MUST THE REJECTION OF AN OFFER BE COMMUNICATED TO THE OFFEROR?

The term communication is here used in its exact sense, that is to say, information brought home to the intelligence of the party for whom it is intended.

In examining the various requirements for the formation of a contract we find that there is a necessity for communication between the parties as to some steps which must be taken. It goes without saying that an offer must be brought to the knowledge of the offeree because by the term offer we mean a communication to the offeree.

It is also, now, recognized by the best authorities that the revocation of an offer must be communicated to the offeree, and that without such notification there is no revocation.[1]

Acceptance, on the other hand, need not be brought to the knowledge of the offeror, whether such acceptance be given in a bilateral or unilateral contract.[2]

There remains, however, a mooted question as to whether there can be a rejection of an offer without communication to the offeror. In the development of our law it has become established that an offeree can cause an offer to terminate by his own act. That is to say he can reject the offer. This he may do in one of three ways. He may either make a new offer on his part or he may make what purports to be an acceptance but is not effective as such because there is a variation of a material term of the offer, or he may distinctly express himself in terms of rejection. By one of these methods he can terminate an offer, although the offeror may have designated a time during which the offer shall remain open, and such time has not expired. At first sight this power on the part of the offeree to terminate and extinguish the offer in spite of the offeror, seems strange, but a moment's reflection shows us that

[1] Brauer vs. Shaw, 168 Mass. 198.

[2] See 2 Columbia Law Review 1 for an expression of the present writer's views on this point.

these well settled principles of our law are based upon reason, and are sound. The object in making the offer in the first instance is that the offeree may know the wish and intent of the offeror, while the object in leaving the offer open is that the offeree may have an opportunity to reach a conclusion, and when he has done so the reason for continuing the offer ceases, because it has performed its function.

But has it accomplished this object until the offeror knows of the offeree's disagreement, knows the offeree's state of mind?

Why is it that the authorities have agreed that revocation must be communicated to the offeree? An examination of the reasons for this conclusion may throw light upon the question as to why the same requirement should exist as to a rejection. In explaining this necessity an able modern writer says:[1] "One to whom an offer is made has a right to assume that it remains open according to its terms until he has actual notice to the contrary. The effect of the communication must be destroyed by a counter communication."

But this argument applies precisely as well to the situation of an offeror. He has indicated to the offeree his intent and desire that his offer should remain open and is entitled to assume that it does thus remain open unless he is informed to the contrary. There appears to be just as cogent reasons for requiring communication in the case of rejection as in that of revocation, and the term rejection seems to mean informing the offeror that his offer is not accepted.

Where the rejection is brought about by a new offer such new offer must, of course, be communicated, and we cannot say that while it is not as yet operative as a new offer, it is nevertheless a valid rejection, because it has the effect of a rejection only on the ground that making a new offer necessarily shows the offeror that the offeree has different ideas. Thus Lord Langdale says in Hyde v. Wrench:[2] " . . . instead of that the plaintiff made a new offer of his own . . . and he thereby rejected the offer previously made by the defendant." That is, he rejected defendant's offer by an offer of his own. But there was no offer of his own until it was communicated to the defendant.

When the rejection is brought about in direct terms, it would also seem necessarily to indicate that communication must be made. When the offeree says, "I reject your offer," the reason why the offer ceases is that it has performed its function, in that the offeree

[1] Holmes Common Law, p. 306.

[2] 3 Beav. 334.

has told the offeror that no agreement can be made on that basis. The term rejection, then, means informing the offeror that his offer is not accepted.

If the question were purely academic, it might not be of much consequence, which conclusion is reached. In its application, however, vexing questions may arise, and such problems should be solved upon principle. The chances of hardship or inconvenience are as great upon one theory as upon the other.

It seems axiomatic to remark that a contract arises at some one given point, or it does not arise at all. When the parties have gone through certain formal steps the law will annex the obligation of contract or will refuse so to do, and at that final point the wish of one or both of the parties is entirely irrelevant. There is no such thing as waiving any requirement in the formation of contract, and if a bilateral contract is contemplated, both parties must be bound at the point when the contract is to arise or neither can be. One party cannot at his option waive any requirement or change the fixed result. We cannot say a contract will arise at such a fixed period at the option of one of the parties.

Resuming, then, the question as to rejection, the following case may be supposed.

A man in New Haven receives by mail an offer for the delivery of certain articles at his warehouse on July 1st. He replies, "I accept your offer, delivery here on June 1st." The change of date of delivery was made inadvertantly. Upon this reply being received, it constitutes a rejection, and this is so even though the original offeror had no objection to the change. No contract can arise, unless the original offeror, now offeree, accepts this new offer. Suppose, however, that the original offeror knows the law, understands this to be a rejection, and acts upon this knowledge assuming there is no contract. In the meantime, however, the original offeree has discovered his mistake within an hour, has rewritten a proper acceptance, and mailed the same at once, such mailing preceding the receipt of the first letter. Then suppose the second letter is never received. There is a contract in such a case, because the rejection will not take effect until communicated, and hence the offer is still in force, and while it thus remains in force an acceptance is properly mailed causing the contract to arise *eo instante,* which thus prevents the first letter from having any effect whatever. Change the facts slightly and suppose that the New Haven man says in his first letter, "I reject your offer." Before this is received he mails an

acceptance which is lost on the way. In each case the offeror is misled by the first letter, and relying thereon changes his position. Does this prevent a contract from arising? It certainly does not unless we can stretch the much abused principle of estoppel in pais to cover the case. It is true that the offeree has made a statement to the offeror which the latter has reasonably acted upon to his loss. Shall we then conclude that the courts will not allow the offeree to say that he has accepted the offer? The difficulty is that we are dealing with the preliminary requirements of contract, and must therefore look beyond the acts of the parties to see whether the situation is such that the courts will annex the obligation. It is this element which causes the difficulty. That this is a real trouble will appear by considering another question.

In Ricketts[1] v. Scothorn, the court, speaking through Sullivan J., uses this language: "Under the circumstances of this case is there an equitable estoppel which ought to preclude the defendant from alleging that the note in controversy is lacking in one of the essential elements of a valid contract? We think there is. . . . Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration."

It is true that the court here is treating the case of a promissory note and at first sight, one might suppose that this fact had an unconscious influence upon the result reached. It is evident, however, the court believes that such a note requires a common law consideration. The case stands squarely for the view that one may be estopped from showing there is no consideration to support a promise. This same view is often suggested in cases which may be illustrated as follows: A makes an offer requesting an act as consideration for his proposed promise. This being an offer merely can be withdrawn, of course, until it becomes a promise and it does not become a promise until the consideration is furnished, that is, until the act is completed. Suppose that the offeree has performed nine-tenths of the requested act, and that the offeror then revokes his offer. Clearly no promise arises in such a case, and the offeree is without contract remedy for his loss occasioned by his part performance. Very true, it is suggested, no contract arises in reality, but the offeror is estopped from denying it. Certainly the case of

[1] 57 Neb. 51.

Ricketts v. Scothorn[1] is an authority for this view. Is it not evident that such a doctrine practically wipes out the requirement of consideration and thus eliminates one of the rules of law supposed to be most firmly and clearly established?

If, then, one believes that our law does not recognize a promise unless there is a consideration to support it, the conclusion must be reached that the above case is erroneous and that one cannot be estopped from denying a consideration. But does it necessarily follow that the same argument applies to all the elements of a contract? It is well settled that the courts take a position which amounts to enforcing an estoppel in the case of a supposed offer or acceptance. A man may not intend to make an offer, but if his language is such as to reasonably indicate that he is making an offer to another and that other accepts, there is a contract, and the apparent offeror will, of course, not be allowed to say that he made no offer. The courts say that we cannot read his secret thoughts, and must judge his intent from the outward manifestation. Upon whatever ground we place it, here is a situation in which there is no real agreement between the parties, but one of them is not allowed to show this, and hence he is bound precisely as though he had assented. This is not open to doubt.

It is clear, then, that in some cases a contract may be found although in reality the ordinary elements are lacking.

Where shall we draw the line? When the substantive law of contract will be changed by invoking the principle of estoppel in pais it would seem that the courts should refuse to apply this doctrine. Thus to follow the case of Ricketts v. Scothorn[2] would, in most cases, abrogate the doctrine of consideration, in that it is almost always possible for the one claiming a contract to show that he relied upon the words of the other to his detriment. But it has been supposed that no rule is better settled in our law than the one which requires a consideration for a promise. Ricketts v. Scothorn would, therefore, seem to be a piece of judicial legislation abrogating the doctrine of consideration as to a large class of promises. Then again, in such a case, it would be left to the option of the supposed promisee to say whether a contract arises or not, whereas it is for the law to annex the consequence of contract, not the parties. From every point of view it seems indefensible to apply the doctrine of estoppel in such a way as to sustain a promise without a common law consideration. But this is not the situation as regards either an offer or rejection.

[1] Supra.
[2] Supra.

The law requires so called "mutual assent," but that has never necessarily been actual agreement and to hold a party as offeror in accordance with his apparent, although not in truth his real, intention does not introduce any new element into contract or take away any essential requirement. And further it does not leave one of the parties free to decide for himself whether the action taken shall amount to a contract or not. If the supposed offeree accepts he is as much bound as the other. So also in the case of a mailed rejection followed by acceptance given above, if we say that the rejection actually communicated has binding effect upon the parties, in spite of the subsequently mailed acceptance, there is no change in the requisite elements of contract, nor is it left to either party to choose whether he shall hold that a contract did or did not arise. The offeror receives the rejection and acts upon it to his loss. That prevents the second letter, which otherwise would, cause the contract to arise on mailing, from having any effect. There is one difficulty, however, in this argument which is that at the moment the second letter of acceptance is mailed, it should be certain that a contract has or has not arisen, but the above suggestion would leave the question in abeyance until determined by some subsequent event. The first letter of rejection does not cause an estoppel unless received and acted upon so as to cause an injury to the offeror if withdrawn. That is to say, if the letter of rejection results in an estoppel then no contract has arisen, but if not, then the contract will be found as of the time when the second letter was mailed. This is a serious difficulty in the argument, because certainly we ought to be able to say absolutely that the contract either does or does not arise at the time of mailing the second letter, and this question should not be held in abeyance, nor subject to the will of the offeror.

If this suggestion is fatal to the theory of estoppel in the case supposed, then the necessary result seems to be that as a rejection must be communicated, it has no effect in the above illustration, because before it is communicated a proper acceptance has been mailed, the contract has arisen, and when the proposed rejection is communicated there is no offer left to reject. On the whole this seems to be the sounder view.

In the formation of contract, then, communication between the parties would seem to be requisite in the case of offer, revocation and rejection of offer.

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