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EFFECTIVE TIME OF AN ACCEPTANCE

By EDWARD S. STIMSON*

THESE is no better example of the effect of stare decisis in perpetuating error than that afforded by this corner of our law. According to a majority of the decisions, when parties distant from each other are negotiating they become legally bound by a contract when the letter of acceptance is mailed or the telegram sent.¹ Authoritative pronouncements on analogous problems are all the other way, so that the solution of this particular problem arrived at by the majority is a conspicuous variant.

A catalogue of the analogous problems and the results reached in a majority of the cases should throw some light on the problem that we are considering here. There must not only be some overt act on the part of the offeror indicating an intention to communicate the offer to the offeree² but the offeree must know of the offer before his act will amount to an acceptance of the offer which will complete a contract.³ The offeror's revocation of his offer is not effective to terminate the offer until it reaches the offeree.⁴ There are no decisions on when the rejection of an offer takes effect, but one writer and the restaters are of the opinion that it is not effective until received.⁵ Why should the law be different when an acceptance is sent by mail or telegraph?

Occasionally it happens that the letter of acceptance is lost or

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¹The cases are collected in 1 Williston and Thompson, Contracts (1936) sec. 81, note 4. This is also the view of the Restatement. Restatement of Contracts, sec. 64.

²Benton v. Springfield Y. M. C. A., (1898) 170 Mass. 534, 49 N. E. 928, 64 Am. St. Rep. 320; Jersey City v. Harrison, (1905) 72 N. J. L. 185, 189, 62 Atl. 765, 766, 65 Atl. 507; Powell v. Lee, (1908) 99 L. T. R. 284; Restatement of Contracts, sec. 23; Costigan's Cases on Contracts (3rd Ed. 1934) 33. Cf. Cozart v. Herndon (1894) 114 N. C. 252, 19 S. E. 158.

³According to a majority of the decisions an offer of a reward is not accepted by doing the act requested where the person doing the act did not know of the offer. There are some decisions *contra*. The cases both ways are collected in 1 Ann. Cas. 285, note. For an excellent presentation of the majority view see Broadnax v. Ledbetter, (1907) 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. (N.S.) 1057; Costigan's Cases on Contracts (3rd Ed. 1934) 143.

⁴Byrne v. Van Tienhoven and Co., (1880) L. R. 5 C. P. D. 344; Kempner v. Cohn, (1880) 47 Ark. 519, 1 S. W. 869; Brauer v. Shaw, (1897) 168 Mass. 198, 46 N. E. 617; Restatement of Contracts, sec. 41.

⁵Ashley, Must the Rejection of an Offer be Communicated to the Offeror?, (1903) 12 Yale L. J. 419, Selected Readings on the Law of Contracts 246; Restatement of Contracts, sec. 39.

the telegram is not delivered. When this happens the offeror quite naturally assumes that his offer has been ignored and that he is not bound. He accomplishes his purpose by contracting with another. Naturally, too, the offeree assumes that his intention has been communicated to the offeror and that the latter is legally bound to him by a contract. He refrains from making other arrangements to accomplish his purpose. The legitimate expectations of one of these parties are doomed to disappointment. Neither is at fault, but one must suffer loss as a result of the negligence of the agency of communication. Upon whom should the loss fall? Unless the court interferes, it will fall on the offeree. In similar situations the equity doctrine is that a court will leave the loss where it falls, because there is no reason for transferring it to the other party.⁶ The rule that a contract is completed when the acceptance is sent transfers the loss to the offeror and creates an exception to the general rule requiring communication.

In *Farmers' Handy Wagon Co. v. Newcomb*⁷ defendant gave plaintiff's salesman a written order for a silo at a stated price. Below his signature under the heading "Remarks" the salesman had written "This man reserves until August 1, 1907 to reconsider the buying of this silo." Plaintiff wrote accepting the order on June 14th. On July 10th defendant wrote cancelling the order, but plaintiff never received the letter. The silo was shipped, but defendant refused to receive it. The court held that there was a contract subject to defendant's right to withdraw, but that notice of withdrawal had to reach the plaintiff to be effective. It will be noticed that in this case the defendant was bound by a contract⁸ to purchase the silo unless he withdrew. He thought he had done so. Plaintiff, on the other hand, thought that there had been no withdrawal. The court quite properly left the defendant bound by the contract and did not transfer the loss to the plaintiff by declaring the withdrawal effective when mailed.

More often a withdrawal of the offer and an acceptance of it are in course of transmission at the same time. The early cases involved this situation, or something similar to it. They begin with *Adams v. Lindsell*,⁹ decided by the Kings Bench in 1818. The

⁶*Holly v. Missionary Society of the Protestant Episcopal Church*, (1901) 180 U. S. 284, 21 Sup. Ct. 395, 45 L. Ed. 531 and cases there cited. It is for this reason that a bank cannot charge a depositor when it has paid a check to which his signature was forged.

⁷(1916) 192 Mich. 634, 159 N. W. 152.

⁸Professor Williston takes the view that the promise embodied in the offer was purely illusory and that no contract was formed until August 1,

offer sent by mail was misdirected, and reached the offeree several days later than it would have done if properly addressed. It concluded with the words "receiving your answer in course of post." The offeree immediately mailed a letter of acceptance, which was delivered in the usual time, but before receiving it the offeror had sold the wool the sale of which was the subject of the offer. Counsel for the offeror argued that there could be no contract before the acceptance was received, that the offer had been withdrawn before then. 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*."

In subsequent decisions courts have pointed out that in the nature of things both parties cannot know that a contract has been completed at the exact moment when it is, whether that be the time when the acceptance is sent or when it is received. It seemed to them, therefore, that the earliest time should be selected.¹⁰ The difficulty with this reasoning is that in case the acceptance is lost in transit the court is required to transfer the loss from one who is not at fault to one who is equally without fault. In *Adams v. Lindsell* the court failed to note that the revocation was not effective because not manifest to the offeree, as has since been decided.¹¹

1907. 1 Williston, Contracts (1920) sec. 51a note 14; 1 Williston and Thompson, Contracts (1936) sec. 77A note 2. The case is listed in both treatises under the heading "Acceptance to take effect in the future." If the seller's acceptance is considered as a continuing offer which the buyer has agreed may be accepted by his silence through August 1, the failure to get the withdrawal to the seller would result in an acceptance by silence. 1 Williston and Thompson, Contracts (1936) sec. 19C.

⁹(1818) 1 Barn. and Ald. 681.

¹⁰*Taloe v. Merchants' Fire Insurance Co.*, (1850) 9 How. (U.S.) 390, 400; *The Household Fire and Carriage Accident Insurance Co. v. Grant*, (1879) L. R. 4 Ex. Div. 216.

¹¹Note 4 *supra*. Apparently the court relied on *Payne v. Cave*, (1789) 3 Durn. & East 148 and *Cooke v. Oxley*, (1889) 3 Durn. & East 653 cited by counsel for the offeror. In the former, it was held that a bidder at an auction sale could withdraw his bid before the hammer fell. It is hardly applicable to the problem presented by revocation where the parties are at a distance. In the latter, the parties agreed in the morning on the price of a stated quantity of tobacco to be sold if the purchaser notified the vendor before 4 in the afternoon that he would take it. Although the purchaser alleged that he gave notice to the vendor before 4 o'clock that he would take the tobacco, the court ruled that there was no contract. The judges failed to see that the vendor's part of the agreement could be considered an offer which remained open at the time notice of acceptance was received. They were not helped by plaintiff's counsel, who claimed that a contract was formed in the morning subject to a condition that the purchaser could with-

The contrary was decided in 1822 in *McCullock v. The Eagle Insurance Co.*¹² by the supreme judicial court of Massachusetts. Not having heard of *Adams v. Lindsell*, there was nothing to prevent the court from reaching a sound decision. The insurance company replying to McCullock's inquiry offered to cover his brig, Hesper, and cargo, on the way from Martinico, for 2½ per cent. McCullock immediately mailed his acceptance, but the insurance company had mailed a revocation of the offer the day before. Neither party did anything further, and three months later it was learned that the ship was lost. In McCullock's suit against the insurance company, Prescott for the plaintiff argued that putting plaintiff's letter into the post office was a delivery to the defendant. Wilde, J. interrupted to ask: "If so, why was not the putting of defendant's letter of the second into the post office a delivery to the plaintiff?" Saltonstall for defendant said, "It was not sufficient that an assent was in the mind of the plaintiff; it

draw before 4 in the afternoon (as in *Farmer's Handy Wagon Co. v. Newcomb*). In this they were obviously in error, since it was notice of purchase and not of withdrawal which was to be given.

¹²(1822) 1 Pick. 278. This case is supposed to have been overruled by *Brauer v. Shaw* (1897) 168 Mass. 198, cited supra note 4. In that case an acceptance and a revocation of the offer both telegraphed crossed each other, but the acceptance was received by the offeror before the revocation was received by the offeree. Mr. Justice Holmes said "It would be monstrous to allow an inconsistent act of the offeror, not known or brought to the notice of the offeree, to affect the making of the contract; for instance a sale by an agent elsewhere one minute after he personally has offered goods which are accepted within five minutes by the person to whom he is speaking. . . . The contrary suggestion by Wilde J., in *McCullock v. Eagle Ins. Co.* (1822) 1 Pick. 278, 279, is not adopted as a ground of decision. . . ." With all due respect to Mr. Justice Holmes, there was no contrary suggestion in *McCullock v. The Eagle Insurance Co.* The revocation there was received by the offeree before the acceptance was received by the offeror. Mr. Justice Holmes' reasoning would support the decision in *McCullock v. The Eagle Insurance Co.*, for it is equally monstrous that an act of the offeree not known or brought to the notice of the offeror should complete a contract. In *Commonwealth Mutual Fire Insurance Co. v. Knabe and Co.*, (1898) 171 Mass. 265, 50 N. E. 516, Morton J., deciding a conflict of laws question, said "When the policies were mailed in Boston to the defendant's agents in New York, if not before, the contracts were complete, and must be regarded, we think, as Massachusetts contracts." The question in the case was whether the law of New York, by which the contract was illegal and unenforceable, applied. The insurance company acted through its officers in Massachusetts, and the insured was subject to the law of Maryland. It is hardly necessary to dub the legal relation between them a Massachusetts contract in order to decide that the New York law was not applicable. See *Stimson, Which Law Should Govern?*, (1938) 24 Va. L. Rev. 748, 863. The fact that the contract was made for the insured by its agent in New York would not subject it to New York law unless it was a corporation, a fact which is not revealed. See *Stimson, Which Law Should Govern?*, (1938) 24 Va. L. Rev. 748, 868. For other insurance cases see *Patterson, The Delivery of a Life Insurance Policy*, (1919) 33 Harv. L. Rev. 198, 202 et seq.

should have been made known to the other party." The court nonsuited plaintiff on the ground that a contract would not be completed until the letter of acceptance was received. The revocation was received by the offeree before the acceptance was received by the offeror. Chief Justice Parker said that if plaintiff "had sent an express to announce his refusal to accept, before the letter (of acceptance) arrived" there would have been no contract.

In *Mactier's Administrators v. Frith*,¹³ decided by the New York court of errors in 1830, Mactier died while his letter of acceptance was in the mail. No revocation of the offer intervened between Mactier's death and receipt of the acceptance by the offeror, but the court assumed that no contract could be completed after Mactier's death, a proposition itself based on the old idea now discredited that there must be a meeting of the minds or a coincidence of assenting wills. The court held that a contract was completed when the letter of acceptance was mailed. It did so on the ground that the mailing was an overt act by Mactier, manifesting his intention to be bound, although it was unknown to the offeror.

The reasoning in this case has a certain plausibility. The intention of both parties has been manifested in the sense that it can be proved by overt acts and does not merely remain in the minds of the parties. Yet if all that was needed was an overt act indicating intent, the revocation of an offer would be effective when mailed or sent, but, as indicated above,¹⁴ the contrary is held.

Additional reasons less plausible and less meritorious have from time to time been added to bolster the majority rule.

In *Dunlop v. Higgins*¹⁵ the Lord Chancellor said ". . . if the party accepting the offer puts his letter into the post on the correct day has he not done everything he was bound to do? How can he be responsible for that over which he has no control?" It is apparent from this reasoning that the Lord Chancellor was thinking of the difficulties of only one of the parties. Why should the offeror be responsible? He has no control over the post either.

In *Household Fire and Carriage Accident Insurance Co., Ltd. v. Grant*,¹⁶ Lord Justice Thesiger said that the post office was the agent of the offeror to receive acceptance. Other courts¹⁷ and the

¹³(1830) 6 Wend. 103.

¹⁴Note 4 *supra*.

¹⁵(1848) 1 H. L. Cas. 381.

¹⁶(1869) L. R. 4 Ex. Div. 216.

¹⁷See cases in note 22 *post* and in Hodel, *Communication of Acceptance Between Parties at a Distance*, (1930) 15 Cornell L. Quar. 273; Selected Readings on the Law of Contracts 287.

restaters¹⁸ have been taken in by this argument. A postal department or a telegraph company is neither an agent nor a servant, because it is not subject to the control of persons sending messages.¹⁹ It is an independent contractor to effect delivery. It is not authorized by the offeror to represent him in business transactions with the offeree.²⁰ The dissenting Justice, Lord Bramwell, pointed this out, and later in *Henthorn v. Fraser*²¹ all of the justices of the Court of Appeal agreed that the argument was without merit. The effect of the agency reasoning however is to limit the application of the majority rule. In some cases where the offer was by mail and the acceptance by telegraph, the telegraph was held not to have been authorized by the offeror.²²

The majority rule will work badly in cases where the means of communication employed by the acceptor is slower than that used by the offeror. If the contract were not complete until the acceptance reached the offeror, there would often be no contract at all due to the expiration of the offer by lapse of more than a reasonable time.²³ To reach the same result courts applying the majority rule will have to say that the slower means employed by the acceptor were not authorized by the offeror and that the rule does not apply. The rule was held not to apply in *Bal v. van Staden*,²⁴ where due to war conditions the mails were slow and

¹⁸Restatement of Contracts, sections 64, 66 and 68.

¹⁹1 Mechem, Agency (2d ed. 1914) sec. 41. "The English and strong American minority view is that the telegraph company is not the agent of the sender but simply a public utility owing a public duty to both sender and sendee." Hodel, Communication of Acceptance Between Parties at a Distance, (1930) 15 Cornell L. Quar. 273, 290 citing cases holding that when a telegraph company makes an error in transmitting an offer it is not the agent of the sender so that an acceptance would bind him to the terms of the message delivered. *Pepper v. Western Union Tel. Co.*, (1889) 87 Tenn. 554, 11 S. W. 783; *Strong v. Western Union Tel. Co.*, (1914) 158 Ky. 143, 164 S. W. 348; *Mt. Gilead Cotton Oil Co. v. Western Union Tel. Co.*, (1916) 171 N. C. 705, 89 S. E. 21; *Harper v. Western Union Tel. Co.*, (1925) 133 S. C. 55, 130 S. E. 119.

²⁰See 1 Mechem, Agency (2d Ed. 1914) sec. 26.

²¹[1892] 2 Ch. 27.

²²*Dickey v. Hurd*, (C.C.A. 1st Cir. 1929) 33 F. (2d) 415; *Lucas v. Western Union Telegraph Co.*, (1906) 109 N. W. 191, 6 L. R. A. (N.S.) 1016; contra, *Farmers Produce Co. v. McAlester Storage and Commission Co.*, (1915) 48 Okl. 488, 150 Pac. 483 and cases cited in L. R. A. 1916A 1302 note.

²³This analysis was employed in *Ferguson v. West Coast Shingle Co.*, (1910) 96 Ark. 27, 130 S. W. 527; *Robeson v. Pels*, (1902) 202 Pa. St. 399, 51 Atl. 1028; *Quenerduaine v. Cole*, (1883) 32 W. R. 185. See Comment, (1928) 16 Cal. L. Rev. 320, 321 note 10.

²⁴(1903) 20 So. African L. J. 407; note, (1904) 17 Harv. L. Rev. 342.

uncertain and the letter of acceptance was delayed. In *Henthorn v. Fraser*²⁵ the court which repudiated the majority rule merely used a different word. The justices said that the means used by the acceptor must have been *contemplated* by the offeror. The agency and the contemplation justifications are equally false.

Langdell thought the majority rule wrong.²⁶ Williston takes the same view.²⁷ Pollock²⁸ and Page²⁹ also oppose the majority rule. The former asks "Shall the acceptor remain bound, though he should afterwards despatch a revocation which arrives with or even before the acceptance?" He believed that the answer should be in the negative.

Ashley supported the rule,³⁰ but carried water on both shoulders. Arguing that a rejection of an offer should not be effective until it was received by the offeror, he said that Holmes' reason for requiring a revocation to be delivered was equally applicable to the offeror.³¹ Mr. Justice Holmes' statement on which he relied was: "One to whom an offer is made has a right to assume that it remains open according to its terms until he has actual notice to the contrary. The effect of the communication must be destroyed by a counter communication."³² On the other hand in his article, *Formation of Contracts Inter Absentes*, Ashley says that all that is needed by way of acceptance is a manifestation of intent.³³

Anson contents himself with giving examples which show that he looks only at the difficulties of one party.³⁴

²⁵[1892] 2 Ch. 27 cited supra note 21.

²⁶Langdell, *Summary of the Law of Contracts*, (1880) sec. 14; *Contract by Letter*, (1873) 7 Am. L. Rev. 433 (article unsigned but attributed to Langdell in Note, (1893) 7 Harv. L. Rev. 301, 302).

²⁷1 Williston, *Contracts* (1920) sec. 81. Thompson adds "In any event the law is so well settled as to make discussion academic." The frequency with which courts overrule decisions suggests that discussion may not be so academic as Professor Thompson supposes. *Erie Railroad Co. v. Tompkins* (1938) 82 L. Ed. 1188, 58 Sup. Ct. 817; Brandeis, dissenting in *Di Santo v. Pennsylvania*, (1926) 273 U. S. 34, note 6; Sharp, *Movement in Supreme Court Adjudication—A Study of Modified and Overruled Decisions*, (1933) 46 Harv. L. Rev. 361.

²⁸*Principles of Contract* (9th Ed. 1921) 38 et. seq.

²⁹1 Page, *Contracts* (2d Ed. 1920) sec. 199.

³⁰*Formation of Contracts Inter Absentes*, (1902) 2 Col. L. Rev. 1, *Selected Readings on the Law of Contracts* 281.

³¹(1903) 12 Yale L. J. 419, *Selected Readings on the Law of Contracts* 246.

³²Holmes, *The Common Law* (1881) 306.

³³(1902) 2 Col. L. Rev. 1, *Selected Readings on the Law of Contracts* 281 cited supra note 29.

³⁴Anson, *Law of Contract* (Corbin's Ed. 1930) 46-47.

In France, Belgium, Switzerland, Germany, Italy and Japan the codes require delivery of the acceptance to complete the contract.³⁵ It is submitted that the time has come for the courts to repudiate the unjust majority rule.

³⁵Nussbaum, *Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine*, (1936) 36 Col. L. Rev. 920, 922 n. 15 and n. 22. Cf. Holland, *The Elements of Jurisprudence* (13th Ed. 1924) 270; Langdell, *Contract by Letter*, (1873) 7 Am. L. Rev. 433, 443-453; Note, (1906) 4 Mich. L. Rev. 466.