SCOTTISH LAW COMMISSION

MEMORANDUM No: 34

CONSTITUTION AND PROOF OF VOLUNTARY OBLIGATIONS:

GENERAL INTRODUCTION AND SUMMARY OF PROVISIONAL PROPOSALS

10 March 1977

This Memorandum is the introductory volume in a series of related Memoranda which are published simultaneously for comment and criticism, and which do not represent the final views of the Scottish Law Commission.

The Commission would be grateful if comments were submitted by 30 September 1977. All correspondence should be addressed to:

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MEMORANDUM NO. 34

CONTENTS

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CONSTITUTION AND PROOF OF VOLUNTARY OBLIGATIONS:

GENERAL INTRODUCTION AND SUMMARY OF PROVISIONAL PROPOSALS

I. GENERAL INTRODUCTION

1. In our First Programme of Law Reform[1] we recommended that the law of obligations be examined by the Commission with a view to reform. The Memorandum attached to that Programme referred specifically[2] to the constitution and proof of voluntary obligations as a topic which stoood in need of review.

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, and in particular on the topic of constitution and proof, was "very seriously interrupted"[5] during this period by the concentration of our resources on the joint exercise. However, some of the preliminary work which was done with a view to the codification of the law of contract has been of considerable value to us in the preparation of the series of six Memoranda on constitution and proof of voluntary obligations which we now publish, and to which the present Memorandum forms the general introduction. We hope in due course to produce Memoranda on other problem areas of the law of voluntary obligations. All of the Memoranda in the present series concentrate upon the internal

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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.

municipal law of Scotland, and we make no proposals for alteration of the Scottish rules of private international law relating to the creation of voluntary obligations. Changes in these rules, where necessary or desirable, are in our view more appropriately brought about as a result of international action and cooperation.

3. WE WISH TO STRESS THAT THE TOPICS CONSIDERED IN THE MEMORANDA IN THIS SERIES ARE VERY CLOSELY INTERRELATED AND THAT THE INDIVIDUAL MEMORANDA SHOULD THEREFORE BE REGARDED NOT AS SEPARATE AND SELF-CONTAINED BUT RATHER AS DEALING COLLECTIVELY WITH A SINGLE CHAPTER OF THE LAW, DIFFERENT ASPECTS OF WHICH WE HAVE, FOR CONVENIENCE, CONSIDERED IN SEPARATE DOCUMENTS. Apart from the present General Introduction, the Memoranda in the series are entitled:

(1) Constitution and proof of voluntary obligations: unilateral promises (Memorandum No. 35).

(2) Constitution and proof of voluntary obligations: formation of contract (Memoranda No. 36).

(3) Constitution and proof of voluntary obligations: abortive constitution (Memorandum No. 37).

(4) Constitution and proof of voluntary obligations: stipulations in favour of third parties (Memorandum No. 38).

(5) Constitution and proof of voluntary obligations: formalities of constitution and restrictions on proof (Memorandum No. 39).

4. In Memorandum No. 35 we consider the law relating to the creation of obligations through the institution of the unilateral binding promise. Among other matters, we discuss how the law should classify proposals made by a person to pay a sum of money if a certain act is performed, e.g. a notice stating that a reward will be paid if a missing person is found. We come to the provisional conclusion that such proposals should normally be regarded in law as conditional promises and not as offers requiring acceptance. The Memorandum also considers promises made in connexion with offers and acceptances, e.g. a promise to

keep an offer open for a certain time or a promise to accept an offer if one is made in certain terms or within a certain time. We go on to discuss the question of whether communication or notification of the promise to the promisee should be required before an obligation is constituted in his favour; and we also consider the principal practical consequences entailed in regarding a statement as a promise rather than an offer. The Memorandum does not discuss stipulations or promises made by the parties to a contract in favour of third parties (jus quaesitum tertio): this is the subject of Memorandum No. 38. Nor does the Memorandum deal, except in passing, with the matter of the formalities with which unilateral promises should comply or with the matter of restrictions on the methods of proving such promises: these topics are explored in Memorandum No. 39.

5. In Memorandum No. 36 there is dicussed the law relating to the creation of obligations through the institution of the contract. We consider among other things the concepts of offer, acceptance and intention to enter into legal relation. The matters which we discuss include whether it is desirable that shop window displays, supermarket shelf displays, vending machines, invitations to tender, notices of auction, etc. should be classified as offers or as mere invitations to enter into negotiations; whether identical cross-offers should be sufficient to constitute a contract; whether a purported acceptance which in fact seeks to modify or depart from the offer should always be treated as a rejection; whether, and in what circumstances, acceptance of an offer may be implied from the offeree's conduct or his silence; when an acceptance, particularly one sent by post, telegram or telex, should be regarded as having been communicated to the offeror; and what should be the effect of a late acceptance. We also consider the question of termination of offers: e.g. should an offer continue to exist if there has been a material change of circumstances since it was made?; should an offer always lapse on the occurrence of the death, insanity or bankruptcy of offeror

or offeree before acceptance?; should an offeror always be entitled to revoke his offer before acceptance, or should an offer, unless otherwise provided by the offeror, be regarded as irrevocable for a reasonable period after it has been made? The Memorandum does not deal, except in passing, with the matter of the formalities with which contracts or certain types of contracts must comply, or with the matter of restrictions on the methods of proving contracts: these topics are dealt with in Memorandum No. 39.

6. We turn in Memorandum No. 37 to a discussion of certain situations in which, in spite of the actual or apparent making of a promise or reaching of agreement, no obligation in fact comes into existence. The problems which we there consider have hitherto frequently been discussed in the context of "error"; but we think that it helps to clarify the law to regard them rather as matters which prevent obligations from coming into being and, hence, as aspects of the law of formation of obligations. Thus, for example, the formation of a contract may be excluded because no consent, but rather dissent, exists: the parties, perhaps because of a material misunderstanding or an ambiguity in the meaning of the words used by them, are at cross-purposes. Again, a contract may fail to be formed because of the parties' shared ignorance (common error) e.g. as to the non-existence of a factor, the existence of which was considered by them to be fundamental to their agreement (pre-contractual frustration). We also discuss in this Memorandum the situation in which a declaration by a party does not in fact reflect his true intention because e.g. of a slip of the tongue or of the pen; the situation in which a party's declaration is garbled or distorted in a material respect in course of transmission; and the situation (referred to as simulation and dissimulation) in which parties use the outward forms of a particular transaction or type of obligation, but do do for some oblique purpose, e.g. to disguise the nature of the true transaction or relationship between them. In all of these cases we also consider what the legal consequences

for the parties should be when the agreement which they had contemplated or which they thought had come into being, in fact fails to result.

7. Memorandum No. 38 deals with the question of stipulations made in contracts by one or both of the parties thereto in favour of third parties (jus quaesitum tertio). In it we discuss the circumstances in which the third party should acquire a right enforceable against a contracting party who undertook to perform in his favour and when such a right should be capable of cancellation by a contracting party. We consider among other matters, cases in which there is conferred upon the third party a bare title to sue (e.g. for payment of a sum of money on deposit receipt) and not, or not necessarily, any right to the money itself; whether the right of the third party should be challengeable because the contract in which it is conferred is annullable (e.g. because of error); what remedies should be available to the third party in the event of the failure of the contracting party to perform in his favour, or in the event of defective performance; whether a contracting party, as well as the third party beneficiary, should have a title to sue the other contracting party in respect of his failure to perform, or defective performance of, his obligation to the third party; and whether, and in what circumstances, a third party may acquire an enforceable right as a result of a collective agreement made between an employer and a trade union.

8. In Memorandum No. 39 we consider the question of requirements of form in the constitution, and restrictions on the means of proof, of certain types of voluntary obligations. We begin by describing the existing law under which some categories of obligations must be constituted in probative or holograph writ; other types are required by statute to be in writing, but very often the formalities with which that writing must comply are not specified; and

yet other classes of obligations may be constituted in any form but require to be proved by the writ of the party alleged to be bound or by his admission on record or on reference to his oath. After our description of the present law we discuss generally the respective advantages and disadvantages of formal requirements (and especially writing of some kind) in the constitution of voluntary obligations. In the light of this discussion we then submit for comment and criticism four alternative schemes of reform of the law governing formalities of constitution and restrictions on proof. One of these schemes is based upon the existing law, but would clarify and amend it in a substantial number of respects. The other three schemes are new departures, bearing little if any relation to the existing system of constitution and proof. Two of the schemes would require a more widespread use of writing in the constitution or in the proof of voluntary obligations, while the third would introduce a system in which informal constitution was the general rule and writing was required in only a limited and specified number of cases.

9. 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 series of Memoranda:

Professor P-A Crépeau
President of the Commission for the Reform of the Quebec Civil Code
Montreal;

Mr W Dalgleish,
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Professor D T Zeffertt,
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[1]For permission to quote from the English translation by Mr J A Weir of Einführung in die Rechtsvergleichung by Zweigert and Kötz, to be published by them in 1977 as An Introduction to Comparative Law.

II. SUMMARY OF PROVISIONAL PROPOSALS

A. Memorandum No.35 Constitution and proof of Voluntary Obligations: Unilateral Promises

1. (a) Where a seriously intended statement is made by one party to the effect that he will confer a benefit upon another if that other performs a particular act, but where the statement does not seek or contemplate an acceptance or a reciprocal undertaking from that other to perform the act in question, the statement should be regarded in law as a conditional promise which, once made, binds the promisor and obliges him to confer the benefit on purification of the condition.

(b) Where, ex facie of the statement, no acceptance and no undertaking to perform is sought from the other party, if it is alleged that acceptance or a reciprocal undertaking was contemplated, and was understood by the other party to be contemplated, the onus of proving this should lie on the party alleging it. (Paras. 13 and 14).

2. Should a promise to keep an offer open or to accept an offer which has been made, or if one is made, require in order to be validly constituted to comply with the same requirements of form (if any) as the offer in relation to which it is made? (Para. 20).

3. Does the present law relating to acceptance, communication and delivery in the formation of obligations through unilateral promises stand in need of clarification or alteration and, if so, in what respects? (Para. 27).

B. Memorandum No.36
Constitution and Proof of Voluntary Obligations: Formation of Contract

1. Should the display of goods or of the provision of services in shop windows, in the absence of a clear contrary indication, by means of a notice or otherwise, from the shopkeeper be treated by the law as offers? If so, should that result follow only when a price tag has been attached to the article, or a price list forms part of the display? (Para. 9).

2. If such displays were to be treated as offers, acceptances should, in the absence of any stipulation to the contrary, take the form of entry into the premises and communication to the shopkeeper or an assistant; and the obligation incumbent upon the offeror should then be to supply the service displayed or an article of the same quality and description as that displayed. (Para. 10).

3. Should the exhibition of articles on the shelves of self-service shops be treated by the law in the absence of exceptional circumstances as an offer to sell, acceptance of which is indicated by presentation of the articles at the cash desk? (Para. 11).

4. Should it be enacted, for the avoidance of doubt, that the operator of a vending machine makes a standing offer (while stocks last) to provide the article or service which it is the function of the machine to dispense? (Para. 13).

5. Should advertisements of the type which intimate the willingness of an identified person to supply a definite article or service at a stated price be classified by the law as offers, and should the onus of establishing that an advertisement is not of this type be placed upon the advertiser? (Para. 14).

6. In the case of auctions which are expressly, or by necessary implication, represented to be "without reserve", should the exposer of the article be regarded as making an offer to sell to the highest bidder? (Para. 16). cl 11 +

7. An invitation to submit tenders should continue to be classified as a mere invitation to treat. (Para. 17).

8. An offer in writing should be regarded as having been communicated to the offeree when it is delivered to him or to a person having his authority to receive it (irrespective of whether he then becomes aware of its contents) or by its delivery to any place authorised by the offeree for delivery of such communications, at a time at which the offeree or a person having his authority to receive it is, or might reasonably be expected to be, present there. (Para. 22). CL 1(4) +

9. Should this rule, if adopted, apply in respect of withdrawal of offers as well as in respect of the time within which acceptance must be made? (Para. 22). CL 1(5)

10. Where (a) an unauthorised communication of an offer has been made, (b) a reply has been sent "accepting" that offer, and (c) the genuine offer is in fact despatched and received, then the first "acceptance" should be regarded as validly concluding the contract unless, immediately upon receipt of the "acceptance" the offeror informs the offeree that he declines so to regard it. (Para. 23). — CL 3(1)

11. Where it can be established (a) that an offer has been despatched, (b) that it has been lost or delayed beyond the normal period of transmission, (c) that the offeree has obtained cognisance of the offer from another source upon which, in the circumstances, it is reasonable for him to rely, and (d) that the circumstances rendered it impracticable for the offeree to obtain confirmation of the offer from the offeror, then as from the time at which the offer would in the normal course of events have been delivered, an acceptance by the offeree should be effective to conclude a contract. (Para. 24). —

12. It should remain the law that an offer is open for acceptance only by the person or persons to whom it is addressed. (Para. 26). —

13. Where a person, even though one of the people to whom an offer has been addressed, has in ignorance or without the intention of accepting performed the act called for in the offer, or has performed an act from which acceptance would in the case of a person with knowledge of the offer be inferred, it should be the law that no contract is concluded with the offeror. (Para. 27).

14. Should identical cross-offers be regarded as sufficiently indicative of agreement for a binding contract to be constituted thereby, in the absence of prompt notification by either party to the other that he declines so to be bound? (Para. 28).

15. Where an offeree "accepts" an offer, subject to qualifications which do not materially alter the terms of the offer, should a contract be held to come into existence, its terms consisting of the terms of the offer as modified by the terms of the acceptance? (Para. 30).

16. Alternatively, should it be provided that where the offeree's proposals do not materially alter the terms of the offer, the offer should remain open for acceptance in its original terms if the offeree is prepared to depart from his qualifications within the period that the offer would have subsisted had the offeree's first response not been made? (Para. 31).

17. Where an offeror has prescribed a mode of indicating, or of communicating, acceptance should a contract come into existence only if the offeror's instructions are strictly adhered to? (Para. 33(a)).

18. Alternatively, should a contract come into being even though the offeree has used a different mode of communicating acceptance from that prescribed, provided that the mode used enables the offeror to prove the existence and terms of the contract to the same extent as would an acceptance in the prescribed mode? (Para. 33(b)).

19. Alternatively, should a contract come into being on failure to use a prescribed mode of communication of acceptance, provided that the method actually used fulfilled the objectsof the offeror in stipulating the mode of communication which he required? (Para. 33(c)).

20. In the case of proposals to confer a benefit if an act is performed, are the problems which arise from withdrawal of the proposal before completion of performance of sufficient materiality to warrant legislative intervention, granted our conclusion in Memorandum No.35 that such proposals should normally be classified not as offers but as conditional promises? (Para. 36).

21. If so, or if our proposal relating to the classification of such statements does not prove acceptable, which one or more of the following solutions should be adopted?

(a) Where the offer does not specifically state that the offeror reserves the right to withdraw it until such time as performance has been successfully concluded, the offer should be regarded as accompanied by an offer to keep it open for a reasonable period, and embarking upon performance of the required act should be regarded as a valid indication of acceptance of the accompanying offer which contractually binds the offeror to fulfil his principal obligation on completion of performance by the offeree within a time reasonable in all the circumstances. (Para. 36(i)).

(b) In every offer in which acceptance may be indicated only by the performance of an act the law (unless the offer explicitly states the contrary) should imply a collateral unilateral promise not to withdraw the offer once the offeree has commenced performance until such time as that performance, if executed with reasonable expedition, might reasonably have been expected to be complete. (Para. 36(ii)).

(c) Where under the present law the offeror would be free to withdraw his offer in spite of the offeree's commencement of performance, he should remain free to do so, but incur a non-contractual liability to recompense the offeree for and to the extent of any benefit thereby accruing to the offeror. (Para. 36(iii)).
(d) An offer the acceptance of which can be indicated only by the performance of an act should remain revocable until performance is completed, but the offeror should be bound on revocation to compensate the offeree for and to the extent of such expenditure in time, money or effort as he has reasonably incurred. (Para. 36(iv)).

22. It should be enacted, for the avoidance of doubt, that where it is the offeree who is seeking to establish the formation of a contract through his silence on receipt of an offer providing that silence shall be regarded as assent to its terms, and where the offeree satisfies the court that he intended his silence to be treated as an acceptance, the offer should be regarded as having been accepted. (Para. 38).

23. The exceptions to the rule that an offeree will not be held bound by mere silence on receipt of an offer, mentioned in paragraph 39 of Memorandum No.36 should continue to be recognised by the law. (Para. 39).

24. (a) Where an offer is made on a standard form provided and drawn up by the offeree and that form contains a term to the effect that the offeree's silence will amount to acceptance, the offeree's silence should be regarded as binding upon him.
(b) Where the offer, though not made on a form drawn up by the offeree has in fact been solicited by him, the offeree's silence should again be regarded as binding upon him.
(c) Where the offeree's inaction when confronted with the offer occurs in a context in which, if the offer had not been accepted, action on his part would have been necessary, then there should be attributed to that inaction a significance sufficient to convert it

into a satisfactory indication of acceptance. (Para. 40).

25. In the case of an offer to stand cautioner should there be introduced into the law a rebuttable presumption to the effect that communication to the offeror of the offeree's acceptance is necessary for the conclusion of the contract? (Para. 43).

26. Alternatively, should an offer to stand cautioner, if complying with the requirements of form laid down in respect of cautionry be treated in law as a completed cautionary obligation upon which the creditor may found? (Para. 43).

27. Should a letter or telegram of acceptance take effect only when received by the offeror? (Paras. 45-50). CQ 4(1)+

28. An acceptance in writing should be regarded as having been received by the offeror when it is delivered to him or to a person having his authority to receive it (irrespective of whether he then becomes aware of its contents) or by its delivery to any place authorised by the offeror for the delivery of such communications, at a time at which the offeror or a person having his authority to receive it is, or might reasonably be expected to be, present there. (Para. 50). CQ 1 4

29. Should there be a rebuttable presumption that an acceptance which the offeree proves was despatched was received by the offeror in the normal course of transmission? (Para. 50). CQ4(2) +

30. (a) An acceptance which is late in being communicated to the offeror may be treated by the latter as a valid acceptance. The offeror's right so to treat the late acceptance should not be made subject to a condition of notification to the offeree.
(b) Where the offeror is aware that an acceptance, if the system of transmission had operated normally, would have reached him in due time, he should be bound by it unless he promptly informs the acceptor either orally or by despatch of a notice that he considers his offer as having lapsed. (Para. 51).

31. A revocation received by the offeree after despatch of his acceptance even though arriving before receipt of that acceptance by the offeror, should be ineffective to prevent the conclusion of a contract. (Para. 54).

32. (a) Should "receipt" in this context be defined as in proposals 8 and 28, supra?
(b) Or, should notice of revocation be required actually to come to the attention of the offeree? (Para. 55).

33. As an alternative to proposal 31, an offer, once made, should not be capable of revocation until the expiry of a reasonable period after it has been made. (Para. 56).

34. There should be no statutory definition of what is meant by "a reasonable period". (Para. 59).

35. It should continue to be the law that an offer may lapse upon a material change of circumstances, provided always that the change of circumstances in order to have the effect of causing the offer to fall must be so material as to render it in the altered conditions "utterly unsuitable and absurd". The offer should be regarded as terminated only where, if a contract had already been concluded, the change of circumstances would have resulted in its discharge by frustration. (Para. 61).

36. Where the offeror or the offeree has died the question whether the offer is terminated should be determined by the same considerations as determine whether a contract is frustrated upon the death of either party occurring after the contract has been concluded. (Para. 62).

37. Where an acceptance is made to an offeror who has recovered from a period of insanity or by an offeree who has so recovered, a contract should be concluded if that acceptance would, ignoring the offeror's or offeree's temporary insanity, have been regarded as timeous and otherwise valid. (Para. 63.

38. Where an offeror or offeree has become insane the question whether the offer is terminated should be determined by the same considerations as determine whether a contract is frustrated upon the insanity of either party occurring after the contract has been concluded. (Para. 63).

39. The notour bankruptcy of the offeror or of the offeree should cause the offer to lapse in cases where the contract, if concluded, would place upon the bankrupt an obligation to pay. In other cases the offer should not lapse but no contract should come into existence until the solvent party has become aware of the other party's notour bankruptcy and has nevertheless indicated a desire to proceed with the transaction. (Para. 64).

40. It should be provided, for the avoidance of doubt, that a rejection of an offer does not become effective until receipt. "Receipt" should be defined as in proposals 8 and 28, supra. (Para. 65).

41. Should it be provided, for the avoidance of doubt, that the existence of a contract may be inferred even though there is to be found no identifiable sequence of offer and acceptance? (Para. 66).

42. There is no advantage in justifying the reluctance of courts to intervene to enforce, or to award damages for breach of, purely social or domestic family engagements by reference to a lack of intention to be legally bound on the part of the parties to such agreements, rather than by reference to the "personal" nature of such agreements or to the pursuer's lacking a sufficient interest to sue. (Para. 72).

43. In the case of agreements of the types mentioned in paragraph 73 of Memorandum No.36 an action in respect of breach of contract should not be dismissed merely because of the pursuer's inability to qualify a patrimonial interest. (Para. 73).

C. Memorandum No.37
Constitution and Proof of Voluntary Obligations: Abortive Constitution

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

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

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

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

5. Where the latent ambiguity or mutual misunderstanding by which an agreement is affected cannot be resolved by interpreting the agreement in accordance with the actual common intent of the parties or in accordance with the intent of one of them which was, or ought to have been, known to the other, it should continue to be the law that if the ambiguity or misunderstanding is material no contract should be held to

exist, and the rights of the parties in cases where performance (or partial performance) has taken place should be regulated by the law of restitution, repetition and recompense. (Para. 19).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Memorandum No.38
Constitution and Proof of Voluntary Obligations: Stipulations in favour of third parties

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

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

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

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

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

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

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

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

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

E. Memorandum No.39
Constitution and Proof of Voluntary Obligations:
Formalities of Constitution and Restrictions on Proof

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

I: REFORM WITHIN THE EXISTING FRAMEWORK

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

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

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

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

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

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

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

II. A FORMAL SYSTEM

(a) All agreements in which the value of the property, goods, services, etc in respect of which the contract was made exceeded £50, (including agreements for the constitution of a trust) and all gratuitous unilateral promises irrespective of the value of the benefit promised, should require to be constituted in writing unless the agreement were performed on both (or all) sides, or the unilateral promise were fulfilled by the promisor, at the time of conclusion of the agreement or of the making of the promise. Variation or modification of an obligation constituted in writing should be effective only if also executed in writing. (Para. 77).
(b) Promises made subject to a condition of performance by the promisee and promises to keep offers open or to accept offers should be exempted from the requirement of constitution in writing. (Para. 77).
(c) The formalities of constitution should not differ from those necessary at present in the case of obligationes literis. (Para. 76).

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

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

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

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

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

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

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

(k) Where a statute has in the past laid down, or in the future lays down, that contracts of certain types "shall be in writing", then unless a contrary Parliamentary intention appears, writing should be regarded as a requirement of constitution and not of proof, and that writing should require to comply with the usual formalities. Rei interventus and homologation would not in such circumstances operate. (Para. 82).

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

III AN ALTERNATIVE FORMAL SYSTEM

(a) Obligations (including agreements for the constitution of a trust) should be capable of informal constitution, but should require to be proved, if denied, by the writ of the person alleged to be bound. (Para. 84).
(b) This should not apply to agreements performed on both (or all) sides, or to unilateral promises fulfilled by the promisor, at the time of conclusion of the agreement or of the making of the promise. Also exempted should be obligations in which the value of the property, goods, services, etc in respect of which the obligation was undertaken is less than £50, and promises to keep offers open or to accept an offer if one is made. (Para. 85).
(c) Variation or modification of an obligation constituted in writing should be required to be proved by writ unless the party seeking to establish the variation had changed his position in reliance upon the contract as varied. (Para. 84).
(d) Payment under an antecedent obligation, performance or discharge of obligations constituted in writing or proved by writ and gratuitous renunciation of rights should be capable of proof prout de jure. (Para. 86).
(e) The writing by which obligations could be proved should not require to comply with any special formalities, but in cases where the writing was not attested the onus of establishing that the writ was that of the person alleged to be bound would lie upon the party founding upon it. (Para. 87).
(f) The writ should require to be such as to establish both the existence of the obligation alleged and its essential terms. Where a party, while unable to produce a document from his opponent which succeeded in establishing the formation and essential terms of the obligation,

could nevertheless put in evidence a writing by the latter which was such as to render probable the conclusion of a contract then it would become competent to lead parole evidence of the nature and precise terms thereof. (Para. 88).

(g) Exemption from the requirement of production of a writ, such as those mentioned in paragraph 63 of Memorandum No.39 should not be recognised in Scots law. (Para. 88).

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

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

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

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

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

IV AN INFORMAL SYSTEM

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

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

(1) obligations relating to heritage, including leases for more than one year;
(2) contracts of service for more than one year;
(3) contracts of partnership for more than one year;
(4) contracts of agency for more than one year;
(5) factories and commissions authorising another to manage one's affairs;
(6) submissions to arbitration and decrees arbitral;
(7) contracts of insurance;
(8) obligations in terms of which the obligor undertakes to indemnify the obligee if a third party fails to perform a stipulated act in favour of, or to pay a stipulated sum to, the obligee;
(9) gratuitous obligations, other than promises made subject to a condition of performance by the promisee, promises to keep offers open and promises to accept an offer which has been made or if one is made;
(10) gratuitous renunciations of rights;
(11) obligations which the parties have agreed should be formally constituted. (Para. 95).

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

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

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

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