SCOTTISH LAW COMMISSION

MEMORANDUM NO: 42

DEFECTIVE CONSENT AND CONSEQUENTIAL MATTERS

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(Volume I)

MEMORANDUM NO. 42

Volume One

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

The Commission would be grateful if comments were submitted by 30 November 1978. All correspondence should be addressed to

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DEFECTIVE CONSENT AND CONSEQUENTIAL MATTERS

(Volume One)

INTRODUCTION

0.1. In our First Programme of Law Reform[1] we recommended that the law of obligations be examined by this Commission with a view to reform. In the sphere of voluntary obligations, the Memorandum attached to that Programme referred specifically[2] to "the law regarding error, fraud and other factors vitiating consent" and to "void and voidable contracts" as topics which stood in need of review.

0.2. Between 1966 and 1972 we participated in a joint venture with the Law Commission for the codification of the law of contract. For reasons which we stated in our Seventh Annual Report[3] we withdrew from that project in 1972, and work on it was later suspended by the Law Commission as regards the law in England and Wales as well, without prejudice to the possibility of codifying at some future date after the law had been clarified or reformed.[4] Progress on our programme subject of Obligations was "very seriously interrupted"[5] during this period by the concentration of our resources on the joint exercise. We have recently, however, been able to turn our attention again to this area of law, and in 1977 we published a number of Memoranda containing provisional proposals for reform of certain aspects of the law relating to voluntary obligations.[6] In one of these Memoranda[7] we considered

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[1] Scot. Law Com. No. 1 (1965), item 2.

[2] Para. 12.

[3] Scot. Law Com. No. 28 (1973), para. 16.

[4] Law Commission, Eighth Annual Report, Law Com. No. 58 (1973), paras. 3-5.

[5] Scot. Law Com. No. 28, para. 16.

[6] See Memoranda Nos. 34-39 on Constitution and Proof of Voluntary Obligations (10 March 1977). Memoranda Nos. 24-31 on Corporeal Moveables (31 August 1976) also contain a considerable amount of material relevant to this area of law.

[7] Memorandum No. 37, Constitution and Proof of Voluntary Obligations: Abortive Constitution.

certain factors, such as dissensus, "pre-contractual frustration" and simulation, which had hitherto frequently been discussed in the context of the law of error, but which, since their effect is to prevent an obligation from coming into existence at all, we thought might more appropriately be regarded as aspects of the law of formation of obligations. In the present Memorandum we address ourselves principally, but not exclusively, to error properly so called and to other aspects of vitiated will or consent, such as fraud, force and fear, and undue influence through the operation of which an obligation which has come into being may subsequently be open to challenge.

0.3. This Memorandum is divided into six parts, which are contained in two volumes. In this, the first volume, we attempt in Part I to isolate and describe concisely the many problems, doubts and difficulties which exist in this chapter of the law. We go on to make proposals which we think would solve these problems and clarify the areas of doubt and difficulty; and we set forth in brief compass and in as simple and untechnical a way as possible a summary of the factors which we have taken into account and the arguments which have influenced us in reaching these provisional conclusions. A much fuller statement of our views and of our reasons for adopting them is to be found in the remaining five parts of the Memorandum contained in the second volume. We also provide there a full citation of the authority on which our views regarding the present state of the law and its historical development are based, and make frequent reference to the solutions which have been adopted (or have been proposed for adoption) in other legal systems in respect of the problems with which we are concerned. Study of Part I will, we hope, be sufficient to enable the reader to understand our proposals, their effects and the reasons which underlie them. But we wish to stress that Part I is no more than a summary or abridged version of Parts II to VI in Volume Two and that it is to the appropriate paragraphs of that volume that recourse should be had for detailed argumentation. To assist the reader who wishes to consult

Volume Two, we provide cross-references to that volume throughout Part I. In addition to Part I of the Memorandum the present volume contains a summary of our provisional proposals.

0.4. Our consideration in depth of the present law and how it should be reformed begins in Volume Two. In Part II we discuss a problem which we identified but did not seek to solve in an earlier Memorandum,[8] namely how to distinguish situations in which force and fear, or coercion, are so extreme as entirely to exclude consent and so preclude the constitution of obligation altogether, from those in which the will is merely defective and an obligation does come into existence, though one which is open to annulment. We then turn, in Part III, to a consideration of vitiated or defective will or consent properly so-called: those factors which do not prevent an obligation from coming into being but which entitle an obligant to seek its annulment on the ground that his expression of will or consent was defective or was improperly obtained. In this context we consider the present law relating to the effect upon obligations of error, fraud, facility and circumvention, undue influence, force and fear, and "extortion"; we discuss to what extent third parties acquiring personal rights in good faith and for value should be affected by an obligant's vitiated consent; and we put forward proposals for the simplification and rationalization of the law. Part IV of the Memorandum is concerned with restitutio in integrum. Under the present law annulment of an obligation affected by defective or vitiated consent is possible only if the parties are still in a position to restore any benefits received by them under the contract. We examine the question whether annulment should be competent, even though restitution in kind cannot be offered, provided that a monetary payment as a surrogate for restitution in forma specifica is made. In Part V we turn from the law of contract to the law of delict and consider the situation in which misrepresentations which induce a party to enter into

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[8] Memorandum No. 37, Constitution and Proof of Voluntary Obligations: Abortive Constitution, para. 1.

a contract should entitle him to damages. The separate, but related, problem of when a misrepresentation should have the effect of rendering the obligation itself annullable forms part of the subject-matter of Parts III and IV. The final part of the Memorandum, Part VI, is devoted to a discussion of whether an abbreviated or accelerated procedure should in future be available for adoption in the increased number of situations in which, under our proposals, recourse to the courts for annulment would be necessary or desirable.

0.5. We wish to acknowledge our indebtedness to the following, who have generously provided us with information or otherwise assisted us in the preparation of this Memorandum.

Professor R. Feenstra
University of Leiden;

Dr D.C. Fokkema
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Dr W.W. McBryde
University of Aberdeen;[9]

The North-Holland Publishing Company,[10]
Amsterdam;

Mr J.A. Weir
Trinity College
Cambridge.

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[9] For according us access to, and allowing us to quote extensively from, his doctoral thesis Void, Voidable, Illegal and Unenforceable Contracts in Scots Law (Glasgow, 1976, unpublished).

[10] For according us access, before publication, to the English translation by Mr J.A. Weir of Einführung in die Rechtsvergleichung by Professors K. Zweigert and H. Kötz. The translation was published in November 1977 as An Introduction to Comparative Law.

PART I

THE PRESENT LAW AND ITS DEFECTS; OUR PROPOSALS AND THE REASONS THEREFOR: A SURVEY

Enforced simulation of consent (Volume Two, Part II)

1.1. This Memorandum is primarily concerned with obligations which have come into being, but which are, or may be, open to challenge because the expression of will or consent emanating from one of the parties was defective, having been obtained by improper means or as a result of error or misunderstanding. One category of "improper means" of obtaining consent is the exercise of coercion or the making of threats. In most cases in which coercion or threats (usually referred to as "force and fear") have been used the law, we think, at present takes the view that consent, though improperly exacted, has been given; that an obligation consequently comes into existence; but that the victim may subsequently be entitled to annul it. This aspect of force and fear we deal with infra, paras. 1.47 to 1.55, and in Part III, paragraphs 3.104 to 3.119, and is the subject of our proposal No 30. But it is recognised - at least in the United States and in most continental European systems - that there are some very rare situations in which the coercive measures are so extreme that no consent at all has been given and no obligation created, the ostensible obligation being from the outset absolutely null.

1.2. We find it difficult to think of examples which are not far-fetched of cases in which it might reasonably be held, not that a party gave his consent under pressure, but that he did not exercise his will at all. However, such cases might include seizing a person's hand and using it as an instrument for signing a document; the use of hypnosis or of hypnotic drugs; and, perhaps, the use of torture. (See paragraphs 2.1 to 2.4). In those highly exceptional instances in which the effect of the coercion on the mind of the obligor is of such severity that there was merely a simulacrum or appearance of consent, we think that the obligation or transaction should be

absolutely null. The problem is how to determine the circumstances in which coercion should be regarded as totally excluding consent and so rendering the obligation void ab initio.

1.3. In cases involving the handing over of corporeal moveable property by the victim of coercion, we think that a reasonable and appropriate rule would be that the transaction should be treated as absolutely null only if the dispossession amounted to robbery. A vitium reale would then affect the property[1] and the victim would be entitled to recover it not only from the person who exercised the coercion, but from anyone in possession - even from a bona fide third party who had acquired it for value and in ignorance of the means by which it had been obtained. Provided always that the requirement that the dispossession amounted to robbery is satisfied, we take the view - in accordance with the conclusion which we provisionally came to in an earlier Memorandum[2] - that it should not be necessary for the victim to prove, as a condition of recovering the property, that he exercised reasonable fortitude in the face of the robbery. (Paragraphs 2.5 and 2.6).

1.4. In cases not involving corporeal moveables, and in which recourse cannot therefore be had to the law of robbery as providing a test for determining when coercion is so extreme as completely to exclude consent, it may be very difficult indeed to identify situations in which there has been no exercise of will at all and in which the obligation should, in consequence, be absolutely null. Yet the matter could be an important one, particularly since, in such cases too, the rights of third parties in good faith might depend upon the decision arrived at (see e.g. Volume Two, paragraphs 6.4 to 6.6). We do not think it would be worthwhile - even if it were possible - for us to attempt to catalogue all the circumstances in which force and fear should be regarded in law as totally excluding consent or to attempt to list the types or means of coercion which

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[1] We do not, of course, seek in any way to restrict the operation of the vitium reale in cases of non-violent theft (i.e. clandestine, as distinct from forcible, dispossession).

[2] Memorandum No. 27, Corporeal Moveables: Protection of the Onerous Bona Fide Acquirer of Another's Property, paras. 52 and 56.

would have that effect. We reiterate, however, that such cases would be extremely rare: the typical consequence of the exercise of coercion is to induce the obligor to consent (however reluctantly) as the lesser of two evils, not to preclude his consent. We would not completely exclude the possibility that the threat (or the exercise) of force against a third party might justify a decision that an ostensible obligant thus indirectly coerced gave no consent at all. But we find it more than usually difficult to envisage circumstances in which this could reasonably be held to be the case. On the whole matter, however, our provisional view is that, rather than attempting to formulate a test by legislation, it should be left to unfettered judicial decision, based on evidence of all relevant circumstances, to determine whether the act of a coerced victim was, on the one hand, in no sense the expression of his will or, on the other, a reluctant expression of will, albeit secured by extortion. Comments are invited. (Paragraphs 2.7 to 2.9).

1.5. As an alternative to this proposal, that drawing the dividing line between force and fear which induces consent and that which totally excludes consent should be left to unfettered judicial decision, it might instead be provided that a legal act which resulted from the application of serious physical force or the serious threat thereof to any person should be absolutely null, provided that the actor, but for such force or threats, would not have acted as he did. Comments on this alternative proposal are also invited. (Paragraph 2.10).

1.6. If an obligation were, because of the exercise of coercion, absolutely null no third party, even though in good faith, would be able to acquire rights under it against the party coerced. It is, however, possible to take the view that the victim should not be entitled completely to ignore the consequences for innocent third parties of the nullity of his apparent acts. It might therefore be reasonable to require of him that he take prompt steps to denounce his ostensible act after becoming free from pressure. It might be provided that if he failed to do so he should either be personally

barred from asserting the nullity against onerous third parties in good faith who acquired their rights after denunciation of his act could reasonably have been made by the victim; or that he should be entitled to be restored only on condition of compensating them for outlays incurred in reliance upon the validity of the transaction which turned out to be absolutely null. Our preference, however, is simply to attach to the victim's right to plead the absolute nullity of his act as against an onerous bona fide third party a condition that the victim should have acted reasonably in all the circumstances after the coercion ceased. By virtue of the operation of this condition the victim would be required, where possible and practicable, to have taken steps, after cessation of the coercion, to warn potential third party acquirers, as well as to have adopted such other measures as might be reasonable, such as informing the police of the coercion directed towards him, interdicting the coercer against assigning to third parties rights under the obligation, etc. In determining whether the victim had acted reasonably there would also, of course, require to be taken into consideration any reasonable apprehension that denunciation of the obligation might lead to the reimposition of pressure by the coercer or by others on his behalf. We invite comments on our proposal that quoad bona fide onerous third parties reliance upon the nullity of the obligation should be subject to such a condition of reasonable conduct on the part of the victim of coercion. (Paragraph 2.11).

1.7. We note in passing that it may well be that the possibility that in rare cases coercion may be so extreme as to render an obligation absolutely null, is not recognised in the Bills of Exchange Act 1882. Section 38 of that Act provides that a holder in due course of a bill of exchange holds it free from any defect of title of prior parties; and section 29 of the Act defines "defect of title" as including force and fear. It is possible to take the view that the holder in due course should obtain a good title only where the force and fear in question has induced the drawer to give his consent (in the form of signature), albeit under pressure. Where the signature

has been secured without any exercise of the drawer's will at all, it might be thought that the bill should be regarded as no more valid than would be a forgery. However, the view might also be taken that trade and commerce require that the rights of holders in due course of bills of exchange be challengeable on as few grounds as possible and that it would diminish confidence in, and willingness to rely upon, commercial paper if force and fear, even of this very extreme nature, were to invalidate bills of exchange as against holders in due course. We have reached no concluded view on what the attitude of the law should be towards bills of exchange signed as a result of coercion of such severity that the drawer's consent was totally lacking, and we invite comments on the matter. (Paragraph 2.12).

Defective consent or vitiation of consent (Volume Two, Part III)

1.8. General. (Paragraphs 3.1 to 3.7). Vitiation of the will or consent upon which voluntary obligations are founded may result from misapprehension, either self-induced or induced (whether deliberately, negligently or entirely innocently) by another; it may also, as we have seen, be the result of coercion. In legal systems derived from Roman law the three principal grounds of vitiation of consent which are recognised as justifying the annulment of obligations (or other voluntary legal acts) are force and fear, fraud, and error. All modern civilian systems have, however, gone considerably beyond Roman law in recognising situations in which an obligant is entitled to relief on account of defective or vitiated consent, either by wide interpretation of the three principal categories, or by supplementing them with additional categories. The rules of English law governing defective consent are complex, the solutions having evolved against the background of, and owing much of their specific content to, the existence of separate systems of law and equity. Failure to appreciate this has often led to confusion when attempts have been made to apply English rules in a Scottish context.

1.9. The effect of defective consent (or vitiation of consent or "vice of consent") is, in general, to render an obligation annullable. This must be contrasted with the real vice (vitium reale) which attaches to stolen property and bars even a third party in good faith who has given value from acquiring title to it. Vitiated or defective consent is also something quite different from complete absence of consent (which we considered in Memorandum No. 37[3] and also in paragraphs 1.1 to 1.7, supra). In addition to discussing the effect of defective consent upon the parties to an obligation, we also look at what its consequences should be for third parties, such as transferees of incorporeal moveable property and assignees of personal rights. Consideration is also given to whether mere notification of annulment by one contracting party to the other should be sufficient to preclude an innocent third party from acquiring rights under the obligation. Linked to this is the question of what role the courts should play in the process of annulment of obligations for vitiated consent, and in Part VI (and paragraphs 1.74 to 1.83 infra) of the present Memorandum we suggest the introduction of an accelerated judicial annulment procedure. Under the existing law annulment for error, fraud, force and fear, etc is possible only if the parties to the obligation are still in a position to restore to each other any benefits received under it. We consider this requirement in Part IV (and in paragraphs 1.64 to 1.66, infra). As well as entitling the victim to annulment, defective or vitiated consent may in certain circumstances give rise to delictual remedies. We think it important for the avoidance of confusion to keep the contractual and delictual aspects separate, and we deal briefly with the latter in Part V (and in paragraphs 1.67 to 1.73, infra).

1.10. Error. It would, we think, be generally agreed that the present law of Scotland regarding the effect of error on obligations stands in need of clarification. The authorities on this branch of the law are confusing and difficult, if not

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[3] Constitution and Proof of Voluntary Obligations: Abortive Constitution.

impossible, to reconcile. The institutional writers (see paragraph 3.10) did not always distinguish between the various different classes of error, such as dissensus (failure of offer and acceptance to correspond), common (or shared) error and unilateral error. Perhaps as a consequence of this, it is not always clear whether these writers regarded the effect of error (or of a particular type of error) as being to render an obligation absolutely null or merely annullable at the instance of the party in error. However, all accepted that what was legally relevant was "essential error" or "error in substantialibus" as distinct from error in motive. The most detailed and comprehensive institutional discussion of what was meant by essential error is that of Bell, whose classification was approved by Lord Watson in Stewart v. Kennedy[4] in the following terms:

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

The institutional writers concerned themselves, to a greater extent than would be thought justified today, with the actual subjective state of mind of the contracting parties rather than with whether the error was objectively reasonable and probable. And the decided cases (see paragraph 3.13) illustrate this subjective or consensualist approach to error up to the end of the 18th century and, indeed, well into the 19th.

1.11. Until the end of the 19th century misrepresentation (apart from fraud, which was regarded as a separate and distinct vice of consent) was treated merely as one of the means by which essential error could be brought about. It

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[4](1890) 17R. (H.L.) 25 at pp. 28-29.

was not a separate ground of vitiation of consent and was relevant in a contractual context only as being one of the ways (but by no means the only one) whereby essential error might be caused. (Paragraph 3.14). However, two cases in the House of Lords[5] in 1890 and 1893 cast the law into some confusion. Certain passages, particularly in the speeches of Lord Watson, could be (and have been) read as justifying the view that essential error has the effect of rendering an onerous obligation annullable only if induced by the misrepresentations of the other party. Furthermore the meaning of essential error seemed to be extended by Lord Watson far beyond Bell's five categories when he expressed the view that, where there had been misrepresentation (albeit non-fraudulent), error became essential whenever it could be shown that, but for it, one of the parties would have declined to contract. This redefinition of essential error and the common interpretation of Lord Watson's speech as denying the relevance of unilateral, uninduced essential error has caused considerable confusion. In particular, the emphasis upon the special relevance of misrepresentation, even though not fraudulent, along with Lord Watson's reference to English cases concerned with the equitable doctrine of rescission of contract for innocent misrepresentation, have led some courts and writers in Scotland to regard non-fraudulent misrepresentation as now being a ground of annulment separate from the general law of error, with rules derived from the law as developed in the English courts of equity. Historically, however, misrepresentation in Scotland was relevant only in the case of fraud (and it might amount to fraud to attempt to hold someone to an obligation induced by one's misstatements even though not initially known to be untrue) or where essential error in Bell's sense resulted. (Paragraphs 3.15 to 3.20).

1.12. A survey (see paragraphs 3.21 to 3.43) of the law relating to error, and of proposals for reform thereof, in a number of civilian, Anglo-American and "mixed" legal systems demonstrates that there is little uniformity of approach, and the survey serves principally to underline the variety and diversity of solutions which are possible in this area of law. Study of

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[5] Stewart v. Kennedy (1890) 17R.(H.L.) 25; Menzies v. Menzies (1893) 20R.(H.L.) 108.

these foreign systems does however, in our view, make it clear that there is little value in drawing a strict distinction between error in transaction (where a party's declaration does not accurately reflect his intention and he consequently finds himself party to an obligation with a content other than what he intended) and error in motive (where declaration and intention correspond but are both based upon an erroneous appreciation of the facts). Legal systems which in theory or as a starting point regard only the former category of error as legally relevant have in practice been compelled to recognise also wide areas in which error in motive has legal consequences. Some of the legal systems considered regard an error as a potential ground of annulment whenever a party, but for the error, would not have contracted, either at all or in the terms in which he did; others take the stand that an error is legally relevant only if it falls within certain specified categories, which often correspond closely to Bell's five types of error in substantialibus. But even where the latter, apparently more restrictive, attitude is adopted there is often in fact very considerable scope for annulment through a wide and liberal construction of one or more of the specified categories of error. It is also worthy of comment how frequently it is a condition of a party's entitlement to annulment in the systems studied that his error or misunderstanding must have been known to, or was such as ought to have been known to, the other party.

1.13. The approach which we adopt in our proposals for reform of the Scots law of error is to put forward a broad formulation stating when error can be capable of being legally relevant but then very closely to delimit the circumstances in which, granted the presence of such legally relevant error, a party will be entitled to succeed in obtaining relief on account of it. Thus error very broadly defined, and not merely errors falling within certain specified and limited categories, should provide potential grounds for annulment; but no error, of whatever type, would justify actual annulment unless stringent conditions were satisfied. However, before turning to a discussion of our proposed broad initial formulation of

when error should be legally relevant and of the conditions which would still have to be met before annulment would be possible even granted the presence of such error, we think it important, first, to define more closely what it is that we mean by "error"; secondly, to delimit more clearly the area in which our proposals regarding annulment for error would operate; and thirdly to describe briefly what should, in our view, be the required method of annulment of an obligation which is, under our proposals, liable to be annulled.

1.14. When in this Memorandum we speak of the presence of error we mean one or other of two situations. The first of these is where the declaration of a party whereby he bound himself fails to correspond with his true intention. This may, for example, be because a court subsequently accords to the expressions which he employed a meaning other than that which he himself attached to them; or simply because he misunderstood the clear meaning of the words which he used. The result of such error (usually referred to as "error in transaction") is that (unless the law relating to annulment for error provides him with a remedy) the party finds himself bound to perform an obligation the content of which is other than he believed (and intended) it to be.[6] The second type of situation which we classify as "error" and to which our proposals relate, arises where a party's declaration accurately reflects his intention, but that intention was formed as a result of his mistaken appreciation of reality as at the time of the declaration of will or consent. There is no error such as to provide a basis for annulment unless there existed (at the date of the expression of consent by the party seeking relief from the obligation) a discrepancy between the facts (or law) as he assumed them to be and as they actually were. Consequently a party's erroneous belief as to future conditions (e.g. trading prospects) would not amount to error for the purpose of our proposals (though a misapprehension regarding a present fact on which the errans based a belief as to future prospects could do so). (Paragraph 3.49).

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[6] See also our earlier Memorandum No. 37, Constitution and Proof of Voluntary Obligations: Abortive Constitution, paras. 26 and 27. It should also be noted that we do not in the present Memorandum seek to deal with the problem which arises where parties have reached agreement, but that agreement is inaccurately recorded in the document in which their contract is embodied. We intend, in a later Memorandum, to consider this matter and to discuss whether rectification of the writing, rather than simply reduction of it, should be competent in Scots law.

1.15. We also think it appropriate to make it clear at this point that our proposals regarding annulment for error are intended to come into operation only where the risk of such error as is alleged to exist has not been assumed by or allocated to one or other of the parties either by express provision in the contract or by implication of law from the nature of the contract, its terms and the circumstances in which it was concluded. It is open to the parties to provide for themselves what the effect on their obligation will be if it turns out to have been concluded on the basis of a mistaken appreciation of reality on the part of one or other or both of them; and their provision may take the form that the contract shall remain in being and be performed notwithstanding that the consequence of the error is to render performance by one party more onerous or performance in his favour less valuable or beneficial to him, and that in the absence of their express agreement the party detrimentally affected could have sought and obtained annulment of the obligation.

1.16. Equally, although the obligation does not in so many words state that the risk of error shall lie with one of the parties, it may nevertheless be the clear implication from its terms and the circumstances in which it was concluded that it is not to be open to annulment on account of the misapprehension of one or other or both of the parties. For example, it might be stipulated in the notice of tender in relation to a contract for the construction of a stretch of motorway that tendering contractors should conduct their own surveys, tests and investigations of the nature of the land over which the road is to pass. In such a case if the contract were concluded on the basis of mistaken assumptions about the nature of terrain, it would nevertheless not be open to annulment, since the contractor would be held to have assumed the risk. Similarly, even if both parties to a contract of sale or lease mistakenly believe that a piece of machinery is suitable for a particular purpose, the lessee or purchaser will not be able to obtain annulment for error if the contract contains a term to the effect that the lessor or seller does not warrant its suitability for any particular operation.

Conversely, where the truth of a fact has been warranted or vouched for in a contract, whether expressly or by implication, by one of the parties, (e.g. that an article or service provided is suitable for a particular purpose or has certain qualities; that a vessel to be salvaged is lying at a stated depth; that a commodity supplied can be sold in a particular market under a particular description), then the risk that one of the parties was, or both were, in error as to that fact would lie on the party who had vouched its truth and the contract would not be open to annulment for error, the parties being left to resort to whatever remedies might be available for breach of contract. Again, a party would generally be regarded as having assumed the risk of error and so be unable to obtain annulment where he was aware at the time of conclusion of the agreement that his knowledge with respect to the facts to which the error relates was limited, but he nevertheless chose to go ahead and bind himself. In such cases the contract has for him a speculative element: he takes a chance and assumes a risk and cannot escape from the obligation when it transpires that the facts were not as he believed them to be or hoped that they were.

1.17. It is only where the risk has not been expressly or impliedly allocated to one of the parties that our later proposals concerning relief on account of error come into play. We do not, as at present advised, think it useful to attempt to indicate with any greater particularity than is displayed in the two preceding paragraphs what types of contracts should be regarded as placing the risk of error upon one or other of the parties to them. Our view, on which comments are invited, is that, with such guidance as has been provided, it can be left to the court to decide whether the nature of any particular contract is, or the circumstances surrounding its conclusion are, such that the errans should be regarded as having impliedly assumed the risk of error. We appreciate, however, that some of those consulted may think that it would be preferable as conducive to greater certainty to specify in advance categories or types of contracts in which the risk of error of particular kinds should be regarded as falling upon one

party or the other. We would welcome, from those who are of this opinion, suggestions concerning which types of contracts should be specified and the party upon whom the risk of error should be placed. (Paragraphs 3.50 to 3.52).

1.18. A further preliminary question then arises: granted that grounds for annulment exist, what steps should the errans be required by law to take in order to bring the obligation to an end? Under the present law he can do so, provided the requirements for annulment are satisfied, by simple notification to the other contracting party. It may be that legal action will be taken by the errans (e.g. an action of reduction; an action for declarator that he has effectively annulled the obligation) or by the other contracting party (e.g. an action for declarator that the obligation subsists in spite of a purported annulment; an action of damages for breach of contract based upon the errans's notification of annulment and consequent refusal to perform); but brevi manu annulment is sufficient and is recognised as effective. Our provisional view is that this should no longer be the case and that judicial decree (or decree arbitral, if it has been agreed that disputes be submitted to arbitration) should be required for annulment of an obligation on the ground of defective consent. Once an obligation is recognised as having in fact come into being in favour of a party - i.e. the will or consent of the obligor is not so totally lacking that the obligation is treated by the law as absolutely null or void ab initio - then we do not think that the unilateral act of one of the parties to it not acquiesced in by the other should be capable of bringing the obligation to an end.

1.19. Our proposals in many cases envisage that annulment will not be available as of right but should be granted at the discretion of the court and only on terms e.g. that the party desiring it compensate the other. In such situations judicial intervention would clearly be required in any event in the absence of agreement between the parties as to both the justifiability of annulment and the terms on which it should take place. But even in those relatively rare cases in which annulment could be sought as of right we think that

judicial intervention, or the agreement of the parties, should be necessary for the obligation to be effectively annulled. Litigation is even under the existing law inevitable if the parties are not agreed as to the justifiability of annulment, either in the form of an action by the party seeking annulment, or in the form of an action for breach of contract brought against him by the other party. That being so we think it right that the bringing of an obligation to an end should be a matter for judicial decree, whether in a substantive action concluding for annulment by the errans or sought by him by way of defence or counterclaim to an action for enforcement or for damages for breach of contract brought against him by the other party. (Paragraphs 3.53 and 3.54).

1.20. At present annulment is not competent unless restitutio in integrum has remained possible and the parties have either not acted upon the obligation at all or, if they have, can nevertheless be put back into their respective pre-contractual positions (e.g. by handing back money paid or articles delivered under the contract). This restriction on annulment clearly provides one justification for recognising brevi manu non-judicial action: a party must be allowed to take effective steps rapidly before the other party has acted upon the obligation in such a way that restitutio in integrum has become impossible and annulment is in consequence barred. We, however, propose at a later point (see paras. 1.64 to 1.66, infra) that it should no longer be a bar to annulment that restitution in forma specifica is not possible, and that it should in future be competent for annulment to be granted on terms which provide for payment of a monetary surrogatum for restitutio in integrum. If this proposal were adopted, it would no longer be a matter of crucial importance to an errans, as it is under the present law, to be able to take effective action at the earliest possible moment in order to prevent the other party from acting on the obligation. Nevertheless, we do propose the introduction of a new, accelerated form of judicial annulment procedure which would enable a party to obtain a decree of annulment very rapidly indeed (see vol 2, Part VI and

paras. 1.74 to 1.83, infra). We also think that a party claiming judicial annulment of an obligation should be required to have sought it within a reasonable period of discovering the facts upon which he bases his claim. This does not mean that he is to be compelled to resort to our proposed new accelerated procedure nor that he is not to be free, if he wishes to take that risk, to refuse (or cease) to perform and wait to be sued for breach of contract by the other party, in which action he will then counterclaim for annulment. All that is meant is that a court, no matter the nature of the proceedings in which it is seized of the issue, should not decree annulment unless the claim for it has been made within a period that, in all the circumstances, is reasonable. We invite comment on our proposal that annulment should require to be judicially decreed; and that decree of annulment should not be granted unless sought within a period after discovery of the facts on which the claim is founded that is, in all the circumstances, reasonable. (Paragraphs 3.55 and 3.56).

1.21. We also think it would be advisable explicitly to provide that an obligant seeking annulment should, unless the justifiability of annulment is conceded by the other party, (a) be required to disclose how he came to hold his erroneous belief, or the grounds on which he held it and (b) be able to demonstrate that those grounds were reasonable and probable. This, in our view, would be a valuable safeguard against a party's spuriously, or too lightly, claiming that he entered into an obligation under the influence of error. However, if the error has been caused by the other party to the contract (see para. 1.24, infra) we do not think that the errans should be required to establish that he had reasonable grounds for entertaining his mistaken belief. An example of the operation of this "reasonableness" requirement can be seen in the South African case of Maritz v. Pratley.[7] Two articles had been placed one on top of the other at an auction sale.

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[7](1894) 11 S.C. 345.

The defendant made a bid for what he believed to be a single lot whereas only the article on top was then on offer. His error was held to be bona fide and reasonable in the circumstances. We invite comment on our proposal that a party seeking annulment should be required to condescend on the grounds on which he held his erroneous belief and be able to demonstrate that those grounds were reasonable. (Paragraph 3.57).

1.22. Having explained (a) what we mean by error; (b) that our proposals are intended to apply only where the risk of error has not been allocated, expressly or impliedly, in the obligation; and (c) that in our view annulment should, in the absence of agreement between the parties as to its justifiability, require to be judicially pronounced, we return to our broad initial formulation of when error can be capable of being legally relevant. The broad test which we propose should be adopted in determining whether an error is legally relevant is: "Would the obligation have been concluded only on materially different terms, or not at all, if the party in error had known the true position?" It may be thought that this test goes somewhat farther than that set forth by Lord Watson (see paragraph 1.11, supra) which may be read as requiring, before error can be regarded as "essential", that it must be such that the party labouring under it would have declined to contract at all had he known the true position. We think (and the same view is taken in a recent draft Uniform Law produced under the auspices of UNIDROIT) that there can be situations in which a party in error would be justified in claiming annulment even though he could not show that but for the error, he would not have contracted at all: he would still have contracted, but he would not have made that particular contract. An example of such a situation might arise where the owner of a house is determined at all costs to buy a field adjacent to his house in order to prevent development of the site and so protect his view. The owner of the field informs him that he has already received a very high offer of £x from a speculative builder, and the house owner consequently offers

an even larger sum, which is accepted. It subsequently transpires that the information about the earlier offer was untrue (not necessarily fraudulent). It seems right that annulment should be possible in these circumstances even though the buyer cannot establish that but for the misinformation he would not have contracted to buy the field at all. It may well be that when Lord Watson stated that error became essential whenever "but for it one of the parties would have declined to contract" he in fact meant "would have declined to contract in these terms" rather than "would have declined to contract at all". In any event, we prefer the former test. Comments are therefore invited on our proposal that the basic test for the existence of legally relevant error should be whether the party seeking annulment would have contracted only on materially different terms (or would not have contracted at all) if he had been aware of the true position. (Paragraph 3.58).

1.23. This test requires the party seeking annulment to establish that, if he had known the true position, he either would not have contracted at all, or would have done so only on materially different terms. In order to satisfy a court of this it would, we think, be necessary for the errans to do more than merely state that he would not have contracted in the terms which he did if he had not been labouring under the error. He would, in addition, have to show that the circumstances - including the detriment to him of having to perform in the conditions as they in fact are and not as they were mistakenly believed to be - render the obligation something materially different from what was erroneously supposed. We think that this objective element is inherent in the test as we have formulated it. It would, however, be possible to underline its presence by recasting the test to require the errans to show, not that he himself would have contracted only on materially different terms, but that a reasonable man in the same external circumstances as the errans would have contracted only on materially different terms. We invite comments on whether our proposed test should be couched in these objective terms. (Paragraph 3.59).

1.24. Granted that a party's error is legally relevant, in the sense just described, and was entertained on reasonable grounds, in what particular circumstances should this entitle him to seek annulment? The first and clearest case, in our view, is when his error was caused by the other party to the obligation. We shall presently examine whether fraud should continue to be regarded as a ground of annulment of obligation separate from error, but for the moment we treat it as merely one way in which error can be caused by a contracting party. Our provisional view is that if the other party to the obligation caused the error, then the errans should be entitled to have the obligation annulled whether the co-contractant's conduct was deliberate, negligent or completely innocent. He who has caused another's error - even quite innocently - should not be permitted to retain the advantage thus obtained. Concealment, and even mere silence, should be regarded as factors capable of causing error in appropriate circumstances - as where a seller, although aware of the fact, does not disclose that a painting signed "Constable" is in fact a modern copy. More generally, a party's silence should be regarded as having caused the other's error whenever there was a duty incumbent upon the former to speak, a duty which arose because the latter was entitled to look to him for his information and his failure to speak allowed a false impression to be conveyed. It is, we think, for the courts to say just when the circumstances are such that a duty of this nature arises. Suffice it for us to say that, with Bell,[8] we do not think that the existence of a positive duty to speak is in Scots law confined to those contracts classified in England as uberrimae fidei. (Significantly, before the English terminology came into use in Scotland, insurance contracts were regarded as simply requiring the display by the parties of "good faith", the application of this general concept envisaging not that as regards some contracts a man would be more honest than in others, but that an honest man would be more candid in some circumstances than in others.) One advantage for Scots law of a general approach based upon causation of error (an approach which has widespread

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[8] Principles, 4th ed., para. 13; Commentaries, I, 263.

international support) is that misrepresentation would be dispensed with as a separate factor in the context of annulment for vitiated consent; and the delictual role of fraudulent and negligent misrepresentation would be left to develop appropriately without (as has been the case in the past) having undesirable side-effects upon the rules of the law of contract. We therefore invite comment on our proposal that a party should be entitled to have an obligation annulled where legally relevant error has been caused by the other party or by a person for whose conduct he was responsible. (Paragraphs 3.60 to 3.63).

1.25. The second case in which annulment should be possible, in our view, is when the error of the party seeking it was shared by the other party, whether or not that other party also wishes annulment. Where both parties in concluding the contract were labouring under the same error it may be thought to be not unfair that both parties should also bear the risk of losing the contract. Although the defender's reliance upon the obligation is upset by permitting annulment in such circumstances, it seems to us that this is justified since, by definition, his reliance was upon an obligation which (along with the party seeking annulment) he believed had a different content or meaning or effect. When the common error is discovered we do not think that the party to whom the unbargained-for advantage has thus adventitiously enured should necessarily be permitted to retain it. For him to seek to do so might often, in our view, smack of bad faith. We wish to stress, however, that in many cases of shared or common error, the risk of the parties' belief as to facts being inaccurate will have been impliedly allocated to or assumed by one or other of them by virtue of the nature of the contract, its terms and the circumstances in which it was concluded (see paras. 1.15 to 1.17, supra). Thus, for example, where both parties to the sale of a vessel under construction at a shipyard have failed to investigate its state of completion but have chosen to rely upon the accuracy of an oral report thereon by a casual visitor to the yard, a court might very well hold that, since the true facts could have been

readily ascertained, buyer and seller had each impliedly assumed the risk that the facts were not as they thought them to be, and the contract was consequently not liable to annulment for shared error. We also appreciate that an error may have come to be shared because the party who originally laboured under it infected the other with his mistaken belief. In such circumstances our proposals regarding caused error (paragraph 1.24, supra), and not those relating to shared error, are applicable. (Paragraph 3.64).

1.26. As in all cases of annulment on the ground of defective consent, we think that judicial decree (or decree arbitral where the parties have agreed to submit disputes to arbitration) should be required in order to bring an obligation to an end because of shared error, in the absence of agreement between the parties as to the justifiability of annulment. But here, unlike the position in cases of caused error, we think that annulment should not be granted as of right but should be subject to the discretion of the court; and that the court should, furthermore, be entitled to attach terms or conditions to a decree of annulment of an obligation. Except where one party has (whether fraudulently, negligently or innocently) caused the other's error, there should, in our view, be a discretion vested in the court to refuse annulment even though the party seeking it has fulfilled all of the conditions mentioned earlier in this Part of the Memorandum. This discretion the court would exercise in the light of the conduct of the parties both before and after the conclusion of the obligation, and in the light of the likely consequences for each of them of the granting or refusal of decree of annulment. We can envisage a court, in a few exceptional cases of common error, saying that an errans, although not in the circumstances to be regarded as having impliedly assumed the risk of error, should not be granted annulment because (a) he failed to take certain obvious steps before contracting which would have revealed to him the true state of the facts and (b) bringing the contractual relationship to an end would have exceptionally grave consequences for the

other contracting party (who might e.g. have entered into valuable sub-contracts on the faith of the principal contract).

1.27. In less extreme cases - and these, we think, would be of much more frequent occurrence - a court might come to the conclusion that annulment could appropriately be granted, but only on terms. Thus, for example, in a case of shared error where the co-contractant was in no way at fault in relation to the mistake, yet refusal to annul the contract would result in very severe loss to the errans, a court might well think it right to grant annulment on condition that the errans compensate the other party in respect of any actual loss or expenditure or outlays incurred by him on the faith of the obligation. This would be in accordance with the course followed in Steuart's Tr. v. Hart.[9] The consequence of this would be that the co-contractant's negative (or reliance) interest was protected on annulment, but not his positive (or expectation) interest. Again, the condition attached to annulment in a particular case might be that the errans should enter into a new contract with the other party which gives effect to the parties' true common intention, or which fulfils the legitimate expectations entertained by the parties, at the time of conclusion of the original contract. This might be a particularly appropriate condition in a situation where, for example, the co-contractant, on discovering the common error, was prepared to accept a modification of the contract which would safeguard the interests of the errans, but the latter sought to take advantage of the error as a device for escaping from a relationship about which he had simply had second thoughts. We therefore provisionally propose that annulment should be competent, at the discretion of the court and, if thought appropriate by the court, on terms where the legally relevant error upon which a party relies was shared by the other contracting party. Comments are invited. (Paragraphs 3.65 and 3.66).

1.28. The third set of circumstances in which we propose that legally relevant error should be recognised as entitling a party to seek annulment of the obligation, may be thought to

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[9](1875) 3R.192.

be somewhat more controversial. We have already (see paragraph 1.24, *supra*) described circumstances in which a party's silence should be regarded as having caused the error or misapprehension under which the *errans* was labouring. Annulment should, in our view, also be possible (at the discretion of the court and subject, where appropriate, to terms[10]) where the co-contractant knew of the error and remained silent when he could have eliminated it, even though his silence in no way caused the error, it being a clear matter of the *errans*'s own self-deception. For example, the seller of a programme for a computerized accounting system knows that the purchaser believes the programme to be suitable for use in his existing computer. The computer programme is not in fact so usable, but the purchaser's misapprehension has not been caused or induced by any words or actings of the seller. In such a situation it seems to us that it should at least be open to a court to decide that the interest of the party in error to be relieved from unexpected prejudice is more worthy of protection than the interest of the other party in being able to rely upon an obligation in relation to which he, by definition, knew the misconception under which his co-contractant was labouring. To seek to take advantage in this way of another's self-deception could in some, though not all, circumstances be regarded as sharp practice amounting to bad faith. Whatever the precise role in present day Scots law of good faith in the formation and performance of contracts - a factor which in the view of the institutional writers underlies our law of obligations (see paragraph 3.133) - such conduct is something which, in some situations at least, ought not to be encouraged. It is not just in that limited number of types of contract which have come, under the influence of English law, to be classified by some Scottish judges and authors as *uberrimae fidei*, that, in our view, the parties should be held to a certain minimum standard of honesty and fair dealing. Recognition of the possibility of annulment where one party knows of the other's error is the stance adopted in the UNIDROIT draft Uniform Law, in the latest redraft of the American

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[10] See para. 1.26, *supra*.

Restatement (Second) of Contracts and in the actual or recently proposed laws of a number of successful trading nations (see paragraph 3.69).

1.29. Where annulment on this basis is recognised a qualification is usually made, to the effect that the maintenance of silence by the party who knew of the other's error must in the circumstances have been contrary to reasonable standards of fair dealing. Such a restriction is probably technically unnecessary under a scheme such as we are proposing, since where the co-contractant's failure to disabuse the errans of his error is not contrary to reasonable standards of fair dealing a court would probably hold either that such was the nature of the contract and the circumstances surrounding its conclusion that the risk of error had been impliedly assumed by the errans, or that the situation was one in which the court, in the exercise of its general discretion, should not grant decree of annulment. Nevertheless we think that there can be no harm in underlining the point by attaching to the court's power to annul a specific qualification or restriction along these lines. We therefore provisionally propose that annulment should be competent where the errans's legally relevant error was known to the other party and it was contrary to customary or reasonable standards of fair dealing to leave him in error. Comments are invited.
(Paragraphs 3.67 to 3.71).

1.30. It would be possible to go even further than this and to provide that annulment should be possible even where the co-contractant did not in fact know of the error, but ought to have known of it. The Israeli Contracts (General Part) Law 1973, the draft Dutch Civil Code, the UNIDROIT draft law and the redraft of Chapter 10 of the American Restatement (Second) of Contracts all adopt this position. Such a provision might be particularly valuable in cases where actual knowledge by the co-contractant of the error cannot be proved, but there is strong suspicion that he may have deliberately closed his eyes to the errans's mistake. We have ourselves reached no concluded view on whether annulment should be competent where the co-contractant did not know of the errans's mistake, but

ought reasonably to have been aware of it. But we do not reject such a solution and we invite comments on the matter. (Paragraph 3.71).

1.31. The fourth type of case in which we think annulment should be possible (at the court's discretion and, where appropriate, on terms) differs from the other three in one important respect. The party against whom annulment is sought is in this case entirely free from the taint of the error in as much as he did not cause it, he did not share it and he did not know of it. While there is authority in Scots law for a court's granting annulment, subject to financial conditions, even of onerous obligations in cases of unilateral uninduced error of the type here described, most recent cases suggest that this rule is applicable only in the case of gratuitous obligations (see paragraph 3.73). We see little merit in such a distinction. The creditor in a gratuitous obligation may have changed his position in reliance upon receiving the benefit due to him under it - e.g. by contracting to buy a house, by entering into a partnership or by marrying - and it would be just as detrimental to his interests to permit annulment as it would be to the interests of a creditor in an onerous obligation. Conversely, little real prejudice (apart from loss of profit) would be sustained even by a party to an onerous obligation if annulment were granted for pure unilateral error before he had embarked upon performance of his part of the contract or had otherwise acted in reliance upon it. Our provisional view is that there is no sufficient practical justification for the different rules regarding unilateral error which are said to apply to onerous and gratuitous obligations, and that the possibility of annulment of both types for uninduced error not caused by or shared by or known to the other party should not be excluded. Recognition of the possibility of annulment in cases of unilateral error is accorded in the legal systems of a number of advanced commercial nations - see e.g. the American Restatement (Second) of Contracts, the Meijers draft Netherlands Civil Code and the Israeli Contracts (General Part) Law.

1.32. It is, of course, more than ever essential in cases of uninduced unilateral error that the interests of the party not in error should be adequately protected. We think that this would be achieved under our proposals by virtue of the court's discretion to refuse decree of annulment after taking into account the conduct of the parties both before and after the making of the contract, and by virtue of the court's power to grant annulment on conditions, as for example by requiring the party in error to reimburse to the other party any expenses incurred by him in reliance upon the continued subsistence of the obligation or in preparation for carrying out his part of it. Particularly where the contracting party not in error has acted in reliance upon the obligation, or where the errans has acted in a grossly unbusinesslike manner, it might often be the case that a court would think it right to protect the co-contractant's expectation interest and allow the obligation to stand. However, we can equally envisage circumstances in which annulment seems both just and appropriate. For example, a young woman, on reaching majority, without taking legal advice renounces in favour of her father a provision under her late mother's will, believing that only the liferent and not the fee was involved. Again, a businessman grants a franchise or distributorship, on very favourable terms, to a person whom he believed had sustained injury when endeavouring to rescue a child from a river. Subsequently, and before the date of commencement of the franchise, the businessman discovers that the real rescuer had slipped away unnoticed while the grantee of the franchise had drunkenly fallen into the water and been struggling up the bank at the time of the rescue. Or again, a retail company's advertizing manager, in error because instructions to him have been delayed in the post, concludes on behalf of the company a contract for the printing and distribution of posters and leaflets featuring a particular branch. In fact, the company's directors have already decided, though not yet announced, that that branch should be closed down within the following four weeks. An advertizing campaign encouraging the public to patronize it would therefore be not merely valueless, but actually detrimental to the company. Particularly if no major steps had been taken by the printer

for executing the order and the retail company had acted promptly to inform him of the situation, annulment of the contract might be thought to be a reasonable, indeed economically the least wasteful, solution. In such cases, therefore, although not likely to be of frequent occurrence, we think the court's discretion to decree annulment (where appropriate, on terms) should not be excluded. Comments are invited. (Paragraphs 3.72 to 3.75).

1.33. Our provisional proposals envisage that in cases of shared error, of unilateral error known to the other contracting party and of "pure" or uninduced unilateral error, annulment should be not a matter of right, but of judicial discretion exercisable, where appropriate, on terms. We appreciate that some of those whom we consult may be of opinion that our proposals give insufficient concrete guidance to legal advisers as to when annulment will be appropriate and, by conferring a substantial measure of discretion upon the courts, import into contractual relations an undesirable degree of uncertainty and instability. Some may argue that there are relatively few obligations in respect of which one party or the other cannot point to some matter in relation to which he was labouring under a misapprehension of some kind; and that, consequently, practically every contract would be at least potentially amenable to annulment if the court chose so to exercise its discretion. In response, it might be said that the area of uncertainty which the existence of the discretion created would be very limited: a number of important hurdles would have to be surmounted before a pursuer could place himself in a position to be able to request a court to exercise its discretion in his favour and annul an obligation. First of all, the error would have to amount either to a failure of the declaration whereby he bound himself to correspond with his true intention, or to a mistaken appreciation of reality as at the time of the declaration of his will (paragraph 1.14, supra); secondly, the risk of such an error as is alleged to have arisen must not have been allocated to or assumed by the errans expressly or by implication of law (paragraphs 1.15 to 1.17); thirdly, annulment must be sought

by the pursuer within a reasonable time after his discovery of the error (paragraph 1.20); fourthly, the errans must disclose the grounds on which he held his mistaken belief and be able to demonstrate that those grounds were reasonable and probable (paragraph 1.21); and fifthly, he must show that performance of the obligation in the circumstances as they in fact are would be something materially different from performance in the circumstances as he mistakenly thought them to be (paragraph 1.23). Not until these conditions had been satisfied in respect of a legally relevant error (paragraph 1.22) would a court be able to begin to determine whether, in all the circumstances, annulment should be decreed and, if so, on what terms.

1.34. Those whom we consult who think that our proposals would as they stand give rise to an unacceptable amount of uncertainty might prefer that it should be provided specifically that certain categories of error (e.g. error as to the quality or quantity of the subject matter of the contract; error as to the identity of the other party to the contract) should not form a basis for annulment either at all, or in relation to some one or more of the four types of error which we have described (i.e. caused error; shared error; unilateral error known to the other party; uninduced unilateral error). We would welcome reasoned comments from those who take this view and also suggestions concerning what specific categories of error should be regarded as excluded from forming grounds for annulment. Again, some of those whom we consult may agree with our view that annulment should generally be at the discretion of the court, but think that guidelines for the exercise of that judicial discretion might beneficially be provided (e.g. that annulment should normally not be decreed where the co-contractant had acted in reliance upon the obligation; that annulment should not generally be granted in the case of obligations of a commercial, as distinct from a consumer, character). Comments would be appreciated from those who favour this approach, along with suggestions relating to what the guidelines should be and how they should be formulated. (Paragraphs 3.76 and 3.77).

1.35. A problem arises as to the attitude which should be adopted in respect of errors of law. These normally, but not invariably, take the form of misapprehension of the meaning or legal effect of a contract which has been concluded or of a document which has been signed. Should such errors provide grounds for the mistaken party to seek annulment of an obligation, or should errors of fact alone be relevant? Those who favour denying to certain specific and identified categories of error the status of grounds of annulment might well place errors of law within that group; and those who support the provision of guidelines for the exercise of the court's general discretion to annul may think that one of those guidelines might appropriately be that annulment should normally be granted only in the case of errors of fact (see paragraph 1.34, supra). There is, however, a modern tendency - and this can be seen for example in the UNIDROIT draft uniform law and in recent drafts of the American Restatement (Second) of Contracts - not to differentiate between the effect of error of fact and error of law, but indeed to regard the state of the law as part of the factual background against which an obligation is concluded and so capable of forming the subject-matter of an error of fact. In the Scots law of unjustified enrichment there is some authority to the effect that payment made under error of law, in the form of misconstruction of a deed or contract affecting private rights, can form a basis for a claim of repetition as well as payment made under error of fact. Furthermore, Scottish courts in the nineteenth century (see paragraph 3.65) were prepared to grant annulment of obligation when both parties were in error as to their legal rights. We have formed no concluded view on whether annulment should be competent for errors of law on the same basis as for errors of fact. On the one hand, such a provision might perhaps be thought liable to undermine the general principle that persons are presumed to know the law - a fiction primarily relevant in the criminal law. On the other hand, it can be argued that there is no good reason why annulment should not be possible (at the court's discretion

and subject, if appropriate, to terms) where a party has entered into a transaction having fundamentally misunderstood its tax implications - a misunderstanding which may have been induced by, or shared by, the other party, or may be purely unilateral. We invite comments on whether in the context of annulment for defective consent errors of law should be treated in the same way as errors of fact.
(Paragraphs 3.78 to 3.80).

1.36. If the answer to this question is in the affirmative, we would welcome views on whether there are any types of obligations in respect of which it should be specifically provided that annulment for error of law is not to be competent. One category of obligation which some might think should not be annullable for error of law might be agreements for the compromise of disputes to avoid, or in the course of, litigation. As regards the vast majority of such compromise agreements we think that a court would in any event decide that annulment should not be granted since such was the nature of the contract that each party must be regarded as having impliedly assumed the risk of his understanding of the applicable law being erroneous. In the very few cases in which annulment would not be excluded on this basis the view might be taken that there should be no absolute rule that compromise agreements are not potentially annullable for error of law: if, for example, an insurance claims investigator induces an injured workman to compromise a personal injury claim by misrepresenting (perhaps quite innocently) the applicable law, it may be thought that there is no sufficient reason why annulment of the agreement should not be possible. Comments are invited on whether compromise agreements, or any other specific category of obligation, should not be open to annulment on the ground of error of law, on the assumption that, in general, errors of law will not be treated differently from errors of fact.
(Paragraph 3.81).

1.37. A possible alternative in some cases to the admittedly drastic remedy of annulment on account of error might be provided by the introduction into Scots law of a form of judicial amendment of obligations whereby a court, if

appropriate, (e.g. where the error was shared by both parties, or had been deliberately caused by one of them), could maintain the contract in being, but so modify its terms as to give effect to what the party in error mistakenly assumed the obligation to be.[11] Such a power would be conferred on the Dutch courts under recently published draft articles of the new Netherlands Civil Code. Thus, for example, if the seller of a franchise or distributorship in relation to a particular branded product induced the purchaser to believe that the purchaser's exclusive territory covered the whole of a given district, or that the commission on sale of the product amounted to X% on a specified turnover, whereas under the contract only part of the named district was allocated to the purchaser or the true commission was considerably less than X%, a court, instead of annulling the contract, would have the power to maintain it in existence and modify or amend its terms to make them reflect the situation as the purchaser had originally supposed it to be. We are inclined to think that it would be valuable for the courts to be endowed with such a power of amendment, and we invite comments on whether it should be introduced. Those who do not favour this proposal might, however, be prepared to support a more limited type of modification or amendment under which a court would have the power to delete from the contract a clause affected by error if, in all the circumstances, that clause was clearly distinct and severable, and the whole obligation was not affected by the error. In the present law, severance of this nature is sometimes possible in the case of a contract containing an invalid penalty clause. We therefore also invite comments on the desirability of introducing this limited form of judicial modification of contracts affected by error, namely tne deletion of clearly severable clauses. (Paragraphs 3.82 and 3.83).

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[11] We have, in this context, avoided use of the expression "rectification of obligations". That term is normally used where parties have reached an agreement, consent to which is in no way defective, but that agreement has been inaccurately recorded in a written document. We are here concerned with a different problem, namely where the record of the agreement is accurate, but agreement in those terms was arrived at only because of a mistaken appreciation of reality.

1.38. The recently-published draft articles of the Netherlands Civil Code also contain a provision to the effect that annulment may be excluded if the party against whom annulment is sought proposes a modification of the effect of the contract which would make good the loss that would be suffered by the party in error if the contract were to be maintained in being. In other words, the party confronted with a claim for annulment offers an amendment of the terms of the obligation to the party seeking annulment in order that the legitimate expectations which the latter entertained at the time of conclusion of the obligation, and which would otherwise be defeated as a consequence of his error, may be fulfilled. Thus, reverting to the examples provided in the preceding paragraph, the seller of the franchise or distributorship, on learning of the misapprehension under which the purchaser laboured on receiving the latter's claim for annulment, might offer to amend the terms of their contract so that the purchaser was allocated as his exclusive territory the whole of the named district and so that the commission payable would in fact be X% of the turnover and not a lesser amount. An obligant who, in the face of such a proposal, nevertheless insisted upon annulment might reasonably, we think, be suspected of lacking good faith. We therefore propose that annulment of the original obligation in such circumstances should be competent only on condition that the party seeking it enters into an obligation modified as proposed by the other party (see paragraph 1.27, supra). (Paragraph 3.84).

1.39. Our proposals regarding annulment for error have been made in the context of voluntary obligations concluded inter vivos, i.e. contracts and unilateral binding promises. The proposals might, however, also be extended by analogy to unilateral juristic acts such as donation and transfers of property. We have ourselves reached no concluded view on this matter and would welcome comments. In the present Memorandum we are not concerned with the effect of error in mortis causa deeds. To such cases different considerations of policy may

well apply and additional practical difficulties may exist, e.g. the testator being dead, evidence of the nature of the error and how he came to hold it may be more difficult to obtain and less reliable. (Paragraph 3.85).

1.40. Fraud. We have already proposed that a party should be entitled to decree of annulment where his error (provided it is legally relevant error) has been caused by the other party to the contract. If this proposal were accepted it would not be necessary to retain fraud as a separate category among factors which vitiate consent. Fraud would still remain a relevant concept in some areas of the law (e.g. the law of delict), but as a ground for annulment of obligations it would have been superseded by "caused error". However, we think it advisable to devote some attention to fraud as a defect or vice of consent in the present law and to make certain proposals in relation to it, in case our provisional views regarding the desirability of a generalised category of caused error should not meet with approval.

1.41. In the Scots law of voluntary obligations fraud has a very wide meaning (see paragraph 3.91). It is by no means limited to the making of false statements or to the concealing of facts in circumstances in which there ought to have been disclosure. Erskine's definition (Inst. III.1.16) of fraud as a "machination or contrivance to deceive" is perhaps as good as any than can be devised and is sufficiently broad to comprehend the many cases in which fraud has been held by Scottish courts to be established even in the absence of false statements or concealment. In most (but not all) continental European legal systems it is accepted that if fraud is proved, the victim is entitled to annulment of the obligation irrespective of the objective materiality or gravity of the error which was induced thereby, and irrespective of whether or not he would still have contracted had he known the true position. As far as Scotland is concerned, Bell (Comm. 1.262) expresses the opinion that annulment is possible in the case of fraud quod causam dedit

contractui (i.e. where the victim would not have contracted at all if he had known the truth) but not in the case of fraud quod tantum in contractum incidit (i.e. where the victim would still have contracted, but only on terms more favourable to him). The soundness and utility of this distinction has been doubted by other Scottish writers and our own view is that where fraud has been established a court should not be required to undertake a hypothetical investigation of what agreement (if any) the parties would ultimately have reached if there had been no fraudulent manoeuvres. However, and on the assumption that fraud is to remain as a separate ground of vitiation of consent, we invite comments on whether Bell's distinction, if already part of our law, should be retained and, if not at present recognised, should be introduced. (Paragraphs 3.88 and 3.89).

1.42. Bell also at one point suggested (Princ., 4th ed., note to sections 11-13) that fraud which induced the transfer of corporeal moveables might give rise to a vitium reale. This, of course, would mean that, as in the case of theft so in the case of goods obtained by fraud, no acquirer of the goods, even if in good faith and taking for value, would be able to acquire good title to them: the original, fraudulently dispossessed, owner would be entitled to recover them from whomsoever had possession of them. We can find no other institutional or judicial support in Scots law for such a doctrine; but we would, of course, consider any reasoned views which may be expressed to the effect that fraud should, like theft, result in a real vice affecting the goods so obtained. (Paragraph 3.93).

1.43. The Scottish authorities, both institutional and judicial, clearly demonstrate that fraud in our law of voluntary obligations is constituted by any successful attempt to deceive, no matter the method of deceit resorted to. It is not restricted to making a false statement "knowingly or without belief in its truth, or recklessly, careless whether it be true or false". However, some Scottish legal authors seem to have accepted that narrow

definition of fraud, derived from the speeches in the House of Lords in the English case of Derry v. Peek,[12] as relevant in the context of the annulment of obligations for fraud in Scots law. This is all the more surprising since the case itself was not concerned with fraud as a ground for annulment or rescission of contracts, but with fraud as ground for obtaining damages in tort. And in English law it is clearly recognised that fraud for the purposes of the common law tort of deceit is a very much narrower concept than the fraudulent misrepresentation which may entitle a party to the equitable remedy of rescission of contract. Indeed, fraud in English equity jurisprudence extends far beyond deliberate deception and the common law tort of deceit, and can embrace conduct which, although it cannot be proved to be dishonest, it is "against conscience" to allow a party to benefit from. It is in this latter sense, for example, that fraud is used in the expressions "fraud on the minority" in company law and "fraud on a power". In view of the fact that in Derry v. Peek it was the narrow common law species of fraud, relevant only in the law of tort, that was in issue, we think it unlikely that a Scottish court would today accept the definition of fraud there laid down as of any relevance in Scotland in relation to fraud as a ground for annulment of voluntary obligations. However, given that the Derry v. Peek definition of fraud has been referred to in Scottish textbooks in a contractual context, we wonder whether, if fraud is to remain as a separate ground of annulment of obligations, it would be beneficial by statutory provision to negative any supposed restriction of the meaning of fraud in Scotland to the Derry v. Peek formula. Comments are invited. (Paragraphs 3.94 and 3.95).

1.44. Facility and circumvention. As a ground for annulment of obligations, facility and circumvention developed out of the law of fraud. Initially, even in the case of a facile person, fraud, in the sense of a machination or contrivance to deceive, had to be established before annulment was

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[12](1889) 14 App. Cas. 337.

possible. But the courts were very ready in such cases to infer fraud, especially where a person of weak intellect, albeit not incapax, entered into a grossly unequal bargain. However, around the middle of the 19th century, it was decided that facility and circumvention was not simply a species of fraud or a way in which fraud could be established. They were separate pleas, and separate issues raising these pleas could be sent to the jury for trial. Since that time most discussion of facility and circumvention has been centred around the form of issue which has come to be accepted as appropriate to such cases, namely:

> "Whether on or about ... the pursuer was weak and facile in mind, and easily imposed on; and whether the defender, taking advantage of the pursuer's said facility and weakness did, by fraud or circumvention, procure [the obligation in question] to the lesion of the pursuer?"

It is clear from the decided cases, in spite of an isolated expression of judicial opinion to the contrary, that it is not necessary that both fraud and circumvention be established. However, it has quite recently been indicated by the House of Lords that, at least where the grantor of a deed is still alive, dishonesty or deceit must be shown before circumvention can be held to exist. Our view, as we explain later in this Memorandum, is that it would be preferable if facility and circumvention (and also undue influence, and one form of extortion) were replaced by a more generalised and comprehensive ground of annulment. But if facility and circumvention is to be preserved as a separate ground upon which annulment can be sought, we think that the reference to "fraud" in the issue is misleading and should be eliminated. And while we regard as valuable the recent stressing by the House of Lords of the requirement that dishonest advantage must be shown to have been taken of the obligor's weakness, we also think that it should be made clear that dishonesty can, in appropriate cases, be inferred from the circumstances in which an obligation was concluded, without the necessity of proving actual concrete instances of dishonest or deceitful conduct. Thus, repeated and ultimately successful solicitation from a weak and facile

person of an agreement highly favourable to the other party might in certain situations give rise to an inference of dishonesty. Comments are invited. (Paragraphs 3.96 to 3.99).

1.45. Undue influence. The English equitable doctrine of undue influence has been accepted, to a somewhat uncertain extent, as a ground of annulment of obligations in Scots law. What is meant by undue influence in England varies according to whether it is a testamentary writing or an inter vivos transaction that is being challenged. In the former case an element of coercion must be established. But this is not a necessary requirement as far as inter vivos transactions are concerned. There it is sufficient to show the abuse by the party against whom annulment is sought of a personal influence over the mind of the obligant such that, in conscience, he should not be allowed to retain the benefit conferred upon him. The development of the concept of undue influence was rendered necessary in English law largely because of its very narrow definition of duress, which is in effect restricted to cases of extortion by physical violence or imprisonment. In continental systems, by contrast, many situations which English law would classify as involving undue influence would fall within the general category of force and fear (vis ac metus), or within the category of exploitation.

1.46. It was not until quite late in the 19th century that undue influence as a separate category of vitiation of consent made its appearance in Scotland, and even then it was often combined with facility and circumvention. The factors necessary for the operation of the doctrine have been stated to be (a) the existence in one of the parties of a dominant and ascendant influence over the other; (b) confidence and trust reposed in him by the other; and (c) the granting of a material benefit to the ascendant party by the other in circumstances giving rise to an inference that the ascendant party has betrayed the confidence reposed in him. Clearly the doctrine is, in the present law of Scotland, a somewhat vague and amorphous one. It has, however, been recognised as

operative in Scotland in respect of the relationship between parent and child, and lawyer and client; and it has been suggested that it might also extend to other relationships. As we have already stated, we think that undue influence (and certain other grounds of annulment) should be replaced by a more comprehensive category. However, if undue influence is to be retained as a ground upon which a court may be asked to annul, it may well be thought that the existing authorities leave its scope and precise area of application somewhat undefined and lacking in clarity. We would welcome information about whether this apparent lack of clarity has given rise to difficulties in practice; and also on whether situations or relationships have been encountered which the doctrine does not at present cover and which ought to be covered, and vice versa. (Paragraphs 3.100 to 3.103).

1.47. Force and fear (or coercion, or threats, or extortion). Roman law, and modern systems derived therefrom, distinguish between situations in which the result of the exercise of coercion is that a party's will is so completely overborne that no consent at all has been given and situations in which the effect of coercion is to induce a party to consent, albeit unwillingly. With situations of the first type, which are in any event of the utmost rarity, in our view, we are not at present concerned (see paragraphs 1.1 to 1.7, supra, and Volume Two, Part II). Where coercion of the second type has been resorted to, the result in civil law systems is that the obligation is not absolutely null but is open to annulment. In Roman law, at least as reflected in the Digest, it was necessary before relief could be obtained that the threats or coercion should have been such as would have intimidated a man of robust character, and that the threats employed should have been of actual physical harm. (Paragraph 3.104).

1.48. Of the Scottish institutional writers only Bankton clearly and expressly distinguishes between force and fear which is so extreme as to preclude consent, and so renders an ostensible obligation absolutely null, and force and fear which induces consent (albeit unwillingly) but renders the

resulting obligation annullable (see paragraph 3.108). It is by no means clear whether Stair and Erskine regarded force and fear as a ground of absolute nullity or of annulment, or whether they accepted the distinction between coercion precluding consent and coercion inducing consent (see paragraphs 3.105 and 3.106). Erskine, however, did accept that an obligation would be open to reduction on the ground of "dole or extortion" if its terms were plainly and obviously oppressive or it appeared from them that a contracting party had sought "to catch some undue advantage from his neighbour's necessities" (see paragraph 3.106). Support for this view is also to be found in Stair, in Gloag, and in a number of cases decided prior to the ascendancy of the "sanctity of contract" dogma which reached its zenith in the 19th century (see paragraph 3.112). Bell's attitude is somewhat ambiguous; while possibly favouring absolute nullity in case of force and fear, he regards judicial reduction as necessary. Concerning the degree of constancy required to be shown by a person subjected to threats or coercion, he is also equivocal: ordinary constancy and resolution are called for; but nevertheless account requires to be taken of such subjective factors as age, sex and condition (see paragraph 3.107).

1.49. There is little modern judicial discussion of force and fear to be found. Such authority as there is (see paragraphs 3.109 to 3.111) supports the view that threats normally render an obligation annullable, not absolutely null. Apart from threats of violence and threats of the use of diligence by a creditor to extort more than the amount actually due to him, it has been held to be a relevant ground of reduction that an obligant was threatened with loss of employment. And if a party's goods are unwarrantably seized, an obligation entered into to secure their release is reducible. But there has been no exhaustive or clear definition of just what types of coercion or duress or threats render an obligation annullable, and certainly no real development in Scotland of anything comparable to what American lawyers call "economic duress" (or taking advantage

of a party's weak economic position, as for example by threatening to place him on a credit black list) as a ground of annulment of obligations. In the most recent Scottish case (see paragraph 3.110) the view was taken that deeds and obligations are reducible when they have been extracted as a result of pressure (which might or might not take the form of threats) such as would overpower the mind of a person of ordinary firmness. Where the pressure took the form of threats or of actual imprisonment, it was thought that the requirement that the pressure should have been such as to overpower a mind of reasonable or normal firmness might have been to some extent departed from, but that in other cases it still formed part of the law.

1.50. Our general approach. There have, of course, been substantial social and commercial changes since the heyday in the 19th century of "sanctity of contract". The time has come for a re-examination and redefinition of those aspects of Scots law at present grouped under the headings of force and fear, extortion, facility and circumvention, and undue influence. In particular, the limits of legitimate economic pressure need to be considered. Our provisional conclusion is that the category of threats, suitably clarified and redefined, should be recognised as a ground of annulment; and that the ideas which lie behind facility and circumvention, undue influence and extortion (in Erskine's sense of taking undue advantage of a neighbour's necessities) should be drawn together in the formulation of a comprehensive and generalised new category of vitiation of consent, which we refer to as "lesion". We therefore look first at threats and how the law on that topic should be reformed, and then turn to lesion, our proposed new ground of annulment. (Paragraph 3.113).

1.51. Threats. We have already proposed (paragraph 1.4, supra and Volume Two, paragraph 2.10) that the question whether the ostensible act of a coerced victim was, on the one hand, in no sense the expression of his will or, on the other, a reluctant declaration of will secured by extortion, should be left to judicial determination. Where the case falls

into the second category (and only highly rare and exceptional cases will not) and it can therefore be said that the obligant consented, albeit under compulsion by the other party, we think that, in accordance with the attitude adopted in most European legal systems, the transaction should be annullable and not absolutely null. This may already be the position in Scots law; but in view of the fact that institutional opinion is unclear and equivocal, we think that a statutory provision to this effect would be desirable. We also think that on proof that the use of threats or coercion by the co-contractant contributed to cause the victim to oblige himself in a way in which he would not otherwise have done, he should be entitled to annulment. As in cases of caused error, and unlike the position in cases of shared and unilateral error, the court should have no discretion to refuse annulment. Comments are invited. (Paragraph 3.115) We assume, following on from this, that it would be generally agreed that annulment should be competent against a contractant who, although not himself guilty of making threats, knowingly took advantage of threats made by a third party. Comments are, however, invited on this matter also.

1.52. The question then arises: should it be the law that the obligation is annullable only if the threats were such as would have overpowered the mind of a person of reasonable firmness or constancy? Where only the victim and the person who resorted to the threats are involved, our provisional view is that annulment should not be conditional upon the victim's having displayed reasonable constancy. Provided always that the threats are not so trivial as to be ignored under the rule de minimis non curat lex, we think it should be sufficient that the threats did in fact influence the mind of the victim irrespective of the fact that a braver or more robust person would have been able to withstand them. It does not lie in the mouth of a person who has successfully obtained the benefit of an obligation through the exercise of coercion to say that the pressure deliberately imposed by him should have been more strongly resisted by his victim. We consider at a later point (paragraphs 1.62, 1.63, infra, and

Volume Two paragraphs 3.134 to 3.141) whether a third party in good faith to whom the benefit of an obligation is for value assigned by the original creditor should continue, as under the present law, to be affected by the vitiated consent of the debtor in the obligation. If it is to remain the law that defective consent can be pleaded against such assignees, we think that a party seeking annulment, on the ground of threats, against an assignee for value who was unaware of the use of the threats, should be required to prove that he displayed such firmness in the face of the threats as might reasonably have been expected in the circumstances. Where an innocent third party assignee for value is involved, and not the original creditor who resorted to the coercion, we think it appropriate that the victim of the threats should be able to obtain decree of annulment only if, in entering into the obligation, he displayed a reasonable degree of firmness in defence of his own interests. We invite comments. (Paragraph 3.116). We assume that those who think that, in general, onerous assignees should not be affected at all by the defective consent of the debtor to the obligation (which we discuss infra, paragraphs 1.62, to 1.63) would nevertheless agree that even an onerous assignee should be affected by the threats by which the original obligation was extorted if he was aware of the use of these threats. Comments are, however, invited.

1.53. We have already seen that it is not clear in the present law what type of threats - beyond threats of physical violence - are relevant as a ground of annulment. There are isolated instances in which account has been taken of threats to the victim's economic interest in his employment, or to property interests. But it is by no means certain how far the present law regards as legitimate the imposition of economic pressure upon a person to induce him to contract, or how far it would go to provide a remedy in cases of "economic duress", such as a threat to cut off a person's supply of a commodity necessary for his business, or his access to credit, unless he enters into a contract on terms disadvantageous to him. Our view is that where an obligation has been concluded

through the use by one party against the other of threats of harm to the person, or of serious harm to any lawful personal or economic interest of that other, then the obligation so extorted should be annullable. If a person undertakes an obligation because of threats of harm directed, not against the obligor himself but against a third party, we think that annulment of the obligation should be competent where the threat, if implemented, would affect any important personal interest of the third party or any important economic interest of the third party if, in the latter case, the obligor stands in a close social or economic relationship to the third party. Our intention here is that an obligation should be annullable if extorted from the obligor by means of threats of serious personal injury, or death, to any third party, even one not linked in any way to the obligor. We think it right that annulment should be competent in the case of an obligation concluded under the threat that otherwise the occupants of a highjacked aeroplane will be killed, or a kidnapped child will be murdered or mutilated. It should not, in our view, be a requirement that the kidnapped child, or any of the aircraft passengers, be in any way related to or connected with the obligor. Where, on the other hand, the threat under which the obligor enters into the contract is one of harm not to the person but to the property or economic interests of a third party (e.g. a threat that his windows will be smashed; that his factory will be burned down; that he will be put out of business through having his supply of an essential commodity, or his access to credit, cut off) we think that annulment should be possible only where the third party whose property or economic interests are thus threatened stands in a close social or economic relationship to the obligor who sought to protect him (e.g. is a member of his family; his partner; his principal supplier; an important customer). Where there is no such relationship, it might, in our view, justifiably be thought that the obligor is not acting reasonably in regarding the third party's economic interests as more worthy of protection than his own, and should consequently

not be entitled to seek annulment. Comments are invited. (Paragraph 3.117).

1.54. Under the provisions of a law recently adopted in Israel a bona fide warning by a person that he intends to exercise a legal right (e.g. to institute legal proceedings for recovery of a debt) does not constitute a threat for the purposes of the annulment of an obligation thereby induced (see paragraph 3.118). Recently formulated proposals for the revision of the Quebec Civil Code, however, specifically provide that fear produced by the abusive exercise of any right or power vitiates consent (see paragraph 3.118). We approve of both the general principle embodied in the Israeli law and the qualification or proviso found in the Quebec draft article and we provisionally propose their adoption in Scots law. Whereas a creditor has a right to seek payment and a right to warn the debtor of his intention to resort to the means provided by the law to enforce payment, if these rights are exercised oppressively, annulment of any obligation so induced should be possible. There are methods of seeking payment or exacting payment, even of sums legally due, which should not be permitted to succeed, e.g. the adoption, or the threat, of "strong-arm tactics"; the adoption of methods of collection designed to frighten the debtor or to overawe him, such perhaps as persistently calling upon him late at night. The facts of the recent case of Hislop v. Dickson Motors (Forres) Ltd[13] provide a good example of annulment granted because of a creditor's oppressive exercise of his right to obtain payment of a sum due. The concept of oppression is already recognised to a certain extent (e.g. in relation to irritancies) in the Scots law of obligations; and we think it can safely be left to the court to determine whether a creditor's right to seek payment has, in the circumstances of any particular case, been exercised oppressively. Comments are invited.

1.55. The UNIDROIT draft Uniform Law permits annulment only if notification of intention to annul a contract secured by threats is given to the party against whom annulment is sought

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[13]See Volume Two, para. 3.110.

promptly after the threat has ceased (see paragraph 3.119). We have reached no concluded view on whether such a notification requirement should be imposed in Scots law. If notification were to be introduced we think that it should require to be given "within a reasonable time" after the cessation of the threat, rather than "promptly" thereafter. On the whole, we are not at present convinced that compulsory notification serves a useful purpose, but we invite comments on the matter.

1.56. Lesion. We now consider whether it is possible to subsume under a new and more comprehensive, yet clearly defined, ground of annulment those categories of defective or vitiated consent, of somewhat vague and uncertain scope, which are usually referred to as facility and circumvention, undue influence and extortion (in the sense of taking undue advantage of another's necessities without actual coercion or deception). We assume that there would be general approval of the ideas and the policy which lie behind these categories, but we would, of course, consider any criticisms which might be made by those whom we consult. (Paragraph 3.120.)

1.57. It seems to be generally accepted in English law that the traditional categories of mistake, misrepresentation and duress are not adequate to cover all of the situations in which it is desirable that an obligation should be open to annulment because consent has not been wholly free from constraint or has not been adequately informed. A wide range of additional devices has been developed by courts exercising jurisdiction in equity - devices which are thought not to be readily exportable to a system which does not recognise the dichotomy of law and equity. However, there have recently been indications - particularly in the English Court of Appeal - that there is a single unifying factor lying behind these equitable devices. This factor may perhaps be identified as "unconscionability", or the unfairness which would result if a party were allowed to take advantage of a person whose bargaining power was grievously impaired in order to make a totally one-sided transaction (see paragraphs 3.121

and 3.122). If the concept of unconscionability is only just starting, somewhat hesitantly and tentatively, to make an appearance in English decisions, it already is well-established in the United States. There the Uniform Commercial Code provides that if a contract, or a particular clause in a contract, is found to be unconscionable, then the court may refuse to enforce the contract or the particular clause. If the question of unconscionability is raised, the parties must be afforded a reasonable opportunity to present to the court evidence of the commercial setting, purpose and effect of the contract to assist the court in determining the issue. These rules meet with widespread approval in the United States and are not regarded as importing an excessive or undesirable measure of uncertainty or instability into commercial transactions (see paragraphs 3.123 and 3.124). A number of continental European jurisdictions recognise, or have proposed the introduction of, the comparable concept of lesion in contracts as a ground for annulment (see paragraph 3.125). The recent proposals for the revision of the chapter on obligations of the Quebec Civil Code contain a draft article to the effect that lesion vitiates consent when there is a serious disproportion between the parties' prestations under the contract, resulting from the exploitation of one of the parties. The draft article goes on to provide that the mere existence of such serious disproportion creates a rebuttable presumption of exploitation (see paragraph 3.126). Recently published draft articles for a new Netherlands Civil Code allow for annulment of obligations brought about inter alia by "abuse of circumstances". This arises where a party takes advantage of another's necessities or his weakness or inexperience to bring about an obligation when the facts of which he was aware ought to have led him not to do so (see paragraph 3.127).

1.58. Our consideration of these comparative data leads us to the provisional conclusion that it would be both possible and beneficial to replace the concepts of facility and circumvention, undue influence and extortion (in the sense of exploitation of another's necessitous condition), the scope

of application of all of which is somewhat uncertain in the present law, by a new category of annulment which we call "lesion". Annulment for lesion should, we think, be at the discretion of the court, which should have the power to grant it, where appropriate, on terms (see paragraphs 1.26 and 1.27, supra). We propose that lesion should be defined along the following lines:

> "1. Annulment of an obligation on the ground of lesion shall be competent when a party can show that unfair advantage has been taken of his weak personal or economic position.
>
> It will be presumed that unfair advantage has been taken:
>
> (1) in mutual obligations, when there is a gross disproportion between the prestations of the parties; or
>
> (2) when it is proved that serious prejudice has been sustained, or will be sustained, as a consequence of the obligation by a party who was in a situation of dependence upon the other party; or
>
> (3) when it is proved that serious prejudice has been sustained, or will be sustained, as a consequence of the obligation by a party who, as the other party knew or ought to have known, was suffering from impairment of mental capacity or was weakened by illness, age or addiction to alcohol or drugs; or
>
> (4) when it is proved that serious prejudice has been sustained, or will be sustained, as a consequence of the obligation by a party who, as the other party knew or ought to have known, lacked the normal ability to protect his own interests when undertaking obligations, through ignorance, inexperience, lack of education or understanding of language.

2. When it is claimed (or appears to the court) that the consent of a party to an obligation has been given because unfair advantage has been taken of his weak personal or economic position, the party maintaining the obligation shall be entitled to present evidence regarding its commercial setting, its purpose and effect to rebut this allegation."

The overriding test would therefore be whether unfair advantage had been taken of a party's weak personal or economic position. It would be for the court to say whether the advantage alleged to have been taken of him by the other party was unfair; and the latter would be entitled to lead evidence of the purpose, effect and general commercial setting of the obligation to counter the pursuer's allegation of unfairness. A rebuttable presumption that unfair advantage had been taken would arise on the pursuer's proving (and the onus would be on him) that his case falls within one or other of the four sets of circumstances set out above. (Paragraphs 3.128 and 3.129).

1.59. Some may take the view that a ground of annulment such as we have just described would introduce an undesirable degree of uncertainty and instability into contractual relationships: any contract would be challengeable if it could be shown that one party had taken unfair advantage of the other's weak position, and a presumption that unfair advantage had been taken would arise whenever, looked at objectively, the contract was much more favourable to one party than to the other. Particularly in relation to business and commercial contracts, it might be argued, such a ground of annulment would be unacceptable since success in business is, to some extent at least, based upon taking full advantage of prevailing circumstances (including the economic weakness of those with whom one contracts) in order to extract the best possible terms from the other party. This line of argument would point to the conclusion that our proposed new ground of annulment, if introduced at all, should be confined to consumer, or at least to non-commercial, transactions.

1.60. We regard the maintenance of faith in the enforceability of commercial contracts as an important objective of the law, and would not wish to encourage any doctrine which would undermine the stability of contracts fairly concluded. However, we think that a reasonable balance ought to be maintained between the principle that contracts, once entered into, must be enforced according to their terms, and observance of acceptable standards of fair dealing in mercantile transactions as well as in non-mercantile agreements. We would stress that our proposed ground of annulment permits the presentation of evidence regarding the commercial setting, purpose and effect of the obligation in rebuttal of any allegation of the taking of unfair advantage. We would also observe that (as is shown in paragraph 1.61, supra) a number of highly successful commercial nations have introduced or are about to introduce provisions permitting the annulment of contracts secured by unconscionable or unfair dealing which exploits unduly the relative personal or economic weakness of a co-contractant. We invite comments on our proposed new category of annulment, and on whether, if introduced into Scots law, its operation should be excluded in the case of mercantile or business transactions. (Paragraphs 3.130 and 3.131).

1.61. We have already pointed out (see paragraph 1.39, supra) that our proposals relating to error as a ground of annulment of obligations could be applied by analogy to other inter vivos legal acts. As far as threats and our new ground of lesion are concerned, it would again be possible for them to be applied by analogy and without restriction to other inter vivos acts resulting from consent or other declaration of will. We have reached no concluded view on the matter. But, as in the case of error, we do not at present propose that our suggested new categories of threats and lesion as grounds of annulment should be extended to mortis causa deeds, though it may, at some future date, be desirable for the grounds of annulment of mortis causa deeds to be brought into alignment

with those operative in the case of inter vivos acts. Comments are invited. (Paragraph 3.132.)

1.62. Defective or vitiated consent and third party rights. There can be no doubt that it is currently the law that, where the consent of a party to an obligation has been vitiated by error, fraud, facility and circumvention, etc., that party is entitled to annul the obligation even where the right of credit under it has been assigned for value to a third party who was unaware that any such grounds for annulment existed. This must be contrasted with the protection from such challenge that the law accords to onerous bona fide acquirers of rights in immoveable property, rights in corporeal moveable property and negotiable instruments. The reasons for the less favourable position of transferees of personal rights seem to lie in and to flow from the nature of the legal devices which had historically to be resorted to in order validly to transfer the benefit of a contract to a third party (see paragraph 3.135). These technical legal devices are no longer necessary in the present law, yet the lack of protection of third party rights which accompanied them and flowed from them still remains. At one stage in the development of society immoveables and corporeal moveables were economically and socially the most important items of a man's patrimony and might justly be regarded as the only assets meriting the name "property" and deserving of the protection accorded to property rights acquired in good faith. Today this is no longer the case and some might think that the acquirers of personal rights - incorporeal moveable property - should not be at a disadvantage compared with the acquirers of immoveable and corporeal moveable property. If protection were to be extended to acquirers in good faith and for value of personal rights we think that - by analogy with the effect of registration in the case of immoveable property and of acquisition of possession in the case of corporeal moveables - it should be in favour of an assignee only after intimation of the assignation to the debtor in the obligation. The assignee would, of course, be protected from annulment only if he was in good faith and, at the time of acquisition

of his right, ignorant that the obligation was under challenge on account of the other party's defective consent. Furthermore he would be protected only from annulment for defective consent (error, threats, lesion). If the other party had grounds for rescission or cancellation of the contract because of the cedent's breach (e.g., in the case of an insurance contract, his breach of the warranty that the information supplied by him in the proposal form was accurate) then the assignee would be as vulnerable as the cedent himself would have been. It is only annulment for defective consent that would be barred by the intervention of a bona fide onerous assignee. (Paragraphs 3.134 to 3.138).

1.63. On the other hand, it can also be argued that there are good reasons why even bona fide assignees for value should be affected by the vitiated consent of the debtor in the obligation. An assignee, unlike the acquirer of a corporeal moveable, knows that what he is receiving is not a physical object, but a claim against another person for payment of money or performance of an act; and he knows, or ought to know, that there can exist defences or legal grounds on which such claims can be defeated. If the claim in question turns out to be defeasible because of the debtor's defective or vitiated consent, then it may be thought that the assignee should be restricted to seeking a remedy against the cedent, on whose express or implied representation that the claim was valid he chose to rely. Furthermore, it could be argued that since, under our scheme, annulment in most cases is at the discretion of the court, and may be granted on terms compensating the other party for loss sustained in consequence of the annulment, a bona fide onerous assignee is already sufficiently protected. A court, in the exercise of its discretion, might well decide to refuse annulment, or to grant it only on particularly generous terms, where the interests of an innocent and onerous third party were at stake. It could also be argued that to prefer assignees in good faith to contracting parties whose consent had been vitiated might have the undesirable consequence of unduly favouring debt-collecting or debt-factoring agencies to whom unscrupulous

suppliers of goods or services assigned for value the right of payment under contracts with members of the public who had been induced to enter into the agreements by false or misleading statements. It would of course be possible to avoid this result by providing that an onerous bona fide assignee should not be affected by the debtor's vitiated consent in the case of obligations for the performance of an act, but should be so affected in the case of obligations to pay money. We have not at this stage formed any view as to whether the existing law governing the position of bona fide onerous assignees should be altered. We do, however, invite comments on whether such assignees should enjoy the same protection as is accorded to the acquirers of corporeal moveable property and, if so, whether that protection should be restricted to obligations for the performance of an act. (Paragraphs 3.139 to 3.141.)

Restitutio in integrum (Volume Two, Part IV)

1.64. In order for annulment on the ground of defective or vitiated consent to be possible under the present law, the parties must not have ceased to be in a position physically to restore to each other any benefits which have accrued to them under the obligation (e.g. by handing back goods delivered, or restoring money paid). This requirement can create severe difficulties where contracts of certain types have been partially performed. Thus, suppose a civil engineering contractor has been engaged to prepare foundations for a building or to excavate a tunnel. Once excavations have started it is not possible for the contractor's work to be restored to him if it should transpire that either he or his employer was affected by a defect of consent such as error, threats or lesion. Similarly, if the seller of the goodwill of a business, or an ex-employee, covenants not to compete with the buyer or the employer for a period of years, and in fact refrains from so doing for a time, how can his abstention from competition be restored to him even if his consent to the restrictive covenant was vitiated and it would otherwise have

been open to annulment? In cases of fraud the requirement that restoration of benefits should have remained possible is not applied too literally and money may be awarded as a supplementary element in the restitution in order to achieve equality. But in other cases annulment is excluded if restitutio in integrum is not possible. This is particularly serious in cases where the party who would otherwise have been entitled to annul has no alternative delictual claim for damages, e.g. because the misrepresentation which induced him to enter into the contract was neither fraudulent nor negligent.

1.65. We see no good reason why annulment should not be competent even though specific restitution is impossible or impracticable (though we recognise that the fact that a contract has been acted upon may in some cases be a factor which might lead a court to exercise its discretion to refuse annulment). In such circumstances, as is already done to a limited extent in cases involving fraud, a money payment should take the place of the prestation or benefit the restoration of which in forma specifica is not possible or not practicable. This solution has recently been adopted in the laws, or in proposals for reform of the laws, of a number of foreign countries (see paragraph 4.3.). We therefore propose for Scots law a provision to the effect that on annulment restitutio in integrum should, if practicable, be effected in kind; but that, if this is impossible, or cannot be effected without serious inconvenience, or can be effected only partially, the court should decree payment of money as a surrogatum for all or part of what required to be restored. Comments are invited. (Paragraphs 4.1 to 4.4.).

1.66. In certain highly exceptional cases, such a provision could, as it stands, create problems. Suppose a painting were sold which both parties believed to be a modern copy of a Rubens. Some time later, and only after the painting has been accidentally destroyed or disposed of by the buyer, it is discovered that it was a genuine Rubens. The seller, whether because of the misattribution itself or for some entirely separate reason, e.g. deception by the buyer, has

grounds for annulment and, under our proposal, the inability of the buyer to restore the painting in forma specifica is no longer a bar to annulment since restitution can be made by means of a monetary surrogatum. It seems wrong to us that the monetary payment due from the buyer should be the value of a genuine Rubens. We therefore suggest for consideration that when restitution of property to a party seeking annulment is no longer physically possible (e.g. because the other party has consumed or transferred it), the other party, on the analogy of the law of recompense, should not be obliged to restore to the party annulling more than the profit which he has made on the transaction. (We do not, of course, seek to exclude any delictual action for damages which the party annulling may have against the other.) We invite comments. (Paragraph 4.5).

Damages for culpable misrepresentation (Volume Two, Part V)

1.67. We have already proposed (see paragraph 1.24, supra) that misrepresentation, whether fraudulent, negligent or completely innocent, should cease to exist as a separate ground for the annulment of obligations. Cases which would at present be regarded as raising questions of misrepresentation should in future be dealt with in accordance with the rules suggested by us to govern annulment for error caused by the other contracting party. However, although no longer relevant in a contractual context, misrepresentation - if culpable - would remain of importance as the basis upon which a party might claim damages in the law of delict for loss suffered by him. A party's entitlement to damages would depend upon the general principles of the Scots law of delict, as applied to the specific factual situation of loss caused by false statements. One necessary requirement of the present law of delict is that the loss should have arisen as a consequence of the defender's fault. Where damage resulting from statements is in issue, that fault may take the form of fraud or of negligence. Fraud - a "machination or contrivance to deceive" - may arise in many forms apart from misrepresentation. However, we are not aware of any doubts or difficulties in the law of Scotland regarding the delictual aspects of fraud either

in general or, more narrowly, in relation to fraudulent misrepresentation. We would nevertheless welcome comments on fraud in the delictual context and on any problems which may have been encountered in relation to it. (Paragraphs 5.1 and 5.2.)

1.68. The second ground of delictual liability in this area, negligent misrepresentation, is perhaps less clearly defined in the present law.[14] Although it is now generally accepted that, if foreseeable harm has been caused to a person by a defender's failure to take reasonable care, the onus is normally on the defender to show cause why the ordinary principles of delictual liability for culpa or fault should not apply, there is nevertheless controversy over the issue whether, and to what extent, there should be liability where the harm sustained takes the form of economic loss - which is the type of loss most often flowing from negligent misstatements. There is clear institutional and judicial authority to the effect that damages are recoverable in delict for certain types of economic loss (see paragraph 5.3), but such few 20th century Scottish cases as there are, while insisting that there are limits to the circumstances in which liability will exist for economic loss not connected with physical harm to the person or to property, give no clear guidance as to what those limits are. We are not at present concerned with the general question of the boundaries of liability for economic loss, but only with whether there is delictual liability for such loss where it arises from a negligent statement which induced the pursuer to enter into a contract with the defender. In spite of certain expressions of opinion, favouring restriction of liability for negligent

[14] In the Report of the Departmental Committee under the chairmanship of Lord Dunpark on Reparation by the Offender to the Victim in Scotland (Cmnd 6802, July 1977), it is suggested (para. 7.12) that the law relating to inaccurate statements which lead persons to act to their detriment should be examined with a view to reform by this Commission. In the present Memorandum we consider the law relating to negligent statements made by one contracting party to another which induce the conclusion of the contract. It has not been possible for us in the course of the present study to cover the whole field suggested in the Dunpark Report.

misstatements, to be found in a Scottish case in the House of Lords in 1916 (see paragraph 5.4), we have no doubt that the law of Scotland today recognises delictual liability in the circumstances which we are considering. Even before the House of Lords decision in 1964 in which liability in tort for negligent statements causing financial loss was accepted as being part of the law of England (and in which the earlier Scottish case was considered and found to create no obstacle to this) text writers and judges (at least in extrajudicial pronouncements) in Scotland had expressed the firm view that in Scots law it was competent to award damages for negligent misrepresentation (see paragraph 5.5). A recent English Court of Appeal decision has made it clear that in that country the liability which is recognised in tort in respect of negligent statements extends to representations inducing a contract made by one of the contracting parties to the other (see paragraph 5.6). We are sure that the same conclusion would be reached by a Scottish court. And the very fact that the statement was false would, we think, in many cases give rise to the inference that it was made negligently, an inference which the party who made the statement would be called upon to displace. Nevertheless we think that, in view of the absence of modern Scottish judicial authority on negligent misstatements in the law of delict and in the light of the doubt which exists over the general question of the extent of liability for pure economic loss, it would be beneficial if it were confirmed by legislation, that a contracting party can be liable in delict for loss caused by a negligent statement inducing the other party to contract. Comments are invited. (Paragraph 5.7.)

1.69. Our principal concern is, of course, with liability in delict for misstatements inducing contracts. However, our view is that the liability which exists in contractual situations must extend, by analogous reasoning, to other situations in which a person has suffered loss because he was led to declare his will in certain terms as a result of a negligent misstatement made by the person benefiting from that

declaration. Thus, loss incurred in consequence of transfers of property, discharges of obligations, pollicitations, cautionry for another, etc induced by the negligent misstatements of the beneficiary should also be recognised as giving rise to a remedy in delict. We invite comments. (Paragraph 5.8.)

1.70. The English law of misrepresentation was recast by statute in 1967. By section 2 the English Misrepresentation Act (which we consider in greater detail in paragraphs 1.71 to 1.73 infra and in Volume Two, paragraphs 5.12 to 5.31) enables a person to claim damages for misrepresentation without having to prove that the person who made the statement was negligent in doing so, but provides that the latter shall escape liability if he proves that he had reasonable ground to believe and did believe that the facts represented were true. The Act moreover empowers the court, where a contract has been induced by misrepresentation, to uphold the contract and award damages in lieu of annulment, even though the misrepresentation in question was neither fraudulent nor negligent. We do not think that these provisions should be extended to Scotland. Our view is that, even under the existing law, if a pursuer can prove that he was induced to contract, and thereby suffered loss, by reason of the defender's false statement, that statement would be regarded as having been uttered negligently unless the defender could establish the contrary. And in the determination of this question Scots law, in our view, would and should be concerned, not with whether the defender had reasonable grounds for believing that the facts represented by him were true, but with what a reasonable man in the position of the defender would have foreseen and said and done. In the very rare cases in which the defender could establish that he had been utterly without fault in making the statement and inducing the contract, he should not, we think, be liable in damages; though, of course, the contract itself would still be open to annulment on the ground of "caused error". A further possible way of increasing the

protection accorded by the law to the victims of misrepresentation - and one derived from a fairly recent law reform proposal in New Zealand - might be simply to provide that all statements which induce contracts should be treated as contractual terms, on breach of which the party aggrieved would be entitled to the usual contractual remedies, including damages. Although this solution has certain attractions, our conclusion is that it would be artificial to regard all misstatements inducing contract, no matter how collateral their nature, as contractual terms. Moreover, grave complications might arise in cases where oral representations induced the conclusion of an obligation which was of a type that required to be constituted in or proved by writing. Further difficulties which the adoption of this solution would entail are described by us in Volume Two, paragraphs 5.22 to 5.24. On consideration of the whole matter, we take the view that sufficient protection is accorded to the victim of misrepresentation if it is accepted that misstatements inducing contract provide grounds for annulment (on the basis of "caused error"), for restitution, and (when culpable) for actions of reparation. Comments are invited. (Paragraphs 5.9 to 5.11.)

1.71. We think that it would be highly undesirable for the provisions of the English Misrepresentation Act 1967, sections 1 and 2, to be extended to Scotland. In the first place, there is unanimous agreement among the commentators that the Act is obscurely drafted. In the second place, the provisions of the Act are built upon, and assume a knowledge of, the pre-existing English law relating to misrepresentation; and it cannot be contended that that law, deriving as it did from tort and contract and from both legal and equitable sources, was clear and readily comprehensible even to English lawyers. Thirdly, the Act was based upon a view of the English common law - that there was no liability in tort for negligent statements causing purely economic loss - that had been overtaken and falsified by a House of Lords decision even

before it was passed, and which even prior to that decision would not have been accepted by many Scots lawyers as accurately reflecting the Scottish law of delict.

1.72. In any event, the provisions of section 1 of the 1967 Act are unnecessary for Scotland, being designed to remove restrictions upon annulment for misrepresentation which were thought to exist in English law, but which do not exist in Scots law. Thus, there is no authority in our law (as there apparently was in England) to the effect that the remedy of annulment of contract is not available, but only the appropriate remedies for breach of contract, if a misrepresentation which induced a contract is actually incorporated into it as one of its terms. Indeed, such Scottish authority as there is (see paragraph 5.15) supports the view that a misrepresentation does not cease to be a misrepresentation entitling the aggrieved party to the contractual remedy therefor merely because it is later incorporated as a term of the contract. Similarly, in English law prior to the 1967 Act, it seemed to be the case that annulment for misrepresentation was barred if the contract had been performed, at least in the absence of fraud. The cases clearly demonstrate that, always provided restitutio in integrum has remained possible, this is not the law of Scotland (see paragraph 5.16).

1.73. As far as section 2 of the Act is concerned, we have already given reasons (paragraph 1.70, supra) why it should not be extended to apply to Scotland. We would only add that such is the opacity of the provision establishing that damages are to be obtainable for non-fraudulent misrepresentation unless the representor proves that he had reasonable ground for believing the facts stated to be true, that three different, and plausible, interpretations of it have been advanced by courts and by highly-regarded commentators. These are, that the damages should be such as would be awarded in the tort of deceit; that they should be such as would be awarded under the tort of negligence; and that they should not be awarded on a tortious basis at all, but in contract (see

paragraph 5.17). The precise basis upon which a court should assess and award the damages in lieu of rescission envisaged by the same section of the Act in cases where the court exercises its discretion to uphold the contract, is equally obscure and equally controversial (see paragraph 5.18). Our conclusion therefore is that the provisions of the Misrepresentation Act 1967, sections 1 and 2, should not be extended to Scotland in preference to the specific proposals which we have made in this Memorandum in relation to the contractual and delictual consequences of misrepresentation. Comments are invited.

Accelerated annulment procedure (Volume Two, Part VI)

1.74. Under our proposals, annulment would no longer be a step which could be taken unilaterally by a contracting party by means of simple notification to the other party of his intention to annul. An obligation having once come into existence, albeit one tainted by error, threats or lesion, it should not, in our view, be capable of being annulled, in the absence of agreement between the parties to bring it to an end, without judicial decree (or decree arbitral where the parties have agreed to refer the dispute, or disputes generally, to arbitration). However, we recognise that it may often be important for annulment to be effected rapidly, and we are doubtful whether ordinary Court of Session or sheriff court procedure would at present enable a party to obtain annulment sufficiently speedily. We therefore think that, if brevi manu annulment by one party acting unilaterally is to cease to be recognised by the law, an accelerated form of judicial procedure for obtaining decree of annulment should be provided. This could probably be done, without the need for statutory intervention, by appropriate amendments to the Rules of the Court of Session and the Sheriff Court Rules. In the paragraphs that follow we refer particularly to Court of Session procedure; but we think that a similar new accelerated procedure should also be available in the sheriff court for use in such actions of annulment as are competent in that court (i.e. actions which do not amount to actions of reduction of deeds or writings, these latter actions being, and

remaining, within the exclusive jurisdiction of the Court of Session).

1.75. The need for annulment of an obligation to be obtained speedily may arise from various causes. In the first place, the party seeking annulment may wish to prevent third parties from acquiring unchallengeable rights in the subject-matter of the contract. In the case of transfers of corporeal moveables, heritage, and registered incorporeal rights (e.g. company shares) a transferor who alleges that his consent to the contract of sale was defective or vitiated will nevertheless be unable to recover the property if, in the interim, his transferee has disposed of it to an onerous third party acquirer who was unaware that the transferee's right was being challenged. It is therefore important, in circumstances in which it is possible for a third party to acquire rights good against the transferor, for the latter to be able to act swiftly and effectively against his transferee in order to protect his own interests. Clearly, there would be even more cases in which speed in annulment would be vital in order to forestall the acquisition of unchallengeable rights by third parties, if effect were accorded to the suggestion that, in all cases, bona fide onerous assignees should acquire rights not defeasible by virtue of the defective consent of the obligor (paragraph 1.66, supra).

1.76. However, even where the situation is not one in which third parties might acquire indefeasible rights against the party seeking annulment, it may still be of great importance to him for the obligation to be annulled more quickly than could be done by resorting to ordinary judicial procedure. Thus, although inability to make restitutio in integrum in kind is not, under our proposals, to be a bar to annulment, nevertheless the fact that a contract has been substantially performed might well in some cases be a factor which would influence a court to exercise its discretion to refuse annulment. Therefore the party claiming to have grounds for annulment would often wish to obtain decree before the other party had started to perform or had performed to any

appreciable extent. Moreover, even if a party were confident that annulment would be granted of an executed or partially executed contract, he might well still wish to act rapidly in order to minimize the amount of the pecuniary surrogatum for restitution in kind for which, on annulment, he might be found liable to the party who had embarked upon performance of the contract.

1.77. Again, speed in the determination of the question whether a party has grounds for, and should be granted, annulment may be vital in circumstances in which a party wishes to withdraw his resources from performance of the obligation which he claims should be annulled and to deploy them elsewhere. For example, a civil engineering contractor may believe that he was induced to enter into a construction contract by the misrepresentations of the employer. He is offered an opportunity, which must be accepted without delay, to conclude a contract for another construction project. His ability to perform this second contract is, however, dependent upon his machinery, employees, etc. being freed from performance of the first contract. If he simply stops performing that contract he will be liable in substantial damages for breach of it if a court subsequently decides that his supposed grounds for annulment were insufficient. If, however, in order to avoid this possibility the contractor continues to perform the first contract and at the same time raises an action for annulment of it, he will lose the chance of concluding the second contract since judicial decree of annulment cannot be obtained by ordinary court procedure, even at its most expeditious, before the offer of the new contract expires. In order to cope satisfactorily with such cases an accelerated form of judicial annulment procedure seems called for. (Paragraphs 6.1 to 6.8).

1.78. It is true that the Rules of the Court of Session at present make provision[15] in commercial causes for speedier determination than by normal procedure of a question in

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[15] R.C. 148-151.

dispute. However, this accelerated procedure is applicable only if both parties agree to it and only to causes "arising out of the ordinary transactions of merchants and traders"[16]. In any event, it can come into operation only on the closing of the record:[16] prior thereto ordinary procedure applies. If both parties to a dispute are agreed that greater despatch than this is required, resort could be made to the summary trial procedure[17] under which the parties themselves (with the consent of the Lord Ordinary to whom they have chosen to submit the cause) may agree upon the procedure to be adopted for the determination of the dispute. However, the summary trial procedure has the disadvantage that, once again, it can be resorted to only where both (or all) parties to the dispute agree. Neither of these procedures, therefore, seems well adapted to enabling speedy judicial intervention to be sought where a party wishes as a matter of urgency to annul an obligation on the ground of his defective or vitiated consent. We therefore propose the introduction of a new procedure whereby judicial decree of annulment of an obligation could be rapidly obtained by a party who, for some sufficient reason, was not prepared, or not in a position, to accept the delay involved in obtaining a judicial decision by means of ordinary procedure.

1.79. Our suggested new procedure is modelled in general terms upon Rules 72(b) and 150 of the present Rules of the Court of Session. What we envisage is that the party who is seeking annulment should prepare, in the usual way, a summons concluding therefor. After the summons had been signeted, but before its service upon the defender, the pursuer would apply, in writing, to the Deputy Principal Clerk of Session craving the Court to direct that special summary or abbreviated procedure be followed in the determination of the cause. The Deputy Principal Clerk would then bring the application forthwith before a Lord Ordinary

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[16] R.C. 148(a).

[17] Administration of Justice (Scotland) Act 1933, s.10 and R.C.231.

in chambers (or the Vacation Judge). The Lord Ordinary, on being satisfied by the pursuer, or by counsel or solicitor on his behalf, of the urgency of the matter, would then appoint the procedure thereafter to be followed in the cause. Depending upon the precise degree of urgency established to exist, the Lord Ordinary would be empowered, in his discretion, to shorten (and, if appropriate, to dispense with completely) the induciae in the summons; to substitute for service of the summons upon the defender informal intimation to him of the proceedings; to dispense with the lodging of defences (and, hence, with the preparation of open and closed records); and to ordain that the merits of the cause be argued (and proof, if necessary, be heard) on such day and at such time (whether in or out of Term) as he may direct.

1.80. Under such a scheme it would be possible for decree of annulment to be obtained very rapidly. The hearing on the merits might even, in cases of great urgency, be fixed for the same day as the making of the original application to the Lord Ordinary to direct that the cause be determined under the special abbreviated procedure. A pursuer seeking such an unusual degree of despatch would, however, generally be required to satisfy the court that he had given notice to the defender, even if only informally, of his intention to seek an immediate hearing of the merits of the cause. At the hearing the Lord Ordinary would decide whether grounds for annulment existed and, in those cases where, under our proposals, annulment is to be at the discretion of the court, whether to exercise that discretion in the pursuer's favour. If it were decided that it was appropriate to grant annulment but only on terms that the pursuer compensate the defender, the court, if it had sufficient information before it, would immediately fix the sum payable. If the court did not at that time have sufficient information, it might nevertheless grant decree of annulment and ordain the pursuer to find caution for the payment to the defender of a sum to be determined by the court at a later date.

1.81. If such a procedure were introduced, we think that an accelerated appeal procedure should also be made available

whereby the Lord Ordinary's decision could be speedily reviewed. This procedure might be initiated by a party's making application, in writing, to the Deputy Principal Clerk of Session for the Lord Ordinary's interlocutor to be reviewed by the Inner House. The Deputy Principal Clerk would then bring the application forthwith before a Division in chambers (or, in vacation, before the Vacation Judge). The Division (or the Vacation Judge) on being satisfied by the applicant, or by counsel on his behalf, of the urgency of the matter, would then appoint the procedure to be followed in the disposal of the appeal. This, in circumstances of great urgency, and particularly if the respondent had already been notified of the appellant's application, might take the form of an immediate hearing by the Division of the appeal, or of the assembling of a Division (if necessary, an Extra Division) during vacation to hear the appeal.

1.82. It would be possible for our proposed accelerated procedure to go even further than we have so far suggested. In cases in which annulment is sought on the ground of caused error or of threats where, under our proposals, annulment is a matter of right and is not subject to the discretion of the court, it could be provided that decree of annulment, if the court were satisfied that the matter was sufficiently urgent, might be pronounced without the necessity of intimation of the proceedings to the defender and, consequently, without his being accorded an opportunity to appear. The court would act on the basis of the pursuer's averments alone, as can at present be the case in proceedings for interim interdict. However, again as in cases of interim interdict, we envisage that resort to this ex parte procedure should be periculo petentis: if the pursuer misstated the facts (whether fraudulently, negligently or innocently) such that, had the court known the true position, it would not have granted annulment, the pursuer would be liable to the defender for the loss, injury and damage suffered by the latter in consequence of the annulment of the obligation. We have reached no concluded view on whether this extension of our abbreviated

annulment procedure should be introduced. We invite comments on the abbreviated procedure which we have outlined, as well as on the possible extension of it mentioned in this paragraph. (Paragraphs 6.10 to 6.13).

1.83. We intend in due course to consider, with a view to reform, the existing law governing remedies for breach of contract. Even before the appearance of that study, however, we think it might well be beneficial for the abbreviated or accelerated judicial procedure, which we have just proposed should be introduced in the case of annulment of contract for defective or vitiated consent, to be extended to apply also to cancellation (or rescission) of contract on the ground of material breach by the other party. Although annulment for defective or vitiated consent and cancellation for material breach have different consequences when justifiably invoked, yet they present comparable problems and dangers to contracting parties in determining whether their use is, in any particular circumstances, justified. We think that application of our proposed summary procedure would go at least some way towards solving those problems in cases of cancellation for material breach just as it would in cases of annulment for vitiated consent. Comments are invited. (Paragraph 6.14.)

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

1. In cases involving transfer of corporeal moveables, coercion should be regarded as so extreme as totally to exclude consent only where the dispossession amounts to robbery. In all other cases, it should be left to unfettered judicial decision, based on evidence of all relevant circumstances, to determine whether the ostensible act of a coerced victim was, on the one hand, in no sense the expression of his will or, on the other, a reluctant declaration of his will secured by extortion. (Paras. 1.3 and 1.4).

2. Alternatively, should it be provided that a legal act which has resulted from the application of serious physical force or the threat thereof to any person should be absolutely null, provided that the actor, but for such force or threats, would not have acted as he did? (Para. 1.5).

3. The victim of coercion which is so extreme as completely to exclude consent should nevertheless be required to take prompt steps to denounce his ostensible act within a reasonably short time of becoming free from pressure, as a condition of his entitlement to assert the nullity of the obligation against onerous innocent third parties. (Para. 1.6).

4. Should it be provided by legislation that where a signature on a bill of exchange has been secured without any exercise of the will on the part of the signer, the bill should be regarded as no more valid than would be a forgery? (Para. 1.7).

5. Annulment of an obligation on the ground of a particular error should be excluded in circumstances in which the risk of that error was expressly assumed by the party in error or was imposed upon him by implication of law because of the nature of the contract, its terms, and the circumstances in which it was concluded. (Paras. 1.15 and 1.16).

6. It should be left to the court to decide whether the nature of any particular contract is, or the circumstances surrounding its conclusion are, such that the errans should be regarded as having impliedly assumed the risk of error. (Para. 1.17).

7. Alternatively, should an attempt be made to specify in advance categories or types of contract in which the risk of error of particular kinds should be regarded as falling upon one party or the other? If so, which types of contracts should be specified, and upon which party should the risk of error be placed? (Para. 1.17).

8. Judicial decree (or decree arbitral, if it has been agreed that disputes be submitted to arbitration) should be required for annulment of an obligation on the ground of defective consent. (Paras. 1.18 to 1.20).

9. Decree of annulment should not be granted unless sought within a period after discovery of the facts on which the claim is founded that is, in all the circumstances, reasonable. (Para. 1.20).

10. A party seeking annulment should be required to disclose the grounds on which he held his erroneous belief and be able to demonstrate that those grounds were reasonable. (Para. 1.21).

11. The basic test for the existence of legally relevant error should be whether the party seeking annulment would have contracted only on materially different terms (or would not have contracted at all) if he had been aware of the true position. (Para. 1.22).

12. Alternatively, should the test be whether a reasonable man in the same external circumstances as the errans would have contracted only on materially different terms (or would not have contracted at all)? (Para. 1.23).

13. An obligant whose error falls within the scope of Proposal 11 (supra) should be entitled to have an obligation annulled if he can establish that his error was caused by a co-contractant, or by a person for whose conduct the co-contractant was responsible. (Para. 1.24).

14. Annulment should be competent, at the discretion of the court and, if thought appropriate by the court, on terms, where an error, which falls within the scope of Proposal 11, upon which a party relies was shared by the other contracting party, whether or not that other party also wishes annulment. (Paras. 1.25 to 1.27).

15. Annulment should be competent where a party's error, which falls within the scope of Proposal 11, was known to the other party and it was contrary to customary or reasonable standards of fair dealing to leave him in error. (Paras. 1.28 and 1.29).

16. Should annulment be competent where the co-contractant did not know of the errans's mistake, but ought reasonably to have been aware of it? (Para. 1.30).

17. Annulment should be competent (at the discretion of the court and, where appropriate, on terms) in cases of uninduced unilateral error falling within the scope of Proposal 11. (Paras. 1.31 and 1.32).

18. Should it be specifically provided that certain categories of error should not form a basis for annulment either at all, or in relation to some one or more of the 4 types of error which we have described (i.e. caused error, shared error, unilateral error known to the other party, uninduced unilateral error)? If so, what should these excluded categories be? (Paras. 1.33 and 1.34).

19. If annulment is generally to be at the discretion of the court, would it be beneficial for guidelines to be provided as to how that discretion should be exercised? If so, what should these guidelines be and how should they be formulated? (Para. 1.34).

20. Should error in fact and error in law be treated alike as grounds for annulling obligations? (Para. 1.35).

21. If so, should annulment on the ground of error of law be incompetent in the case of compromise agreements or of any other specific category of obligation? (Para. 1.36).

22. Should judicial amendment or modification of obligations affected by error be permissible in Scots law? If so, should such modification be limited to the judicial deletion of a clause affected by error in circumstances in which that clause is clearly severable? (Para. 1.37).

23. Where a party to an obligation which is open to annulment on the ground of the other party's error has offered a modification of that obligation which would fulfil the legitimate expectations entertained by the party in error at the time of his assumption of the obligation, annulment should

be competent only on condition that the party seeking it enters into an obligation modified as proposed by the other party. (Para. 1.38).

24. Should our proposals in relation to error in obligations, if implemented, extend by analogy to other inter vivos legal acts such as transfers of property? (Para. 1.39).

25. In the event of Proposal 13 (supra) proving unacceptable, should there be introduced into, or retained in, Scots law Bell's distinction between fraud such that the victim would not have contracted at all if he had known the truth and fraud such that the victim would still have contracted, but only on terms more favourable to him? (Para. 1.41).

26. Should fraud, like theft, result in a vitium reale attaching to goods obtained thereby? (Para. 1.42).

27. If fraud is to remain as a separate ground of annulment of obligations, would it be beneficial by statutory provision to negative any supposed restriction of the meaning of fraud in Scotland to the Derry v. Peek formula? (Para. 1.43).

28. If facility and circumvention is to be preserved as a separate ground of annulment, reference to fraud in the issue sent to trial should be eliminated and it should be made clear that dishonesty can, in appropriate cases, be inferred from the circumstances in which an obligation was concluded, without the necessity of proving actual concrete instances of dishonest or deceitful conduct. (Para. 1.44).

29. Has the apparent lack of clarity in the area of application of undue influence as a ground of annulment of obligations given rise to difficulties in practice? Are there any situations or relationships which the doctrine does not at present cover and which ought to be covered, and vice versa? (Para. 1.46).

30. Where a contractant has consented, albeit under compulsion, the transaction should be regarded as annullable and not as a complete nullity. In such circumstances, however, the court should have no discretion to refuse annulment. (Para. 1.51).

31. Annulment should be competent against a contractant who, although not himself guilty of making threats, knowingly took advantage of threats made by a third party. (Para. 1.51).

32. If bona fide onerous assignees are not to be otherwise protected, then it should be provided that a victim of threats who later seeks annulment against a bona fide onerous assignee should succeed only if he displayed such firmness in the face of the threats as might reasonably be expected in the circumstances. No such requirement of firmness should be imposed where the victim of the threats seeks annulment against the party who applied the threats. (Para. 1.52).

33. Even if onerous assignees are in general to be protected, annulment of an obligation secured by threats should be competent against an onerous third party assignee who was aware of the use of these threats. (Para. 1.52)

34. An obligation should be open to annulment where it has been concluded through the use by one party against the other of threats of harm to the person, or of serious harm to any lawful, personal or economic interest of that other. If the obligation has been undertaken because of threats of harm directed not against the obligor himself but against a third party, annulment of the obligation should be competent where the threat, if implemented, would affect any important personal interest of the third party or any important economic interest of the third party if, in the latter case, the obligor stands in a close social or economic relationship to the third party. (Para. 1.53).

35. A bona fide warning of an intention to exercise a legal right should not be regarded as constituting a legally relevant threat. However, the oppressive exercise of any right or power should be regarded as capable of vitiating the consent of the person against whom it is exercised. (Para. 1.54).

36. Should annulment of an obligation secured by threats be competent only where the party seeking annulment has, within a reasonable period after the cessation of the threat, notified the party against whom annulment is sought of his intention to seek annulment? (Para. 1.55).

37. Is there general approval for the ideas which lie behind the categories (as distinct from approval for the categories themselves) of facility and circumvention, "extortion" in the

secondary sense of taking advantage of another's necessities, and "undue influence" as grounds for annulment of obligations? (Para. 1.56).

38. There should be introduced into the law as a ground for annulment of obligations, alongside error and threats, but replacing facility and circumvention, undue influence and extortion (in the sense of exploiting another's necessities), a new general category of "lesion". Annulment on this ground would be at the discretion of the court and subject, where appropriate, to terms. Lesion should be defined along the following lines:

> "1. Annulment of an obligation on the ground of lesion shall be competent when a party can show that unfair advantage has been taken of his weak, personal or economic position.
>
> It will be presumed that unfair advantage has been taken:
>
> (1) in mutual obligations, when there is a gross disproportion between the prestations of the parties; or
>
> (2) when it is proved that serious prejudice has been or will be sustained as a consequence of the obligation by a party who was in a situation of dependence upon the other party; or
>
> (3) when it is proved that serious prejudice has been or will be sustained as a consequence of the obligation by a party who, as the other party knew or ought to have known, was suffering from impairment of mental capacity or was weakened by illness, age or addiction to alcohol or drugs; or
>
> (4) when it is proved that serious prejudice has been or will be sustained as a consequence of the obligation by a party who, as the other party knew or ought to have known, lacked the normal ability to protect his own interests when undertaking obligations through ignorance, inexperience, lack of education or understanding of language.
>
> 2. When it is claimed (or appears to the court) that the consent of a party to an obligation has been given because unfair advantage has been taken of his weak, personal or economic position, the party maintaining the obligation shall be entitled to present evidence regarding its commercial setting, its purpose and effect to rebut this allegation. (Para. 1.58).

39. Should the operation of our proposed new category of lesion, if introduced into Scots law, be excluded in the case of mercantile or business transactions? (Para. 1.60).

40. Should the categories of threats and lesion be applied as grounds of annulment not only to obligations but also to other inter vivos acts resulting from consent or other declaration of will? (Para. 1.61).

41. Should the same protection as is accorded to onerous bona fide acquirers of corporeal moveable property be extended to transferees in good faith and for value of personal rights? If so, should such protection apply only in the case of obligations ad factum praestandum and not in the case of obligations to pay money? (Paras. 1.62 and 1.63).

42. Restitutio in integrum should, if practicable, be effected in kind. If this is impossible, or cannot be effected without serious inconvenience or can be effected only partially, the court should decree payment of money as a surrogatum for all or part of what is due. (Para. 1.65).

43. When restitution of property to a party seeking annulment is no longer physically possible (e.g. because the other party has consumed or transferred it), the other party, on the analogy of the law of recompense, should not be obliged to restore to the party annulling more than the profit which he has made on the transaction. (Para. 1.66).

44. Have any doubts or difficulties been experienced in the law of Scotland relating to fraud as a delict and, in particular, when a delictual claim is founded on fraudulent misrepresentation? (Para. 1.67).

45. It should be confirmed by legislation that a contracting party can be liable in delict for loss caused by a negligent statement inducing the other party to contract. (Para. 1.68).

46. Similarly, transfers of property, discharges of obligations, pollicitations, cautionry for another, etc induced by negligent misstatement by the beneficiary should be recognised as potential grounds for delictual liability if loss is incurred in consequence. (Para. 1.69).

47. Misstatements inducing obligations should provide grounds for annulment and, when culpable, for actions for reparation. It would be artificial for the law to treat all misrepresentations inducing contracts as contractual terms which, on breach, accorded the normal contractual remedies to the party aggrieved thereby. (Para. 1.70).

48. The provisions of the Misrepresentation Act 1967, sections 1 and 2 should not be extended to Scotland in preference to the specific proposals made by us in relation to the contractual and delictual consequences of misstatements. (Paras. 1.71 to 1.73).

49. Should an abbreviated or accelerated judicial procedure for the annulment of obligations, as described in paragraphs 1.79 to 1.82, be introduced into the law of Scotland? (Para. 1.82).

50. If such an abbreviated or accelerated judicial procedure were introduced in the case of annulment of obligations for defective or vitiated consent, should it be extended to apply also to cancellation (or rescission) of obligations on the ground of material breach by the other party? (Para. 1.83).

51. In general, we invite comment on any matter dealt with in, or arising out of, this Memorandum.