CONTENTS

Preface to Third Edition ................................................................. vii
Preface to Second Edition ............................................................... ix
Preface to First Edition ................................................................. xi
Table of Cases ................................................................................. xxxi
Table of Statutes ............................................................................ cxlvii
Table of Statutory Instruments ....................................................... clvii

CHAPTER 1

INTRODUCTION

PART 1

The definition of contract
(1) Scots law .................................................................................. 1-01
(2) The promise-based approach ..................................................... 1-04
(3) The problem of invalidity ........................................................ 1-08
(4) The European dimension ........................................................ 1-09

PART 2

The development of Scots contract law .......................................... 1-15
The history in Scotland ................................................................. 1-16
Recent trends ................................................................................ 1-28

CHAPTER 2

PROMISE

INTRODUCTION .................................................................................. 2-01
WHAT IS A "PROMISE"? ................................................................. 2-07
(1) Distinction of promise from a declaration of intention .......... 2-12
(2) Distinction of promise from a testamentary provision ......... 2-16
(3) Distinction of promise from an offer
   (a) General ........................................................................ 2-20
   (b) How is a promise distinguished from an offer? ............. 2-22

THE ACCEPTED PROMISE .......................................................... 2-28

PROOF OF PROMISE .................................................................... 2-35
DELIVERY OF THE PROMISE .................................................... 2-38

CHAPTER 3

CAPACITY TO CONTRACT

INCAPACITY TO CONSENT .......................................................... 3-01
General limitations on ability to contract ...................................... 3-05
NON-AGE OR UNDER-AGE ......................................................... 3-07
### Contents

- The general rule ................................................. 3–12
- Exceptions to the general rule for those under 16 .......................... 3–14
- 16 and 17 year olds ............................................. 3–18
- Parents and guardians ............................................. 3–26
- Married women .................................................... 3–33
- Mental illness
  - Terminology .................................................... 3–36
  - Early law ....................................................... 3–37
  - Adults with Incapacity (Scotland) Act 2000 ....................... 3–38
  - Nature of nullity at common law ............................... 3–40
  - Proof of unsoundness of mind .................................. 3–42
  - Supervening mental illness ..................................... 3–47
- Intoxication and Disease ......................................... 3–49
- Alien Enemies
  - Procedural status of alien enemies ................................ 3–56
- The Crown
  - Crown servants .................................................. 3–62
  - The existence of parliamentary funds ............................ 3–63
  - Crown proceedings ............................................. 3–64
- Local Authorities ................................................ 3–65
- The ultra vires rule
  - Use of the term “ultra vires” .................................. 3–67
  - History of ultra vires ........................................... 3–71
  - Breach of fiduciary duty-distinguished ............................ 3–79
  - Reasonably incidental ............................................ 3–82
- Corporations ...................................................... 3–85
- Universities and Higher Education ................................ 3–88
- Building Societies ................................................ 3–90
- Friendly and Provident Societies ................................ 3–92
- Trade Unions ....................................................... 3–93
- Employers Association ........................................... 3–94
- Partnership ......................................................... 3–95
- Clubs .................................................................. 3–99
- Liquidators .......................................................... 3–105
- Administrators ....................................................... 3–112
- Receivers ............................................................ 3–113
- Trustee in Sequestration and Under a Trust Deed .................. 3–114
- Trustees and Judicial Factors ..................................... 3–116

### Chapter 4

#### DELIVERY OF DEEDS

- The principle of delivery ........................................... 4–01
- Proof of delivery ................................................... 4–10
- What is delivery? .................................................... 4–12
- Intention to deliver .................................................. 4–13
- Delivery to and by third parties .................................. 4–15
- Delivery by post ...................................................... 4–19
- Registration of the deed ............................................. 4–21
- Books of Council and Session ..................................... 4–22
- Register of Sasines .................................................. 4–24
- The Land Register of Scotland .................................... 4–28
CHAPTER 5

THE FORMATION OF A CONTRACT

INTRODUCTION

INTENTION TO CREATE LEGAL RELATIONS

IS THERE A CONTRACT?

FAILURE TO AGREE ON ESSENTIALS REQUIRED BY LAW

Executed contract

VOID FROM UNCERTAINTY

The leading cases

The analysis of the cases

Words too vague in meaning

Incomplete expression

Contradictory agreement

Resolution of the problem by extrinsic evidence

Resolution of the problem by subsequent actings of the parties

The consequences of a phrase being “void from uncertainty”

PARTIES IN DISAGREEMENT

SUSPENSIVE CONDITIONS

An agreement to be followed by writing

PRE-CONTRACT NEGOTIATIONS

What are negotiations?—the difference between a representation and a term

English case law

Collateral statements and Scots law

Contractual provisions on pre-contract statements

Cost of pre-contract negotiations

(1) Implied contract or promise

(2) Melville monument liability

(3) Negligent or fraudulent misrepresentation

(4) Recompense

ACTING ON AN INCHOATE AGREEMENT

CONSTITUTION OF CONTRACTS

Introduction

The requirement of writing

Attestation

The contract which is in writing

E-commerce

The date of the contract
The parties to the contract .......................................................... 5-87

CHAPTER 6

OFFER AND ACCEPTANCE

THE IMPORTANCE OF OFFER AND ACCEPTANCE .......................... 6-01
Classification ............................................................................. 6-06
The meaning of consensus in idem ............................................. 6-08
INVITATIONS TO TREAT; ESTIMATES AND TENDERS ................. 6-14
STATEMENTS OF INTENT .......................................................... 6-18
LETTERS "WITHOUT PREJUDICE" ............................................. 6-20
"EX GRATIA" OFFERS ................................................................. 6-21
OPINIONS AND ADVERTISING "PUFFS" ................................. 6-22
OTHER CASES ........................................................................ 6-24
GENERAL OFFERS ................................................................. 6-25
COMPETITIONS ..................................................................... 6-28
COMMUNICATION OF AN OFFER ............................................ 6-31
Duration of an offer ................................................................... 6-36
(1) Rejection by the offeree ....................................................... 6-37
(2) Lapse of time ..................................................................... 6-44
   (a) Time specified ............................................................... 6-45
   (b) Reasonable time ........................................................... 6-48
(3) Revocation by the offeror .................................................... 6-53
(4) Material change of circumstances ..................................... 6-62
(5) Death and insanity ............................................................. 6-62
ACCEPTANCE OF OFFERS ....................................................... 6-71
Form of acceptance ................................................................. 6-72
Conduct as acceptance ............................................................ 6-73
   Silence by the offeree ......................................................... 6-78
   Cashing cheques ................................................................. 6-83
Acceptance meeting offer ....................................................... 6-85
Qualified acceptance .............................................................. 6-92
The battle of forms ................................................................. 6-97
Who may accept? ................................................................. 6-106
Communication of acceptance .................................................. 6-109
Communication by post ........................................................... 6-114
   (1) What happens if the acceptance is lost in the post? .... 6-115
   (2) Does the posting rule apply to other forms of
       communication, such as telegrams, telex, fax or email?
       ................................................................. 6-118
   (3) Does the posting rule apply when the offer was not made
       by post? .............................................................. 6-119
   (4) Can the posted acceptance be retracted? ..................... 6-120
   (5) Reform ................................................................... 6-121

CHAPTER 7

INCORPORATION OF TERMS

WHAT ARE THE TERMS OF A CONTRACT? ............................... 7-01
CONTRACTUAL DOCUMENTS .................................................. 7-03
TIME OF NOTICE .................................................................. 7-07
WHAT IS INCORPORATED? ..................................................... 7-09
TICKETS .............................................................................. 7-14
CHAPTER 8

CONSTRUCTION OF CONTRACTS

PART 1

HISTORY .......................................................... 8-01

INTENTION OF THE PARTIES .......................................... 8-02

CONSTRUCTION AND INTERPRETATION ................................ 8-05

Contract not to be made for the parties ................................ 8-06

The principle of construction ........................................... 8-08

The ordinary meaning of words ....................................... 8-10

Commercial reality ..................................................... 8-12

Absurd meanings rejected ............................................ 8-13

The whole contract ..................................................... 8-17

Surrounding circumstances ............................................ 8-22

The Hoffmann approach ............................................... 8-25

Prior negotiations ..................................................... 8-28

Circumstances since the contract ..................................... 8-30

Entire agreement clauses ............................................. 8-34

Presumption of legality ............................................... 8-37

Contra proferentem .................................................... 8-38

Ejusdem generis ......................................................... 8-44

Technical terms .......................................................... 8-46

Specific words and phrases .......................................... 8-53

Conjunctions, pronouns and adverbs ................................. 8-54

Terms about time ........................................................ 8-55

Money ................................................................. 8-56

“Best endeavours” ....................................................... 8-57

“Without prejudice” .................................................... 8-59

PART 2

EXCLUSION, LIMITATION AND INDEMNITY CLAUSES ............. 8-60

Rules of construction ................................................... 8-66

(1) Construe the whole contract ....................................... 8-67

(2) An exclusion clause is construed contra proferentem ......... 8-69

(3) Construe an exclusion clause with a business sense ......... 8-74

Drafting an exclusion clause .......................................... 8-76

(1) Mention negligence .................................................. 8-77

(2) Whose negligence? ................................................... 8-79

(3) When do the excepted events occur? ............................. 8-83

(4) Howsoever caused .................................................... 8-86

(5) Claims, expenses and consequential losses ................. 8-91

(6) Self-contradiction ..................................................... 8-93

(7) Confusion with indemnity clauses ............................... 8-96

(8) Conclusion .......................................................... 8-97

PART 3

CLERICAL MISTAKE ................................................... 8-98

(1) Patent mistake ....................................................... 8-99

(2) Latent mistake ........................................................ 8-100
CHAPTER 9

IMPLIED TERMS

PART 1
THE IMPLICATION OF TERMS............................................................... 9–01
Types of implied terms........................................................................ 9–03
When are terms implied?..................................................................... 9–08
  The relationship between implied terms and express terms............. 9–11
  The relationship between implication as a matter of general law and
  the business efficacy rule.................................................................

PART 2
GENERAL IMPLICATIONS—EXAMPLES.................................................. 9–12
Implication of reasonableness
  (1) Reasonable time........................................................................... 9–13
  (2) Reasonable exercise of discretion or power............................... 9–22

THE CONTRACT FOR SERVICES
(1) Distinction from other contracts.................................................... 9–23
(2) The scope of the work................................................................. 9–25
(3) Deviation from original contract.................................................... 9–26
(4) Time of performance................................................................. 9–36
(5) Degree of care and quality of work............................................... 9–37
(6) The employment of others.......................................................... 9–40
(7) Payment
  (a) Is there an obligation to make payment?.................................. 9–41
  (b) How much is to be paid?.......................................................... 9–45
(8) Risk............................................................................................. 9–50

CUSTODY AND DEPOSIT.................................................................. 9–52
Which type of obligation?................................................................. 9–59

PART 3
CUSTOM AND USAGE....................................................................... 9–60

PART 4
THE BUSINESS EFFICACY RULE.......................................................... 9–65

CHAPTER 10

JUS QUAESITUM TERTIO

INTRODUCTION.................................................................................. 10–01
THE NATURE OF A JUS QUAESITUM TERTIO..................................... 10–06
HOW IS A JUS QUAESITUM TERTIO CREATED?............................... 10–08
(1) There must be a contract between A and B............................... 10–09
(2) A and B must intend to benefit C.................................................. 10–10
(3) The third party C must be identified but need not be named or
  be in existence.................................................................................. 10–17
(4) There must normally be delivery or an equivalent...................... 10–20

PROOF OF JUS QUAESITUM TERTIO.................................................... 10–21
REMEDIES AND RIGHTS OF THE THIRD PARTY................................. 10–22
REVOCATION.................................................................................... 10–25
Revocation by the third party............................................................. 10–32
CHAPTER 11

JOINT AND SEVERAL LIABILITY

INTRODUCTION .............................................................................. 11–01
PRO-RATA LIABILITY AND ITS EXCEPTIONS ............................. 11–02
RIGHTS OF RELIEF ...................................................................... 11–07
Difficulties of interpretation of the 1940 Act ............................... 11–13
LIMITATION OF LIABILITY OF ONE CO-OBLIGANT ............... 11–16
DEFENCES AVAILABLE TO ONE OF THE CO-OBLIGANTS .......... 11–19
ALL PARTIES NOT CALLED .......................................................... 11–20
MULTIPLE CREDITORS ................................................................. 11–24

CHAPTER 12

ASSIGNATION

HISTORY ...................................................................................... 12–01
TERMINOLOGY .......................................................................... 12–05
THE NATURE OF ASSIGNATION .............................................. 12–06
Mandate ..................................................................................... 12–09
Novation .................................................................................... 12–10
Sub-participation ..................................................................... 12–11
Delegation .................................................................................. 12–12
Jus quaeitum tertio ................................................................. 12–13
THE PROPERTY WHICH MAY BE ASSIGNED ............................. 12–14
Heritage ..................................................................................... 12–15
Corporeal moveables ............................................................... 12–20
Delivery orders ......................................................................... 12–24
Bills of lading ............................................................................ 12–25
Assignation of incorporeal moveable rights ................................ 12–26
  Alimentary funds .................................................................... 12–27
  Married women’s policies of assurance .................................. 12–29
  Future rights and spes successionis ........................................ 12–30
  Claims in litigation ............................................................... 12–32
  Contracts .................................................................................. 12–33
    (1) Delectus personae .............................................................. 12–36
    (2) The terms of the contract .................................................. 12–38
    (3) Examples of delectus personae ........................................... 12–40
ASSIGNATION OF OBLIGATIONS ............................................. 12–42
ASSIGNATION AND SUBCONTRACTING .................................. 12–44
THE INVALID OR INEFFECTIVE ASSIGNATION ....................... 12–46
FORM OF ASSIGNATION .......................................................... 12–50
  (1) Agreement to assign .......................................................... 12–50
  (2) Legal assignment .............................................................. 12–53
  (3) Terms of assignment .......................................................... 12–54
  (4) A cheque as an assignation ............................................... 12–58
  (5) Statutory forms ................................................................. 12–63
WHAT IS ASSIGNED? ................................................................. 12–65
ASSIGNATUS UTITUR JURE AUCTORIS ..................................... 12–68
  (1) Examples of the principle .................................................. 12–69
  (2) The doubtful case of the counterclaim .............................. 12–71
  (3) Latent equities ................................................................. 12–74
ACTINGS OF THE CEDENT SUBSEQUENT TO ASSIGNATION.............. 12–78
TITLE TO SUE BEFORE AND AFTER ASSIGNATION.................... 12–79
CHALLENGE OF THE ASSIGNATION BY THE DEBTOR.................. 12–81
INTIMATION OF ASSIGNATION........................................... 12–83
(1) Is intimation always necessary?....................................... 12–85
(2) The preference of an unintimated assignation...................... 12–87
(3) When should intimation be made?..................................... 12–91
(4) Method of intimation.................................................. 12–93
(5) Intimation to whom?.................................................... 12–97
   (a) The debtor.......................................................... 12–97
   (b) Several debtors.................................................... 12–98
   (c) Agent of the debtor............................................... 12–99
   (d) Companies......................................................... 12–100
THE RIGHT TO DEMAND AN ASSIGNATION.............................. 12–101
RETROCESSION............................................................ 12–104

CHAPTER 13

ESSENTIAL INVALIDITIES IN CONTRACTS

JUSTA CAUSA TRADITIONIS.................................................. 13–01
THE CATEGORIES OF INVALIDITY........................................... 13–12
VOID CONTRACTS
(a) The history........................................................... 13–13
(b) The consequences of a “void” contract............................. 13–14
(c) Summary of consequences of a void contract..................... 13–18
VOIDABLE CONTRACTS
(1) History......................................................................... 13–19
(2) Consequences of a voidable contract................................ 13–21
(3) Summary of consequences of a voidable contract................ 13–23
UNENFORCEABLE CONTRACTS
(1) History of unenforceable contracts.................................. 13–24
(2) Consequences of an unenforceable contract......................... 13–25
(3) Summary of consequences of an unenforceable contract........ 13–27
(4) Examples of unenforceable contracts................................. 13–28
ILLEGAL CONTRACTS
(1) Terminology............................................................... 13–29
(2) What is an “illegal” contract?......................................... 13–30
(3) Consequences of an illegal contract.................................. 13–31
(4) The doctrine of severance............................................... 13–35
(5) Summary of consequences of illegal contract..................... 13–40

CHAPTER 14

FRAUD

THE MEANING OF FRAUD..................................................... 14–01
METHODS OF COMMITTING FRAUD........................................ 14–09
Fraudulent representation................................................ 14–10
Fraudulent concealment.................................................... 14–13
Unfair activities.............................................................. 14–19
Fraud and insolvency....................................................... 14–25
   Purchase by an insolvent.............................................. 14–27
Fraud and facility and circumvention.................................... 14–32
Fraud after a contract ........................................ 14-33
Other meanings of fraud ....................................... 14-34
PLEADING A CASE OF FRAUD .................................. 14-36
(1) Title to sue ............................................. 14-37
(2) The fraud must induce the contract ................. 14-38
(3) Averment of fraud ....................................... 14-41
(4) Proof of fraud .......................................... 14-43
(5) Who is responsible for the fraud? ................. 14-44
   (a) Gratuitous benefit .................................. 14-45
   (b) Vicarious liability .................................. 14-47
   (c) Participation in fraud .............................. 14-48
REDUCTION AND RESTITUTIO IN INTEGRUM ................ 14-49
   Void or voidable? ....................................... 14-53
FRAUD AS A DELICT ........................................... 14-57
Reduction or damages? ...................................... 14-60
   The advantages of reduction and restitution ........ 14-61
   The advantages of claiming damages ............... 14-62
   The disadvantages of claiming damages ............ 14-63
      (1) Damages are an illiquid claim ................. 14-63
      (2) Choosing the correct defender ............... 14-64
CONTRACTING OUT OF FRAUD ............................... 14-67
BARS TO A PLEA OF FRAUD ................................ 14-69
PRESCRIPTION AND FRAUD ................................ 14-70
EFFECT OF FRAUD ON THIRD PARTIES ..................... 14-74
LAW REFORM ................................................ 14-81

CHAPTER 15

ERROR AND MISREPRESENTATION

PART 1
FORMS OF ERROR ............................................. 15-01
Consensual error ............................................. 15-02
The history of the meaning of essential error ........... 15-04
The present law of error .................................... 15-23
   (1) Settlement of claims .................................. 15-24
   (2) Misrepresentation .................................... 15-26
   (3) Advantage being taken of error .................... 15-30
   (4) Mutual error .......................................... 15-34
   (5) Gratuitous obligations ............................... 15-39
   (6) Unilateral error ....................................... 15-40
Error caused by the defender ............................... 15-42
PART 2
INDUCED ERROR—HISTORY ................................ 15-43
The introduction of innocent misrepresentation into the law 15-51
The relationship between misrepresentation and essential error 15-60
The present law on innocent misrepresentation ............ 15-66
   (1) There was a misrepresentation .................... 15-67
   (2) The misrepresentation induced the contract .... 15-68
   (3) The misrepresentation must have been made by the defender or someone for whom he is responsible 15-71
   (4) Restitutio in integrum must be possible if reduction is sought ................................. 15-72
Negligent misrepresentation ................................ 15-74
The effect of error and misrepresentation on third parties .......... 15-79
PART 3
PERFORMANCE ERROR—CONDICTIO INDEBITI ............................................. 15-88

CHAPTER 16
FACILITY AND CIRCUMVENTION AND UNDUE INFLUENCE

FACILITY AND CIRCUMVENTION—HISTORY OF THE DOCTRINE .............. 16-01
Fraud presumed ........................................................................................................ 16-03
The disappearance of fraud ...................................................................................... 16-04
Distinguishing fraud from facility and circumvention ........................................... 16-08
AVERMENT AND PROOF OF FACILITY AND CIRCUMVENTION IN THE
MODERN LAW .............................................................................................................. 16-12
(1) Facility ................................................................................................................. 16-13
(2) Fraud and circumvention ....................................................................................... 16-16
(3) Lesion .................................................................................................................... 16-19
(4) Causation ............................................................................................................. 16-20
VOID OR VOIDABLE? ............................................................................................... 16-21
UNDUE INFLUENCE
The history of undue influence .................................................................................. 16-22
The modern law of undue influence ........................................................................... 16-25
Distinction from facility and circumvention ............................................................. 16-33
Void or voidable? ....................................................................................................... 16-34
Remedies .................................................................................................................... 16-36

CHAPTER 17
EXTORTION, LESION AND GOOD FAITH

EXTORTION: FORCE AND FEAR ........................................................................... 17-01
The nature of extortion ............................................................................................... 17-03
Nature of what is threatened ...................................................................................... 17-04
English cases on economic duress ........................................................................... 17-08
THE EFFECT OF EXTORTION .................................................................................. 17-10
EXTORTION: ENORM LESION ............................................................................... 17-12
GOOD FAITH ............................................................................................................. 17-23

CHAPTER 18
UNFAIR TERMS

INTRODUCTION .......................................................................................................... 18-01
PART 1
UNFAIR CONTRACT TERMS ACT 1977
History ............................................................................................................................. 18-02
Application of the Act ............................................................................................... 18-03
Section 16 .................................................................................................................... 18-08
Section 17 .................................................................................................................... 18-11
Section 18 .................................................................................................................... 18-15
Section 19 .................................................................................................................... 18-17
Sections 20 and 21 .................................................................................................... 18-18
Secondary contracts ................................................................................................... 18-19
The “fair and reasonable” control ............................................................................ 18-21
## Contents

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>What is “fair and reasonable”?</td>
<td>18-22</td>
</tr>
<tr>
<td>Drafting a valid exemption clause</td>
<td>18-28</td>
</tr>
<tr>
<td>Part III of the 1977 Act</td>
<td>18-38</td>
</tr>
<tr>
<td><strong>PART 2</strong></td>
<td></td>
</tr>
<tr>
<td><strong>UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS</strong></td>
<td></td>
</tr>
<tr>
<td>Introduction</td>
<td>18-39</td>
</tr>
<tr>
<td>The purpose of the Directive</td>
<td>18-42</td>
</tr>
<tr>
<td>The 1999 Regulations</td>
<td>18-43</td>
</tr>
<tr>
<td>The excepted terms</td>
<td>18-45</td>
</tr>
<tr>
<td>Meaning of “unfair term”</td>
<td>18-46</td>
</tr>
<tr>
<td>Effect of term being unfair</td>
<td>18-49</td>
</tr>
<tr>
<td>Complaints to the Director General of Fair Trading</td>
<td>18-50</td>
</tr>
<tr>
<td><strong>PART 3</strong></td>
<td></td>
</tr>
<tr>
<td><strong>HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996</strong></td>
<td>18-51</td>
</tr>
<tr>
<td>Contracts to which the 1996 Act applies</td>
<td>18-53</td>
</tr>
<tr>
<td>Rights to adjudication</td>
<td>18-55</td>
</tr>
<tr>
<td>Rights to payment</td>
<td>18-57</td>
</tr>
<tr>
<td>Notices</td>
<td>18-58</td>
</tr>
</tbody>
</table>

### CHAPTER 19

**PUBLIC POLICY**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>GENERAL NATURE OF THE DOCTRINE</strong></td>
<td>19-01</td>
</tr>
<tr>
<td><strong>HISTORY</strong></td>
<td></td>
</tr>
<tr>
<td>Prior to the eighteenth century</td>
<td>19-06</td>
</tr>
<tr>
<td>The eighteenth-century changes</td>
<td>19-10</td>
</tr>
<tr>
<td>Public policy since the eighteenth century</td>
<td>19-12</td>
</tr>
<tr>
<td><strong>CONTRACTS CONTRARY TO PUBLIC POLICY—GENERAL PRINCIPLES</strong></td>
<td>19-14</td>
</tr>
<tr>
<td>Restitution, non-enforcement and other remedies</td>
<td>19-17</td>
</tr>
<tr>
<td><strong>STATUTORY INVALIDITY</strong></td>
<td>19-28</td>
</tr>
<tr>
<td><strong>STATUTORY NULLITY IMPLIED</strong></td>
<td>19-33</td>
</tr>
<tr>
<td><strong>SEVERANCE</strong></td>
<td>19-37</td>
</tr>
<tr>
<td><strong>HUMAN RIGHTS ACT 1998</strong></td>
<td>19-38</td>
</tr>
<tr>
<td><strong>SEXUAL IMMORALITY</strong></td>
<td>19-43</td>
</tr>
<tr>
<td><strong>COMMISSION OF CRIMES OR CORRUPTION</strong></td>
<td>19-44</td>
</tr>
<tr>
<td><strong>CONTRACT TO INTERFERE WITH THE ADMINISTRATION OF JUSTICE</strong></td>
<td>19-45</td>
</tr>
<tr>
<td><strong>BUYING PLEAS AND PACTA DE QUOTA LITIS</strong></td>
<td>19-46</td>
</tr>
<tr>
<td><strong>GAMBLING</strong></td>
<td></td>
</tr>
<tr>
<td>History</td>
<td>19-49</td>
</tr>
<tr>
<td>The definition of sponsio ludicra</td>
<td>19-53</td>
</tr>
<tr>
<td>The nature of the invalidity</td>
<td>19-59</td>
</tr>
<tr>
<td><strong>COMBINATIONS AND TRADE UNIONS</strong></td>
<td>19-63</td>
</tr>
<tr>
<td><strong>SALE OF OFFICES</strong></td>
<td></td>
</tr>
<tr>
<td>History</td>
<td>19-66</td>
</tr>
<tr>
<td>Present law</td>
<td>19-71</td>
</tr>
<tr>
<td><strong>SALE OF HONOURS</strong></td>
<td>19-74</td>
</tr>
<tr>
<td><strong>TRADING WITH THE ENEMY</strong></td>
<td>19-75</td>
</tr>
<tr>
<td><strong>SMUGGLING</strong></td>
<td>19-76</td>
</tr>
<tr>
<td><strong>CONTRACTS IN RESTRAINT OF TRADE</strong></td>
<td></td>
</tr>
<tr>
<td>History</td>
<td>19-80</td>
</tr>
<tr>
<td>The principles of the present law</td>
<td>19-84</td>
</tr>
<tr>
<td>What is a contract in restraint of trade?</td>
<td>19-87</td>
</tr>
<tr>
<td>The overriding principle</td>
<td>19-92</td>
</tr>
</tbody>
</table>
(1) What is reasonable alters with the changing nature of commerce and society .................................................. 19–95

(2) There is a difference between what is reasonable in a contract of service on the one hand and other contracts on the other hand ................................................................. 19–96

(3) In determining what is reasonable the character of the business must be looked at ............................................. 19–97

(4) There is a doubt about which party has the onus of showing that the restraint is reasonable ..................................... 19–99

(5) The time for ascertaining the reasonableness of a restrictive covenant is the time of the making of the contract .... 19–102

(6) The court will not invalidate a clause because it could apply to improbable circumstances; covenants are limited to the circumstances which the court considers the parties had in their contemplation ................................................................. 19–104

(7) A valid restraint may in certain circumstances be severed from an invalid restraint .............................................. 19–106

(8) A restraint may apply to parties associated with the contracting parties ............................................................... 19–108

(9) In cases where an interim interdict is sought the pursuer or petitioner must show a prima facie case and the balance of convenience must justify the interim order ................................................................. 19–109

Employer and employee cases ................................................................. 19–112

(1) Restriction applying while the employee is employed ............. 19–113

(2) Restrictions after employment have ceased ............................. 19–113

(3) Employment by a rival ................................................................. 19–115

(4) Soliciting customers ................................................................. 19–119

(5) Confidential information and trade secrets .............................................. 19–123

Dissolution of partnership ................................................................. 19–128

Sale of business ................................................................. 19–130

Mortgages ................................................................. 19–136

THE INVALIDITY PRODUCED BY A RESTRAINT OF TRADE ................................................................. 19–137

STATUTORY AND REGULATORY PROVISIONS AFFECTING RESTRAINTS ON TRADE ................................................................. 19–139

Competition within the European Union ................................................................. 19–142

CHAPTER 20

BREACH OF CONTRACT

PART 1
TERMINOLOGY ............................................................................. 20–02

PART 2
THE NATURE OF BREACH ............................................................. 20–07

PART 3
CONTRACT IMPOSSIBILITY ............................................................. 20–11

PART 4
OBSTRUCTION BY THE OTHER PARTY ................................................ 20–16

PART 5
PUTTING IMPLEMENT OUT OF ONE’S POWER .............................................. 20–20

PART 6
TAKING ADVANTAGE OF ONE’S OWN WRONG ................................................ 20–21

PART 7
ANTICIPATORY BREACH
Contents

History ........................................................................................................... 20–22
Definition .................................................................................................. 20–23
Distinction from rescission ........................................................................... 20–30
The effect of anticipatory breach ................................................................. 20–32
Acceptance of anticipatory breach ............................................................... 20–33
Refusal to accept an anticipatory breach ..................................................... 20–37
Acceptance of anticipatory breach and its effect on the contract ................. 20–43

PART 8

THE MUTUALITY PRINCIPLE
The history of the principle .......................................................................... 20–44
The modern rules .......................................................................................... 20–47
The party in breach ....................................................................................... 20–48
Counter stipulations ...................................................................................... 20–53
The nature of the breach ............................................................................... 20–57

PART 9

RETENTION AND COMPENSATION ......................................................... 20–62
Retention of debts ....................................................................................... 20–66
Retention of rent .......................................................................................... 20–68
Special lien .................................................................................................. 20–74
(1) Equitable control .................................................................................... 20–77
(2) Possession ............................................................................................... 20–78
(3) Retention against owner ........................................................................ 20–79
(4) Moveables ............................................................................................... 20–82
(5) Salvors and innkeepers .......................................................................... 20–86

PART 10

MATERIAL AND NON-MATERIAL BREACHES ........................................ 20–88
Fundamental breach ..................................................................................... 20–90
Material breach justifying rescission ........................................................... 20–91
Express provision on material breach ......................................................... 20–95
Material breach as a question of fact ........................................................... 20–96
Examples of material breach ...................................................................... 20–102
What happens when there is material breach? .......................................... 20–104
The method of rescission and contractual provision on rescission ............... 20–107
The effect of rescission ............................................................................... 20–108
Loss of the right to rescind .......................................................................... 20–121
Remediable breach ...................................................................................... 20–122
Ultimatum procedure .................................................................................. 20–128

PART 11

UNJUSTIFIED ENRICHMENT AFTER BREACH ........................................ 20–132
Problems with the present law .................................................................... 20–141
Innocent party ............................................................................................. 20–142
Contract breaker .......................................................................................... 20–144

CHAPTER 21

FRUSTRATION

INTRODUCTION ............................................................................................ 21–01
THE THEORETICAL BASE .......................................................................... 21–05
Implied term ................................................................................................ 21–07
The construction test ................................................................................... 21–08
CONTRACTUAL PROVISIONS AFFECTING SUPERVENING EVENTS ....... 21–13
ILLUSTRATIONS OF THE DOCTRINE OF FRUSTRATION ....................... 21–19
Contents

Commercial difficulty or economic frustration 21-20
Effect of war on contracts 21-22
Impossibility of performance 21-26
Scottish examples of impossibility 21-29
English examples of impossibility 21-30
Frustration of purpose 21-31
Frustration and contracts relating to land 21-35
The fault of one of the parties 21-37
The consequences of frustration 21-44

CHAPTER 22

DAMAGES

PART 1
HISTORY 22-01
TERMINOLOGY 22-04
Competence of an award of damages 22-05
(1) Where the pursuer has suffered no loss 22-06
(2) Claim barred by actings of parties 22-07
(3) Claim for damages regulated by the express provision of the parties 22-09
(4) A claim for damages and the actio quanti minoris 22-10
(5) Void and unenforceable contracts 22-11
(6) Prior assessment of loss 22-12
(7) Prescription and limitation 22-14
(8) Statutory limitations on claims for damages 22-15

PART 2
CAUSATION
(1) The principle of causation 22-16
(2) The selection of the relevant cause 22-17
(3) Intervening events 22-20
“BLACK HOLE” CASES 22-26

PART 3
CONTRIBUTORY NEGLIGENCE IN CONTRACT 22-32

PART 4
MITIGATION
(1) The principle of mitigation 22-37
(2) The recovery of reasonable loss 22-38
(3) The time of mitigation 22-42
(4) Expense of mitigation 22-44
(5) Onus of proof 22-45
(6) Pursuer limited to actual loss 22-46

PART 5
REMOteness
(1) The need for a limit to liability 22-56
(2) Causation and remoteness of liability 22-60
(3) The limit of liability—reasonable contemplation 22-65
(4) The knowledge of the defender 22-70
(5) Foreseeability of scale of loss 22-75
(6) Examples of remoteness of liability 22-76

PART 6
ASSESSMENT OF DAMAGES
(1) General principles 22-91
(2) Cross checks with various measures 22-93
Contents

(3) Disgorgement of the defender’s gains ................................................. 22–94
(4) Abortive or wasted expenditure ............................................................ 22–96
(5) Nominal damages and inconvenience ................................................ 22–98
(6) Solatium for breach of contract ............................................................ 22–104
(7) Out-of-pocket expenses ........................................................................ 22–106
(8) Contract price and market price; rectification costs and diminution in value ............................................................. 22–107
(9) Loss of profit ......................................................................................... 22–111
(10) Replacement cost ................................................................................ 22–114
(11) Taxation ............................................................................................... 22–115

PART 7

INTEREST
Introduction ................................................................................................. 22–119
Historical change ....................................................................................... 22–121
The present principles ................................................................................ 22–122
Interest from the right of action ................................................................. 22–123
Date of demand for payment .................................................................... 22–126
Date of citation ........................................................................................... 22–129
Date of decree ............................................................................................. 22–130
Interest on Damages (Scotland) Act ......................................................... 22–132
Late payment of commercial debts ........................................................... 22–133
Compound interest .................................................................................... 22–138
Rates of interest ........................................................................................ 22–140
Drafting interest clauses .......................................................................... 22–145

PART 8

PENALTY CLAUSES
Terminology ............................................................................................... 22–146
The early law ............................................................................................. 22–148
Nineteenth century ...................................................................................... 22–149
Twentieth century ....................................................................................... 22–150
The modern law ........................................................................................ 22–152
The necessity for a breach of contract ......................................................... 22–153
Penalty or liquidated damages .................................................................. 22–155
Penalties in bonds ....................................................................................... 22–160
Tempus inspiciendum ................................................................................ 22–161
Forfeiture of moneys already paid ............................................................. 22–163
Transfer or forfeiture of property ............................................................... 22–166
Accelerated payment .................................................................................. 22–167
The inverse penalty .................................................................................... 22–168
Withdrawal of rights and privileges and other forms of penalties ............ 22–169
The penalty payable for several breaches ............................................... 22–170
Onus of proof ............................................................................................. 22–172
Cumulative remedies ................................................................................ 22–173
Drafting of penalty clauses ...................................................................... 22–174

CHAPTER 23

SPECIFIC IMPLEMENT AND INTERDICT

DISTINCTION BETWEEN SPECIFIC IMPLEMENT AND INTERDICT ............ 23–01
Specific implement: terminology ............................................................... 23–05
Specific implement as a primary remedy ............................................... 23–08
Specific implement and damages .............................................................. 23–10
Precision in the order sought and relationship to the contract ............. 23–13
Court’s discretion to refuse specific implement ..................................... 23–15
## Contents

1. To enforce an obligation to pay money ........................................... 23–16
2. To enforce an obligation against the Crown ...................................... 23–17
3. To do the impossible ....................................................................... 23–18
4. In contracts which depend upon a highly personal relationship ............ 23–18
5. When performance could be reasonably obtained from another source .... 23–20
6. Generally if implement is thought to be inequitable ............................. 23–22
Interim implement ........................................................................... 23–23
The remedy for failure to implement ................................................... 23–24
Interdict ............................................................................................ 23–28
The competence of interdict ................................................................. 23–30
Title and interest ................................................................................. 23–32
Prima facie case .................................................................................. 23–33
Balance of convenience ....................................................................... 23–35
Width and precision of order ............................................................... 23–36
Miscellaneous matters ......................................................................... 23–37

**Chapter 24**

### PAYMENT

<table>
<thead>
<tr>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Money and the obligation to pay money</td>
<td>24–03</td>
</tr>
<tr>
<td>Methods of making payment</td>
<td>24–07</td>
</tr>
<tr>
<td>(1) Legal tender</td>
<td>24–08</td>
</tr>
<tr>
<td>(2) Cheque</td>
<td>24–10</td>
</tr>
<tr>
<td>(3) Travellers' cheques</td>
<td>24–11</td>
</tr>
<tr>
<td>(4) Standing orders and credit transfers</td>
<td>24–12</td>
</tr>
<tr>
<td>(5) Direct debits</td>
<td>24–14</td>
</tr>
<tr>
<td>(6) Giros</td>
<td>24–15</td>
</tr>
<tr>
<td>(7) Credit cards</td>
<td>24–16</td>
</tr>
<tr>
<td>(8) Debit cards</td>
<td>24–17</td>
</tr>
<tr>
<td>To whom should payment be made?</td>
<td>24–18</td>
</tr>
<tr>
<td>Where should payment be made?</td>
<td>24–19</td>
</tr>
<tr>
<td>Time of payment</td>
<td>24–21</td>
</tr>
<tr>
<td>How much has to be paid?</td>
<td>24–25</td>
</tr>
<tr>
<td>Which debt is paid—appropriation</td>
<td>24–34</td>
</tr>
<tr>
<td>What is the source of payment?</td>
<td>24–37</td>
</tr>
<tr>
<td>What was the purpose of payment?</td>
<td>24–38</td>
</tr>
<tr>
<td>Proof of payment</td>
<td>24–39</td>
</tr>
<tr>
<td>Payment in foreign currency</td>
<td>24–42</td>
</tr>
</tbody>
</table>

**Chapter 25**

### VARIATION AND EXTINCTION OF CONTRACTUAL OBLIGATIONS

<table>
<thead>
<tr>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Variation—introduction</td>
<td>25–01</td>
</tr>
<tr>
<td>Terminology</td>
<td>25–02</td>
</tr>
<tr>
<td>Classification of variation</td>
<td>25–04</td>
</tr>
<tr>
<td>Limitations on power to vary</td>
<td>25–06</td>
</tr>
<tr>
<td>Personal bar</td>
<td>25–08</td>
</tr>
<tr>
<td>Waiver</td>
<td>25–15</td>
</tr>
</tbody>
</table>
Contents

Delectus personae and assignation—the comparison with transmission on death........................................... 26–03
Frustration........................................................................... 26–05
Transmission to whom?.......................................................... 26–06
Examples of transmission to representatives....................... 26–07
Problems with particular cases
(1) Periodical payments...................................................... 26–09
(2) Contracts of service...................................................... 26–10
(3) Contracts for services................................................... 26–13
(4) Mandate....................................................................... 26–14
(5) Formation of contract.................................................. 26–16
(6) Delivery of deeds.......................................................... 26–18
(7) Unfinished work........................................................... 26–20

PART 2
INSOLVENCY........................................................................ 26–21
Fraudulent trading............................................................... 26–23
Various consequences of insolvency................................. 26–25
Balancing of accounts in bankruptcy.................................. 26–31

CHAPTER 27

JURISDICTION AND CONFLICT OF LAWS

INTRODUCTION..................................................................... 27–01

PART 1
JURISDICTION..................................................................... 27–02
Domicile............................................................................. 27–05
The special jurisdiction for contractual obligations............... 27–11
  Matters relating to a contract........................................... 27–14
  Place of performance...................................................... 27–15
  Contractual action combined with action relating to
  immovables................................................................. 27–19
  Consumer contracts....................................................... 27–20
  Individual contracts of employment............................... 27–25
  Insurance contracts....................................................... 27–26
Prorogation of jurisdiction.................................................. 27–27

PART 2
CONFLICT OF LAWS
Introduction......................................................................... 27–30
Scope of Rome Convention............................................... 27–32
Express choice of law......................................................... 27–34
Applicable law in the absence of choice............................ 27–36
Formal validity.................................................................... 27–39
Capacity and material validity.......................................... 27–41
Assignation and subrogation............................................. 27–43

Index.................................................................................. 801