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Sturart McMillan
Convenor of the Delegated Powers and Law Reform Committee

Email to: dplrc.committee@parliament.scot

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Dear Convenor,

Contact (Formation and Remedies) (Scotland) Bill

At the evidence session before the Committee on Tuesday, Professor MacQueen offered to write to respond to the points raised by Dr Brown in his submission. Please find attached a note kindly prepared by Professor MacQueen.

If the Committee has any further questions about the Bill please do contact me.

Thank you.

Yours sincerely,

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Contract (Formation and Remedies) (Scotland) Bill
Professor Hector MacQueen's Response to Dr Jonathan Brown's comments

Dr Brown's concerns seem to start from the proposition that "the principles used to determine whether or not a contract has been formed are the same as those used to ascertain the formation of binding promises, trusts and last wills and testaments". He also suggests that the present law works well in practice and is intuitively understood; the proposed Bill will make the law less accessible to those not commonly engaged in contract litigation.

Relation between Bill and common law principles

The first point to note is that Part 1 of the Bill is not a complete codification of the law on formation of contract. **Section 23(a)** states that "the provisions of this Act are without prejudice to any enactment or rule of law which (a) regulates any question which relates to (i) the formation of contract". Thus, to illustrate, the Bill does not state in terms that a contract is formed when an offer is met by acceptance. That proposition is left to the common law.

The second point is that formation of contract is *not* (contra Dr Brown) the same as unilateral promises, declarations of trust, or last wills and testaments. All of the latter group of legal institutions involve unilateral declarations that can bind the party making the declaration without the ultimate beneficiary knowing anything about it at the time the declaration is made. It is worth noting that in all three cases the ultimate beneficiary can reject the right conferred upon it, although it can hardly do so, or alternatively enforce the right, until it has knowledge thereof.[1] Contracts, on the other hand, are formed by bilateral or multi-lateral declarations by several parties and it has been settled law since at latest *Thomson v James* (1855) 18 D 1 that if the contract is to bind, all parties must know or ought to know about it given the existence of a process of communication between them. The Bill does not depart from that fundamental principle of contract law. It also carefully preserves the position of unilateral promises in **section 4(3)**.

Present law in practice: the postal acceptance rule

Does the present law work well in practice? The SLC has long thought that the postal acceptance rule should be abolished. It is certainly not "intuitive", and its continued existence can perpetrate injustice upon the unwary. The SLC understood that the rule is routinely excluded in contractual arrangements between professionally advised parties. Those not so advised stand at risk of finding themselves bound in a contract without having had the opportunity to know about it. The rule was developed as an exception to the general position in

[1] On declarations of trust see *Gloag & Henderson* (15th edn, 2022) para 41.05 ("Oral trusts are competent. … The second step (after the declaration by the truster) is the delivery or communication of the declaration to the trustees who accept office. The final step is the transfer of the trust property to the trustees. One view is that all the steps are required so that a trust does not come into existence until the property is vested in the trustee. The alternative approach is that the trust comes into existence as between truster, trustees and beneficiaries once the declaration of trust is delivered or communicated to the trustees who accept office, but that property becomes immune from the truster's personal creditors (and available to "trust" creditors) only after its transfer to the trust patrimony has been completed.")

the nineteenth century when the newly instituted postal service was the only means of communication between remote parties and it had to be decided upon which of the parties should fall the risk created by the delay between posting and receiving, or the hazards of delayed or lost communications. The factual position of parties in the twenty-first century is very different, thanks to fax initially, and now to email and other forms of electronic communication. The SLC also took the view that abolishing the postal acceptance rule was sufficiently fundamental to justify also clarifying a number of points in the law of formation in case of future misunderstandings. For example, some have argued that a version of the postal acceptance rule should be applied to electronic communications between parties negotiating a contract. The SLC took the view that it was necessary to prevent any such revival of the postal acceptance rule in any new context unless the parties agreed that it should be applied. The law on when electronic communications take effect in the negotiation of contracts is completely undecided and a statutory rule seemed an appropriate way to remove the uncertainty. A key dimension of the postal acceptance rule was the possibility of revoking or withdrawing either offers or, perhaps more importantly, acceptances; again, it seemed sensible to make clarificatory provision for this in a Bill considering rules on formation of contract.

A final point which emerged in the course of the SLC's research was that the law on the effect of fundamental change of circumstances (such as death or insolvency of either offeror or offeree before the contract is concluded) upon an offer or acceptance is also disputed and again a statutory rule seemed an appropriate way to remove the uncertainty.

Accessibility of the law

Is the law rendered less accessible by being stated in legislation? At present the law can be worked out by reading a lot of cases and a number of textbooks, and there are guides which purport to give short summary overviews of the subject. The cases and the textbooks do not always agree with each other, however. The best chance of making the law accessible to non-lawyers is thus by way of statute framed in as simple words and as few propositions as possible. Whether this Bill succeeds in that is, of course, open to discussion; I note the adverse comments of the SMTA in this regard and also those of the RIAS with regard to construction professionals. But lawyer-respondents seem generally content with the Bill's language and form.

Intuitive understandability of the common law

In his argument that the common law is intuitively understood, Dr Brown makes a good deal of a 2018 article by Adrian Ward and Polona Curk. This is because it draws on a distinction made by the seventeenth-century writer Stair between "*desire, resolution and engagement*" (with only the last committing a person to an obligation). This helps to explore the significance of the sentence in the UN Convention on the Rights of Persons with Disabilities: "safeguards [*for the exercise of legal capacity*] shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person".[2] The People First Group, an organisation of people with learning disabilities run by them and aiming to change the way such people see themselves, found Stair's concept of engagement to be the point, if they reached it, at which

[2] Adrian D Ward and Dr Polona Curk, "Respecting 'will': Viscount Stair and online shopping", 2018 SLT (News) 123-127.

they would want their will to be decisive, not just respected.[3] But Ward and Curk go on to raise the case of a less able friend, governed by immediate impulse alone, and not able to review and reconsider in the way suggested by Stair's tripartite distinction of acts of will. In response, the Group introduced the concept of *certain* "future will" as a further dimension needing to be brought into consideration to justify intervention.[4]

I am unable to see how this kind of interesting use of ideas in Stair's *Institutions* is cut off by the Bill, any more than it cuts off consideration of decisions of the German Federal Constitutional Court such as Ward and Curk also offer in their article.[5] It is worth noting that the Group enjoyed the help of interlocutors (Ward and Curk) in coming to grips with Stair's concepts. In doing so Ward and Curk probably made use of the online shopping example which is set out in their article.[6] The Court of Session has also drawn upon it in relatively recent times and I do so myself in my textbook on Contract Law.[7] I expect to go on doing so in the next edition even if the Bill passes into law, although I note that the Law Society of Scotland says that "the express terminology referring to the parties' intention that their communications have legal effect is clearer and more readily understandable than the common law concepts of will, desire and engagement".

For how long has the law on formation generally required communication to both parties?

Dr Brown's belief that the law as stated in Bell's *Commentaries* in the first half of the nineteenth century is still the law of Scotland is in contradiction to all the standard works on Scots contract law, i.e. *Gloag on Contract*, *McBryde on Contract*, *Stair Memorial Encyclopaedia* vol 15, and *MacQueen & Thomson on Contract Law in Scotland*. I have discussed how this shift occurred mainly through the great case of *Thomson v James* (1855) in an article "'It's in the Post': Distance Contracting in Scotland 1681-1855", in *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie*, edd F McCarthy, J Chalmers and S Bogle (Open Book Publishers, 2015) ch 4 (accessible free of charge at https://www.openbookpublishers.com/books/10.11647/obp.0056).

Addendum on revocation and withdrawal of offers and acceptances

The difference between revocation and withdrawal in the Bill depends on whether or not the offer has reached the offeree.

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[3] Ibid, 127.
[4] Ibid.
[5] Ibid, 125-126.
[6] Ibid, 125, 127. The online shopper sees an item on the website and forms a *desire* to buy it. The stage of *resolution* is when the item is placed in the basket. The moment of *engagement* is when the shopper presses the buy button. A similar analysis can be applied to a supermarket shopper, with the moment of *engagement* being the moment when the item's barcode is passed over the checkout scanner.
[7] See *Cawdor v Cawdor* 2007 SC 285 para 15; MacQueen & Thomson, *Contract Law in Scotland* (6th edn, 2024) para 2.12 n 2.

If it has reached the offeree and so taken effect *as an offer*, only in certain circumstances may it be revoked. The most important example is offers to the public (see s 5). There can be no revocation where the offer has been declared irrevocable, i.e. firm offer
If the offer has *not* reached the offeree and so *not* taken effect *as an offer*, then the offeror may *withdraw* since the offer has not yet taken effect (s 10). *This is so even if the offer declares itself to be irrevocable*.
An acceptance can also be withdrawn until it reaches the offeror, i.e. withdrawal overtakes acceptance and either arrives first or at the same time as the acceptance. (*Countess of Dunmore v Alexander* and Report pp 59-60).
I did not quite understand what Dr Brown was driving at when he referred to my textbook being critical of *Dunmore v Alexander*. Here is what I say at para 2.46 of *MacQueen & Thomson*:

2.46

Once an offeree has posted an acceptance, a contract is formed. Should the offeree change her mind after the letter has been posted, logically she should still be bound by the contract even although she attempts to terminate the contract by informing the offeror before the acceptance is actually communicated. Again, the strict logic of the application of the rule may not be followed in Scotland. In *Countess of Dunmore v Alexander*[1], the Countess wrote to her friend, Lady Agnew, to engage Betty Alexander to be the Countess' servant. The next day the Countess changed her mind and sent a letter to Lady Agnew withdrawing her acceptance of Miss Alexander's services. The two letters arrived together. The court held that Miss Alexander had not been appointed. The reasoning in the decision is not satisfactory (unless, as Gloag suggested[2], the Countess's first letter is analysed as an offer rather than an acceptance). It would appear that Lady Agnew was acting as agent or mandatory for both parties and that the second letter was treated as a postscript to the first so that when read together, Lady Agnew no longer had the authority to engage Miss Alexander on behalf of the Countess. It should be noted, of course, that this case was decided before the postal acceptance rule had been transplanted into Scots law. There is later authority that the case would not be followed in so far as it was inconsistent with the rule[3]. But at the same time it was suggested that a postal acceptance could perhaps be withdrawn if the offeree informed the offeror that there was to be no contract before the acceptance had, in fact, arrived: for instance, if I telephoned, faxed or emailed to you that a letter of acceptance from me which was on its way to you by post should be ignored once it arrived. This seems a sensible result as the offeror does not know that a contract had been formed by the posted acceptance and should not have acted on the assumption that the offer would be accepted.

Footnote

1 (1830) 9 S 190.

2 *Gloag* p 38.

3 *Thomson v James* (1855) 18 D 1. See further MacQueen '"It's in the post!": distance contracting in Scotland 1681–1855' in McCarthy, Chalmers and Bogle (eds) *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (Open Book Publishers, 2015) ch 4.