> Whenever the case is such as to require a notice of acceptance, it is not enough for the offeree to express mental assent, or even to do some overt act that is not known to the offeror and is not one that constitutes a customary method of giving notice. *If the overt act is one that clearly expresses an intention* to accept the specific offer and is in fact known by the offeror, there is an effective acceptance. This is because the offeror has actual knowledge. [Emphasis added.] Corbin on Contracts, supra, §67 at p.111.

As Professor Corbin indicates, the mode of expressing assent is inconsequential so long as it effectively makes known to the offeror that his offer has been accepted. One usually thinks of acceptance in terms of oral or written incantations, but in many situations acts or symbols may be equally effective communicative media. See Restatement of Contracts §21. In the words of Chief Judge Brown in Aetna Casualty & Surety Co. v. Berry, 5 Cir. 1965, 350 F.2d 49, 54:

> That the communication from the Berry Companies to Aetna was not in words express goes only to the weight and clarity of the message, but it does not mean that no contract came into existence. Of necessity, the law has long recognized the efficacy of nonverbal communications. From the formation of contracts by an offeree's silence, nod, hand signal or "x" on an order blank to the doctrine of admission by silence, the law has legally realized that to offer guidance and comment meaningfully on the full range of human conduct, cognizance must be taken of communications other than by words. Symbols for words often suffice. Lawyers and Judges live by them, as the citation to this very case may sometime demonstrate." See also McCarty v. Langdeau, Tex. Civ. App. 1960, 337 S.W.2d 407, 412 (writ ref'd n.r.e.).

In the case at bar there is substantial evidence to support the jury's finding that the company knew that the offerees had agreed to the terms of the proffered bonus contracts. Of particular importance is the fact that Fujimoto and Bravo, who had threatened to quit unless their remuneration was substantially increased, continued to work for the company for fourteen months after receiving the offers. Moreover, during this fourteen-month period they did not again express dissatisfaction with their compensation. There is also evidence that Fujimoto and Bravo discussed the bonus contracts with the company president in such circumstances and in such a manner that their assent and acceptance should have been unmistakable to him. In view of these circumstances, Rio Grande could not have been besieged with any Hamlet-like doubts regarding the existence of a contract. Since Rio Grande knew that Fujimoto and Bravo had accepted its offer, there was a valid and binding contract. See Williston on Contracts §90 (1957).

II

[The court then concluded that the district court miscomputed the 10 percent bonus.]

The judgment of the district court is correct in all respects but one. The court properly held that the company's offers were accepted and that the contracts subsisted until the end of November, 1966. Contracts do not

evanesce because of the perplexities in their construction, and their consequences cannot be ignored because of vexations in damage ascertainment. We hold, however, that the court should have allowed the jury a backward glance at losses carried over on the company's books from prior years. It is from this fiscal vista that the jury should have been instructed to determine Rio Grande's net profits for the October-November, 1966, period. The judgment of the district court is, therefore, affirmed in part and reversed and remanded in part.

Problem 11

Frederick Bean went to Centerboro Grocery and filled up a basket with items. As he got near the checkout counter, a carton of cola in his basket exploded, causing him to lose his footing, fall to the floor, and sustain personal injuries. Bean sued the store for breach of warranty (an action under Article 2 of the UCC; we will discuss such actions in greater detail later). The store defended by arguing that such a warranty action exists only if there is a sale or a contract to sell the cola. The store reasoned that since Bean had not paid for the cola there was no contract. Do you agree? See UCC §§2-204 and 2-206, and Giant Food, Inc. v. Washington Coca-Cola Bottling Co., 273 Md. 592, 332 A.2d 1 (Md. App. 1975).

Problem 12

Hannibal Hamlin ran a business concern that produced cheap cigars. One day he received in the mail the following purchase order:

August 8th

Dear Mr. Hamlin:

I hereby offer to purchase 42 cartons of your West Coast cigars at $200 a carton, shipment to be made F.O.B. truck your plant by September 25th. If acceptable, please write me immediately.

/s/ Thomas R. Marshall

Now read UCC §2-206 and decide which of the following responses create a contract.

(a) Hamlin telephoned Marshall and said, "I accept." Is there an acceptance? If the original letter had not contained the last sentence therein, would your answer be easier?

(b) Marshall sent the letter overnight express. Hamlin responded by regular mail: "I accept." See Defeo v. Amfarms Assoc., 161 A.D.2d 904, 557 N.Y.S.2d 469 (1990) (offer by overnight express; purported acceptance sent by regular mail to agent of offeror who had not been associated with offer).

(c) Hamlin shipped the cigars on September 20 without prior agreement, though he immediately telephoned Marshall's agent notifying him

of the shipment (see UCC §2-504). Is this an acceptance according to §2-206(1)(b)? If the cigars are defective (they explode, say, or are infected with a pesticide), can Hamlin escape liability by arguing in this way: The buyer only offered to buy a product that was usable as a cigar, but the cigars I sent did not conform to this offer so no "acceptance" arose and there is no "contract" between us?

(d) You are Hamlin's attorney and he phones you with this dilemma: Marshall's letter asked for "West Coast cigars," but Hamlin is all out of that brand. He has a slightly different brand on hand ("East Coast"), and he would be willing to sell them for the price Marshall quoted, but he cannot get in touch with Marshall to get approval of the change. If he ships the goods, will he be in breach? Is there any language he should add to the invoice or cover letter to protect himself? See UCC §2-206(1)(b) and Official Comment 4 to that section, and Corinthian Pharmaceutical Systems, Inc. v. Lederle Laboratories, 724 F. Supp. 605 (S.D. Ind. 1989).

C. *Silence as Acceptance*

Problem 13

In the beginning of their commerce, the Mikado Manufacturing Company and the Ruddigore Retailer had done business on a formal basis, agreeing among other things that all items were delivered for immediate purchase at the invoice price. Eventually the parties stopped using formal contracts. A five-year period of extensive dealings was followed by a slack period of one year in which they had no dealings. Then suddenly, Mikado Manufacturing sent Ruddigore a shipment of its latest product line along with a bill for $8,000. If Ruddigore objects immediately, must it pay? What if it says nothing, but one week later sends Mikado Manufacturing a letter objecting to the shipment? Suppose instead that Ruddigore says nothing, but immediately resells the goods to another company. Is this an acceptance? See UCC §§1-205 and 2-208(2)[2]; Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N.E. 495 (1893); and the Restatement (Second) of Contracts §69, quoted below.

§69. Acceptance by Silence or Exercise of Dominion

(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:

(a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.

2. There is a new version of Article 1 of the Uniform Commercial Code that has been slow in gaining acceptance. In that version, these sections are combined into the new Section 1-303.

(b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction and the offeree in remaining silent and inactive intends to accept the offer.

(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

(2) An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.

DAY v. CATON
Supreme Judicial Court of Massachusetts, 1876
119 Mass. 513

Contract to recover the value of one-half of a brick party wall built by the plaintiff upon and between the adjoining estates, 27 and 29 Greenwich Park, Boston.

At the trial in the Superior Court, before Allen, J., it appeared that, in 1871, the plaintiff, having an equitable interest in lot 29, built the wall in question, placing one half of it on the vacant lot 27, in which the defendant then had an equitable interest. The plaintiff testified that there was an express agreement on the defendant's part to pay him one half the value of the wall when the defendant should use it in building upon lot 27. The defendant denied this, and testified that he never had any conversation with the plaintiff about the wall; and there was no other direct testimony on this point.

The defendant requested the judge to rule that:

(1) The plaintiff can recover in this case only upon an express agreement.
(2) If the jury find there was no express agreement about the wall, but the defendant knew that the plaintiff was building upon land in which the defendant had an equitable interest, the defendant's rights would not be affected by such knowledge, and his silence and subsequent use of the wall would raise no implied promise to pay anything for the wall.

The judge refused so to rule, but instructed the jury as follows:

A promise would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall and the defendant used it, but it might be implied from the conduct of the parties. If the jury find that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection, then the jury might infer a promise on the part of the defendant to pay the plaintiff.

The jury found for the plaintiff, and the defendant alleged exceptions.

DEVENS, J. The ruling that a promise to pay for the wall would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall, and that the defendant used it, was substantially in accordance with the request of the defendant, and is conceded to have been correct. Chit. Cont. (11th Ed.) 86; Wells v. Banister, 4 Mass. 514; Knowlton v. Plantation No. 4, 14 Me. 20; Davis v. School Dist., 24 Me. 349.

The [defendant], however, contends that the presiding judge incorrectly ruled that such promise might be inferred from the fact that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, the defendant having reason to know that the plaintiff was acting with that expectation, and allowed him thus to act without objection.

The fact that the plaintiff expected to be paid for the work would certainly not be sufficient of itself to establish the existence of a contract, when the question between the parties was whether one was made. Taft v. Dickinson, 6 Allen, 553. It must be shown that in some manner the party sought to be charged assented to it. If a party, however, voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority or request, a promise to pay for them may be inferred. His knowledge that they were valuable, and his exercise of the option to avail himself of them, justify this inference. . . . And when one stands by in silence and sees valuable services rendered upon his real estate by the erection of a structure (of which he must necessarily avail himself afterward in his proper use thereof), such silence, accompanied with the knowledge on his part that the party rendering the services expects payment therefor, may fairly be treated as evidence of an acceptance of it, and as tending to show an agreement to pay for it.

The maxim, *Qui tacet consentire videtur,* is to be construed indeed as applying only to those cases where the circumstances are such that a party is fairly called upon either to deny or admit his liability. But if silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak. Lamb v. Bunce, 4 M.&S. 275; Conner v. Hackley, 2 Metc. 613; Preston v. American Linen Co., 119 Mass. 400.

If a person saw day after day a laborer at work in his field doing services, which must of necessity inure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence, with a knowledge that another was doing valuable work for his benefit, and with the expectation

of payment, indicated that consent which would give rise to the inference of a contract. The question would be one for the jury, and to them it was properly submitted in the case before us by the presiding judge.

Exceptions overruled.

NOTES AND QUESTIONS

1. As discussed in the beginning of this chapter and in Chapter 3 on Remedies, courts draw a distinction between a contract *implied in fact* and a contract *implied in law*. The former term refers to a contract intentionally created by the parties (typically by their conduct) and is enforced just as any express contract would be. A contract implied in law, on the other hand, is one forced on the parties by the court (regardless of their actual intention) in order to avoid one party being unjustly enriched at the expense of the other. Was the contract in this case one actually intended by the parties (a contract implied in fact) or one created by the court to reach an equitable result (a contract implied in law)?

2. It is not easy to avoid using a wall erected by a neighbor. If your neighbor builds a wall and you allow ivy to grow up your side, do you now have to pay your fair share even though nothing was said about this before the wall was built? What result if you put up a basketball hoop on your side? Use the wall to keep out prying eyes while you sunbathe?

Problem 14

Reginald Bunthorne was considerably annoyed to receive in the mail a copy of a new magazine *Country Music Today.* He liked only classical music. The cover letter with the magazine stated that he was being sent a 12-month subscription for only $18, and that if he didn't want this fabulous limited offer he should return the enclosed card ("Please attach postage, the post office will not deliver unstamped letter," he was told by the envelope). Bunthorne threw the magazine away after a hurried reading confirmed his worst fears. He threw 11 more issues away, too, before the bill for $18 arrived. He then threw it away, and eventually the magazine threatened suit. At a cocktail party, Bunthorne asks you for a free bit of legal advice about his contractual liability. Would it help to know about the following federal statute?

The Postal Reorganization Act of 1970, 39 U.S.C.A.
§3009. Mailing of Unordered Merchandise

(a) Except for (1) free samples clearly and conspicuously marked as such, and (2) merchandise mailed by a charitable organization soliciting contributions, the mailing of unordered merchandise or of communications prohibited by subsection (c) of this section constitutes an unfair method of competition and an unfair trade practice [under §5 of the Federal Trade Commission Act].

(b) Any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, may be treated as a

gift by the recipient, who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender. All such merchandise shall have attached to it a clear and conspicuous statement informing the recipient that he may treat the merchandise as a gift to him and has the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender.

(c) No mailer of any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, shall mail to any recipient of such merchandise a bill for such merchandise or any dunning communications.

(d) For the purposes of this section, "unordered merchandise" means merchandise mailed without the prior expressed request or consent of the recipient.

Problem 15

Mr. and Mrs. Smith signed a contract with the Book-of-the-Month Club, whereby BOMC monthly sends the Smiths a notice describing the next selection, and if it hears no objection from them it then mails out the book (and bill, of course). Is such a "negative option plan," as it is called, in conflict with the above statute? (Negative option plans are regulated by the Federal Trade Commission, 16 C.F.R. §425.)

D. Knowledge of Offer

Problem 16

After detective Philo Vance unraveled the murder mystery and identified the killer, the police took the miscreant away. The next day Vance learned for the first time that there was a $10,000 reward outstanding for anyone who furnished information leading to the solving of the crime. The reward had been issued by the brother of the murder victim, but when Vance applied for the promised money he was told that he was not entitled to it because he had solved the case without knowledge of the reward offer and could not possibly have made an acceptance by his actions (which the reward offeror viewed as gratuitous). Is this the correct legal result? See Gadsden Times v. Doe, 345 So. 2d 1361 (Ala. App. 1977) (agreeing with the argument).

Does the rule that the offeree must know of the offer to accept it follow as a matter of logic? Is it good policy in reward cases? Listen to Judge Nearn, dissenting in Stephens v. City of Memphis, 565 S.W.2d 213, 218 (Tenn. Ct. App. 1977):

> What policy could be more fraught with impediments to justice and with fraud than one that says to the public, "Citizen, if you come forward and do your civic duty promptly as you should, without knowledge or thought of reward, you shall forfeit all claims to any funds which have been offered by other public-minded citizens to induce the citizenry to come forward and do their duty as they should. However, citizen, if you do not do your duty as you should, but on the contrary, wait until the 'pot is right' and you are assured that top dollar will be paid for the information which you ought to have promptly given in the first instance, then you may come forward with your concealed information and you will be amply rewarded for your delay of justice and personal advice." To hold "prior knowledge" necessary for recovery is to make this statement to the people of this state.

And to Judge Frazer in Dawkins v. Sapplington, 26 Ind. 199, 201 (1866):

> If the offer was made in good faith, why should the defendant inquire whether the plaintiff knew that it had been made? Would the benefit to him be diminished by the discovery that the plaintiff, instead of acting from mercenary motive, had been impelled solely by a desire to prevent the larceny from being profitable to the person who had committed it? Is it not well that any one who has an opportunity to prevent the success of a crime, may know that by doing so he not only performs a virtuous service, but also entitles himself to whatever reward has been offered therefor to the public?

Most jurisdictions will hold that if the reward offer is made by a *governmental entity,* the usual rules of contract do not apply, and any citizen who performs the requested service is entitled to the reward, even if the claimant had no idea that the reward was being offered. See Farnsworth, Contracts §2.10 at 67, n.4 (3d ed. 1998).

E. Motive

Problem 17

Norman Bates knew that his mentally incompetent mother had murdered a wealthy woman who had stopped at the Bates Motel. Later Norman learned that a $10,000 reward had been offered by the woman's relatives for information leading to the arrest of the killer. He kept silent until he was on his deathbed one year later, when he cleared his conscience by telling all he knew. The mother was arrested and placed in a mental institution, and Norman miraculously recovered his health. Should he also recover the reward, or does his noncontractual motive in fingering Mom preclude his action as an acceptance? Would he get the reward if he had been arrested as a suspect and had given the information out of fear and a desire to escape prosecution? Compare Williams v. Carwardine, 4 Barn. & Adol. 621, 110 Eng. Rep. 590 (K.B. 1833), with Vitty v. Eley, 51 A.D.

44, 64 N.Y.S. 397 (1900). See Restatement (Second) of Contracts §53, comment c.

F. *Mode of Acceptance*

In a true contract there is always a *promise* on at least one side and sometimes on both. Where two promises are exchanged for one another ("I promise to buy your car" and "I promise to sell it to you") the contract is said to be *bilateral*. Contrasted with this is a *unilateral* contract in which a promise is exchanged for an act or a forbearance to act ("I promise to give you $20 if you wash my car" or "I promise to pay you $50 if you don't tell Mom what time I got home"). The distinction (albeit much less important than was once the case) occasionally raises a number of legal issues as we shall see in this and the next chapter. In the case that follows, the dichotomy between bilateral and unilateral contracts challenges the California Supreme Court as to the proper mode of acceptance.

DAVIS v. JACOBY
Supreme Court of California, 1934
1 Cal. 2d 370, 34 P.2d 1026

PER CURIAM. Plaintiffs appeal from a judgment refusing to grant specific performance of an alleged contract to make a will. The facts are not in dispute and are as follows:

The plaintiff Caro M. Davis was the niece of Blanche Whitehead, who was married to Rupert Whitehead. Prior to her marriage in 1913 to her coplaintiff Frank M. Davis, Caro lived for a considerable time at the home of the Whiteheads, in Piedmont, Cal. The Whiteheads were childless and extremely fond of Caro. The record is replete with uncontradicted testimony of the close and loving relationship that existed between Caro and her aunt and uncle. During the period that Caro lived with the Whiteheads, she was treated as and often referred to by the Whiteheads as their daughter. In 1913, when Caro was married to Frank Davis, the marriage was arranged at the Whitehead home and a reception held there. After the marriage Mr. and Mrs. Davis went to Mr. Davis' home in Canada, where they have resided ever since. During the period 1913 to 1931 Caro made many visits to the Whiteheads, several of them being of long duration. The Whiteheads visited Mr. and Mrs. Davis in Canada on several occasions. After the marriage and continuing down to 1931 the closest and most friendly relationship at all times existed between these two families. They corresponded frequently, the record being replete with letters showing the loving relationship.

By the year 1930 Mrs. Whitehead had become seriously ill. She had suffered several strokes and her mind was failing. Early in 1931 Mr. Whitehead had her removed to a private hospital. The doctors in

attendance had informed him that she might die at any time or she might linger for many months. Mr. Whitehead had suffered severe financial reverses. He had had several sieges of sickness and was in poor health. The record shows that during the early part of 1931 he was desperately in need of assistance with his wife, and in his business affairs, and that he did not trust his friends in Piedmont. On March 18, 1931, he wrote to Mrs. Davis telling her of Mrs. Whitehead's condition and added that Mrs. Whitehead was very wistful.

> Today I endeavored to find out what she wanted. I finally asked her if she wanted to see you. She burst out crying and we had great difficulty in getting her to stop. Evidently, that is what is on her mind. It is a very difficult matter to decide. If you come it will mean that you will have to leave again, and then things may be serious. I am going to see the doctor, and get his candid opinion and will then write you again. ... Since writing the above, I have seen the doctor, and he thinks it will help considerably if you come.

Shortly thereafter, Mr. Whitehead wrote to Caro Davis further explaining the physical condition of Mrs. Whitehead and himself. On March 24, 1931, Mr. Davis, at the request of his wife, telegraphed to Mr. Whitehead as follows:

> Your letter received. Sorry to hear Blanche not so well. Hope you are feeling better yourself. If you wish Caro to go to you can arrange for her to leave in about two weeks. Please wire me if you think it advisable for her to go.

On March 30, 1931, Mr. Whitehead wrote a long letter to Mr. Davis, in which he explained in detail the condition of Mrs. Whitehead's health and also referred to his own health. He pointed out that he had lost a considerable portion of his cash assets but still owned considerable realty, that he needed someone to help him with his wife and some friend he could trust to help him with his business affairs and suggested that perhaps Mr. Davis might come to California. He then pointed out that all his property was community property; that under his will all the property was to go to Mrs. Whitehead; that he believed that under Mrs. Whitehead's will practically everything was to go to Caro. Mr. Whitehead again wrote to Mr. Davis under date of April 9, 1931, pointing out how badly he needed someone he could trust to assist him, and giving it as his belief that if properly handled he could still save about $150,000. He then stated: "Having you [Mr. Davis] here to depend on and to help me regain my mind and courage would be a big thing." Three days later, on April 12, 1931, Mr. Whitehead again wrote, addressing his letter to "Dear Frank and Caro," and in this letter made the definite offer, which offer it is claimed was accepted and is the basis of this action. In this letter he first pointed out that Blanche, his wife, was in a private hospital and that "she cannot last much longer ... my affairs are not as bad as I supposed at first. Cutting everything down I figure 150,000 can be saved from the wreck." He then enumerated the values placed upon his various properties and then continued:

My trouble was caused by my friends taking advantage of my illness and my position to skin me.

Now if Frank could come out here and be with me, and look after my affairs, we could easily save the balance I mention, provided I dont get into another panic and do some more foolish things.

The next attack will be my end, I am 65 and my health has been bad for years, so, the Drs. dont give me much longer to live. So if you can come, Caro will inherit everything and you will make our lives happier and see Blanche is provided for to the end.

My eyesight has gone back on me, I cant read only for a few lines at a time. I am at the house alone with Stanley [the chauffeur] who does everything for me and is a fine fellow. Now, what I want is some one who will take charge of my affairs and see I dont lose any more. Frank can do it, if he will and cut out the booze.

Will you let me hear from you as soon as possible, I know it will be a sacrifice but times are still bad and likely to be, so by settling down you can help me and Blanche and gain in the end. If I had you here my mind would get better and my courage return, and we could work things out.

This letter was received by Mr. Davis at his office in Windsor, Canada, about 9:30 A.M. April 14, 1931. After reading the letter to Mrs. Davis over the telephone, and after getting her belief that they must go to California, Mr. Davis immediately wrote Mr. Whitehead a letter, which, after reading it to his wife, he sent by air mail. This letter was lost, but there is no doubt that it was sent by Davis and received by Whitehead; in fact, the trial court expressly so found. Mr. Davis testified in substance as to the contents of this letter. After acknowledging receipt of the letter of April 12, 1931, Mr. Davis unequivocally stated that he and Mrs. Davis accepted the proposition of Mr. Whitehead and both would leave Windsor to go to him on April 25. This letter of acceptance also contained the information that the reason they could not leave prior to April 25 was that Mr. Davis had to appear in court on April 22 as one of the executors of his mother's estate. The testimony is uncontradicted and ample to support the trial court's finding that this letter was sent by Davis and received by Whitehead. In fact, under date of April 15, 1931, Mr. Whitehead again wrote to Mr. Davis and stated:

Your letter by air mail received this A.M. Now, I am wondering if I have put you to unnecessary trouble and expense, if you are making any money dont leave it, as things are bad here. . . . You know your business and I dont and I am half crazy in the bargain, but I dont want to hurt you or Caro.

Then on the other hand if I could get some one to trust and keep me straight I can save a good deal, about what I told you in my former letter.

This letter was received by Mr. Davis on April 17, 1931, and the same day Mr. Davis telegraphed to Mr. Whitehead: "Cheer up—we will soon be there, we will wire you from the train."

Between April 14, 1931, the date the letter of acceptance was sent by Mr. Davis, and April 22, Mr. Davis was engaged in closing out his business affairs, and Mrs. Davis in closing up their home and in making other

arrangements to leave. On April 22, 1931, Mr. Whitehead committed suicide. Mr. and Mrs. Davis were immediately notified and they at once came to California. From almost the moment of her arrival Mrs. Davis devoted herself to the care and comfort of her aunt, and gave her aunt constant attention and care until Mrs. Whitehead's death on May 30, 1931. On this point the trial court found:

> From the time of their arrival in Piedmont, Caro M. Davis administered in every way to the comforts of Blanche Whitehead and saw that she was cared for and provided for down to the time of the death of Blanche Whitehead on May 30, 1931; during said time Caro M. Davis nursed Blanche Whitehead, cared for her and administered to her wants as a natural daughter would have done toward and for her mother.

This finding is supported by uncontradicted evidence and in fact is conceded by respondents to be correct. In fact, the record shows that after their arrival in California Mr. and Mrs. Davis fully performed their side of the agreement.

After the death of Mrs. Whitehead, for the first time it was discovered that the information contained in Mr. Whitehead's letter of March 30, 1931, in reference to the contents of his and Mrs. Whitehead's wills was incorrect. By a duly witnessed will dated February 28, 1931, Mr. Whitehead, after making several specific bequests, had bequeathed all of the balance of his estate to his wife for life, and upon her death to respondents Geoff Doubble and Rupert Ross Whitehead, his nephews. Neither appellant was mentioned in his will. It was also discovered that Mrs. Whitehead by a will dated December 17, 1927, had devised all of her estate to her husband. The evidence is clear and uncontradicted that the relationship existing between Whitehead and his two nephews, respondents herein, was not nearly as close and confidential as that existing between Whitehead and appellants.

After the discovery of the manner in which the property had been devised was made, this action was commenced upon the theory that Rupert Whitehead had assumed a contractual obligation to make a will whereby "Caro Davis would inherit everything"; that he had failed to do so; that plaintiffs had fully performed their part of the contract; that damages being insufficient, quasi specific performance should be granted in order to remedy the alleged wrong, upon the equitable principle that equity regards that done which ought to have been done. The requested relief is that the beneficiaries under the will of Rupert Whitehead, respondents herein, be declared to be involuntary trustees for plaintiffs of Whitehead's estate.

It should also be added that the evidence shows that as a result of Frank Davis leaving his business in Canada he forfeited not only all insurance business he might have written if he had remained, but also forfeited all renewal commissions earned on past business. According to his testimony this loss was over $8,000.

The trial court found that the relationship between Mr. and Mrs. Davis and the Whiteheads was substantially as above recounted and that the other

facts above stated were true; that prior to April 12, 1931, Rupert Whitehead had suffered business reverses and was depressed in mind and ill in body; that his wife was very ill; that because of his mental condition he "was unable to properly care for or look after his property or affairs"; that on April 12, 1931, Rupert Whitehead in writing made an offer to plaintiffs that, if within a reasonable time thereafter plaintiffs would leave and abandon their said home in Windsor, and if Frank M. Davis would abandon or dispose of his said business, and if both of the plaintiffs would come to Piedmont in the said county of Alameda where Rupert Whitehead then resided and thereafter reside at said place and be with or near him, and if Frank M. Davis would thereupon and thereafter look after the business and affairs of said Rupert Whitehead until his condition improved to such an extent as to permit him so to do, and if the plaintiffs would look after and administer to the comforts of Blanche Whitehead and see that she was properly cared for until the time of her death, that, in consideration thereof, Caro M. Davis would inherit everything that Rupert Whitehead possessed at the time of his death and that by last will and testament Rupert Whitehead would devise and bequeath to Caro M. Davis all property and estate owned by him at the time of his death, other than the property constituting the community interest of Blanche Whitehead; that shortly prior to April 12, 1931, Rupert Whitehead informed plaintiffs of the supposed terms of his will and the will of Mrs. Whitehead. The court then finds that the offer of April 12 was not accepted. As already stated, the court found that plaintiffs sent a letter to Rupert Whitehead on April 14 purporting to accept the offer of April 12, and also found that this letter was received by the Whiteheads, but finds that in fact such letter was not a legal acceptance. The court also found that the offer of April 12 was

> fair and just and reasonable, and the consideration therefor, namely, the performance by plaintiffs of the terms and conditions thereof, if the same had been performed, would have been an adequate consideration for said offer and for the agreement that would have resulted from such performance; said offer was not, and said agreement would not have been, either harsh or oppressive or unjust to the heirs at law, or devisees, or legatees, of Rupert Whitehead, or to each or any of them, or otherwise.

The court also found that plaintiffs did not know that the statements made by Whitehead in reference to the wills were not correct until after Mrs. Whitehead's death, that after plaintiffs arrived in Piedmont they cared for Mrs. Whitehead until her death and "Blanche Whitehead was greatly comforted by the presence, companionship and association of Caro M. Davis, and by her administering to her wants."

The theory of the trial court and of respondents on this appeal is that the letter of April 12 was an offer to contract, but that such offer could only be accepted by performance and could not be accepted by a promise to perform, and that said offer was revoked by the death of Mr. Whitehead before performance. In other words, it is contended that the offer was an offer to enter into a unilateral contract, and that the purported acceptance of April 14 was of no legal effect.

The distinction between unilateral and bilateral contracts is well settled in the law. It is well stated in section 12 of the American Institute's Restatement of the Law of Contracts as follows: "A unilateral contract is one in which no promisor receives a promise as consideration for his promise. A bilateral contract is one in which there are mutual promises between two parties to the contract; each party being both a promisor and a promisee." This definition is in accord with the law of California. Chrisman v. So. Cal. Edison Co., 83 Cal. App. 249, 256 P. 618.

In the case of unilateral contracts no notice of acceptance by performance is required. Section 1584 of the Civil Code provides: "Performance of the conditions of a proposal . . . is an acceptance of the proposal." See Cuthill v. Peabody, 19 Cal. App. 304, 125 P. 926; Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 P. 1086.

Although the legal distinction between unilateral and bilateral contracts is thus well settled, the difficulty in any particular case is to determine whether the particular offer is one to enter into a bilateral or unilateral contract. Some cases are quite clear cut. Thus an offer to sell which is accepted is clearly a bilateral contract, while an offer of a reward is a clear-cut offer of a unilateral contract which cannot be accepted by promise to perform, but only by performance. Berthiaume v. Doe, 22 Cal. App. 78, 133 P. 515. Between these two extremes is a vague field where the particular contract may be unilateral or bilateral depending upon the intent of the offer and the facts and circumstances of each case. The offer to contract involved in this case falls within this category. By the provisions of the Restatement of the Law of Contracts it is expressly provided that there is a *presumption* that the offer is to enter into bilateral contract. Section 31 provides: "In case of doubt it is presumed that an offer invites the formation of a bilateral contract by an acceptance amounting in effect to a promise by the offeree to perform what the offer requests, rather than the formation of one or more unilateral contracts by actual performance on the part of the offeree."

Professor Williston, in his Treatise on Contracts, volume 1, §60, also takes the position that a presumption in favor of bilateral contracts exists.

In the comment following section 31 of the Restatement the reason for such presumption is stated as follows: "It is not always easy to determine whether an offerer requests an act or a promise to do the act. As a bilateral contract immediately and fully protects both parties, the interpretation is favored that a bilateral contract is proposed."

While the California cases have never expressly held that a presumption in favor of bilateral contracts exists, the cases clearly indicate a tendency to treat offers as offers of bilateral rather than of unilateral contracts. Roth v. Moeller, 185 Cal. 415, 197 P. 62; Boehm v. Spreckels, 183 Cal. 239, 191 P. 5; see, also, Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214.

Keeping these principles in mind, we are of the opinion that the offer of April 12 was an offer to enter into a bilateral as distinguished from a unilateral contract. Respondents argue that Mr. Whitehead had the right as offerer to designate his offer as either unilateral or bilateral. That is

undoubtedly the law. It is then argued that from all the facts and circumstances it must be implied that what Whitehead wanted was performance and not a mere promise to perform. We think this is a non sequitur, in fact the surrounding circumstances lead to just the opposite conclusion. These parties were not dealing at arm's length. Not only were they related, but a very close and intimate friendship existed between them. The record indisputably demonstrates that Mr. Whitehead had confidence in Mr. and Mrs. Davis, in fact that he had lost all confidence in every one else. The record amply shows that by an accumulation of occurrences Mr. Whitehead had become desperate, and that what he wanted was the promise of appellants that he could look to them for assistance. He knew from his past relationship with appellants that if they gave their promise to perform he could rely upon them. The correspondence between them indicates how desperately he desired this assurance. Under these circumstances he wrote his offer of April 12, above quoted, in which he stated, after disclosing his desperate mental and physical condition, and after setting forth the terms of his offer: "*Will you let me hear from you as soon as possible*—I know it will be a sacrifice but times are still bad and likely to be, so by settling down you can help me and Blanche and gain in the end." By thus specifically requesting an immediate reply Whitehead expressly indicated the nature of the acceptance desired by him, namely, appellants' promise that they would come to California and do the things requested by him. This promise was immediately sent by appellants upon receipt of the offer, and was received by Whitehead. It is elementary that when an offer has indicated the mode and means of acceptance, an acceptance in accordance with that mode or means is binding on the offerer.

✱ Another factor which indicates that Whitehead must have contemplated a bilateral rather than a unilateral contract, is that the contract required Mr. and Mrs. Davis to perform services until the death of both Mr. and Mrs. Whitehead. It is obvious that if Mr. Whitehead died first some of these services were to be performed after his death, so that he would have to rely on the promise of appellants to perform these services. It is also of some evidentiary force that Whitehead received the letter of acceptance and acquiesced in that means of acceptance.

Shaw v. King, 63 Cal. App. 18, 218 P. 50, relied on by respondents, is clearly not in point. In that case there was no written acceptance, nor was there an acceptance by partial or total performance.

For the foregoing reasons we are of the opinion that the offer of April 12, 1931, was an offer to enter into a bilateral contract which was accepted by the letter of April 14, 1931. Subsequently appellants fully performed their part of the contract. Under such circumstances it is well settled that damages are insufficient and specific performance will be granted. Wolf v. Donahue, 206 Cal. 213, 273 P. 547. Since the consideration has been fully rendered by appellants the question as to mutuality of remedy becomes of no importance. 6 Cal. Jur. §140.

Respondents also contend the complaint definitely binds appellants to the theory of a unilateral contract. This contention is without merit. The complaint expressly alleges the parties entered into a contract. It is true

that the complaint also alleged that the contract became effective by performance. However, this is an action in equity. Respondents were not misled. No objection was made to the testimony offered to show the acceptance of April 14. A fair reading of the record clearly indicates the case was tried by the parties on the theory that the sole question was whether there was a contract—unilateral or bilateral.

For the foregoing reasons the judgment appealed from is reversed.

QUESTIONS

1. If Frank and Caro had changed their minds and had never left Canada, would they have been in breach of contract?

2. Does the fact that Mr. Whitehead committed suicide when he knew they were coming help or hurt them in their contractual arguments?

Problem 18

Three Pigs Restaurant hired Wolf Construction Company to put a new roof on the building, agreeing to pay Wolf $4,000 "on completion." Wolf quit the job when it was halfway done, leaving Three Pigs with a mess to clean up (a second contractor charged $5,000 for finishing the job). Three Pigs sued Wolf for its damages. Can Wolf defend by arguing that it had never made an acceptance? What, if any, is the moment of acceptance here? See Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 P. 1086 (1902); Restatement (Second) of Contracts §§30, 32, 45, 53, and 62.

IV. TERMINATION OF THE POWER OF ACCEPTANCE

RESTATEMENT (SECOND) OF CONTRACTS

§36. Methods of Termination of the Power of the Acceptance

(1) An offeree's power of acceptance may be terminated by

(a) rejection or counter-offer by the offeree, or
(b) lapse of time, or
(c) revocation by the offeror, or
(d) death or incapacity of the offeror or offeree.

(2) In addition, an offeree's power of acceptance is terminated by the non-occurrence of any condition of acceptance under the terms of the offer.

A. *Revocation by Offeror*

Problem 19

Hoover Motor Express Company sent a written offer to purchase certain real estate from Clements Paper Company. Prior to accepting the offer, the vice president of Clements phoned Mr. Hoover to discuss some details of the transaction. He was very surprised to hear Mr. Hoover say, "Well, I don't know if we are ready. We have not decided; we might not want to go through with it." Clements's VP wrote Hoover Motor and accepted the offer as soon as he hung up the phone. Hoover Motor responded that the acceptance came after the revocation and was therefore too late. Who prevails? Is it good policy to hold for the offeror here? See Hoover Motor Express Co. v. Clements Paper Co., 193 Tenn. 6, 241 S.W.2d 851 (1951).

DICKINSON v. DODDS
Court of Appeal, Chancery Division, 1876
2 Ch. Div. 463

On Wednesday, the 10th of June, 1874, the Defendant John Dodds signed and delivered to the Plaintiff, George Dickinson, a memorandum, of which the material part was as follows:

> I hereby agree to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of £800. As witness my hand this tenth day of June, 1874.
>
> £800. (Signed) John Dodds
>
> P.S. — This offer to be left over until Friday, 9 o'clock, A.M. J.D. (the twelfth), 12th June, 1874.
>
> (Signed) J. Dodds

The bill alleged that Dodds understood and intended that the Plaintiff should have until Friday 9 A.M. within which to determine whether he would or would not purchase, and that he should absolutely have until that time the refusal of the property at the price of £800, and that the Plaintiff in fact determined to accept the offer on the morning of Thursday, the 11th of June, but did not at once signify his acceptance to Dodds, believing that he had the power to accept it until 9 A.M. on the Friday.

In the afternoon of the Thursday the Plaintiff was informed by a Mr. Berry that Dodds had been offering or agreeing to sell the property to Thomas Allan, the other Defendant. Thereupon, the Plaintiff, at about half-past seven in the evening, went to the house of Mrs. Burgess, the

mother-in-law of Dodds, where he was then staying, and left with her a formal acceptance in writing of the offer to sell the property. According to the evidence of Mrs. Burgess this document never in fact reached Dodds, she having forgotten to give it to him.

On the following (Friday) morning, at about seven o'clock, Berry, who was acting as agent for Dickinson, found Dodds at the Darlington railway station, and handed to him a duplicate of the acceptance by Dickinson, and explained to Dodds its purport. He replied that it was too late, as he had sold the property. A few minutes later Dickinson himself found Dodds entering a railway carriage, and handed him another duplicate of the notice of acceptance, but Dodds declined to receive it, saying, "You are too late. I have sold the property."

It appeared that on the day before, Thursday, the 11th of June, Dodds had signed a formal contract for the sale of the property to the Defendant Allan for £800, and had received from him a deposit of £40.

The bill in this suit prayed that the Defendant Dodds might be decreed specifically to perform the contract of the 10th of June, 1874; that he might be restrained from conveying the property to Allan; that Allan might be restrained from taking any such conveyance; that, if any such conveyance had been or should be made, Allan might be declared a trustee of the property for, and might be directed to convey the property to, the Plaintiff; and for damages.

The cause came on for hearing before Vice-Chancellor Bacon on the 25th of January, 1876 [who awarded the plaintiff specific performance].

JAMES, L.J., after referring to the document of the 10th of June, 1874, continued: The document, though beginning "I hereby agree to sell," was nothing but an offer, and was only intended to be an offer, for the Plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed there was no concluded agreement then made; it was in effect and substance only an offer to sell. The Plaintiff, being minded to complete the bargain at that time, added this memorandum—"This offer to be left over until Friday, 9 o'clock A.M., 12th June, 1874." That shews it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere *nudum pactum,* was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "Now I withdraw my offer." It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction.

It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the Plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer." This is evident from the Plaintiff's own statements in the bill.

The Plaintiff says in effect that, having heard and knowing that Dodds was no longer minded to sell to him, and that he was selling or had sold to someone else, thinking that he could not in point of law withdraw his offer, meaning to fix him to it, and endeavouring to bind him, "I went to the house where he was lodging, and saw his mother-in-law, and left with her an acceptance of the offer, knowing all the while that he had entirely changed his mind. I got an agent to watch for him at 7 o'clock the next morning, and I went to the train just before 9 o'clock, in order that I might catch him and give him my notice of acceptance just before 9 o'clock, and when that occurred he told my agent, and he told me, you are too late, and he then threw back the paper." It is to my mind quite clear that before there was any attempt at acceptance by the Plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had in fact agreed to sell the property to Allan. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the Plaintiff has failed to prove that there was any binding contract between Dodds and himself.

MELLISH, L.J. I am of the same opinion. [T]he law says—and it is a perfectly clear rule of law—that, although it is said that the offer is to be left open until Friday morning at 9 o'clock, that did not bind Dodds. He was not in point of law bound to hold the offer over until 9 o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew of it, but I will assume that he did) that Dodds had made the offer to Dickinson, and had given him till Friday morning at 9 o'clock to accept it, still in point of law that could not prevent Allan from making a more favourable offer than Dickinson, and entering at once into a binding agreement with Dodds.

Then Dickinson is informed by Berry that the property has been sold by Dodds to Allan. Berry does not tell us from whom he heard it, but he says that he did hear it, that he knew it, and that he informed Dickinson of it. Now, stopping there, the question which arises is this—If an offer has been made for the sale of the property, and before that offer is accepted, the person who has made the offer enters into a binding agreement to sell the property to somebody else, and the person to whom the offer was first

made receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot. The law may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by his promise to give that time; but, if he is not bound by that promise, and may still sell the property to someone else, and if it be the law that, in order to make a contract, the two minds must be in agreement at some one time, that is, at the time of the acceptance, how is it possible that when the person to whom the offer has been made knows that the person who has made the offer has sold the property to someone else, and that, in fact, he has not remained in the same mind to sell it to him, he can be at liberty to accept the offer and thereby make a binding contract? It seems to me that would be simply absurd. If a man makes an offer to sell a particular horse in his stable, and says, "I will give you until the day after to-morrow to accept the offer," and the next day goes and sells the horse to somebody else, and receives the purchase-money from him, can the person to whom the offer was originally made then come and say, "I accept," so as to make a binding contract, and so as to be entitled to recover damages for the non-delivery of the horse? If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum,* how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to someone else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the property has been sold to someone else, it is too late for him to accept the offer, and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson, and even if there had been, it seems to me that the sale of the property to Allan was first in point of time. However, it is not necessary to consider, if there had been two binding contracts, which of them would be entitled to priority in equity, because there is no binding contract between Dodds and Dickinson.

BAGGALLAY, J.A. I entirely concur in the judgments which have been pronounced.

JAMES, L.J. The bill will be dismissed with costs.

QUESTIONS

1. Do we get the same result if all that Dickinson had learned on that Friday morning was that Dodds had offered to sell the property to Allan but had not yet done so? See Corbin on Contracts, supra, at §40.

2. If Dodds had actually sold the property to Allan would that have automatically revoked the offer to Dickinson?

3. Do we get the same result if Berry were lying and the property had not been sold to anyone? What if Berry were merely wrong?

4. Why isn't Dodds bound by his statement that he would keep the offer open? Are there good reasons for allowing him to change his mind? For the resolution of this issue as a matter of international law, see Article 16 of the United Nations Convention on Contracts for the Sale of Goods.

PETTERSON v. PATTBERG
Court of Appeals of New York, 1928
248 N.Y. 86, 161 N.E. 428

KELLOGG, J. The evidence given upon the trial sanctions the following statement of facts: John Petterson, of whose last will and testament the plaintiff is the executrix, was the owner of a parcel of real estate in Brooklyn, known as 5301 Sixth Avenue. The defendant was the owner of a bond executed by Petterson, which was secured by a third mortgage upon the parcel. On April 4, 1924, there remained unpaid upon the principal the sum of $5,450. This amount was payable in installments of $250 on April 25, 1924, and upon a like monthly date every three months thereafter. Thus the bond and mortgage had more than five years to run before the entire sum became due. Under date of the 4th of April, 1924, the defendant wrote Petterson as follows:

> I hereby agree to accept cash for the mortgage which I hold against premises 5301 6th Ave., Brooklyn, N.Y. It is understood and agreed as a consideration I will allow you $780 providing said mortgage is paid on or before May 31, 1924, and the regular quarterly payment due April 25, 1924, is paid when due.

On April 25, 1924, Petterson paid the defendant the installment of principal due on that date. Subsequently, on a day in the latter part of May, 1924, Petterson presented himself at the defendant's home, and knocked at the door. The defendant demanded the name of his caller. Petterson replied: "It is Mr. Petterson. I have come to pay off the mortgage." The defendant answered that he had sold the mortgage. Petterson stated that he would like to talk with the defendant, so the defendant partly opened the door. Thereupon Petterson exhibited the cash, and said he was ready to pay off the mortgage according to the agreement. The defendant refused to take the money. Prior to this conversation, Petterson had made a contract to sell the land to a third person free and clear of the mortgage to the defendant. Meanwhile, also, the defendant had sold the bond and mortgage to a third party. It therefore became necessary for Petterson to pay to such person the full amount of the bond and mortgage. It is claimed that he thereby sustained a loss of $780, the sum which the defendant agreed to allow upon the bond and mortgage, if payment in full of

principal, less that sum, was made on or before May 31, 1924. The plaintiff has had a recovery for the sum thus claimed, with interest.

Clearly the defendant's letter proposed to Petterson the making of a unilateral contract, the gift of a promise in exchange for the performance of an act. The thing conditionally promised by the defendant was the reduction of the mortgage debt. The act requested to be done, in consideration of the offered promise, was payment in full of the reduced principal of the debt prior to the due date thereof. "If an act is requested, that very act, and no other, must be given." Williston on Contracts, §73. "In case of offers for a consideration, the performance of the consideration is always deemed a condition." Langdell's Summary of the Law of Contracts, §4. It is elementary that any offer to enter into a unilateral contract may be withdrawn before the act requested to be done has been performed. Williston on Contracts, §60; Langdell's Summary, §4; Offord v. Davies, 12 O.B. (N.S.) 748. A bidder at a sheriff's sale may revoke his bid at any time before the property is struck down to him. Fisher v. Seltzer, 23 Pa. 308, 62 Am. Dec. 335. The offer of a reward in consideration of an act to be performed is revocable before the very act requested has been done. Shuey v. United States, 92 U.S. 73; Biggers v. Owen, 79 Ga. 658, 5 S.E. 193; Fitch v. Snedaker, 38 N.Y. 248, 97 Am. Dec. 791. So, also, an offer to pay a broker commissions, upon a sale of land for the offeror, is revocable at any time before the land is sold, although prior to revocation the broker performs services in an effort to effectuate a sale. Stensgaard v. Smith, 43 Minn. 11, 44 N.W. 669, 19 Am. St. Rep. 205; Smith v. Cauthen, 98 Miss. 746, 54 So. 844.

An interesting question arises when, as here, the offeree approaches the offeror with the intention of proffering performance and, before actual tender is made, the offer is withdrawn. Of such a case Williston says:

> The offeror may see the approach of the offeree and know that an acceptance is contemplated. If the offeror can say "I revoke" before the offeree accepts, however brief the interval of time between the two acts, there is no escape from the conclusion that the offer is terminated. Williston on Contracts, §60b.

In this instance Petterson, standing at the door of the defendant's house, stated to the defendant that he had come to pay off the mortgage. Before a tender of the necessary moneys had been made, the defendant informed Petterson that he had sold the mortgage. That was a definite notice to Petterson that the defendant could not perform his offered promise, and that a tender to the defendant, who was no longer the creditor, would be ineffective to satisfy the debt. "An offer to sell property may be withdrawn before acceptance without any formal notice to the person to whom the offer is made. It is sufficient if that person has actual knowledge that the person who made the offer has done some act inconsistent with the continuance of the offer, such as selling the property to a third person." Dickinson v. Dodds, 2 Ch. Div. 463, headnote. To the same effect is Coleman v. Applegarth, 68 Md. 21, 11 A. 284, 6 Am. St. Rep. 417. Thus it clearly appears that the defendant's offer was withdrawn before its acceptance had been tendered. It is unnecessary to determine, therefore, what

the legal situation might have been had tender been made before withdrawal. It is the individual view of the writer that the same result would follow. This would be so, for the act requested to be performed was the completed act of payment, a thing incapable of performance, unless assented to by the person to be paid. Williston on Contracts, §60b. Clearly an offering party has the right to name the precise act performance of which would convert his offer into a binding promise. Whatever the act may be until it is performed, the offer must be revocable. However, the supposed case is not before us for decision. We think that in this particular instance the offer of the defendant was withdrawn before it became a binding promise, and therefore that no contract was ever made for the breach of which the plaintiff may claim damages.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

LEHMAN, J. (dissenting). The defendant's letter to Petterson constituted a promise on his part to accept payment at a discount of the mortgage he held, provided the mortgage is paid on or before May 31, 1924. Doubtless, by the terms of the promise itself, the defendant made payment of the mortgage by the plaintiff, before the stipulated time, a condition precedent to performance by the defendant of his promise to accept payment at a discount. If the condition precedent has not been performed, it is because the defendant made performance impossible by refusing to accept payment, when the plaintiff came with an offer of immediate performance. "It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure." Williston on Contracts, §677. The question in this case is not whether payment of the mortgage is a condition precedent to the performance of a promise made by the defendant, but, rather, whether, at the time the defendant refused the offer of payment, he had assumed any binding obligation, even though subject to condition.

The promise made by the defendant lacked consideration at the time it was made. Nevertheless, the promise was not made as a gift or mere gratuity to the plaintiff. It was made for the purpose of obtaining from the defendant something which the plaintiff desired. It constituted an offer which was to become binding whenever the plaintiff should give, in return for the defendant's promise, exactly the consideration which the defendant requested.

Here the defendant requested no counter promise from the plaintiff. The consideration requested by the defendant for his promise to accept payment was, I agree, some act to be performed by the plaintiff. Until the act requested was performed, the defendant might undoubtedly revoke his offer. Our problem is to determine from the words of the letter, read in the light of surrounding circumstances, what act the defendant requested as consideration for his promise.

The defendant undoubtedly made his offer as an inducement to the plaintiff to "pay" the mortgage before it was due. Therefore, it is said, that "the act requested to be performed was the completed act of payment, a thing incapable of performance, unless assented to by the person to be

paid." In unmistakable terms the defendant agreed to accept payment, yet we are told that the defendant intended, and the plaintiff should have understood, that the act requested by the defendant, as consideration for his promise to accept payment, included performance by the defendant himself of the very promise for which the act was to be consideration. The defendant's promise was to become binding only when fully performed; and part of the consideration to be furnished by the plaintiff for the defendant's promise was to be the performance of that promise by the defendant. So construed, the defendant's promise or offer, though intended to induce action by the plaintiff, is but a snare and delusion. The plaintiff could not reasonably suppose that the defendant was asking him to procure the performance by the defendant of the very act which the defendant promised to do, yet we are told that, even after the plaintiff had done all else which the defendant requested, the defendant's promise was still not binding because the defendant chose not to perform.

I cannot believe that a result so extraordinary could have been intended when the defendant wrote the letter. "The thought behind the phrase proclaims itself misread when the outcome of the reading is injustice or absurdity." See opinion of Cardozo, C.J., in Surace v. Danna, 248 N.Y. 18, 161 N.E. 315. If the defendant intended to induce payment by the plaintiff and yet reserve the right to refuse payment when offered he should have used a phrase better calculated to express his meaning than the words: "I agree to accept." A promise to accept payment, by its very terms, must necessarily become binding, if at all, not later than when a present offer to pay is made.

I recognize that in this case only an offer of payment, and not a formal tender of payment, was made before the defendant withdrew his offer to accept payment. Even the plaintiff's part in the act of payment was then not technically complete. Even so, under a fair construction of the words of the letter, I think the plaintiff had done the act which the defendant requested as consideration for his promise. The plaintiff offered to pay, with present intention and ability to make that payment. A formal tender is seldom made in business transactions, except to lay the foundation for subsequent assertion in a court of justice of rights which spring from refusal of the tender. If the defendant acted in good faith in making his offer to accept payment, he could not well have intended to draw a distinction in the act requested of the plaintiff in return, between an offer which, unless refused, would ripen into completed payment, and a formal tender. Certainly the defendant could not have expected or intended that the plaintiff would make a formal tender of payment without first stating that he had come to make payment. We should not read into the language of the defendant's offer a meaning which would prevent enforcement of the defendant's promise after it had been accepted by the plaintiff in the very way which the defendant must have intended it should be accepted, if he acted in good faith.

The judgment should be affirmed.

CARDOZO, C.J., and POUND, CRANE, and O'BRIEN, JJ., concur with KELLOGG, J.

LEHMAN, J., dissents in opinion, in which ANDREWS, J., concurs.
Judgments reversed, etc.

QUESTIONS

1. A *tender* means an offer to perform, but a tender of money, in strict legal terms, means much more than a mere offer to pay. It must be accompanied by the current presentment of the exact amount due in official currency. Checks, even certified or cashier's checks, are not sufficient. (But see §2-511 of the UCC.) Given these rules, at what moment would the contract have come into being in the following series?

(a) As in the actual case, Petterson, money in hand, states: "It is Mr. Petterson. I have come to pay off the mortgage." No Yes NO (yes Lehman

(b) Pattberg opens the door and sees Petterson. yes

(c) Petterson holds out the money and says, "Here." yes

(d) Pattberg takes the money. yes

2. When would dissenting Judge Lehman say that the contract arose in the above sequence?

3. Near the end of the majority opinion, Judge Kellogg expresses "the individual view of the writer" on this same issue. When would Judge Kellogg say that the contract arose in the above sequence? (a) or (b)

4. Judge Kellogg's "individual view" was *dictum* (do you see why?), but it worried the New York legislature enough to lead to this strange statute:

New York General Obligations Law §15-503(1) (McKinney 1978)

Offer of accord followed by tender. An offer in writing, signed by the offeror or by his agent, to accept a performance therein designated in satisfaction or discharge in whole or in part of any claim, cause of action, contract, obligation, or lease, or any mortgage or other security interest in personal or real property, followed by tender of such performance by the offeree or by his agent before revocation of the offer, shall not be denied effect as a defense or as the basis of an action or counter-claim by reason of the fact that such tender was not accepted by the offeror or by his agent.

5. If this famous court seems rather hard on poor Mr. Petterson, consider that the court had more information about the equities than the opinion reflects. According to an often-quoted student piece:

> Other facts in the case, not appearing in the opinion, may have influenced the court. The record of the trial (folios 95-97) reveals that the defendant was prevented from testifying as to a letter, sent to the plaintiff's testator, revoking the offer because such testimony was inadmissible under §347 of the Civil Practice Act, which excludes the testimony of one of the interested parties, to a transaction, where the other is dead and so unable to contradict the evidence. The record (folio 59) also seems to suggest that the mortgagor knew of the previous sale of the mortgage, since he brought $4,000 in cash with him and was accompanied by his wife and a notary public as witnesses: anticipation of the defendant's refusal by seeking to get evidence on which to base this action seems to be a plausible explanation.

There was no actual proof of knowledge of the defendant's inability to carry out his offer but the situation was suspicious.

Note, 14 Cornell L.Q. 81, 84 n.18 (1928).

Problem 20

A says to B, "I will give you $100 if you walk across the Brooklyn Bridge." This is the beginning of a famous hypothetical from an article by Professor Maurice Wormser, quoted below. "Let us suppose," Wormser continues, "that B starts to walk across the Brooklyn Bridge and has gone about one-half the way across. At that moment A overtakes B and says to him, 'I withdraw my offer.' Has B then any rights against A?" Before reading Wormser's analysis below, decide for yourself what the rule of law should be in order to be fair to both parties. At what moment will B have made an "acceptance"? Is it also right to use that as the moment that terminates A's power of revocation? See §45 of the Restatement of Contracts (quoted in the following case).

Professor Wormser:

> Suppose A says to B, "I will give you $100 if you walk across the Brooklyn Bridge" and B walks — is there a contract? It is clear that A is not asking B for B's promise to walk across the Brooklyn Bridge, what A wants from B is the act of walking across the bridge. When B has walked across the bridge there is a contract, and A is then bound to pay to B $100. At that moment there arises a unilateral contract. A has bartered away his volition for B's act of walking across the Brooklyn Bridge.
>
> When an act is thus wanted in return for a promise, a unilateral contract is created when the act is done. It is clear that only one party is bound. B is not bound to walk across the Brooklyn Bridge, but A is bound to pay B $100 if B does so. Thus in unilateral contracts, on one side we find merely an act, on the other side a promise. On the other hand, in bilateral contracts, A barters away his volition in return for another promise; that is to say, there is an exchange of promises or assurances. In the case of the bilateral contract both parties, A and B, are bound from the moment that their promises are exchanged. Thus, if A says to B, "I will give you $100 if you will promise to walk across the Brooklyn Bridge," and B then promises to walk across the bridge, a bilateral contract is created at the moment when B promises, and both parties are thereafter bound. . . .
>
> It is plain that in the Brooklyn Bridge case as first put, what A wants from B is the act of walking across the Brooklyn Bridge. A does not ask for B's promise to walk across the bridge and B has never given it. B has never bound himself to walk across the bridge. A, however, has bound himself to pay $100 to B if B does so. Let us suppose that B starts to walk across the Brooklyn Bridge and has gone about one-half of the way across. At that moment A overtakes B and says to him, "I withdraw my offer." Has B then any rights against A? Again let us suppose that after A has said, "I withdraw my offer," B continues to walk across the Brooklyn Bridge and completes the act of crossing. Under these circumstances, has B any rights against A?
>
> In the first of the cases just suggested, A withdrew his offer before B had walked across the bridge. What A wanted from B, what A asked for, was the

act of walking across the bridge. Until that was done, B had not given to A what A had requested. The acceptance by B of A's offer could be nothing but the act on B's part of crossing the bridge. It is elementary that an offeror may withdraw his offer until it has been accepted. It follows logically that A is perfectly within his rights in withdrawing his offer before B has accepted it by walking across the bridge — the act contemplated by the offeror and the offeree as the acceptance of the offer. A did not want B to walk half-way across or three-quarters of the way across the bridge. What A wanted from B, and what A asked for from B, was a certain and entire act. B understood this. It was for that act that A was willing to barter his volition with regard to $100. B understood this also. Until this act is done, therefore, A is not bound, since no contract arises until the completion of the act called for. Then, and not before, would A be bound.

The objection is made, however, that it is very "hard" upon B that he should have walked half-way across the Brooklyn Bridge and should get no compensation. This suggestion, invariably advanced, might be dismissed with the remark that hard cases should not make bad law. But going a step further, by way of reply, the pertinent inquiry at once suggests itself, "Was B bound to walk across the Brooklyn Bridge?" The answer to this is obvious. By hypothesis, B was not bound to walk across the Brooklyn Bridge. . . . If B is not bound to continue to cross the bridge, if B is will-free, why should not A also be will-free? Suppose that after B has crossed half the bridge he gets tired and tells A that he refuses to continue crossing. B, concededly, would be perfectly within his rights in so speaking and acting. A would have no cause of action against B for damages. If B has a locus poeniteniae, so has A. . . .

It will be noted that in the Brooklyn Bridge cases there is no unjust enrichment of A and consequently no occasion for quasi-contractual recovery by B.

Wormser, The True Nature of Unilateral Contracts, 26 Yale L.J. 136-140 (1916). This article reflects nineteenth-century thinking, which favored a purely subjective (or "will") theory of contract law. In a 1950 book review, Wormser recognized that the law had changed and he repented, "clad in sackcloth." Wormser, 3 J. Leg. Educ. 145, 146 (1950).

If Wormser's original view is no longer good law, why not? What was unacceptable with his result in this hypothetical?

MARCHIONDO v. SCHECK
Supreme Court of New Mexico, 1967
78 N.M. 440, 432 P.2d 405

WOOD, J. The issue is whether the offeror had a right to revoke his offer to enter a unilateral contract.

Defendant, in writing, offered to sell real estate to a specified prospective buyer and agreed to pay a percentage of the sales price as a commission to the broker. The offer fixed a six-day time limit for acceptance. Defendant, in writing, revoked the offer. The revocation was received by the broker on the morning of the sixth day. Later that day, the broker obtained the offeree's acceptance.

Plaintiff, the broker, claiming breach of contract, sued defendant for the commission stated in the offer. On the above facts, the trial court dismissed the complaint.

We are not concerned with the revocation of the offer as between the offeror and the prospective purchaser. With certain exceptions (see 12 C.J.S. Brokers §95(2), pp. 223-224), the right of a broker to the agreed compensation, or damages measured thereby, is not defeated by the refusal of the principal to complete or consummate a transaction. Southwest Motel Brokers, Inc. v. Alamo Hotels, Inc., 72 N.M. 227, 382 P.2d 707 (1963).

Plaintiff's appeal concerns the revocation of his agency. As to that revocation, the issue between the offeror and his agent is not whether defendant had the power to revoke; rather, it is whether he had the right to revoke. 1 Mechem on Agency, §568 at 405 (2d ed. 1914).

When defendant made his offer to pay a commission upon sale of the property, he offered to enter a unilateral contract; the offer was for an act to be performed, a sale. 1 Williston on Contracts §13 at 23 (3rd ed. 1957); Hutchinson v. Dobson-Bainbridge Realty Co., 31 Tenn. App. 490, 217 S.W.2d 6 (1946).

Many courts hold that the principal has the right to revoke the broker's agency at any time before the broker has actually procured a purchaser. See Hutchinson v. Dobson-Bainbridge Realty Co., supra, and cases therein cited. The reason given is that until there is performance, the offeror has not received that contemplated by his offer, and there is no contract. Further, the offeror may never receive the requested performance because the offeree is not obligated to perform. Until the offeror receives the requested performance, no consideration has passed from the offeree to the offeror. Thus, until the performance is received, the offeror may withdraw the offer. Williston, supra, §60; Hutchinson v. Dobson-Bainbridge Realty Co., supra.

Defendant asserts that the trial court was correct in applying this rule. However, plaintiff contends that the rule is not applicable where there has been part performance of the offer.

Hutchinson v. Dobson-Bainbridge Realty Co., supra, states:

> A greater number of courts, however, hold that part performance of the consideration may make such an offer irrevocable and that where the offeree or broker manifests his assent to the offer by entering upon performance and spending time and money in his efforts to perform, then the offer becomes irrevocable during the time stated and binding upon the principal according to its terms.

Defendant contends that the decisions giving effect to a part performance are distinguishable. He asserts that in these cases the offer was of an exclusive right to sell or of an exclusive agency. Because neither factor is present here, he asserts that the "part performance" decisions are not applicable.

Many of the decisions do seem to emphasize the exclusive aspects of the offer. See Garrett v. Richardson, 149 Colo. 449, 369 P.2d 566 (1962);

Geyler v. Dailey, 70 Ariz. 135, 217 P.2d 583 (1950); S. Blumenthal & Co. v. Bridges, 91 Ark. 212, 120 S.W. 974, 24 L.R.A., N.S., 279 (1909); Williston, supra, §60A, note 6, and cases there cited. See also Manzo v. Park, 220 Ark. 216, 247 S.W.2d 12 (1952), where a listing agreement for a definite period of time was held to imply an exclusive right to sell within the time named.

Such emphasis reaches its extreme conclusion in Tetrick v. Sloan, 170 Cal. App. 2d 540, 339 P.2d 613 (1959), where no effect was given to the part performance because there was neither an exclusive agency, nor an exclusive right to sell.

Defendant's offer did not specifically state that it was exclusive. Under §70-1-43, N.M.S.A. 1953, it was not an exclusive agreement. It is not the exclusiveness of the offer that deprives the offeror of the right to revoke. It is the action taken by the offeree which deprives the offeror of that right. Until there is action by the offeree — a partial performance pursuant to the offer — the offeror may revoke even if his offer is of an exclusive agency or an exclusive right to sell. Levander v. Johnson, 181 Wis. 68, 193 N.W. 970 (1923).

Once partial performance is begun pursuant to the offer made, a contract results. This contract has been termed a contract with conditions or an option contract. This terminology is illustrated as follows:

> If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time. Restatement of Contracts, §45 (1932).

Restatement (Second) of Contracts, §45, Tent. Draft No. 1 (approved 1964, Tent. Draft No. 2, p.vii), states:

> (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree begins the invited performance or tenders part of it.
>
> (2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

Restatement (Second) of Contracts, §45, Tent. Draft No. 1, comment (g), says:

> This Section frequently applies to agency arrangements, particularly offers made to real estate brokers.

See Restatement (Second) of Agency §446, comment (b).

The reason for finding such a contract is stated in Hutchinson v. Dobson-Bainbridge Realty Co., supra, as follows:

> This rule avoids hardship to the offeree, and yet does not hold the offeror beyond the terms of his promise. It is true by such terms he was to be bound only if the requested act was done; but this implies that he will let it be done, that he will keep his offer open till the offeree who has begun

> can finish doing it. At least this is so where the doing of it will necessarily require time and expense. In such a case it is but just to hold that the offeree's part performance furnishes the "acceptance" and the "consideration" for a binding subsidiary promise not to revoke the offer, or turns the offer into a presently binding contract conditional upon the offeree's full performance.

We hold that part performance by the offeree of an offer of a unilateral contract results in a contract with a condition. The condition is full performance by the offeree. Here, if plaintiff-offeree partially performed prior to receipt of defendant's revocation, such a contract was formed. Thereafter, upon performance being completed by plaintiff, upon defendant's failure to recognize the contract, liability for breach of contract would arise. Thus, defendant's right to revoke his offer depends upon whether plaintiff had partially performed before he received defendant's revocation. In re Ward's Estate, 47 N.M. 55, 134 P.2d 539, 146 A.L.R. 826 (1943), does not conflict with this result. Ward is clearly distinguishable because there the prospective purchaser did not complete or tender performance in accordance with the terms of the offer.

What constitutes partial performance will vary from case to case since what can be done toward performance is limited by what is authorized to be done. Whether plaintiff partially performed is a question of fact to be determined by the trial court.

The trial court denied plaintiff's requested finding concerning his partial performance. It did so on the theory that partial performance was not material. In this the trial court erred. . . .

The cause is remanded for findings on the issue of plaintiff's partial performance of the offer prior to its revocation, and for further proceedings consistent with this opinion and the findings so made.

It is so ordered.

NOTE ON REVOCATION AND OPTION CONTRACTS

Whatever the word may mean elsewhere, in the law of contracts an *option* means that the offeree has given the offeror an extra payment (or some other form of value) in return for a promise to keep the offer open and irrevocable for a period of time. Where this is true, obviously the offeror may not revoke during the option period. Even more important, a *rejection* or *counteroffer* by the offeree (the one who has the option) does *not* necessarily terminate the offer.

Problem 21

Pecos Bill wanted to buy some logging equipment owned by Paul Bunyan, who was in the business of selling such equipment. The parties negotiated for some time before Paul submitted a signed proposal to Bill stating, "I hereby give you the option to purchase this equipment for

$12,000, the option to expire on Friday at noon unless exercised." Bill paid nothing for the option. On Friday at 11:00 A.M. he showed up at Paul's office but before he could tender the money, Paul said, "I revoke."

(a) At common law, who prevails? What should Bill have done?

(b) Assume that the UCC applies to this problem. If Paul Bunyan makes the same written offer to Bill, who again pays nothing for the option, could Paul revoke prior to Friday at noon? Does §2-205 (the "Firm Offer Rule") change the result?

(c) Suppose that Paul Bunyan is a logger but that he does not normally sell logging equipment. Does that affect things? See also §2-104(1) and its Official Comment 2.

(d) If the offer stated that it would be held open for six months, would Paul be bound for that entire period?

Problem 22

Newman-Money Department Store wanted to buy 500 pairs of rain-boots for a special sale. Newman-Money's buyer phoned Shoe World, a manufacturer, and asked for a quotation. Shoe World's sales manager said, "We will sell you the 500 pairs for $10,000 and guarantee that we will hold this offer open until next Monday." Shortly after this phone call ended, Shoe World learned it could sell the boots elsewhere at a greater profit. It phones you, its attorney, and asks if it can revoke its offer to Newman-Money. Look at UCC §2-205 and decide.

The United Nations Convention on Contracts for the International Sale of Goods (described in the Introduction to this book) expands the firm offer rule by making irrevocable any offer stating a period of time for acceptance (there is no requirement that the statement be in writing or that it be made by a merchant); see Article 16(2)(a). The same article also makes irrevocable any offer so stating, even if no period of time is proposed.

Problem 23

When Art Doyle decided to auction off a valuable old manuscript he owned, he advertised the sale as an "Absolute Sale—Without Reserve." He was nonetheless concerned about getting a good price, so he asked his brother Mycroft to attend the sale and put in a phony bid of $3,000 if the bidding appeared to stop lower than that amount.

At the sale the first bid was from John Watson, who bid $1,200. Then Ms. Hudson bid $1,700 and Mycroft loudly bid $3,000. John Watson then bid $3,500. The auctioneer was in the process of yelling "Sold!" and striking down the hammer when Ms. Hudson bid $4,000. Over Watson's protest the auctioneer announced that he would reopen the bidding and

accept the Hudson bid. At that point, Charles Baskerville suddenly bid $4,500, but was brutally elbowed in the ribs by his wife, and he then said he was withdrawing his bid. The auctioneer replied that the bids were irrevocable and, knocking the hammer on the lectern, the auctioneer announced that the manuscript had been sold to Baskerville for $4,500. Read UCC §2-328 and answer these questions:

(a) Was it proper for the auctioneer to reopen the bidding when Ms. Hudson bid $4,000?

(b) In an auction without reserve, who is the offeror and who the offeree? Can Baskerville withdraw his bid of $4,500 here? See Pitchfork Ranch Co. v. BAR TL, 615 P.2d 541 (Wyo. 1980).

(c) If Baskerville later finds out about Mycroft's instructions from his brother, what options are open to him?

B. Lapse of Time

RESTATEMENT (SECOND) OF CONTRACTS

§41. Lapse of Time

(1) An offeree's power of acceptance is terminated at the time specified in the offer, or, if no time is specified, at the end of a reasonable time.

(2) What is a reasonable time is a question of fact, depending on all the circumstances existing when the offer and attempted acceptance are made.

(3) Unless otherwise indicated by the language or the circumstances, and subject to the rule stated in §49, an offer sent by mail is seasonably accepted if an acceptance is mailed at any time before midnight on the day on which the offer is received.

LORING v. CITY OF BOSTON
Supreme Judicial Court of Massachusetts, 1844
7 Metc. 409, 48 Mass. 409

Assumpsit to recover a reward of $1,000, offered by the defendants for the apprehension and conviction of incendiaries. Writ dated September 30th 1841.

At the trial before Wilde, J., the following facts were proved: On the 26th of May 1837, this advertisement was published in the daily papers in Boston: "$500 reward. The above reward is offered for the apprehension and conviction of any person who shall set fire to any building within the limits of the city. May 26 1837. Samuel A. Eliot, Mayor." On the 27th of May 1837, the following advertisement was published in the same papers: "$1000 reward. The frequent and successful repetition of incendiary

attempts renders it necessary that the most vigorous efforts should be made to prevent their recurrence. In addition to the other precautions, the reward heretofore offered is doubled. One thousand dollars will be paid by the city for the conviction of any person engaged in these nefarious practices. May 27 1837. Samuel A. Eliot, Mayor." These advertisements were continued in the papers but about a week; but there was no vote of the city government, or notice by the mayor, revoking the advertisements, or limiting the time during which they should be in force. Similar rewards for the detection of incendiaries had been before offered, and paid on the conviction of the offenders; and at the time of the trial of this case, a similar reward was daily published in the newspapers.

In January 1841, there was an extensive fire on Washington Street, when the Amory House (so called) and several others were burned. The plaintiffs suspected that Samuel Marriott, who then boarded in Boston, was concerned in burning said buildings. Soon after the fire, said Marriott departed for New York. The plaintiffs declared to several persons their intention to pursue him and prosecute him, with the intention of gaining the reward of $1,000 which had been offered as aforesaid. They pursued said Marriott to New York, carried with them a person to identify him, arrested him, and brought him back to Boston. They then complained of him to the county attorney, obtained other witnesses, procured him to be indicted and prosecuted for setting fire to the said Amory House. And at the March term 1841 of the municipal court, on the apprehension and prosecution of said Marriott, and on the evidence given and procured by the plaintiffs, he was convicted of setting fire to said house, and sentenced to ten years' confinement in the state prison.

William Barnicoat, called as a witness by the defendants, testified that he was chief engineer of the fire department in Boston, in 1837, and for several years after; that alarms of fire were frequent before the said advertisement in May 1837; but that from that time till the close of the year 1841, there were but few fires in the city.

As the only question in the case was, whether said offer of reward continued to be in force when the Amory House was burnt, the case was taken from the jury, by consent of the parties, under an agreement that the defendants should be defaulted, or the plaintiffs become nonsuit, as the full court should decide.

SHAW, C.J. There is now no question of the correctness of the legal principle on which this action is founded. The offer of a reward for the detection of an offender, the recovery of property, and the like, is an offer or proposal, on the part of the person making it, to all persons, which anyone, capable of performing the service, may accept at any time before it is revoked, and perform the service; and such offer on one side, and acceptance and performance of the service on the other, is a valid contract made on good consideration, which the law will enforce.

The ground of defence is, that the advertisement, offering the reward of $1,000 for the detection and conviction of persons setting fire to buildings in the city, was issued almost four years before the time at which the plaintiffs arrested Marriott and prosecuted him to conviction; that this

reward was so offered, in reference to a special emergency in consequence of several alarming fires; that the advertisement was withdrawn and discontinued; that the recollection of it has passed away; that it was obsolete, and by most persons forgotten; and that it could not be regarded as a perpetually continuing offer on the part of the city.

We are then first to look at the terms of the advertisement, to see what the offer was. It is competent to the party offering such reward to propose his own terms; and no person can entitle himself to the promised reward without a compliance with all its terms. The first advertisement offering the reward demanded in this action was published March 26th 1837, offering a reward of $500; and another on the day following, increasing it to $1,000. No time is inserted, in the notice, within which the service is to be done for which the reward is claimed. It is therefore relied on as an unlimited and continuing offer.

In the first place, it is to be considered that this is not an ordinance of the city government, of standing force and effect; it is an act temporary in its nature, emanating from the executive branch of the city government, done under the exigency of a special occasion indicated by its terms, and continued to be published but a short time. Although not limited in its terms, it is manifest, we think that it could not have been intended to be perpetual, or to last ten or twenty years, or more; and therefore must have been understood to have some limit. It was insisted, in the argument, that it had no limit but the statute of limitations. But it is obvious that the statute of limitations would not operate so as to make six years from the date of the offer a bar. The offer of a reward is a proposal made by one party, and does not become a contract, until acted upon by the performance of the service by the other, which is the acceptance of such offer, and constitutes the agreement of minds essential to a contract. The six years, therefore, would begin to run only from the time of the service performed and the cause of action accrued, which might be ten, twenty, or fifty years from the time of the offer, and would in fact leave the offer itself unlimited by time.

Supposing then that, by fair implication, there must be some limit to this offer, and there being no limit in terms, then by a general rule of law it must be limited to a *reasonable time,* that is, the service must be done within a reasonable time after the offer made.

What is a reasonable time, when all the facts and circumstances are proved on which it depends, is a question of law. To determine it, we are first to consider the objects and purposes for which such reward is offered. The principal object obviously must be, to awaken the attention of the public, to excite the vigilance and stimulate the exertions of police officers, watchmen and citizens generally, to the detection and punishment of offenders. Possibly, too, it may operate to prevent offences, by alarming the fears of those who are under temptation to commit them, by inspiring the belief that the public are awake, that any suspicious movement is watched, and that the crime cannot be committed with impunity. To accomplish either of these objects, such offer of a reward must be notorious, known and kept in mind by the public at large; and, for that purpose, the publication of the offer, if not actually continued in newspapers, and

placarded at conspicuous places, must have been recent. After the lapse of years, and after the publication of the offer has been long discontinued, it must be presumed to be forgotten by the public generally, and if known at all, known only to a few individuals who may happen to meet with it in an old newspaper. The expectation of benefit, then, from such a promise of reward, must in a great measure have ceased. Indeed, every consideration arising from the nature of the case confirms the belief that such offer of reward, for a special service of this nature, is not unlimited and perpetual in its duration, but must be limited to some reasonable time. The difficulty is in fixing it. One circumstance, perhaps a slight one, is, that the act is done by a board of officers, who themselves are annual officers. But as they act for the city, which is a permanent body, and exercise its authority for the time being, and as such a reward might be offered near the end of the year, we cannot necessarily limit it to the time for which the same board of mayor and aldermen have to serve; though it tends to mark the distinction between a temporary act of one branch and a permanent act of the whole city government.

We have already alluded to the fact of the discontinuance of the advertisement, as one of some weight. It is some notice to the public that the exigency has passed, for which such offer of a reward was particularly intended. And though such discontinuance is not a revocation of the offer, it proves that those who made it no longer hold it forth conspicuously as a continuing offer; and it is not reasonable to regard it as a continuing offer for any considerable term of time afterwards.

But it is not necessary, perhaps not proper, to undertake to fix a precise time, as reasonable time; it must depend on many circumstances. . . .

Under the circumstances of the present case, the court are of opinion, that three years and eight months is not a reasonable time within which, or rather to the extent of which, the offer in question can be considered as a continuing offer on the part of the city. In that length of time, the exigency under which it was made having passed, it must be presumed to have been forgotten by most of the officers and citizens of the community, and cannot be presumed to have been before the public as an actuating motive to vigilance and exertion on this subject; nor could it justly and reasonably have been so understood by the plaintiffs. We are therefore of opinion, that the offer of the city had ceased before the plaintiffs accepted and acted upon it as such, and that consequently no contract existed upon which this action, founded on an alleged express promise, can be maintained.

QUESTION

If the reward had been for information leading to the arrest of the person setting *one particular fire*, would the statute of limitations for the criminal prosecution have been relevant? See In re Stephen Kelly, 39 Conn. 159 (1872).

Problem 24

Outraged at being robbed, Octopus National Bank put up a poster in its lobby offering a $500 reward to anyone furnishing information leading to the arrest of the individual who had stolen $80,000 at gunpoint in late 2005. The poster (24" x 24") stayed up until early 2007, when a bank employee took it down.

(a) If the robber is caught five minutes later in another part of town by someone who had seen the bank's poster, is Octopus National bound in contract?

(b) If the bank had also advertised in the local newspaper, how would the bank revoke the offer on January 1, 2006? Shuey v. United States, 92 U.S. 73 (1875).

(c) Assume a revocation-of-reward poster went up in January 2007. Would the reward offer be revoked by June of that year? December 2007? February 2008? February 2009? See Carr v. Mahaska County Bankers Assn., 222 Iowa 411, 269 N.W. 494 (1936).

(d) To avoid this issue (and conserve the $500) what would you, the bank's attorney, advise it to do?

Problem 25

Alphonse and Gaston met on the street one day. Alphonse said, "I have long wanted to buy the painting you have hanging in your dining room. I offer you $800 for it." Gaston replied, "Well, I'm not sure I want to sell it. I'm very fond of that painting." The conversation drifted on to other matters, and eventually they shook hands and parted. The next day Gaston decided that he wasn't as fond of the painting as he was of having $800, so he phoned Alphonse and accepted the offer. The latter retorted that there was no deal and refused to pay the $800. If Gaston sues, who should win here? See Corbin on Contracts, supra, §36; Akers v. J. B. Sedberry, Inc., 39 Tenn. App. 633, 286 S.W.2d 617 (1955). If in the original conversation Alphonse had said, "I'll give you until tomorrow at noon to make up your mind," could Gaston have accepted the next day at 5:00 P.M.? At 1:00 P.M.? Would it make any difference if Alphonse were hard to find the next morning?

PHILLIPS v. MOOR
Supreme Judicial Court of Maine, 1880
71 Me. 78

BARROWS, J. Negotiations by letter, looking to the purchase by the defendant of a quantity of hay in the plaintiff's barn, had resulted in the pressing of the hay by the defendant's men, to be paid for at a certain

rate if the terms of sale could not be agreed on; and in written invitations from plaintiff's guardian to defendant, to make an offer for the hay, in one of which he says: "If the price is satisfactory I will write you on receipt of it"; and in the other: "If your offer is satisfactory I shall accept it; if not, I will send you the money for pressing." Friday, June 14th, defendant made an examination of the hay after it had been pressed, and wrote to plaintiff's guardian, same day . . . "Will give $9.50 per ton, for all but three tons, and for that I will give $5.00." Plaintiff's guardian lived in Carmel, 14 miles from Bangor where defendant lived, and there is a daily mail communication each way between the two places. The card containing defendant's offer was mailed at Bangor, June 15, and probably received by plaintiff in regular course, about nine o'clock, A.M., that day. The plaintiff does not deny this, though he says he does not always go to the office, and the mail is sometimes carried by. Receiving no better offer, and being offered less by another dealer, on Thursday, June 20th, he went to Bangor, and there, not meeting the defendant, sent him through the post office a card, in which he says he was in hopes defendant would have paid him $10.00 for the best quality: "But you can take the hay at your offer, and when you get it hauled in, if you can pay the $10.00 I would like to have you do it, if the hay proves good enough for the price." Defendant received this card that night or the next morning, made no reply, and Sunday morning the hay was burnt in the barn. Shortly after, when the parties met, the plaintiff claimed the price of the hay and defendant denied his liability, and asserted a claim for the pressing. Hence this suit.

The guardian's acceptance of the defendant's offer was absolute and unconditional. It is not in any legal sense qualified by the expression of his hopes, as to what the defendant would have done, or what he would like to have him do, if the hay when hauled proved good enough. Aside from all this, the defendant was told that he could take the hay at his own offer. It seems to have been the intention and understanding of both the parties that the property should pass. The defendant does not deny what the guardian testifies he told him at their conference after the hay was burned, — that he had agreed with a man to haul the hay for sixty cents a ton. The guardian does not seem to have claimed any lien for the price, or to have expected payment until the hay should have been hauled by the defendant. But the defendant insists that the guardian's acceptance of his offer was not seasonable; that in the initiatory correspondence the guardian had in substance promised an immediate acceptance or rejection of such offer as he might make, and that the offer was not, in fact, accepted within a reasonable time.

If it be conceded that for want of a more prompt acceptance the defendant had the right to retract his offer, or to refuse to be bound by it when notified of its acceptance, still the defendant did not avail himself of such right. Two days elapsed before the fire after the defendant had actual notice that his offer was accepted, and he permitted the guardian to consider it sold, and made a bargain with a third party to haul it.

It is true that an offer, to be binding upon the party making it, must be accepted within a reasonable time. Peru v. Turner, 10 Maine, 185; but if the party to whom it is made, makes known his acceptance of it to the party making it, within any period which he could fairly have supposed to be

reasonable, good faith requires the maker, if he intends to retract on account of the delay, to make known that intention promptly. If he does not, he must be regarded as waiving any objection to the acceptance as being too late.

The question here is, — In whom was the property in the hay at the time of its destruction?

It is true, as remarked by the court, in Thompson v. Gould, 20 Pick. 139, that — "When there is an agreement for the sale and purchase of goods and chattels, and, after the agreement, and before the sale is completed, the property is destroyed by casualty, the loss must be borne by the vender, the property remaining vested in him at the time of its destruction"; Tarling v. Baxter, 9 Dow. & Ryl. 276; Hinde v. Whitehouse, 7 East. 558; Rugg v. Minett, 11 East. 210.

But we think, that, under the circumstances here presented, the sale was completed, and the property vested in the vendee. The agreement was completed by the concurrent assent of both parties; Adams v. Lindsell, 1 Barn. & Ald. 681; Mactier v. Frith, 6 Wend. 103.

In Dixon v. Yates, 5 Barn, & Adol. 313, Parke, J., remarks (E.C.L.R. vol. 27, p.92,):

> Where there is a sale of goods, generally no property in them passes till delivery, because until then the very goods sold are not ascertained; but when, by the contract itself the vender appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vender, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee.

The omission to distinguish between general contracts for the sale of goods of a certain kind and contracts for the sale of specific articles, will account for any seeming confusion in the decisions. Chancellor Kent, 2 Com. 492, states the doctrine thus: "When the terms of sale are agreed on and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute without actual payment or delivery, and the property and risk of accident to the goods vest in the buyer." That doctrine was expressly approved by this court in Wing v. Clarke, 24 Maine, 366, 372, where its origin in the civil law is referred to. And this court went farther in Waldron v. Chase, 37 Maine, 414; and held that when the owner of a quantity of corn in bulk, sold a certain number of bushels therefrom and received his pay, and the vendee had taken away a part only, the property in the whole quantity sold, vested in the buyer, although it had not been measured and separated from the heap, and that it thenceforward remained in charge of the seller at the buyer's risk.

In the case at bar all the hay was sold. The quality had been ascertained by the defendant. The price was agreed on. The defendant had been told that he might take it and had nothing to do but to send the man whom he had engaged to haul it, and appropriate it to himself without any further act on the part of the seller.

NOTE ON THE RISK OF LOSS

At the time Phillips v. Moor was decided, the risk of loss concerning the sale of goods was on the person having *title* ("property") to the goods at the time of their destruction. Under §2-509(3) of the UCC, title is no longer important — see §2-401 — and risk of loss is generally determined by other factors such as possession or the parties' agreement.

What point does this case make about late acceptances?

Restatement (Second) of Contracts:

§70. Effect of Receipt by Offeror of a Late or Otherwise Defective Acceptance

A late or otherwise defective acceptance may be effective as an offer to the original offeror, but his silence operates as an acceptance in such a case only as stated in §69.

Section 69 (dealing with "silence as acceptance") is reprinted on pages 53-54. Do these sections codify the part of the *Phillips* decision concerning the effect of a late acceptance?

C. *Termination by Death or Incapacity of the Offeror or Offeree*

RESTATEMENT (SECOND) OF CONTRACTS

§48. Death or Incapacity of Offeror or Offeree

An offeree's power of acceptance is terminated when the offeree or offeror dies or is deprived of legal capacity to enter into the proposed contract.

Problem 26

When Scrooge's nephew Donald opened an animal feed store, he entered into a contract to buy needed inventory on a continuing basis from Flauna Feeds, agreeing to pay for each shipment within 60 days after receiving it. Before Flauna Feeds signed the contract with Donald, it insisted he get a guarantor for his payment liabilities, so Donald's Uncle Scrooge signed such a guaranty. It contained a clause providing that Scrooge would guarantee the repayment of all shipments made to Donald until Scrooge sent Flauna Feeds a notice cancelling this undertaking. Two years later Scrooge suddenly died, but Flauna Feeds, unaware of his demise, continued to make shipments to his nephew. Is Scrooge's estate still liable on its guaranty for these shipments if Donald fails to make payment? Do we get the same result if Scrooge did not die, but instead

underwent a court proceeding declaring him incompetent to conduct his affairs? See Swift & Co. v. Smigel, 115 N.J. Super. 391, 279 A.2d 895, aff'd, 60 N.J. 348, 289 A.2d 793 (N.J. App. 1972).

D. *Termination by Rejection*

Problem 27

Zorba wrote Nikos and offered to be his guide for a summer tour of Greece, stating a price for his services and adding that he would leave this offer open until April 30. On April 9, Nikos wrote back that he was "not interested," but the next day his plans changed and he decided to take the tour. He immediately wrote Zorba and accepted the offer. Zorba, however, was outraged by the first letter and refused to act as Nikos's guide. Nikos consults you. Does he have a contract or not?

Would your answer change if Nikos had purchased an option that allowed him to retain Zorba's services at a fixed price until April 30? Ryder v. Wescoat, 535 S.W.2d 269 (Mo. Ct. App. 1976).

Assuming there was no binding option, if Nikos had replied that he would employ Zorba, but at a lower price than Zorba proposed, would this counteroffer also be a rejection and terminate his power of acceptance?

If Nikos responds that he is considering Zorba's offer, but in the meantime would like to propose that the tour include Turkey as well as Greece, with an appropriate adjustment in the price of Zorba's services, is this counteroffer also a rejection?

RESTATEMENT (SECOND) OF CONTRACTS

§38. Rejection

(1) An offeree's power of acceptance is terminated by his rejection of the offer, unless the offeror has manifested a contrary intention.

(2) A manifestation of intention not to accept an offer is a rejection unless the offeree manifests an intention to take it under further advisement.

E. *The "Mail Box" Rule*

MORRISON v. THOELKE
District Court of Appeals of Florida, Second District, 1963
155 So. 2d 889

Allen, Acting Chief Judge. Appellants, defendants and counter-plaintiffs in the lower court, appeal a summary final decree for appellees, plaintiffs

and counter-defendants below. The plaintiff-appellees, owners of certain realty, sued to quiet title, specifically requesting that defendant-appellants be enjoined from making any claim under a recorded contract for the sale of the subject realty. Defendant-appellants counterclaimed, seeking specific performance of the same contract and conveyance of the subject property to them. The lower court, after hearing, entered a summary decree for plaintiffs.

A number of undisputed facts were established by the pleadings, including the facts that appellees are the owners of the subject property, located in Orange County; that on November 26, 1957, appellants, as purchasers, executed a contract for the sale and purchase of the subject property and mailed the contract to appellees who were in Texas; and that on November 27, 1957, appellees executed the contract and placed it in the mails addressed to appellants' attorney in Florida. It is also undisputed that after mailing said contract, but prior to its receipt in Florida, appellees called appellants' attorney and cancelled and repudiated the execution and contract. Nonetheless, appellants, upon receipt of the contract caused the same to be recorded. . . .

In appealing the summary decree the appellants argue that the lower court erred in determining the contract void. . . . The question is whether a contract is complete and binding when a letter of acceptance is mailed, thus barring repudiation prior to delivery to the offeror, or when the letter of acceptance is received, thus permitting repudiation prior to receipt. Appellants, of course, argue that posting the acceptance creates the contract; appellees contend that only receipt of the acceptance bars repudiation. . . .

The appellant, in arguing that the lower court erred in giving effect to the repudiation of the mailed acceptance, contends that this case is controlled by the general rule that insofar as the mail is an acceptable medium of communication, a contract is complete and binding upon posting of the letter of acceptance. See, e.g., 12 Am. Jur., Contracts §46 (1938, Supp. 1963); 1 Williston, Contracts §81 (3d ed. 1957); 1 Corbin, Contracts §78 (1950 Supp. 1961). Appellees, on the other hand, argue that the right to recall mail makes the Post Office Department the agent of the sender, and that such right coupled with communication of a renunciation prior to receipt of the acceptance voids the acceptance. In short, appellees argue that acceptance is complete only upon receipt of the mailed acceptance. They rely, inter alia, on Rhode Island Tool Company v. United States, 128 F. Supp. 417, 130 Ct. Cl. 698 (1955) and Dick v. United States, 82 F. Supp. 326, 113 Ct. Cl. 94 (1949).

Turning first to the general rule relied upon by appellant some insight may be gained by reference to the statement of the rule in leading encyclopedias and treatises. . . .

A . . . statement of the general rule is found in 1 Williston, Contracts §81 (3d ed. 1957):

> Contracts are frequently made between parties at some distance and therefore it is of vital importance to determine at what moment the contract is complete. If the mailing of an acceptance completes the contract, what

> happens thereafter, whether the death of either party, the receipt of a revocation or rejection, or a telegraphic recalling of the acceptance, though occurring before the receipt of the acceptance, will be of no avail; whereas, if a contract is not completed until the acceptance has been received, in all the situations supposed no contract will arise.
>
> It was early decided that the contract was completed upon the mailing of the acceptance. The reason influencing the court was evidently that when the acceptance was mailed, there had been an overt manifestation of assent to the proposal. The court failed to consider that since the proposed contract was bilateral, as is almost invariably any contract made by mail, the so-called acceptance must also have become effective as a promise to the offeror in order to create a contract. The result thus early reached, however, has definitely established the law not only in England but also in the United States, Canada and other common law jurisdictions. It is, therefore, immaterial that the acceptance never reaches its destination.

The same work, in Section 86, negatives the possible effect of a power to recall an acceptance after mailing. In the author's words:

> By the United States Postal Regulations, the sender of a letter may regain it by complying with certain specified formalities, and yet a contract is completed by mailing an acceptance in the authorized channel. Since the acceptance is binding when it is mailed, the fact that the sender of a letter may regain possession of it should have no effect on the validity of the acceptance. . . .
>
> Title to chattels may also pass by an authorized appropriation on the part of the seller while they still remain entirely within his own control, and though it would not be generally admitted that there may be delivery of a formal document remaining wholly within the maker's hands, the mere possibility that the maker may regain possession would still permit a delivery to the post-office to operate as a delivery of the instrument to the person addressed.
>
> Though the analogy is by no means perfect between a transfer of property or of a formal instrument on mailing and the formation of a bilateral contract by the mailing of a letter of acceptance, no reason is apparent why the possibility of the withdrawal by the sender should be of any more importance in the latter case than in the former.

A second leading treatise on the law of contracts, Corbin, Contracts §§78 and 80 (1950 Supp. 1961), also devotes some discussion to the "rule" urged by appellants. Corbin writes:

> Where the parties are negotiating at a distance from each other, the most common method of making an offer is by sending it by mail; and more often than not the offeror has specified no particular mode of acceptance. In such a case, it is now the prevailing rule that the offeree has power to accept and close the contract by mailing a letter of acceptance, properly stamped and addressed, within a reasonable time. The contract is regarded as made at the time and place that the letter of acceptance is put into the possession of the post office department.

Like the editor of Williston, Corbin negates the effect of the offeree's power to recall his letter:

The postal regulations have for a long period made it possible for the sender of a letter to intercept it and prevent its delivery to the addressee. This has caused some doubt to be expressed as to whether an acceptance can ever be operative upon the mere mailing of the letter, since the delivery to the post office has not put it entirely beyond the sender's control.

It is believed that no such doubt should exist. . . . In view of common practices, in view of the difficulties involved in the process of interception of a letter, and in view of the decisions and printed discussions dealing with acceptance by post, it is believed that the fact that a letter can be lawfully intercepted by the sender should not prevent the acceptance from being operative on mailing. If the offer was made under such circumstances that the offeror should know that the offeree might reasonably regard this as a proper method of closing the deal, and the offeree does so regard it, and makes use of it, the contract is consummated even though the letter of acceptance is intercepted and not delivered. . . .

To a certain extent both appellants and appellees admit and approve the position adopted by the authorities quoted above. However, to the extent that these authorities would negative or disallow effect to appellees-offerees' power to repudiate their acceptance prior to its receipt by appellants, the appellees disagree. Their argument, and the position adopted by the lower court, is succinctly expressed in the excellent memorandum opinion of the lower court as follows:

> From our examination . . . the decisions of the Courts seem to hinge upon the question of whether or not the party has lost control of the instrument prior to the time of its renunciation by him. Formerly, the Courts took the position that once a letter had been deposited in the U.S. Mail, it was beyond retrieve and the depositor no longer had control over it; that the Post Office Department became, in fact, the agent of the addressee so that any attempt to cancel or repudiate the written document was beyond the power and authority of the sender and without effect once it had been deposited in the mail. U.S. Postal Regulations, Sec. 153.5, provide, and for some years has provided, that mail deposited in a post office may be recalled by the sender before delivery to the addressee.
>
> In the Court decisions cited by the parties here, wherever this Postal Regulation has been brought to the attention of the Court, they have held that the Post Office is the agent of the sender, rather than the addressee, and his right to withdraw mail after deposit gives him the right to repudiate a document signed and mailed by him but not yet received by the addressee. . . .

The rule that a contract is complete upon deposit of the acceptance in the mails, hereinbefore referred to as "deposited acceptance rule" and also known as the "rule in Adams v. Lindsell," had its origin, insofar as the common law is concerned, in Adams v. Lindsell, 1 Barn. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818). In that case, the defendants had sent an offer to plaintiffs on September 2nd, indicating that they expected an answer "in course of post." The offer was misdirected and was not received and accepted until the 5th, the acceptance being mailed that day and received by defendant-offerors on the 9th. However, the defendants, who had expected to receive the acceptance on or before the 7th, sold the goods

offered on the 8th of September. It was conceded that the delay had been occasioned by the fault of the defendants in initially misdirecting the offer.

Defendants contended that no contract had been made until receipt of the offer on the 9th. . . .

Examination of the decision in Adams v. Lindsell reveals three distinct factors deserving consideration. The first and most significant is the court's obvious concern with the necessity of drawing a line, with establishing some point at which a contract is deemed complete and their equally obvious concern with the thought that if communication of each party's assent were necessary, the negotiations would be interminable. A second factor, again a practical one, was the court's apparent desire to limit but not overrule the decision in Cooke v. Oxley, 3 T.R. 653 [1790] that an offer was revocable at any time prior to acceptance. In application to contracts negotiated by mail, this latter rule would permit revocation even after unqualified assent unless the assent was deemed effective upon posting. Finally, having chosen a point at which negotiations would terminate and having effectively circumvented the inequities of Cooke v. Oxley, the court, apparently constrained to offer some theoretical justification for its decision, designated a mailed offer as "continuing" and found a meeting of the minds upon the instant of posting assent. Significantly, the factor of the offeree's loss of control of his acceptance is not mentioned. . . .

The unjustified significance placed on the "loss of control" in the cases relied upon by appellee follows from two errors. The first error is failure to distinguish between relinquishment of control as a factual element of manifest intent, which it is, and as *the* legal predicate for completion of contract, which it is not. The second error lies in confusing the "right" to recall mail with the "power" to recall mail. Under current postal regulations, the sender has the "power" to regain a letter, but this does not necessarily give him the "right" to repudiate acceptance. The existence of the latter right is a matter of contract law and is determinable by reference to factors which include, but are not limited to the existence of the power to recall mail. In short, the power to recall mail is a factor, among many others, which may be significant in determining when an acceptance is effective, but the right to effectively withdraw and repudiate an acceptance must be dependent upon the initial determination of when the acceptance is effective and irrevocable.

From the foregoing it is clear that a change in postal regulations does not, ipso facto, alter or affect the validity of the rule in Adams v. Lindsell. To the extent that the cases relied upon by appellee mistakenly assumed that "loss of control" and "agency" were determinative of the validity of the rule they are not authority for rejecting the rule. Rather, the adoption of the rule in this jurisdiction must turn on an evaluation of its justifications, quite apart from the fallacious theories of agency and control sometimes advanced in its support. . . .

An attempt at critical analysis of the "deposited acceptance" rule is by no means a new or unusual endeavor. The cases, treatises and learned journals are replete with discussion and analysis of the rule both in its practical and theoretical aspects. E.g., 1 Corbin, Contracts §78 (1950); Ashley, Contracts *Inter Absentes,* 2 Col. L. Rev. 1 (1902); Winfield, Some

Aspects of Offer and Acceptance, 55 L.Q.R. 499 (1939); Samek, A Reassessment of the Present Rule Relating to Postal Acceptance, 35 Aust. L.J. 38 (1961). Unfortunately, much of the adverse criticism is directed to justifications for the rule which are, in fact, not relied upon by its proponents. Accordingly, the brilliant refutations at the conceptual level of the argument from loss of control, the argument from agency and the related argument from waiver, do not meet the issue. Rather, discussion and criticism must be directed to the practical and theoretical basis of the rule relied upon by its advocates.

The justification for the "deposited acceptance" rule proceeds from the uncontested premise of Adams v. Lindsell that there must be, both in practical and conceptual terms, a point in time when a contract is complete. In the formation of contracts *inter praesentes* this point is readily reached upon expressions of assent instantaneously communicated. In the formation of contracts *inter absentes* by post, however, delay in communication prevents concurrent knowledge of assents and some point must be chosen as legally significant. The problem raised by the impossibility of concurrent knowledge of manifest assent is discussed and a justification for the traditional rule is offered in Corbin, Contracts §78 (1950).

> A better explanation of the existing rule seems to be that in such cases the mailing of a letter has long been a customary and expected way of accepting the offer. It is ordinary business usage. More than this, however, is needed to explain why the letter is operative on mailing rather than on receipt by the offeror. Even though it is business usage to send an offer by mail, it creates no power of acceptance until it is received. Indeed, most notices sent by mail are not operative unless actually received.
>
> The additional reasons for holding that a different rule applies to an acceptance and that it is operative on mailing may be suggested as follows: When an offer is by mail and the acceptance also is by mail, the contract must date either from the mailing of the acceptance or from its receipt. In either case, one of the parties will be bound by the contract without being actually aware of that fact. If we hold the offeror bound on the mailing of the acceptance, he may change his position in ignorance of the acceptance; even though he waits a reasonable time before acting, he may still remain unaware that he is bound by contract because the letter of acceptance is delayed, or is actually lost or destroyed, in the mails. Therefore this rule is going to cause loss and inconvenience to the offeror in some cases. But if we adopt the alternative rule that the letter of acceptance is not operative until receipt, it is the offeree who is subjected to the danger of loss and inconvenience. He can not know that his letter has been received and that he is bound by contract until a new communication is received by him. His letter of acceptance may never have been received and so no letter of notification is sent to him; or it may have been received, and the letter of notification may be delayed or entirely lost in the mails. One of the parties must carry the risk of loss and inconvenience. We need a definite and uniform rule as to this. We can choose either rule; but we must choose one. We can put the risk on either party; but we must not leave it in doubt. The party not carrying the risk can then act promptly and with confidence in reliance on the contract; the party carrying the risk can insure against it if he so desires. The business community could no doubt adjust itself to either rule; but the rule throwing

> the risk on the offeror has the merit of closing the deal more quickly and enabling performance more promptly. It must be remembered that in the vast majority of cases the acceptance is neither lost nor delayed; and promptness of action is of importance in all of them. Also it is the offeror who has invited the acceptance.

The justification suggested by Corbin has been criticized as being anachronistic. Briefly, critics argue that the evident concern with risk occasioned by delay is premised on a time lag between mailing and delivery of a letter of acceptance, which lag, in modern postal systems, is negligible. Opponents of the rule urge that if time is significant to either party, modern means of communication permit either party to avoid such delay as the post might cause. . . .

Opponents of the rule argue as forcefully that all of the disadvantages of delay or loss in communication which would potentially harm the offeree are equally harmful to the offeror. Why, they ask, should the offeror be bound by an acceptance of which he has no knowledge? Arguing specific cases, opponents of the rule point to the inequity of forbidding the offeror to withdraw his offer after the acceptance was posted but before he had any knowledge that the offer was accepted; they argue that to forbid the offeree to withdraw his acceptance, as in the instant case, scant hours after it was posted but days before the offeror knew of it, is unjust and indefensible. Too, the opponents argue, the offeree can always prevent the revocation of an offer by providing consideration, by buying an option.

In short, both advocates and critics muster persuasive argument. As Corbin indicated, there must be a choice made, and such choice may, by the nature of things, seem unjust in some cases. Weighing the arguments with reference not to specific cases but toward a rule of general application and recognizing the general and traditional acceptance of the rule as well as the modern changes in effective long-distance communication, it would seem that the balance tips, whether heavily or near imperceptively, to continued adherence to the "Rule in Adams v. Lindsell." This rule, although not entirely compatible with ordered, consistent and sometime artificial principles of contract advanced by some theorists, is, in our view, in accord with the practical considerations and essential concepts of contract law. See Llewellyn, Our Case Law of Contracts; Offer and Acceptance II, 48 Yale L.J. 779, 795 (1939). Outmoded precedents may, on occasion, be discarded and the function of justice should not be the perpetuation of error, but, by the same token, traditional rules and concepts should not be abandoned save on compelling ground.

In choosing to align this jurisdiction with those adhering to the deposited acceptance rule, we adopt a view contrary to that of the very able judge below, contrary to the decisions of other respected courts and possibly contrary to the decision which might have been reached had this case been heard in a sister court in this State. However, we are constrained by factors hereinbefore discussed to hold that an acceptance is effective upon mailing and not upon receipt. Necessarily this decision is limited in any prospective application to circumstances involving the mails and does not purport to determine the rule possibly applicable to cases involving

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other modern methods of communication. Cf. Entores v. Miles Far East Corp., 2 Q.B. 327 (1955) (rejecting the application of Adams v. Lindsell to a case involving instantaneous communication). Restatement, Contracts §65 (1932).

In the instant case, an unqualified offer was accepted and the acceptance made manifest. Later, the offerees sought to repudiate their initial assent. Had there been a delay in their determination to repudiate permitting the letter to be delivered to appellant, no question as to the invalidity of the repudiation would have been entertained. As it were, the repudiation antedated receipt of the letter. However, adopting the view that the acceptance was effective when the letter of acceptance was deposited in the mails, the repudiation was equally invalid and cannot alone support the summary decree for appellees.

The summary decree is reversed and the cause remanded for further proceedings.

Phillip → mildred
mildred — letter Phillip

Problem 28

(1) By mail, Phillip offered to buy 300 dwarf apple tree saplings from Mildred, adding that the offer would remain open until midnight of August 21. (The offer was not signed.) Mildred wrote a letter of acceptance to Phillip. The letter was properly addressed and mailed, but Phillip never received the letter. Three weeks later, Mildred called Phillip and was told that there was no contract. Was there an acceptance?

(2) If Phillip had hand delivered the original offer to Mildred, would her mailed acceptance have created a contract on dispatch?

(3) What result with this sequence:

(a) On August 1, Phillip mailed his offer, but on August 2, he changed his mind and mailed her a revocation of the offer.

(b) On August 4, Mildred received the offer and the next morning she posted a written acceptance. Later that same day, she received his second letter. Does she have a contract?

(4) Consider this variation:

(a) On August 1, Phillip mailed his offer and Mildred received it on August 4.

(b) On August 5, Mildred mailed her acceptance, but later that day changed her mind and phoned Phillip, telling him she was rejecting. She did not mention her en route letter.

(c) Phillip immediately contracted with someone else to purchase the 300 dwarf apple seedlings. The next day he received her letter of acceptance, but threw it away.

(d) Mildred changed her mind again and now wants to sell the seedlings to Phillip. Her attorney points to Morrison v. Thoelke (the last case) and argues that there is a contract. Is Phillip bound?

(5) In (1) above, what result if Phillip's offer had stated, "If I do not receive a written reply from you by August 21, I will assume you do not accept"? See Restatement (Second) of Contracts §63(a) and comment b,

and American Heritage Life Ins. Co. v. Virginia Koch, 721 S.W.2d 611 (Tex. App. 1986).

NOTE ON OPTION CONTRACTS

Where the offeree has paid money to create an option period for acceptance, the usual mail box rule establishing the contract on dispatch of the acceptance does *not* apply. The acceptance must be *received* within the option period to be effective. See Restatement (Second) of Contracts §63(b) and River Development Corp. v. Slemmer, 781 S.W.2d 525 (Ky. Ct. App. 1989).

NOTE ON OFFERS IN INTERNATIONAL SALES

Under the United Nations Convention on Contracts for the International Sale of Goods, the mail box rule (acceptance effective on dispatch) is altered. In international sales to which the treaty applies, an acceptance is not effective until *received* (Article 18(2)). However, the offeror is not permitted to revoke an offer once the acceptance has been dispatched (Article 16(1)), thus effectively reaching the same result as American law.

F. Termination by Counteroffer and the "Battle of the Forms"

1. The Common Law

Except with respect to option contracts, the offeree's power of acceptance generally terminates when, rather than accepting, the offeree makes a counteroffer. Restatement (Second) of Contracts §§36(1)(a) and 37. The rationale for this rule is that a counteroffer is impliedly also a rejection.

LIVINGSTONE v. EVANS
Alberta Supreme Court, 1925
4 D.L.R. 769

WALSH, J. The defendant, T. J. Evans, through his agent, wrote to the plaintiff offering to sell him the land in question for $1,800 on terms. On the day that he received this offer the plaintiff wired this agent as follows: "Send lowest cash price. Will give $1,600 cash. Wire." The agent replied to this by telegram as follows "Cannot reduce price." Immediately upon the receipt of this telegram the plaintiff wrote accepting the offer. It is admitted by the defendants that this offer and the plaintiff's acceptance of it constitute a contract for the sale of this land to the plaintiff by which he is bound

unless the intervening telegrams above set out put an end to his offer so that the plaintiff could not thereafter bind him to it by his acceptance of it.

It is quite clear that when an offer has been rejected it is thereby ended and it cannot be afterwards accepted without the consent of him who made it. The simple question and the only one argued before me is whether the plaintiff's counteroffer was in law a rejection of the defendants' offer which freed them from it. Hyde v. Wrench (1840), 3 Beav. 334, 49 E.R. 132, a judgment of Lord Langdale, M.R., pronounced in 1840, is the authority for the contention that it was. The defendant offered to sell for £1,000. The plaintiff met that with an offer to pay £950 and (to quote from the judgment at p.337) — "he thereby rejected the offer previously made by the Defendant. I think that it was not competent for him to revive the proposal of the Defendant, by tendering an acceptance of it." . . .

The plaintiff's telegram was undoubtedly a counter-offer. True, it contained an inquiry as well but that clearly was one which called for an answer only if the counter-offer was rejected. In substance it said: — "I will give you $1,600 cash. If you won't take that wire your lowest cash price." In my opinion it put an end to the defendants' liability under their offer unless it was revived by the telegram in reply to it.

The real difficulty in the case, to my mind, arises out of the defendant's telegram "cannot reduce price." If this was simply a rejection of the plaintiff's counter-offer it amounts to nothing. If, however, it was a renewal of the original offer it gave the plaintiff the right to bind the defendants to it by his subsequent acceptance of it.

With some doubt I think that it was a renewal of the original offer or at any rate an intimation to the plaintiff that he was still willing to treat on the basis of it. It was, of course, a reply to the counter-offer and to the inquiry in the plaintiff's telegram. But it was more than that. The price referred to in it was unquestionably that mentioned in his letter. His statement that he could not reduce that price strikes me as having but one meaning, namely, that he was still standing by it and, therefore, still open to accept it. . . .

I am, therefore, of the opinion that there was a binding contract for the sale of this land to the plaintiff of which he is entitled to specific performance. It was admitted by his counsel that if I reached this conclusion his subsequent agreement to sell the land to the defendant Williams would be of no avail as against the plaintiff's contract.

There will, therefore, be judgment for specific performance with a declaration that the plaintiff's rights under his contract have priority over those of the defendant Williams under his. The plaintiff will have his costs as agreed by the case. It is silent as to the scale but unless otherwise agreed they should be under C.R., Sch. C., c. 3.

Judgment for the plaintiff.

NOTE

The common law insisted on the "mirror image" rule: The acceptance must look exactly like the offer and must not try to change it in any way. If the acceptance tried to add new terms not already implied in the offer, it

was no acceptance at all, but instead a counteroffer. The rule caused no end of difficulties.

Problem 29

Assume that Gandalf, a prestidigitator, offers to perform magic tricks for an extravaganza put on by Frodo, an impresario, for $3,000. Frodo replies, "I accept, but I plan to videotape your performance and show it monthly thereafter at park concerts." Is there a contract? If Gandalf says nothing, but does perform and is videotaped, can he later object to the monthly showings? What if, instead of the above, Frodo had replied, "I agree to pay you $3,000, but you must be sober during the performance." Is this a counteroffer?

In the main, commerce is not conducted with the assumption that every transaction will result in litigation; obviously most business transactions are concluded smoothly. This is not to say that they are accomplished without legal planning. A manufacturing concern, for example, is likely to have its legal counsel draft a series of forms designed to facilitate its purchasing of raw materials and its sale of manufactured items. These forms will be worded to give the client every reasonable advantage (and, all too often, some advantages not so reasonable). Alas, those selling *to* the manufacturer and those buying *from* the manufacturer may also be very well armed with their own forms facilitating their respective sales and purchases and giving them every reasonable advantage (and, again all too often, some advantages not so reasonable).

The use of such forms is typically harmless. Although these documents may introduce some potentially difficult legal issues, almost all transactions do proceed without a hitch and the forms will not be read before being filed away by clerks. *But* when a marked advantage perceived by one party disappears, or the goods are defective, not delivered, delivered late, or when a multitude of other problems arise, the forms will be pulled from the files and the battle begun.

Because this battle of the forms is handled quite differently in the original version of Article 2 of the Uniform Commercial Code and the 2003 revision of that Article, the segments below are similarly divided.

2. The Original Battle of the Forms

Section 2-207 of the Uniform Commercial Code, a much-criticized section, deals with a number of factual situations in which buyers and sellers try to reach a contract. Typically the buyer sends a purchase order with its terms, and the seller replies with an acknowledgment form, as in the Problem that follows. First use the common law rules just explored to resolve the question of the terms of the resulting deal.