Cass. civ., 17 December 1958[72] **2.F.17.**

OFFER OPEN FOR CERTAIN PERIOD

Chalet for sale

Where it is expressly or implicitly understood that an offer is to remain open for a certain period, the offer cannot be withdrawn within that period without incurring liability.

Facts: By letter of 11 August 1954, Isler informed Chastan that he was willing to sell to the latter a chalet owned by him, at a price of 2,500,000 francs. From the judgment, it appears that Chastan had written to Isler, saying that he planned to visit the chalet on the 15 or 16 August, and that Isler apparently approved this arrangement in his letter. Having visited the chalet four days later, Chastan notified Isler by telegram the following day that he accepted that offer. On 17 August 1954 he confirmed that acceptance by letter, stating that he was willing to pay the purchase price in cash upon the signing of the transfer deed. Chastan served formal notice on Isler on 6 September 1954, requiring the latter to accept the purchase price and to hand over the keys; Isler did not comply with that notice, whereupon Chastan brought legal proceedings. In the proceedings, Isler alleged that he could not have sold the chalet to the plaintiff on 16 August 1954, since, as at that date, he had already sold it to Puy. Puy intervened in the proceedings, stating that the sale of the property to him had been concluded at the beginning of August and that it had been formally completed by a private contract in writing on 14 August 1954, that act having been accompanied by a payment on account of one million francs.

Held: Chastan succeeded in his claim.

Judgment: . . .—Whereas whilst an offer may in principle be revoked at any time prior to its acceptance, that is not the position where the person making it has expressly or impliedly undertaken not to revoke it before a certain date;

—Whereas in the present case, the contested judgment, having acknowledged that the letter of 11 August 1954 constituted "merely an offer to sell" which could "in principle be revoked at any time prior to being accepted", goes on to state: "however, Isler, knowing from a letter from Chastan dated 9 August that the latter was proposing to visit the chalet on 15 or 16 August, and having authorised him to do so in his reply of 11 August, tacitly undertook to keep his offer open during the period thus envisaged, that is to say, until after the proposed visit had taken place", and that Isler could not therefore have withdrawn from the transaction on 14 August without "incurring liability" . . .

—Whereas it follows that the contested judgment did not infringe the legislation referred to in the appellant's pleadings and is justified in law.

Notes

(1) In French law, an offer is in principle revocable. The *Cour de cassation* held in a decision of Cass. civ. 1re, 3 February 1919:[73]

As an offer is not in itself binding on the offeror, it may in general be revoked so long as it has not been validly accepted.

This point of view can be explained theoretically by the fact that French law traditionally does not attribute binding force to a unilateral act.

(2) In practice, the rigid principle of revocability is not maintained, because it would lead to insecurity and injustice. The addressee of an offer may incur costs in reliance on the offer (e.g. travelling costs to examine the offer), or turn down other offers, or change

[72] D. 1959.1.33
[73] D.P. 23.I.126.

his position, for example by resigning from his job or by terminating his tenancy.. French case law has therefore strongly mitigated the principle of revocability and, in practice, has reversed it. If an offer expressly contains a period within which it has to be accepted, the offeror has the obligation to keep the offer open during that period.[74] Further, as the *Chalet for Sale* case shows, if the offer does not expressly contain a period for its acceptance, it may have to be implied that the offeror tacitly promised to keep his offer open during a certain period. Whether or not an offer implicitly contains a period for acceptance is a matter of fact that has to be decided by the lower courts.[75] In the French case cited here, the fact that the owner of the chalet had agreed on the offeree visiting the chalet on a certain date led to the assumption that his offer tacitly contained a period lasting at least until that date.

(3) Some French authors address a further category: offers that do not contain any period, even implicitly. They are of the opinion that such offers have to be maintained during a reasonable period: Malaurie and Aynès[76] admit an exception to this rule in the case of an offer to the public; Ghestin[77] rejects a distinction between offers to the public and offers to one or more particular persons.[78] The length of this period is determined as a matter of fact by the lower courts and depends on the circumstances of the case.

(4) The irrevocability of an offer does not lead to the same results in French law and in German law. It seems to follow from the *Chalet for Sale* case that, in French law, the consequence of the obligation to keep the offer open during a certain period is not that a revocation of the offer lacks effect, but that the offeror is liable to pay damages for the loss the offeree has suffered from the untimely revocation. French authors are of the opinion that these damages may be awarded *in natura* in the form of the conclusion of the contract,[79] but there is no case law to this effect. Given the relative ease with which an implicit promise not to revoke the offer can be established, these damages play an important role in compensating losses arising from the revocation of an offer. In German law on the other hand, the consequence of the binding force of an offer is that its revocation has no effect: even after the revocation the offeree can still accept and thus conclude a contract. The same is true for Dutch law; and also, it would seem, under PECL, CISG and the Unidroit Principles.

(5) In French law an offer can be effectively revoked without communicating the fact of the revocation to the offeree: for example, an offer to sell goods will be effectively revoked through a sale of the goods to a third party whether or not the offeree knows of the sale. This rule is in contrast to German law and, as we will see, English law.

[74] See e.g. Cass. civ., 10 May 1968, Bull. civ. III.209.
[75] See also the French cases mentioned in 2.1.2.C.
[76] Malaurie and Aynès, para. 384.
[77] Ghestin at 276–8.
[78] See also Terré, Simler and Lequette, para. 109.
[79] Ghestin, at 274.

as any other acceptance, effective only when notice thereof reaches the offeror. The comment states that in cases where the conduct will of itself give notice of acceptance to the offeror within a reasonable period of time, special notice to this effect is not necessary. However, the use of the smoke ball in *Carlill* v. *Carbolic Smoke Ball Co.* would not have sufficed for this purpose. See the American Restatement 2d:

Restatement of Contracts **2.US.41.**

§ 54: (1) Where an offer invites an offeree to accept by rendering a performance, no notification is necessary to make such an acceptance effective unless the offer requests such a notification.
(2) If an offeree who accepts by rendering a performance has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty, the contractual duty of the offeror is discharged unless
(a) the offeree exercises reasonable diligence to notify the offeror of acceptance, or
(b) the offeror learns of the performance within a reasonable time, or
(c) the offer indicates that notification of acceptance is not required.

Cass. civ., 21 December 1960[138] **2.F.42.**

MATTER FOR DISCRETION OF LOWER COURTS

Chomel

The question whether a contract has been concluded is a question of fact, and is therefore a matter for the unfettered discretion of the lower courts.
Judgment:—Whereas the appellant, Chomel, contests the judgment of the cour d'appel (Aix, 5 June 1958) by which it dismissed his claim to be entitled to rely on a [contractual] term agreed in correspondence between Roqueta and him, on the ground that it had not been proved that Roqueta, which had proposed that term, had received his letter agreeing to it before revoking its offer;
—Whereas the acceptance operated, as soon as it took place, to render the contract definitive and binding, and an offeror cannot revoke such an offer once it has been accepted;
—Whereas however, in deciding that Roqueta was entitled to revoke its offer at any time up until it received Chomel's acceptance, the court adjudicating on the substance of the case was merely exercising its unfettered discretion to construe the intentions of the parties; it follows that the appellant's plea is unfounded; . . .

Cass. com., 7 January 1981[139] **2.F.43.**

DISPATCH OF ACCEPTANCE

L'Aigle/Comase

An acceptance by letter is effective upon dispatch, and not upon receipt.

Facts: On 10 June 1975 Messrs L'Aigle sent a purchase offer, valid for 30 days, to Messrs Comase. The latter company accepted it on 3 July, but was unable to prove that its acceptance reached the offeror before 10 July.

[138] D. 1961.I.417 annotated by Ph. Malaurie.
[139] Bull. civ. IV.14; RTD civ. 1981.849, annotated by F. Chabas.

Having failed to fulfil its obligations, L'Aigle sought to avoid the liability which it had incurred, by maintaining that the contract had not been concluded. It argued that a contract became definitive and binding only upon receipt by the offeror of acceptance of his offer; since it had not been proved by its opponent that such acceptance had indeed taken place within the time-limit stipulated in the offer, that offer had lapsed and it had not been possible for the contract to come into existence.

Held: A contract had been concluded.

Judgment: . . .—Whereas the appellant, Société L'Aigle, contests the judgment of the cour d'appel ordering it to pay damages to Société Comase by way of compensation for the loss suffered by the latter as a result of the wrongful termination by the said Société L'Aigle of the abovementioned agreement, on the ground that Société Comase had accepted the offer made within the time-limit laid down;
—Whereas according to the appellant, it is for the party seeking performance of an obligation to prove the same, and it is therefore for Société Comase to furnish evidence showing that it communicated its acceptance to Société L'Aigle before 10 July 1975; as the appellant further argues that, by basing its decision solely on its consideration of a letter from Société Comase dated 3 July 1975 (produced to the court in evidence), which could not have reached Société L'Aigle until after 10 July, the cour d'appel reversed the burden of proof, and that it was for Société Comase to prove that the letter was received before the time-limit expired, and not for Société L'Aigle to prove the contrary; as the appellant additionally maintains that, by failing, moreover, to investigate whether the letter reached its addressee by 10 July, the cour d'appel robbed its decision of any legal basis;
—Whereas however, in the absence of any stipulation to the contrary, the written communication of 10 June 1975 was intended to become definitive and binding not upon receipt by Société L'Aigle of Société Comase's acceptance but upon the despatch of that acceptance by Société Comase; the appellant's plea to the contrary is unfounded; . . .

King's Bench **2.E.44.**
Adams v. *Lindsell*[140]

POSTAL RULE

Two days late

An acceptance by post is effective when it is sent, not when it is received.

Facts: The defendants by letter offered to sell to the plaintiffs certain specified goods, receiving an answer by return of post; the letter containing the offer being misdirected, the answer notifying the acceptance of the offer arrived two days later than it ought to have done; on the day following that when it would have arrived if the original letter had been properly directed, the defendants sold the goods to a third person. The defendants contended that until the plaintiff's answer was actually received, there could be no binding contract between the parties; and before then, the defendants had retracted their offer, by selling the goods to other persons.

Held: A contract had been concluded between the plaintiffs and the defendants.

Judgment: The court said that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by

[140] (1818) 1 B. & Ald. 681, 106 ER 250.

the parties have reached an agreement on the thing sold and the price to be paid. An offer to enter into a sales contract must therefore, according to French law, at least mention the thing to be sold and the price to be paid. (It has however been decided that where an agreement—a "framework contract"—provides for further contracts to be made under it, the price need not be fixed in the first agreement: the *Alcatel* case.[59]) In contrast, under the Sale of Goods Act 1979, an agreement for the sale of goods may be binding as soon as the parties have agreed to buy and sell, the remaining details being determined by the standard of reasonableness or by law; section 8(2) of the Act provides that, if no price is determined by the contract, a reasonable price must be paid. Under English law therefore, a proposal to enter into a sales contract may amount to an offer even if it does not mention an (exact) price.

The question of the essential minimum that a proposal should include in order to make it an offer should be distinguished from the fact that, in some cases, a failure to agree some point will indicate that no contract was concluded. The latter question turns on whether the necessary "intention to be bound" was present: a proposal which mentions the thing to be sold and the price will not be an offer if the offeror does not intend the other party to be able to accept. According to French case law, if one of the parties makes it clear that he does not want to enter into a binding agreement before one or more other conditions of the contract is or are settled in a satisfactory manner, a contract does not come into existence before these additional matters are agreed upon.[60] English case law shows a similar picture: the question whether an agreement is a binding contract depends primarily on the intention of the parties and inferences on this intention may be drawn both from the importance of a matter left over for further agreement, and from the extent to which the parties have acted on the agreement.[61] This is the same in German law by virtue of the following provision:

BGB **2.G.13.**

§ 154: So long as the parties have not agreed on all points of a contract upon which agreement is essential, according to the declaration even of one party, the contract is, in case of doubt, not concluded. . . .[62]

Compare also Article 2:103 (2) of the PECL and Article 2.13 of the Unidroit principles.[63]

2.1.2.C. Revocability of an offer

Principles of European Contract Law **2.PECL.14.**

Article 1:303: **Notice**

(1) Subject to paragraphs (4) and (5), any notice becomes effective when it reaches the addressee . . .

[59] Cass. Ass. plén. 1 December 1995, JCP 1995.II.22.565, annotated by Ghestin.
[60] Cass. civ. 3e, 2 May 1978, D. 1979.317, annotated by Schmidt-Szalewski and Cass. civ. 3e, 14 January 1987, D. 1988.80, annotated Schmidt-Szalewski.
[61] Treitel, *Contract*, at 53.
[62] Translated by von Mehren & Gordley, op. cit., *supra* note 55, at 193.
[63] *Supra*, at 178.

(5) A notice has no effect if a withdrawal of it reaches the addressee before or at the same time as the notice.

Article 2:202: **Revocation of an Offer**

(1) An offer may be revoked if the revocation reaches the offeree before it has dispatched its acceptance or, in cases of acceptance by conduct, before the contract has been concluded under Article 2:205(2) or (3).
(2) An offer made to the public can be revoked by the same means as were used to make the offer.
(3) However, a revocation of an offer is ineffective if:
(a) the offer indicates that it is revocable; or
(b) it states a fixed time for its acceptance; or
(c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Unidroit Principles **2.INT.15.**

Article 2.3: (*Withdrawal of offer*)

1. An offer becomes effective when it reaches the offeree.
2. An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 2.4: (*Revocation of offer*)

1. Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance.
2. However, an offer cannot be revoked
a. if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
b. if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.[64]

RG, 25 October 1917[65] **2.G.16.**

Effective offer cannot be withdrawn

Delivery to a housemaid

An effective offer cannot be withdrawn. An offer which has been received by the offerees employee but has not come to the attention of the offeree is effective, and cannot therefore be withdrawn.

Facts: On 19 and 20 November 1915 the plaintiff requested, by way of newspaper advertisements, the submission of offers for the supply of military drill textiles. In response, Messrs B on 20 November offered him "without engagement or obligation", according to sample, pure linen drill approximately 84 cm in width at a price of 0.80 marks per metre, "pure net, prompt cash, approximately 20,000 m available for immediate delivery". The plaintiff replied on 22 November, having on that day received Messrs B's letter, stating that he accepted the offer of 20,000 m and requesting confirmation by telegram. Messrs B wired him at 5.15 p.m. on the same day in the following terms: "Organised only on the basis of telegraphic transfer of 1000 marks today, balance payable cash on delivery". That telegram was delivered at 7 p.m. to the plaintiff's residence, the plaintiff being out at the time. However, Messrs B then came to a different decision and asked the telegraph office to return their telegram. The telegraph office sent an official wire to the St. office, requesting the latter to stop the telegram sent to the

[64] See also CISG Articles 2.15 and 2.16, which are identical to these provisions.
[65] RGZ 91, 60.

plaintiff. However, since that telegram had already been delivered, it arranged for the telegraph messenger to get the housemaid of the plaintiff, who was still out of the house, to hand it back.

Held: The defendant was not entitled to withdraw the offer.

Judgment: . . .

2. The decision in the present case is founded on the import of § 130 BGB. The telegram sent by Messrs B, which was subsequently taken back, contained a contractual offer made to the plaintiff, and thus a declaration of intent which had to be received in order to be effective. It became effective, and the offer thus became binding (§§ 145, 146 BGB), at the moment in time when it reached the plaintiff. A statement contained in a letter, to which a telegraphic communication must be regarded as equivalent, is deemed to reach its recipient upon being delivered to the latter's address, even where it is handed to a member of the recipient's family or to a domestic servant, and irrespective of whether the recipient is at home or not; he is thereby given the opportunity of taking cognisance of its contents, this being an essential element of the concept of a communication "reaching" its recipient (RGZ, Vol. 50, p. 191, 194, Vol. 56, p. 262, Vol. 60, p. 334). It does not matter, therefore, whether it actually comes to the knowledge of the recipient; what matters is that it is placed at his disposal, so that he is given the opportunity of taking cognizance of it. It is for that reason, as stated in the decision of the court below, that the second sentence of § 130(1) additionally provides that the withdrawal of a declaration of intent needing to be received by its addressee will be effective only if it reaches the recipient before or at the same time as the initial declaration of intent; in such circumstances, the time at which the communication actually comes to the knowledge of its recipient is wholly immaterial. According to those principles, the offer made in the present case by Messrs B to the plaintiff reached him when it was handed, in his absence, to his housemaid, with the result that the party by whom the telegram was sent was bound by his contractual offer on the terms contained therein. The withdrawal contained in the second telegram was too late, since at the time when it was delivered, or rather could and should have been delivered, that is to say, when the telegraph messenger arrived at the plaintiff's residence bearing the withdrawal telegram, the proposal concerning implementation of the contract had already reached the plaintiff.

In opposition to this, the appellant relies, nevertheless, on the view occasionally advanced by certain academic legal authors, which the *Landgericht* [Regional Court] has likewise seen fit to adopt in its judgment, to the effect that it would be contrary to the principle of good faith if the recipient of a contractual offer were able to rely on that offer to his benefit, and could derive rights from it, notwithstanding that the contractual offer, despite having reached him earlier, only actually came to his knowledge at the same time as the withdrawal of that offer. However, that view is not compatible with the clear provision contained in the second sentence of § 130(1), which cannot be excluded. The sole decisive factor, as regards both the sender and the recipient, is the time at which the communication reached the latter; by contrast, the time at which it actually came to his knowledge is immaterial, as regards both the offer and the withdrawal thereof. . . .

Notes

(1) The German case cited above[66] is concerned with the question when an offer made to an absent person becomes effective. This question is of relevance under German law because any declaration, including an offer, may be retracted *before* it has become effective. In accordance with the terminology of the PECL, CISG and the Unidroit principles,

[66] *Supra*, at 195–6.

such a retraction will be described as a "withdrawal". The term "revocation" can thus be reserved for retraction of the offer *after* it has become effective, also in accordance with PECL, CISG and the Unidroit principles. The question of the revocability of an offer that is made orally to a present person or over the telephone does not arise, since such an offer is generally assumed to lapse if it is not accepted immediately[67]—unless the offeror intended it to remain valid for a longer time. Of greater importance is the question of the revocability of an offer when a contract is to be concluded *inter absentes*.

(2) The German Code contains a general provision on the moment any declaration directed to an absent person becomes effective:

BGB

§ 130: 1. A declaration of intention to another, if it is made to another in his absence, is effective at the moment when it reaches him. It does not become effective if a withdrawal[68] reaches him previously or simultaneously.

In the cited case the *Reichsgericht* states that, in accordance with the concept of *zugehen* (reaching) that it is not necessary that the offeree has actually been informed of the offer; it is sufficient that the letter or telegram containing the offer has been delivered at his house. Until that moment, the offer can be withdrawn by retracting it from the post or by sending a second letter or telegram that reaches the offeree before or at the same time as the offer; after that moment withdrawal is no longer possible, even if the offeree is informed of the withdrawal at the same moment as of the offer itself. The same decision was given in RG 8 February 1902.[69]

(3) The possibility of *withdrawal* of an offer is of particular importance in German law, because once the offer has reached the offeree, it cannot in principle be revoked: under § 145 BGB; an offeror is bound by his offer unless he has excluded this engagement (see the next note).

(4) In German law, although the main rule is that an offeror is bound by his offer, the offeror may exclude the binding force of the offer under § 145 BGB. He may do this by using terms such as *freibleibend*, *ohne obligo* or *Zwischenverkauf vorbehalten*.[70] As has been seen in 2.1.2.A.,[71] there is some uncertainty about the legal effect of such terms. It is certain, however, that a statement containing such terms may be revoked before it is accepted.

[67] Zweigert and Kötz, at 364; see also *infra*, at 207.
[68] According to the terminology adopted here.
[69] RGZ 50, 191.
[70] Medicus, *SAT* at 137; Flume, *Rechtsgeschäft* at 642.
[71] See the *Aeroplane Charter* case, *supra*, at 183–4.

Court of Appeal
Dickinson v. *Dodds*[80]

2.E.18.

REVOCABILITY OF OFFER

Offer left over until Friday

An offer to sell property may be revoked before acceptance without any formal notice to the person to whom the offer is made. It is sufficient if that person has actual knowledge that the person who made the offer has done some act inconsistent with the continuance of the offer, such as selling the property to a third person.

Facts: The defendant, the owner of property, signed a document which purported to be an agreement to sell the property to the plaintiff at a fixed price. But a postscript was added, which he also signed—"This offer to be left over until Friday 9 A.M.". In the afternoon of the Thursday, the plaintiff was informed by a Mr. Berry that the defendant had been offering or agreeing to sell the property to Thomas Allan. Thereupon the plaintiff, at about half-past seven in the evening, went to the house of Mrs. Burgess, the mother-in-law of the defendant, where he was then staying, and left with her a formal acceptance in writing of the offer to sell the property. According to the evidence of Mrs. Burgess this document never in fact reached the defendant, she having forgotten to give it to him.

On the following (Friday) morning, at about seven o'clock, Berry, who was acting as agent for the plaintiff, found the defendant at the Darlington railway station, and handed to him a duplicate of the acceptance by the plaintiff, and explained to the defendant its purport. He replied that it was too late, as he had sold the property. A few minutes later the plaintiff himself found the defendant entering a railway carriage, and handed him another duplicate of the notice of acceptance, but the defendant declined to receive it, saying, "You are too late. I have sold the property".

Held: The document amounted only to an offer, which might be revoked at any time before acceptance, and that a sale to a third person which came to the knowledge of the person to whom the offer was made was an effectual revocation of the offer.

JUDGMENT: JAMES LJ: The document, though beginning "I hereby agree to sell," was nothing but an offer, and was only intended to be an offer, for the Plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed there was no concluded agreement then made; it was in effect and substance only an offer to sell. The Plaintiff, being minded not to complete the bargain at that time, added this memorandum—"This offer to be left over until Friday, 9 o'clock A.M., 12th June, 1874." That shews it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere nudum pactum, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "Now I withdraw my offer." It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retractation. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance.

[80] (1876) 2 Ch. D463.

If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the Plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer." This is evident from the Plaintiff's own statements in the bill.

The Plaintiff says in effect that, having heard and knowing that Dodds was no longer minded to sell to him, and that he was selling or had sold to some one else, thinking that he could not in point of law withdraw his offer, meaning to fix him to it, and endeavouring to bind him," I went to the house where he was lodging, and saw his mother-in-law, and left with her an acceptance of the offer, knowing all the while that he had entirely changed his mind. I got an agent to watch for him at 7 o'clock the next morning, and I went to the train just before 9 o'clock, in order that I might catch him and give him my notice of acceptance just before 9 o'clock, and when that occurred he told my agent, and he told me, you are too late, and he then threw back the paper." It is to my mind quite clear that before there was any attempt at acceptance by the Plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had in fact agreed to sell the property to Allan. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the Plaintiff has failed to prove that there was any binding contract between Dodds and himself.

Notes

(1) English law is completely opposite to German law with respect to the revocability of offers: offers are freely revocable. Further, unlike French case law, English case law holds that offers are revocable regardless of whether they contain a time limit for their acceptance. Theoretically this point of view is based on the English doctrine of consideration.[81] No binding obligation can arise for the offeror to keep his offer open, even if he expressly fixes a period during which his offer may be accepted, since there is no consideration from the other party for such a promise. As Best CJ said in *Routledge* v. *Grant*:[82]

> Here is a proposal by the Defendant to take property on certain terms; namely that he should be let into possession in July. In that proposal he gives the plaintiff six weeks to consider; but if six weeks are given on one side to accept an offer, the other has six weeks to put an end to it.

Compare also the case of *Byrne* v. *Van Tienhoven*.[83]

(2) It should be noted that an offer can be made irrevocable by an agreement between offeror and offeree in English law; the agreement will normally be made by deed to overcome the problem of consideration. In this case the offeree may accept the offer despite any purported revocation by the offeror: *Mountford* v. *Scott*.[84] However such "option agreements" are rare outside sales of land. US law goes further. UCC § 2–205 provides that if written offers relating to commercial sale contracts are stated to be binding, they may not be withdrawn during the prescribed period or, if no period is prescribed, for a reasonable period not exceeding three months.

(3) The more general question of when the offer becomes effective may also arise in English law, for example, where there is an issue whether the period of time for acceptance

[81] On which see Chapter 1.
[82] (1828) 4 Bing 653.
[83] (1880) 5 CPD 344.
[84] [1975] Ch. 258.

Whereas actual authority, express or implied, derives from what the principal tells the agent, apparent authority results from the principal's manifestations to third persons. "To bind the principal * * * the one dealing with the agent must prove that the principal was responsible for the appearance of authority by doing something or permitting the agent to do something which reasonably led others, including the plaintiff, to believe that the agent had the authority he purported to have. If this is proved, the principal should have realized that his conduct would cause others to believe that the agent was authorized, and the principal and the other party are bound by the ordinary rules of contract, unless the other has notice that the agent was unauthorized." Seavey, Handbook of the Law of Agency 13 (1964). Obviously, the objective theory of contracts and the agency doctrine of apparent authority are compatible ideas.

Comment: The Role of Conduct As Evidence of Agreement in UCC Article 2

UCC 1–201(3) defines "agreement" as the "bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1–205, 2–208, . . .)." "Contract" is defined as the "total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." UCC 1–201(11). Where a claimed sale of goods or a lease of goods are involved, whether an agreement as defined in Article 1 is a contract depends upon the application of Article 2 or Article 2A of the UCC. In answering the formation question in a "code covered" transaction, e.g., an alleged sale of goods, Article 1 and Article 2 may be read together.

Consider again the facts in *Ammons v. Wilson & Co.*, supra. The seller's agent, Tweedy, solicited an order of a specific quantity of goods at a fixed price from Ammons for "prompt shipment." This order was treated as an offer.

Under UCC 2–206(1)(a), the offer could be accepted by a "prompt promise to ship" or by the "prompt or current shipment of conforming goods. . . ." Thus, an invited method of acceptance is the conduct of shipment. Moreover, the "beginning of a requested performance", if reasonable, may also create a contract. UCC 2–206(2). This, however, is not the *Ammons* case.

To vary the facts a bit more, suppose the offer was for 942 cases of shortening and the seller responded by telephone that it could ship only 800 cases. At this point there is no contract but the seller has made a counteroffer to ship 800 cases which the seller can accept or reject. Suppose the buyer initially says no to the counteroffer but the seller, nevertheless, ships 800 cases and the buyer accepts them without objection. Is there a contract? See UCC 2–204(1). If so, what are the terms? More pointedly, what is the agreement upon which the contract rests? Clearly, it is at a minimum an agreement to buy 800 cases.

Return to *Ammons* where the offer was to buy 942 cases at 7 ½ cents per pound. Since Wilson neither shipped nor promised to ship (and in fact ultimately rejected the offer), is the failure to reject within a reasonable time an acceptance under Article 2? The answer depends on whether the seller has agreed to the buyer's proposed bargain and this turns on how one uses the prior course of dealing between the parties. Read UCC 1–205(1) & (3). Is that course of dealing "other circumstances" from which the seller's agreement to accept orders by silence unless a prompt rejection is given can be implied? If not, may the buyer turn to the protective arm of Section 69(1)(c) of the Restatement (Second)? We think that the answer to the first question is "probably not" but that the answer to the second question is yes.

(4) TIME WHEN ACCEPTANCE IS EFFECTIVE

Adams v. Lindsell

Court of King's Bench, 1818.
1 Barn. & Ald. 681, 106 Eng.Rep. 250.

Action for non-delivery of wool according to agreement. At the trial at the last Lent Assizes for the county of Worcester, before Burrough, J., it appeared that the defendants, who were dealers in wool, at St. Ives, in the county of Huntingdon, had, on Tuesday the 2d of September 1817, written the following letter to the plaintiffs, who were woolen manufacturers residing in Bromsgrove, Worcestershire. "We now offer you eight hundred tods of weather fleeces, of a good fair quality of our country wool, at 35s. 6d. per tod, to be delivered at Leicester, and to be paid for by two months' bill in two months, and to be weighed up by your agent within fourteen days, receiving your answer in course of post."

This letter was misdirected by the defendants, to Bromsgrove, Leicestershire, in consequence of which it was not received by the plaintiffs in Worcestershire till 7 P.M. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St. Ives and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On the Monday September 8th, the defendants not having, as they expected, received an answer on Sunday September 7th, (which in case their letter had not been misdirected, would have been in the usual course of post,) sold the wool in question to another person. Under these circumstances, the learned Judge held, that the delay having been occasioned by the neglect of the defendants, the jury must take it, that the answer did come back in due course of post; and that then the defendants were liable for the loss that had been sustained; and the plaintiffs accordingly recovered a verdict.

Jervis having in Easter term obtained a rule nisi for a new trial, on the ground that there was no binding contract between the parties.

Dauncey, Puller, and Richardson, showed cause. They contended, that at the moment of the acceptance of the offer of the defendants by the

plaintiffs, the former became bound. And that was on the Friday evening, when there had been no change of circumstances. They were then stopped by the Court, who called upon Jervis and Campbell in support of the rule. They relied on Payne v. Cave (3 T.R. 148), and more particularly on Cooke v. Oxley (Ibid. 653). In that case, Oxley, who had proposed to sell goods to Cooke, and given him a certain time at his request, to determine whether he would buy them or not, was held not liable to the performance of the contract, even though Cooke, within the specified time, had determined to buy them, and given Oxley notice to that effect. So here the defendants who have proposed by letter to sell this wool, are not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till the plaintiffs' answer was actually received, there could be no binding contract between the parties; and before then, the defendants had retracted their offer, by selling the wool to other persons. But—

The Court said, that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them, that the plaintiffs' answer was received in course of post.

Rule discharged.

NOTES

(1) Exactly what did *Adams v. Lindsell* hold, that the contract was formed when the letter of acceptance was posted or something else?

A justification for forming the contract at the time of posting was attempted by an English court in 1879:

> There is no doubt that the implication of a complete, final, and absolutely binding contract being formed, as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. *An offeror, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance.* If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which despatch, is as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

Household Fire & Carriage Accident Insurance Co., Ltd. v. Grant (1879) 4 Ex.D. 216, 223-24 (emphasis added). Is this persuasive? See G.H. Treitel, The Law of Contracts 23-29 (10th ed.1999) (describing the rule as arbitrary but workable).

(2) *Justifications for and Scope of the Mailbox Rule.* The so-called "mailbox" rule, derived from the landmark case of *Adams v. Lindsell* and others which followed, has gained almost universal acceptance in common law jurisdictions.

Restatement (Second) § 63(a) provides: "Unless the offer provides otherwise, (a) an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror; * * *."

A frontal attack upon the rule by the Court of Claims has apparently failed. In Rhode Island Tool Co. v. United States, 130 Ct.Cl. 698, 128 F.Supp. 417 (1955), the offeror, who had made a mistake in bid, communicated a withdrawal of the offer to the contracting officer after written notice of award was mailed but before it was received. The court, in holding that no contract was created, relied substantially upon revised postal regulations which gave the sender control over a letter up to delivery: "The acceptance, therefore, is not final until the letter reaches destination, since the sender has the absolute right of withdrawal from the post office, and even the right to have the postmaster at the delivery point return the letter at any time before actual delivery." Is this reasoning persuasive?

The mail-box rule, of course, is a default rule and the offeror can always require communication before the contract is formed. For a recent example of stipulation in an offer for receipt of acceptance, precluding application of "mailbox" rule, see Crane v. Timberbrook Village, Ltd., 774 P.2d 3 (Utah App.1989). Even so, what is the justification for ever holding an offeror to a bilateral contract before he or she knows of the acceptance? Perhaps a justification can be found in the fact that the rule is a default that can be contracted around by the offeror herself. The mail-box rule is a default that disadvantages the offeror, but the offeror to free opt out of this rule and condition acceptance on receipt.

Another problem of formation concerns the optimal number of confirmations. As recognized in Crook v. Cowan, 64 N.C. 743 (1870), the last person to confirm will always be at at an informational disadvantage because she will not know whether her confirmation got through:

James Baird Co. v. Gimbel Brothers, Inc.

United States Court of Appeals, Second Circuit, 1933.
64 F.2d 344.

■ L. HAND, CIRCUIT JUDGE. The plaintiff sued the defendant for breach of a contract to deliver linoleum under a contract of sale; the defendant denied the making of the contract; the parties tried the case to the judge under a written stipulation and he directed judgment for the defendant. The facts as found, bearing on the making of the contract, the only issue necessary to discuss, were as follows: The defendant, a New York merchant, knew that the Department of Highways in Pennsylvania had asked for bids for the construction of a public building. It sent an employee to the office of a contractor in Philadelphia, who had possession of the specifications, and the employee there computed the amount of the linoleum which would be required on the job, underestimating the total yardage by about one-half the proper amount. In ignorance of this mistake, on December twenty-fourth the defendant sent to some twenty or thirty contractors, likely to bid on the job, an offer to supply all the linoleum required by the specifications at two different lump sums, depending upon the quality used. These offers concluded as follows: "If successful in being awarded this contract, it will be absolutely guaranteed, * * * and * * * we are offering these prices for reasonable" (sic), "prompt acceptance after the general contract has been awarded." The plaintiff, a contractor in Washington, got one of these on the twenty-eighth, and on the same day the defendant learned its mistake and telegraphed all the contractors to whom it had sent the offer, that it withdrew it and would substitute a new one at about double the amount of the old. This withdrawal reached the plaintiff at Washington on the afternoon of the same day, but not until after it had put in a bid at Harrisburg at a lump sum, based as to linoleum upon the prices quoted by the defendant. The public authorities accepted the plaintiff's bid on December thirtieth, the defendant having meanwhile written a letter of confirmation of its withdrawal, received on the thirty-first. The plaintiff formally accepted the offer on January second, and, as the defendant persisted in declining to recognize the existence of a contract, sued it for damages on a breach.

Unless there are circumstances to take it out of the ordinary doctrine, since the offer was withdrawn before it was accepted, the acceptance was too late. Restatement of Contracts, § 35. To meet this the plaintiff argues as follows: It was a reasonable implication from the defendant's offer that it should be irrevocable in case the plaintiff acted upon it, that is to say, used the prices quoted in making its bid, thus putting itself in a position from which it could not withdraw without great loss. While it might have withdrawn its bid after receiving the revocation, the time had passed to submit another, and as the item of linoleum was a very trifling part of the cost of the whole building, it would have been an unreasonable hardship to expect it to lose the contract on that account, and probably forfeit its deposit. While it is true that the plaintiff might in advance have secured a contract conditional upon the success of its bid, this was not what the defendant suggested. It understood that the contractors would use its offer in their bids, and would thus in fact commit themselves to supplying the linoleum at the proposed prices. The inevitable implication from all this was that when the contractors acted upon it, they accepted the offer and promised to pay for the linoleum, in case their bid were accepted.

It was of course possible for the parties to make such a contract, and the question is merely as to what they meant; that is, what is to be imputed to the words they used. Whatever plausibility there is in the argument, is in the fact that the defendant must have known the predicament in which the contractors would be put if it withdrew its offer after the bids went in. However, it seems entirely clear that the contractors did not suppose that they accepted the offer merely by putting in their bids. If, for example, the successful one had repudiated the contract with the public authorities after it had been awarded to him, certainly the defendant could not have sued him for a breach. If he had become bankrupt, the defendant could not prove against his estate. It seems plain therefore that there was no contract between them. And if there be any doubt as to this, the language of the offer sets it at rest. The phrase, "if successful in being awarded this contract," is scarcely met by the mere use of the prices in the bids. Surely such a use was not an "award" of the contract to the defendant. Again the phrase, "we are offering these prices for * * * prompt acceptance after the general contract has been awarded," looks to the usual communication of an acceptance, and precludes the idea that the use of the offer in the bidding shall be the equivalent. It may indeed be argued that this last language contemplated no more than an early notice that the offer had been accepted, the actual acceptance being the bid, but that would wrench its natural meaning too far, especially in the light of the preceding phrase. The contractors had a ready escape from their difficulty by insisting upon a contract before they used the figures; and in commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves.

But the plaintiff says that even though no bilateral contract was made, the defendant should be held under the doctrine of "promissory estoppel." This is to be chiefly found in those cases where persons subscribe to a venture, usually charitable, and are held to their promises after it has been completed. It has been applied much more broadly, however, and has now been generalized in section 90, of the Restatement of Contracts. We may arguendo accept it as it there reads, for it does not apply to the case at bar. Offers are ordinarily made in exchange for a consideration, either a counter-promise or some other act which the promisor wishes to secure. In such cases they propose bargains; they presuppose that each promise or performance is an inducement to the other.... But a man may make a promise without expecting an equivalent; a donative promise, conditional or absolute. The common law provided for such by sealed instruments, and it is unfortunate that these are no longer generally available. The doctrine of "promissory estoppel" is to avoid harsh results of allowing the promisor in such a case to repudiate, when the promisee has acted in reliance upon the promise.... But an offer for an exchange is not meant to become a

promise until a consideration has been received, either a counterpromise or whatever else is stipulated. To extend it would be to hold the offeror regardless of the stipulated condition of his offer. In the case at bar the defendant offered to deliver the linoleum in exchange for the plaintiff's acceptance, not for its bid, which was a matter of indifference to it. That offer could become a promise to deliver only when the equivalent was received; that is, when the plaintiff promised to take and pay for it. There is no room in such a situation for the doctrine of "promissory estoppel."

Nor can the offer be regarded as of an option, giving the plaintiff the right seasonably to accept the linoleum at the quoted prices if its bid was accepted, but not binding it to take and pay, if it could get a better bargain elsewhere. There is not the least reason to suppose that the defendant meant to subject itself to such a one-sided obligation. True, if so construed, the doctrine of "promissory estoppel" might apply, the plaintiff having acted in reliance upon it, though, so far as we have found, the decisions are otherwise.... As to that, however, we need not declare ourselves.

Judgment affirmed.

Roger J. Traynor: Roger Traynor served as an Associate Justice of the California Supreme Court from 1940 until 1964, and then as the Court's Chief Justice until his retirement in 1970. Traynor made notable contributions to contract and criminal law. But he is perhaps best known for his tort and product liability opinions, which helped establish the principle of strict liability. Traynor graduated from the University of California at Berkeley in 1923, earning both his Ph.D. (1926) and his J.D. (1927) there as well. He was editor-in-chief of the California

Law Review and taught political science at Berkeley from 1926 until his appointment to the bench in 1940. Traynor was born in Park City, Utah in 1900. He died in 1983.

Drennan v. Star Paving Co.

Supreme Court of California, 1958.
51 Cal.2d 409, 333 P.2d 757.

TRAYNOR, JUSTICE. Defendant appeals from a judgment for plaintiff in an action to recover damages caused by defendant's refusal to perform certain paving work according to a bid it submitted to plaintiff.

On July 28, 1955, plaintiff, a licensed general contractor, was preparing a bid on the "Monte Vista School Job" in the Lancaster school district. Bids had to be submitted before 8:00 p.m. Plaintiff testified that it was customary in that area for general contractors to receive the bids of subcontractors by telephone on the day set for bidding and to rely on them in computing their own bids. Thus on that day plaintiff's secretary, Mrs. Johnson, received by telephone between fifty and seventy-five subcontractors' bids for various parts of the school job. As each bid came in, she wrote it on a special form, which she brought into plaintiff's office. He then posted it on a master cost sheet setting forth the names and bids of all subcontractors. His own bid had to include the names of subcontractors who were to perform one-half of one percent or more of the construction work, and he had also to provide a bidder's bond of ten percent of his total bid of $317,285 as a guarantee that he would enter the contract if awarded the work.

Late in the afternoon, Mrs. Johnson had a telephone conversation with Kenneth R. Hoon, an estimator for defendant. He gave his name and telephone number and stated that he was bidding for defendant for the paving work at the Monte Vista School according to plans and specifications and that his bid was $7,131.60. At Mrs. Johnson's request he repeated his bid. Plaintiff listened to the bid over an extension telephone in his office and posted it on the master sheet after receiving the bid form from Mrs. Johnson. Defendant's was the lowest bid for the paving. Plaintiff computed his own bid accordingly and submitted it with the name of defendant as the subcontractor for the paving. When the bids were opened on July 28th, plaintiff's proved to be the lowest, and he was awarded the contract.

On his way to Los Angeles the next morning plaintiff stopped at defendant's office. The first person he met was defendant's construction engineer, Mr. Oppenheimer. Plaintiff testified: "I introduced myself and he immediately told me that they had made a mistake in their bid to me the night before, they couldn't do it for the price they had bid, and I told him I would expect him to carry through with their original bid because I had used it in compiling my bid and the job was being awarded them. And I would have to go and do the job according to my bid and I would expect them to do the same."

Defendant refused to do the paving work for less than $15,000. Plaintiff testified that he "got figures from other people" and after trying

for several months to get as low a bid as possible engaged L & H Paving Company, a firm in Lancaster, to do the work for $10,948.60.

The trial court found on substantial evidence that defendant made a definite offer to do the paving on the Monte Vista job according to the plans and specifications for $7,131.60, and that plaintiff relied on defendant's bid in computing his own bid for the school job and naming defendant therein as the subcontractor for the paving work. Accordingly, it entered judgment for plaintiff in the amount of $3,817.00 (the difference between defendant's bid and the cost of the paving to plaintiff) plus costs.

Defendant contends that there was no enforceable contract between the parties on the ground that it made a revocable offer and revoked it before plaintiff communicated his acceptance to defendant.

There is no evidence that defendant offered to make its bid irrevocable in exchange for plaintiff's use of its figures in computing his bid. Nor is there evidence that would warrant interpreting plaintiff's use of defendant's bid as the acceptance thereof, binding plaintiff, on condition he received the main contract, to award the subcontract to defendant. In sum, there was neither an option supported by consideration nor a bilateral contract binding on both parties.

Plaintiff contends, however, that he relied to his detriment on defendant's offer and that defendant must therefore answer in damages for its refusal to perform. Thus the question is squarely presented: Did plaintiff's reliance make defendant's offer irrevocable?

Section 90 of the Restatement of Contracts states: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." This rule applies in this state. . . .

Defendant's offer constituted a promise to perform on such conditions as were stated expressly or by implication therein or annexed thereto by operation of law. . . . Defendant had reason to expect that if its bid proved the lowest it would be used by plaintiff. It induced "action * * * of a definite and substantial character on the part of the promisee."

Had defendant's bid expressly stated or clearly implied that it was revocable at any time before acceptance we would treat it accordingly. It was silent on revocation, however, and we must therefore determine whether there are conditions to the right of revocation imposed by law or reasonably inferable in fact. In the analogous problem of an offer for a unilateral contract, the theory is now obsolete that the offer is revocable at any time before complete performance. Thus section 45 of the Restatement of Contracts provides: "If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time." In explanation, comment *b* states

that the "main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted. Part performance or tender may thus furnish consideration for the subsidiary promise. Moreover, merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding (see § 90)."

Whether implied in fact or law, the subsidiary promise serves to preclude the injustice that would result if the offer could be revoked after the offeree had acted in detrimental reliance thereon. Reasonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis also for implying a subsidiary promise not to revoke an offer for a bilateral contract.

The absence of consideration is not fatal to the enforcement of such a promise. It is true that in the case of unilateral contracts the Restatement finds consideration for the implied subsidiary promise in the part performance of the bargained-for exchange, but its reference to section 90 makes clear that consideration for such a promise is not always necessary. The very purpose of section 90 is to make a promise binding even though there was no consideration "in the sense of something that is bargained for and given in exchange." (See 1 Corbin, Contracts 634 et seq.) Reasonable reliance serves to hold the offeror in lieu of the consideration ordinarily required to make the offer binding. In a case involving similar facts the Supreme Court of South Dakota stated that "we believe that reason and justice demand that the doctrine [of section 90] be applied to the present facts. We cannot believe that by accepting this doctrine as controlling in the state of facts before us we will abolish the requirement of a consideration in contract cases, in any different sense than an ordinary estoppel abolishes some legal requirement in its application. We are of the opinion, therefore, that the defendants in executing the agreement [which was not supported by consideration] made a promise which they should have reasonably expected would induce the plaintiff to submit a bid based thereon to the Government, that such promise did induce this action, and that injustice can be avoided only by enforcement of the promise." Northwestern Engineering Co. v. Ellerman, 69 S.D. 397, 408, 10 N.W.2d 879, 884; see also, Robert Gordon, Inc. v. Ingersoll-Rand Co., 7 Cir., 117 F.2d 654, 661; cf. James Baird Co. v. Gimbel Bros., 2 Cir., 64 F.2d 344.

When plaintiff used defendant's offer in computing his own bid, he bound himself to perform in reliance on defendant's terms. Though defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it would be used or not. On the contrary it is reasonable to suppose that defendant submitted its bid to obtain the subcontract. It was bound to realize the substantial possibility that its bid would be the lowest, and that it would be included by plaintiff in his bid. It was to its own interest that the contractor be awarded the general contract; the lower the subcontract bid, the lower the general contractor's bid was likely to be and the greater its chance of acceptance and hence the greater

defendant's chance of getting the paving subcontract. Defendant had reason not only to expect plaintiff to rely on its bid but to want him to. Clearly defendant had a stake in plaintiff's reliance on its bid. Given this interest and the fact that plaintiff is bound by his own bid, it is only fair that plaintiff should have at least an opportunity to accept defendant's bid after the general contract has been awarded to him.

It bears noting that a general contractor is not free to delay acceptance after he has been awarded the general contract in the hope of getting a better price. Nor can he reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer.... In the present case plaintiff promptly informed defendant that plaintiff was being awarded the job and that the subcontract was being awarded to defendant.

Defendant contends, however, that its bid was the result of mistake and that it was therefore entitled to revoke it. * * * Plaintiff, however, had no reason to know that defendant had made a mistake in submitting its bid, since there was usually a variance of 160 per cent between the highest and lowest bids for paving in the desert around Lancaster. He committed himself to performing the main contract in reliance on defendant's figures. Under these circumstances defendant's mistake, far from relieving it of its obligation, constitutes an additional reason for enforcing it, for it misled plaintiff as to the cost of doing the paving. Even had it been clearly understood that defendant's offer was revocable until accepted, it would not necessarily follow that defendant had no duty to exercise reasonable care in preparing its bid. It presented its bid with knowledge of the substantial possibility that it would be used by plaintiff; it could foresee the harm that would ensue from an erroneous underestimate of the cost. Moreover, it was motivated by its own business interest. Whether or not these considerations alone would justify recovery for negligence had the case been tried on that theory (see Biakanja v. Irving, 49 Cal.2d 647, 650, 320 P.2d 16), they are persuasive that defendant's mistake should not defeat recovery under the rule of section 90 of the Restatement of Contracts. As between the subcontractor who made the bid and the general contractor who reasonably relied on it, the loss resulting from the mistake should fall on the party who caused it.

* * *

The judgment is affirmed.

NOTES

(1) In *Drennan,* Judge Traynor observes that "there was neither an option supported by consideration nor a bilateral contract binding on both parties." He then proceeds to create an option under promissory estoppel doctrine. How does he avoid Judge Hand's reasoning in *Baird*? For what reasons and by what methodology is the option created? What is the scope of the protection afforded the general contractor by the option?