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Merton L. Ferson

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DOES THE DEATH OF AN OFFEROR NULLIFY HIS OFFER?

By MERTON L. FERSON*

THE death of the promisor, before the offer is acted upon, is a revocation of the offer."[1] This oft-repeated statement is sometimes made with bland assurance that it is a necessary corollary of the rule that it requires a "meeting of minds" to make a contract.[2] Other times the proposition seems to stand upon reasoning to this effect: The offeror could when living (by giving notice) revoke his offer; the dead offeror is unable to act; therefore, the offer is revoked.[3]

In most cases where the death of an offeror occurs, that fact may be deemed to revoke the offer without much, if any, injustice resulting. Some cases, however, present situations in which it

*Dean of the School of Law, University of North Carolina, Chapel Hill, N. C.

[1]Pratt v. Trustees of Baptist Society, (1879) 93 Ill. 475, 34 Am. Rep. 187.

[2]"The continuation of an offer is in the nature of its constant repetition, which necessarily requires someone capable of making a repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, one made by a dead man." Pratt v. Trustees of Baptist Society, (1879) 93 Ill. 475, 34 Am. Rep. 187.

[3]Jordan v. Dobbins, (1877) 122 Mass. 168; Aitken v. Lang, (1899) 106 Ky. 652, 51 S. W. 154. "Death terminates the power of the deceased to act and revokes any authority or license he may have given if it has not been executed or acted upon." Aitkin v. Lang, (1899) 106 Ky. 652, 51 S. W. 154. Professor Parks in a well written article advances the idea that there is an implied term in every offer to the effect that it will lapse at the offeror's death. 23 Mich. L. Rev. 475. This seems, at least, a more rational explanation of the unfortunate rule than it is to call the offeror's death a "revocation." The essence of a revocation is notice to the offeree. "An uncommunicated revocation is, for all practical purposes, and in point of law, no revocation at all." Stevenson v. McLean, (1880) L. R. 5 Q. B. 346.

produces shocking hardships to the offerees to hold that death of the offerors, unknown to the offerees, has terminated the offers. Suppose such a case as this: A said to B, "I request you to furnish goods to X tomorrow morning to the value of $100, and in consideration of your doing so I will pay you." A dies before morning; but B, unaware of the death, transfers the goods to X. Has B a contract claim against A's estate? Some courts have smugly answered to the effect that the death of an offeror revokes the offer and denied to B any contract claim.[4] Other courts have balked when the proposition was heading them toward such an unfair result.[5] One's faith in the common law leads him to question a principle which leads to injustice, particularly when a substantial number of courts refuse to follow it.

The explanation of the proposition generally runs something like this:

"This event (death of offeror) is in itself a revocation as it makes the proposed agreement impossible by removing one of the persons whose consent would make it."[6]

It will be observed that this explanation assumes that there must literally be a meeting of minds to make a contract. That assumption is the root of the difficulty.

"If the formation of a contract required mutual mental assent of the parties, and offer and acceptance were merely evidence of such assent, it would be obviously impossible that a contract should be formed where either party to the transaction died before the assent was obtained. That such assent was formerly thought necessary seems probable, and as to death at least this theory still maintains itself."[7]

In the dead-offeror cases we seem to be plagued by an old conception of "meeting of minds," which for most purposes has given away to a more rational one.

A statement of the older conception is found in *Household Insurance Co. v. Grant*[8] where we read:

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[4]Jordan v. Dobbins, (1877) 122 Mass. 168; Hyland v. Habich, (1889) 150 Mass. 112, 22 N. E. 765. Aitkin v. Lang, (1899) 21 Ky. L. Rep. 247, 51 S. W. 154.

[5]Garrett v. Traube, (1886) 82 Ala. 227, 3 So. 149; Davis v. Davis, (1890) 93 Ala. 173, 9 So. 736; Bradbury v. Morgan, (1862) 31 L. J. Ex. 462, 1 H. & C. 249; Fennel v. McGuire, (1870) 21 U. C. C. P. 134; Dodd v. Whelan, (1897) 1 Ir. R. 575; Knotts v. Butler, (1858) 10 Rich. Eq. (S.C.) 143.

[6]Wald's Pollock on Contracts, p. 38.

[7]1 Williston, Contracts, sec. 62.

[8](1879) L. R. 4 Ex. Div. 216, 220.

"The minds of the parties should be brought together at one and the same moment; that notion is practically the foundation of the English law upon the subject of the formation of contracts."[9] Clearly a contract could not be formed in accordance with that doctrine after one of the parties making it had died. But we know that contracts are frequently made at moments when the offeror is unaware of it; indeed, that is generally the case when acceptances are mailed at places remote from the offeror.[10] Contracts are even made when offerors are positively unwilling to make them and are doing their utmost to revoke their offers.[11] The actual state of the offeror's mind at the moment an acceptance is made is of no importance.

The most essential factor in the formation of a contract obligation seems to be an act (generally called a promise) whereby the obligor has symbolized his will to come under the obligation.[12] Making an offer is such an act. The offeror always exacts something in exchange for his obligation and does not become bound until that thing has been done or given. The contract obligation, therefore, arises, if at all, after—and perhaps long after—the act of offering has taken place.

Other explanations than the foregoing of the rationale of contract obligations are common. According to Professor Holland:

"When the law enforces contracts, it does so to prevent disappointment of well-founded expectations, which though they usually arise from expressions truly representing intention, yet may occasionally arise otherwise."[13]

Dean Pound, Professor Oliphant and Sir Frederick Pollock also emphasize that contract obligations arise from an endeavor to prevent a promisee from being disappointed in the expectations his promisor has aroused.[14] It is sufficient for the present discus-

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[9]"It must, to constitute a contract, appear that the two minds were at one, at the same moment of time." Dickenson v. Dodds, (1876) L. R. 2 Ch. Div. 463. See also note 2.

[10]Adams v. Lindsell, (1818) 1 B. & Al. 681; Dunlop v. Higgins, (1848) 1 H. L. C. 381, 12 Jur. 295.

[11]Byrne & Co. v. Van Tienhoven, (1880) L. R. 5 C. P. D. 344.

[12]Consideration and competent actors are assumed. See Ferson in 2 N. C. L. Rev. 201, and 9 Cornell L. Q. 402.

[13]Holland, Elements of Jurisprudence, 1st Am. Ed. star page 20.

[14]"The law of contract may be described as the endeavor of the state, a more or less imperfect one by the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness. Accordingly, the most popular description of a contract that can be given is also the most exact one, namely that it is a promise or set of promises, which the law will enforce." Pollock, Principles of Contract, 2nd. Am. Ed., p. 1.

sion to note that very few would contend that mutual and synchronous mental assent is necessary to the formation of a contract. "Meeting of the minds" no longer means that, although the phrase still lingers in our books. It seems to be only the ghost of a bygone conception that now points us to the rubric, "The death of an offeror revokes the offer." The offer is not obliterated by death of the offeror. It consists of an act which is an accomplished fact and cannot be undone. Courts can refuse to consider it but there is no logical necessity for them to do so, and hardship sometimes results from such refusal.

The offer is not dead but the offeror *is* dead in the cases we are discussing. It remains to consider what effect that fact may have on the formation of a contract. The particular question is whether the acceptance called for by the offer is possible without the existence of the offeror. It must be borne in mind that any one of a variety of performances, transfers, or promises may be required to constitute an acceptance. The performance, transfer, or promise may or may not involve the existence of a certain person, e.g., the offeror. The non-existence of the offeror, according to well-settled principles, renders some sorts of acceptances impossible. It leaves other sorts possible. The cases may be grouped into two classes: first, those where the acceptance called for by the offer, and attempted by the offeree, consists of something that *can* be accomplished without the existence of the offeror; and second, those where the acceptance called for consists of something which *cannot* be accomplished without the existence of the offeror.

It may be supposed as an illustration of the first group of cases that A offers to pay B $5 if B will saw a certain pile of wood within a given time. A dies, but B, unaware of the death, saws the wood within the time limit of the offer. A's existence is not essential to that kind of performance. He is not a party to the performance which constitutes acceptance. Another illustration

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"There being no revocation, an offer will continue so long as the reasonable expectation which has been aroused in the mind of the offeree may reasonably continue." Professor Oliphant in 18 Mich. L. Rev. 205.

"The individual claims to have performance of advantageous promises secured to him. He claims the satisfaction of expectations created by promises and agreements. . . . Social interest in the security of transactions, as one might call it, requires that we secure the individual interest of the promisee, that is, his claim or demand to be assured in the expectation created, which has become a part of his substance." Dean Pound, An introduction to the Philosophy of Law 236-7.

of the same type of cases is found in this: A writes to B offering to pay him $100 if B will transfer his horse Darby to X. Again suppose A dies, but that B, unaware of the death, and within the time limit of the offer, transfers Darby to X. The acceptance consists of that transfer. A is no party to it, so his death should not prevent it. It may be observed in passing that the death of X would prevent it. In *Garrett v. Trabue*[15] and *Davis v. Davis*,[16] the facts were that an agent of the offeror sent an order for goods the day before the offeror died. The goods were to be shipped to the agent and resold by him for his own profit. The offer was accepted by shipment of the goods to the agent after the offeror died. The estate of the offeror was held liable for the goods.

"When the order was posted the agent executed the authority so far as requisite to a valid contract; and if the goods were shipped by the plaintiff in pursuance of the order, within a reasonable time, and in ignorance of the death of the principal, it became a completed contract from the day when the order was deposited in the mail, binding on the estate of the principal notwithstanding it was not received by the plaintiffs until after her (the offeror's) death."[17]

A number of cases have come before the courts where one offered to guarantee the payment for such goods as might be furnished by the offeree to another, and where the offeror has died, but the offeree, unaware of the death, has furnished goods, relying on the offer. It would seem, if the principles set forth above are sound, that a contract was made in each case when the goods were furnished, and that the offeree-acceptor should be allowed to recover. Some of the decisions dealing with that situation so hold.[18] In other cases the courts have rigorously applied

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[15](1886) 82 Ala. 227, 3 So. 149.

[16](1890) 93 Ala. 173, 9 So. 736.

[17]Garrett v. Traube, (1886) 82 Ala. 227, 3 So. 149.

[18]Bradbury v. Morgan, (1862) 31 L. J. Ex. 462, 1 H. & C. Rep. 249; Fennel v. McGuire, (1870) 21 U. C. C. P. 134; Dodd v. Whelan, [1897] 1 Ir. Rep. 575; Knotts v. Butler, (1858) 10 Rich. Eq. (S.C.) 143. In Coulthard v. Clementson, (1879) L. R. 5 Q. B. 42, the offeree had notice of the offeror's death. The decision does not, therefore, determine what effect the death would have had in the absence of notice. The inference, however, to be drawn from the language of Bowen, J., is that death alone would not end the offer. He says: "I am of the opinion that the notice with which the bank in the present case was affected amounted to a discontinuance, so far as future advances were concerned, of the guarantee. A guarantee like the present is not a mere mandate or authority revoked ipso facto by the death of the guarantor. The guarantee, it has been said, is divisible as to each advance and ripens as to each advance

the supposed rule that the death of an offeror revokes his offer, and denied recovery.[19]

The second group of cases may be illustrated by supposing that A offers (his obligation) to pay $100 for (title to) B's horse Darby. B's attempted acceptance of such an offer will consist of his shipping Darby, or otherwise symbolizing his will to transfer the title to A. But there is—if A has died—no transferee. The situation here is like that in the well-known case of *Cundy v. Lindsay*.[20] In that case the seller of handkerchiefs was induced by a fraudulent person to ship goods, with the purpose to pass title, to the firm of Blenkiron & Sons. The fraudulent person acquired possession, but as he was not the intended transferee the title did not pass to him. Blenkiron & Sons had no knowledge of the transaction and title did not pass to them. The attempt to pass title failed for lack of a transferee. It was held that the shipper, therefore, still owned the goods. The facts in the case of *In re Reed*[21] were similar, except that it does not appear that the shipper's mistake was induced by fraud. The result was the same, viz, the transfer failed for lack of a transferee. Those cases appear to be in point in the present discussion. The contemplated transferee is lacking as surely when he has died as when he is ignorant of, and claims no connection with, the transaction. An offer which calls for a transfer to the offeror cannot be accepted after the offeror has died.[22]

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into an irrevocable promise or guaranty only when the advance is made . . . the guarantee could be legally determined at any time *after* the guarantor's death by a proper *notice* to that effect."

[19]Jordan v. Dobbins, (1877) 122 Mass. 168; Hyland v. Habich, (1889) 150 Mass. 112, 22 N. E. 765; Aitkin v. Lang, (1899) 21 Ky. L. Rep. 247, 51 S. W. 154.

[20](1878) 3 A. C. 459.

[21](1875) L. R. 3 Ch. Div. 123.

The facts in Hardman v. Booth, (1863) 1 Hurlst. & C. 803, were that the plaintiff who was the owner of goods attempted to pass title to Gandell & Co. The possession of the goods was turned over to Gandell and Todd, who pledged the goods to the defendant. It was held that no property passed from the plaintiff and defendant was liable in trover. The court emphasized that "there was no contract." Channel, B. said further, "There is no doubt they were originally the plaintiffs' goods, and they must still be theirs unless there has been a contract of sale to divest the property. It is not suggested that there was a sale to Gandell & Co., and I do not think there was a sale to Gandell and Todd, or either of them, so as to render a repudiation of the contract by the plaintiffs necessary, for it is evident that the plaintiffs believed that they were dealing with Gandell & Company and never meant to contract with Gandell and Todd."

[22]A contract, (not merely an offer) which calls for the transfer of a title to an obligee can, of course, be performed after the original obligee has died. The right he had passes to his heir or representative and the

The second group of cases above referred to includes also the cases where an offeree-acceptor attempts to assume a contract obligation in favor of the offeror. This attempt fails, if the offeror has died, for lack of the designated obligee. "It is a rule of law that if a person intends to contract with A, B cannot give himself any right under it."[23] Cases dealing with mistake, by the promisor, as to the identity of the promisee are in point. In *Boston Ice Co. v. Potter*[24] the defendant had promised to buy ice from the Citizens Ice Company. Plaintiffs afterwards bought out the Citizens Ice Company and delivered ice to the defendant, without notifying the defendant as to the change. The defendant was held to be not liable.

"A party has the right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. He may contract with whom he pleases, the sufficiency of his reasons for doing so cannot be inquired into."[25] This principle would spare one, who had attempted to assume an obligation to A, from having A's administrator thrust upon him as the original obligee. The mistake on the part of the transferor or promisor, as to the identity of the transferee or promisee, has in some cases been induced by fraud. The rule applies, however, where the mistake arises without any fraudulent conduct.[26]

If the obligee dies *after* a contract has been made, the obligor must, of course, recognize his executor or administrator as a substituted obligee. In this situation the obligee, intended by the obligor, existed when the obligation was created; and so the case is entirely different from one where the contemplated obligee dies *before* a contract is made. This substitution is permitted in order to preserve—not to create—an obligation. There is a growing tendency also to permit assignments of contract claims.[27] This effects the substitution of another obligee for the original one. Courts balked for more than a century before upholding assign-

performance consists in transferring the title to such heirs or representative. In this situation the transferee, contemplated at the time of the transfer, exists.

[23]Boulton v. Jones, (1857) 2 H. & N. 564.

[24](1877) 123 Mass. 28, 25 Am. R. 9.

[25]Wernwag v. Phil. W. & B. Ry. Co., (1887) 117 Pa. St. 46, 11 Atl. 868; Boston Ice Co. v. Potter, (1887) 123 Mass. 28, 25 Am. Rep. 9; Langdon v. Hughes, (1903) 113 Ill. App. 203; Roof v. Morrison Plummer & Co., (1890) 37 Ill. App. 37; Re Reed, (1875) L. R. 3 Ch. D. 123.

[26]In re Reed, (1876) L. R. 3 Ch. Div. 123; Roof v. Morrison, (1890) 37 Ill. App. 37.

[27]Cook, Alienability of Choses in Action, 29 Harv. L. Rev. 816; 30 Harv. L. Rev. 449.

ments. They were deemed unfair to the obligor.[28] It must be emphasized that assignments, although now permitted, have nothing to do with the *creation* of contract obligations. It is still fundamental that an obligor may choose his original obligee.[29]

The chief obstacle in the way of predicating a contract in the second group of cases above is that a would-be acceptor does not *give* the transfer or *shoulder* the obligation he intended to. The transferee or obligee he contemplated, in attempting an acceptance, did not exist. This seems to be an end of the question in such cases; a contract has not been made. The acceptance called for in an offer may, on the other hand, be a performance which does not involve the existence of the offeror and his death may leave the acceptance possible to an offeree unaware of the death.

Another hindrance to the making of valid contracts, in dead-offeror situations, appears when we consider what the acceptor or would-be acceptor *gets*. The offeror generally proposes to shoulder a duty in exchange for the acceptance; and the acceptor assumes as a condition of his acceptance that he is acquiring the right correlative to that duty. This condition assumed by the acceptor does not exist when the offeror has died; he does not get a right against the offeror. The predication of a contract in this situation gives the acceptor a right against the administrator or executor. The acceptor thus gets something different from that which he bargained for and would seem entitled to a privilege to rescind. The suggested privilege of rescinding is, perhaps, merely academic; because, in most situations where the acceptance consisted in an accomplished performance, the acceptor would not want to rescind, and, in cases where his attempted acceptance failed for lack of a transferee or obligee, there is nothing to rescind.

It has been pointed out that acceptances of some kinds are possible without the existence of the offeror. The recognition of such acceptances as effectual alters the relations of the offeror's estate by divesting it of a title or imposing upon it an obligation. Such changes in legal relations are as possible to the estate as they

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[28]"A contract was conceived of as a strictly personal obligation. It was as impossible for the obligee to substitute another in his place as it would have been for him to change any other term of the obligation. This conception, rather than the doctrine of maintenance, is the source of the rule that a chose in action is not assignable." Ames, Lectures on Legal History 258.

[29]See notes 23, 24 and 25.

would have been to the offeror had he lived. The offeror invited the change; everything he exacted in his offer is acquired by the estate when the acceptance is made; and there is nothing novel in the idea of visiting the consequences of one's acts upon his estate.

The death of an offeror should not,—on grounds of either expediency or logic—revoke the offer, as long as the offeree is unaware of the death. The acceptance of that offer may or may not be possible, depending on what the offer demands for its acceptance. The acceptance called for may consist of a performance, the transfer of a title, or the assumption of an obligation. Whether an acceptance, completing the contract, is possible in the particular case should depend on whether it involves the existence of the offeror.