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Acceptance by Act Not Communicated to Offeror

J.P. McKeehan

Notes

ACCEPTANCE BY ACT NOT COMMUNICATED TO OFFEROR—*Ross v. Leberman, 298 Pa. 575,* decides not only that an offeror's promise becomes binding when the act named as a condition of the promise has been done but that failure to give the offeror notice that the act has been done is mere matter of defense and the plaintiff need not aver that he gave notice. Ross authorized Leberman to apply money which Leberman owed him to the needs of a corporation in which they were both interested. When sued for the sum owed, Leberman set up that he had applied the money as directed. The lower court held that Leberman was bound to aver that he had informed Ross when the actual expenditures were made. Reversed. .

The debt arose in 1921. Authority to apply the money was given in 1923. Suit was brought in 1928. The outlays were made between 1923 and 1926. Ross contended that there was no acceptance of his offer alleged, for Leberman did not aver notice of acceptance. Obviously, the case was not one of guaranty but rather a discharge of a debt by payment to a third person at the request of the creditor. Was there any burden on the debtor to report the payment or was the creditor bound to ascertain whether the corporation had received the money? The authority was contingent upon the payment of a like sum by the debtor on his own account for the benefit of the corporation in which both parties were interested. Was there a duty to report that this condition had been performed or was the creditor bound to ascertain from the corporation all that happened?

Ross did not request reports from Leberman as to what he did in the matter and any duty to report arose by operation of law, either as an essential part of the law of contracts relating to the acceptance of an offer or as part of the duty of an agent to keep his principal informed as to what he does for his benefit. The Supreme Court treated the case as the acceptance of an offer to make a unilateral contract, rather than as a case of agency, perhaps for the reason that the act authorized was for the mutual benefit of

both parties and not solely for the benefit of the one authorizing it.

The offer or authority, whichever it was, remained unrevoked until it had been acted upon. Whether it might have lapsed before it was acted upon is not discussed by the court.

"As a one-fourth owner of the stock of the corporation it would seem he was in position to secure the information if desired". * * * * "It is not the notice which creates the contract, but the lack of it may constitute an excuse from liability. If this is so, then the agreement is enforceable, unless the promisor can establish that for some reason he is relieved from performance. If this arises from failure to give notice at the time advances were made, and he was therefore misled and prejudiced, not having the power to learn the true facts by inquiry, this is a matter of defense, and must be averred in answer to the counterclaim filed, which is on its face sufficient".(p. 581)

In *Bishop v. Eaton,*[1] the court said: "The language relied relied on was an offer to guarantee, which the plaintiff might or might not accept. Without acceptance of it there was no contract, because the offer was conditional and there was no consideration for the promise. But this was not a proposition which was to become a contract only upon the giving of a promise for a promise, and it was not necessary that the plaintiff should accept it in words, or promise to do anything before acting upon it. It was an offer which was to become effective as a contract upon the doing of the act referred to. It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer and furnishes the consideration. Ordinarily there is no occasion to notify the offeror of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. *But if the act is of such a kind that knowledge of it will not quickly come to the*

[1]161 Mass. 496. (1894).

promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a subsequent withdrawal of it, if within a reasonable time afterwards he notifies the promisor".

In *Bishop v. Eaton,* the guarantor wrote the plaintiff: "If Harry needs more money, let him have it or assist him to get it, and I will see that it is paid". The offeree made no promise to do as requested but proceeded to do so. Such a situation is distinguished from that in *Ross v. Leberman* by the fact that when Ross authorized the use of his money for corporate purposes, it was in conversation with Leberman and Justice Sadler says: "The offer was contemporaneous with the understanding that advances were to be made". Whether it is meant that a binding contract was then made by these two parties to make equal advances to their corporation, is not clear. He may mean only that Ross had more ground to expect action in reliance upon the promise than had the offeror in *Bishop v. Eaton.* A like expectation is aroused by the fact that a guaranty is offered in response to a request by the guarantee. But in *Evans v. McCormick,*[2] the decisions of the United States Supreme Court were rejected and it was held that precedent request cannot supply the place of subsequent notice, the purpose of which is to inform the guarantor that the advance has actually been made. It would seem that a mere "understanding" would be open to the same objection. It is the fact that the advance has been made that the offeror is entitled to know. But the Court intimates that this "understanding" produced a situation similar to that of "an absolute guaranty accepted when given", as in *Gardner*

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[2]167 Pa. 247. (1895).

v. Lloyd.[3]

This decision is interesting as showing again the disposition of the Supreme Court of Pennsylvania, to give careful consideration to the pronouncements of the American Law Institute. The court quotes section 56 of the Restatement of the Law of Contracts.[4] Of course when the offer is to pay for services to be rendered to the offeror personally, their rendition is acceptance and words are superfluous.[5] The same is true when the act showing assent is a course of dealing between the offeror and offeree.[6] But when the promisor requests a dealing with a third person, as when one offers to guarantee payment, if the offeree will sell goods to another, the offeror is not in position to infer acceptance from what he must see, if

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[3]110 Pa. 278, 284. (1885). See also Black, Starr & Frost v. Grabow, 216 Mass. 516, 518 (1914) as to "some previous understanding" as relieving of the duty to give notice in guaranty cases.

[4]"Where forebearance or an act other than a promise is the consideration for a promise, no notification that the act or forebearance has been given is necessary to complete the contract. But if the offeror has no adequate means of ascertaining with reasonable promptness and certainty that the act or forebearance has been given, and the offeree should know this, the contract is **discharged** unless within a reasonable time after performance of the act or forebearance, the offeree exercises reasonable diligence to notify the offeror thereof". Comment: "It is only in the exceptional case where the offeror has no convenient means of ascertaining whether the requested act has been done that notice is requisite. Even then, it is not the notice which creates the contract, but lack of the notice which ends the duty".

[5]Snyder v. McGill, 265 Pa. 122. (1919); Nangle's Est., 268 Pa. 481. (1920).

[6]Lineweaver's Est., 284 Pa. 384, 391 (1925). In Hoffman v. R. R., 157 Pa. 174, 193 (1893) it is said: "The company began to work upon the right of way through his farm and made considerable expenditure of money. It is plain that such work being done in a substantial performance of the contract, was as well defined a notice of acceptance as one clearly expressed in writing, and is sustained by the rule of the common law 'that the fulfillment of that which the promisor stipulates for has always been deemed the best and sufficient proof of assent, and notice need not be given unless the circumstances are such that he **cannot** inform himself by inquiry'. Hare on Contracts, 313".

he does not shut his eyes. It would seem that it is for this reason that notice has always been required in such cases in Pennsylvania.[7]

Justice Sadler quotees with approval from Hare on Contracts, page 332: "When, what the promisor stipulates for is performance, the contract is complete as soon as the act is done, whether it be or be not known or communicated to the promisor. If the circumstances are such that he *cannot inform himself by inquiry,* it *may be requisite* to give him notice; but this is a *condition* subsequent that will annul the contract if unfulfilled, and not a step that must be taken to call it into being".

Contrast with this the American Law Institute's proposition that the *contract "is discharged"* whenever the offeror has "no *adequate* means of ascertaining *with reasonable promptness and certainty* that the act or forbearance has been done, and the offeree should know this", etc.

The American Law Institute has attempted a generalization applicable to all offers to make unilateral contracts, with the guaranty cases as its basis. The opinion in *Ross v. Leberman* indicates that the guaranty cases are to be deemed a class apart and that the other cases in which one must report the doing of an act which constitutes acceptance are quite exceptional. "If Ross was *deceived* as to the extent of payments being made, or he was *unable,* after due in-

[7]In Sullivan Smythfield Co. v. Welsh, 91 Pa. Super. Ct. 413. (1926) it is said: "The reason for requiring notice is to enable the guarantor to know the nature and extent of his liability, so that he may guard himself against losses and reasonable **notice after the sale** has actually been made is all that is necessary". This seems to be the first clear statement that notice in these cases is a condition subsequent. The contrary was indicated in Acme Mfg. Co. v. Reed, 197 Pa. 359, 365. (1900) in Justice Brown's words: "Upon the making of the contract **and notice** of the acceptance of the guaranty by the company for the fulfillment by Schlandecker, **and not before,** the guarantor would incur liability". That this statement was construed as making the notice a condition precedent in guaranty cases, see "Offer of Guaranty, its Acceptance and Notice Thereof", XXVII Dickinson Law Review 183 at 189, (1923). Curiously the Acme Mfg. Co. case is cited in the Sullivan Smythfield Co. case as sustaining the proposition that notice is only a condition subsequent.

quiry, though owning one-fourth of the stock of the company, to find the amount being expended under his agreement, this may be considered in way of defense, but if he desires to take advantage of such facts, he must assert and prove them".[8]

In Harriman on Contracts, (2d ed.) sec. 149, page 84, referring to communication of acceptance of guaranties, it is said: "Failure to give notice is therefore a condition subsequent, putting an end to the contract; yet the anomalous rule has been laid down by the highest authority that the guarantee is bound to prove that he has given notice. *(Douglass v. Reynolds, 7 Pet. 113.)* Logically, of course, it should be for the guarantor to show that he has received no notice, and is therefore discharged from the obligation which comes into existence as soon as the advances are made by the guarantee".

In *Davis v. Wells, 104 U. S. 159, 164,* it is said that the requirement of notice of acceptance of an offer of guaranty is an instance of the rule "entering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise". Harriman, in sec. 147, says that this "has been repeated so often that, if repetition could make the law, such a rule might have been established".

The instant decision is in line with the best modern thought on the subject. The drift is away from requiring notice even in the guaranty cases[9] but the rule in these cases is probably too firmly established in Pennsylvania to be abandoned.

J. P. McKeehan

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[8]All italics in this note are the author's.

[9]Midland Bank v. Security Elevator Co., 161 Minn. 30, 200 N. W. 851. (1924).