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Contracts-Conflict of Laws-Offer and Acceptance-Telephone

CONTRACTS—CONFLICT OF LAWS—OFFER AND ACCEPTANCE—TELEPHONE

In 1926 plaintiff insurance broker went to New York and there made an oral offer to defendant's agent to place certain reinsurance contracts with defendant insurance company in exchange for a five per cent commission on all premiums collected on policies. The agent deferred acceptance until he could secure authority from his home office. Plaintiff returned to Philadelphia, and the agent subsequently telephoned from New York and accepted the offer. In 1953 defendant notified plaintiff that it no longer felt bound by the contract. Defendant contended that under the New York Statute of Frauds, oral contracts not to be performed within one year were unenforceable. Plaintiff argued that the contract was made in Pennsylvania where the acceptance was heard, and that the New York statute was, therefore, not applicable. *Held:* when a contract is entered into by telephone, it is deemed to be made at the place where the acceptance is spoken and not where the offeror hears the acceptance. The case was remanded to determine the state from which the defendant telephoned his acceptance since the law of that state would apply. *Linn v. Employers Reinsurance Corp.*, 392 Pa. 58, 139 A.2d 638 (1958).

This is the first case in Pennsylvania deciding the situs of a bilateral contract formed by telephone. Although the decision is in accord with those other state [1] and federal [2] jurisdictions which have decided the question, it is contrary to the results reached by the English courts [3] and the textwriters.[4]

Under the normal conflict of law rules, to determine the formal validity of a contract between parties from different states, it is essential to establish where the alleged contract was made.[5] Usually it is said to be made at the place where the last act necessary to make a binding agreement takes place.[6] Gen-

[1] Carbon v. Hampton, 21 Ala. App. 438, 109 So. 176 (1926); Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 Pac. 855 (1903); Pearson v. Electric Service Co., 166 Kan. 300, 201 P. 2d 717 (1943); Trinity Ins. Co. v. Mills, 293 Ky. 463, 169 S.W. 2d 311 (1943); Dudley A. Tyng & Co. v. Converse, 180 Mich. 195, 146 N.W. 629 (1914); Estrum v. Union Cas. Life Ins. Co., 165 Neb. 554, 86 N.W. 2d 568 (1957); Keegan v. Lenzie, 171 Or. 194, 135 P. 2d 717 (1943); Traders Oil Mill Co. v. Arnold Bros. Gin Co., 225 S.W. 2d 1011 (Tex. Civ. App. 1949).

[2] Parkway Baking Co. v. Freihoffer Baking Co., 255 F. 2d 641, (3d Cir. 1958); Rothenburg v. Rothstein, 181 F. 2d 345 (3d Cir. 1949); Joseph v. Krull Wholesale Drug Co., 147 F. Supp. 250 (E.D. Pa. 1956); United States v. Bushwick Mills, 165 F. 2d 198 (2d Cir. 1947).

[3] Entores, Ltd. v. Miles Far East Corp., [1955] 2 All E.R. 493 (A.C.).

[4] 1 CORBIN, CONTRACTS § 79 (1950); 1 WILLISTON, CONTRACTS § 82 (rev. ed. 1936); Winfield, *Some Aspects of Offer and Acceptance,* 55 L. Q. REV. 499, 513 (1939).

[5] Except for contracts concerning land, the validity of a contract as affected by the Statute of Frauds is generally held to be a matter of substance to be determined by the law of the place of contracting and not a matter relating to proof to be governed by the *lex fori.* Bernstein v. Lipper, 307 Pa. 36, 160 Atl. 770 (1932); Callaway v. Prettyman, 218 Pa. 293, 67 Atl. 418 (1907); RESTATEMENT, CONFLICT OF LAWS § 311 (1934).

[6] Victorson v. Albert M. Green Hosiery Mills, Inc., 202 F. 2d 717 (3d Cir. 1953); *In re* Luce's Estate, 54 York 119 (O.C., 1940); RESTATEMENT, CONTRACTS § 74 (1932).

erally, there is no difficulty in determining what is the last act necessary for the formation of a unilateral contract, which comes into existence when the act bargained for and given in exchange for the promise is performed; the place of contracting is the place where the act occurs.[7] Difficulties arise in determining the last act necessary for the formation of a bilateral contract because there are two different rules establishing contrary conclusions. It is necessary to examine the theories underlying each rule.

One requirement of an informal bilateral contract is a manisfestation of mutual assent, almost invariably taking the form of an offer on the one hand and an acceptance on the other.[8] Two manifestations of willingness to make the same bargain do not constitute a contract unless one is made with reference to the other, and therefore, it is essential to the agreement that there be communication of the offer.[9] Since the very essence of a bilateral contract is an exchange of promises,[10] communication of acceptance is also essential.[11] This has been the general rule, both in the United States [12] and England,[13] where the bargaining has been in the presence of both parties. The hearing of the offeror is the last act necessary for the formation of the contract.

On the other hand, an apparent exception to the general rule arises where the parties are negotiating at a distance from each other. In such a situation some indirect mode of communication must be employed. Four such indirect means have been commonly used—mail, telegraph, telephone, and teleprinter.[14] Two of these modes create an appreciable time difference between the offer and acceptance. Use of any of these communication systems introduces a possibility of error or failure in transmission which does not exist where the negotiations are carried on face to face. When confronted with the problem of where and at what moment a contract is formed, the courts attempted to rationalize the holding of the leading British case of *Adams v.*

[7] Packard Englewood Motors v. Packard Motor Car Co., 215 F. 2d 503 (3d Cir. 1954); Mann v. Salsberg, 17 Pa. Super. 280 (1901); RESTATEMENT, CONFLICT OF LAWS § 324.

[8] RESTATEMENT, CONTRACTS §§ 20, 22.

[9] T. M. James & Sons v. Marion Fruit Jar & Bottle Co., 69 Mo. App. 207 (1896); Jersey City v. Harrison, 72 N.J.L. 185, 62 Atl. 765 (1905); Broadnax v. Ledbetter, 100 Tex. 375, 99 S.W. 1111 (1907); RESTATEMENT, CONTRACTS § 23. *Contra,* Asinof v. Freudenthal, 195 App. Div. 79, 186 N.Y.S. 383 (1921).

[10] RESTATEMENT, CONTRACTS § 12.

[11] McAden v. Craig, 222 N.C. 497, 24 S.E. 2d 1 (1943); Morganstern Electric Co. v. Corapolis Borough, 326 Pa. 154, 191 Atl. 603 (1937).

[12] *Ibid.*

[13] Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256. The *Carlill* case involved a unilateral offer. Nevertheless, the case is generally cited as standing for the proposition that an acceptance of an offer to enter a bilateral contract must be communicated to the offeror. Lindley, L.J., states on page 262 of the opinion: "Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified."

[14] A new machine used for business communications by which messages may be typed out and received almost instantaneously on a similar machine.

Lindsell[15] to reach what was thought to be a sound theoretical and practical conclusion. Thus, cases purporting to follow *Adams v. Lindsell* held that where the offeror has expressly or impliedly authorized a specific channel of communication, a contract is completed the moment the acceptance is deposited in the authorized channel.[16] As a result, the place where the acceptance is deposited is the place of the making of the contract.[17] This appears as an apparent exception to the normal rule of bilateral contracts requiring communication of the acceptance.

Since a majority of modern commercial transactions involve negotiations between parties distant from each other, the exception has become much broader in application than the general rule itself. Whether by analogy to the mail cases or for practical reasons, almost without dissent the courts find that it governs telegraphic communications.[18] A more difficult problem arises in determining whether the exception logically applies to telephonic communications. In the United States both federal and state courts hold that it does.[19] The English judiciary has ruled to the contrary.[20] Because of the different result, it may be well to examine the practical and theoretical reasons given in the postal and telegraph cases to determine whether the extension to the telephone cases is warranted.

A major theoretical difficulty that had to be resolved in the postal and telegraph cases was the apparent lack of requisite mutuality of assent necessary for the formation of a bilateral contract. A legal paradox was created in that the court on the one hand held that posting a letter of acceptance formed a contract, and yet at the same time declared that acceptance must be communicated. A solution to this inconsistency has been sought in the law of agency.[21] Courts employing the fiction reasoned that the offeror had made the post office his agent, and therefore the offeree in giving his acceptance to the agent was

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[15] 1 Barn. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818). The doctrine of a continuing offer through the objective approach to contracts was first clearly stated in this case. Broadly interpreted, it holds that where the offeree has reason to believe that the offer is open because the offeror has not outwardly shown that he did not intend to keep the offer open, the offeree's power of acceptance continues till the acceptance.

[16] 1 WILLISTON. CONTRACTS § 81 nn. 3, 4.

[17] Burton v. United States, 202 U.S. 344 (1905); Machese Bros. v. A. Lyons & Sons, 123 Cal. App. 2d 193, 266 P. 2d 556 (1954); Ward Lumber Co. v. American Lumber & Mfg. Co., 247 Pa. 267, 93 Atl. 470 (1915); Hamilton v. Lycoming Mutual Ins. Co., 5 Pa. 339 (1847); Perry v. Mount Hope Iron Co., 15 R.I. 380, 5 Atl. 632 (1886).

[18] Cowan v. O'Connor [1888] 20 Q.B.D. 640; Dick v. Vogt, 196 Okla. 66, 162 P. 2d 325 (1945); Western Union Tel. Co. v. Gardner, 278 S.W. 278 (Tex. Civ. App. 1925). *But see* Schiff v. Schiff, 45 N.E. 2d 132, rehearing denied 48 N.E. 2d 139 (Ohio App. 1942).

[19] Cases cited notes 1 and 2 *supra.*

[20] Entores, Ltd. v. Miles Far East Corp., [1955] 2 All E.R. 493 (A.C.).

[21] Household Fire & Carriage Acc. Ins. Co. v. Grant, [1879] 4 Ex. D. 216. See notes, 38 GEORGETOWN L. J. 106 (1949); 15 CORNELL L. Q. 273 (1930).

constructively communicating with the principal.[22] Little consideration is needed to see that the post office is no one's agent. None of the elements of agency are present, i.e., there is no authorization by and no control in the offeror; nor has the postal service an intent to act as agent. Such a rationale seems strained, and no attempt has been made to apply it to the telephone cases.

Other courts have denied that a manifestation of acceptance must be communicated to the offeror at all. In *White v. Coriles* [23] it was stated:

> "We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need [sic] that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time communicated to him." [24]

Justice Holmes advanced another theory to justify the intended result. He maintained that the depositing of the letter of acceptance in the mail is "the doing of an overt act, which by general understanding renounces control over the letter." [25] This has been seriously questioned also, and in one case it has been held that with the change in the postal regulations, permitting the sender to recall and withdraw his letter, the "effective on dispatch" holding is now at an end.[26]

> "The acceptance, therefore, is not final until the letter reaches destination, since the sender had the absolute right of withdrawal from the post office, and even the right to have the postmaster at the delivery point return the letter at any time before actual delivery." [27]

This seems a strong argument that the ruling in the mail cases should be universally changed or at least limited in application.

The rationale of the more recent cases is that when the offeror chooses the mail to negotiate a contract, his selection indicates to the offeree that the offeror is willing to be bound before he receives communication of the acceptance, *i.e.*, that if the offeree wants to accept, all he need do is post acceptance

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[22] Household Fire & Carriage Acc. Ins. Co. v. Grant, *supra*, note 21.

[23] 46 N.Y. 467 (1871).

[24] *Id.* at 469.

[25] Holmes, THE COMMON LAW, 1882, p. 306.

[26] Rhode Island Tool Co. v. United States, 128 F. Supp. 417 (Ct. Cl. 1955); See also Dick v. United States, 113 Ct. Cl. 94, 82 F. Supp. 326 (1949).

[27] Rhode Island Tool Co. v. United States, *supra* at 419.

and a contract is formed immediately.[28] Whether this is a realistic interpretation of the offer seems questionable. Can it reasonably be said that the offeror intends to assume all risks or that he is willing to have a contract come into existence when acceptance is mailed? The more reasonable and accurate statement of his intention seems to be to the contrary, that he does not intend to be bound until he receives an answer. Obviously, when extended to the instantaneous modes of communication, application of the rationale of the recent cases becomes more difficult. When a telephone is used, the offeror seems to retain his right to receive acceptance just as fully as he does when all the bargaining is conducted face to face. In such a case the risk of being heard is placed upon the acceptor, the contract being formed when and where the offeror hears or ought to hear the acceptance.[29] The acceptor knows that the offeror is listening to hear, and in accepting it is incumbent on him to make the offeror hear.[30] If it is essential that the offeror hear what is said to him, or at least be guilty of some fault in not hearing, the time and place of the formation of the contract is not when and where the offeree speaks, but when and where the offeror hears, or ought to hear.[31]

> "It may be forcibly argued that making a promise is something which necessarily requires communication, and that sending a letter which never arrives is no more making a promise to the person addressed than talking into a telephone when there is no connection with the person addressed. . . ." [32]

Various practical reasons have been advanced in an attempt to justify the mail cases. The reason most often given is that such a rule is necessary for business expediency. To hold that no contract results until receipt by the offeror would create uncertainity in the offeree's mind, not knowing when and where a contract would come into existance.[33] Thus, "an acceptor would

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[28] This idea seems to have originated in Household Fire & Carriage Acc. Ins. Co. v. Grant, [1879] 4 Ex. D. 216, where Bramwell, L.J., stated on page 233 that "there might be an agreement that the acceptance of the proposal may be by sending the article offered by the proposer to be bought, or handing out a flag or sign to be seen by the offeror as he goes by, or leaving a letter at a certain place, or any other agreed mode, and in the same way there might be an agreement that dropping a letter in a post pillar box or other place of reception should suffice." In Entores, Ltd. v. Miles Far East Corp. [1955] 2 All E.R. 493, Lord Justice Parker prefers to treat the use of the mail or telegraph as an indication by the offeror of a waiver of his right of communication arising out of the general rule of the *Carlill* case. An offeror, opines Parker, ordinarily has a right to receive an acceptance before he is bound, but this right may be waived. According to Parker, such a waiver occurs upon selection by the offeror of the postal or telegraphic channel of negotiation. Therefore, when the offeree deposits his message of acceptance with the post office or telegraph company, a contract is formed immediately. But such waiver is not intended where an instantaneous mode of communication is employed.

[29] 1 WILLISTON, CONTRACTS § 82. *Contra,* RESTATEMENT, CONFLICT OF LAWS § 326, comment *c,* which is dictum in Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 p. 855 (1903).

[30] 75 CENTRAL L. J. 71 (1912).

[31] 1 WILLISTON, CONTRACTS § 82.

[32] 1 WILLISTON, CONTRACTS § 81.

[33] Household Fire & Carriage Acc. Ins. Co. v. Grant, [1879] 4 Ex. D. 216.

never be entirely safe in acting upon his acceptance until he had received notice that his letter had reached its destination." [34] But this practical argument is not applicable to a medium of communication which is instantaneous. For when a telephone is used, communication can be verified without delay.

Another argument advanced is that some instant during the course of the negotiations must be chosen as the time a contract comes into being. However, the argument seems to be one for making a choice, but not for making a particular choice. Therefore, the choice made is arbitrary.

Another of the practical arguments brought forward is that where the contract is negotiated by mail, one of the parties must carry the risk of loss caused by price fluctuations and the inconvenience of not knowing at what moment to begin performance. Because the offeror selected the mode of communication, this burden is placed on him. Although the reason is said to be an arbitrary one, it is a reasonable one in that it permits business transactions to be closed more quickly and enables more prompt performance.[35] But different circumstances are present where an instantaneous medium of communication is employed.

The strongest practical argument advanced in favor of the "effective on dispatch rule" is that such a holding is desirous for reasons of maintaining uniformity of law among the federal and state jurisdictions. The Pennsylvania Supreme Court recognizes that the telephone is more analogous to situations where the parties are *in praesentes* and that it represents a sound theoretical view.[36] Nevertheless the *Linn* case was decided in the light of the cases which were felt to represent the weight of authority. The court acknowledged the problems a contrary decision would pose. To hold otherwise would create variations in the law which are themselves a potent cause of uncertainty and fertile area of forum shopping.[37] To avoid the confusion in the commercial law, the court seemed to reason that the factors in favor of uniformity outweighed those favoring limitation of the "effective on dispatch rule" for theoretical reasons. It would appear that no real harm is done by establishing this rule on a desire to maintain uniformity of the law among states. And if the purpose of having such a rule is to let businessmen know in advance what the courts will do, it is probably best that those state courts which have not decided the question should follow the majority even if the rule has no

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[34] *Id.* at 224.

[35] 1 CORBIN, CONTRACTS § 78.

[36] 392 Pa. at 62, 139 A. 2d at 640.

[37] RESTATEMENT, CONFLICT OF LAWS § 326, comment *c*, states that "When acceptance is to be given by telephone, the place of contracting it where the acceptor speaks his acceptance."

practical or theoretical basis and even if the telephone problem is not analogous to the mail problem.

In summation, it can be said that the theoretical and practical reasons given for the purported rule of *Adams v. Lindsell* are questionable. However, the distortions of that decision have such legal longevity that it is necessary to accept them. Such a conclusion does not preclude, however, a rational attempt to limit their operation. But, instead, by analogy, the rule has been extended to the other communication systems. While the similarities between the mail and the telegraph may warrant the formulation of analogous principles of law governing acceptance of offers, perhaps there is no such resemblance between communications by mail and the telephone.[38] Indeed, a contract made by telephone presents a greater analogy to a contract made where the parties are in each other's presence.[39] The circumstances involved warrant distinction rather than analogy to the mail cases. Since all the cases deciding the issue involves a question of jurisdiction, the question of risk of being heard was not presented. This may explain why the cases are singularly lacking in discussion of the principles involved. If not expressed, implicit in them is the attempted analogy to the rule in the postal cases, that the dispatching is the last act necessary for the formation of the contract.[40]

It could be concluded that the rule set forth in the *Linn* case is justified for reasons of uniformity in resolving questions of jurisdiction. This reasoning does not apply where the question is one of formation of a contract as where the offeror is unable to hear the offeree's reply over the telephone. It should be noted, however, that under the ruling in the mail cases, it has been held that even though the letter is lost in the mail and the offeror is unaware that his offer has been accepted, he is bound.[41] A contrary rule would seem more rational in the telephone cases, especially where the offeree selects the mode of communication by telephoning the offeror.

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[38] 1 WILLISTON, CONTRACTS § 82.

[39] RESTATEMENT, CONTRACTS § 65, states that "Acceptance given by telephone is governed by the principles applicable to oral acceptances where the parties are in the presence of each other." However, this black letter law seems ambiguous and is without comment. When interpreted with other pertinent sections, it can be construed to support either contention.

[40] 2 BEALE, CONFLICT OF LAWS § 326.2 (1935); see notes 1 and 2 *supra*.

[41] Vasser v. Camp, 11 N.Y. 441 (1854); RESTATEMENT, CONTRACTS § 64.