On the other hand, it has been found that curators *ad litem* are not liable. The reason of this is obvious from the position they occupy. The case of curators *bonis*, &c., is not very settled, and I desire to reserve my opinion as to such officers of Court, whether and in what circumstances they are to be found liable. I think I may say that a curator for a minor merely giving his consent to an action would not be liable. So far the law is pretty clear. Here we have the case of the tutor to a pupil child, and I agree that if asked in what category we are to put this case, it must be answered, into that of voluntary trustees rather than into officers of Court.

Therefore, for the reasons stated, I think the interlocutor of the Lord Ordinary should be affirmed.

LORD M'LAREN concurred.

LORD KINNEAR—I think that William White, the pursuer in this case, is the person who has created the expense of which the other party is entitled to be relieved, and on that ground I am of opinion that the judgment should be affirmed.

The Court adhered.

Counsel for Pursuer and Reclaimer—Wilton. Agent—John Rhind, S.S.C.

Counsel for Defenders and Respondents—C. S. Dickson—A. S. D. Thomson. Agents—Morton, Smart, & Macdonald, W.S.

Saturday, March 10.

SECOND DIVISION.

JACOBSEN, SONS, & COMPANY *v.* UNDERWOOD & SON, LIMITED.

Sale—Offer and Acceptance—Stipulation for Reply by Certain Day—Whether Acceptance Posted on that Day Timeous—Delay in Delivery from Insufficient Address.

Upon 2nd March the defenders offered to buy from the pursuers a quantity of straw. The offer was stated to be "for reply by Monday 6th inst." The pursuers posted a letter accepting the offer on the evening of the 6th. Owing to the letter being insufficiently addressed it did not reach the defenders until the second instead of the first post on the 7th. The defenders repudiated the contract on the ground that the acceptance was too late.

Held (1) that the pursuers timeously accepted defenders' offer by posting their acceptance on the 6th; and (2) that the pursuers were not to blame for the delay in the delivery of the letter on the 7th, as it was addressed in the same manner as their previous letters to the defenders, who had never said that the address was insufficient.

Contract—Sale—Custom of Trade—Whether Consistent with Law.

The defenders alleged but failed to prove a custom of trade to the effect that when a date was fixed for reply to an offer the reply must be not only despatched but received by that date.

Opinion by Lord Stormonth Darling that the alleged custom of trade, even if proved, would have been ineffectual to affix to the contract the meaning which the defenders desired to put upon it in respect that it was inconsistent with law.

Opinion by Lord Young *e contra*.

Upon 2nd March 1893 Underwood & Son, Limited, hay and straw importers, Brentford, who also carried on business in Leith, offered verbally through their agent in Leith to purchase a quantity of straw from Jacobsen, Sons, & Company, merchants in Edinburgh and Bona, the straw to be shipped during the month of March. The terms of the offer were reduced to writing and confirmed by Jacobsen, Sons, & Company by a letter addressed to Underwood & Son the same day, in which it was stated that the offer was "for reply by Monday 6th inst." Upon 6th March Jacobsen, Sons, & Company wrote accepting the offer. This letter was posted in Edinburgh after six o'clock on the evening of the 6th. In ordinary course it would have been delivered to Underwood & Son by the first post on the 7th, but owing to the name of the street not being specified in the address it was not delivered until the second or midday post. Upon the same day Underwood & Son wrote to Jacobsen, Sons, & Company as follows—"As our offer for the straw was for reply on Monday, you will have to consult us again before confirming sale . . . in the meantime there is no purchase." Jacobson, Sons, & Company refused to accept this repudiation of the contract, and subsequently tendered delivery of the straw, which Underwood & Son refused to take. Jacobsen, Sons, & Company accordingly, after intimation to Underwood & Son, sold the straw in Glasgow through a neutral broker, and then brought an action against Underwood & Son for payment of the difference between the contract price and that actually realised for the straw.

The defenders in answer averred that by the terms of the pursuers' letter of 2nd March, and "according to the understanding and custom of trade and of business men, the defenders' offer was open for acceptance until the end of business hours on Monday 6th March and no longer."

They pleaded, *inter alia*—"(2) The pursuers having failed to accept the defenders' offer in terms thereof, there was no concluded contract, and the defenders ought to be assoilzied."

Proof was allowed. The defenders failed to prove their averment as to custom of trade.

It appeared that the pursuers' letter of acceptance was addressed "Underwood & Son, Argyll Lindsay, Esq., Leith," that

previous letters from the pursuers to the defenders had been similarly addressed, and that the defenders had never complained that the letters were insufficiently addressed.

Upon 22nd December 1893 the Lord Ordinary decerned in terms of the conclusions of the summons.

"*Opinion.*—[*After stating the facts*]—I am of opinion that the pursuers are entitled to decree.

"The defenders aver on record what they call an 'understanding and custom of trade and of business men,' to the effect that when a limit of time is fixed for reply to an offer, the reply must be not merely despatched, but received within that limit of time. They add the further restriction 'before the end of business hours' on the day named. But their witnesses to custom do not all go so far as that. I suppose they felt the difficulty of fixing the end of business hours. At all events, the majority contented themselves with saying that the reply must be received on the day named.

"Now, I do not doubt that usage of trade may affix to the language of a contract a secondary or non-natural meaning, provided it be so notorious that both parties must be presumed to have used the language in that sense, and provided also it be consistent with law. But I regard this alleged usage as failing in both of these respects, especially the latter. The defenders' witnesses speak rather to their own interpretation of this particular contract than to any experience of a general understanding. And their interpretation of it, whether or not it be according to reason, is not, I think, according to law.

"Professor Bell in his Commentaries (Lord M'Laren's Ed., i., p. 344) states the law thus—'It is the act of acceptance that binds the bargain, and in the common case it is not necessary that the acceptance shall have reached the person who makes the offer. An offer to sell goods is a consent provisionally to a bargain, if it shall be accepted within a certain time fixed by the offer or by the law. Until the expiration of that time the consent to the sale is held to subsist on the part of the offerer, provided he continues alive and capable of consent at the time of acceptance. From the moment of acceptance there is between the parties *in idem placitum concursus et conventio*, which constitutes the contract of sale. To this, however, an exception may be made by the offerer limiting it so that the *arrival* of the acceptance only shall bind the bargain.'

"The rule thus stated by Professor Bell is not limited to the case of an acceptance despatched by post. But authoritative decisions, and particularly the judgment of the House of Lords in *Dunlop* v. *Higgins*, 6 Bell's App. 195, and of the English Court of Appeal in *Household Fire Insurance Company* v. *Grant*, L.R., 4 Exch. Div. 216, have established that where an offer is made which, expressly or by implication, authorises the sending of an acceptance by post, the posting of the letter of acceptance completes the contract, whatever delay there may be in its delivery. In the latter case, indeed, the letter never reached its destination at all. On that special ground Lord Bramwell dissented, but even he conceded that 'where a posted letter arrives, the contract is complete on the posting.'

"Here I cannot doubt that the offer was made in such circumstances as to authorise an acceptance by post. The offerer was in Leith, the acceptor in Edinburgh. The offer, though made verbally, was confirmed by letter, and the defenders' agent admits that he expected a letter of acceptance.

"In neither of the cases to which I have referred was any day fixed for reply. But the principle which Mr Bell states, and which these cases illustrate, is just as applicable to a case like the present as to one where the reply is to be given in due course. The principle is that the reply is made and the contract concluded when the acceptance is despatched. To the same effect (though complicated by a question as to retractation) is the case of *Thomson* v. *James*, 18 D. 1."

The defenders reclaimed, and argued—The words in the letter "This for reply by Monday 6th inst." were elliptical and ambiguous; it was, therefore, necessary to have evidence to show what was the proper meaning of the words in the circumstances—*Bowes* v. *Shand*, June 8, 1877, L.R., 2 App. Cas. 455; *Ashforth* v. *Redford and another*, November 6, 1873, L.R. 9 C.P. 20. The evidence showed that the ordinary meaning which mercantile men in Leith put upon these words, although perhaps not strictly a custom of trade, was, "I must have the acceptance in my hand by Monday." The words in this case were different from those used in other cases. In the second place, assuming that the defenders were wrong in their construction of the letter, it was admitted that they ought to have got it by the first post on Tuesday, but they did not get it until noon. In such a business the delay of a few hours was important, and as the delay occurred through the fault of the pursuers in putting an insufficient address upon the envelope, they could not claim damages, as the defenders were entitled to think the pursuers did not intend to take acceptance of their offer.

The pursuers argued—There was no proof of a custom of trade at all. What the witnesses deponed to was merely their opinion upon the words of the letter when shown to them after the transaction had taken place—that was not enough. It was plain, apart from the evidence of the defenders' witnesses, that the pursuers had validly accepted the defenders' offer. Upon Monday 6th March, the day stipulated for in the offer, they had written and posted a letter stating their willingness to carry out the contract as arranged, and that was precisely what was stated to be binding on both parties by Lord Shand in the case of *Mason* v. *Benhar Coal Company*, June 2, 1882, 9 R. 883. The pursuers had written the reply on Monday that bound them to the contract, and that was

sufficient — *Higgins & Son* v. *Dunlop, Wilson, & Company*, February 24, 1848, 6 Bell's App. 195; *Thomson* v. *James*, July 12, 1855, 18 D. 1. As regarded the objection that the letter had been unduly delayed, that was the fault of the post office, for which the pursuers were not liable, but the defenders were themselves to blame because it was proved that letters with the same address had been delivered to them before, and they made no complaint.

At advising—

LORD JUSTICE-CLERK—The question in this case is whether the defenders having offered to buy certain goods from the pursuers, and having in their letter used this expression, "This for reply by Monday 6th inst.," and the pursuers having posted their acceptance to the defenders on the 6th, the pursuers had timeously accepted under the above condition.

The defenders maintain that the condition in their letter was not fulfilled, that it could not be fulfilled unless the pursuers' acceptance reached them within what they call "business hours" on the Monday, and they aver that there is what they call a "custom of trade" to that effect in Leith where the transaction took place. They have brought evidence to substantiate this alleged custom, but having considered the evidence, I come without difficulty to the conclusion that they have entirely failed to substantiate their averment. There is certainly no satisfactory evidence of an established and accepted understanding of the kind alleged. No doubt some of the witnesses say that they would so understand such words, but that is quite a different thing from proving that there exists a universal or even general understanding, such as the defenders maintain, which is and has been acted on in the trade. It could hardly be seriously maintained that such an established understanding was proved by the evidence. I think, therefore, that as matter of fact the defenders' defence fails.

But, further, there is in my opinion ground for holding that the law is established to the effect that such an acceptance as that given by the pursuers is a good acceptance. When a letter of accepttance is posted it is out of the power of the accepting party. He has committed it to a medium of communication which is bound to hold it and safely deliver it to the other party in due course. The dispatcher of the letter has effectually bound himself the moment he has committed his acceptance to the mail. He has done that act of acceptance which, in the language of Mr Bell in his Commentaries, "binds the bargain." If Mr Bell be correct in his statement of the law, and there is nothing to be found to the contrary so far as I can see, viz., that an offer to sell goods is a consent provisionally to a bargain, if it shall be accepted within a certain time fixed by the offerer or by the law, then I feel compelled to hold that when the offerer names a time such as a certain day of the month, there is given to the person to whom the offer is made the whole of that day to make his decision, and that if within that day he accepts in a manner to bind himself, the bargain is closed. Up to the end of the time named the consent of the offerer must be held to subsist, so that it may be taken advantage of by the other party. Now, it has been made matter of distinct decision that acceptance by post, that is, by posting a letter of acceptance, completes the contract. It is in this case undoubted that acceptance by post was a suitable mode, and indeed was contemplated, and that the defenders' representative expected that the acceptance would so come. I have no doubt in holding (1) that the pursuers were entitled to accept at any time on the Monday; and (2) that they effectually accepted by posting their letter of acceptance on the Monday.

A point was raised on the fact that the acceptance did not reach the defenders' agent till noon on the Tuesday, and this was said to have arisen from the pursuers' fault in using an insufficient address. No such point is raised in the pleadings, but even if it had been, I should have no difficulty in denying any effect to it. The address upon the letter was the same as was regularly used by the pursuers in their communications to the defenders and appears not to have led to any delay on other occasions. It probably arose from some defect of acquaintance with the district on the part of some less informed official than the one who usually took charge of letters for the district. It is certain that the defenders' agent never informed the pursuers that their letters were unsatisfactorily addressed, and it is not proved that they were delayed in consequence of the address.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD YOUNG—I arrive at the same conclusion. I do not think that the case is absolutely clear, but on the best consideration that I have been able to give it, I think that it is ruled by the principle stated by Professor Bell in the passage quoted by the Lord Ordinary. With respect to usage of trade, I do not think that any usage such as is here alleged has been proved to exist. The doctrine of usage of trade is quite clear. If persons in any trade use language to which by custom a special or peculiar meaning is attached, they will be presumed to have used it with that meaning in any contract which they have made, and the contract will be interpreted accordingly. The Lord Ordinary says—"I do not doubt that usage of trade may affix to the language of a contract a secondary or non-natural meaning, provided it be so notorious that both parties must be presumed to have used the language in that sense." So far, that is just the doctrine which I have stated; but the Lord Ordinary goes on to add—"and provided also it be consistent with law." In one sense that is true enough. Any

usage must be consistent with the public law of the land. But his Lordship goes on to say that he regards "this alleged usage as failing in both of these respects, especially the latter." Now, I cannot assent to that. I think that if the usage here alleged had been proved to exist, there is nothing whatever in it that is inconsistent with law. My judgment proceeds entirely on this, that no usage of trade has been proved to exist, and I therefore think that the case must be decided in accordance with the doctrine stated by Professor Bell.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court adhered.

Counsel for the Pursuers—C. S. Dickson—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Defenders—Ure—Aitken. Agents—Wallace & Pennell, W.S.

Wednesday, March 14.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

BLAIR *v.* STRACHAN.

Property—Servitude—Road—Reservation in Feu-Charter—Construction—Use.

The pursuer and defender were adjoining feuars in a town, both holding of the same superior. At the back of the pursuer's feu there was a well which had been constructed by the superior for the convenience of the surrounding feuars prior to 1806, when the pursuer's feu was granted. The feu-charter in favour of the pursuer's author contained a clause "reserving always to our said feuars and their tenants and servants free entry and issue to and from the said well by a road or passage six feet wide and at least eight feet high to be left out upon the west end of the piece of ground hereby disponed." Following on the feu-charter the pursuer's predecessors had erected buildings on the feu but had left a passage six feet wide at the extreme west to the well. The passage was built over, but the building rested upon the gable of the house built on the defender's feu, and the passage was bounded on the west along its entire length by the said gable and a wall extending from it, both built wholly on the defender's ground. This state of matters continued down to 1892, when the pursuer brought an action for declarator that he was entitled to erect a wall along the west boundary of his property provided he left a road or passage at the west end of his feu as an access to the well. It appeared that the proposed wall would prevent the defender from entering the passage except at its end, and would move the passage to the east to an extent equal to the breadth of the wall.

The Court (*aff.* judgment of Lord Kyllachy—*diss* Lord Young) *granted* the declarator craved, *holding* that the pursuer was not excluded by the terms of the feu-charter from building a wall at the west boundary of his property, and was entitled to alter the position of the servitude road to the extent required.

At Whitsunday 1887 James Blair, boot and shoemaker, Woodside, near Aberdeen, bought certain subjects, numbered 120 and 122 Hadden Street, Woodside. The ground had been originally feued to Andrew Brodie, by feu-charter dated 29th December 1806. It was bounded on the south by Hadden Street, to which it fronted, and on the west by property belonging to Charles Strachan, baker, 124 Hadden Street. Prior to the date of the original feu-charter the superiors had made a pump-well on the back part of Blair's feu for the common use of their feuars in that neighbourhood, and for their convenience the feu-charter contained this reservation—"But reserving always to our said feuars and their tenants and servants free entry and issue to and from the said well by a road or passage of six feet wide and at least eight feet high to be left out upon the west end of the piece of ground hereby disponed." Brodie, or his successors erected buildings upon the part of their feu which faced Hadden Street, but in building they left a road or passage at the west side of the feu. This passage was built over to the same depth as the house, making an entry numbered 122 Hadden Street, but on the west of the passage the building rested on the gable wall of the house built on Strachan's feu. The ground behind the buildings on Blair's feu was vacant and not built upon.

For many years the boundary between Blair's and Strachan's property consisted of the east gable of the house built on Strachan's feu and of a wall or dyke extending northwards from said gable, and forming the wall of a bakehouse, stables, &c., used by Strachan and his predecessors. This wall was built wholly in Strachan's feu, and Strachan and his predecessors had made four openings in it for their own convenience, the first counting from the street, under the covered passage, as an entrance to the dwelling-house fronting Hadden Street, and the other three to the different offices situated behind the dwelling-house.

When Blair bought in his property in 1887 he disputed Strachan's right to use the passage as he was doing, and both parties raised actions of interdict in the Sheriff Court, and upon 13th April 1888 the actions were conjoined. In the action at Strachan's instance the Sheriff found it proved that for more than forty years Strachan had had the use of the passage as an access to his dwelling-house and stable by the openings 1st and 4th from Hadden Street, and interdicted Blair from shutting up or interfering with said openings; and in the action at Blair's instance