

# **PRESCRIPTION (SCOTLAND) ACT 2018**

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## **EXPLANATORY NOTES**

### **THE ACT – COMMENTARY ON SECTIONS**

#### *The structure of the Act*

#### *Section 2 - Obligations related to contract*

9. This section amends paragraph 1 of schedule 1 of the 1973 Act to bring within the scope of the five-year prescription two further types of obligation.
10. Subsection (2) inserts a new sub-paragraph (fa) dealing with the first type of obligation: any obligation relating to the validity of a contract. Where a contract has been induced by error or innocent misrepresentation (caused by the debtor innocently or otherwise), the contract is voidable. In other words, the contract is valid until it is set aside by the party entitled to avoid it. For example, A is induced to purchase a painting from B by B's innocent misrepresentation that the painting is by artist C. When A discovers the painting is not in fact by C, A can seek to have the contract set aside on the ground of misrepresentation and recover from B the sum paid. It does not appear however that the right to reduce a contract on those grounds can in all cases be categorised as a right arising from contract and hence fall within the ambit of schedule 1, paragraph 1(g) of the 1973 Act. The effect of the provision is that such rights and obligations relating to the validity of a contract which do not fall within any other sub-paragraph of paragraph 1 are subject to the five-year prescription. The purpose of the qualification in the final part of the sub-paragraph is to deal with any potential overlap with obligations arising from delict, for example in cases of fraud or negligent misrepresentation. This sub-paragraph is not concerned with a situation where the error is so material as to preclude consent, meaning that there is no contract at all. Subsection (2) also inserts a new sub-paragraph (fb) dealing with the second type of obligation to be brought within the five-year prescription by this section: the obligation to reimburse expenditure incurred as a result of dealings in anticipation of the coming into existence of a contract which does not in fact come into being. The situation in which this would apply would generally be where one party has in good faith incurred expenditure in reliance on an assurance by the other that there is a binding contract between them, but the contract does not come into being; in other words, the liability is pre-contractual in nature. Perhaps the most famous example of this concerned the Melville Monument in Edinburgh. Development of an estate in Edinburgh owned by W was to include a monument paid for by subscribers led by M. The subscribers, with W's consent, carried out preparatory work on the estate with a view to having the monument erected there. This disrupted W's other plans for the estate. Subsequently, the subscribers had the monument erected in a different place – in St Andrew's Square. W sued M. The court decided that W was entitled to recover from M any wasted expenditure incurred as a result of the monument not having been erected at the agreed location on his estate.