The Significance of *Adams v Lindsell*

The 1818 case of *Adams v Lindsell* states a paradox concerning the formation of contractual agreements. On one common view, the paradox is designed to show that, at least in certain circumstances, a full-blown 'meeting of the minds' theory of agreement is impracticable. The present article advances an alternative view of the *Adams* paradox, on which it has somewhat different implications for our understanding of contract law. On this view, the paradox strikes at a certain form of methodological individualism in our thinking about contractual agreement, which is problematic regardless of whether we seek a 'meeting of the minds'. Reflection upon this version of the *Adams* paradox may enhance our understanding both of contractual agreement generally and of the special rules governing the formation of contracts *inter absentes*.

Adams v Lindsell, decided two centuries ago, is well-known as a source of what we now call the 'postal acceptance rule': the rule that a contract entered through postal correspondence is concluded when the offeree posts his letter of acceptance, rather than when the offeror receives the letter.[1] This rule is often thought to be an exception to the more general principle that a contractual agreement is concluded when the offeree's acceptance is communicated to the offeror. The *Adams* case is also well-known for its statement of a certain paradox—an infinite regress—that would supposedly arise if the law did require receipt of acceptance in order to complete a postal agreement.

On one common view of the paradox stated in *Adams v Lindsell*, it does not pose an especially difficult puzzle for our understanding of contract law. According to this view the paradox arises if one seeks to apply, in the postal context, a theory of contractual agreement that most lawyers today would in any event regard as outdated and implausible: a certain version of the so-called 'meeting of the minds' or 'consensus ad idem' theory. The paradox can be avoided, it is thought, by abandoning or modifying that implausible theory of agreement. For example, by adopting some version of an objective approach to contract formation.

Notably, given this common view, the resolution of the paradox in *Adams* does not actually justify the rule of law for which the case has come to stand—the 'postal acceptance rule'. Replacing the 'meeting of the minds' theory with an objective approach to agreement, for example, does not in itself tell us at what point a postal agreement is concluded. Consequently, if we seek a rationale for the postal rule we must look elsewhere. While a number of rationales have been proposed by courts and commentators over the centuries since *Adams*, each is subject to significant objections. This has led some to conclude that the postal rule must be largely arbitrary.

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[1] (1818) 1 B & Ald 681; 106 ER 250.

The present article develops an alternative view of the *Adams* paradox, on which it has somewhat different implications for our understanding of contract law. On this view the paradox does not strike only an implausible 'meeting of the minds' theory of contractual agreement. Hence the paradox cannot be avoided just by abandoning or modifying such a theory, for example by adopting an objective approach. Furthermore, on the view advanced here, the *Adams* paradox does not afflict only contracts that are concluded by post. The paradox is at least latently present in all cases of contract formation—even where parties contract face to face. Resolving the paradox therefore requires us to reconsider some quite fundamental and general assumptions about the nature of contractual agreement.

The resolution of this alternative version of the paradox also, the article will suggest, yields at least the outline of a satisfactory account of the 'postal acceptance rule'. We can come to see that the postal rule is not arbitrary, and indeed, that the various justifications courts and commentators have proposed for the rule over the years, though not fully satisfactory, contain important grains of truth.

The common view of the *Adams* paradox and its resolution, and the alternative view to be developed here, each comprise a complex constellation of thoughts about the character of contractual agreement. Almost every aspect of each of these views is highly contestable. The article does not seek to show that the common view is untenable. Nor that the alternative view is inescapable. Certainly, the article does not seek to rule out many other possible understandings of the *Adams* paradox, and of contractual agreement more generally, which are not captured by either of the views discussed here. The article seeks only to bring out, by way of contrast to a common existing view, an alternative understanding of *Adams* that is not wholly implausible, and which has potentially interesting theoretical ramifications.

The article's overall argument may be characterised as an exercise in interpretive legal theory.[2] *Adams v Lindsell* provides the occasion for discussing a certain conceptual or philosophical problem, reflection on which illuminates both the particular rules governing postal contracts and our more general understanding of contractual agreement in the common law. The main aim of this exercise in interpretive theory is to improve our understanding, rather than to change the law. Much of the discussion will be at a more abstract level than usually appears in doctrinal analysis. However, the discussion may also have some implications for

[2] S A Smith, *Contract Theory*, Oxford University Press, Oxford, 2004, p 5. It is also a contribution to the literature on legal and contractual paradoxes. See eg George Fletcher, 'Paradoxes in Legal Thought' (1985) 85 *Colum L Rev* 1263; Richard Bronaugh, 'A Secret Paradox of the Common Law' (1983) 2 *Law & Philosophy* 193; also notes 51-52 below.

how we formulate, or reformulate, existing legal doctrine. Nor will the article venture any historical or comparative theses, though there is of course much of importance that could be said about *Adams* in those respects.[3]

Adams v Lindsell

Adams was a case about a sale of wool. The defendants were wool dealers based in the town of St Ives, in what is now Cambridgeshire. On a Tuesday in September 1817, they wrote a letter to the plaintiffs offering to sell a large quantity of fleeces. Unfortunately the letter containing the offer was misaddressed—it was sent to Bromsgrove, Leicestershire, whereas the plaintiffs resided in Bromsgrove, Worcestershire. Eventually the letter was delivered to the correct address, but it of course took longer to arrive than would otherwise have been expected. The letter arrived on the Friday evening. Upon receiving it, the plaintiffs immediately posted back a letter of acceptance, which arrived with the defendants the following Tuesday. Meanwhile, however, on the Monday, the defendants had sold their wool to someone else.

The plaintiffs sued for nondelivery of the wool, arguing that a binding contract had arisen on the Friday evening, when they accepted and posted their letter to that effect. In response the defendants argued that, for a contract to have been concluded, they would have had to *receive notice* of the acceptance at least by the Monday—before they sold their wool to a third party. Now, this argument is likely to strike modern readers as peculiar because it seems to assume that the defendants' uncommunicated sale of the wool to a third party could suffice to retract their offer, whereas we today would assume the sale should be legally significant only if communicated to the offeree.[4] The *Adams* defendants were evidently not greatly troubled by any such thoughts, because the essence of their submission was summed up as follows: 'Till the plaintiffs' answer was actually received, there could be no binding contract between the parties; and before then the defendants had retracted their offer, by selling their wool to other persons.'[5]

The King's Bench rejected the defendants' argument:[6]

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[3] See eg M Lobban, 'Formation of Contracts, Offer and Acceptance' in W Cornish et al, eds, *Oxford History of the Laws of England*, Oxford University Press, Oxford, 2010, vol XII; P H Winfield, 'Some Aspects of Offer and Acceptance' (1939) 55 *LQR* 499 at 506-7.

[4] As noted by Simon Gardner, 'Trashing with Trollope: A Deconstruction of the Postal Rules in Contract' (1992) 12 *OJLS* 170 at 170-1. Today a lawyer might argue that the offer lapsed on the Monday because by then a reasonable time for communication of acceptance had expired.

[5] (1818) 1 B & Ald 681 at 682-3; 106 ER 250 at 251.

[6] (1818) 1 B & Ald 681 at 683; 106 ER 250 at 251.

> The Court said, that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them, that the plaintiffs' answer was received in course of post.

That is the entirety of the court's reported reasoning.

Despite, and indeed because of, the *Adams* case's brevity, it is not easy to understand fully. Fortunately, this article does not aim to offer a comprehensive understanding of the case, let alone of its position in the intellectual history of the common law of contract. Certainly, the aim here is not to establish what the *Adams* court, the lawyers, or the parties were necessarily thinking at the time. Instead, the article will focus very selectively on a particular part of the court's reasoning—the paradox or infinite regress problem presented in the '*ad infinitum*' passage—and consider some possible contemporary interpretations of it, in order to draw out its potential implications for our theoretical understanding of contractual agreement today.

An existing view of *Adams*

The paradox

On one common interpretation, the paradox stated in *Adams v Lindsell* is not especially troubling at least for lawyers today, because it undermines a theory of contractual agreement that is now widely regarded as obsolete: a specific version of the so-called 'meeting of the minds' or 'consensus ad idem' theory, which requires the parties to reach a simultaneous alignment of certain subjective mental states. In particular, the paradox is thought to undermine the theory that the making of a contractual agreement requires each of two parties to possess, at a single moment in time, an intention to undertake a proposed deal, coupled with knowledge that the other party shares that intention.[7]

[7] Articulations of this kind of view include Lobban, above, n 3, pp 335-6; A W B Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *LQR* 247 at 261; David Marshall Evans, 'The Anglo-American Mailing Rule' (1966) 15 *ICLQ* 553 at 571; Horst K Lucke, 'Striking a Bargain' [1962] *Adel L Rev* 293 at 309 n 115; Asher Kahn, 'Contracts by Correspondence' (1959) 6 *McGill LJ* 98 at 104; Clarence D Ashley, 'Formation of Contract *Inter Absentes*' (1902) 2 *Colum L Rev* 1 at 3; C C Langdell, *A Summary of the Law of Contracts*, Little Brown & Co, Cambridge, Mass, 2nd edn, 1880, p 19.

An especially lucid articulation of this view can be found in perhaps the most renowned contemporary article on the postal acceptance rule, by Simon Gardner. Gardner's interpretation of the *Adams* paradox is worth setting out in some detail. He begins by quoting the court's *ad infinitum* passage and proceeds to offer his interpretation:[8]

> The court decided that [the acceptance] took effect on posting. If it were effective only on delivery, they said, 'no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer were received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had viewed their answer and assented to it. And so it might go on *ad infinitum*'.
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> It is easy to see what the court is getting at here. The defendants' argument was essentially that for a contract to arise there must be *consensus ad idem*: each party must simultaneously contemplate the same deal and know that the other shares that contemplation. In the context of the case, the defendants ceased to be in *consensus* once they thought there was no letter coming from the plaintiffs and sold the wool away. The court's reference to the prospect of an infinity of letters is aimed at rejecting the very foundation of this argument. It observes that the exigencies of doing business at a distance with non-instantaneous means of communication make the *consensus* model impracticable, even if it were otherwise attractive.

For Gardner, then, the court's *ad infinitum* passage raises a difficulty for a particular version of the 'meeting of the minds' theory: the notion that the parties 'must simultaneously contemplate the same deal and know that the other shares that contemplation'. The court's reasoning shows that this theory is impracticable in certain special circumstances, namely, where two parties are communicating 'with a non-instantaneous means of communication', such as the post. While parties communicating face-to-face or by other instantaneous means could presumably reach a point at which they both simultaneously contemplate the same deal and know that the other shares that contemplation, parties using a delayed means of communication, Gardner observes, can never ensure such a result. Any attempt to do so will be futile and produce only an infinite sequence of letters, because something like the following series of events will occur. When the offeree accepts, he will inform the offeror by sending a letter to that effect. However, by the time that letter arrives with the offeror, she may well have changed her mind about the deal (as in *Adams*), in which case there is obviously no consensus. Moreover, even if the offeror does still wish to proceed, upon receiving the offeree's letter she merely has notice of the offeree's state of mind at a prior point in time—and in the meantime, the offeree may have changed his mind. Perhaps, then, the offeror might try sending another letter to the offeree, confirming that she still wishes to proceed with the deal and seeking the

[8] Gardner, above, n 4 at 171.

offeree's reassurance that he does too. But of course, by the time *that* letter reaches the offeree, one or both parties may again have changed their mind …. No matter how many letters the parties send each other, they will never achieve the desired result here.

Solutions to the paradox

Given the view of the *ad infinitum* problem just outlined, a solution is not far to seek: as Gardner observes, the obvious solution is to modify or abandon the notion that contractual agreement requires a full-blown 'meeting of the minds'.[9] This could be achieved in a number of ways.

Gardner describes one possible solution to the 'meeting of the minds' paradox that turns out to be something of a false start. This solution would retain the requirement that two contracting parties must simultaneously intend a proposed deal, but discard the requirement that each *know* the other intends the deal. Gardner speculates that the *Adams* court itself took this approach:[10]

> Perhaps the best explanation for the court's choice of posting [as the moment of contract formation] is that on the facts of the case this view involved the lesser departure from the *consensus* model. At posting, the parties happened simultaneously to contemplate contracting together (although they were not both aware of this fact); whereas by the time of the letter's delivery the defendants no longer intended contracting with the plaintiffs.

But as Gardner proceeds to note, this diminished version of the *consensus* theory is a false start because it does not, without more, address the possibility that the offeror might change her mind about the deal *before* the offeree posts his acceptance. Presumably an uncommunicated change of intention of this sort by the offeror should not preclude contract formation,[11] even though it would mean there is not even a diminished simultaneous *consensus*.

Fortunately, there are other more convincing ways to avoid the paradox, which depart from the full-blown 'meeting of the minds' theory in various other respects. Another solution would be for the law to adopt an *objective* perspective on contract formation. For example, we could hold that the parties' mental states—such as intention or knowledge—must be construed from the standpoint of a reasonable person.[12] Each party would be taken to have the intention or

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[9] Gardner, above, n 4 at 171.
[10] Gardner, above, n 4 at 171.
[11] Gardner, above, n 4 at 171, citing *Henthorn v Fraser* [1892] Ch 31.
[12] Some support for this approach can of course be found in the reasoning of the *Adams* court itself, which notes that an offer in a posted letter must be regarded as persisting during the time it takes to reach the offeree. ('The defendants must be considered in law as making, during every instant of the time their letter was travelling, the

knowledge that a reasonable person in their shoes would possess. This would in fact allow the law, were it so inclined, to achieve a sort of 'meeting of minds' occurs—a point at which the parties could be taken to 'simultaneously contemplate the same deal and know that the other shares that contemplation'—*objectively* speaking. The offeror would post her offer letter, from which point her intention to embark on the proposed deal would be taken to persist for a reasonable time. When the offeree received the letter, and sent back a letter of acceptance, he could be reasonably taken to know of the offer and to be assenting to it. Furthermore, his state of mind would be taken to persist for a reasonable time. Then, when the offeror received the offeree's letter within a reasonable time, she could be reasonably regarded as continuing to intend the proposed deal, and as possessing knowledge of the offeree's (objectively persisting) state of mind. Thus, the law could reach a point where—objectively speaking—both parties simultaneously contemplate the same deal and know that the other does too.

Arguably the notion of an objectively persisting mental state, such as intention or knowledge, is just a straightforward application of the familiar objective approach that appears in contract law more generally, whereby each party's conduct is interpreted from the standpoint of a reasonable person. However, for some commentators—Brian Simpson is a prominent example—the notion of an objectively persisting mental state is a 'fiction'. It is an intellectual device designed to allow us to find, in a context such as postal contracting, the moment of simultaneous consensus required by the 'meeting of the minds' theory. The fiction allows us 'to reconcile the realities of life with the requirement of the dogma'.[13] Someone who holds this view might prefer simply give up on the idea that any *simultaneous* coincidence of the parties' mental states is required.[14] Instead, the law could hold that it is sufficient for parties to express their (objectively construed) intentions, and reach the requisite states of (imputed) knowledge, successively—without there being any moment of overlap.

Finally, a more radical departure from the 'meeting of the minds' theory might hold that the law should not consider the parties' *mental states* at all—even construed from the standpoint of a reasonable person. Instead, like Oliver Wendell Holmes in his more combative moods, we might contend that contractual formation should be based purely on overt behaviours or events.[15] On this approach, we might regard, say, the posting of a letter, or the

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same identical offer to the plaintiffs'.) This construal of the offer might be extended to all of the parties' communications.

[13] Simpson, above, n 7 at 261.

[14] Though others would resist this approach, eg Lucke, above, n 3; H K Lücke, 'Simultaneity and Successiveness in Contracting' [2007] *European Rev Private Law* 327.

[15] O W Holmes, 'The Path of the Law' (1897) 10 *Harv L Rev* 457 at 463-4.

delivery of the letter to the recipient's place of residence, as legally significant in themselves regardless of what mental states they might be taken to evidence. On this approach, the paradox that arises for a 'meeting of the minds' theory will of course not trouble us.

In sum, there are a number of approaches one could potentially take to avoiding the paradox that seems to arise, in the postal context, if one seeks to establish a full-blown 'meeting of the minds'. Although 1) abandoning the *knowledge* requirement is not a very satisfactory solution, the law could 2) adopt an *objective* approach, which might mean construing the parties' intentions, knowledge, or other mental states, from the standpoint of a reasonable person, or 3) simply rejecting any investigation of the parties' *mental states* whatsoever. The law could also 4) discard the *simultaneity* requirement. Or adopt some combination of those approaches. Whatever course is taken, the paradox seems relatively easy to avoid, in that doing so is not an especially difficult intellectual endeavour at least for those modern lawyers who have no deep commitment to a 'meeting of the minds'.

Rationales for the postal acceptance rule

Notably, given the understanding of the *Adams* paradox just outlined, its resolution does not actually justify the rule of law for which the *Adams* case has come to stand: the 'postal acceptance rule'. This is because the 'meeting of the minds' paradox can be avoided by *any* approach to contract formation that discards the requirement of a simultaneous subjective mental consensus whereby each of the parties knows that the other intends the proposed deal.

For one thing, the adoption of an objective approach whereby the parties' mental states are construed from the standpoint of a reasonable person, does not in itself tell us at what point a postal contract should be concluded—when the offeree objectively expresses his assent, when the offeror receives reasonable notice of that assent, or at some other point. *A fortiori*, abandoning a search for mental states altogether, and focusing only on overt actions or events, does not tell us what should be the decisive action or event. Nor does abandoning the simultaneity requirement itself decide at what point the contract is concluded. Hence, as Gardner observes, while the *Adams* court chose the point of posting as the crucial moment, 'its reported reasoning does not require this choice'—since 'an infinity of letters would be avoided by *any* rule' of contract formation that does not require a full-blown meeting of the minds.[16]

[16] Gardner, above, n 4 at 171. To similar effect see eg Evans, above, n 3 at 558-9; E Peel, *Treitel on the Law of Contract*, Sweet & Maxwell, London, 13th edn, 2011, para 2-031.

If reflection upon the *Adams* paradox does not tell us when a postal agreement should be concluded, we must look elsewhere for a rationale for the 'postal acceptance rule'. In the two centuries since *Adams* a number of alternative rationales have been proposed. However, none is generally thought to be fully convincing.[17] This article will not attempt an exhaustive discussion, or to resolve any of the debates about the various proposed rationales, but merely give a sense of the intellectual stalemate.[18]

First of all, it has been suggested that a contract should arise at the point of the acceptance's posting because here the offeree has done all he can do and has put the matter out of his *control*.[19] Now, it is questionable whether the premise of this rationale is true, because the postal service may allow the offeree to provide for supervision of delivery and against possible miscarriage of his letter.[20] The offeree may also be able to retract the letter after posting, depending on the postal regulations.[21] In any event, it is not obvious why it should suffice for contract formation that the offeree has done all he can do and put the matter out of his control. Perhaps all he can do is not enough. (One might say that an offeror has done all she can do, and put the matter beyond her control, when she posts an offer. Nevertheless it is usually supposed that the offer is not effective until receipt.)[22]

Alternatively, courts have quite self-consciously suggested, as a convenient way of reconciling the postal rule with the requirement of a true agreement, that the post office be treated as the *agent* of the offeror.[23] But this seems too transparently artificial. While the post office may plausibly have authority to carry a letter from the offeree to the offeror, it is less plausible that an offeror grants the post office agential authority to receive an acceptance, and so conclude a contract, on her behalf.[24] (Would you grant the post office such authority?)

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[17] See J Beatson, A Burrows, and J Cartwright, *Anson's Law of Contract*, Oxford University Press, Oxford, 30th edn, 2016, p 50; *Treitel*, above, n 16, para 2-031; M Chen-Wishart, *Contract Law*, Oxford University Press, Oxford, 5th edn, 2015, pp 73-4.

[18] For a recent discussion of these and other rationales, such as efficiency, see Elizabeth MacDonald, 'Dispatching the dispatch rule?' (2013) 19(2) *European J Current Legal Issues*.

[19] *Dunlop v Higgins* (1848) 1 HLC 381 at 398.

[20] *British & American Telegraph v Colson* [1871] LR 6 Ex D 108 at 116 (Bramwell B).

[21] So it might seem that the postal rule should depend upon the regulations that happen to be in force for recovery and tracing of letters. *Dick v United States* (1949) 82 F Supp 326.

[22] Also, with respect to 'instantaneous' forms of communication such as telex, to which the postal rule does not apply, the offeree has arguably put the matter out of his control at the moment of transmission of acceptance, yet a contract is not formed until receipt. See *Anson*, above, n 17, p 50; but contrast *Treitel*, above, n 16.

[23] *Household Fire and Carriage Accident Insurance v Grant* [1879] LR 4 Ex D 216 at 220-1; also *Hebb's Case* [1867] LR 4 Eq 9 at 12.

[24] *Household Fire* [1879] LR 4 Ex D 216 at 238. See further Langdell, above, n 3, p 20; Peter Goodrich, 'Habermas and the Postal Rule' (1996) 17 *Cardozo L Rev* 1457 at 1471.

Perhaps the offeror *impliedly authorises*—agrees to[25] or assumes the risk of[26]—acceptance by post? Again this seems artificial. An offeree requires no special authorisation to accept a contract by post—he may choose any reasonable means of communication he likes. The only effect of the supposed implied authorisation we are contemplating, then, is to render the offeree's acceptance effective at the point of posting. One could be forgiven for suspecting that such an authorisation 'will obviously be implied only when the tribunal considers that it is a case in which this result ought to be reached'.[27]

What about *fairness*: surely it is only fair to allow the offeree to rely on the efficacy of his acceptance from the point of posting? Langdell notoriously responded that fairness is irrelevant in this context.[28] More persuasively, he pointed out that any enhancement of fairness from the standpoint of the offeree is counterbalanced by prejudice to the offeror, since the postal acceptance rule imposes a contract upon her before she can know of its existence.[29] Thus, the decision whether to adopt the postal acceptance rule, as opposed to a rule of receipt, is a wash so far as fairness is concerned. 'Adopting one view, the hardship consists in making one liable on a contract which he is ignorant of having made; adopting the other view, it consists in depriving one of the benefit of a contract which he supposes he has made.'[30]

Finally there is Gardner's own theory: an *historical* 'demasking' of the postal rule. On this approach, the rule is explained by a peculiar historical context and so is perhaps 'something of a museum piece'.[31] Gardner links the rule's development to the introduction of the uniform penny post, together with three other advances that occurred around 1840: prepaid postage, 'the self-adhesive postage stamp', and 'the cutting of letter-boxes in the front doors of houses'.[32]

> Taken together, these measures may have great significance. Until 1840, the delivery of a letter typically required that the addressee should manually receive and pay for it. This was not, of course, a significant practical hurdle, but it sat in symbolic contrast with the new position, whereby the sender had only to affix his stamp and post the letter, and it would go through to its destination *without further subvention*

[25] *Household Fire* [1879] LR 4 Ex D 216 at 228; Langdell, above, n 3, p 19; Ashley, above, n 3, p 7.
[26] Eg Kahn, above, n 3, p 123.
[27] *Henthorn v Fraser* [1892] 2 Ch 27 at 33; see also *Household Fire* [1879] LR 4 Ex D 216 at 282-3.
[28] Langdell, above, n 3, p 21.
[29] It is sometimes thought the prejudice to the offeror is a less pressing concern because she has the opportunity to exclude postal acceptance if she chooses. But that is arguably only true if the offeror is legally knowledgeable or advised about this possibility. In any case, the offeree often has an equivalent opportunity: he can choose not to use the post if he prefers. *British & American Telegraph* [1871] LR 6 Ex D 108 at 116.
[30] Langdell, above, n 3, p 21.
[31] Gardner, above, n 4 at 192. The phrase appears in *Rhode Island Tool Co v United States* (1955) 128 F Supp 417 at 420-1, cited in Evans, above, n 3 at 571.
[32] Gardner, above, n 4 at 179-80.

> *from outside the system.* So these three innovations of 1840 may be seen as predicating a radically new perception of the nature of the post: the notional equation of the posting of a letter with its delivery. They may thus have been a very powerful influence towards courts affirming the acceptance rule [in the 1840s].

Gardner tells us that this perception of the post was subsequently lost, with the advent of even better communication technologies such as the telegraph and telephone. Hence, Gardner suggests, the common law later adopted a different approach to posted *revocations* of offers—which, unlike acceptances, are effective only upon receipt.[33]

Gardner hints that his demasking of the postal rule, and exposure of 'the "real" reason' behind it, is meant to be taken playfully rather than literally.[34] Still, for the avoidance of doubt we may note that Gardner's thesis, based on developments in the postal service in the 1840s, is not easy to square with the fact that *Adams v Lindsell* was decided in 1818.

In this way each of the proposed rationales for the postal acceptance rule turns out to be less than fully satisfactory. After surveying these and other proposals some commentators conclude the rule must be largely arbitrary.[35] It is a creature of the positive law that resolves a practical problem to which there is no inherently rational or just solution. Sometimes commentators make this point by saying that the rule is merely a convenient way to resolve a 'coordination problem'—much like a decision about whether cars should drive on the left or the right hand side of the road.[36]

Another view of *Adams*

This article will not seek to show that the common view of the *Adams* paradox just outlined is untenable. On the contrary, Gardner and others who share this view seem to have identified a genuine problem that arises if one seeks to apply a full-blown 'meeting of the minds' theory in the context of postal contracting.

However, the article will now suggest an alternative interpretation of the *Adams* paradox, which is potentially interesting because it brings out some different implications for our theoretical understanding of contractual agreement. This alternative view identifies a paradox

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[33] Gardner, above, n 4 at 190.
[34] Gardner, above, n 4 at 176.
[35] Though others regard this conclusion as unsatisfactory. Eg Evans, above, n 3 at 559 ('no more than an abdication of responsibility'); *Household Fire* [1879] LR 4 Ex D 216 at 235.
[36] Smith, above, n 2, pp 188, 192. See also eg Chen-Wishart, above, n 17, p 72. On the idea of a 'coordination problem' see T C Schelling, *The Strategy of Conflict*, Harvard University Press, Cambridge, Mass, 1960, pp 54-8; David Lewis, *Convention*, Harvard University Press, Cambridge, Mass, 1969, pp 6, 24.

that clearly does not arise because of an assumption that a contractual agreement requires a 'meeting of the minds', and so cannot be avoided just by modifying that implausible theory of agreement in the ways discussed above. Indeed, on this alternative view, the *Adams* paradox does not arise only where parties seek to contract by post, or by other delayed means of communication. It arises in all contracting scenarios—even where a contract is concluded face to face. Resolving this version of the paradox, then, will require us to reconsider some quite fundamental and general assumptions about the nature of contractual agreement. Furthermore, the resolution of this version of the paradox will turn out to yield at least the beginning of a rationale for the 'postal acceptance rule' for which *Adams* has come to stand, and allow us to see some important grains of truth in the various rationales for the rule that have been proposed over the centuries.

The paradox reconsidered

In *Adams*, the defendant offerors—the wool dealers in St Ives who wanted to sell their fleeces—claimed that a contractual offeror should be entitled to receive notice of acceptance before a contract is formed. The court responded that this claim was implicitly paradoxical. Let us now try to bring out an alternative view of why the claim might be paradoxical. To bring out this view, it will help to reconsider the reason that someone in the shoes of the *Adams* offerors might suppose they should be entitled to receive notice of acceptance.[37]

So let us imagine ourselves in the shoes of the *Adams* offerors at the point where they have posted the letter containing their offer, and are still awaiting a reply—which should come in the post from Bromsgrove any day now. Our offerors are assuming, let us suppose, that until they actually receive the reply, they should not be bound to any contractual agreement.[38] Why would they make such an assumption?

A proponent of the 'meeting of the minds' view of *Adams* might suggest that our offerors in St Ives must be assuming that contract formation requires the parties to reach a sort of watershed moment of simultaneous awareness. That is, a definitive instant in which both parties not only contemplate a sale of wool, but at the same time know that the other party does

[37] Though as noted above, our aim is not to establish what the court or the parties in *Adams* were actually thinking at the time, but rather to bring out some possible implications of the case's reasoning for our theoretical understanding of contract law today.

[38] David McLauchlan argues that the offerors in fact explicitly provided for this, since the offer was stated to be subject to 'receiving your answer in course of post'. *Adams* (1818) 1 B & Ald 681 at 681; 106 ER 250 at 250. The interpretation of this phrase is open to debate, but McLauchlan plausibly reads it as requiring actual receipt for the formation of a contract. 'The Uncertain Basis of the Postal Acceptance Rule?' (2013) 30 *JCL* 33 at 41.

so too. Yet, reflection on one's own experience of contracting by delayed means of communication might lead one to doubt that any sane contracting party would suppose that such a moment could be achieved by means of the post. Thus, one could be forgiven for suspecting that a somewhat different assumption about contract formation—a more intuitive and less theory-laden one—might be at work here.

There is indeed another, relatively straightforward reason our offerors in St Ives might have assumed they should not be contractually bound until they received notice of the offerees' acceptance. The offerors might simply have assumed it would be unfair to bind them to a contractual agreement with the offerees before they were in a position to discover whether the offerees had agreed. Intuitively, it seems reasonable to suppose that, before an offeror can be bound to a contract, she must be put in a position to find out where stands with respect to the transaction: whether it is actually going ahead, and whether she is bound. Therefore, before the offeror is contractually bound, she must be able to discover whether the offeree has done what is required, on his part, for the parties to be in agreement. And this, one might assume, is why the offeror should be entitled to receive notice of the offeree's acceptance before a contract is formed.

Notably, support for this intuitive assumption can be found in dicta from the contractual commentary and case law right up to the present day. Often, when commentators or judges discuss the requirements for the formation of a contractual agreement, they point out that it would be unfair to bind an offeror before she is in a position to discover whether a binding contract has come into existence. Consequently, the offeror must, at least generally speaking, be entitled to receive notice of the offeree's acceptance. Indeed, this is the reason perhaps most commonly advanced for what is often said to be the general principle of the common law of contract that communication of acceptance is required to conclude an agreement. So for example if we turn to one leading contemporary treatise we will be told that communication is generally required because 'the offeror is entitled to know whether a binding contract has been concluded by acceptance'.[39]

The case law makes the same point more vividly. Lord Denning in the *Robophone* case says that 'It would be *deplorable'* if an offeror were contractually bound when she does 'not know whether or not there [is] a contract binding' upon her.[40] Hence in that case Lord Denning concluded that the offeree, an answering machine sales firm, could not accept its customer's

[39] *Anson*, above, n 17, p 46.
[40] *Robophone Facilities v Blank* [1966] 1 WLR 1428 at 1432 (emphasis added).

offer merely by signing a contractual document that never left its office, and so never became available to the customer. The sales firm had to provide notice of acceptance.

One could find in the case law other examples of apparently 'deplorable' contract formation scenarios which might result if communication of acceptance were not required. Lord Blackburn, considering the alleged formation of a coal supply contract for a railway in *Brogden v Metropolitan Railway*, famously rejects the notion that an offeree might accept a contractual offer merely by mentally assenting in his own mind, or by signing a contractual document but immediately locking it away in his desk drawer.[41] Surely it would be inappropriate for such an act by the offeree to bind the unwitting offeror. To give one other example, discussed in an early American law review article: an offeree presumably cannot conclude a contract just by whispering to his friends that he has done so.[42] If, say, I propose to you that we should open a café together, you surely cannot accept by whispering your answer to your other friends in the room, and instructing them not to tell me. It would be unfair to bind me contractually in this scenario. And this, one might suppose, is because the offeror must be able to discover whether her counterparty has done what is necessary for the parties to be contractually agreed.

Thus, it is natural to assume that the reason a contractual offeror should receive notice of acceptance is because only then is she placed in a position to discover whether the offeree has done what is required on his part for a contractual agreement to arise. Yet now, having articulated this assumption about the position of the offeror, we must turn to consider the position of the offeree. If we are committed to even-handed treatment of the parties, we must presumably also posit that he is entitled to be placed in an equivalent position. That is, we must hold that the *offeree* is entitled to find out, before he is bound, whether the offeror has done what is required on her part for them to be agreed. But then, of course, a paradox looms.

On this approach the formation of a contract will require an infinite sequence of communications. Our offeror sends an offer to the offeree, who assents and sends a letter of acceptance back to her. Once the offeror receives that letter, she has notice that the offeree has done what is required on his part for the parties to be agreed. Therefore she has reached the position required, on her part, for a contractual agreement. However, before the offer*ee* can be bound, he must receive notice that the offeror has reached that position. Therefore, our offeror must send a communication to the offeree notifying him of her receipt of his acceptance. Once

[41] (1877) 2 App Cas 666 at 692.
[42] Ashley, above, n 7 at 7.

it arrives, the offeree will have achieved what is required on his part for the parties to be agreed. But of course, the offeror must be put in a position to know that this has occurred. So she must receive an acknowledgement that he has been notified of her receipt of his acceptance … and so on. The sequence will continue *ad infinitum*.

To be sure, one might dissent from the intuitive thought about contract formation being articulated here, and the associated attempt to equate the positions of the offeror and offeree, which gives rise to the infinite regress. In particular, one might be tempted to say that the last thing that should be required for a contractual agreement is for the offeror to receive notice of the offeree's approval of the deal—with no need for the offeree then to learn of the offeror's receipt of such notice. The present article will not seek to prove that this position is untenable. However, there is a plausible line of reasoning that might lead one to conclude it is inadequate. In particular, it is natural to worry about the apparent imbalance between the offeror and the offeree that will be produced if a contract cannot be formed until the offeror receives notice of acceptance, but can be formed regardless of whether the offeree learns of that receipt. This approach means that the offeror enjoys a great advantage in contract formation. She cannot be bound until she is in a position to discover whether or not the contract is going ahead and whether she is bound. By contrast, the offeree enjoys no equivalent security. He is out in the cold, as it were. A contract can become binding on him before he is in any position to know of its existence.[43] If this would be a 'deplorable' result, to use Lord Denning's word, to impose upon the offeror, surely it would also be unfortunate to impose an equivalent result upon the offeree?

In any event, it is submitted that the elaboration provided here is a not implausible interpretation of the reasoning presented in the *ad infinitum* passage in *Adams*. Indeed, we have arguably merely restated the concern that the *Adams* court literally articulates in the relevant passage: 'if the [offerors] were not bound … till the answer was received, then the [offerees] ought not be bound till after they had received the notification that the [offerors] had received their answer'. Arguably this passage represents an intuitive and straightforward assumption about what fairness requires before a binding contractual agreement is imposed upon the parties. To generate an infinite regress, one need not adopt any relatively elaborate theory of contractual agreement such as the 'meeting of the minds' account, with its requirement of a sort of doubly Damascene moment of simultaneous awareness.

[43] Cf above, text at n 29.

Differences from the 'meeting of the minds' view

Because the alternative view of the *Adams* paradox just articulated differs in a number of crucial respects from the 'meeting of the minds' view advanced by Gardner and others, the alternative paradox cannot be so easily resolved.

As an initial matter, our alternative view, unlike the 'meeting of the minds' view, is not committed to any *knowledge* requirement for contract formation. It is consistent with the alternative view to hold that the offeror need not actually know of the acceptance, but should merely be put in a position where the relevant information is in some sense available to her.[44] For example, through a written notice being hand-delivered to the offeror's address, regardless of whether she actually reads it. Even a *notice* requirement of this sort will generate our paradox, because, given a commitment to even-handed treatment of the contracting parties, we will then have to say that the offer*ee* must receive notice that the offeror has received notice of acceptance … and so on.

Relatedly, our alternative view does not presume that the parties' mental states, such as knowledge or intention, should be construed *subjectively*—such that those states might change from moment to moment according to the parties' whims. Instead, an *objective* construal might be appropriate. It is entirely consistent with our intuitive assumption—that each party should be placed in a position to discover whether the other has done what is required for contract formation—to hold that each must be taken to have the intention or knowledge a reasonable person in their shoes would possess. Our paradox will still arise, because if the offeror is entitled to be put in a position where a reasonable person would realise the offeree had accepted, the offeree is entitled to be put in a position where a reasonable person would realize that the offeror had reached the relevant position, and so on.

Indeed, our alternative view does not necessarily assume that the law should take any interest at all in the parties' *mental* states—as opposed to *overt actions or events*. Again, our intuitive view might require only the occurrence of a certain event, such as the delivery of a written notice to the offeror's residence regardless of whether it influences her mental state. Our paradox will still arise, so long as we assume that the reason for insisting on this overt action or event is to confer on the offeror a certain sort of benefit: of being placed in a position to discover whether her counterparty has done what is required on his part for contract

[44] On which point see eg O W Holmes, Jr, *The Common Law*, Little Brown & Co, Cambridge, Mass, 1881, p 306; 'The Path of the Law', above, n 15 at 464; *The Brimnes* [1975] QB 929; *Haywood v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2018] 1 WLR 2073; 2018 UKSC 22.

formation. Because then, fairness would seem to require that the offeree enjoy an equivalent position.[45]

Our alternative view also contains no commitment to *simultaneity*—to a particular moment in time at which for example the parties' mental states, or other behaviours, align. We may suppose that the offeror's receiving notice of acceptance need not overlap at any instant in time with the offeree's acceptance, but rather may be obtained subsequently. Still, the offeree will then need to obtain notice of the offeror's receipt … and so on. Our paradox arises even if all the relevant actions or events may occur successively.

The upshot of all this is that our alternative paradox is not as easily resolved as the 'meeting of the minds' paradox. Given our intuitive assumption about what contract formation requires, it will not assist matters merely to 1) abandon a knowledge requirement, 2) adopt an objective approach, such as one employing a reasonable person standard, or indeed 3) to focus only on overt actions or events. Nor will it help 4) to give up on simultaneity.

Finally, we can now also see that our alternative paradox does not arise only in the postal context, or other special contract formation scenarios. The paradox is at least latently present in all contract formation scenarios. Recall that Gardner associates the *Adams* paradox with practical difficulties that arise where parties are using a delayed or 'non-instantaneous means of communication'. Because postal communications are inherently delayed, there is a danger the parties might change their mind while a communication is travelling between them. By contrast, our alternative paradox is independent of such considerations. To see this, imagine that two contracting parties can somehow transmit truly instant messages to each other, and so there is no danger that either party may change their mind while a message is travelling. (Some modern instant messaging technology may effectively approximate this condition.) When our offeree accepts, he can instantly inform the offeror, and she will instantly know that he has reached the state required on his part for a contractual agreement. The problem is that, now the offeror has received this information, the offeree must be notified that she has done so—since he cannot be bound until he is notified that she has fulfilled the requirements on her part for contract formation, which include obtaining notification of his acceptance. Of course, the offeror can send an instant message supplying the offeree with the requisite information, and when it instantly arrives the offeree will reach the state necessary, on his part, for contract

[45] Of course, if one does not assign any reason of this sort to the law's requirement of an overt event such as the giving of notice, one can escape the paradox. But by doing so, one gives up on our initial intuitive assumption.

formation. But then the offeror is entitled to be notified, before she is bound, that he has done so. She must receive another instant message from the offeree …. And so on.[46]

Another treatment of the *Adams* paradox has recently been proposed by the American scholar Shawn Bayern according to whom the paradox arises because of the possibility that, in a special context such as postal contracting, any given communication might fail to be delivered. That is, because the parties are 'using an unreliable communications technology'.[47] If communications between the parties might fail, Bayern reasons, neither party can 'be confident that the other party [receives] its communication', and as a consequence, 'absolute certainty in reaching an agreement is impossible to achieve'.[48] Once the offeree sends his message of acceptance, he cannot be certain it has reached the offeror. Therefore, she must send a return message confirming her receipt. However, she cannot be certain *that* message reaches the offeree. Therefore he must send another message confirming it has got through … and so on.

By contrast, our alternative paradox arises regardless of the possibility of communication failure, and associated uncertainty about whether communications have been received. To see this, let us consider—one last time, with apologies for the repetitiveness of the exercise—a sequence of interactions between two parties seeking to reach a contractual agreement. Let us imagine that these parties have a perfectly reliable method of transmitting messages. (Let us assume also, for reasons that will become apparent, that each party has perfect reasoning powers.) Still our paradox arises. Our offeror transmits an offer to the offeree, who receives it and accepts. Next, the offeree must notify the offeror of his acceptance, and so he sends a message to that effect—which she of course receives through the perfect messaging system. At this point, the offeror has reached the state required, on her part, for a contractual agreement. But of course, the offeree is entitled to be notified that she has done so, before he is bound. Now, given the existence of a perfect messaging system, the offeror need *not* send another

[46] For other reasons to question the instantaneous/non-instantaneous distinction in the context of the postal acceptance rule see the probing discussion by Eliza Mik, 'The Effectiveness of Acceptances Communicated by Electronic Means' (2009) 26 *JCL* 68; Brian Coote 'The Instantaneous Transmission of Acceptances' in J W Carter, ed, *Contract as Assumption II*, Hart Publishing, Oxford, 2016, ch 4 (originally (1971) 4 *NZULR* 331).
[47] 'Offer and Acceptance in Modern Contract Law: A Needless Concept' (2015) 103 *Cal L Rev* 67 at 82. Bayern notes that an infinite sequence akin to the one in *Adams* has troubled the field of computer science and communications theory. At 83, citing E A Akkoyunlu, K Ekanadham, and R V Huber, 'Some Constraints and Tradeoffs in the Design of Network Communications', in J C Browne and Juan Rodriguez-Rosell, eds, *Proceedings of the Fifth ACM Symposium on Operating Systems Principles*, 1975. In that field it has come to be known as the 'Two Generals' problem, because it tends to be explained using the example of two generals, encamped on either side of a city they are besieging, trying to coordinate their attack plan.
[48] Bayern, above, n 47 at 82.

message to the offeree here. Instead, the offeree, at the moment he sends his own message, can *reason* that it will certainly be received by the offeror, and therefore, that all the requirements on her part for contract formation will be satisfied. By reasoning to that conclusion, the offeree can reach the state required on his part for a contract to be formed, without any further communication. Note, however, that the offeree's *reasoning to that conclusion* is then an act required on his part for contract formation. Consequently, the offeror must be notified that the offeree has performed that act. Again, of course, no message need be sent to confer such notification on the offeror. Given that she has received the offeree's acceptance, the offeror can reason that the offeree has reasoned himself into the knowledge that she has received it. Still, the offeror's *reasoning to that conclusion* is then the last thing required on her part for contract formation. And so the offeree must be informed that it is has occurred …. A contract will never be formed.[49]

Our alternative version of the *Adams* paradox is therefore perfectly general. It arises in all cases of contract formation—not just where parties seek to contract by special means of communication such as the post. The paradox arises regardless of whether the parties' communications are delayed, or might fail to be delivered. It arises even where communications are instantaneous and perfectly reliable. Indeed, our paradox arises even where parties seek to contract face to face. Even two parties who are looking each other in the eyes, and communicating orally without any delay or other difficulty, will have to embark upon an infinite sequence of communications in order to reach a contractual agreement—at least, that is, if we assume that each party is entitled to acquire, before she is agreed, notice that the other party has reached the state required for them to be agreed.[50]

Solution?

How could we avoid the alternative paradox identified here? To do so, we will need to ascertain the root source of the paradox, and develop a revised theoretical approach to contractual

[49] Note that it makes no difference whether the reasoning here is objectively imputed or a subjective process. For a philosophical treatment of this kind of infinite reasoning process see eg Lewis, above, n 36.

[50] For the avoidance of doubt, the claim here is not that contractual agreement between parties who are interacting face to face is in fact impossible, only that it is impossible given a certain understanding of what contractual agreement involves. Therefore there must be something wrong with that understanding. Relatedly, it is of course true that, in reality, no contracting parties would bother to work through even the initial stages of the complicated sequences of interaction discussed above. But that only confirms that there must be something wrong with an understanding of agreement which would in principle require parties to embark on such a sequence—indeed, to complete an *infinite* sequence—of that kind.

agreement that can avoid it. Subsequently, we can consider some potential concerns that might arise about this approach.

The source of the paradox

Our paradox arises because we have effectively adopted an understanding of contract formation that involves a problematic relationship of *interdependence* between the parties. We are assuming that what each individual party must do, to form a contract, is dependent or conditional upon the other doing what is required on their part.[51] Because each party must receive notice that the other has done what is required. Given this assumption, neither party can ever enter an agreement—we are instead trapped in an endless sequence, whereby we first seek to establish that one party has done what is required, then the other, then the first, and so on. By way of analogy, imagine two overly courteous persons, neither of whom can enter a room because each insists the other enter first—'No, after *you*'.[52]

Why have we fallen into this problematic understanding of agreement, whereby what each of the parties must do, to reach a contractual agreement, is dependent upon the other first doing what is required on their part? The root source of our difficulties, it is submitted, is a certain form of what we might call 'methodological individualism' in our thinking about contract formation.[53] In thinking about what it takes for a contractual agreement to be concluded, we have been considering the position of each party individually, and asking what he or she can legitimately demand from the other.

For example, in considering the *Adams* case, we first took the position of a contractual offeror—the wool dealers in St Ives—and articulated the thought that an offeror must be entitled, before she is bound, to notice that her counterparty is agreed. We then shifted to consider the position of the other party to the transaction, the offeree. Here we concluded that, if the parties are to be treated even-handedly, the offeree must have an equivalent entitlement

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[51] The paradox is structurally equivalent to those discussed in the philosophical literature on agreement by Colin Radford, 'I Will, if You Will' (1984) 93 *Mind* 577; and Margaret Gilbert, 'Is an Agreement an Exchange of Promises?' (1993) 90 *J Philosophy* 627.

[52] Sometimes known as an 'Alphonse and Gaston' routine, after a comic strip featuring two characters prone to this kind of interaction.

Note also that on this view the 'coordination problem' analogy is deeper than some legal commentators seem to realise. See text to note 36 above, and Schelling, above, n 36, p 54; Lewis, above, n 36, pp 27-34, 52-7. See further P Vanderschraaf and G Sillari, 'Common Knowledge' in E N Zalta, ed, *The Stanford Encyclopedia of Philosophy*.

[53] For the origins of this term, in the fields of economics and sociology, see Joseph Schumpeter, 'On the Concept of Social Value' (1909) 23 *Quarterly J Economics* 213. Of course there is today a multifaceted debate ranging across a number of fields concerning the meaning and appropriateness of 'methodological individualism'. Joining such debates is beyond the scope of the present article, which merely adopts the term as a convenient and instructive label for the approach to understanding contract formation described in the text above.

to notice of the offeror's relevant actions. Considering each party's position individually in this way, we arrived at the conclusion that the entry of each party into the agreement must depend upon the other first doing what is required to enter it. But then, of course, contract formation is impossible.

Avoiding the paradox

What, then, is an alternative theoretical approach to contractual agreement that could avoid the paradox? It is submitted that such an approach would have to begin, not by considering the contracting parties individually, but with the notion of an activity or enterprise that is inherently joint or dual. By way of analogy, one way in which someone unfamiliar with the game of tennis might try to understand it is by scrutinising each individual player's actions separately, and asking what each must do in order to produce the joint phenomenon of the game. However, a more fruitful approach might be to start by considering the nature of the game—an inherently joint activity—in light of which the observer can then understand what is required of each individual player.[54]

In this vein, the article will now suggest—in a necessarily tentative and brief fashion—that we might avoid our paradox by adopting the following theory of contractual agreement. We should understand the formation of a contractual agreement as, in a slogan, the parties' *participation in a joint contractual enterprise*. This approach would begin with the idea of a joint enterprise in which both parties might participate, and then ask what that enterprise requires of the parties who seek to establish their participation.

There is nothing mysterious about the notion of a joint contractual enterprise or transaction in the sense intended here. It is simply an exchange, deal, or other reciprocal relationship upon which two contracting parties might embark. For example, they might exchange a substantial quantity of fleeces for money between different counties, or establish an ongoing supply arrangement whereby one provides coal for the other's railway, or open a café together.[55]

To determine whether two parties are participating in a joint contractual enterprise, we may (but need not) analyse the matter in terms of a process of 'offer' and 'acceptance'.[56] This process begins when one party makes an 'offer': she proposes a particular substantive

[54] Some philosophers of collective action have adopted a similar approach to address problems in their field. Eg B Laurence, 'An Anscombean Approach to Collective Action' in A Ford, J Hornsby, and F Stoutland, eds, *Essays on Anscombe's Intention*, Harvard University Press, Cambridge, Mass, 2014.

[55] This kind of enterprise is irreducibly joint, in that it could not be undertaken by one person alone. If a single person acting alone attempted to exchange fleeces for money, for example, that would so radically change the character of the project that it would no longer be the same enterprise.

[56] Cf *Gibson v Manchester City Council* [1979] 1 WLR 294 at 296G, 297D.

transaction for the parties to embark upon. For example, an offeror proposes that the parties exchange fleeces for money, start a coal supply arrangement, or open a café. But of course, the offeror's proposal cannot by itself suffice to get her contemplated contractual enterprise off the ground. The enterprise essentially requires the participation of another person.

Accordingly, someone else—an offeree—must 'accept' the offeror's proposal. That is, he must do something that establishes he is participating in the offeror's proposed transaction. As Lord Blackburn put it in *Brogden v Metropolitan Railway*, the offeree 'must signify his acceptance by doing some particular thing'.[57] Often the offeree's acceptance will of course take the form of an utterance of oral or written words—'We've got a deal,' 'Let's do it!', and so forth. In other cases, the offeree may perform a physical act, so long as this carries the meaning that he is participating in the enterprise the offeror has proposed. For example, if you suggest today that we should run a café together, and I arrive tomorrow morning at the storefront you have rented and start unloading bags of coffee, this would tend to establish my participation in your proposed enterprise. It will not suffice if the offeree's conduct is merely equivocal—such that it is consistent with a state of affairs other than his participation in the proposed transaction. Putting the point only a little hyperbolically: the offeree must do something 'which clenches the matter and shows beyond all doubt' that he is participating.[58]

Importantly, in order for the offeree's act to establish that he is participating in the proposed transaction, it must generally be one that is not secretive or furtive, but rather reasonably accessible to both parties in accordance with the demands of the transaction.[59] This is important because it means that the view proposed here can explain why a contractual offeror will not generally be bound in the 'deplorable' scenarios discussed by Lord Denning and others—such as where an offeree merely assents mentally, locks a signed document away in a desk drawer, or whispers to his friends. In such scenarios there is no contractual agreement, on the view suggested here, because the offeror's act does not plausibly signify that he is participating in the joint enterprise proposed by the offeror—rather, the act tends to show that the offeree is pursuing a separate agenda of his own. Imagine, for example, that you propose to me that we should open a café together, and I whisper my answer to my other friends in the room and tell them not to tell you. My behaviour here could not ordinarily be taken to mean that I have joined

[57] *Brogden* (1877) 2 App Cas 666 at 691 (emphasis in the original).
[58] *Household Fire* [1879] LR 4 Ex D 216 at 223.
[59] Cf Christopher Essert, 'Legal Powers in Private Law' (2015) 21 *Legal Theory* 136 at 146, 150-1, advocating a 'publicity' requirement with respect to the exercise of legal powers generally. Regrettably a full engagement with Essert's argument is beyond the scope of the present article.

with you in the enterprise of opening a café. Without more facts, it is unclear exactly what I am up to—perhaps I am playing a joke, or being deliberately cruel. Whatever the case may be, my conduct tends to show I am pursuing some agenda of my own, and it certainly does not unequivocally demonstrate that I have joined in your proposed enterprise. Or again, imagine that you propose to supply coal to my railway at a certain price, and after receiving your written proposal I initial the document but lock it away in my desk drawer. My conduct here does not plausibly signify my participation in your proposed exchange of coal for money. It is not the kind of thing people do when they want to proceed with such an arrangement. My conduct might have a number of possible meanings depending on the context. Perhaps I am strongly inclined to participate in the proposed transaction, but want to think it over before committing. Or perhaps my act has a more nefarious significance—I may be planning to perpetrate some sort of fraud. Whatever the case may be, rather than joining in the transaction you have proposed, I have shown that I must have some other design.

Why will a secretive act by the offeree not generally signify his participation in a proposed joint enterprise?[60] For the mundane reason that, in order for such an enterprise actually to proceed, both parties' participation must be reasonably available in accordance with the demands of the enterprise. Two people cannot plausibly be regarded as carrying out together an exchange of fleeces for money, or a railroad coal supply arrangement, or as running a café together, for example, if either party withholds or conceals her supposed participation from the other. The fact that each is participating must be reasonably available given the parties' need to coordinate their activity.

In sum: on the alternative approach to contractual agreement tentatively sketched here, a contractual agreement is concluded when the offeree performs an act which carries the meaning that he is participating in the joint enterprise the offeror has proposed. Such an act will at least generally be one that becomes reasonably available in accordance with the demands of the proposed enterprise.

[60] 'Generally' because the offeror's proposal may indicate, either explicitly or implicitly given the nature of the proposed transaction, that a secretive mode of acceptance should suffice. The court's construal of an explicit stipulation of this sort may be influenced by considerations of what is reasonable in the context of the proposed transaction. Eg *Manchester Diocesan Council for Education v Commercial and General Investments* [1970] 1 WLR 242.

Objections

While this article cannot address all of the concerns that might arise about the understanding of contractual agreement as participation in a joint enterprise, it will help to consider some of the most likely concerns.

First, one might worry that this approach to contractual agreement leads to another infinite regress. However, this concern is unfounded. Our approach does not require that, for an agreement to occur, the offeror must receive a notification that the offeree has done what is required on his part to reach an agreement (and vice versa). More broadly, it does not require that either party reach an individually specifiable position, which is dependent or conditional upon an equivalent position being reached by the other. All that is required is that the parties perform actions which signify their participation in a proposed joint enterprise, and which are reasonably accessible in a way that accords with the ordinary demands of such an enterprise.

Second, what is the relation between the approach to contractual agreement proposed here and what is often said to be the general principle of the common law that acceptance must be 'communicated'? The proposal here does contain a sort of 'communication' or 'notice' requirement, and so can be reconciled with the general principle. Yet, we must be careful about how exactly the communication or notice requirement is formulated.[61] In particular, the requirement associated with our approach differs subtly, but significantly, from the one that appears on the problematic individualistic understanding of agreement discussed above. The individualistic understanding adopts the standpoint of an individual party, the offeror, and asks whether she can be said to have received notice of the offeree's acceptance. (Leading to infinite regress, because, given a commitment to even-handed treatment, we will then have to say that the offeree is entitled to receive notice of the offeror's receipt ….) Our approach, by contrast, adopts the standpoint of the parties' alleged joint enterprise, and asks whether adequate 'communication' or 'notice' has been provided given the nature of that enterprise. Is the offeree's act of communication or notification the kind of thing that would ordinarily signify his participation in such an enterprise, *inter alia* because it would ordinarily become accessible in a way that would enable the parties to coordinate their relevant activity?

Relatedly, the approach suggested here certainly does not entail that communication or notice of acceptance must be received by the offeror *before* a contractual agreement can be

[61] Cf Coote, above, n 46, at 35 ('The rule that acceptances must be communicated does not answer, but merely begs, the main question. The issue is not whether an acceptance must be communicated but what acts on the part of the offeree will fulfil that requirement.'), citing R N Gee (1959) 2 *Syd LR* 357 at 359-60.

concluded. Rather, the offeree's relevant act of participation must be the kind of thing that will generally become available in due course—as required for the carrying out of the proposed enterprise.

Third, one might object that the approach to contractual agreement suggested here avoids paradox simply by deploying an objective standard. Yet, while our approach does employ an objective standard, again, we must be careful about how this is formulated. It is crucial to adopt an 'objective' standpoint that is not individualistic in character, but rather one which accords with a focus on the parties' joint enterprise. So in considering whether a 'reasonable' signification of acceptance has been given, we should *not* ask what is 'reasonable' from the perspective of an individual party such as the offeror. We should not, for example, place ourselves in the shoes of the offeror and ask whether a message of acceptance hand-delivered to her place of residence, perhaps when she is absent, provides her with sufficiently accessible evidence of the offeree's assent. (That approach stands us at the brink of a paradox, because it will then be natural to conclude that, if the offeror is entitled to reach such a position, the offeree should be entitled to reach an equivalent position ….) Rather, we must ask what is reasonable given *the character of the contractual enterprise* in which it is alleged the parties are participating.[62] So we should ask for example whether the hand delivery of a message to the offeror's residence is, in the circumstances, a reasonable way to establish the offeree's participation in the enterprise proposed by the offeror.

Finally, a word on 'simultaneity'. Note that on the approach to contractual agreement proposed here, there is no requirement that the parties reach individually specifiable states, such as states of intention or knowledge, and so there is certainly no requirement that both of the parties reach such states at a single moment in time. All that is needed is for each of the parties to do something to establish their participation in the joint enterprise—an ongoing activity that continues through time.[63]

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[62] This point may relate to the well-known debate about the standpoint the reasonable observer should be placed in—the relative merits of so-called 'promisor-', 'promisee-', and 'detached' objectivity. William Howarth, 'The Meaning of Objectivity in Contract' (1984) 100 *LQR* 265; J P Vorster, 'A Comment on the Meaning of Objectivity in Contract' (1987) 103 *LQR* 274; William Howarth, 'A Note on the Objective of Objectivity in Contract' (1987) 103 *LQR* 527. However, a proper engagement with this debate is well beyond the scope of the present article.

[63] Cp above, nn 3 and 14. See further Michael Thompson, *Life and Action*, Harvard University Press, Cambridge, Mass, 2008, pt 2, for development of this point in the philosophy of action.

A rationale for the postal acceptance rule?

On the approach to contractual agreement just outlined we can also begin to see why a 'postal acceptance rule' might make sense. The article will not attempt to offer a complete justification of the rule and to defend it against all possible objections, let alone to justify the many related rules courts have adopted in the postal context. However, it will be suggested that we can see at least the outline of a possible rationale for the rule, and indeed that there may be some important truth in the various other rationales that have been proposed over the centuries since *Adams*—even if none of those is fully convincing on its own terms.

In a postal correspondence case the offeree purports to accept a contract by a sort of combination of verbal and physical conduct—paradigmatically, the act of dropping a written expression of assent into a post box. Should this suffice for the formation of a contractual agreement? To answer this question, we must ask whether such conduct unequivocally establishes the offeree's participation in the contractual enterprise proposed by the offeror. (Such as, for example, a sale and purchase of fleeces between different counties in England, or a coal supply arrangement, and so forth.)

One could plausibly conclude that the offeree's posting of a letter of acceptance unequivocally establishes his participation in a proposed transaction, such as a sale of fleeces for money. At the point the offeree posts his letter, he performs an act the meaning of which is unequivocal: the offeree is committed to embarking upon the proposed deal. Furthermore, this is the kind of act that will ordinarily become available to the offeror in due course—when the letter is delivered in due course of post—so that the parties will be able to coordinate their respective activities as required for their joint enterprise. That being the case, a contractual agreement should arise at the point of posting. There is no puzzle about the offeree's act constituting a valid acceptance at this point—before the offeror can become aware of it—because the view of agreement suggested here does not make conferral of notice, in that sense, a precondition for contractual agreement.

We previously saw commentators suggest that the postal acceptance rule is arbitrary—like a rule dictating which side of the road vehicles should use.[64] On the understanding of agreement suggested here the rule is not arbitrary in that sense. In postal correspondence cases, just as in other contract formation cases, we must scrutinise the meaning of the offeree's relevant actions to establish whether he is unequivocally participating in the offeror's proposed transaction. The

[64] Above, text at n 36.

answer to this question may be underdetermined, such that more than one conclusion is conceivably available. Relatedly, the answer may depend upon a range of contingent factors, such as the efficacy of the postal service, and perceptions of its efficacy. These are likely to change over time (as more efficacious communication technologies emerge),[65] and may differ from place to place.[66] However, the answer is not essentially undetermined—it is not like a decision about what side of the road people should use, which one might decide by flipping a coin. The question of postal acceptance requires a reasoned judgment about the ordinary meaning or significance of the act of posting a letter in the context of the offeror's proposed deal.[67]

While we saw earlier that none of the various suggested rationales for the postal acceptance rule is entirely satisfactory, we can now see that each contains an important grain of truth. Each gestures at the idea that, by dropping a letter of acceptance into a post box, the offeree unequivocally establishes his participation in the offeror's proposed enterprise. This is why one might be inclined to say that the offeree has, at the point of posting, 'put the matter out of his *control*' and 'done all he can do'. Having signified his participation in the transaction, no more can be expected of him. For the same reason, one might be inclined to say that it is as if the offeree has handed his acceptance to an *agent* of the offeror. Similarly, we can see why one might claim that *fairness* to the offeree requires us to conclude that the contractual transaction is underway at the point of posting. We would not be concerned about fairness to the offeree, by contrast, if his purported act of acceptance had a quite different significance—for example, if he had purported to accept by making a cup of coffee, or going for a swim.

The notion that acceptance by post is '*implicitly authorised*' is perhaps the most transparent way of conveying the idea that the act of posting a letter of acceptance ordinarily signifies the offeree's unequivocal participation. Finally, we saw Gardner associate the postal rule with a certain *historical* conception of the post in the nineteenth century: the belief that a postal communication would 'go through to its destination *without further subvention from outside the system*'.[68] That belief is closely related to the conclusion that the offeree's posting of a letter unequivocally establishes his participation in the offeror's proposed enterprise. At the point of posting of acceptance, we are inclined to regard the matter as a *fait accompli.*

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[65] Hence it is understandable that modern courts seem to respect the postal rule mainly as a matter of precedent. Eg *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft* [1983] 2 AC 34.
[66] Winfield, above, n 3.
[67] For hints at an analogous solution to the original coordination problem see Schelling, above, n 36, pp 57, 114.
[68] Gardner, above, n 32 (emphasis in the original).

Conclusion

The article has advanced an interpretation of the *Adams* court's *ad infinitum* paradox that differs substantially from one common view. While some commentators understand the paradox to strike at an outdated 'meeting of the minds' theory of contractual agreement, this article has suggested that, even if we abandon such a theory, another paradox may lurk in our understanding of contract formation. This paradox ultimately results from a certain form of methodological individualism in our thinking about contractual agreement: considering each individual party in turn, and asking what they can demand of the other party before an agreement is reached. To escape this paradox, the article has tentatively suggested that we should think about contractual agreement by beginning with the idea of an inherently joint condition—a contractual enterprise or transaction—and asking what it requires of the parties who seek to participate in it. The article has suggested that this approach can help us begin to understand a rule of contract formation that otherwise appears puzzling, the postal acceptance rule. Even if the article has not succeeded in these respects, it will have contributed something if it has shown that some of the basic contract law familiar even to beginning law students—the famous paradox stated in *Adams v Lindsell*, and related rules of contract formation—potentially have greater theoretical significance than might otherwise be supposed.