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**'It's in the Post':**

**Distance Contracting in Scotland 1681-1855**

Hector L MacQueen

In 1684 the Duke of Gordon engaged Robert Smith to serve him and his family 'in chirurgery and physic, and also to supervise his buildings and architecture' – an interesting combination of medical and property services. Smith's salary was to be 200 merks a year plus board when the Duke was at home and a daily subsistence allowance otherwise. Smith and the Duke each signed a copy of their agreement, then exchanged these copies. Some seventeen years later, in 1701, Smith obtained decree from the Sheriff at Edinburgh against the Duke for non-payment of 2,823 pounds Scots due under the contract, representing 'so many years board wages, during the years the Duke did not live at home, at the rate of 12 pence per day'. Smith's claim suggests that the Duke did not spend much time at home.<sup>1</sup> The Duke sought to suspend the sheriff's decree in the Court of Session in Edinburgh, on the basis that 'by the contract produced by the charger himself [*i.e. Smith*], it appears, the clause pursued on is a marginal note, and which, not being subscribed by the Duke, but only by Smith himself, can never oblige the Duke.' The court held, however, 'that mutual contracts having two doubles need not be subscribed by both parties-contractors, but it was sufficient in law if the Duke's principal was signed by Smith and his counterpart by the Duke.' An earlier decision said to be to the same effect, *Sinclair of Ossory in Caithness*,<sup>2</sup> was referred to by the court as having settled the question. Smith argued that 'there remain some dark vestiges of a subscription [*to the marginal note on his double*], though by the badness of the ink and the wearing of the paper, it is not so legible now.' Although this explanation is not implausible, bearing in mind that the documents had been executed seventeen years before the case came into court, the Court of Session seems to have preferred the Duke's claim that 'no subscription appeared, nor the least character of letters'. But the court 'sustained the marginal note, though not signed by the Duke, seeing it was contained in his own double uncanceled'. The report summarises the effect of the decision as being that 'if a mutual contract is executed by two counterparts, it is sufficient if each party subscribes the paper containing what is prestable on himself'.<sup>3</sup> The court thus took a fairly liberal approach to the effect of the Duke's undoubted subscription of the double in Smith's

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<sup>1</sup> A merk was worth 2/3 of a pound Scots, itself valued in 1707 at one-twelfth of a pound sterling. One shilling Scots exchanged for one penny sterling in 1707, i.e. one penny Scots was 1/12<sup>th</sup> of a penny sterling.

<sup>2</sup> No report of this case has been traced.

<sup>3</sup> *Smith v Duke of Gordon* (1701) Mor 16987. The case of *Cubbison v Cubbison* (1716) Mor 16988 also involves 'doubles of a writ', and in that case there were three such 'doubles'.

possession as embracing the unsigned marginal note thereon, with perhaps some sort of personal bar arising from the fact that he had not struck out the note in his own double even though that document had indeed been subscribed by Smith. It should however be observed that the court noticed that the clause in the marginal note 'seemed materially to differ' in the two copies, and remitted the case for further inquiry on this point before the ordinary judge (presumably the sheriff in Edinburgh).

*Smith v Duke of Gordon* is a decision which passed virtually un-noticed in cases and legal texts for the next 300 years, apart from a reference in Lord Bankton's *Institute of the Laws of Scotland*, published between 1751 and 1753,<sup>4</sup> and one citation in 1957 in the sheriff court case of *Wilson v Fenton Bros (Glasgow) Ltd.*<sup>5</sup> That case involved the exchange by parties of duplicates of a patent licence agreement, each party signing one copy and then handing that copy over to the other. The sheriff-substitute (J C E Hay) held that the licence agreement had been validly executed, and said: 'In my view, the documents produced and to which I have referred, establish the fact of a completed agreement between the pursuers and the defenders.' He went on to observe:

The form of the agreement is not a usual one in Scotland, but, as all the negotiations were conducted in England, the method of having two copies, of which one copy is signed by each party and delivered to the other party, was adopted in conformity, as I am informed, with a common practice in England.<sup>6</sup>

This comment encapsulates why the *Duke of Gordon* case is so surprising at first sight: the mode of contract formation there recognised is one that more recent Scots lawyers, certainly those of the twentieth century, have associated exclusively with English practice, especially conveyancing practice; so much so, in fact, that when English commercial lawyers took it up as a way of concluding written deals between remote parties, plenty of Scots lawyers thought such a thing not legally possible in Scotland.<sup>7</sup>

One reason for these difficulties was that for two centuries lawyers had been taught that a contract was created by an offer by one party met by an acceptance by the other. The

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<sup>4</sup> Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights with observations upon the agreement or diversity between them and the laws of England* (2 vols, Edinburgh, 1751-2), I, xi, 36 (also available in a reprint as vols 41-43 in the Stair Society series, edited with an introduction by William M Gordon). Note too Bankton's observation on the English law, at I, xi (Observations on the Laws of England), 17.

<sup>5</sup> 1957 SLT (Sh Ct) 3. Note also Gerhard Lubbe, 'Formation of Contract', in Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland* (2 vols, Oxford, 2000), 41-2.

<sup>6</sup> 1957 SLT (Sh Ct) at 5. The pursuers were resident in New York.

<sup>7</sup> See Scottish Law Commission, Review of Contract Law. Report on Formation of Contract: Execution in Counterpart (Scot Law Com No 231, April 2013), paras 1.2-1.3.

model was a familiar one in standard transactions: notably house purchases, but also other sales or leases of land. The offer and acceptance were usually known as the 'missives', and together these documents when executed and subscribed by the appropriate party in the form required by law made a contract. Robert Rennie has written much on this subject in modern law.<sup>8</sup>

But the doctrines associated with offer and acceptance, painfully learned by generations of law students and applied with variable degrees of success in tackling tutorial and examination problems, do not appear to have been in the forefront of the Scots law on contract formation in general before 1800. Before then, offer and acceptance was certainly a way in which contracts might be formed but equally certainly not the only one. The key requirement was, in the language of Stair, the exercise of free will by parties to engage with each other 'of purpose to oblige'.<sup>9</sup> Engagement was to be distinguished from, first, desire, 'a tendency or inclination of the will towards its object',<sup>10</sup> which was insufficient to create a right. Similarly with resolution, 'a determinate purpose to do that which is desired'<sup>11</sup> but still no more than 'an act of the will with itself'.<sup>12</sup> 'The only act of the will which is efficacious', wrote Stair, 'is that whereby the will conferreth or stateth a power of exaction in another, and thereby becomes engaged to that other to perform.'<sup>13</sup> Engagement might be by one party alone, and was not necessarily a two-or-more-person process: hence the enforceability of a unilateral promise in Scots law, and also the possibility of third-party rights in a contract. A *pactum* or paction 'is the consent of two or more parties, to some things to be performed by either of them; for it is not a consent in their opinions, but a consent in their wills, to oblige any of them; and it is much to be considered, whether the consent be given *animo obligandi*, to oblige or not'.<sup>14</sup> It was this understanding of the basis of conventional or voluntary obligations that made it relatively unproblematic, I would suggest, for the Scottish courts at the turn of the seventeenth and eighteenth centuries to see an exchange by parties of duplicate documents, each subscribed only by the other, as simply one of the ways in which such obligations might come into existence.

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<sup>8</sup> See especially D J Cusine and Robert Rennie, *Missives* (2<sup>nd</sup> edn, Edinburgh, 1999).

<sup>9</sup> James Dalrymple, Viscount Stair, *Institutions of the Law of Scotland* (2<sup>nd</sup> edn, Edinburgh, 1693), I, x, 13. I have used the tercentenary edition (a reprint of the 2<sup>nd</sup>) published under the editorship of David M Walker by Edinburgh University Press in 1981.

<sup>10</sup> Stair, *Institutions*, I, x, 2.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> Stair, *Institutions*, I, x, 6.

Stair is not altogether without rules on offer and acceptance, but they flow from his understanding of when voluntary or conventional obligations arise. An offer being conditional upon the acceptance of the offeree was not an engagement until acceptance was made: '[s]o then, an offer accepted is a contract, because it is the deed of two, the offeror and acceptor'.<sup>15</sup> This idea of the offer's non-obligatory quality before acceptance also underpinned Stair's only other substantive comment on the topic:

If the promise be pendent upon acceptance, and no more than an offer, it is imperfect and ambulatory, and in the power of the offeror, till acceptance; and if he die before acceptance, it is revoked as a commission or mandate, which necessarily imports acceptance, and expires by the mandator's death, *morte mandatoris perit mandatum*; so acceptance cannot be by any third party, unless he have warrant for the effect; and so if a promise be made by one to another in favours of a third, importing the acceptance of that third, it is pendent and revocable by these contractors, till the third accept.<sup>16</sup>

Most of the major eighteenth-century writers on contract law also saw the parties' consent and engagement as the key to when conventional obligations arose.<sup>17</sup> For all of them too offer and acceptance was but one way of showing the necessary engagement of all the relevant parties, resting upon the exercise of their concurrent free will. The issue did not need more detailed discussion than Stair had provided: the offeror was free to withdraw the offer until acceptance, and the offer lapsed if the offeror died before acceptance.<sup>18</sup> The non-obligatory nature of an offer meant that distinguishing it from the obligatory promise was critical, however. The test was the existence or not of the party's 'purpose to oblige' or '*animus obligandi*', and it seems that, for Stair at least, this was a matter to be tested objectively. Inward desire and resolution were not enough. The party's engagement had to be manifest in what was said, written or done.<sup>19</sup> But Stair was silent on whether this also entailed communication to the other party. If necessary a party could be put upon his oath of

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<sup>15</sup> Stair, *Institutions*, I, x, 3.

<sup>16</sup> Stair, *Institutions*, I, x, 6. Crucially Stair had earlier in the chapter (*ibid*, I, x, 5) recognised that a third party could without acceptance acquire an irrevocable right under a contract between two others where the contract contained a promise to benefit that third party. For background in medieval and late scholastic juristic thought see James Gordley, *Philosophical Origins of Modern Contract Doctrine* (Oxford, 1991), 45-9, 79-82.

<sup>17</sup> For what follows see William Forbes, *Institutes of the Law of Scotland* (Edinburgh, 1722-1730, reprinted Edinburgh, 2012), II, iii, 1, 3; II, iii, 1, 6; Bankton, *Institute*, I, xi, 1-6; John Erskine, *Institute of the Law of Scotland* (Edinburgh, 1773, reprinted Edinburgh 2014; 7<sup>th</sup> edn 1870 reprinted Edinburgh, 1990), III, i, 16; John Erskine, *Principles of the Law of Scotland, in the order of Sir George Mackenzie's Institutions of that Law* (1<sup>st</sup> edn, Edinburgh, 1754; several further edns to 1793), III, i-iv.

<sup>18</sup> See e.g. Forbes, *Institutes*, II, iii, 1, 6(3); Bankton, *Institute*, I, xi, 4-5; Erskine, *Institute*, III, ii, 88; Erskine, *Principles*, III, ii, 1.

<sup>19</sup> Stair, *Institutions*, I, x, 2 and 6; Lubbe, 'Formation of Contract', 16-18.

verity to admit or deny the making of a potentially obligatory statement.<sup>20</sup> This seems to have been also the explanation of another rule applying where obligatory documents were in formal writing: delivery of the document to its creditor was necessary to make it binding, and the mere fact that the debtor had subscribed the document was insufficient. But the delivery itself had to be with the requisite intention to bind; a mere transfer into another's custody was not enough.<sup>21</sup> Bankton noted that each of the 'doubles' involved in an exchange of contracts like that in *Smith v Duke of Gordon* required delivery to the other party in this sense for the transaction to become binding.<sup>22</sup> Stair however also gave an account of the action of exhibition and delivery whereby a party holding a document which should have been delivered to another could be made to yield it up;<sup>23</sup> thus it again seems that direct communication between the parties was not essential to the existence of an obligation.

Eighteenth-century writers wrestled more than Stair with the extent to which Scots law was still governed by the Roman law structure of contracts: verbal, written, real and consensual; nominate and innominate.<sup>24</sup> As I have shown elsewhere, they were as a result much less clear than Stair himself whether or not there was a general law of contract applying to all contracts. So perhaps they felt less need to give general doctrine on when a contract was formed.<sup>25</sup> For example, David Hume, Professor of Scots Law at Edinburgh University 1786-1822, said virtually nothing in his lectures about contract law in general, focusing instead on particular contracts such as sale and location (hire). It is noteworthy that Hume's only relatively detailed discussion of offer and acceptance comes in his treatment of sale, and there primarily in connection with the sale of land, where already the use of missives seems well established in legal practice.<sup>26</sup> For the sale of moveables, his emphasis was on the lack of formality and the interests of commerce, although he did note that 'among traders and mercantile dealers, when goods are offered to sale by letter, whether sent by post or otherwise, this offer is binding on the seller for a reasonable time only, and falls if not duly accepted on the other part.' This was because 'otherwise the seller is embarrassed and

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<sup>20</sup> Stair, *Institutions*, IV, xliv, 7.

<sup>21</sup> Stair, *Institutions*, I, vii, 14; I, x, 9. See also Forbes, *Institutes*, II, iii, 6(11); Bankton, I, xi, 23, 48-50; Erskine, *Institute*, III, ii, 43-44; Erskine, *Principles*, III, 2, 20.

<sup>22</sup> Bankton, *Institute*, I, xi, 36.

<sup>23</sup> Stair, *Institutions*, I, vii, 14.

<sup>24</sup> Forbes, *Institutes*, III, i; Bankton, *Institute*, I, xi, 18-23, 63-66; Erskine, *Institute*, III, 1-3.

<sup>25</sup> Hector L MacQueen, 'The Law of Obligations in Scots Law', in Reiner Schulze and Frydryk Zoll (eds), *The Law of Obligations in Europe: A New Wave of Codifications* (Seller: Munich, 2013), 213-243. See also Hector L MacQueen, 'Pragmatism, Precepts and Precedents: Commercial Law and Legal History', in Andrew R C Simpson, Scott C Styles and Adelyn Wilson (eds), *Continuity, Change and Pragmatism in the Law: Essays in Honour of Professor Angelo Forte*, forthcoming.

<sup>26</sup> G Campbell H Paton (ed), *Baron David Hume's Lectures 1786-1822* (6 vols, Edinburgh, Stair Society, 1939-58, henceforth Hume, *Lectures*), vol 2, 20-3. See previously Erskine, *Institute*, III, ii, 2.

might suffer by the delay.<sup>27</sup> Mungo Ponton Brown's treatise on sale, published in 1821, discussed offer and acceptance in the context of the sale of land only.<sup>28</sup>

The first Scottish writer to provide us with something like general doctrine on offer and acceptance, in the third (1816-1819) edition of his *Commentaries on the Law of Scotland*, was George Joseph Bell, Hume's successor in the Scots Law Chair at Edinburgh 1822-1839. Perhaps in contrast with Hume and Brown, he introduced the subject in the context of mercantile transactions, as examples of where the formalities of the rules on writing were relaxed:

Contracts in mercantile dealings are not so frequently formed by solemn deeds, as by letters or correspondence. One merchant gives an order to another at a distance by letter, which that other agrees to perform, or he makes an offer which the other accepts. And although the parties are in the same place, mercantile contracts are most commonly formed in this way. ...<sup>29</sup>

From this point Bell moves into almost two pages on the law of offer and acceptance. In the fifth edition of the *Commentaries* (1835), the last published in his lifetime, he supplemented the passage quoted above with the following:

It is dangerous to rely on a long correspondence from which to collect the terms of a contract. The engagement should be so distinct and specific, that the party may be enabled at once to put his finger on it and say, 'Here is my agreement.' And in courts of law nothing short of this can be relied on as the ground of an action.<sup>30</sup>

Bell thus saw the offer-acceptance doctrine as especially conducive to the practice of merchants, helping them to focus on stating their contracts with the minimum of documentation, and also narrowing the field of inquiry for the courts when disputes about the existence of contracts came before them. Two documents were all that was needed: one stating the terms of the bargain, the other acceding to it. Bell distinguished the case of orders in trade:

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<sup>27</sup> Hume, *Lectures*, vol 2, 6, 18-20.

<sup>28</sup> Mungo P Brown, *Treatise on the Law of Sale* (Edinburgh, 1821), 55.

<sup>29</sup> George Joseph Bell, *Commentaries on the Mercantile Jurisprudence of Scotland* (3<sup>rd</sup> edn, Edinburgh, 1816-19), vol 2, 281. Unless otherwise indicated, as here, references to Bell's *Commentaries* in this paper are to the 5<sup>th</sup> edition of 1835, the last published in Bell's lifetime (which is also almost entirely reproduced in the 7<sup>th</sup> and final edition of 1870). The passage quoted above is at vol 1, 325 of the 5<sup>th</sup> edition.

<sup>30</sup> Bell, *Commentaries*, 5<sup>th</sup> edn, vol 1, 326.

If a merchant has sent, not an offer to purchase, but an order for goods, it is so far of the nature of an offer, that it may be rejected; but the person to whom it is addressed binds the bargain, by proceeding with all due diligence to execute the order. Nor is it necessary for him to accept it in order to bind the bargain. It is an equitable part of this rule, however, that if he do not mean to execute the order, he must instantly communicate his refusal; and should he neglect to do so, he will be held to have engaged himself to the performance of it.<sup>31</sup>

Bell was, however, a little less context-specific in his approach to the subject in the later but more elementary *Principles of the Law of Scotland* (essentially his student lecture notes, first published in 1826). There he simply stated that ‘a mutual contract, consensus in idem placitum, commences by offer and is completed by acceptance.’<sup>32</sup> But the detailed discussion occurs almost at the end of his treatment of general contract law, which starts instead with Stair’s concept of the conventional obligation which springs from the engagement, or the deliberate and voluntary consent with purpose to engage, of a party. Offer and acceptance is thus still almost a subsidiary topic in this setting rather than the pre-eminent example of formation of contract.

In both *Commentaries* and *Principles* Bell’s earliest treatments relied almost entirely on Scottish case authorities. Only in later editions of the *Principles* did much the same text come to be adorned with references to Pothier’s treatise on sale, plus the work of Charles Toullier<sup>33</sup> and Jean-Marie Pardessus<sup>34</sup> on French law as well as some English cases.<sup>35</sup> But this does not preclude the possibility that French or English influences were at play in Bell’s thinking from his first writings on offer and acceptance. He is known to have been influenced generally by his reading in both systems, in particular by the writings of Pothier, who had been the first fully to articulate offer-acceptance doctrine on the Continent.<sup>36</sup> On the other

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<sup>31</sup> Bell, *Commentaries*, 5<sup>th</sup> edn, vol 1, 327.

<sup>32</sup> George Joseph Bell, *Principles of the Law of Scotland* (1<sup>st</sup> edn, Edinburgh, 1829; 10<sup>th</sup> edn, Edinburgh, 1899), § 72. Note also §§ 8-9. Unless otherwise indicated, references to Bell’s *Principles* in what follows are to the 4<sup>th</sup> edition of 1838, the last published in his lifetime (reprinted Edinburgh, 2010); the texts under discussion in this paper show virtually no change from 1<sup>st</sup> to 4<sup>th</sup> edition.

<sup>33</sup> Most probably *Droit civil français suivant l'ordre du Code Napoléon, ouvrage dans lequel on a tâché de réunir la théorie à la pratique*, published in 14 volumes between 1811 and 1831. The Advocates Library in Edinburgh holds the 5th edition, published in 15 volumes between 1830 and 1836. Toullier (1752-1835) was Professor of French Law at Rennes from 1778.

<sup>34</sup> The references appear to be to multi-volume works and may therefore be to either *Traité du contrat et des lettres de change* (Paris, 1809, 2 volumes) or *Cours de droit commercial* (1813-1817, 4 volumes). Both works appear in the catalogue of the Advocates Library. Pardessus (1772-1853) was Professor of Commercial Law at Paris from 1810.

<sup>35</sup> Bell, *Principles*, 4<sup>th</sup> edn 1839, §§ 72-79.

<sup>36</sup> Robert J Pothier, *Traité des obligations* (first published 1761) [4]; idem, *Traité du contrat de vente* (first published 1762), [31]-[33]; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian*

hand, Pothier also enjoyed considerable influence on the development of offer-acceptance doctrine in nineteenth-century England.<sup>37</sup> The probability is that various streams of influence merged in Bell.

A final point is that Bell's formulations of the rules took shape in a world where the developing postal system provided the only means of communication between distant parties, especially merchants.<sup>38</sup> In the third edition of the *Commentaries* he wrote:

It would appear that the act of acceptance binds the bargain; *it not being necessary that the acceptance shall have reached the person who makes the offer* [emphasis supplied]. The offer is a consent provisionally to a bargain, if accepted within a certain time fixed by the offer, or by the law; until the expiration of which time, this consent to a sale is held to subsist on the part of the offeror, provided he continues alive and capable of consent; and from the moment of acceptance there is between the parties '*in idem placitum concursus et conventio*', which constitutes the contract of sale.<sup>39</sup>

Thus it appears that Bell, like Pothier, saw offer and acceptance as two concurrent declarations of the parties' wills with the acceptor not having to communicate acceptance to the offeror to make the contract binding. In his fifth edition Bell added to the above passage that 'in the common case' it was not necessary for the acceptance to reach the offeror.<sup>40</sup> Further, an offer which stated a limited time for acceptance fell when that time had expired; in mercantile cases, however, the time for which an offer was open was presumed to be return of post. But the offeror could protect himself by requiring that the acceptance reach him before it became effective.<sup>41</sup> If an acceptance was delayed beyond either the express or implied time limit, as for example the result of a wrong address of the offer, the mere expiry of that limit did not discharge the offer.<sup>42</sup> For this last, Bell cited the English case of *Adams v Lindsell*, which did indeed focus on facts where the initial offer was mis-addressed, so

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*Tradition* (Cape Town, 1990), 567. For Pothier's influence on Bell, see Kenneth G C Reid, 'From Text-Book to Book of Authority: The *Principles* of George Joseph Bell' (2011) 15 *Edinburgh LR* 6, 24-6.

<sup>37</sup> *Ibid*, 571; David J Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, 1999), 222-3; J M Perillo, 'Robert J Pothier's Influence on the Common Law of Contract' (2004-05) 11 *Texas Wesleyan LR* 267; Michael Lobban, 'Introduction [Contract]', in William Cornish and others, *The Oxford History of the Laws of England volume XII* (Oxford: Oxford University Press, 2010), 301-4. See also Gordley, *Philosophical Origins*, 139-40; Lubbe, 'Formation of Contract', 44.

<sup>38</sup> On the development of the postal system in the eighteenth and early nineteenth centuries in Scotland, see A R B Haldane, *Three Centuries of Scottish Posts: an historical survey to 1836* (Edinburgh, 1971). For the wider British context see Duncan Campbell-Smith, *Masters of the Post: The Authorized History of the Royal Mail* (London: 2011), chapter 3.

<sup>39</sup> Bell, *Commentaries*, 3<sup>rd</sup> edn, vol 2, 282.

<sup>40</sup> Bell, *Commentaries*, vol 1, 326-7 (7<sup>th</sup> edn, vol 1, 344).

<sup>41</sup> Bell, *Commentaries*, 3<sup>rd</sup> edn, vol 2, 282; 4<sup>th</sup> edn, vol 1, 249; vol 1, 327 (7<sup>th</sup> edn, vol 1, 344).

<sup>42</sup> Bell, *Principles*, 2<sup>nd</sup> edn, §82; 4<sup>th</sup> edn, §79.

delaying the offeree's response.<sup>43</sup> On Bell's doctrine of acceptance, however, there was no need for the special postal acceptance rule for which *Adams* was also coming to stand in English law (perhaps as a result of the introduction of the penny post across Great Britain in 1840).<sup>44</sup> Bell's approach was rather that the offer committed the offeror for the period stated in it or implied by law, and that an act of acceptance within that period by the offeree produced the consensus needed for a contract regardless of whether the offeror actually knew anything about it.

Now in this Bell was departing somewhat from, or at least modifying, the doctrine as it had stood since the time of Stair, under which an offer could be withdrawn or revoked since it gave rise in itself to no obligation. The way in which Bell stated the matter was in terms of the time-limited offer lapsing rather than the offeror not being able to withdraw; but nonetheless there was at least the implication that the offeror was legally committed and that the offeree's acceptance within the time limit would create a contract, no matter what the offeror did during the intervening period. For other offers, Bell's view seems to have been that offers were 'always and *in terminis* conditional' and thus not obligatory unless the condition of acceptance was fulfilled.<sup>45</sup> Bell was however probably in line with Stair in his view that in principle the acceptance was binding from the moment it was made, regardless of whether or not it had reached, or been communicated to, the offeror.

Bell's positions on these matters failed to last as the law of Scotland, however. They began to run into difficulties in his lifetime, in the 1830 case of *Countess of Dunmore v Alexander*.<sup>46</sup> In that celebrated decision Betty Alexander wished to leave the employment of Lady Agnew. This does not seem to have been because of any difficulties in their relationship; Lady Agnew sought to help her servant by writing to the Countess of Dunmore to ask if she had any need for a servant such as Betty. The Countess then sent a letter to Lady Agnew asking her to engage Betty for her, and Lady Agnew (who was away from home) forwarded that letter to Betty on 5<sup>th</sup> November. On 6<sup>th</sup> November Lady Agnew received another letter from the Countess withdrawing the previous one. Lady Agnew forwarded this letter on by express, with the result that Betty received both letters

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<sup>43</sup> *Adams v Lindsell* (1818) 1 B & Ald 681.

<sup>44</sup> See Simon Gardner, 'Trashing with Trollope: a Deconstruction of the Postal Rules in Contract' (1992) 12 *Oxford Journal of Legal Studies* 170, 172-5, 178-84; Michael Lobban, 'The Formation of Contracts: Offer and Acceptance', in William Cornish and others, *The Oxford History of the Laws of England volume XII* (Oxford: Oxford University Press, 2010), 329, 336-7; Campbell-Smith, *Masters of the Post*, chapter 4. It may be worth noting that all Bell's writing on the subject was published before 1840 and that he died in 1843.

<sup>45</sup> Bell, *Principles*, § 9.

<sup>46</sup> (1830) 9 S 190. This case will be the subject of much more detailed analysis in a forthcoming paper by Ross Macdonald, to whom I am indebted for much helpful discussion.

simultaneously. In an action that Betty brought against the Countess it was ultimately held that there was no contract. Bell's doctrine was invoked on Betty's behalf to argue that the Countess had accepted the servant's offer when transmitting her first letter to Lady Agnew and that the second letter could therefore have no effect. But this was firmly rejected by a 3-1 majority in the Inner House of the Court of Session.

The basis of the decision is not completely clear. The majority clearly focused on Lady Agnew's position – as they saw it, that of a mandatory whose authority had been withdrawn before either of the Countess' letters reached its intended final recipient – rather than offer-acceptance doctrine as between the Countess and the servant. That issue was addressed much more fully in the Outer House by the Lord Ordinary, Lord Newton. He was concerned by what he obviously thought was the inappropriate possibility under Bell's doctrine, that a party could be bound by what had been formed only in his or her mind, or by an acceptance written out but not actually sent. Although Stair is not quoted, the *Institutions* had certainly been cited in argument; and Lord Newton does here seem to be following Stair's distinction between desire, resolution and binding engagement. Further, Lord Newton did not think that an expression of consent to an unconnected third party could be enough to bind either. He noted that the offeror could withdraw before acceptance, and asked why the acceptor should not also be able to withdraw. His conclusion was that 'Each party may resile so long as his offer or acceptance has not been communicated to the other party.'<sup>47</sup> Thus, while the Countess might have commenced a process of accepting Betty's offer to be employed, that would not be complete until communication to Betty; and that interval of time could be used by the acceptor to send an overtaking withdrawal of the earlier communication. If the two communications arrived at the same time, as in this case, then there could be no question of consensus between the parties.

Several points may be noted about this decision apart from Lord Newton's apparent qualification, or even rejection, of Bell's doctrine on the requirements for an acceptance, and his emphasis on the importance of communication in the creation of voluntary obligations. One is that there is no question of this being an inevitable decision in favour of a member of the titled classes over a humble servant. Lord Newton indeed referred to his wish to protect persons in Betty's position against any disadvantage that might arise in bringing an action against a social superior; and she actually won her case in the local sheriff court, the proceedings in the Court of Session being the Countess's appeal against that decision. A second point which is touched upon in the Court of Session opinions is the doubt whether

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<sup>47</sup> (1830) 9 S 193.

Lady Agnew's letter for Betty was an offer; if not, then the Countess' affirmative reply was an offer which, being without an express time limit for acceptance and not concerning a mercantile transaction, she could of course withdraw as she did. And finally, although the English cases on the matter were referred to in the pleadings for Alexander,<sup>48</sup> there is not a word in any of the judgments of any postal acceptance rule whereby the Countess could be bound from the time she sent her first letter to Lady Agnew as some sort of agent for Betty Alexander. That is most probably because there was no such rule in Scots law at the time, whatever the position might be in England. What might have been thought to be taking place in Scotland as a result of *Dunmore v Alexander* was a move towards a requirement of communication between parties before statements of obligatory content could even begin to be considered binding or legally effective.

The postal acceptance rule began to emerge in Scots law in *Dunlop v Higgins*, a case which reached the House of Lords in 1848.<sup>49</sup> But it cannot be seen as a simple Anglicisation of the developing law. The facts were straightforward. D and H were respectively a Glasgow iron master and a Liverpool iron merchant. In January 1845 they were in correspondence about a possible sale of iron by D to H. On the 28<sup>th</sup> D offered to sell the iron by letter, this being received by H on the 30<sup>th</sup>. On that day H posted an acceptance which by a slip was dated the 31<sup>st</sup>. Bad weather meant that H's acceptance was not received by D in Glasgow until the early afternoon of 1<sup>st</sup> February. D immediately sent a reply stating that since their offer had not been accepted 'in due course' they could not supply the iron requested. H wrote on 2<sup>nd</sup> February to say that their previous letter had been accidentally mis-dated, but D continued not to supply any iron. The context was, of course, one in which the price of iron as a commodity was rising rapidly. H brought an action of damages for breach of contract and D defended on the basis that there never had been a contract.

The Court of Session finding that there was a contract is thoroughly analysed by Professor Lubbe.<sup>50</sup> For present purposes the significant points are the use of *Adams v Lindsell* as a precedent by the court without commitment to the view that a postal acceptance as such concluded a contract. The critical point in fact was the actually timeous commitment of the offeree together with the view that that party could not be held responsible for the risks inherent in postal transmission. But Lord Fullerton went further,

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<sup>48</sup> The cases cited were *Payne v Cave* (1789) 3 Term Rep 148 (100 ER 502) and *Adams v Lindsell* (1818) 1 B & Ald 681 (106 ER 250).

<sup>49</sup> *Higgins v Dunlop* (1847) 9 D 1407 (CS); *Dunlop v Higgins* (1848) 1 HLC 381; 6 Bell App 195 (HL).

<sup>50</sup> Lubbe, 'Formation of Contract', 34-5.

rejecting the view that posting an acceptance was enough to conclude the contract as the effect of *Adams v Lindsell*. He argued that the offeror had to know the acceptance had been made before any contract was concluded; posting the acceptance merely barred the possibility of the offeror withdrawing the offer.

The House of Lords affirmed the Court of Session in holding that there was a contract. The only speech came from the Lord Chancellor. The first major issue was the mis-dating of the acceptance by H, and whether that date or the real date of posting should be treated as the time of reply. The real date having been the answer to that question, the next one was whether the senders, having written in due time, were responsible for the 'casualties' in the Post Office, i.e. the slow delivery of H's acceptance resulting from the bad weather. It was held that H having done all he could do to get the letter to D on time, he could not be responsible for misadventure in the post. The usage of trade required only an answer on the day the offer was received. *Adams v Lindsell* was said to be a case of this kind. Persons in the position of D 'must be considered, in law, as making, during every instant of the time their letter was travelling, the same identical offer to the [addressees], and then the contract is completed by the acceptance of it by the latter'.<sup>51</sup> 'Common sense,' the Lord Chancellor continued,

tells us that transactions cannot go on without such a rule, and these cases seem to be the leading cases on the subject; and we have heard no authority cited which in the least degree affects the principle on which they proceed. The law of Scotland appears to be the same as the law of England, for Mr Bell's Commentary lays down the same rule as existing in Scotland, and nothing has been stated to us in contradiction of his opinion.<sup>52</sup>

The Lord Chancellor must be referring to Bell's view that in general communication of an acceptance to the offeror was not necessary; what mattered in a contract was the concurring consent of parties, and that arose in this case on 30<sup>th</sup> January. The general principle was not unseated by use of the Post Office and consequent misadventure with delivery of the acceptance. Moreover, the usage of trade in respect of offers was same day reply, limiting the offeror's exposure to risk and uncertainty. But, as a matter of law, the offeror was committed to the offer for that period of risk.

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<sup>51</sup> (1848) 1 HLC 401.

<sup>52</sup> *Ibid.* The fifth (1835) edition of Bell's *Commentaries* was still the current version in 1847; the sixth edition, edited by Bell's son-in-law Patrick Shaw, did not appear until 1858.

Even though *Dunlop v Higgins* was a decision of the House of Lords, and affirmed the decision of the Court of Session below, just eight years later the First Division in *Thomson v James* took what proved the decisive step away from its underlying principles, in effect re-modelling the rules of offer and acceptance.<sup>53</sup> Although the Division expressed some doubts about the soundness of *Dunmore v Alexander*, in truth it picked up the lines of thought on requirements of communication apparent in Lord Newton's opinion in that case. Yet, at the very moment it overturned Bell's approach and established communication as a general requirement, the Court entrenched an exception for postal acceptances. While relying heavily on Stair's theory of contract, the Court moved away from any notion that contract was about the concurrent wills of the parties in holding that contract was formed even although the parties were probably never in fact exactly of the same mind on the matter at any point. It is a remarkable case, and the internal contradictions in each of the majority opinions mean that by far the most persuasive of all the judgments, at least in terms of its coherence in law and reasoning, is that of the dissentient Lord Curriehill.<sup>54</sup>

The facts are extremely simple. On 26<sup>th</sup> November 1853 James James of Samieston, near Jedburgh, wrote to Alexander Thomson in Edinburgh offering to buy from him the neighbouring estate of Renniston. On 1<sup>st</sup> December Thomson posted his written acceptance of the offer. Both these letters were in the form required for the sale of land. On the same day James posted a written revocation of his offer. The evidence showed that Thomson's acceptance must have been posted in Edinburgh between 2.30 and 4.30 pm on 1<sup>st</sup> December, while James's revocation was posted at Jedburgh at 3 pm on the same day. That suggests the almost simultaneous composition of the two letters. It was also established that Thomson's letter would have been despatched from the Edinburgh General Post Office to Kelso at 7.15 a.m. on 2<sup>nd</sup> December, and would have required further carriage to Jedburgh (although James in fact picked it up in Kelso where he happened to be when Thomson's acceptance arrived). James' revocation letter arrived at the General Post Office in Edinburgh at 8.19 pm on 1<sup>st</sup> December and was sent out for delivery to Thomson at 7 a.m. on the 2<sup>nd</sup>. It is mildly ironic that the two letters must have spent the night of 1<sup>st</sup>/2<sup>nd</sup>

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<sup>53</sup> *Thomson v James* (1855) 18 D 1.

<sup>54</sup> As noted elsewhere, 'The case was clearly seen by contemporaries as a major issue of principle, and both arguments and judicial opinions are exceptionally lengthy by the standards of the time. ... Note also the brief report at 17 D 1146, narrating that the 'extreme length and importance of this case' have led to the full report being held over to the next volume, since judicial revision of the text has not been completed.' (Hector L MacQueen, 'Scots and English Law: the Case of Contract', (2001) 54 *Current Legal Problems* 205-229, 222 and note 62). The issue of postal revocation had not yet been addressed in England and would not be until *Byrne & Co v Leon Van Tienhoven & Co* (1880) 5 CPD 344 : see further Gardner, 'Trashing with Trollope', 175-6.

December together in the Edinburgh GPO.<sup>55</sup> The probability is that Thomson received James' revocation before James picked up Thomson's acceptance. The First Division decided, however, that there was a concluded contract from the moment Thomson posted his acceptance on 1<sup>st</sup> December. James's revocation, on the other hand, took effect only upon communication to Thomson on 2<sup>nd</sup> December, and so came too late to have any impact upon an already concluded contract.

As Professor Lubbe remarks, the judgments in *Thomson v James* are 'rich in principle and implication'.<sup>56</sup> This reflects the even richer arguments put forward by counsel on each side, which referred to a wide range of authorities: not only the native Scots writings and cases, but also the Digest, the medieval glossator Accursius, the later medieval commentators Bartolus and Baldus, and the more modern natural lawyers such as Grotius, Pufendorff, Heineccius and Wolff.<sup>57</sup> Above all perhaps the Court was referred to the French lawyers whom Bell had favoured – Pothier, Toullier and Pardessus.<sup>58</sup> But it is significant that these references mostly stemmed from the side of James, the party arguing that there was no contract. At their root was the definition of a contract, stemming ultimately from Ulpian, as *duorum pluriumve in idem placitum et consensus*.<sup>59</sup> On Thomson's side the argument was dismissive of reliance on the older writers in particular:

The principles laid down by civilians as necessary to the formation of a binding contract had no reference to the modern modes of communication by post, which did not then exist. That mode of transacting business being now universal, its conditions must be held to be imported into all such contracts taking place between parties living at a distance from each other.<sup>60</sup>

The work of later jurists, in particular Pothier, Toullier and Heineccius, was not so irrelevant because they drew on court decisions rather than metaphysical speculation as to the concurrence of remote parties' wills, and were thus a better basis for practical law such as the court had now to decide.

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<sup>55</sup> A further irony is that they now rest together again, possibly in perpetuity, in the case process held in the National Records of Scotland, call number CS230/K/5/21.

<sup>56</sup> Lubbe, 'Formation of Contract', 36.

<sup>57</sup> There are also references to the work of the 17<sup>th</sup>-century German jurist Johann Brunnemann (1608-1672), who was a professor at Frankfurt. Many of his works are to be found in the Advocates Library.

<sup>58</sup> Also cited is the contemporary German Pandectist, Leopold August Warnkœnig (1794-1866), several of whose books are to be found in the Advocates Library.

<sup>59</sup> Digest of Justinian, 2, 14, 1, 2.

<sup>60</sup> (1855) 18 D 4.

This is not a metaphysical question, but a question of Scotch law, to be decided ... according to principles of equity and justice, although civil law considerations might aid in the solution of it. ... Thus the question must be disposed of on principles of equity and justice. The best way to solve it would be to sacrifice the words of the definition, and make a rule applicable to the transaction, and thus do justice to both parties.<sup>61</sup>

Help was also to be obtained from the more modern writings and decisions from other countries, notably America and, of course, England, in which *Adams v Lindsell* was 'a case of general doctrine'.<sup>62</sup> It is however notable that the general doctrine was not, according to counsel, one by which postal acceptances created a contract. Instead it was one that Bell would have recognised, and indeed the *Commentaries* and the *Principles* were cited in its support:

Where a party makes an offer limiting the time within which it shall be accepted, or when the offer is of such a nature that the law allows a certain time for its acceptance, the offeror is not entitled to resile or withdraw his offer within the time which he allows, or which the law gives the party for accepting it.<sup>63</sup>

The essential point was thus, not that the acceptance bound from posting, but that the offeror was not entitled to withdraw the offer, at least until after a reasonable time had elapsed. An offeror had to reserve any further right to revoke expressly in the offer itself.

Against that, counsel for James (led by Dean of Faculty John Inglis, later, as Lord President of the Court of Session from 1867-1891, the most famous Scottish judge of the nineteenth century<sup>64</sup>), did not just rely on the principle of consensus and concurrence of wills between the parties. Their arguments recognised that the law had to provide for parties negotiating a contract by correspondence or at a distance from each other. Pardessus' *Droit Commercial* was cited for the general proposition that what was crucial that each party knew of the other's offer or acceptance, as the case might be, before either could have its legal

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<sup>61</sup> (1855) 18 D 4-5.

<sup>62</sup> (1855) 18 D

<sup>63</sup> (1855) 18 D 5. As previously noted, the sixth edition of Bell's *Commentaries* did not appear until 1858, so the current edition in 1855 was still the fifth of 1835.

<sup>64</sup> See Gordon F Millar, 'Inglis, John, Lord Glencorse (1810–1891)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/14403>, accessed 6 Aug 2014]; also James Crabb Watt, *John Inglis, Lord Justice-General of Scotland* (Edinburgh, W Green & Sons, 1893). Inglis' junior was George Pattison. His opponent, George Graham Bell (no relation of George Joseph Bell), was never appointed to the Scottish bench. His junior was Charles Baillie (later Lord Jarviswood). See for all these men Stephen P Walker, *The Faculty of Advocates 1800-1986: A Biographical Directory of Members Admitted From 1 January 1800 to 31 December 1986* (Edinburgh, 1987). The agents were Thomson & Elder WS (the pursuer's own firm) and James Neilson SSC.

effects. This, it was argued, was the position of the Natural lawyers and the modern civilians.<sup>65</sup> The parties could contract to put themselves out of the rule, or a contrary principle might grow up out of commercial law, or by implication from circumstances or the usages of trade; but the present case did not fall within any of these categories, and there was no contrary Scottish authority. Indeed the *Dunmore* case supported it.<sup>66</sup> There was also the principle of delivery, without which a writing was not binding. But handing a letter to the post office was not delivery to the addressee; even if the letter could not be reclaimed from the post office, that was a matter of public regulation only, and in any event various misadventures could befall the communication while it was in the post that would prevent delivery to the actual addressee. The argument from equity was also challenged:

But it is said that, according to modern writers, the definition of strict law is to be sacrificed, and the principles of equity are to be introduced. That may be true as to the common law of England, but not so as to the law of any other civilised country in Europe. Besides, what is meant in this sense by principle of equity but consuetude making law? It is not that equity is to be allowed to control the law, and there is no ground for equity to be brought in here.<sup>67</sup>

The basic rule was that the offeror had the right to retract until the acceptance was known to him.

The fundamental differences between the two sides were thus about whether or not there was a right to revoke an offer once made, and about whether or not an acceptance had to be communicated to the offeror to conclude a contract between the parties. On the revocation point, Lord President M'Neill was clear that 'a simple, unconditional offer may be recalled at any time before acceptance, and that it may be so recalled by a letter transmitted by post', and cited Stair as authority on the point.<sup>68</sup> On the communication point the Lord President said that 'an offer is nothing until it is communicated to the party to whom it is made' and that 'the recall or withdrawal of an offer that has been communicated can have no effect until the recall or withdrawal has been communicated, or may be assumed to have been communicated, to the party holding the offer.'<sup>69</sup> But this principle of communication did not apply to an acceptance, which was different in nature from a revocation: 'The one

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<sup>65</sup> See further on this Gordley, *Philosophical Origins*, 175-80.

<sup>66</sup> Perhaps surprisingly the printed argument for James does not refer to Stair on the offerer's power to withdraw the offer or on the general need for consent to be manifested by external signs.

<sup>67</sup> (1855) 18 D 8.

<sup>68</sup> (1855) 18 D 10, 12.

<sup>69</sup> (1855) 18 D 10 (see also *ibid*, 11).

consists in effectually undoing something that the party himself already done, and which binds him, unless it is effectually undone; the other consists in merely acceding to a proposal made.<sup>70</sup> What the acceptor had to do varied according to the circumstances. Where, as in this case, writing was required, it was not enough to create the writing and then keep it; but personal delivery was also not necessary.

Where an offer is made by letter from a distance through the medium of the post, the offeror selecting that medium of transmission authorises and invites the offeree to communicate his acceptance through the same medium. ...By putting the letter of acceptance into the post-office, the offeree did just what he was invited to do, and all that it was incumbent on him or possible for him to do by way of acceptance, by the mode of communication which he was authorised, if not invited by the offeror to adopt.<sup>71</sup>

Hence, the Lord President reasoned, 'the act of acceptance was completed by the putting of the letter into the post-office; and ... a letter of recall, which did not arrive till after that act, cannot be held to have interrupted the completion of the contract'.<sup>72</sup> He found this supported by the Scottish authorities of Bell's *Commentaries* and *Higgins v Dunlop*. His position was also reinforced by his view that the requirement of delivery in relation to the formal writing was satisfied by putting the acceptance in the hands of the post office.<sup>73</sup> At no point did he cite *Adams v Lindsell* or any other English or other authority.

The second member of the majority in *Thomson*, Lord Ivory, agreed in substance with the Lord President's view of the law and its application; but the third member, Lord Deas, while reaching the same result, did so more on the basis which had been actually argued by the pursuers, viz that the offer was binding if the act of acceptance was made within a reasonable time. An express stipulation to the contrary in the offer was needed to make the result otherwise. Accordingly:

It is enough that the offeror has said, or is held to have said, that if the offer be accepted *debito tempore*, he shall be bound. This being the nature of his offer, whether expressly or by implication, he cannot resile from it if the party to whom it is

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<sup>70</sup> (1855) 18 D 11 (see also *ibid*, 13).

<sup>71</sup> (1855) 18 D 11.

<sup>72</sup> (1855) 18 D 11.

<sup>73</sup> (1855) 18 D 12-13.

addressed, having the offer, and nothing but the offer, before him, has, by duly posting his acceptance *bona fide*, done all in his power to comply with the only condition in the offer to make it absolutely binding on the offeror.<sup>74</sup>

Lord Deas also observed that in mercantile cases ‘a reasonable time would, by the usage of trade, have meant in course of post.’<sup>75</sup> ‘It follows,’ he added,

that, if posting the answer were not acceptance here, posting the answer, even in due course of post, never could be acceptance in any mercantile transaction. This would be a great impediment to mercantile dealings, where the party who receives an offer of goods, or for goods, and duly posts his acceptance, naturally goes into the market and deals with other persons upon the footing that this particular bargain has been concluded.<sup>76</sup>

The Deas view of the case was thus essentially the one that had been articulated first by Bell, justified by the perception that the commercial marketplace demanded both speed and certainty, and resting more on the irrevocability of offers than on the view that postal acceptances created a contract. He noted (but without committing to) Lord Fullerton’s view in *Dunlop v Higgins* that the posting of the acceptance only barred the offer’s revocation, while also reserving his opinion on the soundness of *Dunmore v Alexander* and its apparent ruling that a postal acceptance could be revoked by a further communication from the offeree catching up with or even over-taking the first letter.

Lord Curriehill’s powerful dissent started from Stair’s statement that offers, being non-obligatory, could be withdrawn before acceptance. It was not necessary for the offer to state as much. On this point he was therefore in agreement with the Lord President and Lord Ivory. The question for him was, which of two powers was exercised first: the offeror’s power to revoke, or the offeree’s power to accept? In his view, the answer depended on which of the communications was first to be delivered to its addressee or a person acting for that addressee, and the evidence showed that it was the revocation. He could see no reason in either principle or authority for distinguishing between the communications as to when they took effect. Stair’s distinction between desire, resolution and engagement was again referred to in support of the argument that a communication had to be brought to the

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<sup>74</sup> (1855) 18 D 24.

<sup>75</sup> (1855) 18 D 24.

<sup>76</sup> (1855) 18 D 24.

notice of the party whom it was intended to affect. That was reinforced by the requirement of delivery in relation to obligatory documents. Posting a letter was not to be treated as such delivery. The post-office was not an agent or mandatory of either party, nor was it a common carrier; the inability of a sender to recover a letter from the post-office was a matter of public regulation which equally prevented the addressee from demanding it until it reached its address. The writer of a letter might have lost control of the document but he had 'no more lost his control over the act of his will which he therein expresses, than if that document were still in the hands of his own servant or messenger'.<sup>77</sup> This was the explanation of *Dunmore v Alexander*, the ground of the judgement being that stated by Lord Newton in the Outer House.<sup>78</sup> Neither *Dunlop v Higgins* nor *Adams v Lindsell* had involved revocations, while both had proceeded upon what was held to be a usage of trade in such commercial cases. Neither could be authority in a case about the sale of land in Scotland which was not alleged to be subject to any such usage of trade. Bell's statement that 'in the common case it is not necessary that the acceptance shall have reached the person who makes the offer' was supported by no authority, had not been fully accepted in *Higgins*, and was only correct in certain cases, such as that of the unconditional promise or that of the order in trade.

What then could be said of the law of offer and acceptance after *Thomson v James*? First, it was now plainly a doctrine of the general law of contract. Even though all the judges emphasised the importance of the fact that this was a case about the sale of land, with its concomitant of formal writing requirements, there was little doubt of its bearing on other situations, above all commercial transactions. Second, three of the four judges were clear that offers could be freely revoked by the offeror prior to acceptance unless there was an express statement or implication to the contrary. Next, the same three were also clear that such revocation required communication to the offeree to be effective. The judges all further agreed that an offer also required communication before it could be accepted. But only Lord Curriehill was of the view that acceptance too needed communication, indeed, in the case of the written acceptance, delivery, to the offeror or his representative to take legal effect and conclude a contract. The majority view seems to have been that, not just postal acceptances, but acceptances in general did not need communication to have this effect. While more than a mental decision to accept, or the preparation of a written acceptance

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<sup>77</sup> (1855) 18 D 21.

<sup>78</sup> Lord Curriehill also commented: '[M]y confidence in the general principle, stated by Lord Newton as the ground of the judgment in the case of Lady Dunmore, is much strengthened by the circumstance that that eminent judge was for a considerable time professor of civil law in the University of Edinburgh.' ((1855) 18 D 23). As Alexander Irving, Lord Newton held the Edinburgh Civil Law Chair from 1800-1827.

without sending it, was required, use of the postal service was an example of what was needed, but perhaps not the only one. This perhaps allowed Bell's statement of the law to remain unaltered in the seventh and final edition of the *Commentaries* (published in 1870), and for the 'postal rule' to be applied to acceptance by telegram.<sup>79</sup> While, finally, the majority in *Thomson v James* remained committed to the theory that contract was essentially about a concurrence of wills, they also acknowledged that the actual decision on the facts of the case meant that they were finding a contract to exist where most probably there never had been such a concurrence. The decision thus qualified, while not altogether removing, a subjectivist starting point for contract formation.

Bill McBryde rightly describes *Thomson v James* as 'by a long way, our most important case on offer and acceptance'.<sup>80</sup> Over the remainder of the nineteenth century, offer and acceptance appeared as a rule of contract formation in general and the law increasingly adopted the objective approach for which the case stood.<sup>81</sup> The rule on acceptances came to be, as stated by Gloag, that 'an offer requires acceptance, communicated in some way to the offeror'.<sup>82</sup> Cases that did not fit this model, such as orders in trade and postal acceptances, were presented as exceptions to the general proposition.<sup>83</sup> A special postal acceptance rule thus became established, so that an acceptance posted within a time limit set by an offer but arriving with the offeror after the limit's expiry could nonetheless conclude a contract between the parties.<sup>84</sup> The explanation of the result was the application of the postal acceptance rule, not the concurrence of the parties' subjective wills within the offer's time limit. But doubt remained, and remains, about the English decision of *Household Fire Insurance Co v Grant*<sup>85</sup> in which it was held that even if a posted acceptance never

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<sup>79</sup> So held in the English case of *Bruner v Moore* [1904] 1 Ch 220, seemingly accepted by Gloag, *Contract* (1<sup>st</sup> edn, Edinburgh 1914) 40 note 3; (2<sup>nd</sup> edn, Edinburgh 1929), 33 note 7. Probably this was to be explained by the Post Office assuming monopoly control of the telegram from 1869: see Tom Standage, *The Victorian Internet: The Remarkable Story of the Telegraph and the Nineteenth Century's Online Pioneers* (London, 1998), 161-2; Campbell-Smith, *Masters of the Post*, 175-83.

<sup>80</sup> W W McBryde, *The Law of Contract in Scotland* (3rd edn, Scottish Universities Law Institute, Edinburgh, 2007), para 6.12. Cusine and Rennie, *Missives*, paras 3.14, 3.15, 3.17, cite the case without making any particular comment on its significance.

<sup>81</sup> The doctrine of offer and acceptance emerges fully fledged as part of the general law of contract in the 1860 (13<sup>th</sup>) edition of Erskine's *Principles* (edited by John Guthrie Smith), having appeared only in relation to contracts by word and writ in previous editions. Note also Andrew Mitchell, Advocate, 'Offer and Acceptance', *Green's Encyclopaedia of the Laws of Scotland* (W Green & Sons Ltd, Edinburgh, 1898), vol 9, 89-91.

<sup>82</sup> Gloag, *Contract* (1<sup>st</sup> edn, 1914), 29; (2<sup>nd</sup> edn, 1929) 26.

<sup>83</sup> Gloag, *Contract* (1<sup>st</sup> edn, 1914), 29; (2<sup>nd</sup> edn, 1929) 26-35. Gardner, 'Trashing with Trollope', 189-92, suggests that the exceptionality of the postal rule was increasingly underlined after the development of the telephone as a means of communication between distant parties from the late 1870s on. This was despite the Post Office also gaining a monopoly on telephone services in 1880 via the Telegraph Act 1869: see *Attorney-General v Edison Telephone Co of London* (1880) 6 QBD 244. Campbell-Smith, *Masters of the Post*, 192-6, narrates the subsequent liberalisation of the telephony market between 1884 and 1911, when the industry was re-nationalised under the Post Office.

<sup>84</sup> *Jacobsen, Sons & Co v Underwood & Son Ltd* (1894) 21 R 654.

<sup>85</sup> (1878-79) LR 4 Ex D 216 (CA).

reaches the intended party a contract will be concluded despite the offeror's ignorance of its obligations. There are several Scottish judicial dicta against such a rule from *Thomson v James* down to the present, pointing to a perception that the postal rule was an exception to the general rule, not itself reflecting the norm.<sup>86</sup>

Communication too became an objective question, with parties to be taken as having read that which in the ordinary course of business they ought to have read and being bound by the result. Thus in *Burnley v Alford* in 1919 it was held that there was no contract when A had sent an offer to B at the latter's home address, B had gone on holiday without leaving a forwarding address, A then sent a revocation of offer to B at his home address, and B, on returning from holiday, had not opened the revocation letter before posting an acceptance of offer to A.<sup>87</sup> Had a set of appropriate facts arisen, the Scottish courts would probably have reached the same result in the case of cross-offers as the English courts in *Tinn v Hoffmann*,<sup>88</sup> namely, no contract, because the subjective meeting of minds could not prevail over the objective fact that neither party could have known of the other's intention at the time of making their own communication, and so they could not be treated as responses to each other.

In conclusion, however, dominant as the doctrine of offer and acceptance has become, it remains true that, as Professor McBryde has observed, '[o]ffer and acceptance ... should not be regarded as the necessary form of every contract.'<sup>89</sup> The master concept remains that of an 'agreement between two or more parties ... intended to establish, regulate, alter or extinguish a legal relationship'.<sup>90</sup> That master concept allows the reintroduction of counterpart execution in Scots law by statute in 2015 without any sense of creeping Anglicisation.<sup>91</sup> The story reminds us that the law goes on developing, however slowly and belatedly, in response to the changing world it exists to serve; but to do that it needs, not only legislators and litigants like Messrs Thomson and James, but also lawyer-jurists like Stair, Bell and Robert Rennie.

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<sup>86</sup> See McBryde, *Contract*, para 6.115, for the doubting authorities, and add *Sloans Dairies v Glasgow Corp* 1977 SC 223 (IH) per Lord Dunpark at 239.

<sup>87</sup> *Burnley v Alford* 1919 2 SLT 123. See also *Carmarthen Developments Ltd v Pennington* [2008] CSOH 139.

<sup>88</sup> *Tinn v Hoffmann & Co* (1873) 29 LT 271. The case is cited without adverse comment in most Scottish contract texts: David M Walker, *The Law of Contracts in Scotland* (3<sup>rd</sup> edn, Edinburgh: T & T Clark, 1995), para 7.43; McBryde, *Contract*, para 6.33; Hector L MacQueen & Joe Thomson, *Contract Law in Scotland* (3<sup>rd</sup> edn, Haywards Heath, 2012), para 2.18; *The Laws of Scotland: Stair Memorial Encyclopaedia*, Vol 15, para 634. It is not referred to, however, in Gloag on Contract.

<sup>89</sup> McBryde, *Contract*, para 6.05.

<sup>90</sup> *Ibid*, para 1.03.

<sup>91</sup> See the Legal Writings (Counterparts and Delivery) (Scotland) Bill 2014, implementing Report on Formation of Contract: Execution in Counterpart (Scot Law Com No 231, 2013).