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ATTEMPTED ACCEPTANCE OF A DECEASED OFFEROR'S OFFER*

Occasionally an offeree will attempt to accept an offer within its life as originally stated, but the act which he regards as an acceptance, and which usually would have been effective as such, is done after the death of his offeror. On this state of facts courts in the past have generally held that no contract could result from the offeree's efforts.¹ The rule was to the effect that the offeror's death terminated his offer and his offeree's legal power to bind his estate to the bargain originally proffered.

The reasons assigned to support this proposition are that every contract must result from a meeting of the parties' minds; an offeror's death renders him incapable to assent to anything; therefore, an attempted acceptance after his death can not effect a binding agreement within the accepted definition of that term.² This conclusion is inevitable if actual mutual assent is requisite to the formation of a simple contract. But, as will be hereinafter shown, modern authority does not insist that an offeror and offeree must really be in agreement to bind themselves contractually. Accordingly, if an offeror's death is to be regarded as ending his offer, such a rule will have to be based upon some other premise or principle.

Suppose that A has two horses, Tom and Dick; that he actually offers to sell Tom to B, *intending*, however, to offer Dick; if B, in ignorance of A's real state of mind, accepts the offer, A will be bound to sell Tom pursuant to his stated offer. A will not be permitted to say in any court, after B has agreed to the proposed bargain, that he really intended to sell Dick and consequently, because there was no actual mutual assent, no contract existed. Courts in determining the existence or non-existence of a contract will not concern themselves with the actual or subjective will of an offeror but merely with what he reasonably appears to offer. A proposal to contract, if duly assented to, is binding according to its apparent meaning and no other.³ An offeree has the legal power to bind his offeror to the latter's offer interpreted in a reasonable manner, and an offeror can not defeat a proper exercise of that power by

*The writer has expressed some of the views herein contained in articles that appeared in 19 Mich. Law Rev. 152 (1921) and 23 *id.* 475 (1925). They are reprinted here with the kind permission of the Editor of that magazine. Since these articles appeared, the American Law Institute has dealt with the topic under discussion and in some material respects the writer has changed his former opinion. For these reasons a general review of the entire subject does not seem out of place.

1. *Jordon v. Dobbins* (1877) 122 Mass. 168; *Williston, Contracts*, sec. 62 and cases cited. See, also, *Shaw v. King* (1923) 218 P. (Cal.) 50 (statute).

2. "There is believed to be one positive exception in our law to the rule that the revocation of a proposal takes effect only when it is communicated to the other party. This exception is in the case of the proposer dying before the proposal is accepted. This event is in itself a revocation [termination?] as it makes the proposed agreement impossible by removing one of the persons whose consent would make it." *Pollock, Principles of Contract* (9th Ed.) 42. "The continuance of an offer is in the nature of its constant repetition, which necessarily requires some one capable of making a repetition. Obviously, this can no more be done by a dead man than a contract can in the first instance, be made by a dead man." *Pratt v. Trustees* (1879) 83 Ill. 475, *et seq.* See, also, *Aitken v. Long's Admr.* (1899) 106 Ky. 652, 51 S. W. 154.

3. *Haubelt Bros. v. Rea & Page Mill Co.* (1898) 77 Mo. App. 672; *Williston, op. cit. supra* n. 1, sec. 94.

"The meeting of the minds which is essential to the formation of a contract is not determined by the secret intentions of the parties, but by their expressed intention, the latter of which may be wholly at variance with the former." *Haubelt Bros. v. Rea & Page Mill Co., supra*, 77 Mo. App. l. c. 681. See, also, *Hotchkiss v. National City Bank* (1911) 200 Fed. 287; *Restatement No. 1, Am. L. Inst.* p. 63, sec. 69.

proving that he intended to make a bargain of a different nature from that which he appeared to offer. It is because of this proposition that the statement was ventured that the premise upon which courts have concluded that an offeror's death nullifies his offer is untenable.

It would seem then that the problem of determining when an offer is open for acceptance should be solved, not by trying to ascertain what the offeror's actual frame of mind was when his offeree gave an acceptance, but rather by asking the question: was the offeree at that time privileged to assume that his offeror wished to contract and intended to be bound in the event of a proper acceptance being given? If an offeree could make such an assumption and gave an acceptance on that basis, there should be a contract, but not otherwise. Most modern authority seems to apply this test and modern authors have taken the position that all transactions involving this question should be decided on this basis.

The best illustration of the rule just suggested is found in the case of an accepted offer, where the offeror, prior to such acceptance, had changed his mind with reference to his proposed bargain, but his offeree was ignorant of this fact. Under these conditions a contract is held to result from the offeree's acceptance and rightly so.⁴ The offeror, by making his offer, led his offeree reasonably to assume that the offer was open at the time that the acceptance was given; hence when the offer was acted upon in this way, there was a contract. The offeror's change of mind was a secret intention; it constituted merely his subjective will. His *objective* will, differing from the former, controlled and bound him.

What effect an offeror's death should have upon his offeree's power to bind his estate should be determined by applying the test last mentioned; it should be ascertained what the offeree would be privileged to believe his offeror would desire under such circumstances. Certainly there is not and should not be any legal impediment to an offeror's binding his estate in the event of an acceptance being given by his offeree after his death. The question, therefore, should be: could an offeror in any given case be reasonably taken as having intended to bring about this result? If his offer could have been so interpreted, then that constituted his objective will, and his offeree by giving due acceptance should be regarded as having gained a contractual right against his estate.

At the outset, it can be said that there is one class of cases where the offer must be deemed terminated at the offeror's death. This will be so whenever it calls for the making of an agreement, performance of which on the offeror's side will be personal in its nature.⁵ Under such circumstances the offer suggests a bargain which will call for personal action on his part. If he is deceased, obviously such action will be impossible and the offer, of necessity, will be at an end. Its termination in this event must have been intended and expected by both the offeror and his offeree. It can accurately be said that the life of the offer is conditioned upon the offeror continuing to live.

Aside from the type of offer last mentioned, it will be found that the question under discussion will arise in offers where the offeror promises to do a non-personal act in return for either his offeree's promise or act. It will also be found that in a case involving either type of offer, the offeree will have attempted to accept either knowing of his offeror's death, or in ignorance of that fact, believing the latter to be still

4. *Lapsley v. Howard* (1894) 119 Mo. 489; *Williston, Contracts*, sec. 56. *Cf. Groomer v. McCully* (1902) 93 Mo. App. 544.

5. See *Oliphant, The Duration and Termination of an Offer*, 18 Mich. L. Rev. 201, 210 n. 18 (1920). "Offers for contracts of a personal nature can hardly be said to survive.... since a resulting contract would be discharged by death." *Ibid.*

living and in his original contractual frame of mind. How should these various situations be dealt with?

If an offer invites the formation of a bilateral contract (*i.e.*, if it asks for a promise as an acceptance, and the offeree gives the requested promise, knowing at that time of his offeror's prior death, it seems quite proper and just to hold that no contract will result. It is believed that it would be unreasonable for an offeree to assume under these conditions that his offeror desired or intended to have him possess the power to bind the latter's estate contractually. It would seem that the normal business man's purpose in making a proposal to contract would be to perfect an agreement that he personally might perform, or at least supervise its performance. It hardly seems likely that an offeror would intend to empower his offeree to force a bargain upon his estate after his death. The opinion is ventured that men make offers expecting to acquire contractual rights while living and not to charge their estates after their deaths. Of course, if the foregoing are the natural and reasonable intentions to attribute to an offeror, his offeree, knowing of his offeror's death, would not be privileged to believe that he still possessed the power to gain a contractual right. Such a belief would be unreasonable and no rights could be predicated thereon. In such a situation an offeree must be taken as knowing that his offeror intended the offer's life to be conditioned upon the latter's own life also continuing.

In the case where an offeree gives his promise at a time when the offeror is dead, ignorant of this occurrence, the soundness of a rule to the effect that no contract results is not so evident. Suppose that the parties live at a distance and the offeree dispatches his acceptance *via* an invited means of communication, assuming that his offeror is still living and willing to be bound by his offer. If the offeree subsequently learns of his offeror's death before he changes his position by taking steps to perform his promise, which he believes to be part of a binding contract, again it would seem proper to hold that no contract existed. The offeree should have known, had he considered the matter at the time that he dispatched his acceptance, that his offeror only desired to make a contract if living and that his offer was contingent in this respect. Moreover, under such circumstances, the offeree has suffered no material damage and all that he will lose will be the contemplated advantages of a supposedly existing contract. Why should he not suffer this disappointment, especially when it is recalled that he could not reasonably have anticipated having the power to bind his deceased offeror's estate after hearing of the latter's death? When the offeree learned of this fact, it would seem that thoughts somewhat as follows would have passed through his mind: "My offeror was dead when I attempted to accept; I was to have the power to bind a living man; my power, therefore, ceased at his death; my acceptance was futile and inasmuch as I have suffered no monetary damage as a result of that which I have done, I should have no claim against his estate whatever."

Suppose, however, that the facts in the last assumed case are changed and the offeree, after dispatching his promise, which he assumed to be a due acceptance, changed his position materially before he heard of his offeror's death. For example, let it be assumed that the offer called for a promise to sell and that the offeree believing that his promise bound him, purchased the articles that the offeror had promised to buy and that he could not dispose of the same elsewhere save at a loss; should

6. "A revocable offer is terminated by the offeror's death....." Sec. 48 *id.* By sections 45, 46 and 47 of the Restatement it is provided that all offers are revocable except (1) offers for unilateral contracts where the offeree has given or tendered part of the requested performance, and (2) offers which the offeror is contractually bound to keep open, commonly called options.

the offeror's estate be under any liability to the offeree under such a state of facts? Probably most cases would answer the question in the negative, and apparently the American Law Institute's Restatement of Contracts has adopted this proposition.⁶ Is it a wise or desirable rule of law?

In a certain sense a decision denying an offeree all rights against his offeror's estate in this situation may seem to be unjust and to work a hardship. It is probably true that the average offeree when he sends his acceptance to his distant offeror, if he is familiar with the proposition of law that a properly dispatched acceptance is effective when sent,⁷ may think that he has a contractual right and is under a contractual duty, at that very moment. It will never enter his mind that his offeror is dead at that time and, in this sense to use Professor Williston's words, the offeror's "apparent" will was contractual.⁸ From this premise it might very plausibly be argued (as it has been in some quarters⁹) that it is an offeror's objective will that determines an offeree's power to complete the offered agreement and that, therefore, because the offeree was not conscious of his offeror's death the offer continued and a contract resulted.

Whether or not this result should be reached and the offeror's estate held, must be determined by inquiring if the offeree was reasonable in assuming (or rather probably not having the question present in his mind) that his offeror was alive when he dispatched his promise? If the offeree was sufficiently reasonable in believing this to be the fact or not taking this possible contingency into consideration, then the decisions above referred to would seem to be incorrect, and the offeror's estate should be regarded as obligated to live up to the terms of the offer.

The situation presented in the assumed case is that of an offer which does not cover all possible contingencies and it is probably accurate to say that the possibility of the offeror's death within the life of the offer did not occur to either party—the unexpected and unprovided for has happened. Under such circumstances all that can be done is for the courts to try to determine what the parties would have reasonably stipulated for had they had in mind this unexpected contingency, and attribute such intentions to the parties. If parties have not taken into consideration future possible events that they should have considered, courts can only endeavor to decide what the parties would have desired had they been sufficiently careful and diligent and hold them upon this basis as if they had actually had and expressed such desires.^{9a}

What effect then would an offeror desire to have his death have upon his outstanding offer in the case under discussion? Would he insist that his death should terminate his offer regardless of his offeree's position, stipulating that his offeree must act at his peril, and if he wished to protect himself from possible loss, ascertain whether his offeror was living before making any move whatever? Of course, such a position could be taken and justified by merely saying, death may come at any time;

7. The proposition is elementary although perhaps unfortunate. It is difficult to characterize a letter containing a promise, as a promise until it is *received* by the intended promisee. It is nothing but a secret intention. But see *Dunlop v. Higgins* (1848) 1 House of Lords Cases 381; *Tayloe v. Merchants etc. Ins. Co.* (1850) 9 How. (U. S.) 390, 13L. Ed. 187. "An acceptance may be transmitted by any means which the offeror has authorized the offeree to use and, if so transmitted, becomes a valid acceptance and completes the contract as soon as put out of the offeree's possession without regard to whether it ever reaches the offeror." Sec. 62 Am. L. Inst. Restatement on Contracts.

8. "On principle under the modern view of the function of contracts which makes the expression of mutual assent the determining factor, notice of the death should be required to end the offer, since until notice, the apparent effect of the offer continues." Williston, *Contracts*, sec. 62.

the offeree must take notice of this fact and also of the fact that the offeror wished his offer to come to an end then.

On the other hand, it might be said that while death is uncertain, usually offerors do not die and are not expected to die during the time that their offers are outstanding. Perhaps the very proof of this statement lies in the fact that nearly always offers contain no provisions covering this contingency. Business men do not seem to take into consideration the possible interruption of their affairs as a result of sudden death; the assumption seems to be that life will continue. If this is the attitude of the average man and his normal expectation, it might follow that the offeree in the assumed case acted in accordance with normal standards, when he changed his position before he knew of his offeror's death and that his offeror's estate should compensate him for the same. In other words, the proposition might be that an offeree in a transaction looking to the formation of a bilateral contract has the power to bind his offeror's estate, when he gives an acceptance after the latter's death. Under this line of reasoning, to what extent should the offeree be able to bind his offeror's estate? Should his acceptance be effective in the same manner that it would have been had the offeror continued to live? Or should it merely be effective to bind the offeror's estate to compensate him for any loss that he may have suffered up to the time that he discovered the fact that his offeror had died before he sent his acceptance? It seems correct to say that an offeror intends to have his unaccepted offers lapse at his death; that he does not intend to have contractual obligations, which will bind his estate perfected after his death. If these are the intentions and expectations that are to be attributed to the normal business man, the offeree should be taken as being familiar with them and he could not claim a complete contract right binding on the offeror's estate. The most then that he could claim would be a right to be compensated for any actual loss that he may have suffered as a result of his action. Such a liability could, of course, only be predicated upon the offer comprising within its terms by implication a promise upon the part of the offeror that his estate would compensate the offeree for such loss under the supposed facts.

To the writer, the rule embodied in the American Law Institute's Restatement that death terminates an offer to make a bilateral contract *ipso facto* seems the more reasonable and desirable solution of the problem. If an offer can be terminated upon the happening of a condition—and it can be—and if, as is obviously the case, death may come to an offeror before his offer would normally expire, and if an offeror intends to be bound only if he is living at the time an acceptance is given, and if an offeree is to be bound only if he is living at the time an acceptance is given, and if an offeree is to be taken as having in mind all contingencies that may possibly happen, the advocated proposition follows inevitably and reasonably enough. Obviously if this conclusion is proper, there is no basis for implying an understanding upon the

9. "These cases [*i. e.* those holding that death terminates an offer] 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 offeror 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. . . . But no concurrence of wills is necessary." Oliphant, *The Duration and Termination of an Offer*, 18 Mich. L. Rev. 201, 210 (1920). See, also, note (1924) 24 Col. L. Rev. 294.

9a. "Conditions implied by law are conditions supplied by the court to govern situations for which the parties did not expressly provide, because they never contemplated them or, at least, if they did contemplate those situations, gave no clear and controlling intimation of their wishes as to what should be done if and when those situations should arise. They are conditions which do not rest on the intention which parties are known to have had, but which are supplied by the courts in the interest of that fair dealing which the courts should require as between litigants." Costigan, *The Performance of Contracts*, 2nd Ed.) 8.

part of the offeror that his estate shall compensate the offeree in the manner suggested in the last paragraph.

Suppose that A promises to pay B \$100 for the *act* of digging a ditch upon C's land; that B, with reasonable diligence, commences and proceeds to perform; that either prior to B's so commencing or after commencing, but before completing the requested act, A dies; should B have any claim against A's estate? It is possible that B may have acted as suggested, either knowing or in ignorance of A's death. If B knew of A's death before he commenced to dig, it seems clear, upon principles heretofore discussed, that B should have no rights whatever. On the other hand, if B was ignorant of A's death, unless some compensation be made for that which he may have done, he may suffer substantial loss for which many would claim he should be compensated. The situation again may be one of real hardship to B.

The unexpected termination (due to any cause) of an offer asking for an *act* as an acceptance, may result unfortunately for the offeree, unless there is some kind of an obligation resting on the offeror at least to indemnify his offeree for the expense that he has gone to in performing and attempting to accept the offer. Suppose, for example, that after an offeree has commenced and continued with due dispatch to perform the requested acceptance, his offeree attempts to retract his offer. Is an offeror privileged to do this? Has he the legal power to prevent an acceptance by communicating a revocation to his offeree?

It could be said that an offeree has no rights against his offeror in the supposititious case; that the rule of law is that all offers can be revoked, prior to acceptance, regardless of offerees' expectations to the contrary. Offerees must know that offers are not contracts and that they are not even representations upon which an estoppel can usually be predicated.¹⁰ Under such a line of reasoning, it will not lie in an offeree's mouth to say that he thought his offeror would not revoke his offer. Any attempt to accept after a proper revocation would be futile. Professor Williston has advocated in the past such a decision in this kind of a case although the learned writer states that it will result in a "practical hardship"¹¹ to the offeree.

Concluding the case in the above suggested way would work not only a "practical hardship" upon, but also a substantial injustice to an offeree. Writers have been fully aware of this fact and courts have been struggling to find a proper and adequate solution of this problem for almost a century.¹² One effort in this direction is to hold that the contract becomes bilateral (*i.e.*, as if the parties had exchanged promises) as soon as the offeree commences to perform the act that the offer requests.¹³ Such a decision is desirable in the sense that it assures to the offeree compensation for that which has been done by him. On the other hand, such a decision is undesirable because it binds the offeree to perform the whole of the acceptance, whereas such a duty was never contemplated by the offeror. He requested an *act* in his offer and *stipulated against* a promissory obligation.¹⁴ This ruling, therefore, is merely a crude attempt to secure justice; it does not correctly analyze the facts and consequently, as is so often the case, it fails to carry out the real intentions of the parties.

Professor McGovney has submitted a possible way out of the difficulty and appar-

10. As a rule, there is no such thing as a promissory estoppel known to the law; a promise is binding if it is a part of a valid contract, but not otherwise. Occasionally equity has enforced a voluntary promise as, for example, in the case of specific execution of a promise to give land. See *Seavey v. Drake* (1882) 62 N. H. 393. But surely the principles upon which such an estoppel are based have no application to the case under consideration.

11. Williston, *Contracts*, sec. 60a.

12. See discussion of Erle, C. J., in *Offord v. Davies* (1862) 12 C. B. (N. S.) 748.

13. *Los Angeles etc. Co. v. Wilshire* (1902) 135 Cal. 654, 67P.1086; *Am. Pub. Co. v. Walker* (1901) 87 Mo. App. 503; Williston, *Contracts*, sec. 60a.

ently his suggestions have been adopted by the American Law Institute in their Restatement. The proposition advocated is that every offer which calls for the performance of an act as an acceptance contains, by implication, a collateral offer or undertaking whereby the offeror promises to hold his principal offer open for acceptance, if his offeree will commence to perform the stipulated acceptance within a reasonable time¹⁵ and will also continue such performance to completion with reasonable diligence. This construction of this kind of offer seems entirely accurate and to give effect to what ought to have been the parties' reasonable expectations and intentions. The main contract will not be completed until the offeree has entirely performed his acceptance, neither will the offeree be *bound* to perform the acceptance, but he will have a reasonable opportunity to perform and will be safeguarded against any loss by reason of his offeror unreasonably retracting his offer after he has set about in good faith performing his acceptance.

The problem in offers of the type under discussion, where an offeror dies before acceptance is, for the most part, the same as that met with in the case where a living offeror attempts to revoke his offer. If an offeree, prior to the death of the offeror, has commenced acceptance within the life of the offer, there should be a collateral obligation resting upon his offeror along the lines suggested above. The offeror should be bound contractually to keep his offer open, and this contractual obligation, like all others that are non-personal in their nature, should bind his estate. In fact this obligation is similar in all respects to the ordinary option, the burdens of which, according to the better decisions, are binding upon the estate of the party who gives the same.¹⁶ It should be noted that the American Law Institute has adopted this view of the matter in their Restatement, providing in substance that this kind of an offer becomes irrevocable under the conditions heretofore stated and that the offeror's death will not terminate an irrevocable offer.¹⁷

The last possible situation to be considered is that where an offeror dies before the offeree commences to perform, and the offeree starts performance thereafter in ignorance of this occurrence. This problem would seem to be identical with the one involved in the case already considered where the offer asked for a promise, and the offeree dispatched the same and then, not knowing that his offeror was then dead and assuming otherwise, changed his position considering himself to be contractually bound. In solving this case the same questions should be again asked: should the offeree have considered the possibility of his offeror's being dead when he commenced performance and should he have known, in connection with this thought, that his offeror would not intend to have his offer continue in force beyond his own life? To the writer, as already intimated, it seems that the offeree should have had this possible contingency in mind, and should have known also that his offeror would desire to have the offer come to an end at the time of the latter's death. If this analysis is sound, it follows that the offeree has no contractual right against his offeror's estate. On the other hand, this result need not necessarily be

14. Ballantine, *Acceptance of Offers*, 5 Minn. L. Rev. 94, 96 (1920). This difficulty was recognized by Goode, J., in *Am. Pub. Co. v. Walker*, *supra*, note 13. The learned judge there said (87 Mo. App. l. c. 506) "Whether the act of the plaintiff's agent [*i. e.* the offeree's agent] in taking the order from the defendant [*i. e.*, the offeror] would amount to an agreement by it to comply with the contract [offer?] which would be binding and effective, is unnecessary to decide." The action was by the offeree, and not by the offeror to hold the offeree bound to perform the requested act.

15. McGovney, *Irrevocable Offers*, 27 Harv. L. Rev. 644, 659 (1914). See, also, Ballantine, *op. cit. supra*, n. 14, l. c. 96.

16. See *Gustin v. Union etc. District* (1893) 94 Mich. 502; *Converse's Estate* (1913) 240 Pa. St. 458.

17. Restatement, secs. 45 and 48.

reached. If we can say that an offeree in this situation would be privileged to assume, as a reasonable man, that his offeror would desire to indemnify him for any expense that he may have gone to, while ignorant of the former's death, a clear right to compensation from his offeror's estate would exist. Again, the question is, is the condition that is operative to terminate an offer (*i.e.*, to cause it to lapse) the offeror's death alone, or that fact *known to the offeree*.

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