
CONTRACT — OFFER AND ACCEPTANCE — PLACE OF
CONTRACTING — COMMUNICATION BY "TELEX"

Both plaintiffs in London and defendant's agents in Amsterdam had in their offices equipment known as Telex service by which messages could be dispatched by a teleprinter operated like a typewriter in one country and almost instantaneously received and typed in another. The plaintiffs desired to make a contract with the defendant's agents in Amsterdam for the purchase of copper cathodes from the defendant corporation. A series of communications by Telex passed between the plaintiffs and the defendant's agents, the material ones for the present purposes being a counter-offer made by the plaintiffs on September 8, 1954 and an acceptance of that offer by the Dutch agents on behalf of the defendant received by the plaintiffs in London by Telex on September 10, 1954. The plaintiffs alleged there had been a breach of the contract by the defendant. They applied under Order 11, rule 1 of the English Rules of Court for leave to serve notice of a writ on the defendant in New York on the ground that the contract was made in England. It was contended for the defendant that the contract was made in Holland. The application was granted by a master whose decision was affirmed by Donovan, J. The Court of Appeal affirmed Donovan, J.'s decision unanimously. *Entores v. Miles Far East Corporation*, [1955] 3 W. L. R. 48.

Order 11, rule 1 of the English Rules of Court provides in part that service out of the jurisdiction of a notice of a writ of summons may be allowed by the Court or Judge in an action to recover damages for the breach of a contract made within the jurisdiction.¹ Thus in this case the order could be granted if it were held that the contract was made when the message appeared on the Telex receiver in London, but not if the acceptance was effective on its transmission in Holland.

The general rule is that acceptance of an offer of a bilateral contract must be communicated to the offeror unless he has waived such communication by indicating some other mode. It would follow that the place of making is the place of receipt. Where, however, an offer is made by post, the rule is that the contract is concluded when and presumably where the letter of acceptance is posted. The Court of Appeal had to decide whether communication by Telex fell within the general rule or was so closely analogous to postal communication as to fall within that special category. Guidance could be sought in cases dealing with telephonic and telegraphic communication.

1. R. S. C., Ord. 11, s. 1. (e) (i).

The law concerning telephonic and telegraphic communications is, however, not clear. The case law seemed to show a tendency to treat these cases as being similar in effect to the letter cases. In *Cowan v. O'Connor*,² for example, it was held that acceptance of an offer by telegram is made when and where the acceptance is handed to the telegraph company for transmission. Hawkins, J. said:

"I think that where, as here, a person opens a correspondence and initiates a transaction by telegram he must be treated as though he were, through it, speaking to the person to whom such telegram is directed, at the place to which he directs it to be sent, and where he intends it to be delivered; and if he desires a reply by telegram, such a reply must be considered as given to him at the telegraph office from whence such reply is despatched."³

The same principle was applied in *Carow Towing Co. v. The "Ed McWilliams,"*⁴ a telephone case. It was held that a contract proposed and accepted over the telephone is made where the words of acceptance are spoken. In the Exchequer Court, Hodgins, J. said: "His reply at the telephone is of the same effect as if he had posted a letter or sent off a telegram from an office in Ontario."⁵ Professors Williston and Winfield have, however, taken a different view on the time and place of making a contract by telephone. Professor Winfield has written:

"It is submitted that there is no communication until the reply actually comes to the knowledge of the offeror. In the first place, the telephone is much more like conversation face to face than an exchange of letters. It is a mere technicality to say that just because the Post Office has control of the telephone, it ought to be subject to exactly the same rules as govern letters . . . the rule about acceptance by post was laid down before the telephone was generally known or used."⁶

Professor Williston expressed the hope that ". . . the principles applicable to contracts between parties in the presence of each other will be applied to negotiations by telephone."⁷

The telephone and telegraph cases could give the court no sure guidance in the present case. Denning, L. J., said, ". . . There is no clear rule about contracts made by telephone or by Telex."⁸ But contracts by Telex, being instantaneous, fell more naturally, he thought, within the general rule governing acceptance. The conclusion he reached was:

2. (1888) 20 Q. B. D. 640.

3. *Ibid.*, at p. 642.

4. (1919) 46 D. L. R. 506.

5. *Ibid.*, at p. 508.

6. Winfield, *Some Aspects of Offer and Acceptance*, (1939) 55 Law Q. Rev. 499, at p. 514.

7. Williston on Contracts (Revised ed. 1936), s. 82, p. 239.

8. [1955] 3 W. L. R. 48, at p. 50.

“ . . . that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror: and the contract is made at the place where the acceptance is received.”⁹

Birkett, L. J. agreed:

“The ordinary rule of law, to which the special considerations governing contracts by post are exceptions, is that the acceptance of an offer must be communicated to the offeror, and the place where the contract is made is the place where the offeror receives the notification of the acceptance by the offeree.”¹⁰

Parker, L. J. referred to the judgment of Thesiger, L. J. in *Household Fire and Carriage Accident Insurance Co. v. Grant*,¹¹ “. . . in which he points out that where the parties are at a distance the balance of convenience dictates that the contract shall be deemed complete when the acceptance is handed to the Post Office.”¹² But in contracts made by instantaneous communication there is no need for any such rule of convenience; the normal rule governing the formation of contracts should apply.

This case is important because of the international scope of modern business and its use of methods of instantaneous communication. The case has laid down a workable principle logically arrived at.

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9. *Ibid.*, at p. 51.

10. *Ibid.*, at p. 53.

11. (1879) 4 Ex. D. 216.

12. [1955] 3 W. L. R. 48, at p. 54.