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CONTRACTS - OFFER AND ACCEPTANCE -TERMINATION OF OFFER BY SUBSEQUENT HIGHER BID OF ANOTHER

CONTRACTS — OFFER AND ACCEPTANCE — TERMINATION OF OFFER BY SUBSEQUENT HIGHER BID OF ANOTHER — The receiver of an insolvent bank received from one Lorensen bids of $4,500 for the building and $500 for the fixtures of the bank, the bid for the fixtures being conditioned on acceptance of the bid for the building. He received a subsequent bid of $4,600 for the building alone, no mention being made of the fixtures. Lorensen's bid for the fixtures was made on separate paper and was considered as distinct from his bid for the building. The receiver called on Lorensen, notified him of the higher bid (indicating that it had been received without qualification) and tried to induce him to raise his bid. This Lorensen refused to do; he at no time renewed or raised his bid. Some time later the receiver accepted Lorensen's bid as the best under the circumstances, there being no other market for the fixtures. Upon the receiver's application to the court for confirmation of the contract Lorensen objected that there was no contract, and his objection was sustained. The receiver appealed. The supreme court of the State in affirming the decision of the lower court *held* that the receipt of the higher bid and the receiver's statement to Lorensen to that effect operated to terminate Lorensen's offer before the receiver had accepted it, and consequently there was no contract. *State ex rel. Sorensen, Att'y Gen. v. Wisner State Bank et al.*, (Neb. 1933) 250 N. W. 89.

An offer continues till revoked or rejected, after which it ceases to exist and cannot be accepted so as to form a contract.[1] Can it be said that, where compet-

[1] Minneapolis & St. L. Ry. v. Columbus Rolling-Mill Co., 119 U. S. 149, 7 Sup.

ing offers are made to the same offeree concerning the same subject matter, the existence of a higher offer received from a third person and known to the offeror will operate to terminate his offer? [2] A contract is a matter of agreement between the parties thereto. It might be argued that the action of a third party cannot affect that agreement. But a closer examination into the question will show that the action of the third party may produce such a change in the relation of offeror and offeree as to terminate the offer. There is no authority directly in point.[3] Mutual assent under modern doctrine is a matter of objectively manifested intention; that is, words and actions which may be reasonably understood as assent constitute assent.[4] Under that theory a counter-offer[5] or a failure to accept within a reasonable[6] or stated time[7] will operate as a rejection because the offeror reasonably understands from the counter-offer or lapse of time either that the offeree will accept on no terms other than those indicated in the counter-offer, or that he will not accept at all. The offeror is then placed in a position where he no longer feels the necessity to withdraw the offer in order to escape obligation. If for no other reason the counter-offer or lapse of time must be held to terminate the offer in order to protect the offeror. Does not this same reasoning apply in the question raised in the principal case? Does not the offeror there reasonably and justifiably infer that his offer is no longer under consideration and that it will not be accepted; does he not reasonably understand that there is no necessity for him to withdraw his offer to avoid liability? If he does, then the unqualified receipt of that higher bid, which is known to the original offeror, must operate to terminate his offer.

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Ct. 168, 30 L. ed. 376 (1886); Lewis v. Johnson, 123 Minn. 409, 143 N. W. 1127 (1913); Sypherd v. Myers, 80 N. J. L. 321, 79 Atl. 340 (1911).

[2] On this question see 1 WILLISTON, CONTRACTS, secs. 21, 50, 51, 53, 54, 77 (1920).

[3] Question discussed 12 BOSTON UNIV. L. REV. 240 (1932).

[4] 1 WILLISTON, CONTRACTS, sec. 21 (1920).

[5] Hyde v. Wrench, 3 Beav. 334, 49 Eng. Repr. 132 (1840); First Nat. Bank v. Hall, 101 U. S. 43, 50, 25 L. ed. 822 (1880); Wheaton Bldg. & L. Co. v. Boston, 204 Mass. 218, 90 N. E. 598 (1910); Kehlor Flour Mills Co. v. Linden, 230 Mass. 119, 119 N. E. 698 (1918); Grenier v. Cota, 92 Mich. 23, 52 N. W. 77 (1892); Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94 (1888).

[6] Van Camp Packing Co. v. Smith, Rouse & Webster, 101 Md. 565, 61 Atl. 284 (1905); Emerson v. Stevens Grocer Co., 95 Ark. 421, 130 S. W. 541 (1910), 105 Ark. 575, 151 S. W. 1003 (1912); Bowser & Co. v. Fountain, 128 Minn. 198, 150 N. W. 795 (1914); Ortman v. Weaver, 11 Fed. 358 (1882); Baker v. Holt, 56 Wis. 100, 14 N. W. 8 (1882).

[7] Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. ed. 479 (1892); Eagle Mill Co. v. Caven, 76 Mo. App. 458 (1898); Horne v. Niver, 168 Mass. 4, 46 N. E. 393 (1897); Van Camp Packing Co. v. Smith, Rouse & Webster, 101 Md. 565, 61 Atl. 284 (1905); Palmer v. Phoenix Mut. Life Ins. Co., 84 N. Y. 63 (1881).