istence for the very purpose of purchasing and working this particular mine. Now, the preliminary contract by which the terms of the sale were settled was a contract in which the nominal vendor was Mr Long and the nominal vendee was Mr James Henderson. The Lord Ordinary has made a slight mistake, in point of fact, in supposing James Henderson to be the defender. He is the defender's nephew. But that circumstance makes not the slightest difference in my mind upon the general result of the case. There can be no doubt that both these gentlemen were mere names, representing other people. The vendors were the persons who had the true interest in this Canadian mine, and the vendees were the persons who were getting up the Company which was registered on the 1st of April. Now, who then were these vendees? So far as I can see, in the first place, the true vendee was the defender Mr Henderson; because when the first prospectus was issued his name appears as the only director of the Company, and the other parties who assisted him or co-operated with him in framing the prospectus and circulating it privately were parties who were rather interested on the side of the vendors, particularly Mr M'Ewen, who really was the agent of the vendors in Glasgow. The original prospectus thus framed having been privately circulated, some additional names were procured of persons to act as directors. And it is not immaterial to observe that of the gentlemen who are named in the second edition of the prospectus as it was ultimately issued there are only two of them who were not, in point of fact bribed to get up this Company for the purpose of adopting and giving effect to this sale. No doubt the other gentlemen who received money on account of this service received much smaller shares than the defender, and they have made the best reparation in their power by paying over the money to the Company, with interest; and the position of the defender is that he received £10,000 for giving his name as a director, and for getting up the Company along with those other persons, the object or one of the objects at least of these parties in getting up the Company being to secure to the vendors the full price of £125,000 as the equivalent for the mine to be sold. Then we have it established by the clearest and most distinct evidence that what Mr Henderson, the defender, stipulated for as the condition of his becoming a director and getting up the Company to give effect to this contract of sale, was that he should receive from the vendors a certain portion—amounting to £10,000—of the price which was to be paid by the Company for the mine. Now, that is enough I think for the decision of the case. I think all the other facts may be looked at with advantage in judging of the conduct of the persons who are involved in this transaction, but these are the broad and simple facts upon which I think the decision of the case must rest; and it appears to me that they disclose Mr Henderson, the defender, as standing distinctly in this position, not that he was a director of the Company at the time that he entered into the arrangement with Mr M'Ewen and his clients, because the Company was not then in existence, but that he stipulated that he should become a director, and so place himself in a fiduciary position for the Company, and so assume the duty of managing and protecting the interests of the Company when it came into existence, for the very purpose—not perhaps the sole purpose, but for this purpose among others—of compelling the Company when it came into existence to adopt and fulfil this contract of sale by which they were to pay that £125,000. I think therefore that he just accepted the £10,000 as a bribe to induce him to bring this Company into existence, and to make himself a director of the Company—he accepted the £10,000 as the consideration upon which he was to perform that office for the vendors of the mine, and thus he placed himself in the position of having a trust duty to perform and a personal interest directly conflicting with that trust duty.

Now, the doctrine of law as applicable to such a case I think cannot be better stated than it is in one passage of the Lord Ordinary's note, in which he says,—"Whenever it can be shown that the trustee has so arranged matters as to obtain an advantage, whether in money or in money's worth, to himself personally through the execution of his trust, he will not be permitted to retain it, but be compelled to make it over to his constituent." The judgment which the Lord Ordinary has pronounced is just to compel this gentleman to make over the money which he has received to his constituent, the Company, and in that judgment, as I said before, I entirely concur.

The Court adhered.

Counsel for Pursuers—Lord Advocate (Watson) —Balfour—Low. Agents—Frasers, Stodart, & Mackenzie, W.S.

Counsel for Defender — Asher — Mackintosh. Agents—Mylne & Campbell, W.S.

Friday, January 12.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

HOGG *v.* ELLIOT.

Contract—Sale—Offer and Acceptance.

E. sold a horse to H. at the price of £170, subject to a veterinary surgeon's certificate that the horse was sound. It was understood that the horse was eight years old, but the veterinary surgeon discovered that he was ten. This fact was communicated by H. to E. by letter, in which H. expressed his willingness to buy the horse if the price was reduced to £150, and if he was allowed to try him. E. agreed to take £150 for the horse, and thereafter it was arranged that H. should try the horse on "Tuesday or Wednesday" the 5th and 6th October. On Monday the 4th October, E. sold the horse to a third party, delivered him on the following day, and communicated the sale to H. by post-card dated 5th October, and posted about one o'clock on the afternoon of that day—H. received the card on the Wednesday. In the meantime H. had found that owing to engagements he could not try the horse either on Tuesday or Wednesday, and on the afternoon of Tuesday the 5th October he posted a letter to E. agreeing

to take the horse at £150, without trial, and requesting E. to send him down as soon as convenient. This letter E. received on Wednesday.—*Held* that there had been no binding offer made by E, and that therefore he had not committed a breach of obligation by selling the horse before the expiry of the day fixed for trying him.

This was an action of implement and damages at the instance of Thomas Hogg of Hope Park, Berwickshire, against Robert Henry Elliot of Clifton, Roxburghshire, concluding that the defender should be ordained to deliver to the pursuer a horse named "His Grace," and to make payment to the pursuer of £100 sterling as damages caused by the defender's failure to implement a sale of the said horse to the pursuer.

On 23d September 1875 the pursuer had, after trying the horse, offered to purchase him from the defender at £170, subject to a veterinary surgeon's opinion. This offer the defender agreed to. Thereafter the following correspondence passed between the parties:—

"*Hope Park, Coldstream,*
"*28th Septr.* 1875.

"Dear Sir,—I enclose Mr Robertson's certificate and remarks just received. I am disappointed, as no doubt you will be, to find that the horse is 10 years old instead of 8, which was the age I bought him for. Of course 2 years at that period of a horse's age depreciates his value considerably; still, as I like the horse, and as you remarked I would like him better on a trial in the hunting field, on your knocking £20 of his price, making price £150, I will, if you approve, try him on Saturday first with Sir John Marjoribanks' hounds, which are to be at Wark Common on that day at 7 o'c. A.M. As I am to be at Berwick market, your man could have him at the cover side at the above hour. It will be a short day, as I have to go to Berwick by the 10·45 train.—I am, &c.,

"(Signed) THOMAS HOGG.

"*Clifton Park, Kelso,*
"*Septr. 29th,* 1875.

"Dear Sir,—I am certainly surprised to find the horse so much older than I had every reason to believe he was from his published age, and, had I known it at the time, would have certainly returned him on account of false description, or, at any rate, obtained an abatement. After I bought the horse I never had him examined in any way, and when he was examined for Mr Scott in the Spring no statement of his age was made to me. Your objection, of course, is perfectly reasonable, and it is equally so that you should expect an abatement in price, and I will take £150 for him; but my coachman, who is a man of great experience with hunters, tells me that the horse is not in a fit state to be ridden to hounds at present, as he has been kept at and been doing nothing in the shape of work, except being exercised quietly round my wood, and he does not advise my having him tried with hounds accordingly, but you are perfectly at liberty to come up again and ride him over any fences you please. I may add that the horse has never been sick a week since I had him, and if my coachman had not just assured me that the horse was not in a fit state to hunt at present, I should readily have sent him down. Would you be good enough to let me have your answer as soon as convenient, as I now find that I have a chance of disposing of the horse in another quarter.—Yours, &c.

"(Signed) ROBERT H. ELLIOT.

"*Hope Park, Coldstream,*
"*2nd Oct.* 1875.

"Dear Sir,—I am sorry that the horse could not be sent to Wark Common to-day. It was not my intention to have *hunted him,* but merely to have tried him about the cover side. But for Kelso Races on Monday, where all the world are likely to be, I would have come up and ridden him on that day, but, if convenient for you, I shall endeavour to do so on Tuesday or Wednesday.—I am, &c.,

"(Signed) THOMAS HOGG.

"*Clifton Park, Kelso,*
"*October 2nd,* 1875.

"Dear Sir,—Tuesday or Wednesday will answer me very well. I am still in some doubts as to the horse's age. Mr Robertson says, you will observe, that he only *believes* him to be 10 years old. Now, I myself, though I have had horses all my life, am most painfully ignorant about them, so I can say nothing of my own knowledge; but a friend of mine who was here to-day says that Robertson could not know from the horse's mouth how old he is. A reference to the published age of the horse will shew that he was advertised as a six-year-old. Well, I bought him two years ago, counting from last April, and all I can say is, that if he is now 10 years old (which he may be for all I know to the contrary), I have been grossly imposed upon. I should much like to know how Mr Robertson ascertained his age.—Yours, &c.,

"(Signed) ROBERT H. ELLIOT.

"Memorandum of Terms of Letter written by Pursuer to Defender on 5th October 1875.

"On Tuesday, 5th Oct., I wrote Mr Elliot from Kelso, to say that I was sorry that, having another engagement on the morrow, I could not get up, but write this to say that I will take 'His Grace' at the price agreed upon, and would thank him to send him down as early as convenient.—Kept no copy.

"Post-Card, Defender to Pursuer.
"*Post-mark, 5th Oct.* 1875.
"*October.*

"The horse has been sold, and I hope you will receive this in time to save further trouble."

The conclusion for delivery was not insisted in, as it appeared that the horse had been sold by the defender in *bona fide* to a third party.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 19th July* 1876.—The Lord Ordinary having considered the cause, assoilzies the defender from the conclusions of the summons, and decerns: Finds him entitled to expenses, of which allows an account to be given in; and remits the same when lodged to the Auditor to tax and report.

"*Note.*—The facts of this case are not disputed. In September 1875 the defender had a

horse for sale. On the 23rd of that month the horse was tried by the pursuer at Clifton Park, the residence of the defender. On that day a sale was concluded at the price of £170, subject to a veterinary surgeon's certificate that the horse was sound. It was understood that the horse was eight years old, but the veterinary surgeon discovered that he was ten. This fact was communicated by the pursuer to the defender by letter dated 28th September, and in consequence the sale fell to the ground.

"In the same letter the pursuer expressed his willingness to buy the horse if the price was reduced to £150, and if he was allowed to try him in the hunting-field on Saturday, 2d October. In his answer on 29th September the defender said 'I will take £150 for him,' but he objected to the proposed trial, on the ground that the horse was not then in a condition to be ridden to hounds. He added—'But you are at perfect liberty to come up again and ride him over any fences you please.'

"The pursuer replied on 2d October, saying that but for the Kelso Races on Monday, 'I would have come up and ridden him on that day; but if convenient for you I shall endeavour to do so on Tuesday or Wednesday.' On the same day the defender answered, 'Tuesday or Wednesday will answer me very well.'

"So standing matters, the defender on the evening of Monday, 4th October, sold the horse to Mr Scott of Langlee, and delivered him on the following day. He communicated the sale to the pursuer by post-card dated 5th October, and posted in Kelso about one o'clock in the afternoon of that day. The pursuer resides at some distance from Kelso, and the card was not received till Wednesday about one o'clock.

"The pursuer found that, owing to engagements, he could not try the horse either on the Tuesday or Wednesday. In consequence, he resolved to buy him without any further trial, and about four o'clock in the afternoon of Tuesday, 5th October, he posted a letter to the defender in order to conclude the transaction. The letter has not been preserved, but its tenor is not disputed. It was a simple agreement to take the horse at £150, accompanied by a request that the horse might be sent down as soon as convenient. This letter was received on Wednesday about one o'clock.

"There is no pretence for saying that before this letter was written the pursuer had heard of the sale to Mr Scott.

"The question is, Whether, in the circumstances above stated, there was a concluded contract of sale? The Lord Ordinary is of opinion that there was not.

"The argument of the pursuer was threefold. He maintained, in the first place, that by the letters of 28th and 29th September and 2d October there was a completed contract of sale, subject to the pursuer's right to reject the horse on trial; in the second place, that the defender offered the horse to him, and bound himself to keep the offer open for acceptance till Wednesday, 6th October, so that he could not withdraw it; and, in the third place, that the contract was concluded by posting the letter of acceptance before the pursuer had notice of the withdrawal.

"1. The Lord Ordinary sees no ground for holding that any contract of sale was completed by the letters founded on by the pursuer. He thinks that the defender did nothing more than make an offer of the horse to the pursuer, and that in order to complete the sale it was necessary that the pursuer should accept it.

"2. An offer may in the general case be withdrawn before it is accepted. It may be so expressed as to deprive the offerer of this right, but it must be made very clear that the offerer comes under such an engagement. In the opinion of the Lord Ordinary the defender did not do so. He had sold the horse to the pursuer, but the contract had been abandoned on both sides. In consequence, he made a new offer, or, in other words, he expressed his willingness to sell the horse if the pursuer should on trial approve of him. A time was fixed for the trial, but this, it is thought, does not carry the transaction beyond the region of a simple offer. It merely fixed a time when it might be convenient for both parties that the pursuer should have an opportunity of considering whether or not he should accept the offer. This does not imply any engagement on the part of the defender that he would not withdraw the offer.

"3. Nor, in the opinion of the Lord Ordinary, was the offer completed by posting a letter of acceptance. He does not doubt that the contract could have been completed by a letter dispensing with the trial, and delivered within the period fixed for it. The trial was a condition wholly in favour of the pursuer, and therefore he could dispense with it; but according to the intention of the parties the acceptance or refusal was to be communicated at the trial, and if for any reason the letter of acceptance had not reached the defender on Wednesday, the Lord Ordinary thinks that it could not have completed the contract.

"The pursuer relied on the case of *Thomson* v. *James*, 18 D. 1, and *Harris*, 7 Chancery Cases, Law Reports, 587, in support of his pleas that the defender could not recal his offer, and that the contract was completed by posting the letter of acceptance.

"It is true that in both of these cases the offer was held to be binding till return of post, so that it could not be effected by any change of mind on the part of the offerer unknown to the offeree at the time of acceptance. But this does not imply that the offer was not subject to recal. It means no more than that the recal must be communicated to the offeree before acceptance.

"But it was held that the contract was complete by posting the letter of acceptance. This proceeded on the principle that the offer was so made that the contract was capable of being completed in that way; or, in other words, the offerer engaged that the contract would be completed by posting a letter of acceptance. It did not matter whether the letter was duly delivered to him or not. The post-office on receiving the letter, according to his engagement, became his agent for its delivery. But in this case it is thought that no such engagement was made by the defender. The contract might, no doubt, have been completed by letter, but this was not in the contemplation of the parties at the time the offer was made and received; and if the pursuer took such a mode of closing the contract, he took the risk of the letter being delivered in time. The post-office was his agent for delivery.

"But the letter of acceptance was posted, and it is possible was delivered, before he received

notice of the recal, for it is not clear whether the defender's post-card or the pursuer's letter of 5th October first reached its destination. But at the time when the pursuer's letter was received by the defender the latter had recalled the offer. There was no *concursus in idem placitum.* If, instead of sending a letter of acceptance, the pursuer had gone to Clifton Park to try the horse, the defender could have declined the sale. His rights cannot, it is thought, be affected because the pursuer adopted a mode of acceptance not contemplated by the parties. The pursuer took his chance that at the time when the letter was delivered the offer was still standing, which, in the opinion of the Lord Ordinary, it was not."

The pursuer reclaimed, and argued — 1st, The parties agreed upon the subject and the price; they had been in continuous treaty since the original sale, and the letters of 28th and 29th September and 2d October amounted to a sale, subject to the condition of a trial by the pursuer. 2d, At least there was an offer of the horse binding the defender down to 6th October. It was the common case of the seller fixing a price, and giving the refusal for a few days to a likely purchaser. According to Scotch law, the offerer had no right to withdraw an offer for the acceptance of which he had given a term—Bell on the Law of Sale, pp. 32–35; Bell's Comms. i. 343 (7th ed.); Bell's Prin. sec. 73; Toullier, Droit Civil Francais, 6, 33, No. 30; Stair, i. 3, 9. This was the doctrine of the Civil Law; the English law, based on the peculiar doctrine of consideration, was opposite—Pollock, Principles of Contract, p. 8. 3d, Assuming the power of the defender to retract, at least there was a simple offer binding until withdrawn. It was not mere intimation, advertisement, or invitation. The offer had been timeously accepted, *i.e.*, before a communicated intention to withdraw—*Higgins* v. *Dunlop*, 9 D. 1408, and 6 Bell's App. p. 195; *Thomson* v. *James*, 18 D. p. 1 (Lord Pres. M'Neill's opinion, pp. 10, 11; Lord Ivory's opinion, pp. 14–16); Parsons on Contracts, i. 480–85; Pollock, *ut supra*, p. 10; *Harris*, L. R., 7th Ch. 587, and 41 L. J., Ch. 621 (case of application for shares where posting of letter was held sufficient acceptance). The offer was competently accepted by letter. It was not essential that parties should meet as arranged. As the pursuer had stipulated for a trial, he could not waive it. 4th, Pecuniary loss was not proved, but trouble and inconvenience caused by breach of contract was enough—*Webster & Co.* v. *Cramond Iron Co.*, 2 Rettie 752 (Lord Pres. Inglis' opinion).

The defender argued—We do not dispute that an offeree is to have a reasonable opportunity of accepting, even where the offer is not expressed to be binding for any time whatever. In commercial affairs that is satisfied by waiting for return of post. But the doctrine of *Thomson* v. *James and Harris* does not apply here. There was no offer; neither party came under any promise or obligation. There was a mere intimation of readiness to treat at a certain price, such as might have been made to many different persons at one time. If there was an offer, it was to settle at a meeting for trial, and the offer was withdrawn by writing before the meeting took place—*Dickinson* v. , L. R., 2 Ch. Div. 463 (where want of intimation was supplied by private knowledge); *Countess of Dunmore*, 1830, 9 S. 190.

At advising—

Lord Justice-Clerk—I think the Lord Ordinary's interlocutor ought to be adhered to. There was here no offer in a legal sense. The defender mentioned to the pursuer that he had a horse, and stated the price he was willing to take. The pursuer, after the mistake about the age of the horse had been discovered, proposed that £20 should be knocked off the price. The defender expressed his willingness to treat on that footing; and then it was arranged there should be a trial by the pursuer. He does not go to the trial, but sends a letter through the post accepting the horse at the price mentioned, without trial. Before that, however, the defender had sold the beast to a third party, as I think he was entitled to do. The conduct of the defender may not have been friendly, but I can discover no breach of contract.

Lord Ormidale—I concur. It is necessary, however, carefully to distinguish the legal grounds on which we are proceeding from those mentioned in the Lord Ordinary's note, about which I have considerable doubt. The Lord Ordinary thinks there was an offer by the defender. Had there been so, we might possibly have held on the decided cases that the pursuer had timeously accepted it. But I think the letters of 28th and 29th September do not contain an offer by either party. It is not clear from the last-mentioned letter that the defender offered the horse at £150, nor is it clear from the subsequent letters that he made his offer binding till the 6th of October. There was no legal obligation constituted on either side; parties were just in the course of negotiation. In this view it is unnecessary to decide the law which has been so amply discussed at the bar, as regards the question whether the acceptance was too late, and whether the defender timeously withdrew from his position. There was, in fact, nothing either to accept or to retract, but parties had arranged to meet for the purpose of coming to terms.

Lord Gifford—I concur, although I think this is a rather nice question on the correspondence. We must recollect that the proof of a unilateral obligation, one party being bound, the other not, must be clear and precise. Now, I do not think it is proved that there was any obligation on the defender to give the refusal of this horse to the pursuer until 6th October. Just as little was there any obligation on the pursuer to take the horse on trial.

The Court adhered.

Counsel for Pursuer—Guthrie Smith—Darling. Agent—J. C. Murray, W.S.

Counsel for Defender—Lord Advocate (Watson)—Jameson. Agents—C. & A. J. Douglas, W.S.