Michigan Law Review

Volume 18 | Issue 3

1920

Duration and Termination of an Offer

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THE DURATION AND TERMINATION OF AN OFFER.

PROFESSOR Williston has recently pointed out[1] the change which the law of the formation of simple contracts underwent during the first century of its development. The change is fundamental. Originally the courts thought of a simple contract as involving an actual concurrence of the minds of the parties. Gradually this conception was supplanted by the notion that the objective and not the subjective state of mind of the parties is controlling. Where the actual state of mind differs from the apparent state of mind, the former must be ignored and, whenever they happen to be identical, it may be ignored without affecting the results ordinarily. The courts in the main have abandoned the subjective analysis and have adopted an objective one. Nevertheless, the cases and text books abound in language, the use of which shows an attempt to state results reached under the new analysis in the terminology of the old. Too frequently, too, the old analysis is employed. In either event, the result in some cases is decisions difficult to defend. There is need for a total abandonment of the old terminology and for a consistent restatement of the law of contracts on the basis of the analysis now generally accepted and in its terminology.

Most of the questions concerning the duration and termination of an offer present no great difficulty and, to most of those which have been considered, the cases have returned answers to which no serious objection can be taken. The reasoning by which the courts have reached these results and, especially, the language in which they have expressed them are confusing and misleading in many cases. In the occasional instances where the results reached seem objectionable, a misleading analysis or use of words has obscured considerations which should have prevailed.

THE MEANING OF REVOCATION.

In connection with offer, the term, *revocation,* is usually employed to express the idea of a reversal of purpose on the part of the offerer communicated 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 early cases has been abandoned. It rested upon the assumption that an offerer's liabilities are determined by his actual state of mind rather than by the state of mind apparent to the offeree. The opinion now generally held

[1] XIV ILLINOIS LAW REVIEW, 525.

is that the operative fact is the communication. The change of mind is an immaterial circumstance although it is usually an attendant one. It is better, therefore, to define *revocation* as the *communication* of a change in the offerer's purpose.

"Lapse of an offer" is quite commonly and very usefully employed to denote all the circumstances under which an offer will end in the absence of a revocation by the offerer and a rejection by the offeree.

These ideas, revocation and lapse, are relatively simple and occasion little difficulty. But there seems to be considerable obscurity as to the meaning of *revocation* in the well known case of *Shuey* v. *United States*.[2] In this case the difficulty concerns the distinction between the revocation and the lapse of an offer.

This case will be considered at some length in at attempt to show that the result reached is as logically sound as it is practically judicious. Before undertaking an analysis of the case, it may be well to refer to the discussion of this decision by some of the text-writers.

In the third American edition of Sir William R. Anson's Principles of the Law of Contracts edited by Professor Arthur L. Corbin, which has just appeared, there is repeated, p. 55, the following statement which is found in earlier revisions:

> "There is American authority for the view that the revocation of an offer made by advertisement need not be communicated to the offeree. As such an offer is made to the whole world, it clearly can be revoked only in the way in which it is made—by advertisement. See *Shuey* v. *United States*, 92 U. S. 73."

So far as this statement is an approval of the result reached by the court on the second ground upon which it put the case of *Shuey* v. *United States*, it is not open to objection. However, a careful analysis of this case will show that the statement is inaccurately phrased as a result of an unstudied use of words and discloses, it is believed a misapprehension of the principle upon which the result in that case must rest. Morever, the statement as made is likely to mislead.

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[2] 92 U. S., 73. In April, 1865, the Secretary of War published in the newspapers an offer of $25,000 for the apprehension of one Surratt, an accomplice of Booth. In November, 1865, the President published a withdrawal of this offer. In April, 1866, the plaintiff's testator was in Italy and there gave information leading to Surratt's arrest, not knowing of the second publication. The Court held that the plaintiff could not recover the reward because his testator had not performed the act asked for and because the offer had been "revoked" before he acted upon it. Only the second ground upon which the case is put will be considered.

The following appears in Professor Clarence D. Ashley's "The Law of Contracts" p. 33, 34:

> "In the case of *Shuey* v. *United States*, the United States Supreme Court reached a conclusion which has been subjected to little criticism. The result of the case on the point of revocation is stated at the end of the opinion. The Court there says: 'True, it is found that. . . .he (i. e., the offeree) was ignorant of the withdrawal; but that was an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the same manner in which it was made.'
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> "In the first place, the manner in which the offer was made was by communication. There was no offer to him until he knew of it. If he ought to know that it could be revoked in the same manner, he ought to know something the Court seems not to know, namely, that it can be revoked in no other manner.
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> "And again, why ought he to know that communication of a revocation is not necessary? If he knows anything about the law, he will be aware that the law as to revocation requires communication, and before this decision he would seem to be justified in the assumption that the Supreme Court would decide according to the rules of law. The Court was possibly influenced by the fact that it might prove difficult to revoke under such circumstances. But what of it? Such may prove to be the case with any offer. The offerer ought to think of this when he makes his offer.
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> "It is usually said that an offer does not bind the offerer, and this is true in the sense that he may withdraw the offer by taking proper and timely steps. But it is not true that an offer places no responsibility upon him.
>
> "Every one is responsible for his actions, and if he makes an offer he must take the consequences. No matter what diligence he may use in striving to recall such offer, it will not avail unless he actually succeeds in doing what the law requires for a revocation. If after such endeavor he fails, the offer which thus continues may be accepted, and a contract arise in spite of the offerer's efforts. Thus if one makes an offer to another, designating one year as the time it shall continue, and such offeree goes to the woods of Africa, it may well happen that the offerer may be unable to communi-

cate a change of mind, and a contract arise in spite of attempts to make known such change of intention."

The same confusion of thought and terms characterizes this quotation. The seriousness of this confusion is shown by its having led Professor Ashley to disapprove the result reached.

Speaking of the same case, Sir Frederick Pollock says:

> "The Supreme Court of the United States has held that a general proposal made by public announcement may be effectually revoked by an announcement of equal publicity, such as an advertisement in the same newspaper, even as against a person who afterwards acts on the proposal not knowing that it has been revoked. For 'he should have known' it is said, 'that it could be revoked in the manner in which it was made.' In other words, the proposal is treated as subject to a tacit condition that it may be revoked by an announcement made by the same means. This may be a convenient rule, and may perhaps be supported as a fair inference of fact from the habits of the newspaper-reading part of mankind; yet it seems a rather strong piece of judicial legislation."[3]

This passage suggests the solution of the problem raised by this case, but the rule does not involve the question as to what amounts to a *revocation* of an offer in any ordinary meaning of the term.

Without attempting a complete definition, an offer may be roughly described as an expression of an intention to act in a certain way with reference to subject-matter of some social importance, such as induces in the mind of another a reasonable expectation[4] that the proposer will conduct himself as stated should the other person act in reliance thereon, and such as invites that action.[5]

An offer having been made will continue until it is ended by a lapse or a revocation.[6] The offerer may, by informing the offeree of a change of mind, terminate the offer by thus destroying the expectation which his offer has aroused and for which he is respon-

[3] WALD'S POLLOCK ON CONTRACTS, (Third Ed.) 23.

[4] The sentence with which Sir Frederick Pollock opens his treatise on the law of contracts is noteworthy. "The law of contract may be described as the endeavor of the State, a more or less imperfect one by the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness."

[5] An offer is here described in terms of the operative facts rather than their legal consequences. Whether the operative facts are what the offerer said and did as opposed to the state of mind of the offeree is not considered at this time, since the difference, if any, does not affect the questions under discussion.

[6] An offer is terminated also by a rejection. This is considered p. 209.

sible. There being no revocation, an offer will continue so long as the reasonable expectation which has been aroused in the mind of the offeree may reasonably continue; i. e., so long as the offerer has led the offeree reasonably to believe that he will continue with a like intention and determination. When that period of time ends, the offer lapses. Obviously, it is not terminated by revocation.

The duration of this expectation, in all cases, is purely a question of fact. If the offer is accompanied by a statement that it is to remain open for a specified time, the answer to this question of fact is clear.[7] The offer remains open for the time specified because that, as a matter of fact, is the scope of the expectation which has been aroused. If the offerer says nothing as to how long the offer is to remain open, its duration is still a question of fact[8] and it is the same question of fact. How long did the offerer lead the offeree to believe that he intended the offer to remain open? Since the offerer has not said, we conclude as a fact that he objectively intended a reasonable time, not because we find him actually to be a reasonable man or, in the absence of evidence to the contrary, presume him to be reasonable, but because we consider the effect of his words and conduct upon the offeree. They being normal, usual or reasonable, aroused in the mind of the offeree an expectation of reasonable duration. The words and conduct being normal, as a matter of ordinary human experience, the offeree could not reasonably conclude that the offerer intended an unreasonable time.[9]

It has been given as a reason why an offer in terms unlimited is limited to a reasonable time that otherwise great hardship would result to the offerer in case he became unable to communicate a revocation to the offeree. This reason does not account for an offer remaining open until the lapse of a reasonable time. Moreover, it is not believed that this is a circumstance because of which the law imposes upon the parties the reasonable-time rule regardless of the facts in a particular case. It is merely one of the surrounding circumstances which, together with what the offerer said and did, we

[7] The effect of such a statement is not always negative. POLLOCK, *op. cit.*, 28. It is affirmative if the period specified is longer than would be reasonable under the circumstances of the offer in question.

[8] The courts sometimes call it a question of law when all that is meant is that it is a question for the judge and not for the jury. In the ordinary case, it is a question for the jury. Although the other facts in the case are not in dispute, it should be left to the jury to say whether the attempted acceptance was within a reasonable time unless the time is so long or short as to make a question about which men could not reasonably differ.

[9] If the offerer is subjectively unreasonable but objectively reasonable, his actual state of mind is of no legal consequence so far as the offeree's power to accept and his rights after acceptance are concerned.

use in determining as a matter of fact the scope of the expectation aroused by the offerer.

Regardless of the language used by the Court, the question involved in *Shuey* v. *United States* is as to the scope of the offer when made. It is not a question of revocation at all if that term is used with accuracy. If A makes an offer to B stating that it is to remain open two weeks, B may not, by an acceptance after two weeks, make a contract, because the offer, i. e., the reasonable expectation, has ceased to exist. The expectation aroused by the offer was at the outset qualified by a time contingency and that contingency has happened. So of an attempted acceptance after a reasonable time if no time is specified. In neither case has there been a revocation. The offers in these cases have lapsed. 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 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 upon the happening of this contingency. The contingency qualified the expectation. When one reads an offer of a reward in a newspaper, the expectation aroused is similarly qualified. It is a matter of common experience that, after offers of this kind have been made in this way, the offerers publish their change of mind in the same manner. "As a fair inference of fact from the habits of the newspaper-reading part of mankind", it can be said that unless the expectation aroused by an offer of a reward so communicated is thus limited and qualified, it is not a reasonable expectation.[10] The second publication does not need to be relied upon as a revocation. The expectation is contingent and this publication is the contingency. Had the plaintiff in *Shuey* v. *United States* apprehended Surratt at the time he gave the information leading to his apprehension, there would have been no contract since at that time there was no offer because it had lapsed, not because it had been revoked.[11]

The word, *revocation,* is useful when limited to its true meaning. It should be reserved to express the idea of a communication of a change of mind on the part of the offerer. It is unnecessary to qualify the general rule that an uncommunicated change of mind is inoperative in order to sustain the result in *Shuey* v. *United States.* It is moreover, unfortunate to handle the case in terms of revocation be-

[10] For the same reason, the contingency has not happened unless the second publication is substantially as widespread as was the publication of the reward.

[11] The rule in this case seems to be a no stronger piece of judicial legislation than is any logical application of a familiar principle.

cause the apparent logical difficulties that result may lead to a condemnation of the rule. Certainly the rule is desirable. Rewards are useful devices and their utility depends largely upon an ability to make them effective as offers in a widespread fashion. Their use would be restricted by a rule requiring actual communication of a change of mind to all who chanced to hear of them. It is no answer to say, as Professor Ashley does, that this is what is required in the case of an ordinary offer to an individual. In such a case, the offerer ordinarily needs and wants to induce but a single person to act.

CASUAL COMMUNICATION.

How recent the development of the law of simple contract is, is shown by the number of elementary questions which have not come up for decision or have been passed upon in too few cases to make much generalizing possible. One of such questions is the legal consequences of casual as opposed to direct communication in the formation of contracts. This question is considered in *Dickerson* v. *Dodds*.[12] Even though this had been an action at law, the question as to whether or not the hear-say information about the offerer's later state of mind which the offeree received would terminate the offer would not be raised until it were first determined whether or not the fact that the offerer was offering to sell the same property to another fairly indicated to the mind of the offeree a change in the offerer's determination. It may have fairly led the offeree to believe no more than that the offerer intended to sell to another if he could do so upon better terms before the plaintiff accepted. This would not necessarily mean that he was no longer minded to sell it to the offeree. But such information, at least, qualified the offeree's expectation by introducing the contingency of a sale to an-

[12] 2 Ch. Div., 463. On Wednesday, the defendant, Dodds, made an offer to the plaintiff for the sale of a dwelling house, which offer was to remain open until the following Friday, 9 A. M. In the afternoon of Thursday, the plaintiff was informed by one Berry that Dodds has been offering or agreeing to sell the property to the defendant, Allan. Thereupon the plaintiff left a notice of acceptance with a Mrs. Burgess, at whose house Dodds was staying. It never reached him, she forgetting to give it to him. At seven o'clock on Friday morning, the plaintiff's agent handed Dodds a duplicate of the acceptance. Dodds then told the agent that he had sold the property. A contract for the sale of the property to the defendant, Allan, had been signed on Thursday. The plaintiff sought specific performance and a decree by the Vice-Chancellor granting it was reversed on the ground that there was no contract between the plaintiff and Dodds.

It is probably true that, under the facts in this case, the plaintiff was not entitled to specific performance. In his bill, however, the plaintiff asked damages. Prior to the Judicature Act, the court was not at liberty to award them when they were auxiliary to the principal relief requested and the request for that relief was not well founded. It would seem that the court had power under the Judicature Act to grant damages although the plaintiff was not entitled to specific performance. FRY, SPECIFIC PERFORMANCE (5th Ed.), Secs. 1305-6. This question was not considered in the case.

other although unknown to the offeree if the mode of its communication was sufficient.

If in a given case what the offerer says or does fairly 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.[13] If that expectation has been destroyed, there is no longer any offer so that how it was destroyed would seem to be unimportant.[14]

The same principles should, it is believed, be applied to the rejection of an offer. An offerer should continue responsible for the expectation which he has aroused until he ends that expectation or until he is fairly informed that the offeree is not contemplating acting in reliance upon the offer. If the offerer in fact has learned that the offeree is no longer considering the offer, it would seem unimportant whether he learned it directly from the offeree or through third persons.

Should the same rule apply to the casual communication of willingness to contract? It seems not. The effect of a revocation and a rejection is to prevent the formation of a contract. The effect of an offer and of an acceptance, however, may be the formation of a contract. This difference is broad enough to justify, and serious enough to indicate, definitions both of an offer and of an acceptance that would exclude casual communication. What authority there is on this point indicates that the courts will make this distinction.[15]

The Effect of a Counter Offer.

It is commonly said that a counter-offer terminates a prior offer. As a rule of thumb this is useful, but it is important to observe and to keep in mind that it is merely a rule of thumb. A counter-offer may or may not terminate a prior offer depending upon the facts in the particular case. It usually does and does so for the same reason that an express rejection by the offeree usually ends an offer. One by making an offer creates a situation having possible consequences for which he is responsible. He creates in the mind of the

[13] But an offer does continue as long as does the expectation. This seems to be the justification of the rule that a revocation is operative not when sent, but when received.

[14] *Cortwright* v. *Hoogstoll*, 105 L. T., 628; *Coleman* v. *Applegarth*, 68 Md. 21; *Frank* v. *Stratford*, 13 Wyo. 37.

[15] *Benton* v. *Springfield Y. M. C. A.*, 170 Mass. 534; *Peek* v. *Detroit Novelty Works*, 29 Mich. 313. See *Sears* v. *King Co. Elev. Ry. Co.*, 152 Mass. 151.

offeree an expectation as to his future conduct and invites action[16] in reliance thereon. If the offeree expressly rejects the offer, he must know that the possibility of his acting in reliance upon it will cease to be a part of the offerer's calculations and the offerer is properly held at liberty to make other arrangements.[17] So whether a counter-offer ends a prior offer depends upon whether, under the circumstances, the counter-offer fairly justifies the offerer in concluding that the offeree is no longer considering acting in reliance upon the prior offer. In the ordinary case, a counter-offer does fairly signify a brushing aside of the prior offer as the basis of a business arrangement, but this may not be true in all cases. Suppose, in reply to an offer by A, B writes, "I shall want to consider your offer for more of the time which you have allowed me for that purpose because I am so situated now that I cannot return an immediate answer. However, the situation is such that if you want to settle the matter at once, I will close with you now at 5% less than the price you name." It seems clear that A could conclude a contract by accepting the lower price, but this reply should not, under ordinary circumstances, be held to terminate the original offer. Whether a counter-offer terminates a prior offer is, in all cases, a question of fact to which this rule of thumb returns the correct answer in most, but not in all of them.

DOES THE DEATH OF AN OFFERER TERMINATE AN OFFER?

It is commonly stated by text-writers that the death of the offerer terminates an offer. In none of the text-books does the question seem to have been examined critically.

It seems clear that, where the offeree learns of the death of the offerer before he has acted in reliance upon the expectation aroused by the offer, he cannot bind the offerer's estate by a subsequent acceptance.

A wholly different case is that in which the offeree, not knowing of the death of the offerer, performs the act constituting an acceptance whether that act is the giving of a counter-assurance or

[16] This is true whether the conduct invited is a counter-assurance of what the offeree's conduct will be or some other action.

[17] Does a rejection in the ordinary sense of that term always terminate an offer? Suppose the offerer says when making the offer, "I expect you to reject this offer upon first consideration, but I want you to consider it further, because I think you will accept when you have thought about it a while." The offeree immediately sends a rejection which the offerer ignores. On further thought, the offeree sends an acceptance. It is believed the courts would hold the offerer bound. He has been taken at his word. His objective will is decisive. Possibly it may be useful to confine the term, rejection, to a meaning more limited than its ordinary one.

some other act. There are cases holding that even in this case death terminates the offer.[18]

It would be difficult to find a better example of the unfortunate results that follow applying logical processes only to the solution of practical problems. These cases are also a good example of the persistence of the subjective analysis of the law of contracts. The courts say that the reason the offer is terminated by the death of the offerer is obvious. A contract cannot be made with a dead man. If an actual concurrence of wills is necessary for the formation of a contract, this is true, since in our law the *persona* of the deceased is not continued. But no concurrence of wills is necessary.[19] The offerer by his offer aroused a reasonable expectation in the mind of the offeree upon which, by hypothesis, he has reasonably acted. As between the gratuitous takers of the offerer's property and the offeree, it is perfectly clear which should suffer the consequences of the casualty of the offerer's death. It is no answer to say that the offeree can, in a proper case, recover on principles of *quasi* contracts because what is now being examined is the merit of this rule in the law of contracts. Moreover, recovery on a *quasi* contract would not always cover all the impoverishment which the offeree may have unjustly suffered, much less his reasonably anticipated profits. The question is more acute concerning offers for unilateral than bi-lateral contracts, but there seems to be no sufficient reason why the same rule should not apply to both. There are cases holding that the unknown death of the offerer does not terminate the offer.[20] An examination of authorities will probably show that this

[18] *Aitkens* v. *Lang*, 106 Ky. 652; *Jordan* v. *Dobbins*, 122 Mass. 168. *Wallace* v. *Townsend*, 43 O. St. 537, is probably distinguishable on the ground that the offeree knew of the death of the offerer when it accepted. Strange to say, *Offord* v. *Davies*, 12 C. B., N. S., 748 has been cited as authority for this view. *Michigan State Bank* v. *Estate of Leavenworth*, 28 Vt. 209, can rest on other grounds.

Offers for contracts of a personal nature can hardly be said to survive regardless of whether there is or is not knowledge of the death since a resulting contract would be discharged by the death.

[19] It is believed that one adopting a subjective analysis would be troubled to find grounds for holding a contract to have been formed by an acceptance subsequent to death when the offerer had expressly stated that his death was not to terminate the offer.

[20] *Bradbury* v. *Morgan*, 31 Law J. Exch. 462; *Fennell* v. *McGuire*, 21 U. C. C. P., 134. See also *Dodd* v. *Whelan* (1897), 1 I. R. 575; *Coulthart* v. *Clemenson*, 5 Q. B. D. 42; *Harris* v. *Fawcett*, L. R. 8 Chan. App. 866; *Garrett* v. *Trabue*, 82 Ala. 227; *Davis* v. *Davis*, 93 Ala. 173.

Mr. Williston points out (XIV ILL. LAW REVIEW, 91) the bearing upon this question of the holdings in cases of insanity.

question is still fairly open for disposition in terms of a sound analysis and upon common sense considerations.[21]

The same considerations apply to the death of the principal in the law of agency. In fact, the problems in the two situations can be stated in identical logical terms. In both cases there is a power not coupled with an interest.[22] A great majority of the agency cases hold that the lack of knowledge of the death of the principal is immaterial in determining whether the power of the agent has been terminated.[23] The explanations of this result given in the cases are based upon a wholly abstract analysis and the result itself is an unfortunate consequence of excessive ratiocination. The rule has been much criticised and a few courts have held otherwise, following the rule of the civil law.

If it be useful to generalize further, it can be said in resumé, that most if not all the problems concerning the duration and termination of an offer can be reduced to the basic question of fact, "What was the objective will of the offerer?" the obverse of which is, "What, as a matter of fact, is the scope of the expectation reasonably attributable to the offeree?"[24]

In considering the duration and termination of an offer the question may be put in either of these two ways without affecting the result in most cases. There may be cases, however, where this is not true. To say that the two are interchangeable in all cases involves the assertion that the apparent and not the real state of mind of a person is controlling not only where that person is denying contractual duties and liabilities but also where he is claiming contractual rights and powers. Whether or not the test is objective

[21] As to the unknown death of the offeree, the question does not arise or is not acute concerning offers for unilateral contracts. Suppose an offer for a bi-lateral contract provides that the contract is not to arise at the posting, but only upon the receipt of the letter or assent. The offeree posts his acceptance and dies before it is received. His estate should be bound. There seem to be no cases in point. *Northwestern Mutual Life Insurance Co.* v. *Joseph*, 31, Ky. Rp. 714 and *Mactier* v. *Frith*, 6 Wend. 103 do not involve this question.

[22] Arthur L. Corbin, 26 YALE LAW JOURNAL, 169, 181 *et seq.*

[23] MECHEM AGENCY, (2nd Ed.), Sections 664-667.

[24] A rule that the unknown death of the offerer terminates an offer would not be consistent with this test. The average layman would be surprised to be told that he had no contract if he advanced credit to a third person in reliance upon an offer for a unilateral contract of guaranty, because the offerer at a distance had died but a moment before he advanced the credit. The law exists for laymen and should, so far as possible, square itself to their understanding and not to the understanding of those prepossessed by a theory of contracts. The measure of the practical objections to the rule in question is the extent to which it disappoints men's reasonable expectations.

in both cases is a large and a difficult question extending beyond the purpose of the present discussion.[25]

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[25] See p. 204, n. 5.