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Indirect Revocation and Termination by Death of Offers

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INDIRECT REVOCATION AND TERMINATION BY DEATH OF OFFERS

IN a learned and useful article, entitled "The Duration and Termination of an Offer,"[1] by Professor Oliphant, which appeared in the January, 1920 number of MICHIGAN LAW REVIEW, the nature of an offer to make a simple contract was considered as well as the question of when such an offer can be regarded as either revoked, or terminated. It is pointed out that where the actual state of mind of the offerer is different from his apparent state of mind that "the former must be ignored, and whenever they happen to be identical that it may be ignored without effecting results ordinarily."[2] In other words, the test to be applied in determining whether or not there is an offer in existence, which can be accepted is, could the offeree, as a reasonable man, when he attempted to accept the offer believe that there was one open? Did the offeree, at such time, have a right to believe from what the offerer had said or done, that the latter was in a contractual frame of mind? No one, at this stage of the development of the Law of Simple Contracts, would be disposed to question the soundness of this general principle, nor to determine in any given case the existence, or non-existence of an offer in any other way. It is believed, however, that a further application of this test to the cases of indirect and casual revocations of offers, and a consideration of the cases, which deal with the death of an offerer before the offer's acceptance may well be profitable. It is, accordingly, the purpose of this article to give these situations some further brief attention.

The normal rule is that an offerer may not destroy his offer, during its life, except by a communication of a revocation of the same to the offeree. "The notion that an uncommunicated change of mind is sufficient to destroy the offeree's power to accept, which is found in some of the earlier cases has been abandoned."[3] A rule requiring the communication of the revocation is but just and proper. It is, in fact, but an application of the general proposition, which Professor Oliphant lays down in his article and which is

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[1] 18 MICH. L. REV. 201.
[2] 18 MICH. L. REV. 201.
[3] 18 MICH. L. REV. 201, et seq.

quoted at the outset of this. If A makes B an offer, which A represents will remain open for a week and then does nothing further, the offer will remain open for that period, and is acceptable within it. The mere fact that A may have changed his mind within the week will not, of itself, affect the offer, for it is not a question of what A's real mind is, but of what B, as a reasonable man, believes it to be. If B is reasonable in thinking that A still wants to contract, then it will be held that the offer is still available in spite of any secret intentions that A may have. So the law is that B, unless he has reason to believe that A has no longer a desire to contract, can assume that A meant exactly what he said with respect to the offer's life, and normally the only fact which will preclude B from so believing is a direct, authoritative communication of a revocation.

While the above is generally the rule, it may be that the offerer's conduct, in some unusual cases, may indicate to the offeree, just as effectively as a direct revocation, that he does not intend to contract, and, where this is so, such conduct will destroy the offer, because it actually communicates to the offeree, although in an uncommon way, a "reversal of purpose."[4] The offerer by so doing makes it impossible for the offeree to believe any longer that the offer is open for acceptance. Suppose that A offers to sell B a horse and, during the life of the offer, B sees A killing the horse which was offered; this act destroys the offer because, in truth, it was a communication of a revocation of the same, although not a formal one. B could not, having seen A killing the horse, believe reasonably that A wanted to sell it to him. Such a revocation might be termed a casual one, but the terminology would only be correct if it is meant by that that A had not formally revoked his offer. The revocation in this case could not be considered as having been indirectly communicated to B because B's knowledge of A's change of mind came directly from A through his conduct. In fact, the only difference between this kind of a revocation and the usual one is, that in this instance, A does not write or speak, but merely acts, his act being entirely inconsistent with his continuing in a contractual frame of mind. It would seem, then, that there can be

[4] 18 MICH. L. REV. 208; the quotation is from Professor Oliphant at this point.

a revocation of an offer, which is not formal, and can be termed casual but which is *direct*, whenever the offeree discovers the offerer acting in a way which indicates that the latter cannot, under any conceivable state of facts, capable of existing consistently with what he *is* actually doing, intend to continue his offer.[5] The offeree, in such a case, cannot assume that the offerer wants to contract, and so the offer is gone. But suppose that in the last assumed case, B had found the offered horse in the possession of X and had seen A deliver the possession, but had not heard the conversation accompanying the delivery; this could not amount to a revocation of the offer, because X's possession of the horse could exist consistently with the continuation of the offer. It might have been that A delivered the horse to X subject to the offer. The possession was not, under all conceivable conditions, inconsistent with the offer, and so, B had a right to believe that X's possession did not effect it in any way, but that it continued as originally represented.[6]

There is, however, a class of cases, which is apt to be confused with the group just discussed and where, unless care be taken, it will be thought that there is room to hold also that there has been an informal or casual revocation of the offer, but where, in truth, if a careful analysis of the facts is made, it will be readily seen that this is not so. This class of cases is represented by the situation presented in *Dickinson* v. *Dodds*.[7] Making the facts in that case a little stronger than they actually were, they would be these: A makes an offer to sell to B a parcel of land, the same to remain open for a week; during the course of the week, X, a friend of B, knowing of the offer, comes to B and tells him that A told him, X, that he would not sell the land to B; in fact, that he could not do this for the reason that the land had been disposed of to another. Would

[5] Another case where there would be a casual revocation of this kind would be in the case, often suggested, where the offerer has offered real estate, and the offeree sees a deed covering the same land on record, which runs from the offerer to another. It is to be noted that the deed is the direct act of the offerer, known directly to the offeree. There is therefore no revocation resulting from indirect information.

[6] This proposition is intimated by Professor Oliphant (18 MICH. L. REV. 207) in connection with his discussion of the case of *Dickinson* v. *Dodds*, 2 Ch. Div. 463.

[7] 2 Ch. Div. 463.

this information, given in this way, amount to a revocation of the offer? It is not altogether clear to the writer whether or not Professor Oliphant means to intimate that X's report in the assumed case would constitute an effective revocation. The author, however, states his rule as follows:[8]

"If in a given case what the offerer says or does indicates to the offeree that the offerer no longer intends to perform his offer, there seems to be no sufficient reason to hold a casual communication of this fact any less effective as a revocation of the offer than a direct communication. An offer continues no longer than the expectation aroused continues. If that expectation is destroyed, there is no longer any offer so that how it was destroyed would seem to be unimportant." This proposition might be construed in a broad enough manner to justify a person in applying it to the suggested case, and in holding, as a result, that the offer had been revoked by X's report. It is to be noted also that the author, in support of his suggested rule cites authority which would hold that there had been a revocation in such a case.[9] It is possible that a situation such as that supposed might present itself for decision where either (1) X was incorrect as to his information, and A had not really told him what he reported to B, or (2) where X was correct and made a truthful statement to B. It is believed that under neither of these assumptions could it be said that the offer was destroyed or revoked but that, in spite of all that happened, the offer continued and would have been acceptable by B. It is urged that if Professor Oliphant's statement, quoted above, is intended to suggest a contrary holding, that it is not sound.

Whenever the offeree would be unreasonable in thinking that the offer was still available, and this would be due to conduct of the offerer of which he knew, there would be a revocation. Conversely, whenever the offeree could reasonably assume, in the face of all he knew, or the offerer had done, that there was an offer in existence, there will be no revocation, and the offer will still be open. Applying these rules to the case where X was incorrect in his report as to A's frame of mind, one is led inevitably to the conclusion that the offer was still open. To hold otherwise it would

[8] 18 MICH. L. REV. 208.

[9] 18 MICH. L. REV. 208, note 14.

have to be found, at least, that B could not plausibly believe that A was still willing to make a contract. Suppose B had believed X, and had accordingly abandoned all hope of accepting the offer, but, while in this attitude, had fallen in with A, who told him that his impression with respect to the offer was altogether wrong, and that it had not been revoked; all would agree that under these conditions B could have accepted the *original offer*,[10] because it had in reality been available all along. Moreover, it is submitted, that all ought to agree, if the problem is looked at in this light, that if B had not met A, and had, as a result not accepted the offer, because of his erroneous belief that it was at an end, that B's failure to accept would have been due solely to his folly in believing X's report. In other words, this entirely possible supposition leads one to say that B, at all times, would have been reasonable had he disregarded X's report, and considered A's offer as never having been authoritatively revoked. There was no direct conduct on the part of either A, or an agent of A, which would preclude B's belief to this effect. Casual information such as X brought to B, in the case under consideration will not destroy the offer because it does not destroy the offeree's expectation. As has been seen, some casual information may have this effect, but in cases considered to this point in addition to being casual, the information has also been *direct* and *authoritative.*

Turning to the second case, namely, that where X was accurate in his report, and A was no longer in a contractual frame of mind, there would seem to be no justification for holding that such a change in the facts of the case should lead to a decision that the offer was revoked. It must be remembered that such a holding is only justifiable in instances where the offeree, from what he knows, is precluded from reasonably thinking that the offerer might still be willing to contract. There is nothing in this case to bring about this result. The information, which he has at hand is the same as he had in the first suppositious case, and there it was shown that he

[10] It might be suggested that what would happen here would be that A made a new offer; it is not believed that this is so. All that A does is to say, in effect, as follows: "I have never changed my mind; it is the same as ever, and my same offer, originally made, still stands." This is not making a new offer, but merely assuring the offeree of the continued existence of an old contractual intent.

would be reasonable in taking the offer as still open. X's report in this case will not appear differently to B than it did in the case where X was not telling the truth. This being so, if B was reasonable in the first case in thinking the offer available, he will be just as reasonable in so thinking in the second. So far as B is concerned, the same facts exist in each case; whatever impression, therefore, they make in one, they must also make in the other. So again it must be said that the offer was not revoked.

In the light of the foregoing discussion, it is sound to hold that a casual revocation of an offer can be effected only when by "casual" is meant informal *action* by either the offerer, or his duly qualified agent. Mere "hear-say information"[11] about a change of mind on the part of the offerer can never be authoritative, and if it is not, then the offeree can reasonably recognize this fact, and, accordingly, assume that the offer stands as originally made. This proposition amounts to holding that no indirect communication of a revocation will result in destroying the offer. To bring about this result there must be direct action on the part of the offerer, known to the offeree. This is just, and is merely applying the objective theory of contracts. Does not an offerer, when he makes an offer, in effect lead the offeree to believe that the offer will stand unless *he* informs the latter in some way or other to the contrary? It is true that in exceptional cases the offer will be destroyed without the offerer's formally notifying the offeree of his change of mind, but in all of these cases there is, in spite of this lack of formality, altogether reliable information resulting from the *offerer's own conduct,* which informs the offeree, with no uncertainty, that the offerer will not contract. Such cases in reality, therefore, are not contrary to the suggested rule. Of course, it is realized that the rule suggested involves holding that *Dickinson* and *Dodds*[12] is wrong; it is believed that this is true.

It might be said that if the report of the offerer's change of mind is correct that it ought to destroy the offer; that there is no justification under these conditions for permitting him to insist that there is an acceptable offer. Perhaps in a loose sense, this is true. But even so, it does not follow that this ought to be the result by

[11] The quotation is from Professor Oliphant, 18 MICH. L. REV. 207.
[12] *Supra,* note 7.

reason of the information having worked a revocation; it cannot. It might be, however, that such information ought to put the offeree on inquiry as to what the real state of mind of the offerer may be. What is meant by this suggestion is, that it might be the duty of the offeree, in the face of this information, to go to the offerer and find out whether he really has changed his mind, as reported. But suppose that this duty is imposed on the offeree; suppose that he does go, and inquire; if he does and finds that the report is true, then there will be a revocation as a result, not of the report furnished, but as a result of the direct authoritative statement made to him by the offerer in answer to his question. On the other hand, if the offerer tells the offeree, in answer to the latter's question, that the report is untrue, there will be no revocation at all; all that the statement will accomplish will be to assure the offeree that the original offer is still open. The suggestion that the report of change of mind should put the offeree on inquiry is not one that appeals to the writer. It is believed that a better attitude would be one, which permits the offeree to disregard statements coming from an unauthorized source. But it can be said, if it is thought wise, that the offeree should be on inquiry, and holding him to such a duty does not involve a further holding that the information brings about a revocation before it is verified.

II

If an offerer makes an offer and then dies before its acceptance, there are cases holding that such a death terminates the offer, even though the offerer does not know of this fact.[13] The reason usually given for such a decision, is that a contract cannot be made with a dead man; the offerer's mind, through his death, is gone, hence there is no possible basis for saying that there is a meeting of the minds.[14] Professor Oliphant suggests[15] that it is not essential to have a "concurrence of wills" to have a contract (which is true) and that therefore it is immaterial whether the offerer's mind meets that of the offeree when the offer is accepted. The author says that the offerer, by his offer, "aroused a reasonable expectation in the mind of the

[13] 18 MICH. L. REV. 210, note 18 and cases cited.
[14] 18 MICH. L. REV. 210.
[15] 18 MICH. L. REV. 210.

offeree, upon which, by hypothesis, he has reasonably acted" when he accepted the offer, and accordingly there ought to be a contract notwithstanding the death of the offerer.[16] It is suggested that a decision that there is not a contract under this state of facts, is "a good example of the persistence of the subjective analysis of the law of contracts."[17] The point to the learned writer's argument would seem to be that when an offer is made, the offeree has a right to believe that it will continue for the time specified, and so unless he knows of the death of the offerer, he will be reasonable in assuming him still to be living and the offer continuing. On the other hand, Professor Oliphant states[18] that if the offeree knows that the offerer is dead, that he cannot accept the offer, because under those conditions he would know that there was no basis for mutual assent and agreement. But if the offeree does not know of this fact, it is said that the offer ought to be acceptable.

It is possible to make an offer's duration contingent upon a certain event. If it is contingent, and the event happens, the offer is dead; it lapses, and this is so whether the offeree knows of the happening of the contingency, or not. "Suppose A makes an offer to B saying that it is to remain open for two weeks, but is to end at once if A's factory is destroyed by fire within the two weeks. Suppose that the factory burns within the period limited, and A thereafter accepts not knowing that it has burned. No contract arises, not because the offer has been revoked, but because it has lapsed on the happening of the contingency. The contingency qualified the expectation."[19] This is a just result; B ought to have known in the assumed case, as a reasonable man, that the offer would terminate if the specified condition happened. B also knew that it was not a question of whether he knew of that condition having happened, for by the terms of the offer, he was compelled to take a chance as to that. It is also possible that a condition to an offer may be implied rather than expressed.[20] This will be the case whenever the parties know, even though they do not say so, that it is intended by the offerer that the happening of some event shall des-

[16] 18 MICH. L. REV. 210.
[17] 18 MICH. L. REV. 210.
[18] 18 MICH. L. REV. 209.
[19] 18 MICH. L. REV. 206.
[20] 18 MICH. L. REV. 206.

troy the offer. Now it is believed that both offerer and offeree know that it is intended that the offer's life shall be contingent upon the continued lives of both parties. The offerer does not intend to contract with a dead man—that is certain—nor does the offeree intend to do that.[21] Each of the parties act with the notion in mind that each of them will live, and that each one intends that negotiations shall cease if the other dies. If this is so, does it not follow that if the offerer dies the offer will lapse (this is not a case of revocation) because the implied condition "qualified the expectation"? It is not intended to support the reasoning that is adopted in the cases, holding that the offer is ended by the death of the offerer. The matter should not be treated to a subjective analysis. But the result of the decisions is right, for the offeree ought to have known that the continuation of the offer was subject to the implied condition that the offerer should continue to live.[22]

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[21] Professor Oliphant, at one point in his article, assumes this, for he says (18 MICH. L. REV. 209) that if the offeree knows of the death of the offerer before acceptance, the offer is gone. This must be because the offeree, as a reasonable man, knows that he is to contract with a living man, and not with the estate of a dead one. That is what reasonably passes through his mind, when he hears of the death of the offerer, otherwise he would be justified in insisting that the offer was still open.

[22] Some five years ago, the writer had the privilege of being associated with the late Professor E. O. Schreiber at George Washington University Law School. As a result, he received from Professor Schreiber many useful suggestions, which have influenced him in his discussion of the case of *Dickinson* v. *Dodds*. It is not intended, however, to intimate that Professor Schreiber, were he living, would subscribe to all that is here written in this connection, but merely to make acknowledgment of that which has turned out to be of assistance.