SCOTTISH LAW COMMISSION

MEMORANDUM No: 36

CONSTITUTION AND PROOF OF VOLUNTARY OBLIGATIONS:

FORMATION OF CONTRACT

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

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CONSTITUTION AND PROOF OF VOLUNTARY OBLIGATIONS: FORMATION OF CONTRACT

A: INTRODUCTION

1. General

1. This Memorandum is one of a series of six in which we consider possible reforms in the law relating to the constitution and proof of voluntary obligations. In it we discuss one of the categories of voluntary obligations known to Scots law - the contract - and, in particular, the general rules which govern how agreement or consensus in idem, which is one of the essential legal requirements for the conclusion of a contract, can be shown to have been reached. We do not in the present Memorandum deal with the question of the formalities with which the agreement must in certain cases comply (e.g. tested or holograph writ) or with the question of restrictions upon how various classes of agreement may be proved (e.g. proof by writ or oath). These matters are the subject of our accompanying Memorandum No. 39. While in the present Memorandum we consider such positive factors in the formation of contract as offer, acceptance and intention to create legal relations, we turn in Memorandum No. 37 to a discussion of certain negative factors - situations in which in spite of the actual or apparent existence of an offer and an acceptance, no contract comes into being e.g. because of a latent material ambiguity or pre-existing

illegality or in impossibility of performance. Of the other Memoranda in the series, No. 35 is concerned with the creation of voluntary obligations through the unilateral promise; No. 38 deals with stipulations in favour of third parties; and No. 34 is a general introduction to the complete series, containing a summary of the provisional proposals made in all the Memoranda. We wish to stress that the topics considered in the six individual Memoranda are very closely interrelated and that the Memoranda in the series should therefore be looked upon as dealing merely with different aspects of a single branch of the law.

2. Contracts and unilateral binding promises

2. Scots law recognises that binding coluntary obligations may come into existence in two separate ways.

(i) Through a contract: an agreement between two (or more) persons which the law recognises as creating, altering or extinguishing the legal rights and duties of the parties thereto[1] (and in certain cases, at least as far as the conferring of rights is concerned, those of third parties[2]).

(ii) Through a unilateral promise made by one person in favour of another. In this case agreement between the parties to confer rights and impose duties is not essential for the obligation to come into being, though of course the benefit promised cannot be forced upon the promisee against his will. The existence of the obligation is not dependent upon the promisee's agreement, but the performance of the act promised may well require his acquiescence or cooperation.

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[1] See Gloag, Law of Contract, 2nd edition, p.8.

[2] We consider the doctrine of jus quaesitum tertio in our accompanying Memorandum No. 38.

3. A contract in most cases will impose duties and confer rights upon both (or all) parties to it, and the parties' respective rights and duties will be the counterparts each of the other. In a contract of sale, for example, the seller is inter alia bound to deliver the article sold, and entitled to receive the price; the buyer is inter alia bound to pay the price, and entitled to receive delivery of the thing. But a contract may also be such that the duties thereby imposed upon, or the undertakings made by, one party are not met with corresponding duties imposed upon, or undertakings made by, the other. This can be seen in the following two separate situations:

(a) A and B agree that if A rescues a hostage being held by a group of terrorists B will pay him £1000. Such a contract (provided it can be proved in the appropriate manner) imposes upon B the duty to pay the £1000 if A succeeds in rescuing the hostage but imposes no duty upon A actually to attempt to do so.

(b) A and B agree that B, although by statute entitled to make use of A's harbour facilities without paying therefor, will make ex gratia payments to A for the use of those facilities. Such a contract (provided it can be proved in the appropriate manner) imposes upon B the duty to pay the agreed sums[1] but imposes upon A no duty (except to receive the payment).[2]

4. In English law neither situation (a) nor situation (b), until payment or performance had been made, would give rise to enforceable legal rights and duties. Because of the

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[1] Wick Harbour Trs. v. The Admiralty 1921, 2S.L.T. 109.

[2] Smith, Short Commentary, p. 494, footnote 55; cf. Douglas-Hamilton v. Duke and Duchess of Hamilton's Trs. 1961 S.C. 205 per Lord President Clyde at p.221.

existence of the doctrine that a binding contract requires that valuable consideration pass from the promisee in exchange for the promisor's undertaking, situation (b) could give rise to no legal obligation on the part of B (unless his promise had been made in a deed under seal), while situation (a) would mature into a binding contract only when A had performed the task (or perhaps when he had embarked upon it), his efforts in that regard providing the valuable consideration flowing from him in return for B's promise. In Scots law, on the other hand, there would in both situations be a valid contract once the parties had reached their agreement (though proof of that agreement, in case of dispute might, in both situations be restricted to writ or oath). Thus in Scotland a contract is binding whether the obligation imposed upon a party to it is gratuitous (i.e. without counterpart from the other party) or onerous (i.e. undertaken in return for a counterprestation from the other party).

5. A unilateral binding promise gives rise to a legal obligation on the part of the promisor without the necessity of the promisor and promisee having come to any agreement about the subject-matter of the promise. Thus a binding promise can be made in favour of someone who is unaware of it, or is incapable of agreeing to it, or is not yet in existence (e.g. an unborn child; a company not yet incorporated).[1] The obligation to which such a promise gives rise (unless it forms part of a larger, composite transaction) is unilateral, in that it is the creation of the will of the promisor alone; this is so even though the promised performance is stipulated to be conditional upon some act or abstention by the promisee. For example:

(a) B promises A that if the latter rescues a hostage being held by a group of terrorists, B will pay him £1000

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[1] Stair, I.10.4; see also our accompanying Memorandum No. 35. The promisee must, of course, be in existence and be aware of the promise before he can claim performance of the obligation. See Walker, Principles of Scottish Private Law, 2nd edition, pp. 522-3.

(b) B promises A that if the latter will cease paying court to his (B's) daughter, B will pay him £1000

(c) B promises A that if the latter within seven days pays him £10,000, B will convey his house to A.

Such promises are unilateral and gratuitous and are not converted into bilateral and onerous contracts merely because the promisee in his turn either (a) promises to fulfil the stipulated condition or (b) actually does fulfil it.[1] The juristic nature of the obligation is determined once and for all when it first comes into existence: if at that stage the content of the obligation is not the product of the agreement of the parties there is not then, and there will not subsequently be, a contract between them in relation to the promised performance.

6. It will be appreciated that the distinction between a contract and a conditional unilateral promise will often on the facts of a particular case be a difficult one to draw.[2] It cannot be assumed that because an obligation is gratuitous it has its source in a unilateral promise; nor that because the creditor of an obligation has performed (or will perform) some act for the benefit of the debtor that that obligation is contractual in origin. Yet the distinction while not always easy to draw, is important, for in not a few areas the legal consequences vary according to whether the obligation in question has its source in a contract or in a unilateral promise; and the fundamental question of whether a legally binding obligation has come into existence at all (as well as the subsidiary questions of when and where it came into being) may depend upon the classification of the parties as contractors or as debtor

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[1] Millar v. Tremamondo (1771) Mor. 12395; Smith v. Oliver 1911 S.C. 103. See also Forbes v. Knox 1957 S.L.T. 102 at p. 103.

[2] Cf. paras. 3(a) and 5(a), supra.

and creditor under a unilateral promise. In this Memorandum we confine ourselves to consideration of the creation of obligations through the institution of the contract.

B: CONTRACTS: THE INDICIA OF AGREEMENT

7. The existence of a contract is dependent upon the agreement of the parties to it, at least as far as its material terms are concerned: there must be consensus in idem. However, unless a plea such as error or fraud is in issue this falls to be determined objectively: in case of dispute it is for the court to say, after consideration of the words and actings of the parties in their dealings with one another, whether agreement exists between them.[1] It is normally considered that the parties have reached agreement when an unqualified offer by one of them is met by an unqualified acceptance of that offer from the other, although there are a number of situations in which agreement has clearly been reached yet which do not readily yield to analysis in these terms.[2] What should be construed as an offer, what as a mere invitation to enter into negotiations, and what as an acceptance has given rise to considerable litigation. In relation to many typical negotiating situations the law is settled; as regards others there is either no authority or a conflict of authority. In the paragraphs which follow we shall consider the existing settled rules and whether they could be improved; and we shall draw attention to the areas in which doubt still remains, and suggest ways in which the position could be clarified.

1. Offers and invitations to enter into negotiations

8. An offer must be distinguished from a mere invitation to enter into negotations (sometimes referred to as an "invitation to treat"). The former may be defined as a statement of terms which the offeror proposes to the offeree as the basis of an agreement, coupled with a promise, express or implied, to adhere to those terms if the offer is accepted. An invitation

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[1] Muirhead and Turnbull v. Dickson (1905) 7F.686; Brownlee v. Robb 1907 S.C. 1302; Mathieson Gee v. Quigley 1952 S.C. (H.L.) 38.

[2] See para. 66, infra.

to treat may amount to a statement of terms, or of willingness to negotiate terms, for an agreement where no express or implied promise of adherence is made and where the person to whom the statement is made is himself invited to make an offer.[1] The difficulty is to determine which statements or proposals fall into which category. In relation to certain common situations the juristic nature of a proposal has been legally decided; in other areas the legal position is unclear.

9. Shop window displays. In English law the display of goods in a shop window (with or without price tags) is normally classified not as an offer to sell but as a mere invitation to treat. It is the customer who makes the offer to the shopkeeper.[2] There appears to be no Scottish decision on this point.[3] The English interpretation of one of the most common of all contractual situations has been justified on various grounds but primarily upon the following: it is said that if it were held that the shopkeeper made the offer, then a dealer with only limited stocks of the article displayed might receive numerous acceptances and hence find himself a party to a greater number of contracts of sale than he had goods to fulfil, and hence in breach of contract.[4] We think that, whatever the merits of the rule, this argument is not conclusive. Everyone knows that retailers do not have unlimited stocks of the goods in which they deal. It could therefore reasonably be held to be an implied term of any offer made by the dealer that it was open for acceptance

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[1] An offer must further be distinguished from a unilateral promise to do or abstain from some act. Such a promise may be expressed to be conditional upon some act or abstention (or promise thereof) by the promisee. Unilateral promises are considered separately in Memorandum 35.

[2] Timothy v. Simpson (1834)6 C. & P. 499; Fisher v. Bell [1961] 1 Q.B. 394.

[3] Walker, Principles, 2nd edition, p. 528, takes the view that Scots law in this respect is the same as English law; cf. Smith, Short Commentary 760.

[4] See e.g. Esso Petroleum Ltd. v. Comrs. of Customs and Excise [1976] 1 All E.R. 117 at p. 126.

"while stocks last". An implied term of this nature is already recognised by the law in the case of innkeepers and common carriers, who are at present regarded as making to the public a standing offer to exercise their respective callings. Thus a traveller who finds no room at the inn has no action for breach of contract against the innkeeper. The latter's offer is implied to be made "subject to the availability of accommodation".[1] We therefore see no objection on this ground to a rule that shop window displays should be treated as offers. Such an attitude is adopted, apparently without injurious consequences, by a number of foreign legal systems.[2] Indeed, in English law it is apparently the case that the display of goods for hire amounts in law to an offer open to acceptance by those to whom it is addressed.[3] The question therefore becomes whether it is appropriate that the display of goods or of the provision of services in shop windows should be treated as a mere invitation to enter into negotiations. It is possible to think of instances in which such a rule appears to work unsatisfactorily. For example, a fur coat is displayed in a shop window with a price tag marked £200 attached. Mrs A informs the shopkeeper that she wishes to buy the coat and tenders £200. She is then informed that the coat is not for sale (or is for sale at £500). Under the existing English law relied upon by Professor Walker for Scotland Mrs. A would have no contractual right to the coat, and would have no legal remedy against the store. We would welcome views on whether the display of goods or of the provisions

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[1] Bell, Principles, para. 159; Rothfield v. N.B. Railway 1920 S.C. 805.

[2] E.g. France: D.1869, 3.14; Planiol et Ripert Traité pratique de droit civil français, 2nd edition, vol. 6, para. 128; Marty et Raynaud Droit civil, vol. 2, para. 100. Switzerland: Code of Obligations, article 7(iii).

[3] Chapelton v. Barry U.D.C. [1940] 1 K.B. 532. There appears to be no authority on the legal status of shop windows displaying the provision of services (e.g. photocopying, hairdressing).

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

10. We take the view that if the legal position were to be as outlined in the preceding paragraph it should also be provided that acceptance of the offer would, in the absence of any stipulation to the contrary by the shopkeeper, be required to take the form of entry into the premises and communication by the customer of his intention to buy to the shopkeeper or an assistant. The obligation of the offeror should then be to provide the service displayed or to supply, not necessarily the article actually displayed in the window, but one of the same quality and description. Although there would be implied into the offer a "subject to availability" or "while stocks last" term, a problem for the offeror might still arise in certain highly exceptional circumstances. Suppose a shop had a stock of two fur coats of a particular type and three customers simultaneously[1] intimated to the same or different assistants acceptance of the offer to sell. Such cases are likely to be extremely rare, and could be obviated entirely by the seller's requiring in cases where his stock is very limited that a customer's acceptance be intimated to one particular person (e.g. to the manager of a particular department in the shop, in his office). However, where such precautions have not been taken, we think that in this type of situation one possible solution would be to provide that two contracts

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[1] If the acceptances were not simultaneous, then contracts would come into existence only in the cases of the first two to be intimated and the "subject to availability" provision would operate in respect of the third.

only come into existence, the shopkeeper being required to choose which two of the three customers he will contract with. Alternatively, it could be provided that the customers should draw lots and that the shopkeeper's contracts would be with those two of the three who were successful. Comments are invited.

11. Self-service displays. It is similarly the case in English law that the display of goods on the shelves of a self-service shop is generally treated by the law as amounting merely to an invitation to the customer to enter into negotiations, and not as an offer to sell.[1] It is the customer who makes the offer when he presents the goods selected at the cash desk, at which point the shopkeeper may accept or reject that offer. It is argued in favour of this rule that to regard the display of goods on the shelves as an offer would entail the undesirable consequence that the customer would be regarded as having accepted that offer as soon as he handled the goods, or at least as soon as he deposited them in his basket, with the result that he would not thereafter be legally entitled to change his mind and replace the goods on their shelves. We accept that this would be an undesirable result; but we do not accept that it necessarily follows from treating the shelf display as an offer. It is possible to argue that acceptance in these circumstances would be not the removal of the article from the shelf or placing it in the basket, but its presentation at the cash desk. Until that point the customer, not having finally committed himself, would be entitled to reject the offer by replacing the article on the shelf. The question therefore once again becomes whether the English rule is an appropriate one and one which works satisfactorily. It

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[1] Pharmaceutical Society of G.B. v. Boots Cash Chemists [1952] 2 Q.B. 795; [1953] 1 Q.B. 401; Walker, Principles, 2nd edition, p. 528. It may indeed be questioned whether the technical rules of the law of contract regarding offer and acceptance should be regarded as relevant in the interpretation of criminal statutes such as those under consideration in this case and in Fisher v. Bell [1961] 1 Q.B. 394. See Cross, Statutory Interpretation, p. 11.

is arguable that in some circumstances it does not. For example, during a period in which sugar is in short supply a supermarket obtains a consignment which it displays prominently inside the store and advertises widely outside. Customers flock there from competing establishments to buy their weekly groceries. On reaching the cashdesk customers (other than those who normally patronise the establishment) have their offers to buy accepted in respect of all the goods in their baskets except the sugar, which is promptly replaced on the shelves. It is at least arguable that if a retailer wishes to retain a measure of control over the persons to whom he will supply goods, he should be bound to make this clear, either by means of a notice beside the shelf display or by removing the goods in question from the open shelves, both of which expedients are already commonly adopted in self-service, and other, shops engaged in the retailing of alcohol for consumption off the premises. We would welcome views on whether the exhibition of articles on the shelves of self-service shops should be treated by the law in the absence of exceptional circumstances as an offer to sell, acceptance of which is indicated by presentation of the articles at the cashdesk. It is thought that, in the interest of uniformity, a change in the law in this respect should not be made unless accompanied by a similar change in relation to the display of goods in shop windows.

12. Vending machines. As regards contracts made through the instrumentality of autonmatic vending machines[1] there is s dearth of authority on the juridical nature of the acts of the respective parties. It may well be that this is a situation which cannot realisitically be analysed in terms of offer and acceptance,[2] but if an attempt to do so is made the possibilities would appear to be (i) that the presence of the machine constitutes a standing offer by its owner or operator to contract (on terms displayed on or near the machine) with anyone who indicates acceptance by

[1]While the term "vending machines" is used by us throughout, we appreciate that contracts other than sale may be concluded through the instrumentaility of machines, e.g. the coin-operated washing and drying machines to be found in launderettes, machines providing visual entertainment. Our proposals are intended to apply to machines which provide services as well as to those which dispense goods.

[2]See para. 66, infra.

inserting the appropriate coins; or (ii) that the presence of the machine constitutes an invitation by its owner to negotiate. In the latter case the customer would be regarded as making an offer by inserting coins, and acceptance of that offer would be indicated by the machine's retention of the money (or alternatively by its delivery of the article), and rejected by the return of the coin (or alternatively by its failure to deliver the article). If the presence of the machine were held to amount to a standing offer then an action for breach of contract would lie in favour of the person inserting the coins if the machine should fail to deliver; and if the customer's acceptance were the insertion of the coins, that result would follow whether or not the money was returned by the machine, provided always that the coins were in condition unobjectionable. Were the presence of the machine to be regarded as an invitation to negotiate, with the customer making the offer by inserting the coin, an action for breach of contract would lie only if the acceptance of that offer were held to be retention of the coin, and the machine did so retain, yet nevertheless failed to deliver the article. There would be no breach of contract if the machine rejected the coin, even though it was undamaged and in mint condition. On the other hand, if the view were to be taken that acceptance did not occur until the machine actually delivered the article, no action for breach of contract could succeed even if the machine retained the coin and failed to perform; the customer's sole remedy in these circumstances would appear to be an action for repetition of the sum which he had inserted. In view of the small amounts of money normally involved in transactions with vending machines, it may be thought that analysis of the precise legal status of the actings of the customer and of the machine is of purely academic significance. But it is possible to envisage situations in which large amounts of money could depnd upon the determination of these questions: for example in the case of the machines dispensing life assurance policies to

be found in airports. If the presence of such a machine were held to amount to a standing offer, the personal representatives of a passenger who had inserted money which had been unwarrantably refused and who had subsequently been killed when his aeroplane crashed, would have an action of damages for breach of contract against the insurance company in which the quantum of damages recoverable would be, it is thought, directly related to the sum for which his life would have been insured had the machine dispensed the policy. But if the insertion of the coins were held to be the offer, and those coins were rejected, there would in law be no contract for breach of which the personal representatives could sue. Again, if the presence of the machine were held to be an offer the customer, once he had signified his acceptance by inserting his money, would not be bound by any terms printed on the policy which had not been adequately drawn to his attention before the contract was concluded.[1] Whereas, if it were the customer who made the offer and the acceptance were the production of the policy by the machine, it is at least arguable that the policy would be regarded as a contractual document and any exemption clauses printed upon it would be binding on the insured, provided they were adequately drawn to his attention.[2]

13. In view of the current attitude of the law (at least in England) in classifying the display of goods in shop windows and on supermarket shelves as mere invitations to enter into negotiations, it might be surmised that a court confronted with the problem raised by an automatic vending machine would be inclined to hold that its presence amounted merely to an invitation by its owner or operator to negotiate. However, a recent English

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[1] Hood v. Anchor Line 1918 S.C.(H.L.) 143; McCutcheon v. MacBrayne 1964 S.C. (H.L.) 28.

[2] Hood, supra; McCutcheon, supra; Gray v. L.N.E.R. 1930 S.C. 989; Lewis v. Laird Line 1925 S.L.T. 316; Thompson v. L.M.S. Railway [1930] 1K.B.41.

case[1] would seem to suggest that, at least in that country, the presence of the machine might be regarded as a standing offer. In this case a number of judges in the Court of Appeal took the view that the proprietors of a well signposted automatic car-park made a standing offer which was accepted by a motorist's driving his car so far into the premises that he could not reasonably be regarded as having retained the option to change his mind and refuse to enter into any relationship with the offeror. It is thought that this reasoning would lead to the classification of the proprietor of a vending machine as the offeror and his customer as the acceptor. Though there is little judicial authority in favour of (or against) this attitude, it is accepted by distinguished legal writers in a number of foreign countries.[2] It is our provisional view that it should be enacted, for the avoidance of doubt, that the operator of a vending machine makes a standing offer (while stocks last) to provide the article or service which it is the machine's function to dispense. We would welcome comments on this proposal. It may be that detailed regulation of the duties incumbent upon the operators of vending machines - including such matters as their liability where a machine fails to indicate that it is empty or out of order and retains the

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[1] Thornton v. Shoe Lane Parking [1971] 2 Q.B. 163, esp. per Lord Denning M.R. at p. 169 and Sir Gordon Willmer at p. 174.

[2] France: Demogue Traité des obligations en général, para. 551. Italy: De Martini and Giannattasio Rassegna di Giurisprudenza sul codice civile, art. 1326 para. 44 and art. 1336 para. 114; Mirabelli Dei Contratti in generale, art. 1336 para. 2. Germany: Enneccerus-Kipp-Wolff Lehrbuch des Bürgerlichen Rechts, vol. 1 (ed. Nipperdey) para. 161 I 1b; Lehmann Allgemeiner Teil des Bürgerlichen Gesetzbuchs, para. 33 II 1a. Switzerland: Berner Kommentar zum Schweizerischen Zivilgesetz-buch, vol. 6, part 1 (ed. Becker), art. 7, para. 4; von Tuhr Allgemeiner Teil des Schweizerischen Obligationenrechts (ed. Siegwart), vol. 1, para. 24 II. Austria: Klang and Gschnitzer Kommentar zum Allgemeinen bürgerlichen Gesetzbuch, art. 861, para. II 3b.

customer's money - is a matter suitable for consideration by the Director General of Fair Trading.[1]

14. Advertisements. Advertisements, e.g. of goods forsale, whether in newspapers or in circulars delivered to members of the public or of a determinate class, are generally held by the law to be mere invitiations to negotiate, even though they quote prices for the goods therein described.[2] Even at present, however, there are some circumstances in which a circular or quotation of prices may be held to be an offer capable of acceptance by the addressees.[3] It is thought that were the display of goods in shop windows and on supermarket shelves, to be treated by the law as offers a similar provision regulating the status of some types of advertisements and circulars would be desirable for the sake of uniformity. Where such intimations were treated in law as offers there would, of course, be implied where appropriate a "subject to availability" or "while stocks last" term. There are, we think, two distinct types of advertisements. The first variety merely seeks to bring the availability of a product (or a service) to the attention of the public with the intention of stimulating interest in it and providing information about it. Most television and "colour supplement" or "glossy magazine" advertisements are, in our view, of this type. The other principal category of advertisement - of which classified advertisements in newspapers under such headings as "For Sale" or "Services" are perhaps the clearest examples - amounts in effect (if not in law) to an offer by an identified person to supply a definite article or service (usually at a stated price). As regards advertisements of this latter type,

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[1] See article in The Sunday Post 18 July 1976, p.13.

[2] Fenwick v. Macdonald, Fraser & Co. (1904) 6F.850; Grainger v. Gough [1896] A.C. 325; Partridge v. Crittenden [1968] 1 W.L.R. 1204.

[3] Liquidators of Edinburgh Employers Co. v. Griffiths (1892) 19 R. 550; Philp v. Knoblauch 1907 S.C. 994.

would it be desirable to provide that the advertiser should be regarded in law as making an offer to perform in accordance with what his advertisement or circular sets forth? If so, should the onus of establishing that an advertisement is not of this type be placed upon the advertiser?

15. One consequence of treating certain categories of advertisements as offers would be that a person responding to such an advertisement (e.g. by sending the appropriate sum of money to the advertiser) would be regarded as accepting the offer and so be contractually bound from the moment his acceptance took effect.[1] At present a person replying to such an advertisement is treated as making an offer which he is at liberty to withdraw until such time as it is accepted by the advertiser. Under a system in which the customer is held to make an acceptance of an offer, however, it would still be possible if it were ever to be thought necessary, to protect the rash consumer by providing a "cooling-off" period, as is at present provided for in hire purchase transactions,[2] during which his acceptance could validly be withdrawn. Provision might also require to be made to govern how long a supplier would be entitled to retain his customer's money before either supplying the goods or informing the customer that his stock was sold out and refunding the money paid. However, this same problem exists under the present law in terms of which the customer merely makes an offer to buy. Proposals for its solution have been made by the Director-General of Fair Trading and commented upon by the Consumer Protection Advisory Committee.[3] These proposals would seem equally

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[1] We consider infra, paras. 44 - 50, the time at which an acceptance takes effect.

[2] Hire-Purchase (Scotland) Act 1965, s. 11; Consumer Credit Act 1974, ss. 67-74.

[3] Prepayment for Goods: A Report on Practices Relating to Prepayment in Mail Order Transactions and in Shops, Consumer Protection Advisory Committee, published 13 April 1976 (HMSO). The Report has been partially implemented by the Mail Order Transactions (Information) Order 1976, (S.I. 1976 No. 1812).

applicable where the customer's response to the advertisement was regarded by the law as an acceptance rather than an offer.

16. Auction sales. At an auction sale the exposure of articles for sale is regarded not as an offer to sell, but as an invitation to treat. Each bid is an offer to buy (which lapses when a higher bid is made), and the acceptance is made by the auctioneer, as agent for the seller, in the customary manner (e.g. by fall of the hammer). Until that happens the seller remains free to withdraw the article from sale, and the bidder to withdraw his offer.[1] This remains the legal position even when the auction is represented to be "without reserve".[2] We do not propose any alteration in the legal effects of the acts of the parties in auction sales in general. But we invite comments on whether in the case of auctions expressly, or by necessary implication, represented to be "without reserve" the exposer of the article should be regarded as making an offer to sell to the highest bidder. It is at least arguable that this would do no more than give effect to what a layman might reasonably expect to be the consequences of the use of that expression. The result of such an alteration in the law would be that a contract came into existence as soon as what transpired to be the highest bid was made. The fall of the hammer would become a mere formality of no legal relevance. This would also mean that the last bidder lost the right which he currently enjoys to withdraw from the sale in the interval between pronouncing his bid and the auctioneer's declaration of the conclusion of the sale. We ourselves see little objection to this; but if the contrary view were taken, it would be possible even if bids in a

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[1] Fenwick v. Macdonald, Fraser & Co. (1904) 6 F. 850; Sale of Goods Act 1893, s.58(2).

[2] This is certainly the case in England: Warlow v. Harrison (1859) 1 E. & E. 309; Harris v. Nickerson (1873) L.R. 8 Q.B. 286. There are dicta to the same effect in Fenwick.

"without reserve" auction were treated as acceptances to retain the bidder's statutory right to withdraw his bid until the fall of the hammer,[1] while depriving the exposer of any similar right to withdraw his offer to sell after commencement of the bidding.

17. Tenders. Invitations to submit tenders are also normally regarded as invitations to enter into negotiations and it is the persons who submit tenders who are looked upon as making offers, any of which the recipient is free to accept or reject.[2] Even though such invitations do not in law constitute offers, nevertheless it is common for notices of tender to contain a clause to the effect that the invitor does not bind himself to accept the highest (or the lowest) or any tender. We regard this as a salutary practice which ought to be encouraged. Nevertheless, we do not think that it would be appropriate to provide that in the absence of a clear statement to this effect, a notice of tender should be classified as an offer to contract with the person submitting the highest (or lowest) tender. In the first place, it is only in relation to simple sales and purchases that it would be possible readily to determine which tender was in fact the lowest (or highest); where what was in issue was something more complex, such as construction work, ascertainment of the highest (or lowest) tender, if possible at all, would be a matter of great difficulty in view of the fact that the hypotheses or assumptions on which the various individual tenders were based would be likely to be different. Secondly, there may be substantial reasons why an invitor would not wish to accept the lowest (or highest) tender, e.g. doubt about the capitalization or resource commitments of the tenderer. Comments are, however, invited.

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[1] Sale of Goods Act 1893, s.58(2).

[2] Spencer v. Harding (1870) L.R. 5 C.P.561; Gloag, Contract, 2nd edition p.23.

2. To whom offer made.

18. An offer may be made to, and hence be open for acceptance by, a specified person or a specified class of persons or the public generally.[1] An offer addressed to more than one person may permit numerous acceptances (e.g. an offer to mow the grass of the individual occupiers of houses in a particular district), or may permit only one acceptance (e.g. an offer to a number of antiquarian booksellers to sell a Kilmarnock edition of the poems of Burns). It is thought that the terms of the offer and the circumstances in which it is made normally make it clear whether multiple acceptances are envisaged or only a single acceptance is possible.

19. Perhaps the most common type of proposal addressed to the public generally is the advertisement of payment by way of reward for the performing of a specified act or the finding and return of a specified object.[2] Such an advertisement can be construed in two quite separate ways: (a) as a unilateral promise to pay the reward to the person or persons who fulfil the conditions adjected to it by performing the stipulated act or returning the stipulated object;[3] or (b) as an offer to the public to pay the reward to such person or persons as validly accept the offer, such acceptance being manifested in or implied from conduct which simultaneously amounts, either wholly or partially, to the performance stipulated for by the offeror as the offeree's fulfilment of his part of the contract.[4] The

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[1] Petrie v. Earl of Airlie (1834) 13 S.68; Hunter v. Hunter (1904) 7F.136; Hunter v. General Accident Co 1909 S.C.(H.L.) 30; Carlill v. Carbolic Smoke Ball Co. [1893] 1Q.B. 256.

[2] See cases cited in preceding footnote.

[3] This seems to have been the approach adopted in Petrie v. Earl of Airlie (1834) 13 S.68.

[4] As in Carlill v. Carbolic Smoke Ball Co. [1893] 1 Q.B. 256.

diverse legal consequences which flow from the classification of advertisements of reward as either unilateral promises or offers requiring acceptance is dealt with in more detail in our accompanying Memorandum No. 35 on unilateral promises, where a proposal is made concerning the juridical nature to be attributed by the law to such advertisements in cases where their wording, and the circumstances of their issue, do not put beyond doubt the category into which they fall. The tendency of the Scottish courts, in such few cases as have arisen in the past hundred years[1] has been to treat advertisements of reward as offers. We consider later in this Memorandum what has, in such cases, been regarded as acceptance by the offeree.

3. Communication of offer.

20. In order to give rise to the legal consequence of enabling a contract to be concluded by acceptance an offer must be communicated to the offeree. Nothing said or done by the offeree. Nothing said or done by the offeree prior to communication to him of the offer can be regarded as an acceptance.[2] Consequently an offer contained in a letter which remains unposted on the writer's desk is not open for acceptance and actings of the addressee which, if performed after receipt of the offer, would be regarded as implying acceptance, cannot be so treated.[3] It therefore becomes important to determine precisely what is meant by communication in this context.[4] The matter may further be of importance

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[1] See cases cited in footnote 1, p. 20, supra.

[2] R. v. Clarke (1927) 40 C.L.R. 227.

[3] See para. 27, infra.

[4] A somewhat similar, but not identical, problem arises in relation to the communication by the offeree to the offeror of his acceptance of the offer. See paras. 41-50, infra.

since it is possible that in certain circumstances an offer after communication may not validly be revoked, whereas prior thereto it may always effectually be withdrawn. Again, the question of when communication is made may arise in situations where an express or implied time limit for acceptance is adjected to the offer. Clearly, if the offer specifies the date by which a reply must be made, and that day is past before the offeree becomes aware of the offer, no effective acceptance can be made.[1] But a difficult question of the validity of an acceptance may arise where the offer provides e.g. "Please reply within 24 hours". In deciding whether in such a case a purported acceptance has been timeously made, is the terminus a quo the time of delivery of the offer to the offeree's address, or the time at which he becomes aware of the offer? A similar problem arises, as regards offers not specifying a time limit for acceptance, in determining whether an alleged acceptance has been made "within a reasonable time": does time start to run from the moment of delivery of the offer or not until the offeree becomes conscious of it?

21. Where the parties are not in instantaneous communication it is then a matter of some doubt whether delivery of the offer to the offeree's address is sufficient, or whether communication is not made until the contents of the letter (or telegram or telex message) are brought to his attention. There is authority, as was stated in the previous paragraph, to the effect that nothing done or said in ignorance of an offer can be construed as amounting to an acceptance thereof; from this it would appear to follow that communication would not be complete until the letter or telegram or telex message had actually been read by the offeree, and he was therefore cognisant of the existence and contents of the offer. On the other hand, where an offeror

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[1] Walker, Principles, 2nd edition, p. 531.

purports to revoke his offer by means of a letter or telegram addressed to the offeree, although unlike an acceptance it does not take effect as soon as dispatched, nevertheless, delivery of the revocation to the offeree's address is thought to be sufficient communication and it is not necessary that he should have become aware of its arrival or of its contents.[1] Furthermore, in The Brimnes[2] the view was taken that the notice of withdrawal of a ship send by telex from the owners to the charterers in the late afternoon of April 2, but not brought to the attention of the responsible officer of the latter until the following morning took effect from the time of its receipt in the charterers' office. Megaw L.J.[3] expressed his opinion in the following terms:

> "I think that the principle which is relevant is this: if a notice arrives at the address of the person to be notified, at such a time and by such a means of communication that it would in the normal course of business come to the attention of that person on its arrival, that person cannot rely on some failure of himself or his servants to act in a normal businesslike manner in respect of taking cognisance of the communication so as to postpone the effective time of the notice until some later time when it in fact came to his attention."

22. We provisionally take the view that where the parties are in instantaneous communication - as where they are face to face or are in contact by telephone - an offer should be regarded as having been communicated only when it actually comes to the attention of the offeree. In the case of a written offer, however, whether by letter, telegram or telex, we think that communication should be regarded as effectually made by the

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[1] Thomson v. James (1855) 18 D. 1 at pp. 10, 11 per Lord President McNeill; Burnley v. Alford 1919, 2 S.L.T. 123; Treitel, Law of Contract, 4th edition, p. 33. A similar rule may apply in those circumstances in which a postal acceptance must, to conclude the contract, actually be received by the offeror (e.g. because the offeree has mis-addressed the letter). See Chitty on Contracts, 23rd edition, vol. 1, para. 64; Restatement (Second) of Contracts, para. 69.

[2] [1973] 1 W.L.R. 386 at 404-6 per Brandon J.; [1975] Q.B. 929 at 945-6 per Edmund Davies L.J. and at 966-7 per Megaw L.J.

[3] [1975] Q.B. 929 at 966-7.

delivery of the message to the offeree or to a person having his authority to receive it (irrespective of whether he then becomes aware of its contents) or by its delivery to any place authorised by the offeree for the delivery of such communications, at a time at which the offeree or a person having his authority to receive it is, or might reasonably be expected to be, present there. It would be possible to provide that the proposed rule governing written offers should not apply to prevent the withdrawal of offers which have not actually come to the attention of offerees, but should be restricted in its application to fixing the terminus a quo in any calculation of the length of time for which offers remain open for acceptance. It can be argued that in the former case no prejudice can be suffered by an offeree through the withdrawal of an offer of which, though it had been delivered to his address, he had not become aware. On the other hand, in relation to offers which have a time limit for acceptance (e.g. "Reply within 24 hours") or which must be accepted within a reasonable time, the offeror could be gravely prejudiced if it were held that the time did not start to run until the offer came to the offeree's attention. This would put a premium on inefficiency: the more disorganised the recipient of the offer, the longer that offer would remain open for acceptance. We think that the position of the offeror in respect of the length of the period within which his offer may mature into a contract should not be dependent upon the efficiency of the offeree's office organisation. We invite comments on our provisional proposal for regulating the time at which an offer is to be regarded as having been communicated, and on whether our suggested rule, if adopted, should apply in respect of withdrawal of offers as well as in respect of the time within which acceptance must be made.

23. The question may also arise of the effect of communication of an offer to the offeree by an unauthorised person or in an irregular manner. For example, the offeror's manager or personal assistant sees and reads the letter containing the offer while it lies on the former's desk. The manager or personal assistant - perhaps in good faith and in response to an enquiry - then divulges the contents of the letter to the offeree. In such circumstances, whether an offer has been made and communicated or not would, it is thought, be determined by resort to the principles of the law of agency: did the manager or personal assistant have the actual or ostensible authority of his employer to transmit the contents of his letter to the offeree? In the absence of such authority no valid communication of the offer has taken place.[1] It may be, therefore, that no reply by the offeree can have the effect of concluding a contract, even though the letter containing the offer is, subsequent to the purported acceptance, despatched to and received by the offeree. If this is in fact the legal position, it may work to the serious prejudice of the offeree: having already received and replied to one (albeit unauthorised) communication, he may, in the belief that he has already accepted the offer, fail to take any action in response to the second (and genuine) communication. We think that it might beneficially be provided in order to resolve any uncertainty in the present law that, where (a) an unauthorised communication of an offer has been made, (b) a reply has been sent "accepting" that offer, and (c) the genuine offer is in fact dispatched,[2] then upon the principle of homologation the first "acceptance" should be regarded as validly concluding the contract unless, immediately upon actual receipt of the "acceptance" the offeror informs the offeree that he declines so to regard it. We think that the same duty

[1] Cf. Cole v. Cottingham (1837) 8 C. & P. 75, 173 E.R. 406.

[2] We do not regard it as essential that (b) should precede (c).

of immediate notification, if he wishes to prevent the conclusion of a contract, should rest upon the offeror where he has, for example, dropped the letter containing the offer in the street, a passerby has picked it up and posted it, and the offeree has in good faith dispatched an acceptance. We invite comments on these matters.

24. Irregularity of communication may also give rise to problems in a somewhat different situation. An offer may be duly dispatched, but be delayed or lost in transmission. If the offeree then learns of the offer in some other way (e.g. from a third party who had been informed of it by the offeror), can he make a valid acceptance? In many cases it would be reasonable to expect an offeree in such a position to contact the offeror and have the offer confirmed or repeated. But it is possible to envisage circumstances in which, because of the inaccessability of the offeror or because of the closeness of the date for acceptance stipulated in the offer, the offeree would, if he were to be accorded the opportunity of accepting at all have to do so on the sole basis of the third party's information and without confirmation from the offeror. It may be that under the present law a contract would be held to exist in these circumstances, the offeror having done all within his power to communicate the offer, and the offeree having been in fact informed about it. We take the view, however, that for the avoidance of doubt it might be desirable to provide that where it can be established (a) that an offer has been despatched, (b) that it has been lost or delayed beyond the normal period of transmission, (c) that the offeree has become aware of the terms of the offer from another source upon which, in the circumstances, it is reasonable for him to rely, and (d) that the circumstances rendered it impracticable for the offeree to obtain confirmation of the offer from the offeror, then as from the time at which the offer would in the normal course of events have been delivered, an acceptance by the offeree should be effective to conclude a contract. A purported acceptance made before the time at which

delivery would in the normal course of events have been expected, should in our view be effective only if the offeror fails, immediately upon receipt thereof, to inform the offeree that he declines so to regard it. The effect of a provision to this effect would be to preserve the general right of an offeror effectively to withdraw his offer, even though it has been dispatched, by means of a communication to the offeree which arrives prior to, or contemporaneously with, the original offer. Comments on these proposals are invited.

4. Acceptance: what constitutes.

25. In order to ripen into a contract an offer must be accepted. Acceptance may be defined as an assent by the offeree to the terms of the offer coupled with an undertaking, expressed or implied, to fulfil any obligations which may fall upon him under the proposed contract. An acceptance, like an offer, may be in words or may be inferred from conduct. In the paragraphs which follow in this section we shall consider what responses to offers are regarded by the law as acceptances and what are not. This will involve discussion of the following problems: (a) who may accept? (b) acceptance in ignorance of the offer; (c) identical cross-offers; (d) qualified acceptances and counter-offers; (e) the consequences of an offeror's prescribing a particular mode of acceptance; (f) acceptance inferred from conduct; and (g) silence as a mode of acceptance. In the succeeding section of this Memorandum we shall consider the communication of acceptances and the questions where and when acceptances take effect.

26. (a) Who may accept? An offer is open for acceptance solely by the person or persons to whom it is addressed.[1] A purported acceptance from a third party would be treated by

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[1] Greer v. Downs Supply Co. [1927] 2 K.B. 28; Saltsberg & Rubin v. Hollis Securities (1965) 48 D.L.R. (2d) 344. Walker, Principles of Scottish Private Law, 2nd ed., p. 531; Smith v. Colquhoun's Tr. (1901) 3F. 981 at 990.

the law as an offer which the original offeror is free to ignore or to accept or reject. We think that this is as it should be: an offeror, just as he has freedom in respect of the contents of his offer, should have freedom in respect of the range of persons to whom he will address it. There may, however, be circumstances in which the existing law could work to an offeror's disadvantage: for example, where an offer to sell goods is made to the members of a particular club, a non-member submits an "acceptance" and the offeror regards this as concluding a contract between them, only to be informed when he calls upon the non-member to take delivery and to pay the price that the latter's "acceptance" was in law merely an offer, which the former had failed timeously to accept. It is thought that such situations must be of infrequent occurrence; that where they do arise it may sometimes be possible to protect the offeror by finding that his actings upon receipt of the third party's "acceptance" were an indication of assent sufficient for the conclusion of a contract or alternatively that the third party was personally barred from relying upon the offeror's omission to accept. To the extent to which an offeror in the situation described remains unprotected, we take the view that this is the price which must be paid by an offeror for his freedom from the possibility of having forced upon him a contract with a person with whom he did not wish to deal. We would, however, welcome comments on this.

27. <u>(b) Acceptance in ignorance of offer</u>. An offer may prescribe that acceptance will be inferred only from the performance of an act, e.g. an offer to pay £1000 to the undesirable suitor of one's daughter if he emigrates to Libya and which stipulates that the only sufficient indication of acceptance of the offer will be the offeree's arrival on Libyan soil. Similarly, conduct may give rise to the inference or implication that the actor has accepted an offer even though that offer could also be accepted otherwise than by inference from conduct; for example, an offer to buy an article belonging

to the offeree, to which the latter responds by sending the article to the offeror. In such cases as these, where performance of an act is the indication of acceptance demanded or where acceptance can be inferred from such performance, does a contract come into existence when the actor although the person or one of the persons to whom the offer was addressed, is unaware that an offer has been made and consequently in acting as he did had no intention of accepting it? The problem arises chiefly in relation to offers (e.g. of reward) made by advertising to the public or to a large group; and the law appears to be that in such circumstances the performance of the act does not result in the conclusion of the contract.[1] In English law it seems that, provided the actor knows of the offer, it is irrelevant that he did not perform the required act with an intention of accepting it.[2] In Australia the contrary view has been taken: even if the actor knows of the offer when he performs the act there is no contract unless by his performance he intends to accept it.[3] We are provisionally of the view that even where the actor is the person, or is one of the persons, to whom an offer[4] was

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[1] Wylie & Lochhead v. McElroy (1873) 1R.41; Hall Maxwell v. Gill (1901) 9 S.L.T. 222. If the reward notice were classified not as an offer, but as a unilateral promise to pay to whomsoever performed the stipulated act then the actor would be entitled to the reward even though he acted in ignorance of it. See our accompanying Memorandum No. 35.

[2] Williams v. Carwardine (1833) 5 C. & P. 566. In this case the plaintiff, thinking she was dying, and "in order to ease my conscience, and in hope of forgiveness hereafter" gave information which led to the conviction of a murderer. A reward, of which the plaintiff was aware, had been offered to anyone supplying such information. It was held that the plaintiff was entitled thereto, Patteson J. adding, "We cannot go into the plaintiff's motives."

[3] R. v. Clarke (1927) 40 C.L.R. 227.

[4] The problem here discussed would arise less frequently were such statements to be generally regarded not as offers but as conditional promises. We provisionally propose that this should be the case in Memorandum No. 35, paras. 11 - 13.

addressed his performance of the act called for in the offer, or of an act from which acceptance would in the case of a person with knowledge of the offer be inferred, should not be regarded as concluding a contract with the offeror. Similarly, no contract should come into existence where the offeree performs the act with knowledge of the offer but without any intention of accepting it thereby. It is our view that in principle a contract cannot, and should not, be held to exist unless the parties are in, or have reached, agreement, and in the circumstances under consideration, agreement is manifestly lacking. Comments are invited.

28. (c) Identical cross-offers. If A writes a letter to B offering to sell him his car for £1000 and B, before receiving the letter, writes to A offering to buy his car for £1000, it appears that there is no contract.[1] Blackburn J. in Tinn v. Hoffman & Co.[2] expressed, obiter, the reasoning behind this conclusion: "The promise or offer being made on each side in ignorance of the promise or the offer made on the other side, neither of them can be construed as an acceptance of the other." It may be objected to this that it lays too much stress on the concepts of offer and acceptance. What the law of contract requires is that the parties should be in, or have reached, agreement. One way of ascertaining whether agreement exists is to look for an offer from one party which has been accepted by the other. But agreement may exist, and be recognised as giving rise to a binding contract, even though it is impossible to isolate or to identify an offer from one party and an acceptance from the other.[3] In favour of the rule that cross-offers do not result in the formation of a contract it may be

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[1]Harvey v. Smith (1904) 6F. 511; Tinn v. Hoffman & Co. (1873) 29 L.T. 271, 279.

[2](1873) 29 L.T. 271 at 279.

[3]See para. 7, supra, and para. 66 infra.

said that it tends to promote certainty: the contrary rule might give rise to difficult problems in the determination of precisely where and when the resulting contract came into being, questions which may frequently be of importance as regards passing of title to moveable property and as regards jurisdiction and choice of law. Furthermore, to recognise in such circumstances that a contract existed could be done only at the cost of depriving each offeror of the benefit of a period of time during which he would otherwise have been entitled to change his mind and withdraw or revoke his offer. This, in the example given at the beginning of this paragraph, A would be deprived of the right which he currently enjoys, by means of an appropriate communication reaching the offeree, to withdraw or revoke his offer to sell until such time as B has posted his letter of acceptance. On the other hand, it can be argued that the present system works to the detriment of the honest man, while benefiting the rogue. The parties to a cross-offer situation may reasonably believe that they are in agreement and so take no further steps in the matter. Then, after some considerable time has elapsed, one of them, repenting of the agreement, claims to be entitled to resile on the ground that since neither one of the offers was formally accepted, no binding contract came into existence. In such circumstances it is thought that the party seeking to withdraw might frequently be barred, _personali exceptione_, in that he himself in the interim acted in a way which could be explained only on the basis that a binding contract existed, or alternatively allowed the other party so to act.[1] However, it may well be the case that in some situations a plea of personal bar would not succeed, e.g. because the party seeking

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[1] See _Gatty_ v. _Maclaine_ 1921 S.C. (H.L.) 1, per Lord Birkenhead at p. 7: "Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time."

to establish the validity of the agreement cannot prove that he acted in reliance thereon to his prejudice.[1] It is therefore for consideration whether it would be desirable for the law to provide that identical cross offers are sufficiently indicative of agreement for a binding contract to be constituted thereby, in the absence of prompt notification by either party to the other that he declines to be so bound. This is the attitude adopted by a number of European legal systems,[2] which generally solve the problem of determining when and where the resulting contract comes into being by reference to the time and place of receipt of that offer which takes the longer to be delivered. We would welcome views on whether this is a solution which might advantageously be adopted in Scotland.

29. (d) Qualified acceptances and counter-offers. A purported acceptance which does not in fact express assent to all of the terms of the offer but seeks to qualify those terms in some way, or which attempts to introduce new conditions into the parties' negotiations, is in law a rejection of the offer which, having been thus rejected, is not open for subsequent acceptance.[3] But this rejection may itself be treated as a counter-offer, the unqualified acceptance of which would result in the conclusion

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[1] Furthermore, personal bar operates only inter partes, while the question whether a contract had been concluded between the parties might be relevant in the context of subsequent acquisition of rights by third parties, e.g. assignees or transferees.

[2] France: Valéry Des contrats par correspondence, para. 220; Demogue, Traité des obligations en général, para. 583; Planiol et Ripert Traité pratique de droit civil français, vol. 6 (2nd edition by Esmein), para. 126. Italy: Corte di Cassazione, 21 Sept. 1944, Giur. It. 1944, I. 1, 111; De Martini and Giannattasio Rassegna di Giurisprudenza sul codice civile, art. 1326, para. 47.

[3] Johnston v. Clark (1854)17 D.228; Wylie & Lochhead v. McElroy (1873) 1 R. 41.

of a contract.[1] Where the new term which the acceptance seeks to introduce is one which the law would in any event imply its expression in the acceptance will not prevent a contract's coming into existence.[2] Nor will a purported acceptance be treated as a rejection which precludes later acceptance of the offer where the qualification to which it is subject can be construed as merely a proposal as to the manner in which the contract is to be carried out or as a mere request for further information about, or clarification of, the offer or as a request for more favourable terms while expressing or implying willingness to assent to the existing terms of the offer. In such cirmstances a contract may or may not be held to have come into being, but certainly the original offer will not be regarded as having been rejected.[3] In Scotland an acceptance "subject to contract" (i.e. indicating that the parties' agreement should be embodied in a formal deed) may, depending upon the circumstances, be consistent with a contract's coming immediately into existence[4] or, on the other hand, with the postponement of any binding obligation until such time as the formal document is drawn up and executed:[5] in each case it is for the court to determine, in the light of the words and actings of the parties and of the

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[1] Johnston v. Alexander (1855) 18 D. 70; Roberts & Cooper Ltd v. Salvesen 1918 S.C. 794; Mathieson Gee v. Quigley 1952 S.C. (H.L.) 38.

[2] Erskine v. Glendinning (1871) 9 M. 656 at p. 659 per Lord President Inglis.

[3] See e.g. Johnston v. Clark (1854) 17 D.228; Tait & Crichton v. Mitchell (1889) 26 S.L.R. 573; Gloag Contract, 2nd edition, pp. 40-42.

[4] Smeaton v. St. Andrews Police Commissioners (1868) 7 M. 206, (1871) 9 M. (H.L.) 24; Erskine v. Glendinning (1871) 9 M. 656.

[5] Campbell v. Douglas (1676) Mor. 8470; Van Laun v. Neilson, Reid & Co. (1904) 6F. 644.

surrounding circumstances, whether it was their intention that execution of a deed should be a condition suspensive of their respective obligations.[1] Unlike the position under English law, therefore, the phrase "subject to contract" is not a term of art invariably indicating that the parties are still at the stage of negotiation.

30. It is thought that the rules governing qualified acceptances outlined in the foregoing paragraph generally operate satisfactorily. However, it is for consideration whether, in one respect, they might not be improved. It can be argued that it is too strict a rule that a purported acceptance which seeks to introduce conditions not provided for in the offer and which cannot be interpreted as mere requests for further information or for more favourable terms, should in all circumstances be treated as a rejection. One possibility would be for the law to provide that where the offeree's proposals do not materially alter the terms of the offer, then unless the offeror promptly communicates his objection to the discrepancy a contract should be held to exist, its terms consisting of the terms of the offer, as modified by the terms of the acceptance. This solution is adopted in the American Uniform Commercial Code[2] and in the Uniform Law on the Formation of Contracts for the International Sale of Goods.[3] The typical situation in which a provision to this effect would allow a contract to come into existence where at present the parties would be regarded as not having reached agreement, is in relation to what American lawyers call a "battle of forms".

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[1] Rederi Aktiebolaget Nordstjernan v. Salvesen (1903) 6 F. 64 at p. 75; Stobo v. Morrisons (Gowns) Ltd. 1949 S.C. 184.

[2] Section 2-207; see also Matter of Doughboy Industries Inc. (1962) 233 N.Y.S. 2d 488; Roto-Lith Ltd. v. Bartlett & Co. (1962) 297 F. 2d 497.

[3] Uniform Laws on International Sales Act 1967, schedule 2, art. 7(2).

For example, A Ltd. sends to B Ltd. an order for a certain quantity of goods at a certain price. The order is typed on A Ltd's standard "order form" which has printed on it many clauses, which are stated to be the terms on which alone A Ltd. makes the order. B Ltd. accepts the order by dispatching to A Ltd. its own standard "acceptance form" on which is to be found an equal number of printed clauses, which are stated to be the terms on which alone B Ltd. accepts the order. The clauses printed on the two forms conflict. Under the present law it would probably be held (at least until the goods had been delivered to, and accepted by, A Ltd.[1]) that no contract of sale had been concluded. If a system such as that found in the Uniform Commercial Code were to be adopted a contract would be held to exist, on the terms stipulated in B Ltd.'s acceptance form, provided that it could be said that those terms did not materially alter the nature of the contract proposed in A Ltd's order form.

31. Another possible solution would be a provision to the effect that in the circumstances outlined in the preceding paragraph the offeree's qualified acceptance should not result in the conclusion of a contract, but should leave the original offer in existence and capable of acceptance should the offeree subsequently be prepared to depart from the qualifications made in his initial response within the period that the offer would have subsisted had his qualified acceptance not been made. This would mean that, unlike the position under the present law, an offeror would not be in all circumstances entitled to treat a qualified acceptance as equivalent to an outright rejection. His offer would remain open for acceptance where, but only where,

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[1]Upon delivery of the goods to, and their acceptance by, A Ltd, it seems that a contract would be held to exist in terms of B Ltd's acceptance form, A Ltd. being regarded as having by conduct accepted the counter-offer contained in B Ltd.'s form: B.R.S. v. Arthur V. Crutchley Ltd. [1968] 1 All E.R. 811. In Scotland, A Ltd.'s conduct would probably have been regarded not as amounting to acceptance, but as indicating acceptance.

(a) if the offeree had not replied as he did, the offer would still be in existence (e.g. because any time limit attached to it had not expired) and (b) the qualifications to which the initial acceptance was subject did not amount to a material variation of the terms of the offer. We appreciate that such a provision might be objected to as promoting uncertainty in contractual negotiations: in spite of the offeree's response the offer would remain open, but a contract would not have come into being. On the other hand, it can be argued that such an attitude is preferable to that outlined in paragraph 30 in that it does not lead to the offeror's being held bound to a contract which is at variance (albeit not in material respects) with his offer. We would welcome views on whether either of the possible solutions to the problem of qualified acceptances discussed in this and the foregoing paragraph ought to be introduced into Scots law.

32. (e) Mode of acceptance prescribed by offeror. The offeror, in making his offer, may stipulate the manner in which any acceptance thereof must be made. He may provide that the only indication of acceptance which he will regard as binding upon him is the performance of a particular act,[1] or that acceptance must be communicated to him at a particular address or in a particular form (e.g. by telex, by telegram, by registered post, by first class post). Where the offeror in this way lays down the mode of acceptance, the general rule is that he will not be bound by a purported acceptance made in any other manner:[2] the offeror is free not only to determine the content of his offer and the person or persons to whom he wishes to make it, but also to prescribe what he is prepared to regard as an

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[1] Cf. example in para. 27 supra, of father offering daughter's suitor £1,000 if he indicates acceptance by emigrating to Libya.

[2] Eliason v. Henshaw (1819) 4 Wheat. 225; Financings Ltd v. Stimson [1962] 1 W.L.R. 1184; Jaeger Bros Ltd v. McMorland (1902) 10 S.L.T.63.

acceptance binding upon him. To this general rule, however, the courts in England at least are recognising an increasing number of exceptions, the effect of which seems to be that the court must first determine what was the object of the mode of acceptance prescribed in the offer. Then if the form of acceptance actually used by the offeree, although not the form desiderated, attains that object equally well and in no way prejudices the offeror that acceptance will be held to have validly concluded the contract. Thus, in Manchester Diocesan Council for Education v. Commercial and General Investments Ltd[1] a term in the offeror's form of tender provided that the acceptance was to be sent to the address stipulated by the offeror in that form.[2] The acceptance was in fact sent by the offeree not to this address, but to the offeror's surveyor, who had conducted all prior negotiations on his behalf. It was held that a contract had been concluded: the object of the address stipulation was merely to ensure that the offeree could be in no doubt as to where an acceptance might validly be sent. It did not preclude the possibility of an effective acceptance being sent to the offeror elsewhere, so long as the offeror suffered no prejudice through this different mode of proceeding.[3]

33. We invite comments on what attitude the law should adopt where notification of acceptance reaches the offeror, but the

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[1] [1970] 1 W.L.R. 241.

[2] The form of tender containing this clause had in fact been drawn up by the offeree.

[3] See also Yates Building Co. v. Pulleyn, The Times 26 Feb. 1975, [1975] C.L.Y. 388 (C.A.) where the offer provided that acceptance should be by notice sent by registered or recorded delivery post. It was held by the Court of Appeal that a contract was concluded where the acceptance was in fact sent by ordinary post. The object of the provision in the offer, according to the court, was to obtain additional security that an acceptance, once posted, would actually arrive. The acceptance, though not registered, had arrived; therefore the offeror's object had been attained.

acceptance is not in the form, or is not communicated in the form, prescribed by the offeror. There are a number of possible solutions to this problem.

(a) It could be provided that a contract would come into existence only if the offeree adhered in every detail to the offeror's instructions as regards mode of acceptance and of communication of acceptance. If, for example, the offeror called for acceptance to be communicated by telegram, a telex message would not suffice. Were this view adopted, it would then be for consideration whether the offeror should be entitled at his discretion to waive compliance with the mode of communication prescribed by him or whether, if he wished a contract to be concluded, he should in turn be required to communicate his own acceptance of what would in law be regarded as the offeree's counter-offer.[1]

(b) At the other extreme, it could be provided that whereas a prescribed mode of indicating acceptance (e.g. arriving in Libya, in the case of the offer of £1000 to the undesirable suitor of one's daughter) would always require to be complied with by the offeree, failure to adhere to a stipulation merely as to the mode of communication of acceptance would not be regarded as preventing the conclusion of the contract where communication in another form was made to the offeror, provided that the mode of communication actually used enabled the offeror to prove the existence and terms of the contract to the same extent as would an acceptance communicated by the mode

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[1] See Compagnie de Commerce et Commission SARL v. Parkinson Stove Co. [1953] 2 Lloyd's Rep. 487.

prescribed. Thus, for example, a contract might exist where acceptance was notified by telegram or telex though the offeror had prescribed first class mail; similarly, where use of registered or recorded delivery mail was called for, the delivery to the offeror of an acceptance by ordinary mail would be sufficient. However where communication of acceptance in writing (e.g. letter, telegram, telex) was stipulated, an acceptance notified by telephone would not be binding upon the offeror since this form of communication deprives him of written evidence of the conclusion of the contract.

(c) A further possibility would be a provision to the effect that failure to use a prescribed mode of communication of acceptance should not prevent the formation of a contract, provided that the method actually used fulfilled the objects of the offeror in laying down the mode of communication which he required. For example, where the offer contained a term prescribing acceptance by first class post, the question whether a communication by telegram or by telex bound the offeror would depend upon the object sought to be attained by him in adjecting that term to his offer. If he simply meant that he desired a speedy reply, then an acceptance in any form which reached the offeror more quickly than, or as quickly as, a first class letter would have done, would result in the conclusion of a contract. But if the object of the offeror were not merely to ensure speed but also to obtain a writing under the hand of the offeree (e.g. for evidential purposes), or to avoid the possibility of being confronted with a message garbled in transmission, then an acceptance by telex or telegram, since it does not accomplish these objects, would not be effective (though a written acceptance delivered by personal messenger would be). In order to minimise the problems which could

clearly arise under such a system in determining just what an offeror's objects were in this regard, it might be advisable to go on to provide (i) that the offeror's intention should be ascertained by the court solely from the terms of the offer and the circumstances in which it was made or alternatively (ii) that the onus should be upon the offeror to establish that the form of communication used by the offeree did not fulfil the offeror's objects in prescribing the mode of acceptance.

34. (f) Acceptance implied from conduct. An offer may in terms, or by necessary implication, call for conduct on the part of the offeree as the only indication of acceptance which the offeror is prepared to regard as binding upon him.[1] In such a case a purported notification of acceptance by other means (such as a promise by the offeree to perform the act called for) would not result in the conclusion of a contract. Where the offer is one in which an act is the only valid means of indicating acceptance the question may arise whether it is the commencement of performance of the act, or its completion, which leads to the conclusion of the contract. The distinction may be of great importance in situations such as the following:

(a) A offers to pay £1000 to whoever informs him of the whereabouts of a missing person. B diligently searches for, and finds, the missing person. Before he has an opportunity to communicate the information to A, notification of withdrawal of the offer is received.

(b) A offers to pay £1000 to B if he rescues a hostage being held by a terrorist group in a foreign country. B travels to the foreign country, makes detailed (and

[1] An example is given in para. 27, supra. In English law because of the doctrine of consideration acceptance may be said to be made by conduct, as distinct from being implied from conduct.

expensive) preparations to attempt the resue when A sends a telegram purporting to withdraw the offer.

(c) A offers to buy from B at a fixed price per ton as much of a certain commodity as B delivers to A's warehouse by the end of the week. B's fully laden lorries set out for A's warehouse. Before they arrive A telephones B and tells him that he withdraws his offer.

In situations such as these it is only if A's statement is classified by law as an offer that the question of withdrawal before completed performance can arise. If the statement is regarded as a unilateral promise then it is binding from the time it is made and enforceable by B, provided he fulfils the condition attached to it, irrespective of any purported withdrawal by A. If such statements are regarded as unilateral promises then many, if not most, of the difficulties which we have to examine here would be eliminated.

35. In each of the three examples given in the preceding paragraph, even where the statement is classified as an offer, if B's partial performance (and intention to continue) can be regarded as the required indication or acceptance, then A's purported withdrawal or revocation is too late, since his offer has already matured into a binding contract. On the other hand, if acceptance is not in law effectively made until the performand of the stipulated act is successfully completed, it would seem that, in accordance with the general principle of the revocability of offers until such time as they are validly accepted,[1] A's withdrawal would be accorded legal effect, and

[1]Revocability of offers will be dealt with infra, paras. 53-57.

B, in spite of his partial performance, would have no contractual remedy.[1]

36. If this second possibility represents the existing law of Scotland it might perhaps be thought that it fails adequately to protect the interests of the offeree and makes desirable an alteration in the law. Apart from making offers generally irrevocable for a reasonable period,[2] protection could be accorded to the offeree in a number of different ways:

> (i) It could be provided that in all cases in which the offer does not specifically state that the offeror reserves the right to withdraw it until such time as performance has been successfully concluded, the offer should be regarded as accompanied by an offer to keep it open for a reasonable period, so that embarking upon performance of the required act would be regarded as a valid indication of acceptance of the accompanying offer which contractually binds the offeror to fulfil his principal obligation on completion of performance by the offeree within a time reasonable in all the circumstances. The effect of this would be that in the examples given in paragraph 34 supra A's purported withdrawal would amount to breach of his contract to keep his offer open thus according to B the normal contractual remedies for breach. A further consequence of such a provision would be that the offeree's

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[1] By analogy to the doctrine that a suspensive condition is regarded in law as purified if a party in bad faith prevents its being fulfilled (e.g. Pirie v. Pirie (1873) 11M.941 at 949), it might possibly be argued that a contract would come into being where the offeror in bad faith prevented the offeree from performing the act called for in the offer.

[2] See paras. 56-57, infra.

commencement of performance, because regarded by the law as a sufficient indication of acceptance of A's offer to keep his offer open, would oblige the offeree to fulfil any obligations laid upon him in the offer. This does not, of course, mean that in the example given in paragraph 34(b) supra once B had arrived in the foreign country and made preparations for the rescue attempt he would be in breach of contract if he failed to complete the rescue. This is so because the contract which has been concluded places no obligation upon B to do so.[1] But in cases (which are thought to be rare) in which the offer to keep the offer open does in addition seek to impose obligations upon the offeree, the latter's commencement of performance, if treated by the law as a valid indication of acceptance, would bind the offeree to fulfil those obligations.

(ii) It could be provided that in every offer in which acceptance may be indicated only by the performance of an act the law (unless the offer explicitly states the contrary) should imply a collateral unilateral promise not to withdraw the offer once the offeree has commenced performance until such time as that performance, if executed with reasonable expedition, might reasonably have been expected to be complete. There is considerable doubt in Scots law as to the precise legal nature and consequences of an offer coupled with a promise to keep that offer open.[2] It may be that such a promise renders the offer to which it is attached irrevocable; in which case the offeree would be entitled to ignore a purported revocation, complete his performance, and demand that the offeror

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[1] See para. 3 supra.

[2] This is considered in more detail in paras. 53-57, infra, and in our accompanying Memorandum No. 35, paras. 15-20.

fulfil his part of the bargain. Or, it may be that the offer as such remains revocable, but that the offeror's exercise of his right of revocation puts him in breach of his collateral promise and liable in damages therefor. Again, it may be that the collateral promise to keep the offer open converts the offer into a promise by the offeror to pay or perform (conditional upon performance by the offeree, within the specified time, of the act called for) which he is not at liberty to revoke, and which the offeree can enforce provided he has in fact performed the act upon which the offeror's promised payment or performance is conditional.[1] Although the position of the offeree and the nature and scope of the remedies available to him would vary according to which of these analyses was adopted in a particular case, any one of these three variations would provide the offeree with a substantial measure of protection in a situation of purported revocation of the offeror after performance had been started. However, a solution based upon an implied unilateral promise not to revoke could be subject to one very severe limitation: at present such a promise, being unilateral and gratuitous, may possibly be proveable only by writ or oath.[2] In our accompanying Memorandum No. 39 we consider whether the rules which require that certain types of obligation be proved by writ or oath should continue to operate. Unless and until this restriction on proof is abolished we are of the view that it would not be practicable and could indeed result in considerable injustice, to attempt to safeguard the position of the

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[1] See Memorandum No. 35, para. 19.

[2] Walker, Principles, 2nd edition, p.563-4. Gow, The Mercantile and Industrial Law of Scotland, p.11; cf. Gloag Contract, 2nd ed. p.52 fn. 2 and Bell, Principles, para. 8.

offeree who has commenced performance of the act called for through the instrumentality of an implied promise from the offeror to keep his offer open.

(iii) It could be provided that where under the present law the offeror would be free to withdraw his offer in spite of the offeree's commencement of performance, he should remain free to do so, but incur a non-contractual liability to recompense the offeree for and to the extent of any benefit thereby accruing to the offeror. There may well be situations in which an action for recompense would be competent in present law, as where an offer has been withdrawn after the offeree's partial performance has already benefited the offeror.[1]

(iv) The solution outlined in the preceding sub-paragraph would in some measure protect the interests of the offeree where the offeror had benefited from his partial performance. But even in cases where the offeror has reaped no such benefit from uncompleted performance the offeree may have incurred considerable expense in reliance upon the continued subsistence of the offer.[2] It could therefore be provided that, although an offer the acceptance of which can be indicated only by performance of an act should remain revocable until performance has been completed, the offeror should be bound on revocation to compensate the offeree for and to the extent of such expenditure in time, money or effort as he has reasonably incurred. The offeree would not be entitled to claim the benefit originally offered, but would be protected from finding himself out of pocket through his reliance upon it.

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[1] E.g. where lost property has been found and returned to the offeror in spite of his withdrawal of his offer of reward when he saw the finder approaching.

[2] See examples in para. 34(a),(b) and (c), supra.

In our accompanying Memorandum No. 35 we reach the provisional conclusion that statements of the type here under consideration should normally be classified not as offers but as conditional promises. We would therefore welcome views on whether the problems arising from withdrawal before completion of performance in those relatively few cases in which such statements would still be classified as offers are thought to be of sufficient materiality to warrant legislative intervention. If so (or if our proposal relating to the classification of such statements should not prove acceptable), which one or more of the solutions mentioned in this paragraph should be adopted?

37. (g) Acceptance implied from silence. It is a general rule that acceptance of an offer will not be implied from inaction or failure to respond or silence on the part of the offeree,[1] even when the offer itself states in terms that the offeror will construe silence as acceptance. The law takes the attitude that before a contract can come into existence the offeree's assent must in some way be made evident whether by words or by conduct, and that his silence cannot adequately perform this function.[2] In certain areas this attitude of the common law has been upheld and reinforced by statute.[3] It is thus clear that in normal circumstances[4] in an action by the offeror an offeree will not be held to have contracted where he remains silent upon receipt even of an offer which states

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[1] We are not here concerned with the situation in which the offeree has taken action on the offer but has failed to communicate this to the offeror. This problem will be considered infra, para. 41

[2] Jaffrey v. Boag (1824) 3 S.375; Watson v. O'Reilly (1826) 4 S.475; Felthouse v. Bindley (1862) 11 C.B. (N.S.) 869.

[3] Unsolicited Goods and Services Act 1971, s.1.

[4] In para. 39 infra we consider a number of exceptional cases in which silence may be treated as a sufficient indication of acceptance.

that silence will be treated as indicating acceptance. We are firmly of the view that this is as it should be. It is less clear whether the offeror is similarly entitled to deny the existence of a contract when the offeree claims that he relied upon the term in the offer to the effect that his silence would be construed as acceptance, and that he intended his silence to be so regarded. Where the offeree, although he has not commicated his acceptance to the offeror, has acted upon the offer to his prejudice, it is thought that the offeror would be personally barred from denying the existence of a contract.[1] However, where the offeree has performed no overt act on the faith of the offer, but has simply remained silent and inactive, it is at least open to doubt whether the doctrine of personal bar would come to his assistance by preventing the offeror's taking the point that no valid acceptance had been made.[2] Nevertheless, it is the view of Bell[3] and of Gloag[4] that, even where the offeree has taken no action on the faith of an offer which provides that silence will be regarded as acceptance, a contract will be concluded if the offeree claims that he intended his inaction to be construed as an acceptance by him.

38. We are provisionally of the view that it should be enacted, for the avoidance of doubt, that where it is the offeree who is seeking to establish the formation of a contract through his

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[1] Gatty v. Maclaine 1921 S.C.(H.L.) 1 per Lord Birkenhead at p.7.

[2] In Fairline Shipping Corp. v. Adamson [1975] Q.B. 180 at 189, the argument that an offeror was estopped from denying the existence of a contract in such circumstances was rejected on the ground that the offeree could not establish that he had taken action in reliance upon the offer.

[3] Principles, para. 76.

[4] Contract, 2nd estion, pp. 28,9.

silence on receipt of an offer providing that silence would be regarded as assent to its terms, and where the offeree satisfies the court that he intended his silence to be treated as an acceptance, the offer should be regarded as having been accepted. We appreciate that such a provision may allow an offeree to speculate at the expense of the offeror: thus, on receiving an offer to sell to him a particular commodity at a certain price containing such a term, the offeree could remain silent and, if the commodity rose in price on the market, subsequently allege that he intended his inaction to amount to acceptance, whereas if the price fell allege that it was not so intended. However, we feel that this is a risk that the offeror must bear if he chooses to make his offer in such terms.

39. Although the general rule is that an offeree will not be held bound by mere silence on receipt of an offer, this rule is subject to a number of exceptions. Thus, a custom of trade may be recognised as placing an obligation upon the recipient of an offer expressly to reject it if he does not wish to be bound.[1] Similarly, a previous course of dealing between the parties in which the offeree's silence has been treated by them both as indicating acceptance may result in the offeree's being obliged explicitly to inform the offeror if on a particular occasion he does not wish to contract.[2] Again, where there have been protracted negotiations between the parties about the terms of a proposed contract a court may readily infer that silence in the face of a definite and comprehensive offer is intended by the offeree to signify

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[1] See Sharrat v. Turnbull (1827) 5S.361; Lombe v. Scott (1779) Mor. 5627; Serruys & Co. v. Watt 12 Feb. 1817 F.C.

[2] Gilbert v. Dickson (1803) Hume's Decisions 334; Cole-McIntyre-Norfleet Co. v. Holloway (1919) 214 S.W.87 (Tennessee).

acceptance.[1] And where goods are ordered in the course of business from a trader who holds himself out as dealing in goods of that description, it appears that his silence on receipt of the order will be treated as amounting to acceptance and the onus is on him to refuse the order if he does not intend to comply with it.[2] We are provisionally of the view that these exceptions to the rule that, as against the offeree, a contract will not be held to be concluded by his silence, are desirable for the adequate protection of the offeror and work no injustice to the offeree. We would, however, welcome comments.

40. It is also for consideration whether in a number of other situations an offeree's inaction should not be regarded as sufficiently indicative of acceptance to result in the conclusion of a contract.

> (i) Where, as is increasingly common in consumer transactions, the offer is made on a standard form provided and drawn up by the offeree, and where that form contains a term to the effect that the offeree's silence will amount to acceptance, there seems little merit in holding in an action by the offeror for specific implement or damages, that the offeree's silence did not bind him.[3] As the author of the term in the offer the offeree should not in our view be allowed to avoid liability by relying on a general rule the true purpose of which is to prevent offerees being forced into unwelcome contracts by offerors.

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[1] Pierson v. Balfour 1 Dec. 1812 F.C.; Barry, Ostlere & Shepherd v. Edinburgh Cork Importing Co. 1909 S.C.1113.

[2] Bell, Commentaries, I. 344; Serruys & Co. v. Watt 12 Feb. 1817 F.C.; Hunter v. Levy (1825) 3S.605; Sutton v. Ciceri (1890) 17R. (H.L.)40.

[3] See Alexander Hamilton Institute v. Jones (1924) 234 Ill. App. 444.

(ii) Where the offer, though not made on a form drawn up by the offeree, has in fact been solicited by him, it is arguable (though we think the argument is less strong than in the case outlined in sub-paragraph (i) supra) that if, when the desired offer is made, he no longer wishes to enter into contractual relations with the offeror, it should be incumbent upon him expressly to refuse the offer.

(iii) Where the offeree's inaction when confronted with the offer occurs in a context in which, if the offer had not been accepted, action on his part would have been necessary, then it may be that there should be attributed to that inaction a significance sufficient to convert it into a satisfactory indication of acceptance. For example, A sends his son to a private boarding school. Term officially ends on 30 June. Some time before this the school authorities write to A to inform him that his son wishes to stay at the school for a week beyond this date to participate in an athletic training programme, for which each participant is to be charged £50, and requesting A to signify his assent to this arrangement. A does not respond to this letter, nor does he collect his son from the school on 30 June or make any other arrangements in that regard. If A were to deny that he was contractually bound to pay the £50 it may be that the doctrine of personal bar would operate to prevent the according of effect to A's denial that his inaction amounted to acceptance of the school's offer. However, were it to be held that A's conduct was not sufficient to bring that doctrine into operation, it is thought that the school's sole remedy would be a claim for recompense, the amount thus recoverable being not the £50 fee, but the sum by which A had been enriched through his son's additional week at school. It is for consideration whether, for the avoidance of doubt, it should be provided that in circumstances of the kind outlined, inaction should be treated as indicating acceptance.

We invite comments on whether, in the situations described in the three foregoing sub-paragraphs, inaction or silence on the part of the offeree should be treated as indications of acceptance sufficient to bring a contract into existence.

5. Communication of acceptance.

41. It is a general rule that before a contract will come into being the offeree's acceptance must be communicated to the offeror.[1] Thus, if the offeree writes a letter of acceptance but forgets to post it[2] there will be no contract. Similarly, if the offeree though informing his friends and business associates of his acceptance, does not communicate it to the offeror,[3] no contract will be held to have been concluded. In circumstances such as these if the offeror is told of the offeree's uncommunicated acceptance by a third party it would appear that a contract does come into existence though perhaps only if the third party was authorised by the offeree, actually or ostensibly, to transmit his acceptance.[4] However, in the case of offers in which indication of acceptance in the form of performance of an act is demanded by the offeror or in which acceptance can be implied from the performance of an act,[5] the need for an express communication of acceptance in addition to that performance will normally be held to have been waived by the offeror.[6] Thus, in the example suggested in paragraph 27

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[1] Gloag, Contract, 2nd edition, pp. 26, 28; Walker, Principles, 2nd edition, p. 533, 34.

[2] Kennedy v. Thomassen [1929] 1 Ch. 426; Gloag, Contract 2nd ed. pp. 26 - 28.

[3] Hebb's Case (1867) L.R. 4 Eq. 9; Gloag op. cit., p. 28.

[4] Chapman v. Sulphite Pulp Co. (1892) 19 R. 837; Nelson v. Fraser (1906) 14 S.L.T. 513; Powell v. Lee (1908) 99 L.T. 284.

[5] See paras. 34 - 36, supra.

[6] Carlill v. Carbolic Smoke Ball Co. [1893] 1 Q.B. 256; Hunter v. General Accident Corporation 1909 S.C. 344, aff'd. 1909 S.C. (H.L.) 30.

supra, a binding contract would come into existence as soon as the undesirable suitor landed on Libyan soil and without the necessity of communication of his arrival to the father. And if an offer to sell goods were made simply by sending them to the offeree, the contract of sale would be concluded by the latter's using the goods even though no formal notification of his acceptance were sent to the supplier.[1] Similarly in those exceptional circumstances in which an offeree's silence or inaction is treated as sufficiently indicative of acceptance[2] it seems clear that no form of communication from offeree is called for, the latter being regarded as having waived not only the necessity for an external manifestation of assent from the offeree, but also the transmission to him of any notification of that assent.

42. An area in which some doubt exists regarding the need for communication of acceptance is in relation to an offer to stand cautioner made to a person contemplating the advance of money or the supply of goods to a third party. In such a case does a contract of cautionry come into existence when the offeree, in reliance upon the offer, makes the advance or supplies the goods, or alternatively not unless and until the offeree notifies the offeror that he accepts the offer and intends to make the advance or supply the goods (or in reliance thereon has already done so)? The attitude of the courts appears to be that the answer to this question depends in each case upon

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[1] Gloag, Contract, 2nd edition, p.28; Weatherby v. Banham (1832) 5 C. & P. 228. In a situation to which the Unsolicited Goods and Services Act 1971, s. 1 applied, the recipient of goods would now be entitled to regard them as an unconditional gift to him.

[2] See paras. 37 - 40 supra.

the true construction of the offer, it being held in the majority of cases that communication of acceptance to the offeror is not required.[1] It is for consideration whether the law might beneficially be clarified.

43. One possibility would be to provide in the case of an offer to stand cautioner that there should be introduced into the law a rebuttable presumption to the effect that communication to the offeror of the offeree's acceptance is necessary for the conclusion of the contract of cautionry. If the putative cautioner promised to guarantee any advances made to the third party, then (provided the promise was in the form required by the Mercantile Law Amendment (Scotland) Act 1856, s. 6) he would be under an immediate obligation to the creditor and notification by the latter would be irrelevant. And if an offer to stand cautioner provided that making the advance or supplying the goods would be a sufficient indication of acceptance, without notification, effect would be given to this. But where the offer does not so provide it is arguable that the offeror should be entitled to expect that acceptance be communicated to him, particularly since the making of advances or the supplying of goods to a third party is a matter which might easily, in the normal course of events, not come to his attention for some considerable time (or at all), with the result that the offeror would remain in a state of uncertainty concerning his liability. Alternatively, it could be provided that an offer to stand cautioner e.g. if a loan is made, if complying with the requirements of form laid down in respect of cautionry[2] should be treated in law without more as a completed cautionary obligation which the creditor may found

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[1] Tweedie v. McIntyre (1823) 2 S. 361; Thomson v. Dudgeon (1851) 13 D. 1029; Veitch v. Murray (1864) 2 M. 1098; Wallace v. Gibson (1895) 22 R. (H.L.) 56. Contra: Allan v. Colzier (1664) Mor. 9428; Thomson v. Marquess of Breadalbane (1854) 16 D. 943. We appreciate that the problem here under discussion is unlikely to arise in a business of commerial context, where e.g. banks would refuse to rely upon a mere offer to stand cautioner and would insist upon the use of their own standard cautionary contract.

[2] See our accompanying Memorandum No. 39, para. 22.

upon. In support of this solution it may be argued that where an offeror goes as far as proposing (in writing) that he will stand cautioner e.g. if a loan is made, he encourages the creditor to act on the faith of his proposal and should not be allowed to escape liability, merely because no formal acceptance was communicated to him, when the act which he envisaged and solicited is performed. Such a solution would have the further merit of rendering it unnecessary to attempt to distinguish between promises to stand cautioner and mere offers to do so, a task which under our first suggested solution might often prove to be one of considerable difficulty. Comments are invited.

44. What amounts to communication. In those cases in which communication of acceptance is necessary for the conclusion of a contract, the general rule is that that acceptance is validly communicated only when it is actually brought to the attention of the offeror. The contract consequently comes into existence at the place where and at the time when the offeror becomes aware of the offeree's notification to him. This is perhaps most clearly expressed in the judgment of Denning L.J. in Entores Ltd. v. Miles Far East Corporation[1]:

> "Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait till the aircraft is gone and then shout back his acceptance so that I can hear what he says. Not until I have his answer am I bound ....
>
> Now take a case where two people make a contract by telephone. Suppose, for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes "dead" so that I do not

[1] [1955] 2 Q.B. 327 at p. 332. See also per Birkett L.J. at p. 335 and Parker L.J. at p. 337.

> hear his words of acceptance. There is no contract at that moment.... If he wishes to make a contract, he must therefore get through again so as to make sure that I heard. Suppose next, that the line does not go dead, but it is nevertheless so indistinct that I do not catch what he says and I ask him to repeat it. He then repeats it and I hear his acceptance. The contract is made, not on the first time when I do not hear, but only the second time when I do hear. If he does not repeat it, there is no contract. The contract is only complete when I have his answer accepting the offer.
>
> Lastly, take the Telex. Suppose a clerk in a London office taps out on the teleprinter an offer which is immediately recorded on a teleprinter in a Manchester office, and a clerk at that end taps out an acceptance. If the line goes dead in the middle of the sentence of acceptance, the teleprinter motor will stop. There is then obviously no contract. The clerk at Manchester must get through again and send his complete sentence. But it may happen that the line does not go dead, yet the message does not get through to London. Thus the clerk at Manchester may tap out his message of acceptance and it will not be recorded in London because the ink at the London ends fails, or something of that kind. In that case, the Manchester clerk will not know of the failure but the London clerk will know of it and will immediately send back a message "not receiving". Then, when the fault is rectified, the Manchester clerk will repeat his message. Only then is there a contract. If he does not repeat it, there is no contract. It is not until his message is received that the contract is complete."

45. To this general rule an exception is recognised in the case of contracts concluded by post or by telegram. Where the offer expressly states that these shall be appropriate methods of communicating acceptance, or where their appropriateness can reasonably be implied from the circumstances surrounding the parties' negotiations,[1] and

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[1] For example, the parties' places of business are some distance apart, and the original offer was made by post.

where the offeror has not stipulated that the acceptance must actually reach him, then communication of acceptance is held to be validly made, and the contract to be complete, as soon as the letter of acceptance is posted, or the telegram of acceptance is handed in.[1] From this proposition Scots law has been prepared to deduce three consequences.

(i) The place of conclusion of the contract (which may be of relevance as regards e.g. jurisdiction and choice of law) is the place where the letter of acceptance was posted.[2]

(ii) Where an express time limit for acceptance has been attached to the offer, acceptance is timeous if posted before the expiry date even though not reaching the offeror until after the date specified.[3] Similarly, where no express time limit has been imposed, and the offer therefore remains open for a reasonable time,[4] it is sufficient if the acceptance is posted within a period that in all the circumstances can be regarded as reasonable.[5]

(iii) A purported revocation of the offer comes too late to prevent the conclusion of a contract if it

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[1]Bell, Commentaries, I.344; Dunlop v. Higgins (1847) 9 D. 1407; aff'd (1848) 6 Bell's App. 195; Thomson v. James (1855) 18 D.1; Jacobsen v. Underwood (1894) 21 R. 654. It may also be noted that under s. 69(7) of the Consumer Credit Act 1974 it is provided that a notice of cancellation of a regulated agreement sent by a debtor or hirer during the cooling-off period is deemed to be served on the creditor or owner at the time of posting whether or not it is actually received by him.

[2]See Anton, Private International Law, pp. 185-6; 198; 203-4; Dunlop v. Higgins (1848) 6 Bell's App. 195; Valery v. Scott (1876) 3 R. 965.

[3]Jacobsen v. Underwood (1894) 21 R. 654.

[4]See infra, para. 58.

[5]Dunlop v. Higgins (1848) 6 Bell's App. 195.

reaches the offeree after he has posted his acceptance, even though it may have been dispatched by the offeror before the posting of the offeree's letter.

46. However, certain consequences which might seem equally to flow logically from the general proposition appear not to have been accepted in practice by Scottish courts.

(i) There are strong dicta to the effect that if an acceptance is posted, but never in fact arrives, no contract comes into existence.[1]

(ii) It appears that no contract is concluded if, though an acceptance has already been posted, a rejection which is dispatched later reaches the offeror prior to or along with the acceptance. This is the interpretation placed by Gloag[2] and, following him, by most English text writers, on the case of Countess of Dunmore v. Alexander.[3] It is, however, possible to argue that in this case the court took the view that the communication which they held to have been effectively withdrawn was not an acceptance but an offer or, alternatively, a mandate to the addressee to make an offer.

(iii) There is no United Kingdom authority on the question whether, and if so when, a contract comes into being if the offeree dispatches a rejection

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[1] Mason v. Benhar Coal Co. (1882) 9 R.883 at 890; J M Smith Ltd v. Colquhoun's Tr. (1901) 3F. 981; Aliter in England: Household Fire Insurance Co. v. Grant (1879) 4 Ex. D. 216.

[2] Contract, 2nd ed., p. 38.

[3] (1830) 9 S. 190.

of the offer and then posts an acceptance, both of which subsequently reach the offeror. The American Law Institute's Restatement of Contracts[1] and Restatement (Second) of Contracts[2] take the view that a contract is formed if, but only if, the acceptance reaches the offeror first: neither the rejection nor the acceptance is given effect on dispatch. In England, Winfield,[3] Anson[4] and Treitel[5] are of the same opinion.

47. It is for consideration whether the exception in cases of postal and telegraphic communication to the general rule that the offeror must actually receive the acceptance should be retained in our law. Its most important function[6] seems to be to protect the offeree from being prejudiced by the offeror's revocation of his offer after an acceptance has been dispatched. We are of the view that such protection is desirable. It is arguable, however, that it could be accorded in a less circuitous fashion by a provision to the effect that an offer once made remains binding upon the offeror and cannot be revoked for a reasonable time, or by a provision to the effect that, although generally revocable, an offer should become incapable of revocation after dispatch of the acceptance. These possibilities are discussed further later in this Memorandum.[7] With regard to the further consequence of the

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[1]Para. 39.

[2]Para. 39.

[3]"Some Aspects of Offer and Acceptance" (1939) 55 L.Q.R. 499 at 513.

[4]Principles of the English Law of Contract 23rd edition, p. 64.

[5]Law of Contract, 4th edition, p. 34.

[6]See para. 45(iii), supra.

[7]Paras. 53-57, infra.

"posting rule" that at present a contract is made at the place where the acceptance is dispatched,[1] it is thought that to propose a change in the law which would incidentally have the effect of altering this is a matter of less importance today than it would once have been since reference in international private law to the lex loci contractus has largely been superseded by reference to the proper law of the contract.[2] The other major change in the respective positions of the parties which abolition of the "posting rule" would entail is that the offeree's acceptance to be effective would have to reach the offeror before expiry of any time limit attached to the offer, or where no express limit was attached, before expiry of a reasonable time.[3] The view can be taken that such a change would be desirable. It is arguably unduly prejudicial to the interests of offerors that an offer made on Monday and expressed to be open for acceptance until 5 p.m. on Friday should be validly accepted by a letter posted at 4.30 p.m. on Friday which will not reach the offeror until the following Monday (and if second class post has been used, probably not until the following Tuesday). Moreover, the present rule allows the offeree to speculate at the expense of the offeror: the former may delay posting his acceptance of e.g. an offer to sell a certain commodity at a certain price until a few minutes before the offer lapses in order to take advantage of any rise or fall in the market price of that commodity. This possibility would be minimized if the offeree's acceptance had to be received by the offeror before the time limit had expired.

48. If favour of the "posting rule" it may be argued that it enables an offeree who, by posting an acceptance, has done

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[1]See para. 45(i) supra.

[2]Anton, Private International Law, pp. 185-7.

[3]See para. 45(ii) supra.

everything in his power to conclude the contract to act safely in reliance thereon. It is though that, in Scotland at least, such reliance might prove to be misplaced if the offeree's letter never in fact arrived.[1] Moreover, it may be objected that the law should be equally solicitous of the interests of the offeror who, having received no acceptance, may himself have acted upon the belief that no contract had come into existence. In a situation in which there must always be a time-lag between the acceptance leaving the offeree and reaching the offeror and in which consequently each may have, and act upon, contrary beliefs as to the willingness of the other to contract, it is possible to take the view that the law should not discriminate against the offeror. After a reasonable time has elapsed since making the offer during which no reply has been received, it is arguable that the offeror should not be bound by an acceptance which has been posted but has not yet been delivered. The offeror is in ignorance as to the actings of the offeree; the latter has full knowledge of what the position is. He knows that his acceptance has been posted; he knows (or ought to know) that mail is not infrequently delayed. If he chooses nevertheless to act on the assumption that his letter will arrive expeditiously the risk that his confidence may be misplaced should be borne by him. He can, if he wishes more complete security, inform the offeror (e.g. by telephone) that his acceptance is on the way.

49. In favour of the rule that a contract should not be concluded until receipt of the acceptance by the offeror it may be said, first, that it is a simple and comprehensible rule likely to be welcomed by the layman. It is thought that a layman would be somewhat surprised to learn that (reverting

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[1] Mason v. Benhar Coal Co. (1882) 9 R 883 at 890 per Lord Shand; J M Smith Ltd v. Colquhoun's Tr. (1901) 3F.981.

to the example given in paragraph 47, supra) it is the present law that an offer stated to be open for acceptance until 5 p.m. on Friday can be validly accepted by a letter arriving at 10 o'clock on the following Monday morning. Secondly, a change such as that suggested would render uniform the time of conclusion of the contract in all cases of postal or telegraphic acceptance. Under the existing law such an acceptance will not take effect upon dispatch if the offeror has provided that the offeree's reply must actually reach him;[1] and it is by no means clear what forms of words used in an offer will be interpreted as having this effect.[2] Similarly, it would appear that an acceptance by post to be valid must actually reach the offeror where it has been misaddressed, at least where this is ascribable to the fault of the offeree.[3] Thirdly, a rule delaying the conclusion of the contract until receipt of the postal acceptance has the advantage of producing a uniform treatment for all modes of acceptance, whether the parties are in instantaneous communication or not. Such uniformity may be particularly valuable in disposing in advance of all problems as to the category into which will fall any new modes of communication which the advance of technology is likely to produce. At present such a problem must be solved by deciding whether the new type of communication is analagous to face to face conversation or to postal correspondence.[4] Under the scheme proposed every acceptance, however communicated, would take effect when and where received by the offeror. Fourthly, such a scheme would

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[1] Bell, Commentaries, I.344.

[2] Gloag, Contract, 2nd edition, pp. 34, 5.

[3] Getreide Import Gesellschaft v. Contimar [1953] 1 W.L.R. 207 and 793; Treitel, Law of Contract, 4th edition, pp. 20, 21.

[4] Entores v. Miles Far East Corp. [1955] 2 Q.B. 327, concerning telex.

follow the provisions of the Uniform Law on the Formation of Contracts for the International Sale of Goods,[1] and would bring Scots law into consonance with the provisions of a number of European legal systems on this matter.[2]

50. We have formed no concluded view on the question whether, in the case of postal or telegraphic acceptances, a change in the law should be made to the effect that a contract would be concluded only upon receipt of the communication by the offeror. Comments are invited. Should such a change be thought desirable we would make the consequential proposal that the meaning to be attributed to "receipt" should be the same in this context, and in those cases where actual receipt is required by the existing law, as in relation to communication of offers.[3] We would also welcome views on whether it should be provided that a communication which the offeree could prove had been dispatched should be presumed to have been received by the offeror in the normal course of transmission. This would have the effect that once the offeree established that his letter of acceptance had been posted or his telegram of acceptance had been handed in, the onus of establishing that it had not in fact reached him would be placed on the offeror. Such a provision would seem to be desirable for the protection of the offeree, who might find it relatively easy to prove e.g. that his letter had been posted but have no means of establishing that it had been delivered to the addressee.

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[1] Uniform Laws on International Sales Act 1967, Schedule 2, arts. 6(1) and 12(1).

[2] E.g. Austria: Allgemeines Bürgerliches Gesetzbuch, art. 862a. Germany: Bürgerliches Gesetzbuch, art. 130, 1; 1902 R.G.Z. 50, 191; 1903 R.G.Z. 56, 262; Italy: Codice Civile, arts. 1326 and 1335.

[3] See para. 22, supra.

Where the offeror denied receipt of the communication, proof by him of its non-arrival (as by leading evidence from his clerical staff and by producing his records of incoming mail) would seem more appropriate than requiring the offeree to prove actual receipt. We invite views on these matters.

51. Late acceptance. An acceptance which is not made within the time limit stipulated in the offer or where no time limit is mentioned within a reasonable time, is not a valid acceptance. It is in effect a new offer which the addressee may accept or reject or ignore.[1] It is possible that even if the offeror were prepared to treat the late acceptance as validly concluding a contract the offeree, having in the meantime had second thoughts about the matter, might be able to escape from his obligations by claiming that his acceptance was in fact an offer, which the original offeror had not accepted, or of which the offeror's acceptance had not been duly communicated to the offeree. In order to obviate this possibility we provisionally propose for the avoidance of doubt that where an acceptance reaches the offeror but is late in being communicated to him, it may nevertheless be treated by the latter as a valid acceptance. The Uniform Law on the Formation of Contracts for the International Sale of Goods adopts this solution,[2] but requires the offeror, if he wishes a contract to be concluded, promptly to inform the acceptor of this either orally or by dispatch of a notice. It could be said that to make the offeror's right subject to such a condition of notification would in practice result in depriving the offeror in most cases of the advantage sought to be conferred upon him. We would welcome comments on this matter. Article 9(2) of the Uniform Law goes on to provide

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[1] Wylie & Lochhead v. McElroy (1873) 1 R.41; Gloag, Contract 2nd edition, p. 37.

[2] Uniform Laws on International Sales Act 1967, Schedule 2 art. 9(1).

that where an acceptance arrives late but the offeror is aware that if the system of transmission had operated normally, it would have reached him in due time, he shall be bound by it unless he promptly informs the acceptor either orally or by dispatch of a notice that he considers his offer as having lapsed. A provision in these terms would place an obligation of notification upon the offeror only where the lateness of the acceptance is, from the circumstances of the case, clearly due not to tardiness on the part of the offeree but to a delay in the course of transmission. It is our provisional opinion that this is a reasonable counterpart exigible from offerors in return for the benefit proposed to be conferred upon them by allowing them, at their option, to treat late acceptances as valid or not. We would welcome views on this proposal.

6. Termination of offers.

52. In order that an acceptance will have the effect of concluding a contract it is necessary that the offer to which it is a response should still be in force and open for acceptance. If the offer no longer exists at the time when the acceptance becomes operative[1] no contract can come into being. In the paragraphs which follow we consider the ways in which an offer, once made, may cease to be effective. We do so under the headings (a) withdrawal and revocation; (b) lapse of time; (c) occurrence of condition; (d) material change of circumstances; (e) death; (f) insanity; (g) bankruptcy; and (h) rejection.

53. (a) Withdrawal and revocation. An offer if not declared to be irrevocable or stipulated to be open for a definite

[1] See paras. 41-50, supra.

period of time,[1] may be withdrawn by intimation to the offeree at any time before acceptance.[2] In cases where the parties are in postal or telegraphic communication the offeror's notification of withdrawal must to be effective reach the offeree before the latter has posted his letter of acceptance, or handed in his telegram.[3] We have already sought views[4] on whether, where an acceptance is made by letter or telegram, a contract should come into being only at such time as the offeree's communication actually reaches the offeror. If such a change in the law were made it would, standing alone, substantially weaken the position of the offeree by enabling the offeror validly to revoke his offer even after an acceptance had been posted provided only that his notification of revocation reached the offeree before the latter's acceptance reached him. We are of the view, therefore, that a change in the "posting rule" (if generally regarded as desirable) should be made only if it is possible to protect the offeree in some other way from the effect of precipitate withdrawals of offers by offerors. Such protection could be accorded in two ways.

54. First, it could be provided that a revocation received by the offeree after dispatch of his acceptance even though arriving before the acceptance had been received by the offeror, should be ineffective to prevent the conclusion of a contract. No contract would come into being until the acceptance was delivered, but in the period between dispatch and delivery the offer would be irrevocable. Dispatch of a letter of

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[1] Offers coupled with a promise to keep them open for a certain time are considered in detail in Memorandum No. 35.

[2] Gloag, Contract, 2nd edition, p. 37; Walker, Principles, 2nd edition, p. 530; Byrne v. Van Tienhoven (1880) 5 C.P.D. 344; Henthorn v. Fraser [1892] 2 Ch. 27.

[3] Thomson v. James (1855) 18 D.1; Gloag, loc. cit.

[4] Para. 50, supra.

acceptance would not, as at present, result in the conclusion of the contract, but would have the effect of converting the offer from a revocable into an irrevocable one, which would mature into a contract provided the acceptance was received before expiry of any time limit adjected to the offer or, in the absence of an explicit time limit, before expiry of a reasonable period. The offeror would retain his present freedom to withdraw his offer at any time provided the offeree had not in the meantime dispatched his acceptance. Such a solution would have the advantage of familiarity: the same conduct on the part of offeror and offeree which results in the conclusion of a contract under the existing law would do so under the new system. It would have the disadvantage of retaining as a relevant factor in the formation of contracts the time of dispatch of an acceptance. Although no longer determinative of the time and place of formation of the contract, the time of dispatch might still require often to be investigated in order to fix the terminus a quo of the offer's irrevocability. It may be argued that in the interest of simplicity it would be preferable that either the time of dispatch or the time of receipt but not both be looked to as relevant factors in the conclusion of contracts. Furthermore, a rule to the effect that revocation of an offer is ineffective from the moment of despatch of an acceptance may be regarded as entailing the undesirable consequence of of encouraging or at least permitting an offeror to regard himself as free to act upon his revocation in the belief that he is thereby released from any actual or potential obligation to the offeree. The offeror has no way of knowing that the offeree's acceptance has been posted and that his revocation is therefore inoperative: until such time as the acceptance actually reaches him the offeror may well believe that his offer has been effectively withdrawn and may act on that

belief to his detriment. In other words, to allow offers to remain in principle revocable, but to bar revocation on the occurrence of an event outside the knowledge and control of the offeror, may unduly prejudice the interests of the latter, or at least open the door to such prejudice.

55. In the event of the solution outlined in the preceding paragraph finding favour with those whom we consult, we would welcome views on the meaning to be attributed to "receipt" in this context, it being only an acceptance despatched before receipt of the offeror's notice of revocation that would have the effect of rendering the offer irrevocable. Should "receipt" be defined here in the same way as already provisionally proposed in relation to offers[1] and acceptances;[2] or should it instead be required in this case that the notice of revocation come to the attention of the offeree? The latter alternative would have the consequence that an acceptance despatched after delivery of the notice of revocation to the offeree's address but before the offeree became aware of its contents, would deprive that revocation of effect. It might be argued that such a result is unduly prejudicial to the offeror: his rights become dependent, in part at least, upon the efficiency of the offeree or of the offeree's office organisation in that the longer the time it takes for a letter delivered to his address to come to his attention the longer the offeror's revocation remains ineffective and capable of being defeated by the sending of an acceptance. On the other hand, it could be said that, an offer having once been made to him, the offeree may be expected to rely on its remaining open for the period stated in it (or for a reasonable period). Consequently an offeror who seeks to defeat the reasonable expectations of the

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[1] See para. 22, supra.

[2] See para. 50, supra.

offeree by revoking his offer should be required in order to achieve this end to succeed in bringing his revocation to the attention of the offeree. Comments are invited.

56. The second possible means of protecting the offeree from revocation by the offeror would be to provide that an offer, once made, should not only as at present be capable of acceptance only within a reasonable time, but should also be incapable of revocation within that same reasonable time.[1] The offeror, having elected to make an offer, would be barred by law from revoking it until a reasonable time had elapsed,[2] unless in the offer he had reserved the right to revoke at any time before acceptance. In the absence of such a reservation an acceptance reaching him within a reasonable time would result in the conclusion of a contract in spite of any earlier purported revocation. Such a solution has the advantage of making it clear to the offeror at the outset that if he puts it out of his power to act in accordance with the terms of his offer (e.g. by selling to a third party the article offered to the offeree) before a reasonable period had expired without his receiving an acceptance, he does so at his own peril. The offeror's position is weakened by depriving him of the power which he currently enjoys to revoke his offer at any time before dispatch of acceptance;[3] but in return therefor he will have the knowledge that he cannot be contractually bound until he is aware of the fact by receiving an acceptance - an

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[1] Cf. The City Code on Take-overs and Mergers (April 1976 revised version), para. 22, which provides that a take-over offer must be kept open for at least 21 days after it has been posted to shareholders in the target company.

[2] Cf. Bell, Principles, 4th ed. (1839) para. 73, where the view is expressed that revocation in such circumstances might give rise to a remedy in reparation.

[3] In situations in which it might be thought desirable that there should be a "cooling-off" period in which an offeror should be entitled to revoke an offer (e.g. some consumer transactions) specific statutory provisions to this effect could be enacted.

acceptance which, moreover, will not bind him unless he receives it within a reasonable time. He is freed from the possibility which exists under the present law, and which would remain under the solution outlined in the two preceding paragraphs, of being bound without his knowledge and in a situation in which he might very well act to his detriment in the mistaken belief that because of his revocation his offer was no longer valid and that he was therefore free to do so. The suggested new system would deprive the offeror of his power to revoke, but would protect him from being subjected to contractual obligations without his knowledge. At the very least it would remove the undesirable period of uncertainty which must at present exist after a revocation has been posted during which the offeror cannot know whether a contract has been concluded or not. This period of uncertainty might well, in modern postal conditions, extend over a period of some days even where offeror and offeree are both in Scotland.

57. Against the solution outlined in the preceding paragraph it may be argued that it in fact creates more uncertainty than it dispels by making conclusion of a contract in every case depend upon receipt of the acceptance by the offeror "within a reasonable time". The onus is placed upon the offeror to decide in the first instance whether the acceptance is timeous, in the knowledge that if he decides to treat it as late and a court subsequently disagrees he will be held in breach of contract. Thus uncertainty will always prevail in every case in which an offeror declines to regard an acceptance as binding upon him. In reply it may be said that even under the existing rules an offeror may frequently be confronted with the same type of difficult decision entailing for him the same serious consequences if a court later takes a different view of the timeousness of an acceptance. An offer must, at present, be accepted within a reasonable time; it is merely

the tempus inspiciendum which would be different - the time of posting under the old system, the time of receipt under the new. The only situation in which the offeror would require to come to such a decision under the new system but would be spared it in the old seems to be where the offeree has delivered an acceptance in spite of having received an earlier purported revocation. The rule that an offer, once made, remains open and incapable of revocation for a reasonable period is accepted in a number of European legal systems.[1] The existence of such a rule does not preclude the withdrawal of an offer by means of a communication reaching the offeree prior to, or along with, the original offer; it is only once the offer has been received that the offeror's power of revocation is curtailed. We would welcome views on whether either of the solutions mentioned in this and the three foregoing paragraphs ought to be adopted in Scots law, and, if so, which one of them.

58. (b) Lapse of time. Where a time limit for acceptance is attached to an offer, the offer lapses on the expiry of the time specified; and where there is no such time limit, it lapses on the expiry of a reasonable time.[2] At present, in contracts concluded by post or by telegram, it is generally sufficient that the offeree's communication be dispatched before the time has elapsed. If the law were to be altered to the effect that even in these circumstances an acceptance should not take effect until actually received by the offeror,[3] the

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[1] E.g. Austria: Allgemeines bürgerliches Gesetzbuch, art. 862; Germany: Burgerliches Gesetzbuch, art. 145; Switzerland: Obligationenrecht, arts. 3, 5. In France, the opinion of the majority of writers is that unless it states the contrary an offer is revocable at any time by the offeror; see e.g. Aubry et Rau, Cours de droit civil français, 6th edition, para. 343; Planiol et Ripert, Traité pratique de droit civil français, 2nd edition, vol. 6, para. 131; Mazeaud Leçons de droit civil, 2nd edition, para. 135. However, the French courts with increasing frequency recognise in an offer a "requirement of temporary irrevocability"; see e.g. D. 1913, 2.1, note Valéry; D. 1959.33; Litvinoff, (1967) 28 Louisiana L.R. 1 at 24 - 29.

[2] Glasgow Steam Shipping Co. v. Watson (1873) 1 R.189; Wylie & Lochhead v. McElroy (1873) 1 R. 41; Hall-Maxwell v. Gill (1901) 9 S.L.T. 222; Gloag, Contract 2nd edition, p. 36.

[3] See para. 50, supra.

offeree's communication would have to reach the offeror before expiry of the time limit for which the offer was open. We have, however, also provisionally proposed[1] that where the offeror is aware that a late acceptance would have reached him in due time if the system of transmission had operated normally, a contract should come into existence unless the offeror promptly notifies the acceptor that he considers his offer to have lapsed. And if the suggestion[2] were implemented that an offer, once made, should subsist for a reasonable period, an offer would be incapable of revocation until it lapsed on expiry of a reasonable time after its communication to the offeree. Thus the same test would in the normal case determine both the period of the offer's non-revocability and the period at the end of which the offer ceased to be open for acceptance.

59. What is a reasonable time depends largely on the nature of the subject matter of the offer, and the means used to communicate it. In relation to offers to buy or sell commodities which are subject to rapid fluctuations in market price the time for which the offer will be regarded as being open for acceptance may be very short indeed.[3] Where the element of fluctuation of price is not present the offer will generally be regarded as remaining open for a longer period, the precise duration of which in case of dispute is a matter for the court to decide in the light of the whole surrounding

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[1] Para. 51, supra.

[2] See para. 56, supra.

[3] Dunlop v. Higgins (1847) 9 D. 1407, (1848) 6 Bell's App. 195; Wylie & Lochhead v. McElroy (1873) 1 R.41.

circumstances. The prior dealings of the parties and the practice of others in the same trade or business are factors to be taken into account.[1] Also relevant is the mode of communication used by the offeror.[2] Use of a telegram imports into the negotiations more urgency than use of a first class letter; use of the first class post more urgency than use of the second class service. Where the parties are in each other's presence or are in instantaneous communication as by telephone or telex, it may be clear from their words and actings that any offer made will lapse if not accepted immediately. We are of the view that it would not be desirable to attempt by statutory provision to inject greater certainty into the concept of reasonable time. Such is the diversity of contractual dealings that it seems clear that a fixed period cannot be laid down; and any attempt to frame general guidelines or to list relevant factors to assist in the determination of the question when an offer is deemed to lapse would create more confusion and opportunities for dispute than it alleviated. A measure of uncertainty, ultimately resolvable in case of dispute only by resort to the court which will consider ex post facto the whole circumstances surrounding the parties, is the price which must be paid for the flexibility which is necessary for the proper functioning of the law of formation of contracts, granted the multifarious and diverse negotiating situations which its rules must embrace. It is our view that if an offeror desires a greater measure of certainty than this as to how long his offer will remain open for acceptance, he is free to attach a specific time limit to it. We would, however, welcome comments on this matter.

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[1] Gloag, Contract, 2nd edition, p.36.

[2] See e.g. Treitel, Law of Contract, 4th edition, p. 35.

60. (c) Occurrence of condition. There may be adjected to an offer an express or implied condition that it shall cease to be open for acceptance on the occurrence or non-occurrence of a specified event. It seems clear on principle, though there is little authority on the point,[1] that the offer will be treated by Scots law as having lapsed if the condition is fulfilled. Thus, an offer to buy or to hire a certain article may be subject to the implied condition that if the article is damaged before the offer is accepted the offer shall lapse. In sale by auction it is currently the law[2] that a bid constitutes an offer, but one which can be accepted only if no higher bid is submitted by another bidder: a higher bid having been received (even though later withdrawn) the first bid cannot be accepted since the resolutive condition to which it was subject has been fulfilled. In company take-overs an offer may be made by the bidding company to shareholders in the target company to acquire their shares subject to the condition that the offer will not become or be declared unconditional as to acceptances unless within 60 days of the offer the bidding company has acquired or agreed to acquire shares carrying at least 50 per cent of the voting rights attributable to the equity share capital.[3] Where a house-owner, wishing to sell his house, places it in the hands of several estate agents this involves an offer to pay commission to whichever agent finds a buyer. But the natural understanding is that the offer thus made to each estate agent is conditional upon his being the first to find a buyer: the offer to each lapses upon the earlier introduction

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[1] See Sommerville v. N.C.B. 1963 S.C. 666; Financings Ltd. v. Stimson [1962] 3 All E.R. 386.

[2] See para. 16, supra.

[3] City Code on Take-overs and Mergers (April 1976 revised version), paras. 21 and 22. Acceptance by holders of 90 per cent in value of the shares is necessary before the shares of the dissenting minority can be compulsorily acquire under the provisions of s. 209 of the Companies Act 1948.

of a buyer by one of the others. We are not aware of any problems or difficulties to which offers subject to such resolutive conditions have given rise and we consequently make no proposals for the alteration of the law on this subject.

61. (d) Material change of circumstances.[1] In Macrae v. Edinburgh Street Tramways[2]. Lord President Inglis said:

> "It may, in my opinion, as a general rule in the law of offer and acceptance, be stated that, when an offer is made without a limit of time being stated within which it must be accepted, it may become inoperative by reason of any important change of circumstances, without any formal withdrawal of the offer being made. It may have been made in such circumstances as to be a reasonable offer as between both parties, but after it is made circumstances may so alter as to make it utterly unsuitable and absurd, and I do not suppose that it can be disputed that when the change of circumstances is so important the offer would not remain binding."

The offer in question in this case was a tender made in the course of litigation, and the "important change of circumstances" which was held to bar acceptance of it was the delivery to the parties of his notes of intended award by the judicial referee to whom the action had been, by consent, referred. All of the reported cases in which a material change of circumstances has been held to result in an offer's becoming inoperative are cases of tenders made prior to or in the course of judicial proceedings.[3] On the other hand, the rule set out in Lord President Inglis's dictum is expressly stated to be of general application in the law of offer and acceptance, and

[1] See also our accompanying Memorandum No. 37.

[2] (1885) 13 R.265, 269.

[3] Heron v. Caledonian Rly. Co., (1867) 5 M. 935; Bright v. Low 1940 S.C. 280; Sommervile v. N.C.B. 1963 S.C. 666; Lawrence v. Knight 1972 S.C.26.

in none of the other cases on lapsed tenders is this doubted or questioned. Since a change of circumstances has the effect of causing the offer to fall only if it is so material as to render the offer in the altered conditions "utterly unsuitable and absurd", we are of the view that the uncertainty that such a provision may be said to import into the law of formation of contract is not intolerable. Furthermore, our provisional opinion is that there is no sufficient reason why this result should be reached only when the offer is made "without a limit of time being stated within which it must be accepted." It might, however, serve to clarify the law if it were to be provided by statute that a material change of circumstances should lead to the termination of an offer only where, if the contract had already been concluded, that change of circumstances would have resulted in its discharge by frustration. The effect of this would be that if, before acceptance of the offer, there occurred a change of circumstances which would render a contract couched in terms of the offer a thing radically different from what it would have been had no such change of circumstances happened,[1] or which renders conclusion or performance of such a contract either illegal or impossible,[2] then the offer would automatically lapse. Among the events which can be envisaged as likely, in appropriate cases, to have this consequence may be mentioned destruction (or confiscation or requisition by the government) of an object

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[1] Cf. Davis Contractors v. Fareham U.D.C. [1956] A.C. 696 per Lord Radcliffe at p. 729: " ... frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being peformed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."

[2] On the discharge by frustration of a conluded contract through supervening illegality or impossibility, see Fraser v. Denny, Mott & Dickson 1944 S.C. (H.L.) 35.

necessary, if the contract were concluded, for its performance;[1] in contracts involving delectus personae the serious illness, imprisonment, conscription or internment of the person who would be bound to perform.[2] Comments are invited. We consider separately, in the paragraphs which follow, the effect upon the subsistence of an offer of the death, insanity or bankruptcy of the offeror or offeree.

62. (e) Death. Although exceptions may exist, an offer generally ceases to be open for acceptance on the death of either the offeror or the offeree.[3] No contract will come into existence even though the offeree has accepted in ignorance of the offeror's earlier death.[4] It may, however, be clear from the terms of the offer that it was intended to be binding upon the offeror's personal representatives if he died before acceptance, or that the offer was made to the offeree and his personal representatives. We are provisionally of the view that the present rule whereby an offer generally falls on the death of either party might beneficially be clarified and modified. It seems to us deirable that an

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[1] In the case of concluded contracts such events have been held to amount to rei interitus or frustration. See Allan v. Robertson's Trs. (1891) 18 R. 932; London & Edinburgh Shipping Co. v. The Admiralty 1920 S.C. 309; Tay Salmon Fisheries v. Speedie 1929 S.C. 593; Mackeson v. Boyd 1942 S.C. 56.

[2] Though there is little authority on the point, such events would probably be held in the case of concluded contracts to amount to frustration. See Manson v. Downie (1885) 12 R. 1103; Smith, Short Commentary, p. 848; Cheshire & Fifoot, Law of Contract, 9th ed., pp. 548-9 and cases there cited.

[3] Stair, I.10.6; Bankton, I.11.5.

[4] Thomson v. James (1855) 18D. 1,10; Dickinson v. Dodds (1876) 2 Ch.D. 463, 475.

offer to perform services or to do work in which the personal qualities, judgment or skill of the offeror are an important element should lapse on his death. We take the same view where the person whose personal qualities, judgment or skill are relied upon is the offeree; it should not be possible for his personal representatives to accept the offer and substitute performance by themselves or by a third party. If, however, there is no element of delectus personae in the performance offered by or requested from the deceased we think that the offer should not lapse on his death.[1] Where it is the person to whom performance is to be made who dies, we similarly take the view that whether he is the offeror or the offeree the offer should lapse only if the personal qualities of that person are matters of consequence for the other and performance in favour of the deceased's personal representatives would amount for the performer to something radically different from that envisaged when the offer was made. Thus, an offer of employment whether made by the prospective employer or by the prospective employee would terminate automatically on the death of the former. But an offer relating to the supply of coal to a household, whether made by the coal merchant as an offer to sell or by the householder as an offer to buy, would not lapse on the subsequent death of the householder. We take the view that the same considerations should determine whether an offer is terminated by death as would determine whether the contract were frustrated had the death occurred after acceptance.[2] Comments are invited.

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[1]The arguments in favour of the view that an offer should not automatically lapse on death would be even stronger were it to be accepted that an offer, once made, should not be capable of revocation until a reasonable time had elapsed. See paras. 56-57, supra.

[2]Cf. para. 61, supra.

63. (f) Insanity.[1] There is little authority on the effect in the present law of the insanity of the offeror or offeree on the subsistence of an offer. It would appear, however, that the insanity of the offeror, occurring after the offer is made but before its acceptance, causes the offer to lapse irrespective of the offeree's knowledge of it.[2] It is less clear whether an offer ceases to exist on the insanity of the offeree so as to disable his curator bonis (or his tutor-dative or, if he has been cognosced, his curator) from accepting it. If it is currently the law that an offer automatically lapses on the insanity of the offeror or offeree this would have the following two consequences: first, a valid acceptance could not be made by an insane offeree's curator bonis or to an insane offeror's curator bonis; secondly no valid acceptance could be given to an offeror who had recovered from a (perhaps short) period of insanity or by an offeree who had similarly recovered, even though the offer would still at that time have been open for acceptance if the period of insanity had not occurred. We are provisionally of the view that in this second case it should be provided that where an acceptance is made to an offeror who has recovered from a period of insanity or by an offeree who has so recovered, this should be effective to conclude a contract if, but only if, that acceptance would

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[1] We are not in this Memorandum concerned with the general question of the contractual capacity of persons suffering from mental disorder. We confine our attention to the problem whether an offer should automatically fall on the supervening insanity of either party or e.g. whether a valid acceptance could be made by an insane offeree's curator bonis or binding upon the curator bonis of an insane offeror.

[2] Thomson v. James (1855) 18 D.1, 10. The case of Loudon v. Elder's C.B. 1923 S.L.T. 226, which is frequently cited as authority for the proposition that the offeror's supervening insanity renders his offer incapable of acceptance, was in fact solely concerned with a situation in which the offeror was insane at the time his offer was made.

(ignoring the offeror's or offeree's temporary insanity) have been regarded as timeous and otherwise valid.[1] We are also of opinion that there are circumstances in which it would be desirable that an acceptance made by the curator bonis of an insane offeree or made to the curator bonis of an offeror who has become insane, should be effective to conclude a contract. In our view the circumstances in which an offer might reasonably continue to exist despite the supervening insanity of the offeror or offeree are the same as those in which, under the proposal made in the preceding paragraph, an offer would remain open after the death of the offeror or offeree. Thus, an offer would lapse on insanity only if there were an element of delectus personae in the performance offered by or requested from the insane party, or if performance in favour of the insane party's curator bonis would amount for the performer to something radically different from what was envisaged when the offer was made. We invite comments on these provisional proposals.

64. (g) Bankruptcy.[2] There appear to be no decided cases in Scotland on the effect of the bankruptcy of the offeror or offeree on the subsistence of an offer. Bell,[3] however, thought that an offeror's supervening bankruptcy caused his offer to lapse, but expressed no opinion on whether the result should be the same in the case of the bankruptcy of the offeree. We think that it is at least arguable that where the resulting contract would place upon the bankrupt party

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[1] Continuing obligations entered into while sane do not necessarily come to an end by reason of the temporary insanity of one of the parties: Wink v. Mortimer (1849) 11 D.995; Partnership Act 1890, s. 35.

[2] The Commission is currently engaged, in a separate exercise, in a wide-ranging study of the law of bankruptcy. The views expressed in this paragraph should therefore be regarded as merely tentative.

[3] Principles, para. 79. The English case cited by the editor in the 10th edition does not in fact support the author's proposition.

an obligation to pay, the offer should cease to be open for acceptance on that party's supervening notour bankruptcy, whether he be offeror or offeree. The solvent party should not be bound by an acceptance made to him by a bankrupt offeree, nor be bound by an acceptance made by him to an offeror who unknown to him has become bankrupt after making the offer. Where, on the other hand, the obligation which the resulting contract would place upon the bankrupt would be one ad factum praestandum it might be thought that that party's notour bankruptcy should leave the offer in existence. Thus the supervening bankruptcy of a landscape gardener would not cause to lapse an offer made by him, or to him, to plan the lay-out of a garden. Even in such cases, however, the solvent party could be prejudiced by being held bound to a contract with the bankrupt: for example, in the event of incomplete or late or defective performance by the latter the solvent party would be unable to recover full damages, but would be limited to a claim on the bankrupt estate. The risk of being prejudiced in this way might well be one that the solvent party would not have been inclined to accept had he known of the other party's financial position. It might therefore be desirable to provide that in such cases a contract should not come into existence until the solvent party had become aware of the other party's bankruptcy and had nevertheless indicated his desire to proceed. Thus an "acceptance" by a bankrupt offeree would not result in the conclusion of a contract unless and until the offeror was informed of his bankruptcy and notified the offeree, or otherwise indicated, that he regarded the contract as concluded. Similarly, an "acceptance" made to a bankrupt offeror would not bind an offeree who was ignorant of the former's financial position. A contract would come into being only when the offeree became aware of the offeror's bankruptcy and by his words or actings signified that he regarded a contract as existing between them. We invite comments on these tentative views.

65. (h) Rejection. An offer is terminated if rejected by the offeree. Rejection having been communicated to the offeror the offeree cannot subsequently accept the offer even though, had there been no rejection, it would still have been open(e.g. because the time limit attached to the offer had not expired).[1] Where the rejection takes the form of a qualified acceptance[2] we have already proposed that this should not in all circumstances have the effect of rendering the original offer incapable of acceptance, and we have suggested two ways in which such an alteration in the law might be brought about.[3] We also noted earlier[4] that although in most cases of postal or telegraphic communication an acceptance takes effect when dispatched, this does not appear to extend to a letter or telegram of rejection. We think, however, that it would be worthwhile expressly to provide, for the avoidance of doubt, that a rejection should not become effective until receipt. In this context also we take the view that the meaning to be attributed to "receipt" should be the same as in relation to communication of offers.[5] Comments are invited.

7. Agreements with no identifiable sequence of offer and acceptance.

66. Although in most cases in which parties have reached agreement it is possible without difficulty to identify an offer from the one met by an acceptance from the other, there are a number of situations in which agreement has clearly been

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[1] Hunter v. Hunter (1745) Mor. 9169; Hyde v. Wrench (1840) 3 Beav. 334.

[2] See para. 29, supra.

[3] See paras. 30 and 31, supra.

[4] Para. 46(iii), supra.

[5] See paras. 22 and 50, supra.

arrived at, yet the relationship of the parties can be analysed in terms of offer and acceptance only at the cost of resorting to fictions. The following may be cited as examples of cases of this type.

(i) The contracting parties both (or all) concur in or assent to an agreement drawn up by a third party. Thus, A and B who have been negotiating a contract for sometime may decide to refer to C to draw up a contract in an attempt to resolve a deadlock in the negotiations. A and B both find C's draft acceptable and sign it. It would (unless the parties simultaneously signed separate copies of the agreement and then exchanged them) be possible to say that whichever one signed first made an offer, which was accepted by whichever signed later. But the more realistic interpretation of the situation, and the one which it is thought would accord with the parties' understanding, is that there is no offer and no acceptance but simply a common acquiescence in the terms proposed by the third party.

(ii) A more complex variant of the type of case outlined in the preceding sub-paragraph arises where a competition or sporting event is organised by a club or other body which lays down the rules under which the competition is to be held or the event is to be played and solicits entries from interested persons. It seems clear that the legal relationship of the competitors or participants inter se would be governed by the rules laid down by the organising body,[1] but it is thought that it would be somewhat

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[1] See The Satanita [1895] P. 248, affirmed [1897] A.C. 59.

artificial and perhaps sometimes technically impossible to say that each competitor made an offer to all of the others to be bound by the rules and simultaneously accepted an identical offer made by all of those others. The participants are in a state of consensus as to the nature and terms of their relations with each other, but that consensus has not been attained through offer and acceptance.

(iii) Multipartite agreements such as those setting up and forming the constitution of voluntary associations as unincorporated clubs and partnerships can only with difficulty be analysed in offer and acceptance terms. Those involved negotiate until an arrangement emerges which is acceptable to all. At that stage the club or partnership will come into being (unless it is agreed that some more formal procedure must be followed) and the rights and duties of the mebers or partners inter se will be governed by the terms of the agreement thus reached. It might, once again, be possible to say that each simultaneously made to all of the others an offer to be bound and accepted the identical offers of those others; but this would be a mere fiction.

We are of the view that problems arise in relation to agreements of this type only if an attempt is made to force them into the offer-acceptance mould by purporting to find non-existent offers and illusory acceptances. Indeed most of the areas of doubt and difficulty which we have been considering in the earlier paragraphs of this Memorandum arise out of, and owe their existence to, the concepts of offer and acceptance as used in circumstances where they are clearly relevant and in no way unrealistic. These doubts and difficulties could not arise in situation where the agreement is held to exist without resort to these concepts. In order, therefore, to put it beyond doubt that what is crucial in the law of formation of contract is agreement, and that the concepts of

offer and acceptance are useful, but not essential, analytical aids in establishing agreement, we wonder whether it might beneficially be provided that the existence of a contract may be inferred even though there is to be found no identifiable sequence of offer and acceptance. Comments are invited.

C: CONTRACTS: INTENTION TO ENTER INTO LEGAL RELATIONS

67. In English law it is clearly recognised that if the parties to an agreement lack the intention to be legally bound thereby no contract which the courts will enforce comes into being.[1] It is on this basis that in England agreements stated to be "binding in honour only", or made "subject to contract", or purely social or domestic or family arrangements, are held not to be legally binding.[2] At least where the agreement relates to a commercial or business matter the burden of proving that the parties thereto did not intend to be legally bound is on the person who alleges it, and the onus is a heavy one.[3] Contractual intention is presumed to exist, and it is for the party denying this to establish its absence, either by pointing to the terms of the agreement itself or by showing that it is an agreement of a type legal enforcement of which is not usually contemplated.

68. In Scotland too, it is undoubtedly the case that where parties expressly state that their agreement is binding in honour only, or is merely a gentleman's agreement, effect will be accorded to this stipulation and the courts will decline to enforce the agreement.[4] Similarly, though there appears to be little authority on the matter, it would probably be held that where the words used by one party are known by the other

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[1] Balfour v. Balfour [1919] 2 K.B. 571, 578; Rose & Frank v. J R Crompton & Bros. Ltd. [1923] 2 K.B. 261, 293; Wyatt v. Kreglinger & Fernau [1933] 1 K.B. 793, 806.

[2] See e.g. Treitel, Law of Contract, 4th edition, pp. 97-100.

[3] Rose & Frank v. J R Crompton & Bros. Ltd [1923] 2 K.B. 261; Edwards v. Skyways Ltd. [1964] 1 W.L.R. 349.

[4] Woods v. Cooperative Insurance Society 1924 S.C. 692; Gloag, Contract 2nd edition, p. 11. Such agreements do, however, fall within the scope of restrictive practices legislation: see Restrictive Trade Practices Act 1976, s. 43(1) replacing Restrictive Trade Practices Act 1956, s. 6(3).

to have been spoken in jest or not to have been seriously intended, no contract comes into existence; where the other party has no such knowledge and believes the words to have been seriously intended the party in jest would probably be held to be bound.[1] The use of the words "subject to contract" will not necessarily be regarded in Scotland as negativing the existence of a binding contract: it is a matter of construction whether such words, in the context in which they are used, indicate that the parties do not intend to be bound at that stage or, alternatively, that a contract has been concluded one of the terms of which is that it will be put in formal writing.[2] To this extent at least the intention of the parties is relevant and will be respected.

69. Beyond this, however, if in Scotland the courts decline to enforce, or to award damages for breach of, an agreement on a purely social or domestic or internal family matter, the basis upon which they do so is not stated to be the parties' lack of contractual intention, but rather that such agreements are "personal" and so the courts, in the absence of a patrimonial interest on the part of the pursuer, will not accord a legal remedy for breach.[3] In none of the

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[1] See Stair, I.10.6; I.10.13. The law of most European countries is as stated in the text: See Les conditions de validité au fond des contrats de vente, a report prepared for UNIDROIT by the Max Planck Institute (U.D.P. 1963 - Etudes: XVI/B, Doc. 1), pp. 43, 4.

[2] Stobo v. Morrisons (Gowns) Ltd. 1949 S.C. 184.

[3] Forbes v. Eden (1867) 4 M.143, (1867) 5 M. (H.L.) 36; Aitken v. Associated Carpenters & Joiners (1885) 12 R. 1206; Skerret v. Oliver (1896) 23 R. 468; Anderson v. Manson 1909 S.C. 838; Drennan v. Associated Ironmoulders 1921 S.C. 151; Bell v. The Trustees 1975 S.L.T. (Sh. Ct.) 60. Hunter "Collective Agreements, Fair Wages Clauses and the Employment Relationship in Scots Law" 1975 Jur. Rev. 47. But see G MacCormack, "Some Problems of Contractual Theory" 1976 Jur. Rev. 70 at p. 76 et seqq.

Scottish cases in which courts have declined to enforce an agreement has the decision been based on the ground that the parties did not intend to be legally bound thereby and hence that there was no contract; rather the basis of the refusal has been that the pursuer had no legally recognised interest to sue.[1] The agreements in question in all of the reported cases on this topic were the rules or constitutions of voluntary associations of various kinds, such as sporting clubs, trades unions, gardening clubs and non-conforming churches or religious groups. The prevailing judicial attitude is clearly expressed by Lord Kinnear (in an opinion concurred in by Lord President Robertson, Lord Adam and Lord McLaren) in Murdison v. Scottish Football Union,[2] in which the pursuer complained of having been wrongfully suspended from playing Rugby Union football by the Union.

> "Nobody has a right which he can enforce at law to compel other people to play a game of football with him. If there be an agreement between them to play a game together, that is not an agreement which the law will enforce. The general rule is that such agreements are personal. Agreements to associate for purposes of recreation, or an agreement to associate for scientific or philanthropical or social or religious purposes, are not agreements which Courts of law can enforce. They are entirely personal."

70. Even where an agreement is of this "entirely personal" type, the courts will nevertheless intervene if a pursuer alleges that the breach of which he complains infringes a

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[1] See e.g. Forbes v. Eden (1867) 4 M. 143 at p. 157 per Lord Justice-Clerk Inglis: "There may no doubt be breaches of contract where the party complaining has no such interest to enforce the contract as can be recognised by a court of law. Thus an association may be formed for mere sport or amusement, which every member is at liberty to leave as soon as he feels inclined, and which he can leave without any pecuniary loss. In such a case the law will not interfere."

[2] (1896) 23 R. 449 at 446,7.

patrimonial right vested in him, or deprives him of a particular status. Thus, if a club in breach of its rules expels the pursuer and so deprives him of his share in the club's property or of his right to use that property or if a club disposes of its property in a manner not permitted by its constitution, and is challenged by one of its members, the courts will act to protect him.[1] Similarly, if a voluntary religious body deposes one of its ministers contrary to its constitution he will have a contractual remedy if, but only if, he thereby loses some patrimonial benefit which he previously enjoyed, or is deprived of his status as a minister. Thus, in Skerret v. Oliver[2] Lord President Robertson said:

> "Courts of law, as I understand, take no concern with the resolutions of voluntary associations, except in so far as they affect civil rights. If a man says merely 'such and such a resolution of an ecclesiastical body is a violation of its constitution, on the faith of which I became a member or a minister' and stops there, the Court will have nothing to do with his case, and will not declare the illegality or reduce the resolution. But if the same man says, 'I have been ejected from a house, or have been deprived of a lucrative office, under colour of this illegal resolution, and I ask possession of the house, or I ask £500 of damages,' then the court will consider and determine the legality of the resolution, on its way to the disposal of the demand for practical remedy. There is there a specific claim of a specific remedy for invasion of patrimonial rights."

And in Forbes v. Eden[3] Lord Justice-Clerk Inglis stated:

> "The possession of a particular status, meaning by that term the capacity to perform certain functions or to hold certain offices, is a thing which the law

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[1] Renton F.C v. McDowall (1891) 18 R. 670; Murray v. Johnstone (1896) 23 R. 981; Gardner v. McLintock (1904) 11 S.L.T. 654.

[2] (1896) 23 R. 468 at 490, 91. See also McMillan v. Free Church of Scotland (1861) 23 D. 1314 esp. at 1329 and 1345-47.

[3] (1867) 4 M. 143 at 157. See also Renton F C v. McDowall (1891) 18 R. 670 at 672, per Lord Kincairney (Ordinary).

> recognises as a patrimonial interest; and no one can be deprived of its possession by the unauthorised or illegal act of another without having a legal remedy."

In the absence of such a patrimonial interest a pursuer will not be assisted by the courts in any action whether concluding for damages, specific implement, reduction or declarator, based upon breach of the agreement constituting, or forming the rules of, the voluntary association.[1]

71. Under the Trade Union and Labour Relations Act 1974, section 18(1) and (2) it is provided that collective agreements between trade unions and employers or associations of employers are "conclusively presumed not to have been intended by the parties to be a legally enforceable contract," unless they are in writing[2] and contain a express stipulation to the contrary. Under the repealed Industrial Relations Act 1971 section 34(1) collective agreements were "conclusively presumed to be intended by the parties to be a legally enforceable contract" unless the contrary was expressly stated therein. Prior to the 1971 legislation there was little authority on the legal status of collective agreements. In England, however, the general view was that they did not constitute legally enforceable contracts because the parties thereto did not intend them to be legally binding.[3] This

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[1] See e.g. Aitken v. Associated Carpenters and Joiners (1885) 12 R. 1206 at 1212 per Lord President Inglis; Drennan v. Associated Ironmoulders 1921 S.C. 151 at 162,3 per Lord Justice-Clerk Scott Dickson, at 164 per Lord Dundas and at 168 per Lord Ormidale.

[2] The Act does not specify the nature of the writing required, e.g. whether it must be probative. See our accompanying Memorandum No. 39, para. 31.

[3] Flanders and Clegg, The System of Industrial Relations in Great Britain, chapter 2 by Kahn-Freund; Grunfeld, Modern Trade Union Law, pp. 219-20; Wedderburn, The Worker and the Law, 2nd edition, pp. 102-8; Kahn-Freund, Labour and the Law, pp. 129-139. This view of the law was accepted in the single judge case of Ford Motor Co. Ltd. v. A.U.E.F.W. [1969] 1 W.L.R. 339.

reasoning was accepted by Professor I P Miller as applicable to Scotland also, but without the support of convincing Scottish authority.[1] If, as appears to be the case, a presumed absence of intention to enter into legal relations is not the basis upon which Scottish courts refuse to enforce certain types of agreement,[2] it may well be that a collective agreement could amount to a legally binding contract under the common law of Scotland.[3] However, in view of the prevailing tendency to deal with such matters by specific statutory provision, it is thought unlikely that collective agreements will come to be governed again exclusively by the general law of contract, though we do not exclude the possibility that in some cases the common law may supplement the relevant statutory provisions. Consequently we make no proposal for clarification or alteration of the law on this subject.[4]

72. We are of the view that it is desirable that courts should be reluctant to intervene to enforce, or to award damages for breach of, purely social or domestic family arrangements.[5] We see no advantage in justifying this reluctance (as in England) by reference to a lack of intention to be legally bound on the part of the parties to

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[1] Industrial Law in Scotland, pp. 94-97. But see now Casey "Collective Agreements: Some Scottish Footnotes" 1973 Jur. Rev. 22 especially at 25-28, and Hunter, "Collective Agreements, Fair Wages Clauses and the Employment Relationship in Scots Law" 1975 Jur. Rev. 47, esp. at pp. 52-3.

[2] See para. 69 supra.

[3] See Casey, 1973 Jur. Rev. 22 and Hunter, 1975 Jur. Rev. 47.

[4] But see our accompanying Memorandum No. 38, paras. 51-56.

[5] E.g. regulating such matters as which member of the family shall do the washing-up. The mere fact that an agreement is made between members of the same family does not, and in our view should not, render it unenforceable. We see no reason why an agreement that a father shall pay his son £25 per week while the latter qualifies as a doctor should not be enforceable.

such agreements, rather than (as in Scotland) by reference to their "personal" nature or to the lack of a sufficient interest to sue in the pursuer. It is our opinion that it is, in general, right that courts should not enforce entirely social engagements, such as arrangements to play squash or to come to dinner, even though the parties themselves may intend to be legally bound thereby.

73. It is, however, for consideration whether in relation to alleged contravention of the rules or constitutions of voluntary associations, judicial intervention should be limited to cases in which patrimonial interest, or deprivation of a status, is involved. The possibility that there are circumstances in which the courts might successfully be resorted to even where the pursuer cannot qualify such a patrimonial interest was recognised by the Lord Ordinary (Lord Kincairney) in Renton F C v. McDowall[1] where he said:

> "Neither does it seem necessary to express any opinion as to the nature and amount of the patrimonial interest which will warrant recourse to the Court, nor to affirm absolutely that there cannot be cases in which Courts of justice might intervene, even although no interest of a strictly patrimonial character could be alleged."

We are of the view that it would be clearly undesirable that every act of administration performed by the office bearers or the majority of members of a voluntary association should be potentially subject to scrutiny by the courts in an action by a disgruntled member alleging a breach of contract. However, we are provisionally of the opinion that if an expelled member claims that his expulsion was contrary to the rules or constitution of the association his action for damages

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[1](1891) 18 R. 670 at 672.

for breach of contract should not be dismissed merely because the association has no property and the pursuer can therefore point to no patrimonial right which has been infringed. With the recent recognition that on breach of contract damages may be awarded for non-patrimonial losses such as vexation, disappointment and injury to feelings,[1] there seems little reason to continue to insist that a member expelled from a voluntary association in breach of its rules should be able to qualify a patrimonial interest. Similarly, there seems no reason why the absence of a patrimonial interest should bar a remedy for breach of contract in the case of e.g. (a) agreements not to disclose embarrassing information of no patrimonial value; (b) agreements to preserve the amenity of a neighbourhood, for example by regulating the colour which doors may be painted; and (c) agreements not to associate with undesirable characters, for example an agreement between an employer and employee that the latter will not associate with a dismissed embezzler. We invite comments on these matters.

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[1] Diesen v. Samson 1971 S.L.T. (Sh. Ct.) 49; Jarvis v. Swan Tours Ltd. [1973] Q.B. 233; Cox v. Philips Industries Ltd., [1975] I.R.L.R. 344, [1976] 3 All E.R. 161.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Where under the present law the offeror would be free to withdraw his offer in spite of the offeree's commencement of performance, he should remain free to do so, but incur a non-contractual liability to recompense the offeree for and to the extent of any benefit thereby accruing to the offeror. (Para. 36(iii)).

(d) An offer the acceptance of which can be indicated only by the performance of an act should remain revocable until performance is completed, but the offeror should be bound on revocation to compensate the offeree for and to the extent of such expenditure in time, money or effort as he has reasonably incurred. (Para. 36(iv)).

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

23. The exceptions to the rule that an offeree will not be held bound by mere silence on receipt of an offer, mentioned in paragraph 39, should continue to be recognised by the law. (Para. 39).

24. (a) Where an offer is made on a standard form provided and drawn up by the offeree and that form contains a term to the effect that the offeree's silence will amount to acceptance, the offeree's silence should be regarded as binding upon him.

(b) Where the offer, though not made on a form drawn up by the offeree, has in fact been solicited by him, the offeree's silence should again be regarded as binding upon him.

(c) Where the offeree's inaction when confronted with the offer occurs in a context in which, if the offer had not been accepted, action on his part would have been necessary, than there should be attributed to that inaction a significance sufficient to convert it into a satisfactory indication of acceptance. (Para. 40).

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

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

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

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

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

30. (a) An acceptance which is late in being communicated to the offeror may be treated by the latter as a valid acceptance. The offeror's right so to treat the late acceptance should not be made subject to a condition of notification to the offeree.

(b) Where the offeror is aware that an acceptance, if the system of transmission had operated normally, would have reached him in due time, he should be bound by it unless he promptly informs the acceptor either orally or by despatch of a notice that he considers his offer as having lapsed. (Para. 51).

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

32. (a) Should "receipt" in this context be defined as in proposals 8 and 28, supra?

(b) Or, should notice of revocation be required actually to come to the attention to the offeree? (Para. 55).

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

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

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

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

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

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

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

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

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

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

43. In the case of agreements of the types mentioned in paragraph 73 an action in respect of breach of contract should not be dismissed merely because of the pursuer's inability to qualify a patrimonial interest. (Para. 73).