SCOTTISH LAW COMMISSION

MEMORANDUM No: 39

CONSTITUTION AND PROOF OF VOLUNTARY OBLIGATIONS:

FORMALITIES OF CONSTITUTION AND RESTRICTIONS ON PROOF

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. This Memorandum is one of a series of six in which we consider possible reforms in the law relating to the constitution and proof of voluntary obligations. In it we discuss the question of requirements of form (e.g. tested or holograph writ) in the constitution of voluntary obligations whether through the institution of the contract or through that of the unilateral promise, and also the question of restrictions on how such obligations may be proved (e.g. proof by writ or oath). The other Memoranda in the series are concerned with the general law of the creation of obligations through unilateral promises (Memorandum No 35); the general law of the creation of obligations through contracts, including consideration of the concepts of offer, acceptance and intention to enter into legal relations (Memorandum No 36); factors (such as latent material ambiguity and pre-existing illegality or impossibility of performance) which preclude the coming into existence of an obligation in spite of the actual or apparent making of a promise or reaching of agreement (Memorandum No 37); and stipulations made by parties to contracts in favour of third parties (Memorandum No 38). A general introduction to the complete series and a summary of the provisional proposals made in all of the Memoranda is contained in Memorandum No 34. We wish to stress that the topics considered in the six individual Memoranda are very closely interrelated and that the Memoranda in the series should therefore be looked upon as dealing merely with different aspects of a single branch of the law.

2. The rules of the law of Scotland which are now generally accepted[1] as laying down the special formalities required in the constitution of voluntary obligations of certain types and as restricting the means whereby voluntary obligations of other types (or the performance, discharge or variation thereof) may be proved have in recent years been subjected to severe criticism. In Hope Brothers v. Morrison[2] decree for payment was pronounced against a defender, who had led parole evidence that he had already paid the sum claimed, on the ground that such payment required to be proved by the writ or oath of the creditor. Lord Sorn in his opinion commented:[3]

> "I cannot help adding that this decision is not one at which it gives me any satisfaction to arrive, since, if it had been open to me to proceed upon the parole evidence in the case, my decision probably would have been the other way ... These reflections are, no doubt, immaterial so long as the rule that payment under an antecedent obligation, albeit only a verbal one, can only be proved by writ or oath remains part of our law, but they prompt me to doubt the desirability of the rule and to think that the question of discarding it from our law is a question which is due - or perhaps overdue - for examination."

Sheriffs A.G. and N.M.L. Walker[4] have also commented adversely upon the present state of the law:

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[1] The rules which currently operate find their most authoritative expression in the Whole Court case of Paterson v. Paterson (1897) 25 R.144. Dr. J.J. Gow in a series of three articles (1961 Jur. Rev. 1, 119 and 234) and in The Mercantile and Industrial Law of Scotland, p.1 et seqq, criticises the majority in this case as fundamentally misunderstanding and departing from the pre-existing law. Nevertheless the exposition of the law to be found in this case has been accepted by later courts as binding in questions of constitution and proof of obligations.

[2] 1960 S.C.1.

[3] 1960 S.C.1. at p. 5. See also Smith v. Oliver 1911 S.C.103 at p.111 per Lord President Dunedin.

[4] The Law of Evidence in Scotland, p.84.

> "The law which requires writing for the constitution or proof of certain obligations is so uncertain and unsatisfactory that it is almost impossible to state a principle which is of general application. In attempting to state the law as it is, it is difficult not to adopt the course, so often adopted by the courts, of dealing with each kind of obligation as if it were contained in a water-tight compartment, and without regard to the anomalies arising from the application of different rules to other analogous obligations."

3. In Scots law, at least since the decision in _Paterson_ v. _Paterson_,[5] there have been recognised three distinct categories of voluntary obligations: (a) those which must be constituted in writing, which writing must comply with certain requirements of form; (b) those which may be constituted in any form (e.g. orally, or by the actings of the parties) but which may be proved only by the writ of the person denying the obligation or by his admission either on record or on reference to his oath; and (c) those which may be constituted in any form and, if denied, may be proved _prout de jure_. The position is further complicated by certain nineteenth and twentieth century statutes[6] which provide that obligations or agreements of certain types must be expressed in writing but give in general no guidance as to whether the writing must be executed in accordance with the normal Scottish solemnities or even in some cases as to whether the writing is a requirement of the constitution of the obligation or merely of its proof. In the paragraphs that follow we shall describe briefly the present law before turning to consider the range of possible reforms.

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[5](1897) 25R.144.

[6]Ranging from the Truck Act 1831, s.23 to the Mobiles Homes Act 1975, s.1(1).

B: OBLIGATIONES LITERIS

1. The types of obligations

4. The obligations which fall within the first category mentioned in the preceding paragraph and which consequently require to be constituted in writing[1] are the following.

(a) Contracts relating to heritage.[2] These include contracts or missives for the purchase or sale of land and other heritable subjects, including a sale by auction,[3] an agreement to constitute a servitude,[4] an agreement to lend money on heritable security,[5] and leases for more than one year.[6] A unilateral obligation to convey heritage or to lease heritable subjects must equally be constituted by the writ of the promisor.[7] The deeds whereby a real right is conveyed or constituted in implement of such contracts or agreements or obligations must also be in writing; but that is a matter falling within the ambit of the law of property rather than the law governing constitution and proof of obligations. A number of relatively minor exceptions exist to the rule requiring the constitution in writing of obligations relating to heritage. According to Sheriffs A.G. and N.M.L. Walker,[8] "the common feature in these exceptional cases appears to be that the contract relates only incidentally, or to a minor extent, to heritage."

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[1] The nature of the writing required will be considered infra, paras. 8-12.

[2] See e.g. Erskine III.2.2; Goldston v. Young (1868) 7M.188; Scottish Lands and Buildings Co. v. Shaw; (1880) 7R.756; Malcolm v. Campbell (1891) 19 R.278.

[3] Shiell v. Guthrie's Trs. (1874) 1R.1083: both the purchaser's bid and the auctioneer's acceptance on behalf of the seller must be in writing before a binding contract of sale is concluded.

[4] Kincaid v. Stirling (1750) Mor. 8403; Inglis v. Clark (1901) 4F.288.

[5] Glassford v. Brown (1830) 9S.105.

[6] Stair, II. 9.4; Erskine III.2.2; Gowan's Trs. v. Carstairs (1862) 24D. 1382; Walker v. Flint (1863) 1M.417.

[7] Erskine III.3.88; Sichi v. Biagi 1946 S.N. 66; Arbuthnot v. Campbell 1793 Hume's Dec. 785.

[8] The Law of Evidence in Scotland p.89; see also Gloag, Contract, 2nd edition, p.164.

(b) Contracts of service for more than one year[9] and contracts of apprenticeship[10]. The requirement of constitution in writing does not apply to an agency agreement where the agent's remuneration consists, in part, of an annual salary;[11] nor, it seems, to a contract for services.[12]

(c) Submissions to arbitration and decrees arbitral. Submissions relating to heritage must be solemnly executed,[13] except in the case of arbitrations relating to agricultural leases where at common law the submission may simply be in writing and signed.[14] However, in arbitrations under the Agricultural Holdings (Scotland) Act 1949, which are thought to have largely replaced common law arbitrations in this area, both the submission and the award must be formally executed.[15] There is also authority to the effect that submissions relating to moveables must be solemnly executed[16] unless the sum involved is £100 Scots or less.[17] But this view is not unanimously accepted.[18]

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[9] Bell, Principles, para. 173; Stewart v. McCall (1869) 7M.544; Nisbet v. Percy 1952 S.C. 350; Walker v. Greenock Hospital Board 1951 S.C. 464; Cook v. Grubb 1963 S.C.1.

[10] Murray v. McGilchrist (1863) 4 Irv. 461; Grant v. Ramage & Ferguson (1897) 25 R.35.

[11] Pickin v. Hawkes (1878) 5R.676.

[12] Gloag, Contract, 2nd edition, p.180.

[13] Bell, Arbitration, 2nd edition, paras. 93,4; Robertson v. Boyd and Winans (1885) 12 R.419; McLaren v. Aikman 1939 S.C.222.

[14] McGregor v. Stevenson (1847) 9 D.1056; Nivison v. Howat (1883) 11 R.182; Gibson v. Fotheringham 1914 S.C. 987; Cameron v. Nicol 1930 S.C.1, 15.

[15] 1949 Act, ss. 75, 76, 99, Schedules 1 and 6; Agricultural Holdings (Specification of Forms)(Scotland) Instrument 1960, No 1337.

[16] Fraser v. Williamson (1773) Mor. 8476; Ferrie v. Mitchell (1824) 3S.113, Walkers, The Law of Evidence in Scotland, p.98.

[17] A. v. B. (1746) Mor. 8475; Bell, Arbitration, 2nd edition, paras. 81-88, 91.

[18] Dickson, Evidence, 3rd edition para. 562 takes the view that submissions relating to moveables may be constituted informally, but must be proved by writ or oath.

(d) Contracts or obligations which the parties agree should be constituted in writing. The parties to a contract which does not, by operation of law, require to be constituted in writing may nevertheless expressly, or by necessary implication, agree that they will not be bound until their arrangement is reduced to writing. Their agreement is thereby converted into an obligatio literis and the parties will not be legally bound until a written contract has been solemnly executed.[19] However, cases of this type must be distinguished from those in which the parties to an already concluded agreement have stipulated that a formal contract shall be drawn up either as a record or confirmation of their transaction, or to supersede their informal contract. In such circumstances the parties are bound from the time of conclusion of their informal agreement and reduction of its terms to writing is merely one of the obligations imposed by it upon them.[20] Once the formal contract has been prepared and executed, however, contradiction, modification or explanation of its terms by reference to the earlier informal agreement will generally be held to be incompetent.[21] In Walker v. Caledonian Railway Co.[22] Lord Justice-Clerk Hope stated the position in the following terms:

> "The principle is well established, that, when communings are followed by a written contract, it is not competent to allow any part of the communing ... to be held as part of the written contract, or to refer to them so as to enlarge or control the terms of the contract."

It is a question of the intention of the parties whether their agreement to embody their arrangement in a written contract does or does not postpone the constitution of

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[19] Van Laun v. Neilson Read & Co. (1904) 6F.644; Stobo v. Morrisons (Gowns) Ltd. 1949 S.C. 184.

[20] Smeaton v. St Andrews Police Commissioners (1871) 9M.(H.L.) 24.

[21] Inglis v. Buttery & Co (1877) 5 R.58 at 69; (1878) 5 R. (H.L.) 87 at 102. See also the discussion of the parole evidence rule, paras. ~~45-48~~, infra.

[22] (1858) 20D. 1102 at 1105.

the contract until that document has been drawn up and executed. According to Lord President Cooper in Stobo v. Morrison (Gowns) Ltd.[23]

> " ... it is perfectly possible for the parties to an apparent contract to provide that there shall be locus poenitentiae until the terms of their agreement have been reduced to a formal contract; but that the bare fact that the parties to a completed agreement stipulate that it shall be embodied in a formal contract does not necessarily import that they are still in the stage of negotiation. In each instance it is a matter of the construction of the correspondence in the light of the facts, proved or averred, on which side of the border line the case lies."

5. In addition to the obligations considered in the preceding paragraph which will not be accorded legal effect unless constituted in a formal writing,[24] there are obligations which may be constituted informally but to which certain advantages to the creditor may accrue if they are in fact embodied in a solemnly executed deed. The obligation for example of a debtor to repay money which he has borrowed is one which may be constituted in any form (though it may generally be proved only by the debtor's writ or his admission on reference to his oath[25]). The debtor may, however, grant a formal bond obliging himself to repay to his creditor the money borrowed. This allows the creditor to found his claim for payment on a liquid document of debt without the necessity of proving the underlying transaction (in the case posited, loan) upon which his entitlement is based: he may rely solely upon the terms of the bond.[26] Before a creditor can adopt this course the bond must comply with the normal Scottish solemnities.[26] It is thought, however, that it would be strictly inaccurate to refer to a bond as an obligatio literis. The debtor's obligation to repay is not constituted by the bond but by the preceding contract (e.g. loan); the obligation exists independently

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[23] 1949 S.C. 184 at 192.

[24] The nature of the writing required will be considered infra, paras. 8-12.

[25] See infra, para. 36.

[26] Hope v. Derwent Rolling Mills (1905) 7 F.837 per Lord President Dunedin at p.844.

of the bond. Unless the creditor has accepted the bond as taking the place of, and hence as extinguishing the antecedent obligation, he may if he chooses (and in practice must if the bond is defective) ignore the bond and establish his entitlement to repayment by proving (if necessary by the debtor's writ or oath) that antecedent obligation.[27] This was clearly stated by Lord Fullerton in Thom v. North British Banking Co.[28]

> "Take the case of a claim of debt. The creditor may have the benefit of written correspondence, and the entries in the debtor's books; and he may have a bill and a bond. Can it be said, that if, for some reason best known to himself, he puts his case on the general obligation as inferred from the correspondence and books of his adversary, and proves it, a verdict must go against him because he did not found upon the bill or bond? The answer is obvious, that the party who holds these separate modes of proving his case by evidence all primary and admissible in itself, may take any one he chooses, and cannot be impeded in that course, by the contemporaneous existence of another open to him, and which might perhaps have been easier."

6. Also falling outwith the strict definition of obligationes literis or obligations requiring to be constituted in writing are the various deeds through which, usually pursuant to an antecedent obligation, heritable or incorporeal moveable property is transferred from granter to grantee. Thus, a feu-charter or a disposition of heritable property, and a statutory assignation or retrocession[29] of a personal bond or conveyance of moveable property, and an assignation at common law of incorporeal rights in moveables (where the rights themselves are constituted in writing)[30] must be in writing which complies

[27] Thom v. North British Banking Co. (1850) 13 D.134; Duncan's Trs. v. Shand (1872) 10 M.984; Hope v. Derwent Rolling Mills (1905) 7 F.837.

[28] (1850) 13 D.134 at pp. 143-4.

[29] Transmission of Moveable Property (Scotland) Act 1862.

[30] McMurrich's Trs. v. McMurrich's Trs. (1903) 6 F.121, 126.

with the usual formalities.[31] In these cases, however, writing is a requirement of the law of property and not of the law governing the constitution of voluntary obligations. The obligation to convey or assign may (except in the case of heritable rights) exist and be enforceable even though constituted quite informally.[32]

7. The law of Scotland is unsettled as to whether a contract of insurance may be constituted orally or by informal writing.[33] There is authority to the effect that such contracts are obligationes literis. In McElroy v. London Assurance Corp.[34] the pursuer claimed payment from the company under an alleged oral contract of fire insurance. The pursuer's action was dismissed as irrelevant by the First Division on the ground that an oral agreement to insure left the insurer free to resile. Lord McLaren expressed his view of the law in the following terms.[35]

> "As I have always understood, - indeed I think it is perfectly settled in the law of Scotland, - a contract of insurance can only be made in writing. It is true that in the somewhat parallel case of cautionary obligation a practice had grown up of allowing parole evidence in proof of mercantile guarantees, - a practice which was afterwards corrected by statute. But there was no such practice in regard to insurance, and no argument or decision was offered to the contrary. Either a policy, or some informal writing followed by rei interventus is requisite."

However, in cases both earlier[36] and later[37] in date than that

[31]The transfer of certain types of moveable property is subject to special statutory requirements of form, e.g. company shares or debentures: Companies Act 1948, s.75; other registered securities: Stock Transfer Act 1963 s.1; copyright: Copyright Act 1956, s.36(3); patents: Patents Act 1949, s.74; registered trade marks: Trade Marks Act 1938, ss. 22-25; registered designs: Registered Designs Act 1949, ss.17-19; shares in a British ship: Merchant Shipping Act 1894, s.24 Sch. 1.

[32]Nelson Mitchell v. City of Glasgow Bank (1878) 6 R.420, 435; Devlin v. McKelvie 1915 S.C. 180; McConnachie v. Geddes 1918 S.C. 391; Moncrieff v. Seivwright (1896) 33 S.L.R. 456.

[33]Contracts of marine insurance are regulated by statute: Marine Insurance Act 1906, ss.21,22-24.

[34](1897) 24 R.287.

[35](1897) 24R.287 at p.290-91.

[36]Christie v. North British Insurance Co. (1825) 3S.519 per Lord Justice-Clerk Boyle at p.522.

[37]Parker & Co. (Sandbank) Ltd. v. Western Assurance Co. 1925 S.L.T.131.

just mentioned the attitude has been adopted that a contract of insurance may be constituted orally and proved prout de jure.

2. Type of writing required.

8. The writing or writings by which an obligatio literis is constituted must be probative of, or holograph of, or adopted as holograph by, the parties thereto or, in the case of unilateral obligations, the granter.[38] An obligation falling within any of the categories mentioned in paragraph 4 supra which is not couched in one or other of these forms will not be validly constituted and neither party thereto will be legally bound,[39] unless the obligation is in re mercatoria[39a] in which case an informal writing will suffice, or unless rei interventus or homologation[39b] follows upon it and its informal constitution can be established by the appropriate type of proof.

9. In the case of transactions in re mercatoria an obligation of a type which would otherwise require a probative deed or a holograph writ for its constitution may be constituted informally in a document which is merely subscribed or initialled by the parties.[40] This dispensation from compliance with the usual solemnities does not apply to contracts relating to heritage[41] nor to contracts of service.[42] According to Bell,[43] however, the privilege does apply to

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[38] Walkers, The Law of Evidence in Scotland, pp. 84-86, 181-217. The formalities of execution of probative writs there set out have been altered (except in relation to testamentary writings) to the extent of dispensing with the necessity of the granter's signing each page of the deed by the Conveyancing and Feudal Reform (Scotland) Act 1970, s.44. See also Walker, Principles, 2nd edition pp. 77-97.

[39] See e.g. Goldston v. Young (1868) 7 M.188.

[39a] See paras. 9-12, infra.

[39b] See paras. 13-19, infra.

[40] Bell, Commentaries, I.342, 343; McLaren v. Aikman 1939 S.C. 222, 228.

[41] Gloag, Contract, 2nd edition, p.185, Walkers, Evidence, p.100.

[42] Stewart v. McCall (1869) 7 M.544; Gloag, loc. cit.; Walkers, loc. cit.

[43] Commentaries, I.342.

"bills, notes, and checks on bankers; orders for goods; mandates and procurations; guarantees; offers and acceptances to sell, or to buy wares and merchandise, or to transport them from place to place; and, in general, all the varieties of engagements, or mandates, or acknowledgments, which the infinite occasions of trade may require."

With the possible exception of guarantees (the formalities of constitution of which are now governed by statute)[44] none of the examples of writs in re mercatoria supplied by Bell relate to obligations which, by law, can be constituted only in formal writing complying with the usual Scottish solemnities: they are all instances of obligations which may be constituted by any means (e.g. by oral communication, by informal writing) or the formalities of constitution of which are regulated by statute (e.g. Bills of Exchange Act 1882, ss.3(1) and 23). However, in relation to some at least of them proof in a case of dispute might be restricted to writ or oath. It would appear, therefore, that the only obligationes literis to which the privilege of constitution by informal writing, as distinct from probative or holograph writ, applies are submissions to arbitration relating to moveables in mercantile matters[45] and the constitution of mercantile contracts which may ordinarily be entered into in any form, but which the parties expressly or impliedly agree will not be binding upon them until reduced to writing.[46] Obligations of other types, not in general requiring to be constituted in writing, are not, it is thought, subject to greater formalities where the parties thereto are engaged in trade.

10. Submissions to arbitration in mercantile matters and decrees arbitral consequent thereupon are clearly recognised as binding upon the parties although not probative or holograph.[47] As regards contracts which the parties agree, or unilateral obligations which the granter intends, shall be constituted in writing and which if they were not "properly

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[44]Mercantile Law Amendment (Scotland) Act 1856, s.6. The requirements of form imposed by this and other statutes on the constitution of certain types of obligations will be considered infra, paras. 20-33.

[45]See para. 4(c) supra.

[46]See para. 4(d) supra.

[47]Dykes v. Roy (1869) 7 M.357, 360; Hope v. Crookston Bros. (1890) 17 R. 868; McLaren v. Aikman 1939 S.C. 222, 227-8.

mercantile dealings"[48] would have to comply with the usual solemnities, the cases in which informal writing has been accepted as sufficient are many and of great variety. Examples are, an agreement in terms of which a company director undertook to subscribe for, or to find subscribers for, 48,000 of the company's shares;[49] a contract whereby advertising space on the walls of post offices was let;[50] an obligation to purchase the fittings of certain leased premises and to relieve the seller of his obligations under the lease;[51] accession by a creditor to a composition arrangement entered into by his debtor with other creditors;[52] an acknowledgment by a bank that certain bonds originally held for a third party were now held for the pursuer's interest;[53] an undertaking by a firm of ironfounders to deliver iron to or to the order of a specified person.[54]

11. There appear to be very few obligations which can by law be constituted only in formal writing but to which a relaxation of the ordinary formalities applies where the parties are mercantile men acting in the course of their business. The only instance of this seems to be submissions to arbitration and decrees arbitral in commercial matters. The extent of the privilege and utility of writs in re mercatoria would therefore in practical terms appear to be that if the parties wish their agreement to be constituted in writing this may validly be done without the necessity of drafting, and signing before witnesses, a formal document. The same result could, however, be achieved without the necessity of recognising a separate category of writs, by the expedient of adopting a writing as holograph. One distinction between a writing which has been adopted as

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[48] Bell, Commentaries, I. 342.

[49] Beardmore v. Barry 1928 S.C. 101; 1928 S.C. (H.L.) 47.

[50] U.K. Advertising Co. v. Glasgow Bagwash Laundry 1926 S.C. 303.

[51] Kinninmont v. Paxton (1892) 20 R.128.

[52] Henry v. Strachan & Spence (1897) 24 R.1045.

[53] Stuart v. Potter, Choate & Prentice 1911, 1 S.L.T. 377.

[54] Commercial Bank v. Kennard (1859) 21 D.864, 870.

holograph and a writ *in re mercatoria* may, however, exist: even when it has been established that a document in the former category was genuinely adopted as holograph by the granter this does not verify the date which the writing bears in any question between a party thereto and a third party. The date upon which the document was executed must, if necessary, be independently proved by the person relying upon it.[55] On the other hand, if a writ *in re mercatoria* is proved to have been signed or initialled by the granter it is not necessary, at least in so far as concerns the mercantile transaction for which the writing was drawn up, that its date should be separately established.[56] But it is possible (though authority is sparse and inconclusive[57]) that extrinsic evidence of the accuracy of the date borne by the document would be required here also, in a question with a third party (e.g. a trustee in bankruptcy).

12. The real importance of the privilege attaching to writs *in re mercatoria* is thought to lie not in the sphere of constitution of obligations but rather in regard to their enforcement. Such a writ whether constitutive of the parties' obligations or, as is thought to be more often the case, merely evidence thereof, may be used by the creditor as a liquid document of debt: he may rely upon it in an action against the debtor as the sole basis of his claim for payment or performance and need not lead evidence, even where the writ is merely the committing to paper of an earlier binding oral agreement, of the prior informal constitution of the obligation.[57a] If the writing were not *in re mercatoria*, then before it could be used in this way as the sole basis of a cause of action it would require to be either tested or holograph.[58] Thus, in the course of their discussion of *obligationes literis* and in particular of the necessity in

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[55] *Dyce* v. *Paterson* (1847) 9 D.1141; *Waddel* v. *Waddel's Trs.* (1845) 7 D.605; Dickson, *Evidence*, 3rd edition, paras. 770-774.

[56] Dickson, *Evidence*, 3rd edition, para. 794; *Purvis* v. *Dowie* (1869) 7 M.764.

[57] Dickson, *loc, cit.*; *Purvis* v. *Dowie*, *cit.* *supra*.

[57a] See para. 5 *supra*.

[58] Walkers, *Evidence*, pp. 90-91.

some circumstances of formal execution of contracts which do not by operation of law fall into that category, but which the parties do in fact reduce, or intend to reduce, to writing, Sheriffs A.G. and N.M.L. Walker say this:[59]

> "In _Paterson_ v. _Paterson_[60] there are dicta which might be read as suggesting that the category into which the contract is to be placed depends, not upon the intention of the parties, but upon the terms of the writing. The distinction is made between writings which contain express words of obligation and those which merely record facts from which obligations may be inferred, and there are suggestions that the former relate to _obligationes literis_, while the latter do not. 'Obligatory writing' is spoken of as providing the test. It is thought that this distinction is intended to relate rather to the authentication of the writing, and the use which is made of it, than to the nature of the obligations themselves. Thus a party to an obligatory writing may found upon it as the sole basis of his action only if it is solemnly executed or holograph _or one of the exceptions applies_, and this is true even if he might alternatively have sued upon an antecedent binding oral agreement, in support of which the writing, whether properly authenticated or not, might have been used as evidence."[61]

3. _Rei interventus and homologation_.

13. An obligation which, either by operation of law or by the agreement of the parties, can be constituted only in formal writing, is not legally binding until such a writing has been drawn up and executed by both (or all) parties to the agreement or, in the case of unilateral obligations, by the granter. In the absence of such writing _either_ party may resile from the arrangement even though there may be a writ in due form (e.g. a probative offer not yet met by a probative acceptance) from one of them.[62] However, where an informal agreement does exist[63] on a matter which requires to be constituted in solemn form the parties' right to resile (_locus poenitentiae_) may be barred and the agreement held to be completely binding, by

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[59] _Loc. cit._

[60] (1897) 25 R.144.

[61] Emphasis added.

[62] E.g. _Goldston_ v. _Young_ (1868) 7 M.188; _Allan_ v. _Gilchrist_ (1875) 2 R.587.

[63] The question of the means whereby such agreement may be proved will be considered _infra_, para. 15 _et seqq_.

the operation of the doctrines of rei interventus and homologation. The descriptions of these doctrines by Bell have been frequently cited with approval:

> "Rei interventus raises a personal exception, which excludes the plea of locus poenitentiae. It is inferred from any proceedings not unimportant on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract as if it were perfect; provided they are unequivocally referable to the agreement, and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable."[64]

> "Homologation (in principle similar to rei interventus) is an act approbatory of a preceding engagement, which in itself is defective or informal, either confirming or adopting it as binding. It may be express, or inferred from circumstances. It must be absolute, and not compulsory, nor proceeding on error or fraud, and unequivocally referable to the engagement; and must imply assent to it, with full knowledge of its extent and of all the relative interests of the homologator."[65]

14. The actings which are relied upon as amounting to rei interventus or homologation may be established by the admission on record of the party in whose interest it is to deny them[66] or by parole evidence.[67] Where the actings which are alleged to bar the parties' right to resile are those of the party seeking to establish the existence of the obligation it is rei interventus which is in issue; where the actings are those of the party seeking to establish the right to resile homologation is the appropriate plea. Both doctrines may relevantly be invoked on the facts of a single case.[68] They are applicable not only to mutual contracts which lack the necessary formalities but also to unilateral obligations which have not been executed in due form by the granter.[69]

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[64] Principles, para. 26.

[65] Op. cit. para. 27.

[66] Beardmore v. Barry 1928 S.C. 101.

[67] Mitchell v. The Stornoway Trustees 1936 S.C. (H.L.) 56, 63.

[68] Station Hotel, Nairn v. Macpherson (1905) 13 S.L.T. 456; Mitchell v. Stornoway Trs. 1936 S.C. (H.L.) 56; Bathie v. Lord Wharncliffe (1873) 11 M.490, 496; Kinnear v. Young 1936 S.L.T. 574.

[69] Boyd v. Shaw 1927 S.C. 414; National Bank of Scotland v. Campbell (1892) 19 R.885; Baird's Tr. v. Murray (1883) 11 R.153; Church of England Fire and Life Assurance Co. v. Wink (1857) 19 D.1079.

15. Rei interventus and homologation can operate to render an obligation legally binding only where the parties have in fact reached agreement, or a unilateral obligation has been undertaken, and it is merely the fact that that agreement or that obligation is not couched in the required form of writing that prevents its being relied upon. There is weighty authority to the effect that the underlying agreement or obligation, which must be established before rei interventus or homologation can be founded upon to cure its lack of formality, must be proved by (or by a combination of) the writ of the party who seeks to resile[70] or by his admission on record[71] or on reference to his oath.[70] Admission or proof by writ of every term of the alleged agreement or obligation is not, however, necessary: it is generally sufficient if the essentials of the agreement be so established.[72] What are "the essentials" depends upon the nature of the contract. In a contract of lease, for example, the admission or writ would require to embrace at least the identity of the parties and of the subjects to be let, the ish and the rent;[73] in a contract of sale of heritage the admission or writ would have at the minimum to cover the identity of the parties and of the subjects, and the price.[74] Where the parties in their negotiations have discussed other additional terms but there is no proof by writ or no admission that agreement on them was reached, whether there exists a sufficient basis upon which rei interventus and homologation may operate is "a

[70] Mitchell v. Stornoway Trs. 1936 S.C. (H.L.) 56, 66; Sutherland's Tr. v. Miller's Tr. (1888) 16 R.10; Gibson v. Adams (1875) 3 R.144; Philip v. Gordon-Cumming's Exrs. (1869) 7 M.859; Walker v. Flint (1863) 1 M.417; Gowan's Trs. v. Carstairs (1862) 24 D.1382.

[71] Church of England Fire and Life Assurance Co. v. Wink (1857) 19 D.1079; Paterson v. Earl of Fife (1865) 3 M.423.

[72] Emslie v. Duff (1865) 3 M.854; Erskine v. Glendinning (1871) 9 M.656; Bathie v. Lord Wharncliffe (1873) 11 M.490; Westren v. Millar (1879) 7 R.173; Wight v. Newton 1911 S.C. 762.

[73] Wight v. Newton 1911 S.C. 762 at pp. 771-2, 775.

[74] Westren v. Millar (1879) 7 R.173. Agreement on the date of entry is not one of "the essentials": Sloans Dairies Ltd. v. Glasgow Corp. 1976 S.L.T. 147.

question of degree, of the relative importance of the point left unsettled."[75] In Stobo v. Morrisons (Gowns) Ltd.[76] in the negotiations for the sale of a heritable subject agreement had been reached on the extent and description of the property to be sold and on the price. However, it was clear from the situation of the property that certain servitudes and reservations would have to be constituted in favour of the seller. There had been no discussion of these matters between the parties, and it was consequently held that even though the essentials of a contract of sale had been agreed upon and could be proved in the required manner, the matters left unsettled were of such importance that *rei interventus* and homologation could not operate to render the agreement legally binding. Where the essentials have been sufficiently proved or admitted on record or on reference to oath and *rei interventus* or homologation has been established, the court may remit to a conveyancer to draw up e.g. a disposition or a lease containing the usual and necessary clauses,[77] and it may be that non-essential provisions of the lease or disposition, not covered by the writ or admission, may be settled by reference to the actings which were held to amount to *rei interventus* or homologation.[78] In other words, the actings which bar the right to resile from an agreement, the essentials of which have been proved by writ or admitted on reference to oath, may also be used as evidence of what the intention of the parties was in regard to the incidental or non-essential terms of their agreement.

16. The generally accepted view of the role of *rei interventus* and homologation is that they exclude the *locus poenitentiae* which would otherwise exist where an obligation is

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[75] Gloag, *Contract* 2nd edition, p.40.

[76] 1949 S.C. 184.

[77] *Erskine* v. *Glendinning* (1871) 9 M.656; *Westren* v. *Millar* (1879) 7 R. 173; *Wight* v. *Newton* 1911 S.C. 762; Bell, *Lectures on Conveyancing*, 3rd ed., p. 197.

[78] *Colquhoun* v. *Wilson's Trs.* (1860) 22 D. 1035 at 1051 per Lord Justice-Clerk Inglis and Lord Cowan.

constituted without due formality; but that the actings founded upon can have this effect only where the parties have already reached agreement, albeit informally, at least as to the essentials of their arrangement, and that agreement is proved by writ or oath. It has, however, been suggested[79] that the actings, which may be proved by parole evidence, may be used not merely to bar resiliation from an antecedent informal argument, but also as evidence that such an agreement was in fact arrived at. Professor Gloag states the position in the following terms:[80]

> "The normal application of the plea rei interventus is in cases where it is not disputed that an agreement has been made, but where the mere agreement is not binding, because the contract in question is one of the class in which writing is necessary to constitute a binding obligation ... But the term rei interventus is also applied ... to the case where parties have been in negotiation for a contract, and one of them has acted, and been known and allowed to act, on the mistaken assumption that the negotiations had reached the point of a completed contract ...[W]hen rei interventus is relied upon in cases where parties have not arrived at any agreement, verbal or written, the rule that actings may bind them to a contract is not an exception to the general rule that contract requires agreement. What is really meant is that the actings in question are evidence that agreement has been actually reached, though it has not been indicated in words or in other way than by actings. In the former case the actings render an agreement binding; in the latter they prove that an agreement was reached."

17. It is thought that in this passage Gloag was doing no more than drawing attention to the fact that the consent which is always required for the formation of a contract may be made manifest not merely by words, spoken or written, but also through the actings of the parties. The cases cited as authority for his proposition[81] go no further than to illustrate that where the essentials of an obligatio literis

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[79] Sellar v. Aiton (1875) 2 R.381, 390; Gloag, Contract, 2nd edition pp. 46-47; Errol v. Walker 1966 S.C.93.

[80] Contract, 2nd edition, pp. 46-47.

[81] Colquhoun v. Wilson's Trs. (1860) 22 D.1035; Wight v. Newton 1911 S.C. 762.

are established by informal writ or by admission then the fact that the parties had indeed reached agreement on some or all of its incidental terms may be proved by reference to their actings - the same actings, it may be, which give rise to the rei interventus or homologation which brings to an end the parties' right to resile. However, in Errol v. Walker[82] a much wider interpretation was placed upon Gloag's words. In that case the defender in an action of declarator and removing averred that he occupied the heritable subjects in questions in the capacity of purchaser of the pursuer's leasehold interest therein. The pursuer denied that such a sale had taken place. The defender was unable to produce probative or holograph missives of sale, but averred (a) the conclusion of an oral sale agreement between himself and the pursuer's solicitor; (b) the existence of a formal offer to purchase signed by himself; and (c) that actings on the part of himself and the pursuer had taken place which amounted to both rei interventus and homologation. The pursuer pleaded: "The defender's averments being founded on an alleged oral agreement to sell heritage, such agreement can be proved only by writ or oath of party and proof of the fact of such agreement should be restricted accordingly." This plea was repelled by the Second Division which, relying heavily on Gloag[83] unanimously took the view that the defender was entitled to attempt to prove the formation of the sale agreement through the same actings as he relied upon to bar the pursuer's right to resile from that alleged agreement. And for both purposes those actings could be proved by parole evidence. This decision has been severely criticised.[84]

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[82] 1966 S.C. 93.

[83] Cited para. 16, supra.

[84] Walker, Principles, 2nd edition, p. 569, note 8; A.L. Stewart (1966) 11 Journal of the Law Society of Scotland, p. 263 ff.

Mr A.L. Stewart describes its effect as follows:[85]

> "The conclusion reached by the Court in Errol can, I think, fairly be stated thus: if one party to an alleged contract relating to heritage can produce a writ by himself and prove actings of his own part, known to and permitted by the other party, which fall within the definition of rei interventus, this is sufficient in law for the first party to be able to enforce the alleged contract. In other words, proof of an alleged contract belonging to the category of obligationes literis can rest on the writ of the party seeking to uphold the contract together with rei interventus (i.e. actings by that party) ... Although this may be equitable it is submitted that it is not the law of Scotland. And how long will it be before there is no need for writing even on the part of the person alleging the contract? Is there any reason, once the above principle has been accepted, why an alleged purely verbal agreement may not be proved by evidence of rei interventus, even if it relates to heritage? Certainly the passage in Gloag founded on in Errol can be read as embracing such agreements."

18. Actings amounting to rei interventus. The actings alleged to constitute rei interventus will have the effect of barring the right to resile from an informal agreement or obligation only if they are "not unimportant", are performed "on the faith of the contract, as if it were perfect", are "unequivocally referable to the agreement", are "known to, and permitted by, the obligor" and are "productive of alteration of circumstances, loss or inconvenience".[86]

(a) "Not unimportant". It has been held that the requirement that the actings founded upon be not unimportant refers not so much to their extent or difficulty or costliness of performance as to their significance in illustrating the actor's reliance upon the prior agreement.[87] Actings in this context are important in direct proportion to the unlikelihood that they would be performed except on the faith of an agreement such as that sought to be established.

(b) "On the faith of" and "unequivocally referable to" the agreement. Before this test can be satisfied it is clear

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[85] (1966) 11 J.L.S.S. 263 at 268,9.

[86] Bell, Principles, para. 26.

[87] Bathie v. Lord Wharncliffe (1873) 11 M.490, 496; McLean v. Scott (1902) 10 S.L.T. 447; Mitchell v. Stornoway Trs. 1936 S.C. (H.L.) 56,66.

that the actings in question must be later in date than the conclusion of the informal agreement to which they are alleged to be unequivocally referable.[88] They must also, on a fair and reasonable interpretation, be explicable only by reference to the agreement earlier proved by writ or admitted on record or on oath: there must be no other equally plausible title upon which the actings may have followed. Thus, where it is sought to set up a lease for a period of years the actings must be such as would not reasonably be expected in the case of a lease for one year or less.[89] Where it is alleged that heritable subjects have been sold to a party already in occupation thereof under a tenancy agreement, the actings relied upon to make legally binding the contract of sale must be such as are clearly referable to a relationship of seller and purchaser as distinct from lessor and lessee.[90] Where a probative lease had been reduced on the ground of fraud and it was nevertheless sought to establish a valid lease on the basis of the antecedent improbative missives coupled with the actings in the form of the tenant's occupation of and expenditure on improvements to the premises, it was held that rei interventus did not operate since the tenant's actings were on the faith of and attributable to the title thought to have been conferred upon him by the formal lease.[91]

(c) "Known to, and permitted by, the obligor." Actings by the party seeking to establish a binding obligation are irrelevant to the constitution of rei interventus unless they are performed to the knowledge of the party in whose

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[88] Mowat v. Caledonian Banking Co. (1895) 23 R.270; Van Laun v. Neilson, Reid & Co. (1904) 6 F.644; Pollok v. Whiteford 1936 S.C. 402.

[89] Mowat v. Caledonian Banking Co. (1895) 23 R.270; Pollok v. Whiteford 1936 S.C. 402. But cf. Ballantine v. Stevenson (1881) 8 R.959; Buchanan v. Harris & Sheldon (1900) 2 F.935 per Lord Adam.

[90] Colquhoun v. Wilson's Trs. (1860) 22 D.1035.

[91] Gardner v. Lucas (1878) 5 R.638, aff'd (1878) 5 R.(H.L.) 105.

interest it is to deny the obligation and are allowed or permitted by him to take place.[92] An exception to the requirement of such knowledge and permission exists where the actings averred are such as would normally, naturally and necessarily follow upon the formation of an agreement of the kind alleged.[93] It has accordingly been held that where a creditor, on the faith of an informal guarantee, has made advances to the principal debtor this may amount to rei interventus even without averment or proof that the cautioner was aware of the making of the advances.[94] In the normal case, in which knowledge and permission must be established, that of an agent will be held equivalent to that of his principal,[95] always provided that the authority of the agent in question, whether express or implied, extends to entering into agreements of the type in issue[96] or to allowing acts of the kind relied upon.[97]

(d) "Alteration of circumstances, loss or inconvenience". The actings which are founded upon must have resulted in a change, which cannot be dismissed as trivial or insubstantial,[98] in the actor's position. In cases relating to the sale or feuing of heritable property the following have been regarded as relevant and sufficient alterations of circumstances: entering into possession of the subjects,[99]

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[92] Stewart v. Burns (1877) 4 R.427; Gardner v. Lucas (1878) 5 R.638; Bell v. Goodall (1883) 10 R.905.

[93] Gardner v. Lucas (1878) 5 R.638 at 650, 656; National Bank of Scotland v. Campbell (1892) 19 R.885; Danish Dairy Co. v. Gillespie 1922 S.C. 656 at 666, 670.

[94] Johnston v. Grant (1844) 6 D.875; Church of England Insurance Co. v. Wink (1857) 19 D. 1079; National Bank of Scotland v. Campbell (1892) 19 R.885.

[95] Forbes v. Wilson (1873) 11 M.454.

[96] Danish Dairy Co. v. Gillespie 1922 S.C. 656.

[97] Heiton v. Waverley Hydropathic (1877) 4 R.830.

[98] Kinnear v. Young 1936 S.L.T. 574; McLean v. Scott (1902) 10 S.L.T. 447.

[99] Smith v. Marshall (1860) 22 D.1158.

more especially if accompanied by expenditure on alterations thereto;[1] payment of the price or of a substantial part thereof;[2] payment of feu duty;[3] leasing the subjects to tenants;[4] taking proceedings to remove tenants;[5] abstaining from further efforts to obtain a purchaser or tenant;[6] erecting a building not in conformity with existing restrictions in the vassal's title but consistent with the provisions of an informal agreement to relax them.[7] From among the many decisions concerning *rei interventus* in leases the following may be cited as examples of conduct accepted as satisfying the test: entry into possession in terms of an informal or draft written lease;[8] remaining in possession in terms of informal missives for the renewal of the lease;[9] entry into possession coupled with expenditure on improvements[10] such as the erection or demolition of buildings.[11] In contracts of service or apprenticeship the alteration of circumstances is normally commencement of employment or the payment of wages and the provision of work.[12] Where there is a written contract, though one which is informal because not tested or holograph, it will be validated for the full period of service, but only if the actings averred and proved are

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[1] *Campbell* v. *McLean* (1867) 5 M.636; (1870) 8 M.(H.L.) 40; *Forbes* v. *Wilson* (1873) 11 M.454; *Bathie* v. *Lord Wharncliffe* (1873) 11 M.490 (all cases concerned with leases); *Westren* v. *Millar* (1879) 7 R.173.

[2] See *Hamilton* v. *Wright* (1836) 14 S.323, (1838) 3 Sh. & Macl. 127; *Foggo* v. *Hill* (1840) 2 D.1322. But cf. *McLean* v. *Scott* (1902) 10 S.L.T. 447.

[3] *Stodart* v. *Dalzell* (1876) 4 R.236.

[4] *Stewart* v. *Burns* (1877) 4 R.427; *Bell* v. *Goodall* (1883) 10 R.905.

[5] *Sutherland* v. *Hay* (1845) 8 D.283; *Stewart* v. *Burns* *cit. sup.*

[6] *Sutherland* v. *Hay*, *cit. sup.* per Lord Medwyn.

[7] *Simpson* v. *Mason and McRae* (1884) 21 S.L.R. 413.

[8] *Wight* v. *Newton* 1911 S.C. 762; *Wares* v. *Duff Dunbar's Trs.* 1920 S.C.5.

[9] *Buchanan* v. *Harris & Sheldon* (1900) 2 F.935; *Station Hotel, Nairn* v. *Macpherson* (1905) 13 S.L.T. 456.

[10] *Forbes* v. *Wilson* (1873) 11 M.454.

[11] *Walker* v. *Flint* (1863) 1 M.417; *Bathie* v. *Lord Wharncliffe* (1873) 11 M.490.

[12] *Rymer* v. *McIntyre* (1781) Mor. 5726; *Murray* v. *McGilchrist* (1863) 4 Irv. 461; *Young* v. *Scott* (1864) 4 Irv. 541.

inconsistent with a contract of one year's duration.[13] Where the contract is oral (though proved by writ or oath) or where the actings relied upon are equally consistent with a service contract for a single year (e.g. the servant has worked, or the master has paid wages, for less than a year) the rei interventus will validate the contract for one year.[14] Examples of alterations of circumstances which have been held sufficient in relation to other types of obligations include making advances in reliance upon an informal guarantee;[15] the celebration of marriage following upon an improbative antenuptial marriage contract;[16] and decree of divorce following upon an informal agreement between husband and wife that the former would provide for the latter after dissolution of the marriage by a gift of heritable property.[17]

19. Actings amounting to homologation. To establish rei interventus the actings founded upon must be those of the party seeking to uphold the legally binding character of the alleged obligation. Homologation, on the other hand, depends upon actings on the part of the party in whose interest it is to deny the existence of a legally binding obligation. The actings must be later in date than the formation of the informal agreement which they are alleged to render binding;[18] but it is not necessary, in the case of homologation, that the actings averred or proved should be "productive of alteration of circumstances, loss or inconvenience":[19] all that is required is that the actings should be such as to imply

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[13] Rymer v. McIntyre (1781) Mor. 5726; Gow v. McEwan (1901) 8 S.L.T. 484; Dickson, Evidence, 3rd edition, para. 567.

[14] Murray v. McGilchrist (1863) 4 Irv. 461 per Lord Justice-Clerk Inglis; Young v. Scott (1864) 4 Irv. 541; Gow v. McEwan (1901) 8 S.L.T. 484.

[15] National Bank of Scotland v. Campbell (1892) 19 R.885.

[16] Lang v. Lang's Trs. (1889) 16 R.590.

[17] Stewart v. Stewart 1953 S.L.T. 267.

[18] Mitchell v. Stornoway Trs. 1936 S.C. (H.L.) 56, 62-3.

[19] Bell, Principles, para. 26.

assent to the informal agreement,[20] and that the actor be not legally incapax.[21] In one respect, however, it appears that homologation is more difficult to establish than rei interventus: in the former case the actings must be performed in the knowledge of the existence of the right to resile.[22] The actings may be those of an agent, but in that event the principal will be bound only if it was within the agent's express or ostensible authority to conclude contracts of the type in question or if the principal authorised him to perform the act.[23] Examples of actings held sufficient to constitute homologation include allowing a tenant to take possession and accepting rent from him for a number of years under an improbative lease;[24] providing assistance to a vassal under an informal feu contract in proceedings brought by him in the Dean of Guild Court;[25] making application to the licensing authority for transfer of the certificate granted in respect of a licensed grocer's shop sold informally;[26] claiming and leading evidence at an arbitration relating to heritage where the decree arbitral was in probative form but the antecedent submission to arbitration was not;[27] making the payments awarded under an informal decree arbitral.[28]

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20 Mitchell v. Stornoway Trs. 1936 S.C. (H.L.) 56, 67; Erskine, III. 3. 47-50.

21 Erskine, III. 3. 47.

22 Gardner v. Gardner (1830) 9S. 138; Shaw v. Shaw (1851) 13 D.877, especially per Lord Cockburn at p. 879.

23 Danish Dairy Co. v. Gillespie 1922 S.C. 656.

24 Forbes v. Wilson (1873) 11 M.454.

25 Mitchell v. Stornoway Trs. 1936 S.C. (H.L.) 56.

26 Charles v. Shearer (1900) 8 S.L.T. 273; Station Hotel, Nairn v. Macpherson (1905) 13 S.L.T. 456.

27 Brown v. Gardner (1739) Mor. 5659.

28 Bremner v. Elder (1875) 2 R. (H.L.) 136; Robertson v. Boyd and Winans (1885) 12 R.419.

C: STATUTORY PROVISIONS REQUIRING WRITING

20. In addition to the *obligationes literis* mentioned in paragraph 4 which require to be constituted in formal writing there are a number of obligations of other types in relation to which a requirement that they be embodied in writing is imposed by statute. The statutes in question frequently provide simply that the contract "shall be in writing" and shall be signed by the parties thereto. Consequently, it is often a matter of doubt whether or not the writing must comply with the solemnities required for the constitution of an *obligatio literis* and, in some few cases, even whether the writing is a formality of constitution or merely necessary for the proof of the obligation. Among these statutory provisions are the following.

21. The Truck Act 1831, s.23 and the Truck Act 1896, ss. 1(1)(a), 2(1)(a) and 3(1)(a). It is there provided that certain stoppages or deductions may be made by an employer from his employees' wages (e.g. in respect of accommodation, medical attendance, fuel, tools, implements, food, or fines for bad or negligent work, or injury to the materials or other property of the employer) if, but only if, the contract or agreement permitting such stoppages or deductions is "in writing, signed by the workman".

22. The Mercantile Law Amendment (Scotland) Act 1856, s.6 provides as follows:

> "All guarantees, securities or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorised by him or them, otherwise the same shall have no effect."

It seems clear from the terms of this section that writing is necessary for the constitution of a cautionary obligation,[1] and it has been held that an oral guarantee or representation as to credit cannot be founded upon in an action even where it is alleged to have been made fraudulently.[2] There are, however, two obiter dicta to the effect that the writing is required not for the constitution of the obligation but only for its proof.[3] This view is based upon the belief that the purpose of the Act was to bring the law of Scotland into consonance with that of England, and in the latter jurisdiction under the Statute of Frauds 1677, as judicially interpreted, writing is necessary for proof, not for constitution. Doubt also exists, on the assumption that writing is a requirement of constitution, as to the formalities with which that writing must comply. There is support for the view that a cautionary obligation must be constituted in a document which is probative or holograph (or adopted as holograph)[4] except where the guarantee is in re mercatoria[5] or where rei interventus or homologation has followed upon an informal, though written and subscribed, guarantee[6] (e.g. the making of advances on the faith of it). The application to cautionary obligations of the normal rules governing obligationes literis is criticised by Sheriffs A.G. and N.M.L. Walker:[7]

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[1] Gloag, Contract, 2nd edition, pp. 182,3; Walkers, Evidence, pp. 108,9.

[2] Clydesdale Bank v. Paton (1896) 23 R. (H.L.) 22; Irving v. Burns 1915 S.C. 260.

[3] Walker's Trs. v. McKinlay (1880) 7 R. (H.L.) 85 at 88, 89 per Lord Blackburn; Wallace v. Gibson (1895) 22 R. (H.L.) 56 at 59 per Lord Ordinary (Wellwood).

[4] Bell, Principles, paras. 248, 249A; Dickson, Evidence, 3rd edition, para. 603; National Bank v. Campbell (1892) 19 R.885 at 892 per Lord McLaren; Snaddon v. London, etc. Assurance Co. (1902) 5 F. 182 per Lord Kyllachy. In B.O.C.M. Silcock v. Hunter 1976 S.L.T. 217 the respondent did not challenge the appellant's contention that probative or holograph writ was required, and the First Division declined to express an opinion on the true meaning of s.6 of the 1856 Act.

[5] Johnston v. Grant (1844) 6 D. 875; National Bank v. Campbell (1892) 19 R. 885. B.O.C.M. Silcock v. Hunter 1976 S.L.T. 217.

[6] Church of England Life Assurance Co. v. Wink (1857) 19 D. 1079; Johnston v. Grant (1844) 6 D.875; National Bank v. Campbell (1892) 19 R. 885.

[7] Evidence, p. 109.

"It is thought, however, that this view fails to give effect to the terms of the statute, which provide that a writing subscribed by the granter is the only essential requirement. The special rule created by the statute, therefore, is thought to be that a cautionary obligation, in order that it may be founded upon, must be embodied in a writing which is subscribed by the granter, and which need not be tested, and that the writing must be produced".

There is also judicial support for this interpretation of the effect of the Act.[8]

23. The Pawnbrokers Act 1872, s.24, as amended by the Pawnbrokers Act 1960, s.1(b). Where a pawnbroker makes a loan of above five pounds on a pledge he may enter into a special contract with the pawner by delivering to him at the time of the pawning a special contract pawn-ticket signed by the pawnbroker; the pawner in turn must sign a duplicate of the ticket.

24. The Bills of Exchange Act 1882, s.3(1). A bill of exchange is here defined in part as "an unconditional order in writing, addressed by one person to another, signed by the person giving it ..." In terms of s.2 of the Act, "writing" includes print. Section 73 of the Act defines a cheque as a species of bill of exchange; and by s.83(1) a promissory note is defined in part as "an unconditional promise in writing made by one person to another signed by the maker, engaging to pay ..." While promises to pay, or orders to a third party to pay, which are not in writing and signed, may result in the creation of legal obligations, they are not promissory notes or bills of exchange and can enjoy none of the advantages (e.g. negotiability) appertaining thereto.

25. The Partnership Act 1890, s.2(3)(d). If, on advancing money by way of loan to a person engaged or about to engage in business in terms of an agreement whereby the rate of interest received by the lender is to vary with the profits of the business or according to which the lender is to receive a share of the profits, the lender wishes to avoid being regarded in law as a partner of the person or persons

[8] Snaddon v. London etc. Assurance Co. (1902) 5 F. 182 per Lords Trayner and Moncreiff.

carrying on the business and liable as such, the contract of loan must be in writing and signed by or on behalf of all the parties thereto.

26. The Marine Insurance Act 1906, s.22 provides that a contract of marine insurance is inadmissible in evidence unless embodied in a marine policy satisfying the requirements of the Act. Those requirements are set forth in ss. 23 and 24 and lay down, inter alia, that the policy must specify the name of the assured and must be signed by or on behalf of the insurer; where the insurer is a corporation sealing with the corporate seal is sufficient. Although inadmissible in evidence unless embodied in such a policy, a contract of marine insurance is concluded when the proposal of the assured is accepted by the insurer whether the policy be issued at that time or not; and for the purpose of establishing when the proposal was accepted it is permissible to refer to the slip or covering note provided by the insurer.[9]

27. The Moneylenders Act 1927, s.6. A contract with a moneylender for the repayment of money lent or of interest thereon is unenforceable against the borrower, and a contract with a moneylender whereby security is provided in respect of a loan is unenforceable against the cautioner, unless a note or memorandum in writing, containing all the terms of the contract and signed personally by the borrower or cautioner is drawn up and a copy delivered or sent to the borrower or cautioner within seven days of the making of the contract. The note or memorandum must have been signed before the money was lent or the security given.

28. The Companies Act 1948, ss. 3 and 9, as amended by the Finance Act 1970, schedule 8, part IV. The Memorandum and Articles of Association of a company must be signed by each subscriber in the presence of at least one witness who must attest the signature. It is specifically provided that such attestation shall be sufficient in Scotland as well as in England.

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[9]Marine Insurance Act 1906, s.21.

29. The Hire-Purchase (Scotland) Act 1965, s.5(1). A hire purchase, credit sale or conditional sale agreement where the total purchase price does not exceed £2000 is unenforceable by the owner or seller of the goods unless the agreement is signed by the hirer or buyer and by or on behalf of all other parties to it, contains information on the matters set out in section 7, and complies with the requirements of form imposed by regulations made under section 7(2). In a decision on the meaning of similar, but not identical, provisions in an earlier Act[10] it was held that the signature of the hirer or purchaser did not require to be attested.[11] The sheriff was also of opinion that, in view of the terms of the statute, the absence of the purchaser's signature on the agreement gave rise to a defect which could not be remedied by rei interventus. The 1965 Act also provides in section 22(1) that a contract of guarantee relating to a hire purchase, credit sale or conditional sale agreement shall be unenforceable unless the contract of guarantee is signed by the guarantor before two witnesses. It may be noted that it is not specifically stipulated in the section that the witnesses must also sign the contract and it is therefore possible that its terms might be held to have been complied with if it could be established that two witnesses were in fact present when the guarantor signed even though they did not attest the signature.

30. The Merchant Shipping Act 1970, s.1. An agreement in writing must be made between each member of the crew of a ship registered in the United Kingdom and his employers, and this agreement (referred to as "a crew agreement") must be signed by the seaman and by or on behalf of the employers. Except where the Department of Trade grants exemption, the agreements made with the crew members of a single ship must be contained in one document.

31. The Trade Union and Labour Relations Act 1974, s.18. In terms of this Act, any collective agreement (as defined

[10] Hire Purchase and Small Debt (Scotland) Act 1932, s.2.

[11] United Dominions Trust (Commercial) Ltd v. Lindsay 1959 S.L.T. (Sh. Ct.) 58.

in section 30(1)) made before 1 December 1971 or after 16 September 1974[11a] is conclusively presumed not to have been intended by the parties to it to be a legally enforceable contract unless it is "in writing" and contains a provision stating that the parties intended the agreement to be legally binding. Where these conditions are satisfied the collective agreement is conclusively presumed to have been intended by the parties to be a legally enforceable contract.

32. The Consumer Credit Act 1974, ss. 60, 61. These sections have not yet been brought into operation; when in force they will replace the provisions of the Moneylenders Act 1927 mentioned in paragraph 27 supra and the provisions of section 5 of the Hire-Purchase (Scotland) Act 1965 mentioned in paragraph 29 supra. A "regulated agreement" must (unless it is an "exempt agreement")[12] be embodied in a document which complies as regards both form and content with the provisions of regulations to be made by the Secretary of State for Prices and Consumer Protection.[12a] The document is not properly executed unless it is signed by the debtor or hirer and by or on behalf of the creditor or owner.[12b] A "regulated agreement" is an agreement whereby the creditor provides an individual with credit not exceeding £5000[13] or a hire agreement entered into with an individual which is capable of subsisting for more than three months and does not require the hirer to make payments of more than £5000.[14] "Credit" includes a cash loan or any other form of financial accommodation, including a hire purchase agreement.[15] These provisions as to the form and execution of regulated agreements do not apply to agreements not made by the creditor or owner in the course of a business carried on by him.[16] An

[11a] The date upon which the section was brought into operation: S.I. 1974 No 1385.

[12] Consumer Credit Act 1974, s.16.

[12a] 1974 Act, s.60.

[12b] 1974 Act, s.61.

[13] 1974 Act s.8.

[14] 1974 Act, s.15.

[15] 1974 Act, s.9.

[16] 1974 Act, s.74 (1)(a) and s.189.

agreement varying a regulated agreement, though not itself falling within the definition of a regulated agreement, is to be treated as a regulated agreement.[17] Under section 105 of the 1974 Act (which has also yet to be brought into operation but which will when in force inter alia replace the provisions of the Pawnbrokers Act 1872 mentioned in paragraph 23 supra and the provisions of section 22 of the Hire Purchase (Scotland) Act 1965, mentioned in paragraph 29 supra), any security (except one provided by the debtor or hirer himself[18]) provided in relation to a regulated agreement must be expressed in writing (the "security instrument"), the form and content of which may be prescribed by regulations, and must be signed by or on behalf of the surety. "Security" is defined[19] as a mortgage, charge, pledge, bond, debenture, indemnity, guarantee, bill, note or other right provided by the debtor or hirer under the agreement. Where the security takes the form of a pledge the person receiving the article must give to the person from whom he receives it a pawn-receipt in a form to be perescribed by regulations.[19a]

33. The Mobile Homes Act 1975, s.1. In terms of this Act a duty is imposed upon the owner of a site upon which mobile homes are stationed (other than a site licenced for holiday use only or in relation to which there are times of the year when no mobile homes may be stationed thereon[20]) to offer to enter into "a written agreement" with (a) any person already occupying a mobile home on the site as his only or main residence, and (b) with any person whom he proposes to permit to station a mobile home on the site or (c) with any person who has acquired a mobile home stationed on the site and whom he proposes to permit to continue to station it there and who, in cases (b) and (c) has notified the owner in writing that he

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[17] 1974 Act, s.82(3).
[18] 1974 Act, s.105(6).
[19] 1974 Act, s.189.
[19a] 1974 Act s.114(1).
[20] Mobile Homes Act 1975, s.9(1).

intends to occupy the mobile home as his only or main residence. Section 2 of the Act lays down the required duration of the agreement; section 3 details the particulars to be contained in the agreement; and section 4 (as applied to Scotland by section 9(2)) provides that if the owner refuses or fails to enter into such an agreement the occupier of the mobile home may apply to the sheriff having jurisdiction over the site for the grant of an agreement complying with section 3.

D: OBLIGATIONS REQUIRING TO BE PROVED BY WRIT OR OATH

34. In addition to the requirements of writing which must be complied with in the case of obligationes literis and in the case of obligations governed by special statutory provisions, there are many situations in which obligations in Scotland may be constituted quite informally but, in the absence of admission on record, require to be proved by the writ of the party alleged to be bound, or by his admission on reference to his oath. What is meant by "writ" in this context, and the procedure, form and consequences of a reference to oath are considered briefly at a later stage in this Memorandum.[1]

1. Types of obligations.

35. We have already noted that where an obligatio literis has not in fact been constituted in a writing which complies with the required solemnities it may nevertheless become legally binding if the fact that the parties reached agreement, or that a unilateral obligation was undertaken, can be proved by the writ of the party who denies that he is bound or is admitted by him on reference to his oath, and actings amounting to rei interventus or homologation have followed upon it.[2] We may also refer briefly at this stage, for the sake of completeness, to certain prescription and limitation statutes which were repealed in terms of the Prescription and Limitation (Scotland) Act 1973[3] with effect from 25 July 1976[4]. Under these statutes, obligations of certain types, on the expiry of the appropriate period of years without pursuit by the creditor, did not cease to exist or become unenforceable, but could thenceforth be proved only by the writ or oath of the person alleged to be bound.[5] The prescriptive periods and the statutes by which they were imposed were as follows:

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[1] Infra, paras. 49-52.

[2] Supra, paras. 16-17.

[3] 1973 Act, s.16(2) and Schedule 5, Part I.

[4] 1973 Act, s.25(2).

[5] See Walkers, The Law of Evidence in Scotland, chapter XII; Reform of the Law Relating to Prescription and Limitation of Actions, Scot. Law Com. No 15, Part IV and Appendix B.

(a) The triennial prescription of "actiones of debt for house-mailles, mennis ordinars, servands fees, merchantes comptes, and other the like debts, that are not founded upon written obligationes" in terms of the Prescription Act 1579.[6]

(b) The quinquennial prescription of arrears of "ministers' stipends and multures", of "mails and duties of tenants" after they have removed from the lands, and of "bargains concerning moveables or sums of money, provable by witnesses"[7] in terms of the Prescription Act 1669.[8]

(c) The sexennial prescription of the debts contained in bills of exchange and promissory notes in terms of the Bills of Exchange (Scotland) Act 1772, sections 37 to 40. The prescription applied only to the debt contained in the bill of exchange. Any antecedent obligation in implement of which, or as security for which, the bill or note was granted might still be proved in the manner normally required for obligations of the type in question.[9]

(d) The vicennial prescription of "holograph missive letters and holograph bonds and subscriptions in compt-books, without witnesses" in terms of the Prescription Act 1669.[8] According to the provisions of the Act the pursuer had to prove the "verity" of the holograph writing or of the subscription in the account book by reference to the defender's oath: proof by writ was not sufficient. However, the existence of the long negative prescription, by virtue of which almost all obligations are extinguished if not sought to be enforced for twenty years, rendered the

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[6]Cap. 21 (A.P.S.); cap. 83 (Glendook).

[7]The apparent width of this provision was considerably restricted by judicial decision, e.g. McFarlane v. Brown (1827) 5S.189; Baillie v. Young (1835) 13 S.472; Hunter v. Thomson (1843) 5D.1285; Mackinlay v. Mackinlay (1851) 14 D.162; Taylor v. Nisbet (1901) 4F.79; Kilpatrick v. Dunlop 1909, 2 S.L.T. 307.

[8]Cap. 14 (A.P.S.); cap. 9 (Glendook).

[9]E.g. Hunter v. Thomson (1843) 5D.1285; Blake v. Turner (1860) 23D. 15, 17; McKinney v. Allan 1974 S.L.T. (Notes) 74, reported more fully sub nom. Russland v. Allan [1976] 1 Lloyd's Rep. 48.

vicennial prescription of little practical importance.

The following paragraphs consider in outline the other types of obligations which at present may be constituted informally but require to be proved by writ or oath.

36. (a) Loan. Proof of the loan or advance of a sum of money in excess of £100 Scots (£8.33) is restricted, in the absence of admission on record, to the writ or oath of the borrower.[10] If the borrower's writing or his admission on oath, though sufficient to establish receipt of money on loan, is qualified by a claim that the money has been repaid, then resting owing must also be proved by his writ or oath.[11] The restriction on proof does not apply to a loan of corporeal moveables,[12] nor to the debit items in a long standing current account between principal and agent even though these take the form of advances by the agent to the principal.[13] However, the exclusion of parole evidence does not cease to operate merely because it is offered to be proved that the loan in question forms part of a series of similar transactions between the parties.[14] It would appear to be the case that proof of the loan by the borrower's writ or oath is essential only in an action by the creditor or his representatives, such as for repayment of capital or for payment of interest; where the creditor seeks to establish the constitution of the loan as his defence to an action e.g. by a trustee in bankruptcy concluding for reconveyance of property averred by the defender to have been transferred to him by the bankrupt as security, proof is not restricted to the debtor's writ or oath.[15] There is no suggestion in the authorities that an

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[10] See Gloag, Contract, 2nd edition p.192 et seqq; Walker, Principles, 2nd edition, pp. 561-2.

[11] Patrick v. Patrick's Trs. (1904) 6F.836, 839; Walker v. Garlick 1940 S.L.T. 208.

[12] Scot v. Fletcher (1665) Mor. 11616; Geddes v. Geddes (1678) Mor. 12730.

[13] Robb v. Robb's Trs. (1884) 11R.881; Boyd v. Millar 1933 S.N.106, 1934 S.N.7.

[14] McKie v. Wilson 1951 S.C.15; Smith's Tr. v. Smith 1911 S.C.653, 659.

[15] Smith's Tr. v. Smith 1911 S.C.653, as explained by Lord President Cooper in McKie v. Wilson 1951 S.C.15, 20.

agreement to lend money, even where the sum in question is greater than £100 Scots, requires to be proved by the writ or oath of the person alleged to have agreed to lend.

37.(b) Obligations of relief. A conventional obligation of relief may be proved only by the writ or oath of the person alleged to have undertaken it.[16] An obligation of relief which is implied by law (as for example between co-cautioners or between cautioner and principal debtor) may, of course, be proved by parole evidence,[17] as may the fact that the true relationship between parties who are *ex facie* principal debtors is that of cautioner and principal debtor.[18] According to Dickson[19] the restriction of proof to writ or oath even in the case of conventional obligations of relief is mitigated by the rule that "parole will be admitted to prove the obligation when it forms part of a transaction which may be established by that means"; in other words, proof by writ or oath is essential only where the principal obligation, to which the right of relief is accessory and of which it forms part, is one which must itself be constituted in writing or proved by writ or oath. However, the view has been judicially expressed that the admission of parole evidence on this basis is permissible only where the obligation of relief is an integral part of a transaction relating to moveables, perhaps only of a contract of sale of moveables.[20]

38.(c) Declarator of trust. The Blank Bonds and Trusts Act 1696 c.25 provides that -

> "no action of declarator of trust shall be sustained as to any deed of trust made for hereafter except upon a

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[16] Gloag, Contract, 2nd edition, pp. 195-6; Walker, Principles, 2nd edition, p. 562.

[17] Gloag, Contract, 2nd edition, p.195.

[18] Bell, Principles, para. 267; *Lindsay* v. *Barmcotte* (1851) 13D.718, 725; *Thow's Tr.* v. *Young* 1910 S.C. 588, 593, 595. But cf. *McPhersons* v. *Haggart* (1881) 9R.306.

[19] Evidence, 3rd edition, para. 606.

[20] *Devlin* v. *McKelvie* 1915 S.C.180, 187, 189.

declaration or back-bond of trust lawfully subscribed by the person alleged to be the trustee, and against whom, or his heirs or assignees, the declarator shall be intended, or unless the same be referred to the oath of party simpliciter; declaring that this Act shall not extend to the indorsation of bills of exchange, or the notes of any trading company."

As judicially interpreted[21] the Act requires proof by the alleged trustee's writ or oath (or an admission by him on record[22]) when it is sought to be established (in an action which is in substance if not in form a declarator of trust) that property, whether heritable or moveable, held by him under an ex facie absolute written title, is in fact held in trust for, or on behalf of, a third party. The Act does not apply where the document held by the alleged trustee merely indicates that he is entitled to possession of a moveable or to payment of money, as opposed to being the owner of the thing or of the fund.[23] However, proof by writ or oath was insisted upon in a case where the writings in question did not import title in the alleged trustee, but were missives of sale.[24] A strong dissenting opinion was delivered, to the effect that the Act applied only where the document in the alleged trustee's favour was a conveyance, assignation or transfer as distinct from an agreement or contract to convey, assign or transfer.[25] This view has received support in subsequent obiter dicta.[26] The restriction on the means of proof applies only in an action brought by the alleged truster or his successors in title against the alleged trustee or his successors in title. Where it is a third party (e.g. a creditor of the truster, or

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[21] See Gloag, Contract, 2nd edition, pp. 385-90; Walkers, Evidence pp. 119-23; Walker, Principles, 2nd edition, p.562; Wilson & Duncan, Trusts, Trustees and Executors, pp. 50-61.

[22] Seth v. Hain (1855) 17D.1117; Leckie v. Leckie (1854) 17D.77; Chalmers v. Chalmers (1845) 7D.865.

[23] Anderson v. N. of Scotland Bank (1901) 4F.49, 54; Cairns v. Davidson 1913 S.C. 1054; Newton v. Newton 1923 S.C. 15, 25; Kennedy v. Macrae 1946 S.C. 118, 121; Weissenbruch v. Weissenbruch 1961 S.C. 340.

[24] Dunn v. Pratt (1898) 25 R. 461.

[25] (1898) 25 R. 461 at p. 469 per Lord Kinnear.

[26] Cairns v. Davidson 1913 S.C. 1054, 1057; McConnachie v. Geddes 1918 S.C. 391, 399; Newton v. Newton 1923 S.C. 15, 25.

a person seeking to establish a ground of jurisdiction over the truster) who seeks to prove that property held by A is in fact held by him in trust for B, parole evidence is competent.[27] So too proof by writ or oath is not essential where the alleged trustee took the title to the property in his own name without the consent of the person claiming to be entitled to it. A pursuer may consequently prove by parole evidence that an agent or mandatory in taking title in his own name acted contrary to instructions,[28] or that the pursuer's consent to his acting as he did was obtained by fraud or misrepresentation.[29]

There is also authority for the view that where it is averred that the alleged trustee is the pursuer's agent and in taking title in his own name was acting as such, this may be proved _prout de jure_, at least if the agency averred is not of a merely _ad hoc_ character.[30] This has, however, been questioned.[31] Similarly, it has been held that where the defender is alleged to be a partner of a firm and to hold the property in question as trustee for the firm, parole proof is competent.[32] But there is also authority for the contrary view.[33]

39. _(d) Innominate and unusual contracts._ A contract other than one of the familiar nominate real and consensual

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[27] _Middleton_ v. _Rutherglen_ (1861) 23 D.526; _Wink_ v. _Speirs_ (1867) 6M.77; _Wallace_ v. _Sharp_ (1885) 12 R. 687; _Hastie_ v. _Steel_ (1886) 13 R. 843. See also _Murdoch_ v. _Wyllie_ (1832) 10 S. 445.

[28] _Mackay_ v. _Ambrose_ (1829) 7 S. 699, 702; _Horne_ v. _Morrison_ (1877) 4 R. 977; _Dunn_ v. _Pratt_ (1898) 25 R. 461, 468; _McConnachie_ v. _Geddes_ 1918 S.C. 391, 396.

[29] _Marshall_ v. _Lyell_ (1859) 21 D. 514, 521; _Wink_ v. _Speirs_ (1867) 6 M. 77; _Galloway_ v. _Galloway_ 1929 S.C. 160, 167, 169.

[30] _Dunn_ v. _Pratt_ (1898) 25 R. 461 esp. at 468; _Beveridge_ v. _Beveridge_ 1925 S.L.T. 234.

[31] _Cairns_ v. _Davidson_ 1913 S.C. 1054; _McConnachie_ v. _Geddes_ 1918 S.C. 391; in both cases per Lord Salvesen. See also Wilson & Duncan, _Trusts, Trustees and Executors_, pp. 56-7.

[32] _Baptist Churches_ v. _Taylor_ (1841) 3 D. 1030; _Forrester_ v. _Robson's Trs._ (1875) 2 R. 755.

[33] _Laird & Co._ v. _Laird & Rutherford_ (1884) 12 R. 294 esp. per Lord President Inglis at p. 297. In _Munro_ v. _Stein_ 1961 S.C. 362 (O.H.) it was held that the 1696 Act, if it applied in partnership cases at all, applied only in respect of assets acquired during the course of the partnership and not to those brought in by the partners when their association began.

contracts, which is in its terms unusual, anomolous or peculiar must be proved, in the absence of admission on record, by the writ or oath of the party interested in denying its formation.[34] Statements and dicta to the effect that parole evidence is excluded in the proof of all innominate contracts, whether unusual in character or not,[35] have been disapproved and are to be regarded as no longer authoritative.[36] In each case it is the duty of the court to decide, on the basis of the averments regarding the nature and contents of the contract made by the party seeking to establish its formation, whether it is sufficiently anomalous and peculiar to fall into the category requiring proof by writ or oath.[37] It has been judicially suggested that this is a determination which a court is unsuited to make.[38]

40. (e) Gratuitous obligations.[39] Contracts[39a] and promises in terms of which one party only is bound to pay or to perform, no reciprocal undertaking being given by or sought from the beneficiary, require to be proved by the writ of the donor or by his admission on record or on reference to his oath.[40] The restriction on proof does not apply where the obligation in question though in form unilateral and gratuitous is in fact part of a larger composite transaction of a type which may be proved by parole evidence:[41]

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[34] See Gloag, Contract, 2nd edition, pp. 196-7; Walker, Principles 2nd edition, pp. 564-5.

[35] Erskine, IV. 2. 20; Cochrane v. Traill (1900) 2 F. 794, 799; McFadzean's Exr. v. McAlpine 1907 S.C. 1269, 1273.

[36] Forbes v. Caird (1877) 4 R. 1141; Hendry v. Cowie (1904) 12 S.L.T. 31, 261; Allison v. Allison's Trs. (1904) 6 F. 496; Smith v. Reekie 1920 S.C. 188.

[37] Examples of cases in which the mode of proof was restricted are to be found in Gloag, Contract, 2nd edition, p. 196; Walkers, Evidence, pp. 132-3; Walker, Principles, 2nd edition, pp. 564-5.

[38] Hallet v. Ryrie (1907) 15 S.L.T. 367 per Lord Salvesen.

[39] See our accompanying Memorandum No 35, passim; also Memorandum No 36, paras. 3-6.

[39a] E.g. Macdonald v. Macdonald (1960) 48 S.L.C. R.22.

[40] See e.g. Walkers, Evidence, p. 134; Walker, Principles, 2nd edition, pp. 563-4.

[41] Hawick Heritable Investment Co. v. Huggan (1902) 5 F. 75 per Lord Kyllachy at pp. 78-9; also Gloag, Contract, 2nd edition, p. 52.

> "[A] promise or undertaking is not in the eye of the law gratuitous - that is to say is not a mere nudum pactum - if it be part of a transaction which includes hinc inde onerous elements, such for example as a waiver or discharge of claims, or objections to claims - claims or objections which, whether good or bad, it is desired to extinguish. In such a case the whole transaction - unless heritable rights are affected - may, I think it is clear, be the subject of parole proof."

Proof by writ or oath is, however, required even though the promisee has changed his position or incurred expense on the faith of the obligation undertaken towards him: a gratuitous unilateral promise is not converted into an onerous contract merely because the promisee fulfils a condition which was adjected to the promise.[42] Thus, a promise made by a father on condition that the promisee married his daughter could not be proved by parole evidence even though the promisee averred that the marriage had taken place;[43] and a promise to leave a legacy of £7,000 if the promisee built a church according to plans approved by the promisor required to be proved by writ or oath in spite of the fact that the promisee averred that in reliance upon the promise such a church had already been built.[44] Whether an obligation is gratuitous or onerous is determined at the time when the obligation is constituted and while matters are still entire; if at that stage there is no counter-stipulation prestable against the creditor the obligation is gratuitous, parole proof is excluded and nothing done by the promisee thereafter can conver the transaction into an onerous one. In this respect Scots law is less favourable towards promisees than the law of England, under which a conditional promise will be construed as an offer which matures into a binding contract when the promisee performs the act called for, such performance amounting at one and the same time to his acceptance of the offer and the valuable consideration flowing from him to the offeror.

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[42] Millar v. Tremamondo (1771) Mor. 12395; Smith v. Oliver 1911 S.C. 103.

[43] Millar v. Tremamondo (1771) Mor. 12395.

[44] Smith v. Oliver 1911 S.C. 103.

Thus, Lord Normand has pointed out:[45]

> "There are probably few cases (or perhaps none) where an English Court would hold that there was no consideration and a Scottish Court would permit proof by witnesses, but there are probably many in which the English Courts would hold that there was consideration and yet the Scottish Courts would insist on proof *scripto vel iuramento*".

41. In addition to obligations of the types mentioned in paragraphs 35 to 40 the formation or constitution of which requires to be proved by writ or oath, there are a number of other matters in the law of obligations the proof of which is subject to a similar restriction. These include (i) performance or discharge of an obligation constituted in writing; (ii) payment of money under an antecedent obligation; (iii) gratuitous renunciation of rights (acceptilation); and (iv) the variation of obligations constituted or recorded in writing.

42. *(f) Performance or discharge.* Where an obligation has been constituted in writing or, although not so constituted, is vouched for by a document of debt[46] proof by the creditor's writ or oath of the performance or discharge thereof is required.[47] If the obligation in question consists of the payment of money the restrictions on proof of its performance may equally be ascribed to the rule that payment of money under a pre-existing obligation can be established only by the writ or oath of the creditor.[48] Examples of the operation of this restriction in relation to obligations other than the payment

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[45]"Consideration in the Law of Scotland" (1939) 55 L.Q.R. 358, 365.

[46]Cf. paras. 5 and 12, *supra*.

[47]See e.g. Walkers, *Evidence* p. 124 *et seqq.*; Walker, *Principles*, 2nd edition, p. 562-3.

[48]See para. 43 *infra*.

of money are very rare.[49] Indeed, it is settled and accepted that proof by writ or oath is not essential in the case of the discharge by performance of obligations ad factum praestandum[50] such as the provision of services or the delivery of goods. Nor is such proof required in those rare situations in which it is the creditor and not the debtor who wishes to establish performance of the obligation: for example, where a creditor seeks to set up an improbative agreement by proof of actings of the debtor which amount to partial performance and which are sufficient to justify a plea of rei interventus or homologation.[51] A further major exception to the necessity for proof by writ or oath exists where the creditor's actings, or the circumstances generally, are inconsistent with the continued subsistence of the obligation and are such as to lead to the inevitable inference that the obligation has been discharged.[52] Although such actings or circumstances may be proved prout de jure, the onus upon the debtor is a heavy one, and it has been said that he will succeed only if discharge or performance is thereby established beyond a reasonable doubt.[53] Stair[54] describes as follows the factors which might be held relevant to give rise to the "inevitable inference" that an obligation constituted in writing had

[49] One instance is Keanie v. Keanie 1940 S.C. 549, in which shares were registered in the name of A who had however granted a backletter declaring that he held them in trust for B. After B's death A claimed that the trust had been discharged ten years previously by B's making a gift of the shares to him. It was held that A could establish this only by B's writ (a reference to his oath being no longer possible). In the Inner House this restriction was ascribed to the rule that discharge of an obligation constituted in writing could not be proved by parole evidence. The Lord Ordinary (Lord Russell) was of opinion that the case might equally be governed by the rule that proof by writ or oath is required in cases of the gratuitous renunciation (acceptilation) of rights: see p.553.

[50] Stair, IV. 43.4; Erskine, IV. 2.21; Gloag, Contract 2nd edition, p. 720.

[51] Erskine III. 3.50; Foggo v. Hill (1840) 2 D. 1322, 1334.

[52] Chrystal v. Chrystal (1900) 2 F. 373, 379; Bishop v. Bryce 1910 S.C. 426, 435; Campbell v. Campbell's Exrs. 1910, 2 S.L.T. 240, 241; Mackintosh v. Mackintosh 1928 S.C.83, 88; McKenzie's Exrx. v. Morrison's Trs. 1930 S.C.830, 836.

[53] Thiem's Trs. v. Collie (1899) 1 F. 764, 780; Chrystal v. Chrystal (1900) 2 F. 373, 379; McKenzie's Exrx. v. Morrison's Trs. 1930 S.C. 830, 836.

[54] IV. 45.23.

been discharged:

> "As if the creditor had long taken no profit when he had opportunity, as if he had had intromission with the debtor's estate, or was his tutor and curator, and did not retain the sum in that security, nor mention it, or did not mention it in the inventory of his estate, or if he were indigent and claimed it not, and the debtor were opulent; or if a posterior security were granted for a greater sum, without mention or accumulation of the former, and without demanding any thing upon it; it would be presumed to be comprehended in the greater security, if the profit thereof were taken and claimed, and not of the other."

43. (g) Payment of money under an antecedent obligation. Where money in excess of £100 Scots is paid in fulfilment of an obligation undertaken at a time earlier than that at which the payment is made parole proof of the performance of the obligation is generally incompetent whether or not the obligation is constituted in or evidenced by writing: the payment must be proved by the writ or oath of the creditor.[55] Before the restriction on proof applies the payment must have been made under a pre-existing obligation: payment in a ready money transaction (e.g. in the case of a sale where the price is paid on conclusion of the contract or at the time of delivery of the goods[56]) may be proved *prout de jure*.[57] Payment of the price, or of an instalment thereof, in the case of a sale on credit terms must however be proved by the writ or oath of the creditor,[58] as must the repayment of money lent,[59] a payment made by an executor under a prescribed bill of exchange which had been proved by the deceased's writ to be resting owing at the date of his death,[60] a payment to account of the agreed

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[55] Gloag, *Contract*, 2nd edition, p. 717; Walkers, *Evidence*, p. 128 *et seqq.*; Walker, *Principles*, 2nd edition, p.563.

[56] Gloag, *loc. cit.*; *Stewart* v. *Gordon* (1831) 9 S. 466; *Shaw* v. *Wright* (1877) 5 R. 245, 247.

[57] Dickson, *Evidence*, 3rd edition, para. 616; *Burt* v. *Laing* 1925 S.C. 181.

[58] *Tod* v. *Flockhart* 1799 Hume's Dec. 498; *Young* v. *Thomson* 1909 S.C. 529.

[59] *Thiem's Trs.* v. *Collie* (1899) 1 F. 764, 778; *Jackson* v. *Ogilvie's Exr.* 1935 S.C. 154, 160.

[60] *Jackson* v. *Ogilvie's Exr.* 1935 S.C. 154.

price under a building contract.[61] There is some doubt as to whether proof of the payment of employees' wages or salaries is similarly restricted; dicta exist to the effect that this may be proved by parole evidence.[62] As in the case of the performance or discharge of obligations constituted in writing, the principal exception to the requirement of proof by the creditor's writ or oath is where the creditor's actings, or the circumstances generally, are inconsistent with the continued subsistence of the obligation and are such as to give rise to the inevitable inference that the obligation has been discharged, by payment or otherwise.[63] In most of the decided cases the circumstances which were held to give rise to an "inevitable inference" of payment were that the defender had been the alleged creditor's factor or business manager, that his practice had been to account orally for his intromissions at daily or weekly intervals, and that on leaving the alleged creditor's employment no action for payment had been raised for a lengthy period (usually not until after the employer's death).

44. (h) Acceptilation. It is accepted that the gratuitous renunciation of rights constituted in writing may be proved only by the writ or oath of the creditor.[64] Once again, however, an exception is recognised and parole proof is admissible where it is sought to be established that the creditor's actings or the circumstances generally, give rise to the inevitable

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[61] Hope Bros. v. Morrison 1960 S.C.1; Coyle v. Lees, 1976 S.L.T. (Sh. Ct.) 58.

[62] Brown v. Mason (1856) 19 D. 137, 138; Annand's Trs. v. Annand (1869) 7 M. 526, 530.

[63] Couts v. Couts (1636) Mor. 11,423; Irvine v. Falconer (1671) Mor. 11,424; Lord Saltoun v. Fraser (1722) Mor. 11,425; Wilson v. Wilson (1783) Mor. 11,646; Stuart v. Maconochie (1836) 14 S. 412; Russell's Trs. v. Russell (1885) 13 R. 331.

[64] Gloag, Contract, 2nd edition, p. 722; Walkers, Evidence, pp. 130-31; Lord Craigmiller v. Chalmers (1639) Mor. 12,308; Scot v. Cairns (1830) 9 S. 246; Reid v. Gow (1903) 10 S.L.T. 606; Keanie v. Keanie 1940 S.C. 549.

inference that the obligation owed to him has been in some way discharged.[65] As regards proof of the renunciation of rights not constituted in writing, there is a conflict of opinion. Erskine[66] and Gloag[67] take the view that acceptilation in these circumstances may be proved prout de jure. Dickson[68] and Sheriffs A.G. and N.M.L. Walker[69] are of opinion that the renunciation of a right, whether or not constituted in writing, is subject to the same restriction on proof as any other kind of gratuitous obligation.[70] This latter view has received judicial support in the Outer House.[71]

45. (j) Variation of written obligation. It is a general rule, though one which is subject to many exceptions, that it is incompetent 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.[72] The rule applies not only to obligations constituted or recorded in a formal and considered writing which the parties have clearly intended should form the sole measure of their respective rights and duties, but also to contracts concluded through informal written offer and acceptance,[73] and apparently, to contracts concluded by means of an informal written offer and an unqualified oral acceptance or an acceptance inferred from conduct, as by supplying goods for

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[65] Gloag, loc. cit.; Anderson's Trs. v. Webster (1883) 11 R. 35; Kirkpatrick v. Allanshaw Coal Co. (1880) 8 R.327, 334; Lavan v. Gavin Aird & Co. 1919 S.C. 345, 348.

[66] III. 4.8.

[67] Loc cit.

[68] Evidence, 3rd edition, para. 629.

[69] Evidence, p.131.

[70] See para. 40 supra.

[71] Kilpatrick v. Dunlop 1909, 2 S.L.T. 307.

[72] Gloag, Contract, 2nd edition, chs. 20, 21; Walkers, Evidence, ch. 21.

[73] Dickson, Evidence, 3rd edition, para. 1016; Riemann v. Young (1895) 2 S.L.T. 426.

which a written order had been given.[74] The exclusion of extrinsic evidence in the case of written obligations operates in respect of attempted modification, contradiction or variation not only of their express terms but also of any terms implied by law.[75] However, where the law is to the effect that a term will be implied in a contract of a given type only in certain defined circumstances, extrinsic evidence will be allowed to show whether or not those circumstances exist in the case under consideration.[76] Although the parole evidence rule applies equally to attempts to establish that the terms of a written contract do not truly reflect the intention of the parties as it existed when they entered into their agreement, or have a meaning different from that which the words used would ordinarily bear, we shall in the paragraphs which follow concentrate upon the situation that arises where it is alleged that the written terms of the obligation, although perhaps an accurate representation of the parties' intention at the time of conclusion of their arrangement, have in fact been subsequently modified or varied by agreement between them.

46. It is necessary, however, to distinguish between situations in which a written agreement has been, or is alleged to have been, varied subsequent to its conclusion and situations in which a contract has been breached but that breach has been acquiesced in by the party who would have been entitled to object to it. In the former case, provided the variation can be established in the required manner, a party seeking to compel performance in accordance with the

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[74] Pollock & Dickson v. McAndrew (1828) 7 S.189; Müller v. Weber & Schaer (1901) 3 F.401.

[75] Shaw v. Shaw (1851) 13 D.877, 879; Barclay v. Neilson (1878) 5 R. 909; Baird v. Alexander (1898) 25 R. (H.L.) 35, 37.

[76] Jacobs v. Scott (1899) 2 F. (H.L.) 70 - whether buyer had made known to seller the particular purpose for which the goods were required so as to bring into operation the implied condition under s.14(1) of the Sale of Goods Act 1893 that the goods shall be reasonably fit for such purpose. See also Hughes v. Edwardes (1892) 19 R. (H.L.) 33, 35.

original contract will be unsuccessful since a contract in those terms no longer exists, and may himself be compelled to perform in terms of the contract as varied. In the latter case, on the other hand, the original contract continues to exist, and as far as future performance is concerned may be enforced by either party according to its terms;[77] the party who complains of the past departure from the contractual provisions will fail in his action for specific implement or damages not because the contract has been varied with the consequence that the conduct objected to is not a breach, but because the complainer's acquiescence in that breach has the result of personally barring him from founding upon it. Thus, for example, an insurance company against whom a claim under a policy has been made may be held to be personally barried by its words or actings from founding upon the policyholder's failure to comply exactly with the terms of the contract governing how and within what time limits a claim must be made.[78] The facts which give rise to such personal bar, or from which such acquiescence is inferred, may be proved _prout de jure_.[79]

47. Where it is sought to establish not that a breach of contract has been acquiesced in, but that a written contract has been varied or modified by agreement it is clear that parole proof of the agreement to vary or modify is incompetent[80] (unless the contract itself can be interpreted as contemplating orally agreed variations or deviations[81]). What is less clear, however, is just what will be regarded as

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[77] _Carron Co._ v. _Henderson's Trs._ (1896) 23 R. 1042; _Pirie_ v. _Earl of Kintore_ (1903) 5 F. 818, 849, (1906) 8 F. (H.L.) 16.

[78] _Shiells_ v. _Scottish Assurance Corp._ (1889) 16 R. 1014; _Donnison_ v. _Employers' Accident Insurance Co._ (1897) 24 R. 681.

[79] _Sutherland_ v. _Montrose Shipbuilding Co._ (1860) 22 D. 665, 671; _Walker_ v. _Flint_ (1863) 1 M. 417, 422, 423; _Kirkpatrick_ v. _Allanshaw Coal Co._ (1880) 8 R. 327, 334, 336. Cf. as regards English law, _Ismail_ v. _Polish Ocean Lines_ [1976] Q.B. 893 (C.A.).

[80] See e.g. _Law_ v. _Gibsone_ (1835) 13S. 396; _Dumbarton Glass Co._ v. _Coatsworth_ (1847) 9D. 732; _Skinner_ v. _Lord Saltoun_ (1886) 13 R. 823; _Barr's Trs._ v. _Barr & Shearer_ (1886) 13 R. 1055; _Lavan_ v. _Gavin Aird & Co._ 1919 S.C. 345.

[81] _Davidson_ v. _Bisset_ (1878) 5 R. 706.

sufficient to establish the agreement to vary and render it binding upon the parties thereto. Decisions are to be found in which proof of the agreement by writ or its admission on reference to oath were held to be all that was required;[82] in other cases it was regarded as necessary that in addition to proof of the agreement to vary by writ or oath there should be proof of actings in the nature of rei interventus or homologation following upon it;[83] and in yet other cases oral agreement followed by actings or even actings alone - the actings amounting to facts and circumstances explicable only on the basis that the original agreement had been altered - have been treated as sufficient and parole proof of such agreement and such actings allowed.[84]

48. Though the decisions are frequently difficult to reconcile, it is thought that they support the following propositions.

(a) Where the contract which is alleged to have been varied is an obligatio literis[85] the agreement to vary it must be proved by the writ of the party who seeks to deny the variation or by his admission on record or on reference to his oath, and actings amounting to rei interventus or homologation must be shown to have taken place. In other words, an agreement to vary must be established, in the absence of writing complying with the normal formalities for the constitution of an obligatio literis, by the same means as would an original contract.[86]

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[82] E.g. Stevenson v. Manson (1840) 2 D.1204; McMurrich's Trs. v. McMurrich's Trs. (1903) 6 F.121. See also Gloag, Contract, 2nd ed., pp. 392-3.

[83] E.g. Philip v. Gordon Cumming's Exrs. (1869) 7M.859; Carron Co. v. Henderson's Trs. (1896) 23 R.1042, 1048, 1054; Perdikou v. Pattison 1958 S.L.T. 153.

[84] E.g. Baillie v. Fraser (1853) 15 D. 747, 750; Wark v. Bargaddie Coal Co. (1859) 3 Macq. 467; Kirkpatrick v. Allanshaw Coal Co. (1880) 8 R.327, 337; Lavan v. Gavin Aird & Co. 1919 S.C. 345.

[85] See para. 4 et seqq., supra.

[86] See Philip v. Gordon Cumming's Exrs; Carron Co. v. Henderson's Trs; Perdikou v. Pattison, cit. sup.

(b) Where the contract which is alleged to have been varied is in fact constituted or embodied in writing but is not in the category of obligationes literis, the agreement to vary or modify it must be proved by writ or oath, but it is not necessary to go on to aver or prove that actings amounting to rei interventus or homologation have followed upon it.[87]

(c) A written contract, whether an obligatio literis or not, may be held to be effectively varied by parole proof of facts and circumstances which are explicable only on the basis that an agreement to vary it has been entered into by the parties: the contract is thereby "altered rebus et factis for the past and for the future by acts of the parties necessarily and unequivocally importing an agreement to alter."[88] The facts and circumstances which are held sufficient to import such an agreement normally comprise actings by one party which infringe the terms of the written contract, and which are known to and acquiesced in by the other party.[89] Where the actings in question and the acquiescence in them are alleged to be the consequence of a prior agreement between the parties to vary the written contract, it is competent to prove that prior agreement also by parole evidence.[90] But it always remains necessary that the actings and acquiescence should in themselves manifest a clear intention to vary the original contract and be inconsistent with its continuing in force in its original form.[91] So, for example, where it was alleged

[87] See e.g. Stevenson v. Manson; McMurrich's Trs. v. McMurrich's Trs. cit. sup.

[88] Carron Co. v. Henderson's Trs. (1896) 23 R. 1042 at p. 1049 per Lord Kyllachy.

[89] See e.g. Wark v. Bargaddie Coal Co. (1859) 3 Macq. 467; Kirkpatrick v. Allanshaw Coal Co. (1880) 8 R.327; Lavan v. Gavin Aird & Co. 1919 S.C. 345.

[90] Sutherland v. Montrose Shipbuilding Co. (1860) 22 D.665 at p. 673 per Lord Justice-Clerk Inglis.

[91] Kirkpatrick v. Allanshaw Coal Co. (1880) 8 R. 327.

that a party who was entitled to a lump sum payment had agreed instead to accept payment in a number of instalments, parole evidence of the tendering and acceptance of such instalments was held to be inadmissible since even if established this would not by itself be inconsistent with a subsisting right on the part of the creditor to demand immediate full payment.[92]

(d) The possibility of establishing the modification or alteration of a contract by parole proof of actings and acquiescence explicable only on the assumption that an agreement to vary it was entered into by the parties, probably does not exist in the case of building plans or specifications. Unless the contract contains a term permitting orally agreed deviations, it is not open to the builder to seek to prove by parole evidence that a departure by him from the plans was known to and instructed by or authorised by or acquiesced in by the employer or his agent.[93]

2. Meaning of writ.

49. It is clear that, whatever the true legal position may have been prior to 1897,[94] the writing by means of which an obligation falling within one of the categories mentioned in paragraphs 35 to 48 *supra* must be proved, need not be probative or holograph.[95] According to Lord Moncreiff:[96]

> " ... the writ may be of the most informal kind. Any writing, however informal, which can be held to be actually or even constructively the writ of the person sought to be bound, is competent evidence."

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[92] Lavan v. Gavin Aird & Co. 1919 S.C. 345.

[93] Burrell v. Russell (1900) 2 F. (H.L.) 80, 86, 87, 88.

[94] See e.g. Gow "The Constitution and Proof of Voluntary Obligations" 1961 Jur. Rev. 1, 119, 234; Wilson "*In Modum Probationis*" 1968 Jur. Rev. 193.

[95] Paterson v. Paterson (1897) 25 R. 144 (13 judges).

[96] Paterson v. Paterson at p. 168.

Parole proof may be led to establish that the document founded upon is in fact the writ of the person alleged to be bound,[97] e.g. that the signature upon a typewritten letter is his, or that a writing - even one which is unsigned - is holograph of him.[98] The writ of an agent acting within his actual or ostensible authority binds his principal,[99] and parole evidence is competent to determine the extent of that authority.[1] A writing by the party alleging the existence of the obligation may, if it has been retained by the party denying it, be held to be constructively the writ of the latter.[2] Thus in Wood v. Howden[3] a debtor's retention of a receipt for interest granted by the creditor was held to be equivalent to the debtor's own writ.

50. In relation to certain types of writing no authority exists on the question of their sufficiency to prove an obligation by writ. The decided cases establish that a non-holograph document signed by the person alleged to be bound, or by his agent, is sufficient, as also is an unsigned writing which is holograph of him or of his agent. There is, however, no clear decision on the probative value of e.g. an unsigned typewritten memorandum, a receipt produced by a cash register or till, a telegram or a telex message. In the case of a telegram which has been handed for transmission over a Post Office counter a holograph writ which would seem to be clearly sufficient does exist (i.e. the completed telegram transmission form). We understand, however, that the Post Office retains the original forms for a maximum period of only

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[97] E.g. Christie's Trs. v. Muirhead (1870) 8 M. 461; Dunn's Tr. v. Hardy (1896) 23 R. 621, 633; Borland v. Macdonald 1940 S.C. 124, 137.

[98] Wink v. Speirs (1868) 6 M. 657; Storeys v. Paxton (1878) 6 R. 293.

[99] E.g. Bryan v. Butters Bros. (1892) 19 R. 490; Clark's Exrx. v. Brown 1935 S.C. 110; Fisher v. Fisher's Trs. 1952 S.C. 347.

[1] Smith v. Smith (1869) 8 M. 239.

[2] Wood v. Howden (1843) 5 D. 507; Thomson v. Lindsay (1873) 1 R. 65; Campbell's Trs. v. Hudson's Exr. (1895) 22 R. 943.

[3] (1843) 5 D. 507.

three months, and that within a relatively few years the form will be discarded as soon as the message contained on it has been transmitted, and a copy of the message will be stored on magnetic tape for a period of three months. Furthermore, it has become increasingly common for telegrams to be dictated over the telephone, and in relation to these, even at present, no holograph copy exists, but only the operator's typewritten transcription. As regards telex messages also, there is no copy which is holograph of, or signed by, the sender. Provided the operator of the receiving apparatus while the line is still open uses the "who are you" key, it is not possible for the sender of a message successfully to disguise or falsify who is transmitting. However, if the receiving apparatus is unattended when the message is received, or if the operator fails to use the "who are you" key, the sender could deliberately or negligently misidentify himself.

51. We are provisionally of the view that there is no reason in principle why unsigned, non-holograph documents should not be held to satisfy the requirements of proof by writ. Provided always that the party relying upon them is required, if their provenance is disputed, to establish that they are the writ of the person alleged to be bound or of his agent (as is at present the case with regard to holograph and to signed non-holograph documents) we see little danger in accepting such writings as sufficient for proof by writ. We take the same view in relation to photocopies of original documents: if the person alleged to be bound chooses to send to his creditor not the original but a photocopy of a letter acknowledging the obligation, we think that photocopy should be regarded as satisfying the requirements of proof by writ. This question may become of increasing importance with the greater commercial use of data transmission systems (such as Facsimile) which enable a photocopy of a document inserted into the sender's transmitting apparatus to be received instantaneously, or after a short delay, through the recipient's receiving apparatus. At a later point in this

Memorandum[4] we put forward for consideration a number of alternative schemes of formalities in relation to voluntary obligations under some of which the present rules whereby proof of certain types of obligations is restricted to writ or oath would be abolished. However, were none of these schemes to be accepted or implemented, we think that for the avoidance of doubt it should be provided that unsigned, non-holograph writs of the kind discussed in this and the two preceding paragraphs should be capable of satisfying the requirements of proof by writ. Comments are invited.

3. Reference to oath.[5]

52. Reference of the whole or part of a claim to the oath of one's opponent is a procedure entirely distinct from a party's giving evidence on oath, and originated at a time when the parties to an action were not themselves competent witnesses.[6] Even today, a party who has called his opponent as a witness and has led evidence from him cannot subsequently refer any matter on which he has given evidence to his oath.[7] A reference to oath may be made at any time after the disposal of preliminary pleas and before the extract of the final judgement in the case.[8] The effect of such a reference has been explained in the following terms:[9]

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[4] Infra paras. 53 et seqq.

[5] The procedure, form and consequences of a reference to the oath of party are considered in detail in Walkers, Law of Evidence in Scotland ch. 25. See also Reform of the Law Relating to Prescription and Limitation of Actions, Scot. Law Com. No 15 (1970), Appendix B, paras. 10-17.

[6] D.M. Walker, "Evidence" in Introduction to Scottish Legal History (Stair Society, vol. 20), pp. 311-2, 317.

[7] Evidence (Scotland) Act 1853, s.5, as interpreted in Dewar v. Pearson (1866) 4 M. 493; Hamilton v. Hamilton's Exrs. 1950 S.C.39.

[8] Longworth v. Yelverton (1865) 3 M. 645, (1867) 5 M.(H.L.) 144; Walkers, Evidence, p.338.

[9] Walkers, Evidence, p.337.

> "Reference to oath has been described as a contract under which, if the reference is sustained, the party to whose oath reference is made must depone on pain of being held as confessed and the party referring undertakes to be bound by his opponent's answers. These answers are thus not evidence in the ordinary sense, since, in spite of stray dicta about believing the deponent, they must be accepted - challenge or contradiction is incompetent, and even the conviction of the deponent for perjury does not affect the matter."

The procedure is initiated by lodging a minute referring to the party's oath the whole cause or any disputed issue of fact.[10] If a reference is made after judgement in the Court of Session it should be by petition or note.[11] The deponent, if the reference is upheld, is put on oath or makes affirmation, and is questioned on behalf of his opponent on the issues referred to in the minute. Questions may also be put by the judge, but not by the deponent's own counsel.[12] If admissions are made on oath, but these are qualified, the outcome depends upon whether the qualification is intrinsic or extrinsic:[13] if the former, the qualification will be given effect to (and the reference will in consequence normally be negative); if the latter, the qualification will be ignored.

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[10] Brown v. Mason (1856) 19 D. 137.

[11] Longworth v. Yelverton (1865) 3 M. 645.

[12] Soutar v. Soutar (1851) 14 D. 140; Heslop v. Runcie (1894) 22 R. 83.

[13] For discussion of the meaning of intrinsic and extrinsic in this context, see Walkers Law of Evidence in Scotland pp. 347-8; Reform of the Law Relating to Prescription and Limitation of Actions, Scot. Law Com. No. 15, Appendix B, para. 12.

E: OPTIONS FOR REFORM

1. Introduction

53. The survey which we have just undertaken of the formalities of constitution and the restrictions on proof of voluntary obligations in modern Scots law demonstrates, in our view, the unsatisfactory nature of the rules which operate in this branch of the law. In the first place, those rules are highly complex: under them obligations fall into four quite separate categories, namely obligationes literis, obligations in respect of which modern statutory provisions apply, obligations which require to be proved by writ or oath and obligations which may be constituted informally and may be proved prout de jure. We doubt whether this fourfold division of obligations serves a useful purpose. Secondly, the law is in a number of respects unclear and uncertain in operation. For example, it is not settled whether a contract of insurance is an obligatio literis, or precisely what formalities are required when a modern statute provides that a contract of a particular type "shall be in writing". This is perhaps seen most clearly in relation to the doubt which still exists, one hundred and twenty years after the passing of the Mercantile Law Amendment (Scotland) Act 1856, over the formalities with which a cautionary obligation must comply.[1] Thirdly, granted the existence of four distinct categories of obligations, doubt may be felt in relation to the appropriateness in current circumstances of the allocation of types of obligations within these categories. Whatever may have been the case historically, it does not appear to be true today that the obligations in respect of which formalities of constitution or restrictions upon proof are imposed are necessarily those which are most "important" either economically or socially. Thus, complex business or commercial transactions involving millions of pounds could (in theory) be constituted informally and proved by witnesses, while an agreement to sell (or to lease for more

[1] See e.g. B.O.C.M. Silcock v. Hunter 1976 S.L.T. 217 at 219-20, 224.

than a year) a few square yards of ground on which to garage a car would require to be constituted in probative or holograph writ. Again, in view of the modern legislation which governs so many aspect of the employment relationship, it is at least arguable that individual contracts of service (for more than one year) entered into between employer and employee have diminished in importance to such an extent that the requirement of formal constitution is no longer necessary. Fourthly, the rules of constitution and proof - and particularly the requirement of proof by writ or oath - even in cases to which they are clearly applicable may work injustice. We have already drawn attention[2] to judicial criticisms of those rules as they operate in relation to gratuitous obligations[3] and to proof of payment under an antecedent obligation.[4] Injustice may also occur through the rules restricting the means whereby oral variations or modifications of written contracts may be proved and in particular through the denial of the possibility of effective oral variation (even if acted upon) of a building or construction contract[5] - a matter of everyday occurrence.

2. Advantages and disadvantages of requirements of form

54. Later in this Memorandum we put forward for consideration four different possible schemes which would remedy some, if not all, of the defects in the existing law relating to constitution and proof of voluntary obligations. Before doing so, however, we think it appropriate to discuss briefly the more general questions of what are the advantages and disadvantages of requirements of form in the constitution of obligations, and the ways in which legal systems have sought to minimize or mitigate these

[2]Para. 2, *supra*.

[3]*Smith* v. *Oliver* 1911 S.C. 103 at p.111.

[4]*Hope Bros*. v. *Morrison* 1960 S.C.1 at p.5.

[5]See para. 48(d), *supra*.

disadvantages. It may also be stressed at this point that throughout our consideration of these matters we are concerned exclusively with the rôle of formalities in the sphere of the formation of voluntary obligations. Neither the discussion which follows nor any of the four possible schemes of reform which we later advance is intended to apply to the question of the formalities required for the execution of wills or of the deeds whereby a real right in heritable property is conveyed or incorporeal moveable property is transferred: in these cases formalities are a requirement of the law of succession or of property and not of the law governing the constitution of voluntary obligations.[6]

55. Professor Lon Fuller has identified[7] three useful and desirable functions that may be performed by formalities of constitution of obligations. In the first place there is the _evidentiary function_ - the provision of "evidence of the existence and purport of the contract, in case of controversy."[8] Secondly, there is the _cautionary or deterrent function_ - providing "a check against inconsiderate action ... inducing the circumspective frame of mind appropriate in one pledging his future."[9] Thirdly, there is also the _channelling function_ - the provision of means whereby agreements or obligations which are intended to be binding in law can be entered into or undertaken and whereby such obligations can be clearly recognised and differentiated from agreements or proposals or statements not having (or not intended to have) those legal consequences. Thus formalities of constitution may serve "to mark or signalize the enforceable promise; [they furnish] a simple and external test of enforceability ... In this aspect form offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention."[10] We take the view that these are

[6] See paras. 4(a) and (b), _supra_.

[7] "Consideration and Form" (1941) 41 Columbia L.R.799, especially at pp. 800-806.

[8] Quoting Austin, _Lectures on Jurisprudence_, 4th ed., vol.2, p.939.

[9] Fuller, 41 Columbia L.R. 799 at p.800.

[10] Fuller at p.801.

real and important advantages of requirements of form and that it can reasonably be argued that a system based upon the formal constitution of voluntary obligations has much to recommend it, provided always that it is not permitted to operate as a device whereby serious undertakings can be avoided in bad faith by the knowledgeable and that safeguards consequently exist for the protection of those who in good faith act upon informal agreements or promises.

56. Whether or not formalities are generally or commonly required by a legal system for the constitution of voluntary obligations, we think that it is of considerable value and utility for a system to provide a procedure whereby parties, if they couch their promise or agreement in a special, solemn, form may be spared the task of having to prove that an obligation was, in fact, undertaken - for example, by leading evidence that the obligor orally consented or that a writing was in fact his or was signed by him. This function is performed in Scots law by probative writ. A writing which _ex facie_ has been executed in accordance with the statutory solemnities proves itself: when produced in judicial proceedings its genuineness is presumed and proof of its authenticity is not merely unnecessary but incompetent.[11] In _McBeath's Trs._ v. _McBeath_[12] Lord President Clyde explained the effect of a probative writing in the following terms:

> "A probative document is one which, in respect that it complies on the face of it with the prescribed legal formalities, is held to prove the verity of the legal _actus_ expressed in it as the genuine _actus_ of its author. It is important to keep in mind that, in speaking of the formalities required for the purpose of the authentication of a deed, what is meant is something in the form, or shape, or expression of the deed itself, which (when presented to the intelligent eye), provides a legal test of its authenticity. The formalities, in short, are intrinsic, not extrinsic, to the deed. They are, so to speak, the legally recognisable features of honesty and genuineness which the deed

[11] See e.g. _Grant_ v. _Shepherd_ (1847) 6 Bell's App. 153.
[12] 1935 S.C. 471 at p.476.

"carries about with it - on its face - into whosesoever hands it may pass."

A probative writ ceases to have effect as such only when reduced. Such an action is competent only in the Court of Session,[13] and the onus of disproving that the document is authentic, which lies upon the challenger, is a heavy one and can be discharged only by clear and convincing evidence.[14]

57. While requirements of form may thus serve a useful purpose, they may also entail certain cointervailing disadvantages. Professors Zweigert and Kötz, after undertaking a survey of the rôle of formalities in the formation of voluntary obligations in a number of legal systems and in particular in Anglo-American, French and German law, reached the following conclusions:[15]

> "This survey suggests that while no legal system can entirely dispense with formal requirements, the trend is towards informality, at any rate in the area of classical private law. One indication of this is the unanimity in favour of informality when the law of international sales contracts was being unified ...[16] The same tendency can also be seen in the repeal of the Statute of Frauds in England in 1954, which left contracts of guarantee and contracts for the sale of land as the only transactions requiring writing. France has gone particularly far in dispensing with formal requirements: commercial transactions never require any particular form, and in other areas the doctrine of commencement de preuve[17] has been so extended by the courts that a plausible claim hardly ever fails merely because there is no written evidence ... Only in the systems of the German legal family is there no comparable development, those being the systems where the formal requirements are primarily designed to protect inexperienced persons from surprise rather than just restrict the methods of proof.

[13]Maclaren, Court of Session Practice, p.82.

[14]Baird's Tr. v. Murray, (1883) 11 R. 153 at 156; Stirling Stuart v. Stirling Crawfurd's Trs. (1885) 12 R. 610 at 626, 632.

[15]Einführung in die Rechtsvergleichung, vol. II, pp. 58-60 (translated by J.A. Weir as An Introduction to Comparative Law, to be published in 1977 by North-Holland Publishing Co., Amsterdam).

[16]See Uniform Laws on International Sales Act 1967, Schedule 2. article 3.

[17]See para. 63, infra.

"The declining importance of these formal provisions in France and England is easier to understand if we remember that art. 1341 Code civil is designed to restrict the undesirable testimony of witnesses, and that the Statute of Frauds was primarily directed to preventing perjury and false witness. When courts were bound by strict procedural rules, especially rules of evidence ... such provisions may have made sense. Today, however, nearly everyone accepts that all evidence should be admitted for what it is worth, and courts are much better able to guard against the misdoings of witnesses and parties; there is therefore no longer the same need to provide indirect protection by insisting on formal requirements ...

Even the more modern practice of imposing formal requirements so as to protect parties from surprise and draw their attention to dangers should be approached with a certain caution. People are literate today and there is no place in the modern law of contracts for the heavy ... paternalism evident in the excessive formal requirements of the [Prussian] General Land Law ... [L]awmakers must constantly bear in mind that every provision requiring a certain form exacts a high price: not only does it inhibit commercial intercourse and set traps for the unwary, but it brings the legal system into disrepute, for it is only when the courts apply formal requirements and disregard the equities of the particular case in the interests of abstract order that the layman normally becomes conscious of them."

If these views are accepted, it follows that the obligations in respect of which formalities are required should be kept to a minimum, and should be those obligations only in relation to which the fulfilment of the evidentiary or the cautionary (or deterrent) functions[18] of requirements of form is seen to be clearly necessary.

58. Among the transactions in relation to which it may be argued that the advantages of requirements of form outweigh the disadvantages are the following:

(a) Gratuitous obligations. In most Western European legal systems gratuitous obligations are subject to special requirements of form. In many jurisdictions the requisite formality is notarial authentication of the document in which the benefit is promised;[19] in

[18] See para. 55, <u>supra</u>.

[19] See e.g. French Civil Code, art. 931; Italian Civil Code, art. 782; German Civil Code, art. 518; Austrian Civil Code, art. 943, as amended by the law on Compulsory Notarial Contracts (No.75, 1871).

English law a promise made without consideration is binding only if made in a deed under seal; and in Scots law proof by writ or oath is required. It seems, therefore, to be widely accepted that gratuitous promises of benefits, irrespective of value, should have to comply with formalities: in relation to such obligations it is thought desirable that a measure of protection of potential promisors from the consequences of rash or unconsidered actions should be provided, and also that simple means should exist for identifying promises which are clearly intended to be serious and binding and for separating them from those that are not. In other words, the cautionary and channelling functions[20] of form are here applicable.

(b) Obligations in respect of which protection of one party is peculiarly necessary. In certain types of transactions the bargaining power or experience of the parties is so unevenly balanced that it can be argued that formal requirements are desirable for the protection of the weaker or less experienced party: the cautionary or deterrent function of form here comes into play. A number of the statutory provisions in the existing law which require that contracts of certain types be "in writing"[21] may reasonably be classified under this heading, e.g. the Mercantile Law Amendment (Scotland) Act 1856, s.6 in relation to cautionary obligations; the Pawnbrokers Act 1872, s.24 (as amended) in relation to special contract pawn-tickets; the Moneylenders Act 1927, s.6 in relation to moneylending transactions and ancillary cautionary obligations; the Hire-Purchase (Scotland) Act 1965, ss. 5(1) and 22(1); and the Consumer Credit Act 1974, ss.60, 61 and 105.

(c) Obligations of long duration. It could be argued that requirements of form are desirable in the case of agreements which are intended to subsist for an indefinite time or to regulate the legal relations of the parties thereto for a substantial future period. In such cases it may be thought desirable in order to avoid or limit the likelihood of possible future disputes that a formal document

[20] See para. 55, <u>supra</u>.
[21] See paras. 21-33, <u>supra</u>.

setting out the terms of the contract should be drawn up. A requirement of this nature might also be valuable in serving to induce "the circumspective frame of mind appropriate in one pledging his future".[22] It is already the case in Scots law that contracts of service for more than one year and leases of heritable property for more than one year must be formally constituted; and the attitude might be taken that other obligations of long duration should be subject to the same requirements of form, e.g. contracts of agency, of partnership, lease of moveables, instalment sales, long-term building and engineering contracts and contracts for services.

(d) Obligations of substantial value. A number of European legal systems impose requirements of form in the case of obligations in which the value of the property, goods, services, etc. in respect of which the obligation is entered into exceeds a stated amount. In French law[23] transactions of a value in excess of 50 francs (about £6) must be in writing, and in Italian law[24] the figure is 5,000 lire (about £3).[25] If a provision of this general nature were to be considered for adoption, it would probably be thought that these sums were too low. We appreciate the force of Professor Fuller's comment:[26]

> "Forms must be reserved for relatively important transactions. We must preserve a proportion between means and end; it will scarecely do to require a sealed and witnessed document for the effective sale of a loaf of bread."

If, however, the figure selected were a reasonably high one (perhaps £50 or £100 or £200), the view might well be taken that the value of a transaction provided a sufficient, and rational, justification for imposing

[22] Fuller, "Consideration and Form" (1941) 41 Columbia L.R. 799 at p.800.

[23] French Civil Code, art. 1341.

[24] Italian Civil Code, art. 2721.

[25] In both of these systems the sanction for failure to constitute the obligation in writing is not nullity, but the exclusion of proof of the obligation by witnesses unless a "commencement of proof by writing" can be established. See French Civil Code, art. 1347; Italian Civil Code, art. 2724; and para. 63, *infra*.

[26] (1941) 41 Columbia L.R. 799 at p.805.

formal requirements and thereby ensuring that the benefit of the evidentiary and cautionary functions of formalities was obtained.

(e) Obligations in relation to heritage. Scots law, and many other legal systems, require formalities for the constitution of obligations in relation to heritable property. It is thought that the reasons for this are largely historical, deriving from a period in which land was the principal form of wealth and transactions concerning land were therefore of greater economic and social importance than those of most other types. It is arguable that this is no longer true today, and that if the economic and social importance of transactions justifies the imposition of requirements of form, reference to the value of the obligation[27] rather than to the nature of the property concerned would be a better method of achieving the desired result. On the other hand, if it is thought that forms should be attached to specific types of obligations rather than to obligations of whatever kind of above a certain value, then obligations in relation to heritage would probably be regarded, as a class, as being of sufficient importance to merit inclusion in any list of types of transactions subject to requirements of form.

(f) Provisions purporting to exclude the jurisdiction of the courts. It may be argued that renunciation by a party of his right of access to the courts for the enforcement or interpretation of an obligation which he has undertaken is a matter of such importance that it should be required to be formally constituted. Thus a provision in an agreement that disputes arising under it be submitted to arbitration or be referred for resolution to some body, or be subject to some procedure, other than the ordinary courts of law would, if this view were accepted, be subject to formalities of constitution.

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[27] See sub-para. (d), supra.

(g) Conferring on a party of authority to manage another's affairs. It might well be thought that the authorisation of another person to manage one's affairs (e.g. during an absence or illness) was a matter of such importance from the point of view of the party authorising, the party authorised and third parties with whom the latter might seek to transact that formalities of constitution in the conferring of the power should be required. In practice under the present law a factory and commission (or power of attorney) will usually be solemnly executed and will frequently be registered for preservation,[28] since in the absence of these measures third parties will normally be unwilling to deal with the factor (or attorney) or to accept his authority to act on behalf of the constituent.

59. If there are classes of obligations in relation to which, or categories of obligor for the protection of whom, formalities are peculiarly appropriate, it would seem reasonable to suppose that there might be types of obligations in the constitution of which formalities are clearly inappropriate, or classes of obligor in respect of whose transactions requirements of form would be unduly burdensome or restrictive. It is possible to take the view that mercantile transactions, or agreements between commercial men, fall into this category. Thus Professors Zweigert and Kötz argue that

> "Commercial men must often act very speedily and it would be inept to force them to do their business in writing by rendering oral agreements difficult to enforce".[29]

Moreover, in the case of commercial dealings between businessmen the need for the law of constitution of obligations to provide a check against rash action and to promote circumspection does not exist either at all or to the same extent as in regard to transactions involving less experienced persons. Consequently in so far as formalities perform a cautionary or deterrent function[30] they may safely be dispensed with in business dealings.

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[28] See e.g. Bell, Lectures on Conveyancing, 3rd ed., vol.I, p.454.

[29] Einführung in die Rechtsvergleichung, vol. II, p.47 (translated by J.A. Weir as An Introduction to Comparative Law to be published by North-Holland Publishing Co., Amsterdam).

[30] See para. 55, supra.

60. In Scots law this view may appear to be, at least in part, accepted through the privilege accorded to writs in re mercatoria.[31] We have already seen, however, that although our law faveurs "a wide interpretation" of res mercatoria,[32] there are relatively few types of obligations which the law insists be solemnly constituted yet which can be entered into by informal writing in a mercantile context: the only clear examples seem to be submissions to arbitration and decrees arbitral in commercial matters.[33] The true practical importance of a writ in re mercatoria, and the real nature of the privilege attaching to it, is thought to be that it can be used by an obligee as the sole basis of his action for performance or payment, which in the case of a non-mercantile agreement could be done only if it were tested or holograph.[34] However, although under the existing law of Scotland the fact that a transaction is of a mercantile character is of greater relevance to enforcement than to constitution of obligations, it is possible to take the view that, in principle, formalities of constitution should be dispensed with or should be relaxed in mercantile matters. Thus, article 109 of the French Code of Commerce exempts commercial sales from the formalities required by Article 1341 of the Civil Code for all transactions of a value in excess of 50 francs,[35] and

> "it is agreed on all hands that this text is simply a particular instance of the general principle that any evidence is admissible to prove the conclusion of commercial transactions."[36]

In French law the dispensation from compliance with the requirements of form applies only when the transaction has a commercial character for both parties to the contract.[37]

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[31] See paras. 9-12, supra.

[32] Beardmore v. Barry 1928 S.C. 101, 110; B.O.C.M. Silcock v. Hunter 1976 S.L.T. 217, 225.

[33] Para. 10, supra.

[34] Para. 12, supra.

[35] See para. 58(d), supra.

[36] Zweigert and Kötz, op. cit., p.47; see also von Mehren, "The French Civil Code and Contract: A Comparative Analysis of Formation and Form" (1955) 15 Louisiana L.R. 687 at pp.693-4; Ripert Traité Elémentaire de Droit Commercial, 3rd ed. 1954, paras. 318-21.

[37] Zweigert and Kötz, loc. cit.

61. Apart from conferring a special privilege upon writs in re mercatoria or exempting transactions between commercial men altogether from compliance with formal requirements, legal systems have sought to minimize the disadvantages of formalities and to prevent their operating as a trap for the innocent and as a device for the avoidance in bad faith of seriously undertaken obligations by resort to many different expedients, a number of the more important of which we briefly consider in the following paragraphs.

62. Proof by writ or oath. In relation to certain types of obligations Scots law does not go so far as to demand formal constitution, but does restrict to writ or admission on oath the manner in which constitution (and also in some cases variation, performance, discharge, etc.) may be proved.[38] However, far from being generally regarded as a desirable and less rigorous alternative to formalities of constitution the law's insistence upon proof by writ or oath has been subjected to perhaps severer criticism for working injustice than the operation of the rules requiring formal constitution.[39] Though writ is not available there may frequently be parole evidence of the constitution of the obligation and the view has often been taken that it is unjust that a party should be barred from leading it. Furthermore a reference to one's opponent's oath, it is thought, is rarely successful in filling the gap left by an absence of writ. In theory a litigant may refer any disputed issue of fact to his opponent's oath and peril his claim upon the outcome of that reference. However, the procedure, which originated at a time when the parties to an action were not competent witnesses, has in general fallen into disuse and is now in practice resorted to only in the field of constitution and proof of voluntary obligations.[40] Even in this area references to oath are, we

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[38] See paras. 36-48, supra.

[39] See e.g. Smith v. Oliver 1911 S.C. 103; Hope Bros. v. Morrison 1960 S.C.1; Coyle v. Lees 1976 S.L.T. (Sh. Ct.) 58.

[40] Lewis, Manual of the Law of Evidence in Scotland, p.149; Lord Walker "Oath on Reference" in Encyclopaedia of the Laws of Scotland vol. 10, pp.395-6.

understand, uncommon, and only very rarely indeed is a deposition affirmative of the reference. A litigant who has denied the obligation on record is unlikely even to be put on oath by his opponent and if he is, is still less likely to depone affirmatively. Moreover, some critics have expressed the view that the procedure is inherently objectionable since a statement on oath must be accepted as conclusive of the issue "however palpably and disgracefully false it may appear"[41] and even though the deponent is later convicted of perjury.[42]

63. Commencement of written proof. In some foreign legal systems which impose formalities of constitution, where a party, while unable to produce a document from his opponent which succeeds in establishing the formation and essential terms of the obligation, can nevertheless put in evidence a writing by the latter which is such as, on a balance of probabilities, to lead to the conclusion that a contract has been formed or an undertaking has been made, then it becomes competent to lead parole evidence of the nature and precise terms thereof. In other words, provided a document can be produced which renders it likely that an obligation exists the door is opened to proof by witnesses. Such a system operates in Quebec[43] and in France and Italy in respect of the formalities imposed in the case of transactions of more than 50 francs and 5,000 lire in value.[44] Professors Zweigert and Kötz state:[45]

> "The most important limitation on art. 1341 Code civil is that the testimony of witnesses is admitted whenever the party wishing to introduce it can offer a 'commencement de preuve par écrit', that is, can start off his evidence with a written document. By this is meant a document emanating from the opponent which constitutes good evidence that the oral contract really was concluded between

[41] Hunter v. Geddes (1835) 13 S.369 per Lord Jeffrey at p.377.

[42] Walkers, The Law of Evidence in Scotland, p.337.

[43] Quebec Civil Code, art. 1233. See also Johnson v. Buckland [1937] S.C.R. 86.

[44] See para. 58(d), supra.

[45] Einführung in die Rechtsvergleichung, vol. II, pp. 47-48 (translated by J.A. Weir as An Introduction to Comparative Law to be published in 1977 by North-Holland Publishing Co., Amsterdam).

"the parties (art. 1347 Code civil, art. 2724 par. 1 Codice civile) ... Thus a creditor claiming the repayment of a loan may call witnesses to prove the oral loan if he can put in evidence a letter from the defendant thanking him for 'the favour performed': if in all the circumstances of the case this document makes it probable that the loan was made, the plaintiff is allowed, art. 1341 notwithstanding, to use any means of proof, including proof by witnesses, to establish the fact to the satisfaction of the judge."[46]

In some few cases in France the evidence of witnesses is admitted even where there is strictly no commencement de preuve par écrit. Thus, a tape-recorded oral statement has been held sufficient to permit the introduction of parole evidence.[47] More generally

"a plaintiff who has no contractual document may still call witnesses if he can show that on factual or moral grounds it was impossible for him to procure such a document (see art. 1348 Code civil). For example, in transactions between spouses, fiancés, siblings or between parents and children, it is not exactly tactful to insist on the safeguard of a note of hand; the courts recognise the social dilemma in such cases by abandoning the requirement of written proof".[48]

Furthermore, under articles 334 to 336 of the Code of Civil Procedure, the judge may ex proprio motu or at the request of a party summon the other party to appear and to submit to questioning by the judge. His failure to appear, or the answers given by him to the questions asked, may be treated as satisfying the requirement of a commencement of proof by writing.[49]

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[46] There is an immense amount of case law in France on the subject of what constitutes a "commencement of proof by writing". It is clear that the writing need not be dated or signed (D.1855.I.332) and that a letter written some considerable time after the transaction may suffice (D.1903.I.574). An unsigned letter dictated by an illiterate has been accepted (D.1934.20). A receipt granted by a party has been held sufficient evidence of an obligation to allow parole evidence to be led to establish the nature of the transaction involved, and a receipt retained by the recipient may serve as a commencement of written proof against him (S.1930.I.224). Where a writing by the defender refers to another document and this latter document, although not one to which the defender is a party, renders the existence of the obligation probable, a commencement of written proof may be held to exist (D.1894.I.60). See also D.1904.I.295; S.1926.I.165; D.1934.I.113.

[47] J.C.P. 1955.II.8856.

[48] Zweigert and Kötz, op. cit., p.48. See also S.1907.I.209; D.P. 1921.1.40; Gaz. Pal. 1938.2.586; D.1938.I.115.

[49] See Hébraud, D.1943. Leg. 10-14; Meurisse, Gaz. Pal. 1951.II. Doctrine 50.

Nevertheless,

> "it remains the case that [article 1341 of the Code civil] acts as a strong inducement ... to have one's transactions written down, for it is always difficult to say in advance whether the court will, on one ground or another, let in proof by witnesses notwithstanding art. 1341, and people try to avoid this uncertainty so far as possible."[50]

64. Rei interventus and homologation. Perhaps the most useful devices for mitigating the rigour of the existing law of Scotland relating to formalities of constitution of obligations are rei interventus and homologation.[51] Thus, the right to resile from an informally constituted obligation may be lost where the party seeking to resile has performed an act approbatory of the engagement, confirming or adopting it as binding[52] or where, to his knowledge and with his express or implied permission, actings by the other party have taken place on the faith of it.[53] However, before either of these doctrines can operate, the informal constitution of the obligation must be proved by the writ of the party seeking to resile or by his admission on record or on reference to his oath.[54] It may be thought that this limitation on proof restricts to a very considerable degree their practical utility, as also does the fact that rei interventus and homologation cannot be used to set up those obligations (or variation, discharge etc., thereof) which require to be proved by writ or oath. A further restriction on the operation of rei interventus stems from the requirement that the actings be performed to the knowledge and with the permission, of the party claiming the right to resile. The view might be taken that it should be sufficient to allow (parole) evidence to be led of the informal constitution of the obligation that the pursuer can prove that his actings were performed "on the faith of the contract", were "unequivocally

[50] Zweigert and Kötz, op. cit., p.49.

[51] Paras. 13-19, supra.

[52] Bell, Principles, para. 27.

[53] Op. cit. para. 26.

[54] An exception of somewhat uncertain scope and effect, to the necessity for proof by writ or oath was recognised in Errol v. Walker 1966 S.C.93. See paras. 16 and 17, supra.

referable" to it and were "productive of alteration of circumstances, loss or inconvenience."[55] It might on the other hand be argued that to remove this restriction and to permit an informal obligation to be validated by actings of the party interested in upholding it which were not "known to and permitted by"[56] the other party would open the door too wide to avoidance of the formalities and to the possibility of the fraudulent imposition of obligations upon persons who had not in reality undertaken them. An answer to this fear might be that the only effect of proof of actings in reliance upon an alleged obligation would be to admit proof to be brought that such an obligation had in fact been entered into, albeit informally. The actings of the pursuer would not result in the imposition of liability upon the defender unless the former could prove, by corroborated evidence, that the contract which he alleges was concluded between them.

65. Just as it is possible to take the view that the operation of *rei interventus* is in certain respects too restricted in the present law, so it can be argued that in one respect at least the doctrine is too wide. Under the existing law, the conduct which is held to amount to *rei interventus* need not take the form of performance of the actor's part of the agreement, either in whole or in part. The actings must be done "on the faith of the contract"[57] and must be "unequivocally referable to the engagement";[57] but this requirement may be fulfilled by conduct unrelated to the obligations imposed upon the party by the agreement. Thus, for example, in the case of a contract of employment it might be held to amount to *rei interventus* that the prospective employee, to the knowledge of his prospective employer, resigned from his existing employment; in the case of a contract for the sale of a house, it might be sufficient that the purchaser, to the knowledge of the seller, applied for planning per-

[55] Bell, *Principles*, para. 26.
[56] Bell, *Principles*, para. 26.
[57] Bell, *Principles*, para. 26.

mission to undertake alterations, or sold the house which he currently occupied. It can be argued that dangers exist in permitting an informal obligation to be accorded legal force by actings which do not amount to even partial performance of that obligation, but are actings which could equally reasonably have been performed by the actor even in the absence of an agreement such as that alleged to have been made. A fortiori would such dangers exist were it no longer to be essential to rei interventus that the actings take place to the knowledge and with the permission of the other party. In answer to this, it might once again be said that the party seeking to uphold the agreement would always have to establish that his actings were "on the faith of the contract" and were "unequivocally referable" to it, and would remain obliged to prove, by corroborated evidence, that the agreement which he alleged was in fact made.

66. Personal bar. Rei interventus and homologation are aspects of the more general doctrine of personal bar. That doctrine may also operate in other circumstances to prevent a party's taking advantage of informality in the constitution of an obligation. Thus, the granter of a deed may be barred from relying upon a latent defect in the execution of an ex facie probative writing where he has delivered the document to the grantee or to a third party for transmission to the grantee.[58] And in certain circumstances the granter of a probative deed may be barred from founding upon the fact that when he signed it it contained blanks which were filled in subsequent to its execution.[59]

3. Tentative conclusions

67. Our survey of the devices which have been resorted to in order to minimize the disadvantages attendant upon requirements of form in the constitution of obligations, leads us to the following very tentative conclusions:

(a) that the privilege accorded by the present law to writs in re mercatoria is of little practical value as regards the constitution of obligations, but that there may be a place in a new system of formalities for special rules in the case of mercantile transactions;

[58] Baird's Tr. v. Murray (1883) 11 R. 153; National Bank of Scotland v. Campbell (1892) 19 R. 885; MacLeish v. British Linen Bank 1911, 2 S.L.T. 168; Boyd v. Shaw 1927 S.C. 414.

[59] See Walkers, The Law of Evidence in Scotland, para. 184(a) and (e) and cases there cited.

(b) that reference of the constitution (or variation, discharge, etc.) of an obligation to one's opponent's oath - a procedure which has largely fallen into desuetude in other areas of the law, which is rarely resorted to even in the field of constitution and proof of obligations, and which dates from a period in which the parties to an action were not competent witnesses - should cease to be competent.

(c) that if proof of an obligation by the writ of one's opponent - as distinct from a requirement of constitution in writing - merits retention, it should be competent to set up an obligation where no, or insufficient, written proof exists by _rei interventus_ or homologation;

(d) alternatively, that if proof by writ is to continue to be required, parole evidence of the obligation should become competent where there has been a commencement of written proof;

(e) that where formalities of constitution are required but have not been complied with and it is sought to set up an obligation by proof of actings amounting to _rei interventus_ or homologation, it should not be necessary to proof the informal constitution of the obligation by writ or oath.

(f) that in cases where it is sought to establish _rei interventus_ consideration should be given to dispensing with the requirement that the actings must have been known to and permitted by the party seeking to resile; and

(g) that in cases where it is sought to establish _rei interventus_ consideration should be given to requiring that the actings relied upon must have amounted to performance or to partial performance of the actor's part of the obligation which he seeks to set up.

4. Schemes of reform

68. In the light of the foregoing discussion of the advantages and disadvantages of formal requirements and of how these disadvantages may be reduced or minimized, we now proceed to advance

for consideration four different schemes, each of which would remedy some, if not all, of the defects in the existing law governing constitution and proof of voluntary obligations. The first of these schemes would retain the familiar framework of the present law of constitution and proof but would resolve some of the more obvious uncertainties and provide a measure of clarification and rationalization. The second and third schemes each involve a more radical approach, based upon an increased use of writing either in the constitution or in the proof of obligations. The fourth scheme sets forth a system in which, subject to relatively few exceptions, voluntary obligations can be constituted informally and are subject to no special limitations on mode of proof. Other schemes could undoubtedly be devised, and we would consequently welcome not only comments on the four here set out but also suggestions for systems which seem preferable to those whom we consult.

69. (a) Reform within the existing framework. Under this scheme four categories of obligations would remain.[60] The traditional *obligationes literis*[61] would continue in existence but there would be added to their number submissions to arbitration (and decrees arbitral) relating to moveables and contracts of insurance, the precise status of which is at the moment in doubt.[62]

70. *Rei interventus* and homologation would remain as means whereby an *obligatio literis* which had not been constituted by

[60] See para. 53, *supra*.

[61] See para. 4, *supra*.

[62] See paras. 4(c) and 7, *supra*. Contracts of insurance are, we believe, almost invariably constituted in writing at present, though the formalities resorted to may often be not those of the general law relating to solemnities of execution but special formalities adopted by the insurer in its private Act or in its articles of association (see Companies Act 1948, s.32(4), as interpreted e.g. in *Clydesdale Bank v. Snodgrass* 1939 S.C. 805 at 827, 830). Consequently the formalizing of the practice would cause little or no difficulty to insurance companies. Insurers would, we think, continue to honour informal cover notes because of the adverse public relations consequences of failing to do so, just as at the moment it is common practice for life insurance companies voluntarily to provide cover from the time of submission of the proposal form and before the acceptance by the company and the issue of the policy document.

probative or holograph writing could be rendered binding. The question then arises - how should the obligation be proved before evidence of rei interventus or homologation can be led? We take the view that reference of the constitution of the obligation to one's opponent's oath should cease to be competent, and that before rei interventus or homologation could operate the informal conclusion of the agreement should have to be either admitted on record or proved by writ. It should further be provided, for the avoidance of doubt, that the writ need not be signed by, or holograph of, the person alleged to be bound, but that the onus, in case of dispute, of establishing that a document is the writ of that person should be on the party who alleges it.[63] Such a provision would make it clear that there is no substantive ground for failing to accept unsigned typewritten memoranda, photocopies, telegrams, telex messages, etc as satisfying the requirements of proof by writ, but that the burden of establishing their provenance would rest upon the party seeking to rely upon them.

71. Alternatively, it could be provided that where actings amounting to rei interventus or homologation are averred to have followed upon an informal agreement, the conclusion of that agreement should be open to proof prout de jure.[64]

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[63] See paras. 50-51, supra.

[64] A move in this direction has already been taken in the case of Errol v. Walker 1966 S.C. 93, where it was held that the formation of a contract of sale of heritage could be established by parole evidence of actings by the purchaser known to and permitted by the seller, those same actings being relied upon as rei interventus barring the seller's right to resile from that agreement. It may be argued that if the requirement of proof by writ of the informal conclusion of an obligatio literis is not to be strictly adhered to in cases where rei interventus or homologation is alleged, there is no sound reason why the only parole evidence admissible to establish the formation of the agreement should be evidence of actings by the party who seeks to prove its existence. It might indeed be thought preferable, as a matter of policy that, if parole evidence is to be admitted of the conclusion of the agreement, that evidence should be separate from and additional to the evidence adduced to establish rei interventus.

72. It would be expressly provided under the scheme that where a statute has in the past laid down, or in the future lays down, that contracts of certain types "shall be in writing"[65] then, unless the contrary is explicitly stated, writing shall be regarded as a requirement of constitution and not of proof, and that writing must be signed by the party alleged to be bound, but need not be tested or holograph. It would also be provided, as giving full effect to the statutory language and the presumed legislative intention, that a writing signed in accordance with the terms of the statute is in all cases essential and that there is no possibility of setting up an informal agreement by proof of actings amounting to _rei interventus_ or homologation.

73. All matters which at present require to be proved by writ or oath,[66] including not only the question of the existence of certain types of obligations but also agreements for the constitution of a trust (including those where the alleged trustee is an agent or partner) and such instances of payment, performance, discharge and variation as must currently be so proved, would in the revised scheme be restricted, in the absence of admission on record, to proof by writ. Reference to one's opponent's oath would cease to be competent. In this context also, unsigned non-holograph documents, photocopies, cash-register receipts, telegrams, telex messages etc would be acceptable as amounting to "writ" provided that the party founding upon such material could, if challenged, establish by parole evidence, that it was the writ of his opponent.[67]

74. Where a party is unable to prove the conclusion (or the variation or modification) of an agreement by writ, but has to the knowledge of the other party and with his express or implied permission changed his position in reliance upon it, then parole proof of the constitution of the obligation would be admissible. Similarly, where actings approbatory of the

[65] See paras. 20-33, _supra_.

[66] See paras. 34-48, _supra_.

[67] See paras. 50-51 and 70, _supra_.

obligation have been performed by the party seeking to resile from it proof prout de jure would become admissible. In other words, actings which in the case of an obligatio literis would be sufficient to found a plea of rei interventus or homologation would now also be sufficient foundation for the allowance of proof prout de jure of an obligation which would otherwise require to be proved by writ.

75. A system of constitution and proof of voluntary obligations such as that just described would, in our view, have the result of resolving most of the uncertainties and remedying some of the more obvious injustices to which the present law gives rise. It would have the considerable merit of doing so largely within the familiar framework of the existing law. However, the scheme would not diminish to any appreciable degree the complexity of the existing system: four distinct categories of obligations would remain, namely obligationes literis, obligations required by statute to be in writing, obligations proveable only by writ and obligations proveable prout de jure. Moreover, no substantial change would have been made in the types of obligations falling within each of the four categories: the allocation of obligations to their respective categories would remain as appropriate - or as inappropriate - as under the existing law.[68] For these reasons we do not ourselves at present propose the adoption of this scheme. We have, however, reached no concluded view and would welcome comments.

76. (b) A formal system. Under the second possible scheme which we submit for discussion, requirements of form in the constitution of voluntary obligations would play a much greater rôle than in the present law. In effect, the obligatio literis would become the norm, obligations proveable only by writ or oath would disappear, and obligations proveable prout de jure would diminish in both number and importance. The

[68] See para. 53, supra.

formalities of constitution which we propose in this scheme would not differ from those necessary at present in the case of obligationes literis. We have considered whether the requirement of probative writ or of a writing which is either holograph or adopted as holograph might beneficially be replaced by a rule requiring the mere signature of the person undertaking the obligation. However, we have come to the provisional conclusion that if a formal system of constitution of obligations merits adoption then the formalities demanded should be, while not unduly ritualistic, at least such as to impress upon a person about to enter into an obligation the seriousness of what he is doing, and also such as clearly to differentiate between a statement or inquiry or proposal made in the course of negotiation and a final and considered obligatory undertaking. We take the view that the solemnities currently required in the case of obligationes literis perform these functions more successfully than would a simple signature and are, at the same time, not excessively burdensome. Failure to comply with the formalities would, under the scheme, render the obligation void. However, special proposals are made to deal with business or commercial transactions and with situations in which an informal agreement or promise has been acted upon.

77. The starting point of the scheme would be a provision to the effect that all agreements in which the value of the property, goods, services, etc. in respect of which the contract was made exceeded £50, (including agreements for the constitution of a trust) and all gratuitous unilateral promises irrespective of the value of the benefit promised, would require to be constituted in writing unless the agreement were performed on both (or all) sides, or the unilateral promise were fulfilled by the promisor, at the time of conclusion of the agreement or of the making of the promise. Thus, transactions such as sales over the counter and completed donations would be exempt from the requirement of form. Also specially exempted would be promises made subject to a condition of performance by the promisee, promises to keep offers open either for a specified period or indefinitely and promises to accept an offer if the

promisee makes one (or makes one in certain terms or within a certain time); such promises would be valid even though made informally, and could be proved prout de jure. Variation or modification of an obligation constituted in accordance with the required formalities would be effective only if also executed in formal writing. We have reached no concluded view on the question of the sum below which informal constitution of onerous obligations should be permissible, and we would welcome comments on the appropriateness of the figure of £50 here suggested. While there is in theory much to be said for linking the sum below which informal constitution is recognised to the sum below which the summary cause procedure[69] applies in the Sheriff Court, the summary cause limit of £500[70] seems too high for this purpose and would allow many important yet everyday agreements to escape from the requirements of form and so deprive the parties of the advantages and protection thereof. We therefore suggest a figure of £50, to be coupled with a power to raise or lower the figure by statutory instrument.

78. The scheme would provide that in the absence of compliance with the requisite formalities, a purported obligation or variation of an obligation would be void. To this, however, an exception would be recognised where actings amounting to rei interventus or homologation had taken place on the faith of an informal agreement or undertaking or variation thereof. Those actings would have the effect of rendering the agreement or variation binding and at the same time make competent parole proof of its constituion and its terms. It would also be possible to extend further the protection accorded to parties who have acted in reliance upon informally constituted obligations by redefining rei interventus to remove the requirement that the actings of the party seeking to establish the validity of the obligation should have been performed to the knowledge and with the express or

[69]Sheriff Courts (Scotland) Act 1971 ss.35-38.

[70]Sheriff Courts (Scotland) Act 1971 (Private Jurisdiction, etc.) Order 1976 No.900.

implied permission of the other party.[71] It could also be provided that the actings by the party interested in establishing the validity of an informal obligation which should alone have the effect of rendering it binding should be actings which amount to performance or partial performance of his part of the agreement (or to fulfilment of the conditions attached to unilateral promise made in his favour if it were not to be accepted that such promises should be exempt from requirements of form).

79. The scheme would provide for a further exemption from the requirement of constitution of voluntary obligations in writing which is probative or holograph in the case of mercantile transactions between persons professionally engaged in trade or commerce. The dispensation from compliance with the normal formalities in the case of a business transaction would apply only where both (or all) parties to it were engaged in trade or commerce.

80. The privilege of informality of constitution accorded under this scheme to commercial transactions would extend to all categories of contracts, including the obligationes literis of the present law. Where both parties were engaged in business and where for both the arrangement was a commercial transaction, the scheme would not require e.g. a contract of sale or lease of heritable property to be subjected to more stringent requirements of form than a contract of sale or lease of building or engineering plant or equipment.

81. It might, however, be thought by those whom we consult that under this scheme sales or leases of heritage even between commercial men, and perhaps commercial transactions in general, should have no special privilege of informality, or alternatively should be privileged only to the extent that the writing in which they are constituted need not be tested or holograph or adopted as holograph. In the latter case the

[71] There are limited exceptions to the requirement of knowledge in the present law: see para. 18(c), supra.

scheme would be amended to provide that documents such as unsigned typewritten memoranda, photocopies, telegrams, telex messages, etc would, provided they could be proved to be the writ of the party against whom they were produced, be regarded as sufficient.[72]

82. The scheme would go on to provide that where a statute has in the past laid down, or in the future lays down, merely that contracts of certain types "shall be in writing", then unless a contrary Parliamentary intention appears, writing shall be regarded as a requirement of constitution and not of proof, and that writing must comply with the formalities generally demanded, i.e. must be tested or holograph or adopted as holograph. Such a provision would have the consequence of simplifying and, to a certain extent, unifying the system of formalities of constitution of voluntary obligations. It would, or might, also lead to greater legislative explicitness: should the legislature regard the normal formalities as unsuitable *in future* for certain types of obligations this would require to be expressly stated and the alternative formalities set out in the enactment. Although it would thus in general be presumed that a statutory imposition of a requirement of writing referred to a writing complying with the normal formalities, it would remain the case that a distinction existed between such "statutory contracts" and others; in the former case in order to give full effect to the language, and to the presumed intention, of the legislature a writing would in all cases be essential and there would be no possibility of setting up an informal agreement by proof of actings amounting to rei interventus or homologation. Under the scheme there would be exempted from the requirement of writing which is tested, holograph or adopted as holograph (a) special contract pawn-tickets;[73]

[72]See paras. 50-51, 70, and 73, supra.

[73]Pawnbrokers Act 1872, s.24, as amended by the Pawnbrokers Act 1960, s.1(b); see para. 23, supra.

(b) bills of exchange, cheques and promissory notes[74] and
(c) the Memorandum and Articles of Association of a company.[75]

83. Matters (other than the conclusion or variation of obligations) which under the present law require to be proved by writ or oath would, under this scheme, be capable of proof _prout de jure_. Thus, it would be competent to establish by the evidence of witnesses the fact of payment under an antecedent obligation,[76] the performance or discharge of obligations constituted in writing,[77] and the gratuitous renunciation of rights.[78] The existing rules whereby such matters may be proved only by writ or oath have been subjected to strong judicial criticism;[79] and while we have no wish to see a diminution of the salutary practice whereby written acknowledgments of payment, performance, renunciation, etc are provided by creditors and demanded by debtors, we are impressed by the force of those criticisms. We do not think that a change in the law to the effect of permitting such matters to be proved _prout de jure_ would override the natural desire of debtors to have handed to them written receipts or acknowledgments of completed performance, but it would permit justice to be done in those few cases where this precaution has not been taken but where the debtor is in a position to lead the evidence of witnesses of the fact of payment or performance.

84. _(c) An alternative formal system_. The basis of our third possible scheme is that in general obligations (including agreements for the constitution of a trust) would be capable of informal constitution, but would require to be proved, if denied, by the writ of the person alleged to be bound. Reference to oath would not be competent.

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[74] Bills of Exchange Act 1882, ss.3(1), 73 and 83(1); see para 24, _supra_.

[75] Companies Act 1948, ss.3 and 9, as amended by the Finance Act 1970, Schedule 8, Part IV; see para. 28, _supra_.

[76] See para. 43, _supra_.

[77] See para. 42, _supra_.

[78] See para. 44, _supra_.

[79] See e.g. _Hope Bros._ v. _Morrison_ 1960 S.C.1 at p.5; _Coyle_ v. _Lees_, 1976 S.L.T. (Sh. Ct.) 58.

85. The necessity of proof by writ would not apply to agreements performed on both (or all) sides, or to unilateral promises fulfilled by the promisor, at the time of conclusion of the agreement or of the making of the promise. Also exempted from the requirement of proof by writ would be obligations in which the value of the property, goods, services etc in respect of which the obligation was undertaken was less than £50, and promises to keep offers open either for a specified period or indefinitely, or to accept an offer if one is made.

86. Variation or modification of an obligation in fact constituted in writing would require to be proved by writ, unless the party seeking to establish the variation could prove (by parole evidence) that he had changed his position in reliance upon contract as varied, in which event the evidence of witnesses would be admissible. Payment under an antecedent obligation, performance or discharge of obligations constituted in writing or proved by writ and the gratuitous renunciation of rights would not be restricted, as they are in the present law, to proof by writ or oath, and proof by witnesses would be competent.

87. The writing by which obligations could be proved would not require to comply with any special formalities, though in cases where the writing was not attested the onus of establishing that the writ was genuinely that of the person alleged to be bound would lie upon the party founding upon it. Provided always that the burden could be discharged, unsigned non-holograph documents such as typewritten memoranda, printed notices, photocopies, telegrams, telex messages etc. would be sufficient.

88. Under the scheme, it would, in general, be necessary that the writing founded upon be such as to establish both the existence of the obligation alleged and its essential terms.[80]

[80] See para. 15, supra.

Additional, non-essential terms of the agreement or undertaking would be open to proof by witnesses. Where a party, while unable to produce a document from his opponent which succeeded in establishing the formation and essential terms of the obligation, could nevertheless put in evidence a writing by the latter which was such as, on a balance of probabilities, led to the conclusion that a contract had been formed or an undertaking had been made, then it would become competent to lead parole evidence of the nature and precise terms thereof. In other words, provided a document could be produced which rendered it likely that an obligation existed - a commencement of written proof - the door would be opened to proof by witnesses. Exemptions from the requirement of providing at least a commencement of proof by writ such as those recognised in French law,[81] would not be accepted. If, on policy grounds, it is once decided that documentary evidence of obligations is desirable and ought to be generally required, that policy could be easily frustrated were such widespread exceptions to be recognised. Moreover, the requirement may be argued not to be an unduly harsh one, granted that the document need not do more than make the existence of the obligation seem likely, whereupon parole evidence may be brought of its formation and content.

89. It is for consideration whether exemption from the requirement of proof by writ should be recognised in the case of commercial transactions. Our tentative view is that compliance with the requirement of such proof, in the form which we have described in the foregoing paragraphs, would not be unduly burdensome to commercial men. All that would be required to let in parole proof would be a writing rendering it probable that a contract was entered into between pursuer and defender; and that writing could take any form, e.g. a typed or printed confirmation note, a telex message. We understand that it is common commercial practice today in the case of agreements reached orally (e.g. over the telephone) for written confirmation of the arrangement to be sent; in our view this is a desirable procedure which ought to be encouraged.

[81] Para. 63, supra.

90. With the exception of cases of oral variation of written contracts,[82] it would not be possible under this scheme to avoid the requirement of producing a writing by the party alleged to be bound by proving that actings in the nature of rei interventus or homologation have taken place in reliance upon the agreement or undertaking. In contrast with the relatively strict formalities of constitution laid down in our second suggested scheme,[83] the restriction on mode of proof just described is one with which there should in most cases be little difficulty in complying and so a longstop provision to prevent parties from unjustifiably escaping from serious but informal agreements upon which conduct has followed would we think, be unnecessary. In those few cases in which no document could be produced but the pursuer had acted in reliance upon the agreement, the law of recompense would furnish at least a partial remedy, provided the pursuer's actings had benefited the defender.

91. In certain exceptional cases writing would continue to be necessary for the constitution, and not merely for the proof, of obligations. This would be the case as regards those agreements in respect of which a statutory provision requires that they "shall be in writing".[84] The scheme would provide that unless the statute in question (or any future statute imposing a requirement of writing as a formality of constitution) expressly lays down the contrary, the writing would require to be signed, but need not be tested or holograph. It would further be provided that, in accordance with the presumed legislative intention, a signed document is in all cases essential and that there is no possibility of setting up an informal agreement by actings amounting to rei interventus or homologation.

92. Gratuitous unilateral obligations would, if still executory, require to comply with formalities of constitution. The form demanded would be simply signature of a written document.

[82] See para. 86, supra.

[83] Paras. 76-83, supra.

[84] See paras. 20-33, supra.

Where, however, a unilateral promise had been made subject to conditions of performance by the promisee and the promisee had fulfilled those conditions then formal constitution would not be insisted upon and it would be open to the promisee to prove the making of the promise prout de jure.

93. It is for consideration whether the obligationes literis of the existing law (principally obligations relating to heritage and contracts of service for more than one year) should continue to be subject to formalities of constitution. Our tentative view is that they should not.[85] If, however, this opinion is not shared by those whom we consult and if it is thought desirable that such obligations should continue to require to be constituted formally, we think that under this scheme the formalities required should cease to be writing which is probative or holograph or adopted as holograph and should be simple signature of a written document. Where parties agreed that their obligation should be constituted formally then, in the absence of any stipulation of a greater degree of formality, signature of a written document would once again be sufficient.

94. (d) An informal system. Under the fourth possible scheme of reform which we submit for consideration the general rule would be that voluntary obligations could be constituted, varied and discharged informally, and would be subject to no special limitations on mode of proof. Provided agreement had been reached between the parties or a promise intended to be obligatory had been made, it would be of no consequence whether the obligation was constituted in words, oral or

[85] If the production of documentary evidence which renders the existence of the obligation probable is to be sufficient in the case of e.g. complex business and commercial transactions perhaps involving vast sums of money, it can be argued that there is little reason for requiring more extensive formalities in the case of contracts for the sale or lease of heritable property. Under modern conditions transactions involving heritage are arguably no more "important" either economically or socially than transactions relating to corporeal or incorporeal moveable property, and should be subject to no more stringent requirement of form. Similarly, in view of the statutory provisions which today regulate so many aspects of the employment relationship, it is at least arguable that the individual contracts of service negotiated between employer and employee have diminished in importance to such an extent that the requirement of formal constitution is no longer necessary.

written, by actings, or by a combination of these; and the constitution and content of the obligation and its variation or discharge, would be capable of proof prout de jure.

95. Special formalities would, however, be required for the constitution of certain types of obligations, namely those in respect of which it has in the past been, or may in the future be, provided by statute that writing is essential[86] and, in addition, obligations falling within the following categories:

(a) obligations relating to heritable property, including leases for more than one year;

(b) contracts of service for more than one year;

(c) contracts of partnership for more than one year;

(d) contracts of agency for more than one year;

(e) factories and commissions (or powers of attorney) authorising another to manage one's affairs;

(f) submissions to arbitration and decrees arbitral;

(g) contracts of insurance;

(h) obligations in terms of which the obligor undertakes to indemnify the obligee if a third party fails to perform a stipulated act in favour of, or to pay a stipulated sum to, the obligee;[87]

(j) gratuitous obligations, other than promises made subject to a condition of performance by the promisee, promises to keep offers open for a specified time or indefinitely, and promises to accept an offer if one should be made (or made in certain terms or within a certain time);

(k) the gratuitous renunciation (acceptilation) of rights;

(l) obligations which the parties have agreed should be constituted formally.

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[86] See paras. 20-33, supra.

[87] This form of words is intended to cover such "guarantee" or "indemnity" obligations as may not at present be comprehended within the expression "cautionary obligations" in the Mercantile Law Amendment (Scotland) Act 1856, s.6.

96. The obligation in these cases would require to be constituted, as to its essentials,[88] in writing. Except where an existing (or any future) statutory provision[89] laid down a different rule, the writing need not comply with any special requirements of form. Photocopies, telegrams, telex messages, cash-register receipts, unsigned typewritten or printed documents, etc. would be sufficient, provided that the party relying upon them could establish, if challenged, that they emanated from the party alleged to be bound.

97. A writing would be deemed _prima facie_ to have emanated from a party if signed by him, but the onus of proving that the signature, if disputed, was that of the party alleged to be bound would rest upon the person alleging it. In no case would it be required that an obligation be constituted by an attested writ or by documents holograph of (or adopted as holograph by) the parties or the granter. However, where a writing has been attested, its authenticity would be presumed and it would bind the granter unless and until reduced by him. The grounds of reduction would remain those competent in the case of attested deeds under the present law.

98. In the case of obligations which, under this scheme, are required either by law or by agreement between the parties to be constituted in writing, if the writing relied upon as emanating from one or both of the parties takes the form of a standardized document setting forth the terms upon which that party transacts and these terms are habitually used by that party in transactions relating to the same product or service, with only incidental matters such as the name of the other party, dates, quantities etc. (and any special or additional provisions) tailored to the individual case, then that writing would be conclusively presumed to emanate from the party by whom it bore to have been issued and would be

[88]See para. 15, _supra_.

[89]See paras. 20-33, _supra_.

binding upon him.[90] Similarly, where person has completed a proposal or application in a standard form emanating from a party who habitually provides a product or service on receipt of or on the basis of information supplied in, that standard form, and an acceptance in writing of that proposal has been received by the applicant which bears to emanate from the supplier of the form, that acceptance would be conclusively presumed to emanate from that party and would be binding upon him. It would not be open to the supplier of the product or service to deny the constitution of the obligation by alleging or proving that the document relied upon by the other party was issued, completed or amended by a third party without the supplier's authority (though no obligation would be constituted where the recipient of the document was party to or aware of any act of fraud or theft by which the third party acquired, issued, completed or amended the standard form document). The risk of standard form documents falling into the hands of dishonest persons or being used by unauthorised persons or for unauthorised transactions would thus, in the absence of bad faith on the part of the recipient of the document, rest upon the person conducting his business through the use of them and who failed adequately to safeguard them.

99. It is for consideration whether, under this scheme, it should be possible in the case of an obligation requiring formal constitution, to overcome the absence of a writing emanating from the party alleged to be bound by proving that actings in the nature of <u>rei interventus</u> or homologation have taken place

[90] Although the expression "standard form contract" is in everyday use it has no generally accepted special status or recognised meaning. H.B. Sales, "Standard Form Contracts" (1953) 16 M.L.R. 318 defined the term as follows: "The words 'standard form contract' will be used to include every contract ... whether contained in one or more documents, one of the parties to which habitually makes contracts of the same type in a particular form and will allow little, if any, variation from that form." The Israeli Standard Contracts Law, 5724-1964, s.1 defined such a contract as one "all or any of whose terms have been fixed in advance by, or on behalf of, the person supplying the commodity or service ... with the object of constituting conditions of many contracts between him and persons undefined as to their number or identity." See also Kessler, "Contracts of Adhesion" (1943) 43 Col. L.R. 629 and <u>Exemption Clauses: Second Report</u>, Law Com. No.69, Scot. Law Com. No.39, paras. 151-157 (1975).

in reliance upon the agreement or undertaking. Our provisional view is that this should not be competent: writing would be essential in only relatively few, exceptional types of obligations and even in these cases the writing would not require to comply with any special formalities other than that it should have emanated from the party alleged to be bound. The requirement would thus be considerably less difficult to fulfil than is the case with the special form of writing necessary for the constitution of the _obligationes literis_ of the present law. Furthermore, in those cases in which no document could be produced but the pursuer had acted in reliance upon the obligation, the law of recompense would furnish at least a partial remedy, provided the pursuer's actings had benefited the defender.

5. Conclusion

100. In the foregoing paragraphs we have discussed four possible schemes for the reform of the law of constitution and proof of voluntary obligations. Each scheme, in our view, would be an improvement upon the existing law. Other schemes - including total informality in the constitution of obligations - and different permutations of the essential elements of the four schemes here set out, could undoubtedly be devised. We have, at this stage, reached no concluded view as to which of the four options which we have described should be adopted; provisionally, however, we are of opinion that there is special merit in the second[91] and fourth[92] schemes. We invite comments on these and the other schemes and would welcome suggestions for systems which seem preferable to those here specifically considered.

[91] Paras. 76-83, _supra_.

[92] Paras. 94-99, _supra_.

F: SUMMARY OF PROVISIONAL PROPOSALS AND OTHER MATTERS ON WHICH COMMENTS ARE INVITED

Which of the four following schemes of formalities of constitution or restrictions on proof of voluntary obligations, or which individual parts of these schemes, should be adopted?

I Reform within the existing framework

(a) The traditional *obligationes literis* should continue in existence, but there should be added to their number submissions to arbitration (and decrees arbitral) relating to moveables and contracts of insurance. (Para. 69).

(b) *Rei interventus* and homologation should remain as means whereby an *obligatio literis* which has not been constituted by probative or holograph writing could be rendered binding. Reference of the constitution of the obligation to one's opponent's oath should cease to be competent. (Para. 70).

(c) In cases where *rei interventus* or homologation are in issue proof of the fact that the parties had reached informal agreement should be restricted to the writ or admission on record of the party in whose interest it is to deny it. Unsigned non-holograph documents should be accepted as capable of satisfying the requirements of proof by writ. (Para. 70).

(d) Alternatively, should it be provided that where actings amounting to *rei interventus* or homologation are averred to have followed upon an informal agreement, the conclusion of that agreement should be open to proof *prout de jure*? (Para. 71).

(e) Where a statute has in the past laid down, or in the future lays down, that contracts of certain types "shall be in writing" then, unless the contrary is explicitly stated, writing shall be regarded as a requirement of constitution and not of proof, and that writing must be signed by the party alleged to be bound, but need not be tested or holograph. It should be also provided that a writing signed in accordance with the terms of the statute is in all cases essential and that there is no possibility of setting up an informal agreement by proof of actings amounting to *rei interventus* or homologation. (Para. 72).

(f) All matters which at present require to be proved by writ or oath, should be restricted, in the absence of admission on record, to proof by writ. In this context, unsigned non-holograph documents, photocopies, cash-register receipts, telegrams, telex messages etc should be acceptable as amounting to writ provided that the party founding upon such material could, if challenged, establish, by parole evidence, that it was the writ of his opponent. (Para. 73).

(g) If a party is unable to prove the conclusion (or the variation or modification) of an agreement by writ, but has to the knowledge and with the express or implied permission of the other party changed his position in reliance upon it, then parole proof of the constitution or variation of the obligation should be admissible. Proof _prout de jure_ should similarly be admissible where actings approbatory of the obligation have been performed by the party seeking to resile from it. (Para. 74).

II _A formal system_

(a) All agreements in which the value of the property, goods, services, etc in respect of which the contract was made exceeded £50, (including agreements for the constitution of a trust) and all gratuitous unilateral promises irrespective of the value of the benefit promised, should require to be constituted in writing unless the agreement were performed on both (or all) sides, or the unilateral promise were fulfilled by the promisor, at the time of conclusion of the agreement or of the making of the promise. Variation or modification of an obligation constituted in writing should be effective only if also executed in writing. (Para. 77).

(b) Promises made subject to a condition of performance by the promisee and promises to keep offers open or to accept offers should be exempted from the requirement of constitution in writing. (Para. 77).

(c) The formalities of constitution should not differ from those necessary at present in the case of _obligationes literis_. (Para. 76).

(d) Should the sum below which informal constitution would be permissible be £50? If not, what would the appropriate sum be? (Para. 77).

(e) In the absence of compliance with the requisite formalities, a purported obligation should be void. An exception to this would, however, be recognised where an informal agreement or variation of an agreement had in fact been acted upon by one or other of the parties to it. Such actings would be capable of proof <u>prout de jure</u>. (Para. 78).

(f) Should the actings regarded by the law as capable of rendering binding an informally constituted obligation have that effect only if performed to the knowledge of the other party? (Para. 78).

(g) Should the actings by a party interested in establishing the validity of an informal obligation which alone could have the effect of rendering it binding be actings which amount to performance or partial performance of the agreement? (Para. 78).

(h) Business transactions between persons professionally engaged in trade or commerce should be exempted from the requirement of formal constitution, (Para. 79).

(i) The privilege of informality of constitution accorded to business transactions should extend to all categories of contracts, including the <u>obligationes literis</u> of the present law. (Para. 80).

(j) If the proposal made in the preceding sub-paragraph should not be acceptable, should business transactions be privileged to the extent that the writing in which they are constituted need not be tested or holograph or adopted as holograph? In the latter case should documents such as unsigned typewritten memoranda, photocopies, telegrams, telex messages, etc be regarded as sufficient? (Para. 81).

(k) Where a statute has in the past laid down, or in the future lays down, that contracts of certain types "shall be in writing", then unless a contrary Parliamentary intention appears, writing should be regarded as a

requirement of constitution and not of proof, and that writing should require to comply with the usual formalities. Rei interventus and homologation would not in such circumstances operate. (Para. 82).

(1) Matters (other than the conclusion or variation of obligations) which under the present law require to be proved by writ or oath should be capable of proof prout de jure. (Para. 83).

III An alternative formal system

(a) Obligations (including agreements for the constitution of a trust) should be capable of informal constitution, but should require to be proved, if denied, by the writ of the person alleged to be bound. (Para. 84).

(b) This should not apply to agreements performed on both (or all) sides, or to unilateral promises fulfilled by the promisor, at the time of conclusion of the agreement or of the making of the promise. Also exempted should be obligations in which the value of the property, goods, services, etc in respect of which the obligation was undertaken is less than £50, and promises to keep offers open or to accept an offer if one is made. (Para. 85).

(c) Variation or modification of an obligation constituted in writing should be required to be proved by writ unless the party seeking to establish the variation had changed his position in reliance upon the contract as varied. (Para. 86).

(d) Payment under an antecedent obligation, performance or discharge of obligations constituted in writing or proved by writ and gratuitous renunciation of rights should be capable of proof prout de jure. (Para. 86).

(e) The writing by which obligations could be proved should not require to comply with any special formalities, but in cases where the writing was not attested the onus of establishing that the writ was that of the person alleged to be bound would lie upon the party founding upon it. (Para. 87).

(f) The writ should require to be such as to establish both the existence of the obligation alleged and its essential terms. Where a party, while unable to produce a document from his opponent which succeeded in establishing the formation and essential terms of the obligation, could nevertheless put in evidence a writing by the latter which was such as to render probable the conclusion of a contract then it would become competent to lead parole evidence of the nature and precise terms thereof. (Para. 88).

(g) Exemptions from the requirement of production of a writ, such as those mentioned in paragraph 63, should not be recognised in Scots law. (Para. 88).

(h) Business transactions between commercial men should not be excluded from the general requirement of proof by writ. (Para. 89).

(i) Exemption from the requirement of proof by writ should not be allowed in cases where actings have taken place in reliance upon the agreement or undertaking, except in the case of oral variation or modification of written contracts. (Para. 90).

(j) Writing should be required for the constitution of those obligations in relation to which statutes have provided that they "shall be in writing". The writing should not require to be either tested or holograph. _Rei interventus_ or homologation should not operate in these circumstances. (Para. 91).

(k) Executory gratuitous obligations should require to comply with formalities of constitution. The formality required should be a simple signature on a written document. Where a unilateral promise has been made subject to conditions and the promisee has fulfilled those conditions then formal constitution should not be insisted upon and it should be open to the promisee to prove the making of the promise _prout de jure_. (Para. 92).

(1) Should writing continue to be required for the constitution of the _obligationes_ _literis_ of the existing law? If so, should the writing continue to be required to be probative or holograph, or should a simple signed writing be sufficient? (Para. 93).

IV An informal system

(a) Voluntary obligations should generally be capable of informal constitution, variation and discharge and should be subject to no special limitations on mode of proof. (Para. 94).

(b) Formalities of constitution should be required in the case of obligations in respect of which it has in the past been, or may in the future be, specifically provided by statute that they shall be in writing, and in addition in the case of obligations of the following types:

(1) obligations relating to heritage, including leases for more than one year;

(2) contracts of service for more than one year;

(3) contracts of partnership for more than one year;

(4) contracts of agency for more than one year;

(5) factories and commissions authorising another to manage one's affairs;

(6) submissions to arbitration and decrees arbitral;

(7) contracts of insurance;

(8) obligations in terms of which the obligor undertakes to indemnify the obligee if a third party fails to perform a stipulated act in favour of, or to pay a stipulated sum to, the obligee;

(9) gratuitous obligations, other than promises made subject to a condition of performance by the promisee, promises to keep offers open and promises to accept an offer which has been made or if one is made;

(10) gratuitous renunciations of rights;

(11) obligations which the parties have agreed should be formally constituted. (Para. 95).

(c) In such cases the obligation should require to be constituted in a writing which emanated from the party alleged to be bound, but that writing need not comply with any special requirements of form. (Para. 96).

(d) A document should be deemed _prima facie_ to have emanated from a party if signed by him. The onus of establishing the authenticity of the signature (if disputed) would rest upon the party founding upon it, unless the document was attested. (Para. 97).

(e) A standard-form document should be conclusively presumed to have emanated from the party by whom it bears to have been issued. (Para. 98).

(f) Exemption from the formal requirements should not be recognised in cases where actings in the nature of _rei interventus_ or homologation have taken place. (Para. 99).