or in adding up the individual items) the contractor will be held entitled to recover the correctly calculated sum;[62] on the other hand, if the miscalculation is purely private and the offer simply mentions a lump sum, without disclosing individual items which render the mistake apparent, a contract will be concluded on the basis of the sum actually stated by the offeror,[63] unless, possibly, the figure stated is clearly ridiculous, in which case the offeree will be regarded as having notice that the sum mentioned did not represent the offeror's true intention. Where a contract is regarded as having been concluded it may nevertheless, in certain circumstances, be open to annulment for error.[64] We

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[60] See Memorandum No.36, para. 68.

[61] E.g. Jamieson v. McInnes (1887) 15 R. 17; Wilkie v. Hamilton Lodging House Co. (1902) 4 F. 951; Seaton Brick and Tile Co. v. Mitchell (1900) 2 F. 550.

[62] Jamieson v. McInnes, supra; Wilkie v. Hamilton Lodging House Co., supra.

[63] Seaton Brick and Tile Co. v. Mitchell, supra.

[64] Gloag, Contract, 2nd. ed., pp. 438-9.

regard the law relating to offers which are affected by slips of the tongue or of the pen, as set out in this and the preceding paragraph, as generally satisfactory. Comments are, however, invited.

D. ERROR IN TRANSMISSION

28. It appears to be the law that where an offer has been garbled, or altered in a material respect, in the course of transmission, an acceptance by the offeree will not result in the conclusion of a contract.[65] In Verdin Bros. v. Robertson[66] Lord Cowan stated his view of the law in the following terms:

> " ... the first question is, whether or not there has been a concluded contract between the parties ... The correct message was handed in by the defender to the telegraph office, to be transmitted to the pursuer. But a mistake was made by the telegraph officials, which led to the message being delivered to the pursuer in a materially and essentially altered form. Now, can it be said that there was here consensus in eundem contractum between the parties in this transaction? Clearly not. The pursuer may have been willing enough to implement the order he received; but then the defender had not sent that order, and had not consented to it."

It is for consideration whether it is desirable that no contract should come into existence in every case in which an offer is "materially and essentially altered" in course of transmission.[67] The view might be taken that where an offeror chooses to communicate by a method, such as telegram or telex, in which the garbling of messages is a recognised possibility, the risk of this happening should rest upon him and not upon the recipient, except of course where the offeree is aware that the message has been delivered to him in terms different from those in which it was dispatched by the offeror. The consequence of this would be that where the offeree accepted an offer which he did not know had been altered in transmission, a contract would be concluded.

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[65] Henkel v. Pape (1870) L.R. 6 Ex. 7; Verdin Bros. v. Robertson (1871) 10 M. 35.

[66] (1871) 10 M. 35 at p. 37.

[67] It is thought, though there appears to be no authority on the point, that a material and essential alteration is one which relates to "the substantials" of the offer and falls within one of the five categories mentioned in para. 21, supra.

29. An alternative, and in our view, preferable, solution to the problem of protecting bona fide offerees in such circumstances, would be to retain the present rule that no contract comes into being, but to confer upon an offeree who was unaware of the alteration of the offer in transmission a right to recover compensation from the offeror in respect of any actual loss suffered by the former through acting in reliance upon the conclusion of a contract. The offeree's right to compensation would be similar to that arising under the doctrine of culpa in contrahendo in continental legal systems[68] and the offeror might, in his turn, in some cases have a right to recover damages from the communication enterprise for the loss suffered by him in consequence of the improperly transmitted message. In this way, the offeree's negative (or reliance) interest would be protected, but not his positive (or expectation) interest: he would not find himself out of pocket, but on the other hand, would not be entitled to the full contract price or to damages in respect of the profit which he would have made had the contract been validly concluded. Thus in Verdin Bros. v. Robertson, if decided under such a scheme, the pursuer would have recovered from the defender not the contract price for 15 tons of salt or damages in respect of the pursuer's loss of profit when the defender refused to accept it, but rather the cost to the pursuer of sending the salt by rail from Liverpool to Peterhead and the cost of sending it back to Liverpool if it was not reasonably practicable for the pursuer to mitigate his loss by disposing of the salt to a buyer nearer Peterhead.
We invite comments on the different methods of solving the problem created by offers altered in transmission explored in this and the preceding paragraph.

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68 See Schwenk, "Culpa in Contrahendo in German, French and Louisiana Law" (1941) 15 Tul. L.R. 87; Kessler and Fine, "Culpa in Contrahendo ... A Comparative Study" (1964) 77 Harv. L.R.401.

E. PRE-CONTRACTUAL FRUSTRATION

30. In our accompanying Memorandum No.36[69] we provisionally propose that where, after an offer has been made but before it has been accepted, an event occurs which renders the conclusion or performance of a contract in those terms illegal or impossible or which would in some other way have the effect, if a contract had been concluded, of discharging it by frustration, then the offer should automatically lapse, and become incapable of acceptance. It is also our view that, unless in exceptional circumstances, no contract should come into being where, unknown to either party, the illegality or impossibility already exists at the time the offer is made, or where the event, which would have resulted in the discharge by frustration of a concluded contract, has before then already occurred. Under the present law it is clear that this principle is recognised and has been applied in a number of different circumstances. Thus, in the case of a contract for the sale of specific goods, the contract is void if, at the time it is made, the goods have, unknown to the seller, already perished;[70] if a ship is chartered which at the time of conclusion of the charter-party has already been lost, no contract comes into being;[71] if goods are sold which in fact already belong to the purchaser, there is no contract;[72] if a lease is concluded of a house which has already been burned down, the contract is void.[73] Although there appears to be no Scottish authority on the point, we think it likely that a court would reach the same conclusion in a case where parties have made an agreement of a type, the conclusion or performance of which is prohibited or impossible under the law as it stands. It is clearly the case that an existing contract is discharged by a change in the law which

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[69] Para. 61.

[70] Sale of Goods Act 1893, s.6; Couturier v. Hastie (1865) 5 H.L.C. 673. Where the parties are aware that the goods may have perished, it is, of course, possible for a valid contract to be concluded in which the buyer takes that risk, i.e. an emptio spei. See Pender-Small v. Kinloch's Trs. 1917 S.C. 307.

[71] Sibson & Kerr v. Barcraig Co. (1896) 24 R. 91 at p.98.

[72] Cf. Morton v. Smith (1877) 5 R. 83.

[73] Digest 18.1.57.

renders it, or its performance, illegal;[74] it would therefore seem reasonable to conclude that an already existing prohibition on transactions of the kind in question should prevent the formation of a contract. Indeed, it may be difficult in some cases to determine whether the prohibition should be classified as a supervening one or as one which already existed when the parties made their agreement, as where a court, after the agreement has been concluded, interprets a statutory provision, which had not previously been thought to have that effect, as rendering such contracts or their performance, illegal.[75] We therefore propose that it should be enacted, for the avoidance of doubt, that an existing legal prohibition prevents the formation of a contract. It would, of course, remain possible for parties to contract on the basis that one of them should bear the risk of their agreement or its performance being subsequently held to be illegal; and in such circumstances that party's eventual failure to perform because of the illegality would render him liable to the other in damages for breach of contract. Comments are invited.

31. In the case of a concluded contract the doctrine of frustration may operate even though the event which has occurred does not render performance absolutely, or physically, impossible: it is sufficient that the obligation "has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken."[76] So also a contract may be held never to have come into being where, unknown to the parties, and before the conclusion of their agreement, an event has taken place or a state of affairs exists which would render performance, though not strictly impossible, a thing radically different from what the parties

[74] See e.g. Fraser v. Denny, Mott & Dickson 1944 S.C. (H.L.) 35.

[75] Cf. Amalgamated Investment Co. Ltd. v. John Walker & Sons Ltd. [1976] 3 All. E.R. 509 (C.A.) where the plaintiff contended in the alternative that a contract was void for common mistake or had been discharged by supervening frustration.

[76] Davis Contractors v. Fareham U.D.C. [1956] A.C. 696 per Lord Radcliffe at p.729.

had in mind when they made their arrangement. Thus, for example, a purported discharge by a daughter of her claims under her parents' marriage contract was held to be void where both the daughter and her father were genuinely unaware that the father was vested not with the fee but with merely a liferent in his deceased wife's estate;[77] and an assignation of a life insurance policy has been held to be void where both the assignee and cedent were ignorant of the fact that the person whose life was insured was already dead.[78] Gloag expresses the principle applied in cases such as these in the following terms:[79]

> "Where both parties have contracted on the assumption of the existence of a certain state of facts, and it turns out that the assumption is mistaken, the contract may be void on the ground that the existence of the assumed facts was impliedly made a condition precedent to liability".

32. This rationale is, clearly, analogous to the theory which seeks to explain the discharge of a concluded contract by frustration on the existence of an implied term in the parties' agreement to the effect that on the occurrence of the event which in fact happened their agreement would come to an end.[80] This theory of the basis of the doctrine of frustration is not universally accepted. Lord Cooper took the view[81] that

> "The established effect of the operation of frustration is to terminate the contract automatically as regards future performance, leaving it alive only for the purpose of vindicating rights already accrued, and to do so without regard to the individuals concerned or to their supposed interests, intentions or opinions. There is, in my view, no room in this or any similar case for the enquiry suggested by the Lord Ordinary into what the parties would have agreed if they had expressly contemplated a frustration of the trading agreement."

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77 Mercer v. Anstruther's Trs. (1871) 9 M. 618.

78 Scott v. Coulson [1903] 2 Ch. 249; Gloag, Contract, 2nd ed., p. 454.

79 Contract, 2nd ed., p. 453.

80 See e.g. Tamplin S.S. Co. v. Anglo-Mexican Petroleum Products [1916] 2 A.C. 397 at 404; Hirji Mulji v. Cheong Yue S.S. Co. [1926] A.C. 497 at 504; Joseph Constantine S.S. Line v. Imperial Smelting Corp. [1942] A.C. 154 at 163; British Movietonews v. London and District Cinemas [1932] A.C. 166 at 183, 187.

81 Fraser v. Denny, Mott & Dickson 1943 S.C. 293 at 314. See also Cooper, "Frustration of Contract in Scots Law" (1946) 28 Journal of Comp. Leg. 1 at p.5.

A similar attitude - that in cases of frustration the contract is discharged not because of an implied term to that effect in the parties' agreement, but simply because, looked at objectively, performance in the changed circumstances would be something radically different from what was originally undertaken - has been taken in the House of Lords.[82]

33. In proposing that Scots law should recognise a general doctrine of "pre-contractual frustration" - that a contract does not come into being where, unknown to the parties and without the fault of either of them, a state of affairs exists or an event has occurred such that performance would be a thing radically different from that contemplated - we do not find it necessary to adopt one or other of the competing theories regarding the basis of the doctrine of frustration. We can envisage circumstances in which it would be unrealistic to attribute the failure of a contract to be concluded to an implied condition in the parties' agreement - where, for example, the event which had occurred is one which the parties did not foresee, but in relation to which, if they had foreseen it, they would have made provision in some manner less extreme than desiring their agreement to be totally ineffectual. In such cases it seems preferable to say that no contract is formed simply because, on the occurrence of the event, the situation which the parties had in contemplation as the substratum of their agreement does not in fact exist and it has, looked at objectively, become quite inappropriate that they should be regarded as bound by the terms agreed upon, and the court cannot, of course, reformulate the parties' agreement by inserting into it such provision as they themselves would have made had they been aware of the true state of affairs. There are, however, in our view, cases of other types in which it is reasonable to ascribe the failure of a contract to come into

[82] Fraser v. Denny, Mott & Dickson 1944 S.C. (H.L.) 35 esp. per Lord Wright at 42-3; Davis Contractors v. Fareham U.D.C. [1956] A.C. 696 esp. per Lord Reid at 719-20 and Lord Radcliffe at 728-9; Tsakiroglou v. Noblee & Thorl [1962] A.C. 93. See also Lord Wright, Legal Essays and Addresses pp. 258-9.

being to the operation of a condition implied by the parties in their dealings with one another. If, as is clearly possible, parties may expressly provide that no contract shall be concluded between them unless a certain state of facts exists, there seems no reason in principle why such a condition suspensive of obligation should not, in appropriate circumstances, be implied. Not every divergence between the true facts and the facts as they were mistakenly believed to be by the parties would be of sufficient materiality to enable a court to say that no contract had been concluded because, looked at objectively, a contract in these terms would be a radically different thing from what was contemplated by the parties;[83] nevertheless it might well in some situations be clear from their words and actings that for the parties themselves their mistaken belief was of such importance that they would not have concluded any agreement had they known the actual state of affairs. In this event a court might reasonably decide that it was an implied condition of the parties' agreement that no contract would be concluded between them if it transpired that their understanding of the facts was mistaken.

34. Our provisional proposal is, therefore, that it should be enacted that where, unknown to the parties, the performance of a contract such as that envisaged by them is impossible or where, unknown to them, a state of affairs exists or an event has occurred which would render performance in the terms agreed upon a thing radically different from what was contemplated by the parties, then no contract should be held to come into existence unless the language used by them or the circumstances surrounding them, indicate the contrary.[84] Where, in such a

[83] A concluded contract is held to be discharged by frustration only where, in the changed circumstances, performance would be a thing radically different from that which the parties had contemplated. It is not sufficient that performance has merely become more difficult or onerous or expensive: Smith, Short Commentary, pp. 848-9; Walker, Principles of Scottish Private Law, 2nd ed., pp. 674-76. The same rule would apply in cases of pre-contractual frustration.

[84] A similar provision appears in the American Law Institute's Restatement (Second) of Contracts, Tentative Draft No.9 (1974) Ch. 11, s.286: "Where, at the time a contract is made, a party's performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary."

case, money had been paid or property delivered on the faith of the agreement, the normal rules of law governing repetition and restitution would operate; and where one party had benefited from the performance (or partial performance) of the other in circumstances in which restitution or repetition were impossible or inappropriate, an action for recompense would be competent against the party enriched. It is also for consideration whether, if the existence of the fact which gives rise to pre-contractual frustration ought to have been known to one of the parties, (and especially the party who initiated the negotiations), or if the occurrence of the event which causes it is attributable to one of the parties, that party should be liable for any actual loss suffered by the other. This would mean that the latter's negative (or reliance) interest would be protected, but not his positive (or expectation) interest: he would thus be safeguarded against finding himself out of pocket, but would not be entitled to the full contract price or to damages in respect of the profit which he would have made had a contract been validly concluded. We invite comments on these matters.

F. SIMULATION AND DISSIMULATION[85]

35. A simulated contract is one in which the parties imitate the appearance of a genuine agreement or transaction but in reality do not wish it to have any effect, or at least, not to have the effects that would normally flow from an agreement of the type which they appear to have concluded. Their aim is to achieve some oblique purpose through making use of the outward forms of a particular contract. Where the oblique purpose which the parties wish to achieve is to disguise the conclusion between them of a contract of a different type, or with a different content, from that which, on the surface, appears to exist between them, the situation is generally referred to as one of dissimulation (or "relative simulation"); if, on the other hand, the aim of the parties is something other than the disguising of a genuine transaction between them, and in fact their relationship is confined to concluding the sham contract, the situation is one of "absolute simulation" (sometimes referred to simply as simulation).

36. Relative simulation is more commonly encountered than absolute simulation: in most cases the parties wish to disguise a genuine transaction - as by clothing a pledge or a donation in the form of a sale,[86] or by disguising or falsifying the true price to be paid in a genuine contract of sale in order to minimize the ad valorem commission payable by the seller to the broker who introduced the buyer to him.[87] Absolute simulation, though rare, does sometimes occur, as where a man, having repented of a promise to sell an article to another if, before a certain date, he has not received a better offer, enters

85 See e.g. Rives "Simulation in the Civil Law" (1936) 10 Tul. L.R. 188; Holstein, "Vices of Consent in the Law of Contracts" (1939) 13 Tul. L.R. 362 at 365 et seqq.; Blecher, "Simulated Transactions in the Later Civil Law" (1974) 91 S.A.L.J. 358; Les Conditions de Validité au fond des Contrats de Vente, Report to UNIDROIT by Max Planck Institute, U.D.P. 1963, Etudes XVI/B, doc. 1, pp.44-50.

86 See e.g. Robertson v. Hall's Tr. (1894) 24 R. 120; Scottish Transit Trust v. Scottish Land Cultivators 1955 S.C. 254; G. & C. Finance v. Brown 1961 S.L.T. 408; Gow, The Mercantile and Industrial Law of Scotland, pp. 93-7.

87 See UNIDROIT Draft of a Law for the Unification of Certain Rules Relating to Validity of Contracts of International Sale of Goods, U.D.P. 1972, Etude XVI/B, doc. 22, Commentary p.23.

into a fictitious contract of sale with a friend;[88] or where a man pretends to sell valuable property to his wife, their intention being merely to erect a barrier against any creditor who might proceed against the husband's property;[89] or where a minor, with the consent of her curators, granted a receipt bearing to acknowledge the payment to her of money, but the purpose of which was merely to allow the trustees of her deceased father's estate to settle the Government duties on that estate;[90] or where an American company, in order to be allowed to do business in Mexico, set up a Mexican subsidiary and, in order to satisfy the Mexican Government that the subsidiary was both active and independent, purported to conclude a number of contracts of sale with it.[91]

37. It is clearly recognised in civilian systems that whether the case is one of absolute or of relative simulation the sham or fictional contract is absolutely null.[92] Though authority is scarce, it is thought that the same result would be reached in Scots law. In Smith v. Kerr[93] it was held that the fictional receipt granted by the minor with the consent of her curators was of no effect; and in cases in which parties have attempted to achieve the result of creating a security over the debtor's moveable property retenta possessione by couching their arrangement in the form of a sale agreement in which the "seller" does not deliver the article to the "buyer" their agreement has been held to be ineffective to create either a pledge or a sale.[94] While it thus appears to be the law of Scotland that a simulated transaction is void, the question may arise, in cases where that transaction has been concluded in, or embodied in, writing, whether parole evidence may competently be led to establish that

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[88] Digest 18.2.4.5.

[89] McLaughlin v. Richardson (1830) 2 La.78(Louisiana).

[90] Smith v. Kerr (1869) 7 M.863.

[91] New York Trust Co. v. Island Oil and Transport Co. (1929) 34 F. 2d 655.

[92] E.g. Codex 4.22 (plus valere quod agitur quam quod simulate concipitur); Austria: Allgemeines Bürgerliches Gesetzbuch, art. 916; Germany: Burgerliches Gesetzbuch art. 117 et seqq.; Switzerland: Obligationenrecht, art. 18 (as interpreted); Italy: Codice Civile, art. 1414; France: Code Civil art. 1321 (as interpreted); Louisiana: Civil Code, arts. 2239 and 2480.

[93] (1869) 7M. 863.

[94] Robertson v. Hall's Tr. (1896) 24 R.120 esp. at 134; Gavin's Tr. v. Fraser 1920 S.C. 674; Newbigging v. Ritchie's Tr. 1930 S.C. 273; G & C Finance v. Brown 1961 S.L.T. 408; Gow, The Mercantile and Industrial Law of Scotland, pp.93-7.

the agreement is in fact bogus or simulated or a sham. It is a general rule that it is incompetent for a party to lead parole evidence, or extrinsic evidence of any kind, to attempt to explain, modify, contradict or vary the terms of an obligation constituted or embodied in writing.[95] In Müller & Co. v. Weber & Schaer[96] the First Division applied this rule and refused to allow parole evidence to be led to the effect that an ostensible contract of sale was in fact merely a disguise for a contract of agency. The court in this case, however, was not referred to the decision of the House of Lords in Scottish Union Insurance Co. v. Marquis of Queensberry,[97] in which, affirming the First Division of the Court of Session, it was held competent to establish by extrinsic evidence that although an ex facie absolute assignation of certain life-insurance policies had been executed, the true arrangement between the parties was to effect a redeemable assignation in security of a loan. Nor was reference made to Smith v. Kerr, in which parole proof was admitted that the receipt had been granted not in acknowledgment of payment but to enable the trustee to make payment of the duty due on the estate of the grantor's deceased father. Dickson[98] was firmly of the view that in cases of simulation parole evidence could competently be led even where the sham contract was in writing:

> "The rule which excludes extrinsic evidence in contradiction of a writing suffers an exception, where it is averred that the writing was not intended to be the record of a contract, but the cover of an ulterior transaction ... Were extrinsic evidence not admissible to prove allegations of this kind, it would be impossible to bring such latent transactions to light; and one of the parties would succeed in using the deed as proof of an agreement essentially different from the true one. In such cases, also, evidence by witnesses must be received; because, if the allegations are true, there will probably not be written proof of them."[99]

[95] See our accompanying Memorandum No.39, para. 45, and Walkers, Evidence, Chapter 21.

[96] (1901) 3 F.401.

[97] (1842) 1 Bell's App. 183.

[98] A Treatise on Law of Evidence in Scotland, 3rd ed., para. 1038.

[99] See also ibid. para 1041 and Walkers, Evidence, para. 259.

It is, therefore, probably already the law that parole evidence may competently be adduced to establish that a written agreement is a sham or is simulated. However, in order to resolve any doubt which may exist on this point, we think that a statutory provision to that effect might usefully be enacted. Comments are invited.

38. In cases of dissimulation (or relative simulation) the question arises of legal status of the genuine agreement or transaction which the fictitious or sham contract was intended to disguise. Although in such circumstances the sham contract is absolutely null, it is clear in civilian legal systems that the genuine agreement may be valid.[1] The dissimulated contract is regarded as legally effective, provided that a contract of that type may legally be entered into and that the law's requirements of form and substance for a contract of that kind have been complied with. This means that the disguised agreement will frequently be null, since one of the commonest reasons for entering into a simulated transaction is the parties' desire to secure a result which is not legally permissible or to avoid compliance with the requirements imposed by law for the formation of a contract of the type which they genuinely wish to conclude. But the real transaction is considered separately and alone, and is not automatically affected by the nullity of the sham contract: it stands or (more usually) falls on its own merits.

39. Though there is little authority, we think that Scots law would reach the same conclusion. Certainly where parties attempt to create a security over moveable property without delivery by entering into a fictitious sale, their genuinely intended transaction - the security - is ineffective.[2] It is

[1] See e.g. Codex 4.38 (de contrahenda emptione); Austria: Allgemeines Bürgerliches Gesetzbuch, art. 916; Germany: Bürgerliches Gesetzbuch, art. 117; Switzerland: Obligationenrecht, art. 18; Italy: Codice Civile art. 1414; France: Code civil, art. 1321; Netherlands: Burgerlijk Wetboek arts. 1372, 1910; Louisiana Civil Code, arts. 2239, 2480.

[2] See e.g. Walker, Principles of Scottish Private Law, 2nd ed., pp. 1518-9 and cases there cited. Gow, The Mercantile and Industrial Law of Scotland, pp. 93-7.

thought, however, that this result follows not because the parties have attempted to disguise their true transaction, but because of the substantive rule of Scots law that a security over moveables cannot be created retenta possessione. Similarly, if parties seek to clothe an agreement for the payment of gambling debts in the form of fictitious loan or sale their agreement will be denied effect not because they have attempted to camouflage their real purpose but because agreements of that type are unenforceable in Scots law.[3] Where, on the other hand, the genuine transaction is one which is legally permissible and where the requirements of form and substance which govern it have been complied with, it would not, it is thought, be held to be invalid under the present law merely because the parties sought to disguise their true purpose.[4] Thus, in Scottish Union Insurance Co. v. Marquis of Queensberry[5] effect was accorded to the assignation in security which was the true arrangement between the parties but which had been clothed in the form of an absolute assignation. Likewise, we think that if parties disguised a contract of donation as a contract of sale, the true agreement between the parties would be enforced (provided that the requirements of proof of a gratuitous obligation had been fulfilled), though of course where the subject matter of the donation was a corporeal moveable no property in it would pass until delivery (traditio) to the donee had taken place.[6] In order to resolve any doubts which may exist on this matter, however, it is our view that it would be desirable to enact a statutory provision to the effect that the validity of a dissimulated transaction should be determined independently

[3] Robertson v. Balfour 1938 S.C. 207.

[4] Cf. situations where the ostensible conferring of a jus quaesitum tertio on a named tertius confers on him no substantial right - see our accompanying Memorandum No.38, paras. 23-26.

[5] (1842) 1 Bell's App. 183.

[6] In Ferguson v. Dawson [1976] 3 All E.R. 817 (C.A.) esp. at p.825, it appears to have been accepted that a contract of service was not invalid merely because the parties had sought to disguise it as a labour-only subcontract.

and without being affected by the absolute nullity of the simulated transaction. Comments are invited.

40. If it is the case that a simulated[7] transaction is void - as we think it is and should continue to be - the question arises whether any special protection should be accorded to third parties who have, in good faith, relied upon the validity of the sham transaction. Thus, for example, the "buyer" under a fictional contract of sale may have purported to sell the article in question to a bona fide third party; the "creditor" in a sham contract may have purported to assign his rights under it to an assignee who is ignorant of the nullity; a bona fide third party may have made a loan to a borrower on the faith of the latter's supposed rights under a simulated contract. As well as his personal contractual rights against the person with whom he himself contracted the bona fide third party might well under the present law have a right of action in delict against the other party to the simulated contract. If the latter knew that the sham contract was to be used to induce the third party to contract and intended it to be so used, and if the third party thereby suffered loss, injury or damage, it is thought that this would be a machination or contrivance to deceive sufficient to entitle the third party to damages in a delictual action for fraud. Even in the absence of actual knowledge that the stimulated contract would be used in this way, we see no reason why an action for damages based on culpa should not be competent where a reasonable man in the position of the party to the sham contract would have foreseen that the other party to it would use it to induce a third party to contract with him and that the third party would thereby suffer loss. Furthermore, in our Memorandum No.27[9] we have put forward

[7] I.e. absolute simulation.

[8] There is authority directly in point, but this result could it is thought, be reached on an application of the principles seen in operation in e.g. Robinson v. National Bank of Scotland 1916 S.C. (H.L.) 154, Hedley Byrne v. Heller [1964] A.C. 465 and Esso Petroleum v. Mardon [1976] 2 All E.R. 5.

[9] Corporeal Moveables: Protection of the Onerous Bona Fide Acquirer of Another's Property, especially paras. 40-48.

for consideration a proposal to the effect that the onerous bona fide acquirer of a corporeal moveable a non domino should take a good title to the moveable provided it was not affected by a real vice resulting from involuntary dispossession. Were this proposal to be implemented the third party acquirer in good faith would generally take a good title where his transferor had "acquired" a moveable as a result of a simulated transaction. If the law were to be amended in this way, and if it were accepted that a delictual action based on culpa could succeed against a party to a sham contract in the circumstances already mentioned, our provisional view is that no further measures are necessary in order adequately to protect the position of a third party who has been induced to contract, and has thereby suffered loss, because of his reliance upon the validity of a simulated transaction. Comments are, however, invited.

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

1. Where an agreement is affected by a latent ambiguity the agreement should be interpreted in accordance with the actual common intent of the parties where such an intent can be established. (Para. 14).

2. Where, in the case of an agreement affected by a latent ambiguity or mutual misunderstanding the actual common intent of the parties cannot be established the agreement should be interpreted in accordance with the intent of one of the parties where such an intent can be established and the other party knew or ought to have known what that intent was. (Paras. 15 and 16).

3. Alternatively, this result should follow only where the other party actually knew of the intent of the first party; and in cases where he did not know of it, but ought to have known, the lack of consensus (if material) should preclude the formation of a contract but the party who ought to have known of the other's meaning should be liable to the latter for and to the extent of any actual loss suffered by him through acting in reliance upon the existence of a contract. (Para. 16).

4. Where an agreement is affected by a latent ambiguity or mutual misunderstanding, the parties have no actual common intent and neither knew or ought to have known of the intent of the other, it should not be the law that the agreement is interpreted in accordance with the intent that reasonable parties would have had. (Para. 17).

5. Where the latent ambiguity or mutual misunderstanding by which an agreement is affected cannot be resolved by interpreting the agreement in accordance with the actual common intent of the parties or in accordance with the intent of one of them which was, or ought to have been, known to the other, it should continue to be the law that if the ambiguity or misunderstanding is material no contract should be held to exist, and the rights of the parties in cases where performance (or partial performance) has taken place should be regulated by the law of restitution, repetition and recompense. (Para. 19).

6. An ambiguity or misunderstanding should be regarded as material where it concerns the subject-matter of the contract, the price or consideration or the nature of the agreement entered into. (Paras. 20 and 21).

7. An ambiguity or misunderstanding affecting the quality (or qualities) of the subject-matter should be regarded as material only if the presence or absence of that quality is expressly or impliedly considered by the parties as essential to (and a part of) the contract and the existence of the ambiguity or misunderstanding consequently amounts to a failure to agree on the subject-matter of the contract. (Para. 22).

8. An ambiguity or misunderstanding affecting the identity of a party to an agreement should be regarded as material and prevent the formation of a contract only (a) where an "acceptance" is made by a person to whom the offer in question was not directed; or (b) where an "acceptance" is made or actings from which acceptance might be inferred are performed in circumstances in which no offer has been made, or no offer has been made by the person to whom the "acceptance" is directed. (Para. 24).

9. An ambiguity or misunderstanding not falling within one of Bell's five categories of "error in substantials" should have the effect of precluding the constitution of an obligation if the matter in respect of which it exists is regarded by both parties, expressly or tacitly, as essential to the obligation thought to exist between them. (Para. 25).

10. Where, as a result of a slip of the tongue or of the pen, an offer is made in terms which do not accurately reflect the intention of the offeror, this should not prevent the conclusion of a contract where an acceptance is made in good faith and in ignorance of the slip of the tongue or of the pen. (Para. 26).

11. The present law relating to offers affected by slips of the tongue or of the pen, or by error in calculation, is otherwise satisfactory. (Para. 27).

12. Where an offer has been materially and essentially altered in course of transmission, should a contract nevertheless be concluded if an acceptance is made in good faith and in ignorance of that alteration in course of transmission? (Para. 28).

13. Alternatively, should it continue to be the law that no contract comes into being, and should a right be conferred upon an acceptor who was unaware of the alteration in course of transmission to recover damages from the offeror in respect of any actual loss suffered by the acceptor through acting in reliance upon the conclusion of a contract? (Para. 29).

14. It should be enacted, for the avoidance of doubt, that no contract comes into being where a contract of the type supposedly concluded, or its performance, is illegal at the time at which the parties purported to enter into it. (Para. 30).

15. Where, unknown to the parties, the performance of a contract such as that envisaged by them is impossible or where, unknown to them, a state of affairs exists or an event has occurred which would render performance in the terms agreed upon a thing radically different from what was contemplated by the parties, then no contract should come into existence unless the language used by, or the circumstances surrounding, them indicate the contrary. (Paras. 31-34).

16. If the existence of the fact which gives rise to such "pre-contractual frustration" ought to have been known to one of the parties, or if the occurrence of the event which causes it is attributable to one of the parties, should that party be liable for any actual loss suffered by the other through acting in reliance upon the conclusion of a contract? (Para. 34).

17. It should be enacted, for the avoidance of doubt, that parole evidence may competently be adduced to establish that a written agreement is simulated or is a sham. (Para. 37).

18. It should be enacted, for the avoidance of doubt, that the validity of a dissimulated transaction should be determined independently and without being affected by the absolute nullity of the simulated transaction disguising it. (Para. 39).

19. If the provisional proposals for the protection of the onerous bona fide acquirer of another's property made in our Memorandum No.27 were implemented no higher degree of protection than is accorded by the existing law would be necessary for third parties who have been induced to contract, and have thereby suffered loss, in reliance upon the validity of a simulated transaction. (Para. 40).