SCOTTISH LAW COMMISSION

MEMORANDUM No: 38

CONSTITUTION AND PROOF OF VOLUNTARY OBLIGATIONS:

STIPULATIONS IN FAVOUR OF THIRD PARTIES

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: PRELIMINARY MATTERS

1. 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 stipulations or promises made by parties to contracts in favour of third parties (doctrine of jus quaesitum tertio). 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 discussion of the concepts of offer, acceptance and intention to enter into legal relations (Memorandum No. 36); factors (such as latent material ambiguity, 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 requirements of form in the constitution of voluntary obligations and restrictions on how such obligations may be proved (Memorandum No. 39). 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. Though recognition has been given in Scots law to the constitution by contract of rights in favour of third parties, when the contracting parties clearly so intend, and though Stair stated a sound conceptually consistent basis for these rights in his Institutions I.10.3 - 6, this early clarity has been overlaid by misunderstanding and controversy on a number of points. These points have been more fully examined in legal writing over the past quarter century than previously, and this examination has been helpful to us in indicating problems and possible options for their solution. Where the authorities to be found in case law and the institutional writers seem to conflict, we are not obliged to attempt a casuistic reconciliation but are free to consult with the objective of establishing as satisfactory rules as may be for the development of the modern law of Scotland. If such rules can be grafted onto the historic stock of Scots law, coherence of principle in the law of Obligations can best be secured.

3. The problems for consideration have usually been dealt with in treatises and decisions under the heading Jus Quaesitum Tertio - which means literally "The third party has acquired a right" and was a term of art taken over by Stair from a tradition of civilian jurisprudence. As we shall consider presently, this general heading has seemingly in Scots law alone been extended not only to those who have acquired a beneficial right but also to cases where the tertius has merely been given title to sue on another's behalf without acquiring any personal benefit.

4. We have made a fairly extensive examination of comparative material,[1] but in the present context this is of limited value

[1] See e.g. M A Millner "Jus Quaesitum Tertio: Comparison and Synthesis" (1967) 16 I.C.L.Q. 446; Gabriela Shalev "Third Party Beneficiary: A Comparative Analysis" (1976) 11 Is.L.R. 315 and sources cited in these articles.

except on broad questions of policy such as intimation and revocation. Most Continental European systems and those which apply the developed Roman Dutch law link third party rights to some form of acceptance by the tertius, while it seems clear that Scots law does not. So far as Anglo-American systems are concerned, though many do now recognise the rights of third party beneficiaries created by contracts, this result has been achieved by pragmatic legislation or judicial construction against a background of contract law based on privity, consideration and bargain - rather than from the law's recognition of obligation as resulting from the declaration of the will of contracting parties. English law does not itself recognise a doctrine of third party rights created by contract, because of the requirement of privity in contract.[1] Some thirty years ago the Law Revision Committee in England recommended[2] the introduction of the principle of jus quaesitum tertio subject to qualifications. This recommendation has not been introduced by legislation, and in Beswick v. Beswick[3] the House of Lords declined to achieve a like result by judicial decision. By various devices, in particular by invoking the law of trust, English law mitigates the rigidity of privity of contract. One of the most interesting comparative developments is to be found in Chapter 4 of the Israeli Contracts (General Part) Law 1973 - itself the fruit of extensive comparative study and evaluation.[4] Istael inherited from Palestine a contract law which was mainly English, but has in recent years been engaged in codifying contract law as an independent law derived from

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[1] Dunlop Pneumatic Tyre Co. v. Selfridge's Co. Ltd., [1915] A.C.847.

[2] 6th Interim Report 1937, Cmd. 5449.

[3] [1968] A.C.58.

[4] See Shalev sup. cit; also text of the law in (1974) 9 Is. L.R. 282.

several sources - in particular the European codifications. The new contract law relating to third party beneficiaries reflects this influence, but has benefited from consideration of the difficulties encountered in the systems studied.

2. Terminology

5. If, as we think is the law, Stair was right in linking the acquisition of rights by third parties under contracts to which they are strangers with the general doctrine of the unilateral binding promise (or unilateral legal act) in Scots law, we have concluded that it will assist discussion of the relevant problems if for the purposes of this Part of the Memorandum we ascribe specific meanings to certain expressions. The term "promise" is used in many contexts in the law of Obligations. It may imply an offer-promise, or a contractual undertaking, or a unilateral binding declaration of the will by an obligor. English and American legal writing largely analyses the law of contracts in terms of "exchange of promises". Accordingly to avoid confusion, or recurrent use of a phrase rather than a single word to avoid ambiguity, we ascribe to the word "pollicitation" the meaning of an obligation resulting from a unilateral declaration of will which binds the obligor without any requirement of acceptance. Though Roman law (from which the word "pollicitation" in English is derived) did not accept a general doctrine of unilateral binding declaration of will, it distinguished between obligations resulting from the agreement of two parties and "pollicitatio" where the obligation resulted from the declaration of the obligor alone.[1] We are well aware that different meanings have been given to the term pollicitatio and pollicitation by European jurists at

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[1] D.50.12.3 pr.; and see T B Smith "Pollicitatio - Promise and Offer" Studies Critical and Comparative p.168 et seq. By "obligor" we mean the debtor in an obligation.

various stages of legal history and that there is controversy as to whether even Stair[1] used the term "pollicitation" in the sense we have ascribed to it. We do not intend to enter this controversy, but indeed intend to avoid it by ascribing a clear meaning to "pollicitation" which was in fact its original legal meaning in the civil law. The word "pollicitation", which like the word "promise" is derived from Latin, is not perhaps an everyday expression even among lawyers. Possibly its relative unfamiliarity may be an advantage in avoiding confusion with more familiar expressions such as "promise" and in focussing attention on a doctrine which in a generalised form is seemingly a distinctively Scottish development.[2]

6. The conferring of rights by contract upon a third party who is not privy thereto creates a triangular relationship of rights and duties. The parties to the contract may both expressly undertake to confer rights on the tertius, and even if one alone expressly undertakes to do so by the terms of his contract with another, there is authority for the proposition that that other is also subjected by implication of law to a duty to assist the tertius to established his right.[3]

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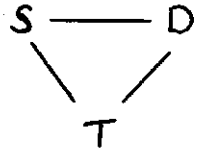
[1] Esp. A. Rodger "Molina, Stair and the Jus Quaesitum Tertio" (1969) Jur. Rev. 34 and 128; G. MacCormack "A Note on Stair's use of the Term Pollicitatio" (1976) Jur. Rev. 121 and authorities there cited.

[2] On the whole continental jurists, in particular Pothier who influenced later codification, followed Grotius who required acceptance for constitution of obligations inter vivos. Stair, Inst. I.10.4, expressly differed from Grotius on this point. Thus in modern European systems in the civil law tradition as well as in English law, (in which system a unilateral promise may take the form of a "contract" under seal) the unilateral legal act inter vivos is exceptional and a matter of express provision. Consequently, voluntary obligations generally are forced into contractual patterns which sometimes seem inappropriate or inconvenient. See refs. supra, also D. N. MacCormick "Jus Quaesitum Tertio: Stair V Dunedin" 1970 Jur. Rev. 228; D.I.C. Ashton Cross "Bare Promise in Scots Law" 1957 Jur. Rev. 138.

[3] Stair, I.10.5; MacCormick, 1970 Jur. Rev. 228 at p.233.

Though the conferring of a right or immunity on a tertius may be a matter of disinterested benevolence, this is not necessarily so. Nor in a system which does not base obligation on a doctrine of consideration would it seems relevant to enquire in the context of substantive rights and duties whether the obligation was onerous or gratuitous.[1] There is no clear justification for distinguishing, as some systems do, between "donee" and "creditor" third party beneficiaries. The ius quaesitum may be intended to discharge indirectly an obligation incurred to the tertius by one or both contracting parties or to discharge an obligation due on principles of unjustified enrichment or may be intended to determine which of the three parties involved should cover a risk by insurance. Not in every case, as we discussed in the context of constitution of contract, will contract (including one conferring benefit on third parties) result from offer and acceptance. The rights of third parties may result from an agreement to join a voluntary association such as a trade union.[2] It follows that no terminology will in all situations be appropriate to identify the role of the parties to the contract which provides for the acquisition of rights by a third party (or third parties). However, in a typical situation a party to a contract stipulates with the other that the latter will oblige himself to confer a benefit on a tertius. This is characterised in many systems as stipulatio alteri - i.e. stipulation for another - or pactum in favorem tertii (agreement for the benefit of a third party). For convenience, therefore, we designate the parties in the triangular situation as Stipulator, Debtor and Tertius - though of course the contracting parties may both be Stipulators and Debtors:



[1] We consider problems of proof in para. 47, infra.

[2] e.g. Love v. Amalgamated Society of Lithograph Printers 1912 S.C. 1078.

3. Stair's Text

7. The point of departure for consideration of the doctrine of ius quaesitum tertio in Scots law is Stair's exposition. Unfortunately Stair's text (Institutions 1.10.3-5) has suffered editorial amendment and corruption in the editions which are in daily use (e.g. More's edition) and this factor has apparently influenced and possibly misled opinions in the House of Lords - especially in Carmichael v. Carmichael's Executrix.[1] It is not, of course, for us to attempt casuistic interpretation of authorities but we have a duty to remove doubts, defects and anomalies in the law. We attach as Appendix A the full text of the relevant portions of Stair's Institutions (I.10.3-6) from the Second Edition (the last to be edited by the institutional author himself) and also, as Appendix B, Dr Alan Rodger's reconstruction of Stair's text[2] from a close study of Stair's editions and manuscript sources. At this stage (apart from the crucial part of paragraph 5) we paraphrase Stair's argument - so far as relevant.[3]

> 1. An obligatory act of the will is sometimes absolute and pure and sometimes conditional. Conditions may relate to the actual constitution of the obligation as where an offer must be accepted before a contract is concluded. However, more usually, conditional obligations become

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[1] 1920 S.C.(H.L.) 195.

[2] 1969 Jur. Rev. p.128-140. We are indebted to Dr Rodger and to Messrs W Green & Son Ltd for permission to reproduce this extract from Dr Rodger's article. See also Roger's detailed analysis in "Molina, Stair and the Jus Quaesitum Tertio" 1969 Jur. Rev. 34.

[3] As appears from Rodger's examination Stair interrupted his main argument by including matters which in a modern text might have been more appropriately relegated to footnotes or to another section of the work.

binding as soon as they are undertaken, though the actual duty of performance may depend upon the purification of a condition.

2. A "Promise"[1] does not require acceptance by another, and in this respect Grotius' contrary opinion is to be rejected - in particular since that view would preclude the constitution of a binding obligation in favour of persons not yet in existence or lacking capacity to consent. Obligations in the form of promises (or Pollicitations) are constituted by the will of the obligor and are recognised in Scots law. However, if the beneficiary rejects, the obligation is avoided not by failure to accept but by actual rejection. This is consistent with the nature of a right which may be vested in persons, such as incapaces, who are incapable of exercising will or do not know of the right created in their favour.

3. (Paragraph 5)[2] "It is likewise the opinion of Molina[a][cap. 263], and it quadrats[b][to] our Customs, that when Parties Contract, if there be any Article in favours of a third Party, at any time, est jus quaesitum tertio, [which][3] cannot

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[1] i.e. in the sense of Pollicitation ascribed in para. 5 supra.

[2] We quote here the text of paragraph 5 from the second (1693) edition; we have put in brackets those parts of Stair's text which have been altered in later editions - in particular in More's edition which is in general contemporary use - and set out below the textual alterations appearing in that edition.

a [Disp. 265]

b [with]

c [either or both of]

d [Achinmoutie v. Hay is deleted and four cases which Stair did not refer to are inserted]

[3] In the first edition (1681) Stair renders "which" as "it" and there is no reason to believe that he intended to alter the sense in the second edition.

be recalled by [c][both] the Contracters, but he may compel either of them to exhibit the Contract, and thereupon the obliged may be compelled to perform. So a Promise, though gratuitous, made in favours of a third Party, that party, albeit not present, nor accepting, was found to have Right thereby, [d][Had. November 25 1609 Achinmoutie contra Hay.]."

4. However, promises by way of Offer depend upon acceptance and if accepted constitute agreements or contracts. Paction or agreement is defined as "duorum pluriumve in idem placitum consensus atque conventio. It is the consent of two or more parties to some things to be performed by either of them." If the promise is no more than an offer and is dependent upon acceptance, it remains in the power of the offeror to revoke until it is accepted.

4. Lord Dunedin's Gloss

8. In Carmichael's Exx[1] Lord Dunedin suggested that Stair considered that irrevocability was the test of the constitution of a valid jus quaesitum tertio.[2] On the one hand his Lordship considered[3] that the words est jus quaesitum tertio (as set forth in the More edition) should be transposed with the phrase beginning "which cannot be recalled" so that "Irrevocability would be a condition not a consequence of the expression of a jus in favour of the tertius". On this the late Sir John Spencer Muirhead commented[4]

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[1]1920 S.C.(H.L.) 195.

[2]At p.199 et seq.

[3]At p.200.

[4]Roman Law p.79.

> "The House of Lords in the case of Carmichael's Executrix v. Carmichael ... provides a disingenuous gloss on this passage from Stair. Its decision by laying down that Stair meant what he is careful not to say would have warmed the hearts of the pontifical lawyers."

Sir John's scepticism has now been reinforced by recent research especially by Dr Rodger on Stair's own versions of the relevant text. Any doubts as to the meaning of "which" are probably eliminated by the fact that Stair used instead the word "it" in the first edition and by the clearer treatment or irrevocability in Stair's own second edition than in subsequent edited texts. It is apparent that Stair did not regard irrevocability as a condition of jus quaesitum. He referred to Molina's Disputatio 263 and not to Disputatio 265 as substituted by his editors.[1] As Rodger has shown Molina's statement bears a remarkable resemblance to Stair's own exposition.[2] Molina writes that unless there is a contrary rule of positive law (which rule Stair did not accept for Scots law), "a promise itself by its very nature has force before acceptance to bind the promisor for his part in such a way that he is bound to show (manifestare) the promise to the beneficiary so that if he wishes to accept it, he [the promisor] should fulfil it, as he was bound for his part before the acceptance." In short, close examination of Stair's text (which generalises Molina's proposition) confirms Sir John Spencer Muirhead's view that Stair meant what he was careful to say.

9. Lord Dunedin also justified his suggested gloss on Stair as follows[3]:

> "But the real reason for supposing that Lord Stair did not mean the larger proposition is the fact that he quotes four cases on which he founds what he is saying, and not one of these would warrant this larger proposition."

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[1] Not surprisingly Gloag Contract 2nd ed. p.69 footnote 3 concluded that the reference in the later editions was incorrect. Apparently he did not check with Stair's own text.

[2] 1969 Jur. Rev. 128 at p.138. The translation is by Rodger.

[3] Carmichael at p.200.

In fact Stair himself cited none of the four cases, which were inserted later by his editors. The one case which Stair did cite, Achinmoutie or Auchmoutie, had been expunged by the editors. It seems to support the proposition that a tertius can rely on a promise given to another not to enforce a remedy against the tertius even though the tertius has not accepted it.[1] We conclude therefore, that, though Stair's views may not in some situations have prevailed, he did not hold that irrevocability was "a condition not a consequence" of the conferring of a jus quaesitum tertio on a tertius. Indeed he seems clearly to have held that when a Stipulator and Debtor agreed to confer a right on a Tertius this was normally irrevocable in the sense that not even the combined wish of the two contracting parties could revoke the benefit. However, it is altogether consistent with Stair's thinking on suspensive and resolutive conditions in obligations that Stipulator and Debtor could have qualified their agreement to confer a benefit on a tertius by a condition which provided for revocation or cancellation on the occurrence or non-occurrence of an event.[2] In the present Memorandum which is concerned with clarification and reform of the law, Stair's views are entitled to consideration on their merits rather than as represented in the Dunedin gloss.

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[1] Rodger, 1969 Jur. Rev. 128, esp. pp.139-40 and 145-6.

[2] See discussion, D N MacCormick "Jus Quaesitum Tertio: Stair v. Dunedin" 1970 Jur. Rev. 228 at p.236.

B: THE RIGHT OF THE TERTIUS

1. Theoretical Basis

10. There has been little examination of the legal nature of the Jus Quaesitum Tertio in Scots law from the time when Stair analysed the legal nature of the right until the second half of the present century. It is perhaps significant that recent writing invariably takes Stair's analysis[1] as the point of departure. Moreover, the most modern analyses in other systems of the doctrine of contracts in favour of third parties recognise, as did Stair, that the theoretical justification for recognising third party rights is that the law should give effect to the wills of the contracting parties as declared in their contracts. Though the subsistence of a valid contract[2] between Stipulator and Debtor is essential for the constitution of the right in favour of the Tertius, his right though founded on obligation, is not contractual in nature.[3] Therefore if Stipulator and Debtor entered into what purported to be a contract for sale of goods to be delivered by instalments to Tertius at monthly intervals as payment was made by Stipulator, the relationship between Debtor and Terius would seemingly not be that of seller and buyer e.g. in respect of the statutory rules regarding passing of property and risk.

11. Though he may reject the agreed benefit it seems to have been generally recognised, at least since Stair's exposition, that the right of the Tertius emerges irrespective of acceptance on his part. Though this analysis is accepted

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[1] I.10.3-6.

[2] An unenforceable contract, if valid, may provide a sufficient foundation. See Love v. Amalgamated Society of Lithographic Printers 1912, 2 S.L.T. 50; also paras. 54 - 56 infra.

[3] Unless, perhaps, Stipulator and Debtor expressly agreed that the proposed benefit should be offered to the Tertius and his acceptance should be a condition of the constitution of his right.

in some modern systems, such as German law, others such as French law and the uncodified Roman Dutch systems of Southern Africa reflect the tradition traced back to Grotius (from whose view Stair expressly dissented) that the element of acceptance, which was probably originally introduced to prevent revocation by the contracting parties, is now regarded as essential for the constitution of the third party's right.[1] This has resulted in considerable controversy and practical inconvenience, and to some extent exceptions have been introduced based on expediency to overcome difficulties - as when tertii do not yet exist or are incapaces at the time the contract has been entered into for their benefit.[2] Similar difficulties to those encountered in South African law have been encountered in codified systems which have inherited Grotius' requirement of acceptance to constitute obligation towards a tertius. Consideration of the consequences of the "acceptance theory" does not attract us to suggest adopting it in Scots law.

12. Though, as will be discussed in the context of revocability, Stair's theory on stipulations for the benefit of third parties has not been fully adopted, there is considerable support in modern legal writing on this topic for a doctrine developed from Stair. This is that the creation of a right in favour of a Tertius is an aspect of the doctrine that the unilateral declaration of will can receive effect in obligations inter vivos as well as in transfers of property rights or declarations of will mortis causa. There is a dearth of case law in Scotland on the nature of the ius quaesitum tertio. However, the late Lord Keith of Avonholm

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[1] See for full citation of relevant authorities Crookes N O v. Watson 1956 (1) S.A. 277(A.D.); Commissioner for I R v. Estate Crewe 1943 A.D. 656; McCullogh v. Fernwood Estates 1920 A.D. 204.

[2] For discussion in Scottish legal literature see inter alia Smith Studies Critical and Comparative p.168 et seq; Rodger 1969 Jur. Rev. 34 and 128; Cameron 1961 Jur. Rev. 103; D.I.C. Ashton Cross "Bare Promise in Scots Law" 1957 Jur. Rev. 138 at p.147 et seq; also Lord Keith of Avonholm's presidential address to the Holdsworth Club The Spirit of the Law of Scotland (1957) p.27 et seq. Cf. A M Honoré The South African Law of Trusts (2nd ed.) esp. p.56.

has observed extra-judicially:[1]

> "A naked promise is quite sufficient to bind the promisor if competently proved. If A and B make a contract for the benefit of C, C will accordingly, subject to certain qualifications, be entitled to enforce it against whichever of A or B has undertaken the obligation in his favour.... It should be noted that the tertius need not be in existence at the date of the obligation undertaken though, of course, means of ascertaining him, if he should come into existence, are essential. In this respect there is an obvious difference between the constitution of a contract and the constitution of a jus quaesitum tertio. It has been pointed out that in some systems of law which recognise the doctrine of jus quaesitum acceptance by the tertius of the benefit conferred is necessary to the constitution of the jus quaesitum but that is not so in Scotland."

Similar views to those of Lord Keith have been expressed independently by Mr Ashton Cross,[2] and by Professors D N MacCormick[3] and T B Smith.[4] It seems to us that Professor MacCormick (basing himself on Stair) corrects a defect in the analysis of Ashton Cross and Smith who considered that a Pollicitation in favour of the Tertius in a Jus Quaesitum Tertio situation was given by the Debtor(s) in the basic contract. MacCormick holds that[5]

> "In entering into a contract containing a term in C's favour, A and B thereby jointly make a pollicitation in C's favour."

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[1] The Spirit of the Law of Scotland, pp. 25-7.

[2] "Bare Promise in Scots Law" 1957 Jur. Rev. 138 esp. p.145 et seq. At pp. 142-144 he analyses critically the views of Erskine, Bell and Gloag on acceptance.

[3] "Jus Quaesitum Tertio: Stair v. Dunedin" 1970 Jur. Rev. 228.

[4] Studies Critical and Comparative esp. 175 et seq; 183 et seq. Smith wrote before Dr Rodger had established Stair's authentic text and before Professor MacCormick's article drawing attention to the duties of both Stipulator and Debtor to the Tertius. Smith has indicated some modification of his views in the light of these articles. Dr Rodger also wrote before MacCormick's article and might possibly have found his analysis of the rights of the Tertius more satisfactory than that of South African jurisprudence to which he refers.

[5] 1970 Jur. Rev. 228 at p.233.

This is a useful suggestion but perhaps not completely satisfactory since it would imply that A and B were co-obligants for the total performance. It seems preferable to regard A and B as making pollicitations for their respective duties.[1] If these views concerning its nature are well founded (as we believe them to be) then the doctrine of Jus Quaesitum Tertio is not, as Gloag seemingly supposed,[2] an exception grafted onto the general rule of contract law that strangers to a contract cannot sue on it, but rather the application of a general principle of Scots law that pollicitation (in our ascribed sense) creates obligation - at least in those legal relationships which other systems would recognise as obligations in favour of third parties.[3] At this stage of discussion, it would not be convenient to state provisional proposals, but we should welcome comment on or criticism of our analysis of the nature of the right in Scots law of a Tertius arising from a contract to confer a benefit[4] upon him.

2. Problems of Lord Dunedin's Classification

13. In Carmichael v. Carmichael's Exx[5] Lord Dunedin did not attempt an analysis of the nature of the rights of a Tertius, but contrasted two approaches to them which have been treated by some authors as guidelines to their examination of law.

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[1] The obligations of the Stipulator will normally be to help the Tertius to prove the contract in his favour and not to default in rendering counterpart performance to the other party to the contract.

[2] Contract 2nd ed. p.234 et seq.

[3] We discuss in paras. 34-38 situations in Scots law which though at present discussed as aspects of Jus Quaesitum Tertio are in fact different in nature from pactum in favorem tertii.

[4] We examine infra pras. 13-24 situations where title to sue is conferred on a third party without the intention or immediate intention to benefit him.

[5] 1920 S.C.(H.L.) 195 at pp.197-8.

"I think it very necessary to begin by pointing out that the expression 'jus quaesitum tertio' is, in different cases and different circumstances, used in a varying sense, or, perhaps I might better say, is looked at from a different point of view. The one sense is meant when the question being considered is simply whether the tertius C has the right to sue A in respect of a contract made between A and B to which contract C is no party. The controversy then arises between C, who wishes to sue, and A, who denies his title to do so.... In Scotland, if the provision is expressed in favour of C, he can sue, and this is often designated by saying 'He has a jus quaesitum tertio'.... (I)n all this class of cases the controversy is between And C: B is either no longer existent or is, so far as he is concerned, quite willing that C should exact his rights .... The other sense of the expression is when the emphasis is, so to speak, on the quaesitum and when the controversy arises not between C and A but between C and B. In such a case A is willing to perform his contract, and the contract in form provides that A shall do something for C, but B, or those who represent B's estate, interfere and say that B and not C is the true creditor in the stipulation."

14. As Lord Reid observed in Allan's Trs. v. I.R.,[1]

Carmichael's Case

"is in some respects a difficult case to interpret.... Normally the parties who make a contract can, if they choose, cancel it or alter it. But if they have chosen to give to a third party a right which they intended to be irrevocable then they cannot do that. The question is what they intended and Carmichael's case deals with the means by which that intention can be proved. I do not think that Lord Dunedin meant to say that this intention to make the provision in favour of the third party irrevocable can never be established by the terms of the contract itself. Generally it cannot and then other evidence of intention is required."

There would seem to be little justification in law or logic to require extrinsic evidence as an aid to interpretation of a contract depending on whether the Tertius is asserting a right to a benefit against Stipulator on the one hand or against the

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[1] 1971 S.L.T. 62 at p.64.

Debtor on the other. If, however, the contract merely stipulates that property shall be conveyed or money paid to a third party or in the name of a third party, extrinsic evidence may be admissible to ascertain the object or purpose. It is in this context that we encounter difficulties, since such a contract may confer no benefit on the third party whatsoever. Indeed if the contract merely enables him to uplift money on behalf of a contracting party he may well be subjected to inconvenience rather than entitled to acquire a benefit. It is no stipulatio in favorem tertii.

15. Gloag states:[1]

> "The most unequivocable indication of an intention that a third party should have a jus quaesitum under a contract is an express provision that he should have a title to enforce it, and it is conceived that there is no principle of the law of Scotland which should prevent a stipulation of this kind having the effect intended.... Thus where a deposit receipt for money deposited by A is made payable to B, he has a right to sue the bank, although, without some further proof of donation, he may be unable to establish any right to the money."

In this connection the author refers to Lord Dunedin's speech in Dickson v. National Bank.[2] His Lordship observed:

> "A deposit receipt is a contract in which the bank promises to pay upon a certain order, but it does not give any indication as to the person to whom the money really belongs after it has been paid - that may be proved in other ways.... A person who has what is called a jus quaesitum tertio has a perfect right in Scotland to sue although he was no party to the contract, and undoubtedly the payer-in of a deposit-receipt has a jus quaesitum tertio."

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[1] Contract 2nd ed. p.236.

[2] 1917 S.C.(H.L.) 50 at p.53. Lord Dunedin made these observations because he expressed himself as startled by the Lord Chancellor's possible encouragement of the view "that it was not necessary to show that there was in the sense of English law an interrment". We too are startled, but conjecture that, bello flagrante, "attornment" may have been the intended term, although even so its relevance is not clear to us.

16. The late Lord Keith of Avonholm[1] focuses the problem:

> "But the phrase jus quaesitum tertio is somewhat unhappily used when the tertius is merely an agent to enforce payment from one of the contracting parties for the benefit of the other. Unless the mere title to sue is regarded as the jus that has been created, the phrase is such a case seems somewhat inapt. A good illustration is to be found in the Scottish deposit receipt cases. A deposits with his bankers a sum of money and takes a receipt in these terms: 'Received from A the sum of £X payable to C.' C, we shall say, is A's daughter. The banker will be fully protected in paying to C on her signature. But it does not follow that the money belongs to C. There is nothing in the mere terms of the deposit receipt to show that A intended to make a gift to C. It is equally possible that he intended to give C the title to uplift the money, as his agent or administrator. We thus have a sort of principle of agency in reserve, where A makes a contract with B which allows B to be sued by A's agent."

This type of case was in Lord Dunedin's mind when he described the second situation quoted above.[2]

17. Where there is merely title to sue without personal benefit, it may well be that an altogether different legal relationship is established between the three parties involved from that which arises when a contract is concluded with the intention of benefiting a Tertius. If, for example, money payments were involved, it may be thought that in a true case of contract for the benefit of a third party the Debtor could plead a right of compensation against Tertius, but not if he actually knew that the designated payee was merely interposed for the convenience of the other contracting party. Compensation cannot be pleaded against an agent acting for a principal.[3] It may be conjectured that in such a situation the obligor could plead compensation against the other

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[1] The Spirit of the Law of Scotland, p.26.

[2] Para. 13, supra.

[3] Matthews v. Auld & Guild (1874) 1 R. 1224.

contracting party. Moreover, if a person has merely bare title to sue it is difficult (unless he acts in the capacity of agent) to see what patrimonial loss he could establish if he sued for non-performance. However, matters are complicated by the probability that the Debtor may not know in what capacity the Tertius or mandatory asserts his right to sue - whether as beneficiary or mandatory or as a mere nominee. The rôle of a third party merely designated as entitled to accept performance and to grant a discharge without personal benefit to himself, is in effect in civilian terms[1] solutionis gratia adjectus - a person to whom a debt due to another may be paid. He may or may not have been expressly authorised to demand performance. The expression jus quaesitum tertio seems to have been stretched inaptly to include the type of cases just mentioned. It may be desirable clearly to distinguish them in principle from situations where a positive benefit is conferred on third parties. However, the ambiguous nature of an important category of obligations involving three parties makes the drawing of a clear distinction difficult under the present law.

18. This difficulty may be illustreated by an excerpt from the dissenting opinion of Lord Skerrington in Carmichael v. Carmichael's Exx.[2] He identified two categories of case - the first illustrated by Lord Stair, and by Lord Cranworth L C and Lord Wensleydale[3] in which a contract properly construed contains a stipulation to confer a benefit on a third party and the other in which there is no such contract but a

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[1] In English law, where problems of consideration may be relevant matters are even more complex see e.g. M C Cullity "Joint Bank Accounts with Volunteers" (1969) 85 L.Q.R. 530, McEvoy v. Belfast Banking Co. [1935] A.C. 24; Greenhalgh v. Union Bank of Manchester [1924] 2 K.B. 153. A banker seemingly may safely pay on a customer's mandate.

[2] 1919 S.C. 636 at pp. 645-5.

[3] in Finnie v. Glasgow & S.W.Rly. (1857) 3 Macq. 75 at pp.88-91.

contract by which a person (generally a lender, purchaser or seller) acquires a right to property and merely stipulates or directs that the conveyance or payment shall be made to a third party yet retains in his own possession the conveyance or writing. He continued:

> "The two groups are also similar in respect that in cases falling under either category the ultimate question which has to be answered is the same, viz.: Was it according to the intention of the parties to the transaction to confer a benefit upon a third party which should not be revocable at the pleasure of either or both of the contracting parties, and if so, has that intention been manifested in a way which makes it legally effectual? In cases falling within the first of the two categories which I have tried to describe and differentiate, the answer to both branches of the question is in the affirmative. In cases falling under the second category the answer is generally in the negative, unless some further evidence over and above the mere form of the title or obligation to pay can be adduced. The distinction between the two categories will become apparent, if it is kept in view that the first postulates as an essential condition the existence of a contract which legally evidences an unequivocal and final intention to confer a benefit on a third party, whereas in the second class the acquirer of a right has (no doubt through the medium of a contract) done something which is essentially ambiguous - something which common sense and legal authority alike reject as unequivocal evidence of any such intention as I have desiderated. One may acquire a right and take the conveyance or obligation in name of a third party without any intention of benefiting the latter, but merely because one proposes to make him one's agent or to constitute him a trustee for certain purposes by afterwards delivering the title to him in exchange for a back-letter of trust. Moreover, even where the wish to confer a benefit of some kind upon the third party is matter of admission, the contemplated benefit may be one which the acquirer of the right does not wish to come into immediate operation, but desires to keep within his own control in the meantime. For example, there may be a future marriage-settlement in view, or a proposal to give security or satisfaction to a creditor, or again an inchoate but incomplete intention to make a gift to the person in whose favour the title has been taken."

19. It will be apparent that in Lord Skerrington's second category there may be some cases in which by contract a benefit is conferred on a Tertius (true examples of contracts for the benefit of third parties); other cases where a third party is introduced for the convenience of the stipulator with no intention of conferring a benefit on that other; further cases where the ultimate conferring of a benefit on a tertius is contemplated as a possibility or probability; and finally cases where although there was no intention to benefit a third party at the time of contracting, a benefit is eventually conferred on him at a date subsequent to the original contract. The Debtor in the original contract may or may not have known what was in the Stipulator's mind. It may be a matter of indifference to the Debtor to whom he renders performance and he may indeed have contemplated, contrary to what the Stipulator intended, that they were contracting to confer an immediate benefit on the Tertius.[1] It may be thought desirable to restrict or eliminate, if possible, these areas of ambiguity which are not (so far as we are aware) encountered in other systems.[2]

20. After a detailed examination of the relevant case law Mr J T Cameron QC[3] has distinguished two strands of authority in the development of the modern law of jus quaesitum tertio in Scots law - which correspond generally with Lord Skerrington's two categories.[4] In one class of case

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[1] In this case to speak of intention of the contracting parties (in the plural) is misleading.

[2] In a system which requires acceptance by Tertius or action in reliance on the promised benefit as conditions of acquiring a completed right, any ambiguity is removed by fulfilment of these conditions.

[3] "Jus Quaesitum Tertio: The True Meaning of Stair I.X.5" 1961 Jur. Rev. 103. Mr Cameron does not investigate situations in which a third party is a mere nominee or agent. Though Cameron was misled by Stair's editors regarding the Disputatio of Molina on which Stair relied, this does not affect the value of his article in the present context.

[4] Para. 18, supra.

delivery or its equivalent is normally required to constitute a right in the tertius, and in the other it is not.[1] Cameron states:[2]

> "In one, the third party has no right except by the donation of the original creditor: the original creditor acquires a bond or similar obligation, but although that bond is taken in name of the third party, that fact alone confers no jus quaesitum; in such cases, the original creditor is in some sense the owner of the sum in the bond until he transfers it to the tertius.... In the other class, that is, in all other cases, the third party acquires a right from the completion of an agreement in his favour and intended to benefit him."

Indeed there are clearly cases where stipulations for the benefit of a third party would scarcely be capable of "donation" - e.g.

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[1] Mr Cameron states persuasive arguments for the view that at least two of the cases cited in the More edition of Stair and relied on by Lord Dunedin in Carmichael's Case do not conflict with the wider interpretation of Stair's view of jus quaesitum tertio, since in the older law delivery of a writ was in many cases essential for actual constitution of an obligation - as contrasted with manifesting intention to donate. However in Hill v. Hill (1755) Mor. 11580, with the deposit receipt cases and other cases in which a creditor acquired a bond or similar obligation with his own money, delivery or its equivalent was usually required to confer right on a Tertius: such cases were linked to, though possibly not regarded as identical with, cases of donation. In all other cases of jus quaesitum tertio however, Cameron contends that the third party acquires his right from the completion of the agreement in his favour and intended to benefit him i.e. the broader interpretation of Stair. Apart from cases where the real point at issue was whether there was a stipulation directly for the benefit of the tertius and therefore discussion of how the right was created was strictly obiter [G Finnie v. Glasgow & S.W. Rlys (1857) 3 Macq. 75; Blumer & Co. c. Scott & Sons (1874) 1R. 379 and Henderson v. Stubbs (1894) 22R. 51,], Cameron (at p.117) cites in support of this wide second category Peddie v. Brown (1857) 3 Macq. 65; Leslie v. Mags of Dundee (1840) 3 D.164; Rose, Murison & Thomson v. Wingate Birrell & Co's Tr. (1889) 16R. 1132; Morton's Tr. v. Aged Christian Friend Society (1899) 2F. 82; Lamont v. Burnett (1901) 3F. 797 and Love v. Amalgamated Society of Lithographic Printers 1912 S.C. 1078.

[2] p.117-8.

giving him the benefit of an exemption clause limiting or excluding liability, or giving him the benefit of an undertaking by a contracting party not to compete in a particular field.

21. Mr Cameron builds his argument from an examination of Lord Dunedin's speech in Carmichael v. Carmichael Exx.[1] In that case there was a competition between a father (who had taken out and paid premiums for an insurance policy upon the life of his son when then a pupil) and the executrix of the son who had died after attaining majority. The son had known of the existence of the policy, but it had not been delivered or intimated to him. The House of Lords preferred the claim of the executrix, partly because of the terms of the policy itself and partly on consideration "of the whole circumstances of the case" including the son's knowledge of the policy. Lord Dunedin seems to have had largely in mind circumstances which could be regarded as equivalent to intimation or delivery,[2] but Lord Shaw could apparently have reached his decision on the construction of the policy itself,[3] and did not regard delivery or intimation as essential. Though under the present law delivery or intimation (whether to the tertius directly or in a public register) is normally necessary to vest a right in a tertius in cases where one party has purchased property or an obligation with his own money it seems that these steps can be dispensed with if the terms of a contract are sufficiently clear.[4] If acquisition of knowledge of a contract expressed

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[1] 1920 S.C.(H.L.)195.

[2] esp. at p.204 - but see Lord Reid's dictum quoted in para. 14, supra.

[3] esp. at p.207.

[4] See the views of Lord Skerrington and Lord Shaw in Carmichael and those of Lord Reid in Allan.

in his favour can be regarded as the equivalent of intimation to a tertius, this does not seem altogether satisfactory. The information could have been communicated without the knowledge of the contracting parties and contrary to their wishes. Thus, for example, on the assumption that the son's knowledge was a vital factor in Carmichael's Case, he might have been told of the policy in his favour by an indulgent mother who was unaware of her husband's wishes. While casual acquisition of information seems relevant in deciding such questions as whether an individual acted in good or bad faith, it seems an unsatisfactory determinant of acquisition of property rights or of becoming creditor in an obligation.

22. In present day conditions the Revenue's interest in ascertaining when rights vest is of considerable importance in determining upon whom the burden of tax, e.g. capital transfer tax, should fall and upon what scale. For this reason in particular we think that there is greater need than in the past for the law to provide for three party situations which contracting parties have left ambiguous. This ambiguity may confer on a Tertius the burden of litigation rather than an intended benefit. On the other hand we do not think that the law should interfere with the parties' right freely to declare their wills in three party situations when such wills are clearly expressed. (We are at this stage concerned with problems of constituting rights in third parties. Related problems concerning revocation or cancellation of third party rights we shall consider subsequently.)

3. Provisional Conclusions

(a) Bare Title to Sue

23. We think that Lord Keith of Avonholm's criticism of the classification of a bare right to sue as a "jus quaesitum tertio" is justified. Indeed unless the third party designated in a contract as entitled to accept payment or

performance is a beneficiary or an agent, mandatory, or trustee, we do not think that he should have a right to sue at all. He has no patrimonial interest of his own, nor is he held out as representing the interests of a contracting party. There is no objection, however, to a contractual provision which entitles or requires the debtor to make payment or render performance to a designated third party - which payment or performance will discharge the debtor's liability to the creditor in the contract. One way of eliminating the "inapt" extension of jus quaesitum tertio" would be to provide by statute for a rule or presumption[1] that when a contract provides that payment or performance shall be made to some person who is not party to the contract, that person shall be regarded as a third party beneficiary unless the contract provides otherwise expressly or by necessary implication. We think that absence of patrimonial interest is probably sufficient in itself to exclude actions by third parties who assert no other justification for their action than a "bare right to sue". If the third party was recognised in the contract as having a representative capacity (such as agent) his rights and duties would be regulated by the law of agency etc, and not by the rules applicable to contracts for the benefit of third parties.

24. We therefore propose provisionally that when a contract provides that payment or performance shall be made to some person who is not party to the contract, that person shall be regarded as a third party beneficiary unless the contract provides otherwise either expressly or by necessary implication. We invite comment.

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[1] In the interests of certainty we consider the enactment of a rule would be preferable to a presumption in this area of the law.

(b) The Ostensible Tertius v. the Ambiguous Stipulator

25. It seems to us that a comparable solution would avoid doubt or ambiguity in cases where contracting parties agree that on payment by one the other should bind himself to transfer rights (whether by way of obligation or property rights) in the name of a third party even though a document vouching title should have been handed over to the party making payment. Though this machinery is firmly established in Scots law, Professor Montgomerie Bell has commented[1] upon the risk and inconvenience of such an arrangement. Lord Sands referred[2] to its "quaintness", and pointed out that the true creditor cannot sue on the deed expressed in favour of a nominee, but would require to bring an action of declarator of his right as a preliminary to claiming from the debtor. We have reached the provisional conclusion that unqualified contracts expressed in the name of a third party should confer a right on the third party to claim the specified rights as a benefit in his favour.[3] If an unqualified provision is in favour both of Stipulator and Tertius, they should become joint creditors in the obligation. However, the parties should be free - if the Stipulator so wishes - to agree expressly that the third party's right to benefit should be subject to a suspensive or resolutive condition. Thus the contracting parties might agree that the right of Tertius should be conditional on his marrying or surviving Stipulator, or should be cancelled if Stipulator should survive Tertius.

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[1] Lectures on Conveyancing, 3rd ed., p.108.

[2] I.R. v. Wilson 1927 S.C. 733 at p.737.

[3] If the contracting parties had obliged themselves to make a donation to Tertius, the latter's right would be to secure implement of the obligation. Donation would not be complete until the rules regulating donation e.g. regarding delivery had been satisfied. However, it would be no longer lawful for the contracting party who had made payment to hold the right stipulated for the third party in suspense unless the contract provided that he might do so.

Moreover, the contracting parties could expressly agree that their provision in favour of Tertius should become obligatory only after acceptance by him. Stair indeed contemplated this situation[1]

> "...if a promise be made by one to another in favour of a third, importing the acceptance of that third, it is pendent and revokable by these contractors, till the third accept."

The contracting parties would, of course, in such situations be free to agree that Debtor should make payment or render performance to Stipulator instead of Tertius on the non-occurrence of the specified suspensive or the occurrence of the specified resolutive condition. Despite the long standing (and possibly idiosyncratically Scottish) legal technique of taking obligations in another's name but without necessarily investing that other with any substantive right, we consider that this technique creates uncertainty and may promote litigation - both between private litigants and between private litigants and the Revenue which could readily be avoided by forethought and competent drafting.[2] It also seems unsatisfactory that a party to the contract (Debtor) may not know whether or not the contract is for the benefit of a third party. Subject to our consideration of the scope of revocation our tentative solution would not appear to interfere in any real sense with the parties' freedom to give effect to their true intentions. It would, moreover, harmonise with what we understand to be the present law

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[1] I.10.6.

[2] We accept that our tentative proposal would - especially in the context of deposit receipt cases - result (in Lord Dunedin's phrase) in a holocaust of accepted authorities in the law of Scotland. The fact that these authorities are so numerous and so difficult to reconcile probably indicates that the law on such cases has fostered ambiguity.

on Jus Quaesitum Tertio in cases where it is clear that parties are contracting expressly for the benefit of a Tertius rather than merely transferring property or a right into his name.

26. We therefore propose provisionally that where a contract provides without qualification or reservation for the transferring of property or the conferring of rights in the name of third parties, such third parties shall be entitled to claim the property or rights notwithstanding the fact that a contracting party retains a document of title or evidencing title. We invite comment.

4. Revocation, Cancellation and Variation

27. Since strictly speaking jus quaesitum tertio has the technical meaning that the third party has acquired a right in his favour, we agree with Mr J T Cameron[1] that "A revocable jus quaesitum is a contradiction in terms". The term "revocation" seems appropriate in the context of offers which until accepted do not create rights. If, therefore, contracting parties do not intend to confer rights upon Tertius forthwith by their agreement, they may, as Stair envisaged,[2] make acquisition of rights conditional on the acceptance of Tertius. In this context "revocation" of offer is an appropriate category. Normally, however, the acquisition of rights by Tertius as a result of a contract in his favour does not in Scots law depend upon his acceptance. The scope of "revocation" is (on one view) consequently more restricted in Scots law than in systems which require acceptance or its equivalent as a pre-condition of constituting an enforceable right in favour of Tertius.[3]

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[1] 1961 Jur. Rev. 103 at p.118.

[2] I.10.6.

[3] See Millner (1967) 16 I.C.L.Q. 446; Shalev (1976) 11 Is.L.R. 315, esp. p.335.

28. Consequently in Scots law the question of revocability has focussed on the time of formation and the terms of contracts containing articles in favour of third parties. It may well be that Professor MacCormick is right in holding that the main controversy between the schools of Stair and Dunedin regarding jus quaesitum tertio is ultimately a matter of presumption:[1]

> "...it follows that the difference between Stair and Dunedin is in effect a difference about presumptions. No doubt they are separated by a great theoretical gulf, but what that theoretical gulf comes down to in the ordinary world of lawyers is this: should terms in favour of third parties be presumed to be irrevocable unless a contrary intention be proved, or should they be presumed to be revocable in the absence of a proven intention to treat them as irrevocable?
>
> Here then we have isolated the crucial question which ought to occupy the mind of the law reformer. It is as plain as a pikestaff that a legal system which recognises the jus quaesitum tertio at all must plump for one or other of these presumptions. What is more, the two presumptions between them exhaust the whole field; we must have one or the other, we cannot have both, and there is no middle way between them. So our question is an agreeably direct one: which of these exhaustive and mutually exclusive presumptions shall we choose?"

29. MacCormick considered[2] that Stair's view is that parties who agree by contract to confer a benefit on a tertius do by so agreeing bind themselves irrevocably in law unless they expressly, or by necessary implication, preserve their freedom to revoke. This he thought is consistent with the general principle that agreements seriously intended are

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[1] 1970 Jur. Rev. 228 at pp.236-7.

[2] op. cit. p.237.

binding in law. He discusses two English cases, Scruttons Ltd v. Midland Silicones Ltd[1] (which was concerned with entitlement of a third party to benefit by an exemption clause which would have rationalised the burden of insurance) and Beswick v. Beswick[2] (in which a husband had contracted for a provision to his wife after his death). He concluded that[3]

> "Cases such as these do not suggest that either commercial expediency or individual justice is secured by excluding third parties from taking the benefit of others' contracts. No more do they suggest that either of these values is very greatly advanced if there be a rule that terms in favour of third parties are to be treated as revocable in the absence of a proven contrary intention."

30. We are inclined to share these particular views of MacCormick's. Third party beneficiaries are not necessarily "happy recipients of a pure windfall" - an argument sometimes advanced, especially in legal systems which require consideration in contract, in support of the view that contracting parties should be free to revoke or cancel provisions in favour of third parties. This argument has little relevance for a legal system such as Scotland which recognises the binding force of a unilateral gratuitous promise.

31. Dr Shalev[4] after close study of the main Continental European systems observes:

> "The various provisions in Continental codifications, regulating the question of revocability, are an attempt to achieve an equilibrium between protection of the third party beneficiary's reliance interest, and preserving the autonomy of the contracting parties. Usually this conflict between the protection of the autonomy of will and the reliance interest is resolved by providing for a stage in the life of the contract after which the right becomes irrevocable."

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[1] [1962] A.C. 446.

[2] [1968] A.C. 58.

[3] op. cit. p.239.

[4] Shalev (1976) 11 Is.L.R. 315 at p.335.

In some systems, acceptance by the tertius is required; and in others the tertius has to act in reliance on the promise.

32. In Scots law, as we have already discussed, it is possible (at least in some cases) to create an irrevocable jus quaesitum tertio by the contract itself; and such provisions may be made in favour of tertii who are not yet in existence[1] or are incapaces, and thus could not found on a "reliance interest". Unlike Professor MacCormick we take the view at present that questions of revocability or, more correctly, cancellation of jura quaesita tertii should not depend upon presumptions but upon the terms of the contract which confers these rights. This would give great freedom to the contracting parties to provide expressly for cancellation or variation of third party rights (as illustrated in para. 25 above). In particular, Stipulator might agree with Debtor that in certain events - e.g. rejection by Tertius- Stipulator should himself be entitled to claim the performance by which the contract envisaged that Tertius should benefit. However, unless the contracting parties do so provide, we suggest that jura quaesita tertius created by contract should

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[1] This is a doctrine of particular value e.g. in the case of a provision in favour of a Tertius which has not come into existence. In Scots law a limited company has no title to sue on contracts made on its behalf before it came into existence. There cannot be an agent for a non-existent principal: Tinnevelley Sugar Refining Co. v. Merrilees, Watson & Yaryan Co. (1894) 21R. 1009. To avoid these awkward consequence the Appellate Division in South Africa has treated persons acting for unformed companies not as agents but as principals in a stipulatio alteri situation - though this has been criticised as distorting the normal principles. See McCulloch v. Fernwood Estate 1920 A.D. 204; A M Honoré South African Law of Trusts 2nd ed. p.56 et seq.

be irrevocable,[1] Moreover, the obligation should be exigible at the time fixed by the contract, of, if no such time were fixed, from the date of the contract creating the obligation in favour of the third party. Notification, delivery or an equivalent should not be required to constitute the third party's right.[2] It would thus be apparent on the face of the contract itself whether rights had been unquestionably conferred on third parties or whether the contracting parties had conferred merely an expectation of rights while retaining by agreement ultimate control over their transfer in one or both of the contracting parties. The position for purposes, for example, of capital gains tax, would be determined one way or the other at any particular time.[3] We should, in short, adopt in modern language Stair's own formulation.

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[1]We accept that there would no doubt be instances when, notwithstanding the irrevocable nature of the third party's right, the contracting parties might agree privately to suppress it if they believed that the third party was unaware of its existence. Such conduct would be comparable to a situation in which members of a deceased's family clandestinely destroyed his will if they found its contents unfavourable. However, matters in a jus quaesitum situation are not within the power of one party only. As Lord Deas observed in Rust v. Smith (1865) 3 M.378 at pp.382-3 "...it must be remembered that the disposition was granted not by the husband himself, but by a third party. It was not left within the power of the husband and wife to alter the state of matters by merely destroying the deed, as they might have done had it been a deed granted by the husband."

[2]This is the opposite approach to that favoured by the Law Revision Committee in England (6th Interim Report 1937) which recommended that unless otherwise provided in the contract it might be cancelled by mutual consent of the contracting parties.

[3]We do not explore the problem of how a contracting party might reduce his own liability to capital transfer tax by providing for payment to third party beneficiaries. The doctrine of Gourley v. British Transport Commission [1956] A.C. 185 regarding tax deductions from damages is difficult to apply in a jus quaesitum situation - see Smith Short Commentary pp.864-5 and Appendix to Sixth Report of the Law Reform Committee for Scotland (Cmnd. 635/1959), and we do not know the extent to which the framers of fiscal legislation take the doctrine of jus quaesitum tertio into account, since it has no application in English law.

33. We propose provisionally

"If any contract contains a term in favour of a third party, then unless the parties provide in their contract for the cancellation or variation of that term, it shall be irrevocable except with the consent of the third party. The obligation in favour of that party shall be exigible at the time and under the conditions fixed in the contract itself unless it is intended to be exigible as from the time of contract. The third party shall have a right to require the co-operation of the contracting parties in proving the term in his favour and also a right to require them to perform the contract as agreed."

5. Contractual Stipulations for Third Parties and Beneficiaries under Trusts.

34. We are in this Memorandum concerned with the law of Obligations and not with the law of Trusts. However, we cannot altogether overlook the fact that persons wishing to make provision for others by inter vivos arrangement of their affairs may select contractual machinery or the machinery of trust. Many authorities are cited as of equal relevance in cases arising under the category of obligations or under the category of trusts.[1] The term jus quaesitum (jura quaesita) is encountered in the context of settlements under trusts, where it is contrasted with spes successionis.[2] English law uses the trsut concept to deal with problems which in Scotland can be solved by means of contractual stipulations in favour of third party beneficiaries, and cross-Border influences have indeed tended to introduce into Scottish practice English

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[1] e.g. Cameron's Trs. v. Cameron 1907 S.C.407.

[2] e.g. Lawson's Tr. v. Lawson 1938 S.C. 632 at p.648; Scott v. Scott 1930 S.C. 903 at p.917.

trust devices in such matters as mitigating the impact of fiscal legislation. We also note that in South African law the inter vivos trust settlement is in fact the contractual stipulatio alteri, and problems regarding revocability arise in that context.[1] One of the sources of Scottish trust law is also the law of contract, though trust law has developed beyond contractual categories.[2]

35. Two interrelated matters have frequently been considered both in the context of trust settlements and in that of contractual stipulations for the benefit of third parties - power of revocation and situations in which a purchaser of property with his own funds takes the disposition in the name of a third party but retains the deed in his own hands. A variant in the case of trust is where a person acquires property with his own funds, taking the disposition in his own name as trustee for a third party, and retains the disposition in his own hands.

36. There has been a considerable body of legal opinion associated with the views of Lord Dunedin in particular, as we have discussed, for the view that delivery or its equivalent, e.g. intimation, is necessary to constitute an irrevocable jus quaesitum tertio - especially where Stipulator has purchased property with his own funds and retains the documents of title in his own possession.[3] However, there is another line of authority which supports the view that, provided a contract clearly so provides, a valid and irrevocable jus quaesitum can be constituted without delivery,

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[1] e.g. Crookes N O v. Watson 1956 (1) S.A. 277 (A.D.); see generally A M Honoré op. cit. esp. p.348 et seq.

[2] See e.g. Wilson and Duncan, Trusts, Trustees and Executors p.8 et seq; T B Smith Trusts and Fiduciary Relationships in the Law of Scotland in Studies Critical and Comparative, p.198 et seq; Burgess "Thoughts on the Origin of the Trust in Scots Law" 1974 Jur. Rev. 196.

[3] see supra, paras. 13-22 and 27-33.

intimation or their equivalent.[1] This view has most recently been favoured, albeit obiter, in the House of Lords by Lord Reid in Allan's Trs. v. Inland Revenue.[2] In paragraphs 32 and 33 we have expressed a preference for this approach. Moreover, we have recommended provisionally[3] that in jus quaesitum tertio situations where Stipulator acquires property with his own funds, taking the disposition in the name of a third party, but retaining the deed in his own hands, unless the contract with Debtor makes clear that Tertius is not to benefit personally, he should do so. Situations in which a person cannot assert that he is the true creditor though he has taken title in the name of another have been described by Lord Sands as quaint.[4] The custodier of the deed under the present law cannot sue on it as it stands, but would require to obtain declarator of his right. We have proposed tentatively that this seemingly inconvenient device should cease to operate in jus quaesitum tertio situations.[5]

37. Although it may be that the device of taking title in another's name or in the name of one person expressly as trustee for another possibly creates difficulties in trust situations, we do not propose to examine them here. In general the conditions for creating a valid and irrevocable jus quaesitum tertio are different from those which may be

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[1] see supra, paras. 13-22 and 27-33.

[2] 1971 S.L.T. 62 at p.64; see also Lord Walker (dissenting) 1970 S.L.T. 73 at p.81.

[3] para. 26, supra.

[4] I R v. Wilson 1927 S.C. 733 at p.737. See A M Bell Lectures on Conveyancing, 3rd ed., p.108; Wilson and Duncan, Trusts, Trustees and Executors, p.34.

[5] see para. 26 supra.

required for creating a valid trust. For the former there must be at least two contracting parties who by their agreement intend to benefit the third party. Clandestine suppression of the obligation in favour of that party does not lie in the power of an individual.[1] On the other hand an individual may make himself trustee of his own property which must be manifested to have any effect.[2] If provision for others is made e.g. through insurance policies the situation is very different if the doctrine of jus quaesitum tertio is invoked as contrasted with the machinery of trust. As Lord Reid observed in Allan's Trs.:[3]

> "To have a jus quaesitum tertio the third party must have been given by the contract of the contracting parties a right to get something from one or both of them. But here the proceeds of the policy were to be paid to Miss Allan. The beneficiaries were given no right against the company: on the contrary the company having paid Miss Allan were freed from all liability to see that she paid the money to the beneficiaries. Any benefit to the beneficiaries flowed from the declaration of trust not from the terms of the contract."

38. In short, nothing which we have said about the constitution and revocability or otherwise of jura quaesita tertio created by contract is to be construed as applicable by analogy to trust situations. In these latter situations we envisage

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[1] See Rust v. Smith (1865) 3M. 378 per Lord Deas at pp.382-3. Though, of course, both contracting parties may unlawfully connive to suppress the agreement (as wrongdoers may suppress evidence in other situations) it is probable that even as a practical matter a party contracting to perform has an interest in maintaining the contract. However a person who transfers property rights to another (who is designated as trustee for a beneficiary) is not concerned with the transferee's fiduciary status nor with the interests of the beneficiary.

[2] see e.g. Allan's Trs. v. I.R. 1971 S.L.T. 62.

[3] 1971 S.L.T. 62 at p.64.

no change from the present requirements of the law which require delivery or its equivalent as essential for the effective creation of an inter vivos trust.[1]

6. Relation between the Right of Tertius and the Basic Contract.

39. In the preceding paragraphs we suggest that Tertius should have a right to require the contracting parties to perform the contract as agreed. By this we mean not only that they should fulfil their obligations to Tertius but also to each other. The main reason for so providing is to support the proposition, which has been seldom discussed in Scots law[2] that the right of the Tertius cannot prevail if defective performance of the contract which is basic to that right justifies one party in withholding performance or terminating the contract. Nor again can the jus quaesitum tertio prevail if the main contract is subjected to challenge on grounds of defect in formation. Lord Keith of Avonholm in the address already cited[3] noted that the Law Revision Committee in England had recommended the introduction of the principle of jus quaesitum tertio subject to the qualification that the tertius should be subject to any defences that would have been valid as between the contracting parties. He commented:

> "I am not aware of any case in Scotland where the first of these conditions has come up for consideration, but I see no reason in principle why it should not operate as part of the law of jus quaesitum. In

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[1] see recent discussion in e.g. Allan's Trs.; Kerr's Trs. v. I.R. 1974 S.L.T. 193.

[2] Bankton in a somewhat obscure passage (I.11.7) partly concerned with perfection of obligation (see Cameron 1961 Jur. Rev. 103 at p.111) observes "If the contract becomes void, by supervening accident, betwixt the parties contracters, the third parties interest, that depended on it, ceases."

[3] The Spirit of the Law of Scotland, at p.28.

Carmichael's case, for instance, if there had been some misrepresentation in the proposal made by the father to the insurance company discovered by the company after the son had acquired his jus quaesitum, there seems no good reason why it should not have had a good claim to set the contract aside."

40. We think that it might be wise to provide for the avoidance of doubt and provisionally propose that

"Any pleas available to a debtor against a creditor in connection with a contract which contains a term in favour of a third party shall also be available against that third party.[1] However, pleas available against the creditor which are not connected with the contract itself, such as compensation, shall not be available against the third party."

We invite comment.

7. Remedies of the tertius

41. In other situations in Scots law where an obligor has clearly bound himself - e.g. by unilateral binding promise - he could not avoid liability for performance conform to his obligation by pleading the gratuitous nature of his undertaking. As we have already considered third party beneficiaries are by no means always mere happy recipients of a windfall provided by a contract between others, but, even when they are, it is difficult to discern any valid reason why they should be treated differently from other creditors in obligations. Indeed the proposition that they should be treated differently might have seemed unstateable had not Gloag stated it.

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[1] The mere fact that a contract is not enforceable between the contracting parties does not necessarily preclude an enforceable claim by a tertius e.g. Love v. Amalgamated Society of Lithographic Printers 1912, 2 S.L.T. 50 and see para. 51 infra, et seq.

42. Professor Gloag asserted in his work on Contract[1]

> "A person who undertakes duties under a contract, and by failure to fulfil them properly causes loss, is not liable on the contract to a person with whom he did not contract, but on whom the loss has happened to light ...; all attempts in such cases to infer liability on the principle of jus quaesitum tertio have failed. That principle, though it may entitle a tertius to sue on nonfeasance of a contract, will not entitle him to damages for misfeasance, because the real foundation of his title to sue is that the debtor in the contract has agreed to be liable to him, and it is not to be presumed that the debtor in a contract has agreed to be liable to a tertius in respect of his defective performance."

He cited in support of this view inter alia the cases of Robertson v. Fleming,[2] Rae v. Meek,[3] Tully v. Ingram,[4] and Edgar v. Lamont.[5]

43. It would be a strange result if Debtor in a jus quaesitum tertio situation could with impunity tender shoddy goods, or tardy delivery or inefficient service and resist all claims for damages in respect of loss sustained. Part of the explanation for Gloag's statement may be due to

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[1] 2nd ed., p.239; see also Gloag and Henderson Introduction to the Law of Scotland, 7th ed., at p.97. The editors note that the author's view has been question by T B Smith Short Commentary p.782 et seq.

[2] (1861) 4 Macq.167.

[3] (1888) 15R.1033; (1889) 16R. (H.L.)31.

[4] (1891) 19R. 65.

[5] 1914 S.C.277.

the fact that he wrote before the decision in Donoghue v. Stevenson[1] had cleared the confusion which for a century had resulted from the partial introduction into Scots law of the fallacy of English law that because A owes a duty in contract to B he cannot owe a duty in delict to C. In fact, despite dicta from the cases Gloag cited which favour his view, they were strictly obiter. In none of the cases had parties contracted to confer an enforceable jus quaesitum tertio on the pursuers.[2] On the contrary the pursuer's attempt to establish such rights failed and they also failed to establish delictual liability based on culpa.

44. In the most recent edition of his Principles of Scottish Private Law Professor Walker observes[3]

> "Some cases have, however, been interpreted as laying down that a tertius cannot sue for damages for defective performance, but such cases are all instances of defective performance of contracts collateral to the contract or gift giving rise to the jus quaesitum, and not truly affecting that principle at all. There is no good reason why conferment of a jus quaesitum implies conferment of title to enforce performance, but not, as is said, title to recover damages for defective performance though this does not exlude possible claims of damages founded on delict."

45. We think that Walker states accurately what is in fact the law. If it were not, then Scots law would seemingly be alone, among those legal systems of the world which

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[1] 1932 S.C.(H.L.) 31. However, in the Sheriff Court case of Cullen v. McMenamin 1928 S.L.T. (Sh. Ct.) 2 it was held that a tertius could recover outlays incurred due to the defender's negligence.

[2] For discussion see e.g. T B Smith "Jus Quaesitum Tertio: Remedies of the 'Tertius' in Scots Law" in Studies Critical and Comparative esp. p.193 et seq; also Short Commentary p.782 et.seq. Lord Keith, The Spirit of the Law of Scotland p.28 refers to Smith and comments "An interesting and unsettled question is whether and how far the tertius could claim damages for non-performance or defective performance of the obligation undertaken for his benefit."

[3] 2nd ed., p.629.

recognise a doctrine of jus quaesitum tertio, to admit a claim for specific implement but to refuse damages for defective performance.[1] However, in view of the high reputation of Gloag's work on Contract, which has been frequently cited in the present context, we think that all possible doubts regarding liability for defective and delayed performance in jus quaesitum tertio situations should be resolved.

46. We propose that it should be enacted for avoidance of doubt that when parties contract to confer a benefit on a third party he should have the same rights of action as any other creditor against a party to the contract who fails to perform or tenders defective or delayed performance of his obligation to such third party.

8. Problems of Proof

47. The rules of evidence relating to proof in jus quaesitum tertio situations have not to our knowledge been closely examined. Writing in 1929 the Dean of Faculty (Condie Sandeman) observed[2]

> "In all the reported cases where a jus quaesitum was said to arise, the contracts have been reduced to writing, but there seems to be no sound reason why a jus quaesitum should not spring out of an oral agreement; subject, perhaps, to the condition that, as in the case of trusts, the constitution of the obligation in favour of the third party be proved by writ or oath."

In a footnote he hints at doubt as to the conjecture regarding writ or oath. We consider in some detail problem of proof of obligations in an accompanying Memorandum,[3] and suggest

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[1] Millner (1967) 16 I.C.L.Q. 446 at p.459.

[2] Jus Quaesitum Tertio in Encyclopaedia of the Laws of Scotland vol. 8 para. 1361.

[3] Memorandum No. 39, para. 53 et seq.

various possible solutions. Whatever solutions are ultimately adopted will, we trust, take into consideration the triangular nature of the jus quaesitum tertio relationship. Though the claim by Tertius is founded on pollicitations in his favour, his claim is dependent on the validity and satisfactory proof of the main contract. The benefits conferred on the third party may be gratuitous or may indirectly discharge onerous obligations. At all events they are linked to an onerous transaction, and we think should be viewed as part of such a transaction, and within the principle stated by Lord Kyllachy in Hawick Heritable Investment Bank v. Huggan[1]

> "...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 .... In such a case the whole transaction - unless heritable rights are affected - may, I think it is clear, be the subject of parole proof."

In short we think that if the main contract satisfies the rules of evidence, no special requirements of proof should be imposed on a third party seeking to enforce a benefit stipulated for his benefit in the contract.[2] We invite comment.

9. Title to Sue

48. We are unaware of clear authority on the question whether in a jus quaesitum tertio relationship, Stipulator, who has retained no personal patrimonial interest in performance, could raise an action against Debtor if the latter failed to implement his obligation to Tertius. If Stipulator had

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[1](1902) 5F. 75 at pp.78-9.

[2]Special rules, e.g. with regard to immoveables might, of course apply to the actual transfer of rights to the third party, and also if the contracting parties decided to offer rights to him conditional on his acceptance.

provided a counterpart (e.g. payment) for Debtor's performance, and Tertius rejected the benefit in his favour, Stipulator would presumably be entitled to claim on the principle recompense if Debtor was unjustifiably enriched. What, however, should be the situation (especially where Stipulator has provided a counterpart for Debtor's performance) if Tertius (though willing to receive the benefit) e.g. because of lack of means or ill health was reluctant to raise an action himself?

49. The Israel Contracts (General Part) Law 1973, s. 38 provides

> "The beneficiary's right shall not derogate from the creditor's right to demand from the debtor the fulfilment of the obligation in favour of the beneficiary."

It seems to us that there might be advantages in recognising expressly such title to sue, but make no recommendation to that effect at this stage. We invite comment.

50. If a Stipulator, having no personal patrimonial interest in performance, was recognised as having a right of action to enforce term in a contract made in favour of Tertius, we envisage that he could only do so in a representative capacity i.e. as agent of Tertius - and therefore not against the wishes of Tertius. Any claim which Stipulator might have on the principle of causa data causa non secuta would not arise from the contract itself - though, of course, the contract itself could expressly empower Stipulator to sue an action for performance to himself if it was not for any reason rendered to Tertius.

10. Collective agreements.

51. We discuss briefly in another Memorandum[1] the status of collective agreements, and concluded that though such agreements might constitute legally binding contracts at

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[1]Memorandum No. 36, para. 71.

common law in Scotland, the prevailing tendency of regulating such agreements by statute is likely to continue. We made no recommendation for clarifying or altering the law in the context of that Memorandum which is concerned with the general law of Obligations. To suggest statutory amendment of the law regarding collective agreements would create an unacceptable risk that action on our main proposals would be deferred until social, political and economic considerations had been assessed in the context of collective agreements. Present legislation in this field indicates little (if any) awareness of the Scottish law of Obligations and was not seemingly drafted with that law in mind.[1]

52. We are bound, however, to take note of recent comment on the possible role of the Scottish doctrine of jus quaesitum tertio in the context of collective agreements, fair wages clauses and employment relationships. Mr Casey has argued a persuasive case, against the background of the Industrial Relations Act 1971, for the proposition[2] that

> "there may be one situation - exclusive to Scotland - where a collectively agreed term can override a term individually negotiated. If a worker can benefit as a tertius under the agreement then the effect will be that the wages collectively agreed will be those to which he is entitled, despite anything to the contrary in his contract of employment."

The fact that a collective agreement may be unenforceable between the contracting parties does not necessarily (as Casey points out) exclude the right of a tertius to claim a benefit in his favour, and this proposition is vouched for by Scottish

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[1] Cf. fiscal legislation referred to in para. 32 supra.

[2] "Collective Agreements : Some Scottish Footnotes" 1912, 2 S.L.T. 50.

authority.[1] Casey also canvasses the "possibility" that under Scots law an employee could benefit under a "Fair Wages clause" inserted in a contract between a government department and a contractor or in a local authority contract.

53. In 1972 Professor Kahn Freund had discounted the relevance of the doctrine of jus quaesitum tertio in the context of collective agreements, and pointed out that invocation of this doctrine in that context had fallen out of favour in jurisdictions which had formerly invoked it.[2] He assumed - erroneously as Casey established[3] - that in Scotland "no one seems as yet to have thought of this ingenious idea."

54. Mr R L C Hunter has written more recently on the employment relationship and jus quaesitum tertio against the background of the Trade Union and Labour Relations Act 1974.[4] He agrees with Mr Casey that the reasons for judicial discouragement of the rights of employees to sue as tertii no longer apply. Section 4(4) of the Trade Union Act 1871 has been repealed, while collective agreements are now normally regarded as reasonable between the parties and in the public interest. Hunter and Casey are also agreed that the mere fact that a statute makes an agreement unenforceable does not necessarily mean that it is not a contract. Hunter does not accept that the doctrine of "intention to create legal relations" - which is so prominent in English law - is part

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[1] Love v. Amalgamated Society of Lithographic Printers 1912, 2 S.L.T. 50.

[2] Labour and the Law pp.73-74.

[3] 1973 Jur. Rev. 22 at p.37; see also Citrine Trade Union Law (3rd ed) p.137; Eunson v. Johnson & Greig 1940 S.C. 49; Downie v. Cowie & Son (1935) 51 Sh. Ct. Rep. 212 (as discussed and analysed by Mr Casey).

[4] "Collective Agreements, Fair Wages Clauses and the Employment Relationship in Scots Law" 1975 Jur. Rev. 47.

of Scots law. In his view collective agreements are contracts under Scots common law which, normally, however, contain an implied term that neither contracting party will enforce them against the other by legal process:[1] "At common law, therefore, there is here no obstacle to the rights of employees as tertii in collective agreements." Moreover, the language of s. 18(1)[2] of the Trade Union and Labour Relations Act 1974, which refers to "legally enforceable contracts" seems to imply that there are contracts which are legally unenforceable.

55. However, Mr Hunter notes other legal and practical obstacles to the application of the doctrine of jus quaesitum tertio to the circumstances of collective agreements. It is an accepted rule that to bring the doctrine into operation both contracting parties must have intended to confer on the tertius a right to sue. It may well be difficult to establish such a common intention in collective agreements relating to employment.[3] Moreover, collective agreements frequently impose obligations on employees, and the doctrine of jus quaesitum tertio does not extend to the imposing of duties on tertii. (Though, of course, the exigibility of rights conferred may be subjected to performance of potestative conditions). On the whole, Mr Hunter considers collective agreements an unsuitable field for the application of the doctrine of jus quaesitum tertio.

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[1] 1975 Jur. Rev. at p.53.

[2] "... any collective agreement made before 1st December 1971 or after the commencement of this section shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement -

(a) is in writing, and

(b) contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract."

[3] We do not discuss Hunter's point regarding abrogation or modification of the rights of tertii. See para. 32 supra.

56. On the one hand we are inclined to accept the soundness of the proposition that a tertius may enforce a right conferred on him by a contract (including a collective agreement) which is unenforceable at common law or by statute. The language of the 1974 Act is very different from that of, for example, the Resale Prices Act 1976 s. 1 which makes collective agreements (of the type with which that Act is concerned) unlawful. On the other hand, we think that it will rarely be the case - especially if a collective agreement is negotiated in London on a national basis - that both contracting parties would intend to confer on employees a right to sue as tertii in Scotland while their English counterparts had no such right. We agree with Mr Hunter that "fair wages clauses" are often too vague to be construed as intending to confer the right to sue on an employee. We see no convincing reason for treating application of the doctrine of jus quaesitum tertio differently in the context of collective agreements than in other contexts in the law of Obligations. However, we think that employees will usually fail to establish that both contracting parties intended to confer on them rights to sue as tertii. We invite comment.

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

1. We would welcome comment on, or criticism of, our analysis of the nature in Scots law of the right of a tertius arising from a contract to confer a benefit upon him. (Paras. 10-12).

2. When a contract provides that payment or performance shall be made to some person who is not a party to the contract, that person should be regarded as a third party beneficiary unless the contract provides otherwise either expressly or by necessary implication. (Paras. 23-24).

3. When a contract provides without qualification or reservation for the transferring of property or the conferring of rights in the name of third parties, such third parties should be entitled to claim the property or rights notwithstanding the fact that a contracting party retains a document of title or evidencing title. (Paras. 25-26).

4. If any contract contains a term in favour of a third party, then unless the parties provide in the contract for the cancellation or variation of that term, it should be irrevocable except with the consent of the third party. The obligation in favour of that party should be exigible at the time and under the conditions fixed in the contract itself unless it is intended to be exigible as from the time of the contract. The third party should have a right to require the co-operation of the contracting parties in proving the term in his favour and a right to require them to perform the contract as agreed. (Paras. 27-33).

5. It should be provided, for the avoidance of doubt, that any pleas available to a debtor against a creditor in connexion with a contract which contains a term in favour of a third party should also be available against that third party. Pleas available against the creditor which are not connected with the contract itself, such as compensation, should not be available against the third party. (Paras. 39-40).

6. It should be provided, for the avoidance of doubt, that when parties contract to confer a benefit on a third party he should have the same rights of action as any other creditor against a party to the contract who fails to perform or tenders defective or delayed performance of his obligation to the third party. (Paras. 41-46).

7. If the contract between the stipulator and the debtor satisfies the requirements of the law of evidence regarding proof of contracts, no special or additional requirements of proof should be imposed upon a third party seeking to enforce a benefit stipulated in his favour in that contract. (Para. 47).

8. Should the stipulator have a title to sue the debtor to enforce performance by the latter in favour of the third party? (Paras. 48-50).

9. There is no convincing reason for treating application of the doctrine of jus quaesitum tertio differently in the context of collective agreements from its application in other contexts in the law of obligations. (Paras. 51-56).

APPENDIX A

Stair's Institutions of the Law of Scotland, 2nd ed. (1693), paras. I.10.3 - I.10.6.

Again, we muſt diſtinguiſh betwixt *Promiſe*, *Pollicitation*, or *Offer*, *Paction* and *Contract*; the difference amongſt which, is this, that the Obligatory Act of the Will, is ſometime abſolute and pure, and ſometime condititional, wherein the condition relates either unto the Obligation it ſelf, or to the performance, ſuch are the ordinar Conditional Obligations, which, though they be preſently (upon the granting thereof) binding, and cannot be recalled; yet they are only to be performed, and have effect, when the condition ſhall be exiſtent, but when the condition relateth to the conſtituting of the Obligation, then the very Obligation it ſelf is pendent, till the condition be purified, and till then it is no Obligation; as when any offer or tender is made, there is implyed a Condition, that before it become Obligatory, the party to whom it is offered, muſt accept, and therefore, an offer by a Son, to pay a Debt due by his Mother, made known to her accepted at ſuch a time, and in ſuch a place, was found not Obligator after the

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Mothers death, unleſs it had been ſo accepted, *June* 24. 1664: *Allan* contra *Collier*. So then, an offer accepted is a Contract, becauſe it is the Deed of two the Offerer and Accepter.

4. But a *Promiſe* is that which is ſimple and pure, and hath not implyed, any Condition, the acceptance of another; in this *Grotius* differeth, *de jure belli, lib. 2. cap.* 11. §. 14. Holding, *that acceptance is neceſſar to every Conventional Obligation in equity, without conſideration of poſitive Law*; and to prevent that obvious objection that Promiſes are made to Abſents, Infants, Idiots, or perſons not yet born, who cannot accept; and therefore, ſuch Obligations ſhould ever be Revockable, till their acceptation, which in ſome of them can never be: He anſwereth, that the Civil Law only withholdeth, that ſuch Offers cannot be Revocked, until theſe be in ſuch a capacity, as to accept or refuſe. Promiſes now are commonly held Obligatory, the Canon Law having taken off the exception of the Civil Law, *de nudo pacto*; It is true, if he in whoſe favours they are made accept not, they become void, not by the Negative non-acceptance, but by the contrair Rejection: For as the Will of the Promiſer conſtitutes a Right in the other; ſo the others Will by Renouncing, and rejecting that Right, voids it, and makes it return. This alſo quadrats with the nature of a Right, which conſiſteth in a *Faculty* or *Power* which may be in theſe, who exerce no act of the Will about it, nor know not of it; ſo Infants truly have right as well as Men, though they do not know, nor cannot exerce it. Promiſes with us are not probable by Witneſſes, though within an hundred Pounds, *July* 3. 1668. *Donaldſon* contra *Harrower*. *February* 9. 1672. *Wood* contra *Robertſon*. The like was found of a Promiſe ingaging for a Party, who bought Goods, not being a Partner in the Bargain; For Promiſes, when they are parts of Bargains about Moveables, are probable by Witneſſes, *Jan.* 19. 1672. *Dewar* con. *Brown*. And the reaſon that our Cuſtom gives no legal Remeid for performance of Promiſes of things of importance by Witneſſes, is the ſame that the *Roman* Law gave no Action upon naked Pactions, to prevent the miſtakes of Parties and Witneſſes in Communings, that they ſhould uſe a ſet form of words in *Stipulation*; ſo now when Writ is ſo ordinar, we allow no Proceſſes for Promiſes, as a Penalty againſt theſe who obſerve not ſo eaſie a method: yet the Promiſe obliges the Conſcience, and the honeſty of the Promiſer.

5. It is likewiſe the opinion of *Molina*, *cap.* 263. and it quadrats to our Cuſtoms, that when Parties Contract, if there be any Article in favours of a third Party, at any time, *eſt jus quæſitum tertio*, which cannot be recalled by both the Contracters, but he may compel either of them to exhibit the Contract, and thereupon the obliged may be compelled to perform. So a Promiſe, though gratuitous, made in favours of a third Party, that party, albeit not preſent, nor accepting, was found to have Right thereby, *Had.* November 25. 1609. *Achinmontie* contra *Hay*. Promiſes dependent upon acceptance, may either be made by way of Offer, or when the Promiſe requires ſome things to be done on the part of him, to whom it is made, not as a condition annexed only to the performance; for then the Promiſe is preſently Obligatory, though the effect be ſuſpended, till the condition exiſt, but if the Condition be ſo meant, or expreſt, that it muſt preceed the Obligation it ſelf, as in mutual Contracts, the one party ſubſcribing, is not obliged untill the other alſo ſubſcribe, or that the other party accept or conſent: And ſo a Contract being Regiſtrat, was found orderly proceeded, though he who Regiſtrated it had not ſubſcribed, ſeing at the diſcuſſing, he did ſummarly conſent to the Regiſtration thereof againſt himſelf, *February* 9. 1627. *M'duff* contra *Mcculloch*. Hence is our vulgar diſtinction betwixt Obligations and Contracts, the former being only where the Obligation is μονομερης on the one part; the other where the Obligation is συνάλλαγμα Obligatory on both parts, whereby both Parties are obliged to mutual Preſtations.

6. *Pactum*, or a Paction, in the Law is defined, *duorum pluriumve in idem placitum conſenſus atq; conventio*, *l.* 1. §. 2. *ff. de pactis*, & *l.* 3. *ff. de Pollicit.* It is the conſent of

of two or more parties, to ſome things to be performed by either of them; for it is not a Conſent in their Opinions, but a conſent in their Wills, to oblige any of them; and it is much to be conſidered, whether the conſent be given, *animo obligandi*, to oblige or not, for the ſame words will ſometime be interpret as obligator, and ſometimes not, according to the circumſtances; as if it be jeſtingly or merrily expreſt, whatſoever the words be, there is no Obligation; becauſe thereby it appears there is no mind to oblige; or if the words be in Affairs, or Negotiations, they are interpret obligator, though they expreſs no obligation, but a Futurition, which otherways would import no more than a Reſolution, as *Titius* is to give *Mevius* an hundred Crowns, in any matter of Negotiation, this would be obligator; but otherways it would be no more but an expreſſion of *Titius* his purpoſe, ſo to do; yet becauſe it is inward and unknown, it muſt be taken by the words or other ſigns; ſo if the words be clearly Obligator and ſerious, no pretence, that there was no purpoſe to oblige, will take place; if the promiſe be pendent upon acceptation, and no more than an Offer, it is imperfect and ambulatory, and in the power of the Offerer, till acceptance, and if he dy before acceptance, it is Revocked as a Commiſſion or Mandat, which neceſſarly imports acceptance, and expires by the Mandator's death, *morte mandatoris perit mandatum*, ſo acceptance cannot be by any third party, unleſs he have warrand for that effect; and ſo if a promiſe be made by one to another, in favours of a third, importing the acceptance of that third, it is pendent and revockable by theſe Contracters, till the third accept.

APPENDIX B

Extract from "Molina, Stair and the Jus Quaesitum Tertio" by Dr A F Rodger, 1969 Jur. Rev. 128 - 140.

MOLINA, STAIR AND THE *JUS QUAESITUM TERTIO*

(continued)

III

In Part II of this article * we decided that the clue to Stair's meaning was to be found in Molina, *Disputatio* 263 but his reference to Molina cannot be properly interpreted without a preliminary analysis of the structure of Stair 1.10.3–5:

> " 3. Again, we must distinguish betwixt *Promise, Pollicitation,* or *Offer, Paction* and *Contract*; the difference amongst which, is this, that the Obligatory Act of the Will, is sometime absolute and pure, and sometime conditional, wherein the condition relates either unto the Obligation it self, or to the performance, such are the ordinar Conditional Obligations, which, though they be presently (upon the granting thereof) binding, and cannot be recalled; yet they are only to be performed, and have effect, when the condition shall be existent. but when the condition relateth to the constituting of the Obligation, then the very Obligation it self is pendent, till the condition be purified, and till then it is no Obligation; as when any offer or tender is made, there is implyed a Condition, that before it become Obligatory, the party to whom it is offered, must accept, and therefore, an offer by a Son, to pay a Debt due by his Mother, made known to be accepted at such a time, and in such a place, was found not Obligator after the Mothers death, unless it had been so accepted, *June* 24, 1664: *Allan* contra *Collier*. So then, an offer accepted is a Contract, because it is the Deed of two, the Offerer and Accepter.
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> 4. But a *Promise* is that which is simple and pure, and hath not implyed, as a Condition, the acceptance of another; in this *Grotius* differeth, *de jure belli, lib. 2. cap.* 11. §. 14. Holding, *that acceptance is necessar to every Conventional Obligation in equity, without consideration of positive Law;* and to prevent that obvious objection, that Promises are made to Absents, Infants, Idiots, or persons not yet born, who cannot accept;

* See *ante* p. 41.

and therefore, such Obligations should ever be Revockable, till their acceptation, which in some of them can never be: He answereth, that the Civil Law only withholdeth, that such Offers cannot be Revocked, until these be in such a capacity, as to accept or refuse. Promises now are commonly held Obligatory, the Canon Law having taken off the exception of the Civil Law, *de nudo pacto*; It is true, if he in whose favours they are made accept not, they become void, not by the Negative non-acceptance, but by the contrair Rejection. For as the Will of the Promiser constitutes a Right in the other; so the others Will by Renouncing, and rejecting that Right, voids it, and makes it return. This also quadrats with the nature of a Right, which consisteth in a Faculty or Power, which may be in these, who exerce no act of the Will about it, nor know not of it, so Infants truly have right as well as Men, though they do not know, nor cannot exerce it. Promises with us are not probable by Witnesses, though within an hundred Pounds, *July* 3. 1668. *Donaldson* contra *Harrower*. *February* 9. 1672, *Wood* contra *Robertson*. The like was found of a Promise ingaging for a Party, who bought Goods, not being a Partner in the Bargain; For Promises, when they are parts of Bargains about Moveables, are probable by Witnesses, *Jan.* 19. 1672, *Dewar* con. *Brown*. And the reason that our Custom gives no legal Remeid for performance of Promises of things of importance by Witnesses, is the same that the *Roman* Law gave no Action upon naked Pactions, to prevent the mistakes of Parties and Witnesses in Communings, that they should use a set form of words in Stipulation; so now when Writ is so ordinar, we allow no Processes for Promises, as a Penalty against these who observe not so easie a method: yet the Promise obliges the Conscience, and the honesty of the Promiser.

5. It is likewise the opinion of *Molina, cap.* 263. and it quadrats to our Customs, that when Parties Contract, if there be any Article in favours of a third Party, at any time, *est jus quaesitum tertio*, which cannot be recalled by both the Contracters, but he may compel either of them to exhibit the Contract, and thereupon the obliged may be compelled to perform. So a Promise, though gratuitous, made in favours of a third Party, that party, albeit not present, nor accepting, was found to have Right thereby, *Had. November* 25, 1609. *Achinmoutie* contra

> *Hay.* Promises dependent upon acceptance, may either be made by way of Offer, or when the Promise requires some things to be done on the part of him, to whom it is made, not as a condition annexed only to the performance, for then the Promise is presently Obligatory, though the effect be suspended, till the condition exist, but if the Condition be so meant, or exprest, that it must preceed the Obligation it self, as in mutual Contracts, the one party subscribing, is not obliged untill the other also subscribe, or that the other party accept or consent. And so a Contract being Registrat, was found orderly proceeded, though he who Registrated it had not subscribed, seing at the discussing, he did summarly consent to the Registration thereof against himself, *February* 9. 1627, *Mcduff* contra *Mcculloch.* Hence is our vulgar distinction betwixt Obligations and Contracts, the former being only where the Obligation is μονοπλευρος on the one part; the other where the Obligation is δευπλευρος Obligatory on both parts, whereby both Parties are obliged to mutual Prestations."

As far as I can discover it was Professor Smith [1] who first drew attention to the fact that Stair's discussion of *jus quaesitum tertio* in 1.10.5 is somehow connected with his discussion of unilateral promises. Mr. Ashton-Cross adopted the same approach.[2] The importance of Smith's observation cannot be exaggerated and this remains true even although we shall show that the subject is infinitely more complicated than has been assumed up till now.

As a first step, we must clear up a matter of terminology and by and large acquit Stair of having perpetrated a blunder of the first magnitude. The point concerns his use of the term " pollicitation." The correct use of the term pollicitation (in Latin, *pollicitatio*) is to describe the type of promise which does not require acceptance. This was how the term was used in Roman law where the institution was recognised only to a very slight extent.[3] Stair's usage, it is said, was different and incorrect. The passage in dispute occurs at the beginning of 1.10.3 where Stair says " Again, we must distinguish betwixt promise, pollicitation or offer, paction and contract. . . ." On this Brodie comments in the fourth edition, " *Pollicitation* is synonimous with *promise*, yet the author makes it so with *offer*.

[1] 1956 J.R. 21, now *Studies*, p. 197.
[2] 1957 J.R. 138 at 141 *et seq.*
[3] See Buckland, *A Textbook of Roman Law* (3rd ed. edited by Stein, Cambridge, 1963), p. 457, n. 11.

The original title to section iii is, Pollicitation or offer, and its effects. The same title was continued by the last editor." Brodie changed the title (which I shall call the "rubric") to "Offer, and its effects." In other words, Stair seems to be making pollicitation the equivalent of offer, when in fact it should be the type of promise which does not require acceptance. Such a usage would be wrong or at the very best perverse. Refusing to follow what appears to be Stair's view in this matter, Smith has recently reasserted the correct use of the term pollicitation.[4]

Stair made no such mistake. Once more we can look at the second edition where the text of 1.10.3 runs "Again, we must distinguish betwixt *Promise, Pollicitation,* or *Offer, Paction* and *Contract. . . .*" There is a comma between "*Pollicitation*" and "or *Offer.*" Hence Stair is not giving them as equivalents: rather they are two different kinds of *Promise*—promises are to be subdivided into two categories, pollicitations and offer promises. It was the omission of the vital comma by later editors which led to the confusion. This omission may well have been prompted by the rubric which also elides pollicitation and offer. At all events that rubric made matters worse, but, as will shortly be seen, the rubric itself is spurious. For the moment, it is enough to say that Stair used the term pollicitation correctly. It is indeed unthinkable that a man so well versed as he in the Civilian writers should have made so elementary a mistake.

In order to understand Stair properly, we must go back to the manuscripts and concentrate our attention on the portion of Stair's text which comprises 1.10.3–5 in the printed editions, *i.e.*, from "Again, we must distinguish" down to "are obliged to mutual Prestations." (In order to try to keep the length of this article within reasonable bounds, I am obliged to omit any details which are not absolutely necessary.) On turning to the manuscripts we discover that the only manuscript which divided Stair's text up in the form taken by the printed editions is Adv.MS.25.1.13, although Adv.MS.25.3.2 has a roughly similar scheme. All the other manuscripts have under a rubric "distinctione of offer promiss and pactione" (or something very similar) a long paragraph which includes the material which now forms 1.10.3–5. It follows that only the two manuscripts which have the odd division into short paragraphs

[4] *Studies*, p. 175. In his *Short Commentary on the Law of Scotland* (Edinburgh, 1962), p. 745, n. 16, Smith points out that even Lord Justice-Clerk Inglis himself was led astray on this matter. See *Macfarlane* v. *Johnston* (1864) 2 M. 1210 at 1213.

need to provide a rubric for these paragraphs. Hence the troublesome rubric of 1.10.3 of the printed editions must also be derived from one or other of these manuscripts. Adv.MS.25.3.2 has " policitatione and offer and its effects " which is close to the printed version, but Adv.MS.25.1.13 has the offending rubric precisely, " Policitation or offer and its effects." When we find that both the rubrics and the arrangement of the printed version and Adv.MS. 25.1.13 correspond closely in this way, we can deduce that it is likely that on these points at least, the printed version is derived from Adv.MS.25.1.13. This is the manuscript which the editors of the third edition called Manuscript D. In the present state of our knowledge, it is idle to speculate on why this manuscript was chosen. At the same time, it may be noted that the rubrics in this manuscript are not found above the titles to which they relate, as they are in the other manuscripts. In this particular manuscript all the rubrics are gathered together at the front to form a sort of table of contents. Such an arrangement might have advantages for someone preparing an edition for publication.

What is important for our purposes is that the original arrangement must have been that with the long paragraph embracing what appears in the printed versions as 1.10.3–5. We cannot assume this just because more manuscripts have that arrangement—the original might still be preserved in one of the two odd ones. Any argument along these lines would require a systematic study of the manuscripts and this we do not have. The way we can detect that the long paragraph is the original arrangement is by considering the argument of the passage. When this is done we see that the argument runs as an entity through this section and that the paragraphing of the printed text cuts across it in a nonsensical fashion. This in turn means that it was the person responsible for this nonsensical paragraphing who probably devised the preposterous rubric of 1.10.3. I cannot believe that this person was Stair himself—even though Stair must apparently have been silly enough not to notice or not to bother that his work was being marred in this way. He should have changed it in the second edition at least. He is, alas, not entirely without blame in these matters.

The rubric in the manuscripts explains the theme: " distinctione of offer promiss and pactione." The opening words of the section take us a little further by subdividing promises into pollicitations and offers. Stair then says that the obligatory act of the will can be

either absolute and pure or conditional. If conditional, the condition can be either a condition relating to the obligation itself or to the performance. If it relates to the performance, then the obligation does not come into existence until the condition occurs. As an example of this second type of conditional promise, Stair gives an offer or tender: "there is implyed a Condition, that before it become Obligatory, the party to whom it is offered, must accept." In the printed version he adds an illustration from the case of *Allan v. Collier*, but this is not found in the manuscripts.

So far then, Stair has done just what he set out to do. He has distinguished between obligatory acts of the will which are binding straightaway and obligatory acts of the will which are binding only on the occurrence of a condition. An example is the offer which requires acceptance. This analysis by Stair serves as an introduction to the rest of his account, which is based on it.

At the place where the printed versions begin 1.10.4, Stair starts considering what we call pollicitations. "But a *Promise* is that which is simple and pure, and hath not implyed, as a Condition, the acceptance of another. . . ." Here, as is well known, Stair holds that a promise not requiring acceptance can create an obligation at civil law, *i.e.*, he recognises the validity of pollicitations. This he does expressly against the authority of Grotius [5] and Stair's arguments against him continue in the printed versions down to the words "as to accept or refuse." In the manuscripts, he added another argument which has been suppressed. It ran on immediately after "refuse" and in fact the result was an anacoluthon: "and yet himselfe acknowledges that there may be efficacious promises betwixt diverse persones and nationes not subject to ane (?) positive law therefor the instance does well conclude that promises are obligatorie simple." [6] That particular argument has been taken out and in its place we have the next sentence "Promises are commonly held Obligatory, the Canon Law having taken off the exception of the Civil Law, *de nudo pacto*. . . ." This sentence is not found in the manuscripts and is besides not particularly clear, but presumably it refers to the development of the idea that a promise can be binding even without a preceding question to make up a stipulation.[7]

[5] On Grotius' attitude and its antecedents, see M. Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen* (Cologne, Graz, 1959).

[6] In default of any scientific study of the manuscripts it is impossible to know which gives the best text. I have quite arbitrarily chosen to quote an early (the date 1667 is on the flyleaf) legible one, Adv.MS.25.1.10.

[7] See van Oven (1961) 29 Tijdschrift voor Rechtsgeschiedenis 378 at 380, Book Review.

In the part " It is true " down to " nor cannot exerce it " Stair continues his treatment of acceptance. Acceptance, he says, is not always necessary. Positive rejection will in pollicitation cases render the promise void, but this is because the promise has been rejected, not simply because it has not been accepted. He also explains that this theory squares with the nature of a right which is such that people can have one although they " exerce no act of the Will about it, nor know not of it " and he cites the case of children.

In the printed text, Stair now opens a new theme and a far more general one. This runs from " Promises with us " down to " and the honesty of the Promiser," *i.e.*, to the end of 1.10.4 in the printed editions. Here the word " promises " is to be construed as embracing not only pollicitations but offer promises as well, promises giving rise to unilateral contracts. Stair says that promises cannot be proved by witnesses except in the case of " Bargains about Moveables." In other cases writ is needed. The reason, he explains, is " the same that the *Roman* Law gave no action upon naked Pactions," namely, to prevent mistakes by making sure that the parties are aware of what they are doing. The rule that writ is required to prove a promise applies, of course, whenever the promise is unilateral and gratuitous, irrespective of whether it requires acceptance or not.[8] This discussion is rather out of place in the middle of an examination of the one kind of promise, pollicitation. Thus even in substance, it betrays its later origin—note also the dates of the cases. As may by now be expected, it does not occur in any of the manuscripts, and must therefore have been inserted, presumably by Stair, prior to the publication of the first edition. He would not notice that it is not altogether relevant here.

However, this new part has a much more serious, indeed a catastrophic, effect, for it breaks up the argument which Stair is putting forward, and that argument now reaches the *jus quaesitum tertio*. If the extra bit on proof is removed and no new paragraph is begun, then the connexion becomes plain. Stair has just explained that a person can have a right even though he is unaware of it: " This also quadrats with the nature of a Right, which consisteth in a Faculty or Power, which may be in these, who exerce no act of the Will about it, nor know not of it." Stair gives the example of infants and then he adds " It is likewise the opinion of Molina and

[8] An oversimplification perhaps at least for modern law. See A. G. Walker, N. M. L. Walker, *The Law of Evidence in Scotland* (Edinburgh, Glasgow, 1964), p. 134, § 138.

quadrats to our Customs. . . ." In other words, he takes the third party beneficiary in a contract as an example of a person who acquires a right out of a promise, even though he has not accepted it and may be completely unaware of it—in *Auchmoutie*, Stair says, the third party had a right "albeit not present, nor accepting." The extra part on proof and the false paragraphing have served to conceal the sequence of Stair's thought here. But we must probably blame Stair at least for adding the piece on proof and for not noticing the effect of these changes.

With the words, "Promises dependent upon acceptance" Stair passes on to the other sorts of promises, the offer promises which require acceptance. He has finished with pollicitations. Since this portion is not directly relevant to our theme, we shall not examine it. Both the manuscripts and the printed editions open a new paragraph at "*Pactum*, or a Paction" when Stair goes on to examine that concept.

Our examination of this section has led us to the conclusion that Stair thought that the third party beneficiary acquires his right by a pollicitation on the part of the promisor and so he does not need to "accept" in any way whatsoever. On this matter Smith was quite correct. The approach of Ashton-Cross is nonetheless shown to be misconceived. He grasps that Stair saw the *jus quaesitum tertio* as a matter of pollicitation, but he misunderstands the reason why Stair saw it in this way. According to Ashton-Cross, ". . . Stair did not see any difference at all between a promise made to no one but for the benefit of some particular promisee, and a promise made to an individual (not the beneficiary promisee) in favour of a third party promisee."[9] In other words, if I make a pollicitation promise to nobody—perhaps more profitably one could think of a promise to God—for the benefit of C, C is just in the same position as when I make a promise to A for the benefit of C. This is ingenious but it was not Stair's approach. Stair was looking at the matter from another angle, and what led him to include the *jus quaesitum tertio* at this stage was that he saw it as a case where a person acquired a right from a promise which he did not need to accept.

We are now at last in a position to make good the promise entered into at the end of Part II to explain Stair's reference to Molina, *Disputatio* 263. When we see the title of the *disputatio*

[9] 1957 J.R. 141.

in question, we can immediately understand why editors of Stair concluded that the reference to 263 was wrong. It runs "*Promissio ante acceptationem revocarine libere possit, et utrum ex sua natura id habeat, an ex positivo iure.*" Molina proposes to see whether a promise can be freely recalled before acceptance, and if so whether this derives from the very nature of promises or from provisions of the positive law. Hardly encouraging for an editor looking for a reference to *jus quaesitum tertio*. Hence the editors looked elsewhere and were immediately attracted by the title of 265 which reads "*Donationi an modus, et gravamen in favorem tertii possit apponi. Et num, antequam per eum acceptetur, possit tolli, ac revocari.*" This is just what is required—Molina is to consider whether a *modus* and burden can be put on a gift for the benefit of a third party, and whether it can be removed and recalled before it is accepted. This *disputatio* bristles with references to *jus quaesitum tertio* and everything looks fine. Except that, as we saw in Part II, there is no support for Stair's doctrine.

Fresh from our examination of the Stair passage, the title of Molina's *Disputatio* 263 has no terrors for us. We have just seen that Stair was working with the idea that the third party's right derives from a promise which he need not accept. A *disputatio* dealing with just such promises is precisely what we are looking for Stair holds that pollicitations are effective at civil law, and his account of *jus quaesitum tertio* for which he cites Molina is based on that assumption. It is therefore something of a shock, to put it at the lowest, when we read the opening words of Molina's *disputatio* [10]:

> Conveniunt doctores, promissionem antequam acceptetur, atque adeo antequam in pactum transeat, regulariter neque obligationem civilem neque actionem in seculari foro parere, ut constat, tum ex aliis iuribus tum ex D.50.12.3 iuncta glossa ibi in verbum offerentis, ex C.8.37(38).5 cuius haec sunt verba *Nuda pollicitatione secundum ea, quae saepe constituta sunt, ad praestanda ea, quae promiserat, urgeri quenquam non semper iura permittunt.*
>
> The *doctores* are agreed that as a rule a promise before acceptance, and so before it turns into a pact, gives rise to neither a civil obligation nor an action in a secular court, as is agreed

[10] *Disputatio* 263, § 1. There is a good deal of interesting material on Molina in M. Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen.*

both from other texts and from D.50.12.3, the gloss on the word *offerentis* there, and from C.8.37(38).5 which runs as follows: *according to what has often been decided the law does not always allow anyone to be obliged by a pollicitation to perform what he had promised.*

Molina says quite distinctly that it is agreed that before a promise is accepted it does not give rise to a civil obligation or to an action in a secular court. This means that Stair cites Molina, who does not believe that promises are effective unless they have been accepted, as authority for a proposition which is based on just the very opposite assumption, namely, that such promises can be effective. This being so, how can Stair legitimately derive support from Molina? We are inevitably faced with other questions. Why did Stair refer to Molina at all if this was Molina's opinion? Did Stair simply misread him?

The answer to the last question is No. Stair was referring to a passage which comes later in the same *disputatio*. As we have just seen, Molina holds that a promise which has not been accepted does not give rise to a civil obligation. However, later on (263 § 13) he considers whether or not, if one leaves positive law to the contrary out of account, a promise even though not accepted founds a natural obligation. He decides that it does, and proceeds to give arguments for his view. In the course of these he says the following (263 § 15):

"Eodemque modo ius Castellae potuit plus adhuc laxare habenas, nempe ut nullius acceptatio necessaria esset, quando constaret promittentem voluisse se obligare. Semper quidem promissio, & donatio, eatenus ex acceptatione donatarii ex natura rei pendent, quatenus, si ille non acceptet, obligatio, quae ex illarum natura oriebatur, dissolvetur, sicut etiam, postquam acceptata est donatio, aut promissio, dissolvitur obligatio ex illa contracta quotiescunque donatarius obligationem remittit.

Verum tamen, quod contendimus, est, promissionem ipsam ex natura sua, secluso iure positivo, quod aliud statuit, vim habere, antequam acceptetur, ad obligandum ex parte sua promittentem, ita ut manifestare donatario promissionem teneatur, ut, si eam acceptare velit, illam adimpleat, prout ex parte sua ante acceptationem tenebatur."

"In the same way the law of Castille could further relax the reins to the point that it was not necessary for anyone to

accept when it was agreed that the promisor had wished to bind himself. In the nature of the case, promise and gift always indeed depend on the beneficiary's acceptance to the extent that if he does not accept, the obligation which arose from their nature will be dissolved, just as even after a gift of a promise has been accepted the obligation so contracted is dissolved whenever the beneficiary remits the obligation.

What we assert is nonetheless true, namely, that leaving aside positive law which decides otherwise, a promise itself by its very nature has force before acceptance to bind the promisor for his part in such a way that he is bound to show the promise to the beneficiary so that if he wishes to accept it, he [the promisor] should fulfil it, as he was bound for his part before the acceptance."

Unless the positive law provides to the contrary, a promise can bind the promisor even though it has not been accepted. In Molina's view this is to be deduced from the very nature of promises themselves. In the first part of the passage quoted he says, just as Stair does in 1.10.4 in the printed editions, that even though promises may not require to be accepted in order to be effective, nonetheless if the potential beneficiary actually rejects the promise or indeed the gift in his favour, then the promisor or donor is released from his obligation. It is to the second part of this text, however, that Stair refers in the celebrated *jus quaesitum tertio* passage. In it Molina says that leaving aside the provisions of the positive law a promisor is obliged by an unaccepted promise in such a way " that he is bound to show the promise to the beneficiary, so that, if he wishes to accept it, he [the promisor] should fulfil it, as he was bound for his part before the acceptance." Here Molina talks of the promisor being obliged to "*manifestare*" the promise; Stair talks of either contractor being compelled " to exhibit the Contract." These verbal echoes mean that there can be no doubt that it was to this text that Stair was referring.

The Molina text provides adequate confirmation of the deductions which we made from our analysis of Stair's work. Stair's reference to this passage of Molina shows that for him the *jus quaesitum tertio* is to be seen as a case of a promise from which the beneficiary obtains a right even though he has not accepted the promise. Only positive rejection by the *tertius* will release the promisor. It is as well to notice that Stair's reference to Molina's

view here is quite sound, even though Molina himself says that an unaccepted promise does not found a civil obligation. Molina reaches that conclusion on the basis of the provisions of the positive law. That is how the legal systems which he is considering have settled the matter. If one ignores these provisions of the positive law, Molina says promises are effective even without being accepted. Since Stair is devising a legal order which does not have provisions against unaccepted promises being effective, he can derive support from these musings of Molina which will apply quite properly to Stair's system.

Finally in our exposition of Stair's meaning, we come to the case which he cites, *Auchmoutie* v. *Laird of Mainehay*, but, as was mentioned above, it does not really help since the report is not detailed enough. Auchmoutie brought an action for spuilzie of teinds against the Laird of Mainehay. After certain stages in the action which do not concern us were over, the defender's counsel raised a new defence, an exception *noviter veniens ad notitiam*. By it, he alleged that the pursuer Auchmoutie had promised a third party, Hay, that if the case came to court Auchmoutie would give the Laird a complete discharge. Auchmoutie argued that the exception could not be admitted, firstly because it had been raised too late, and secondly "becaus the promeis not being maid to the pairtie present and accepted be him selfe it was not obligatour." The court rejected both these arguments and the matter was referred to the pursuer's oath. On oath he denied the promise.

First of all, a textual matter. The manuscript of Haddington's *Practicks* in Edinburgh University Library [11] has the reading "becaus the promise not being made to the pairtie preferred and accepted himselfe. . . ." This does not make sense. I have accordingly chosen above to adopt the reading of the manuscript of Haddington's *Decisions* in the Advocates' Collection on deposit in the National Library of Scotland.[12] This reading is echoed in Stair's words "albeit not present nor accepting." The reading of the Edinburgh University manuscript must be due to a slip made by the person copying out the case.

The situation then was that the Laird argued that Auchmoutie had promised to Hay that he would not pursue his case against the Laird. In other words, the Laird was seeking to enforce the promise

[11] Edin. Univ. MSS., D.C.4.71.
[12] Adv.MS.24.2.2, f. 6 (case number 1657).

made by Auchmoutie in his favour but to Hay. It is the standard case: B promises to A to do something for C. (Actually here *not* to do something.) Auchmoutie argued that it was not binding because the Laird was not present when the promise was made nor had he accepted it. The court rejected this argument, but unfortunately the report does not give us the reasons. *Auchmoutie* is a bit of a damp squib, but it does go as far as to indicate that for some reason or other a *tertius* could sue on a promise which had not been accepted. This bears out the interpretation we have put on Stair's words.