COMMERCIAL LAW

VI. CONTRACTS BY CORRESPONDENCE

A great many contracts are made by correspondence. A person writes a letter to another offering to sell him merchandise at a stated price. The other replies saying that he will accept the offer. Is a contract made at the time of writing his letter and putting it into the post-office, or not until it is received by the person who made the offer? The law in this country is that a contract is made between two persons in that way as soon as the answer is written and put into the post-office beyond the reach of the acceptor.

The post-office usually is the agent of the person who uses it, but when a person sends an offer to another by mail the post-office is regarded a little differently. It is the agent of the person who sends the offer and also his agent in bringing back the reply. Consequently, when this is put into the hands of the agent the law regards the offerer as bound by his offer. In like manner, if a creditor should send a letter to his debtor asking him to send a cheque for his debt and he should comply, the post-office would be the agent of the creditor in carrying that cheque, because he requested his debtor to use this means in sending his cheque to him. But when a request is not made and a debtor sends a cheque on his own account, the post-office is his agent for carrying it to his creditor.

A person making an offer by letter can of course withdraw it through the telephone or telegraph if he likes at any time before the letter has been received by the other party. Suppose the price of things is rising and A, finding that his goods are also advancing, should, after making an offer of some of them by letter, send a telegram stating what he had written and withdrawing his offer. This would be a proper thing for him to do. If, on the other hand, A's offer had been received by B before his withdrawal and accepted, then A would be bound by it.

Can B, after mailing his letter of acceptance and before it has been received by A, withdraw his acceptance? No, he cannot — for the reason above given, that the post-office is the agent of A, in carrying both his offer and B's reply. If this were not so, if the post-office were the agent of B in sending his reply, then of course it could be revoked or withdrawn at any time before it reached A.

Suppose A should send an offer and afterward a withdrawal and the withdrawal should be received first. Notwithstanding this, however, if the person to whom the offer was sent should accept the offer, could he not bind A? One can readily see that all the proof would be in the possession of B, the acceptor. If he were a man without regard for his honour and insisted that he received the offer first, A might be unable to offer any proof to the contrary and fail to win his case should B sue him. But the principle of law is plain enough; the only difficulty is in its application. Doubtless cases of this kind constantly happen in which the acceptor has taken advantage of the other to assent to an offer actually received after its withdrawal.

Suppose B should in fact receive A's offer first in consequence of the neglect of the telegraph company to deliver A's message of withdrawal promptly, which if delivered as it should have been would have reached B

before the letter containing the offer, what then? A doubtless would be bound by his offer, but perhaps he could look to the telegraph company for any loss growing out of the affair. If he could show that he had been injured by fulfilling the contract the telegraph company might be obliged to pay this.

Let us carry the inquiry a little further. Suppose the messenger on receiving the telegram took it to B's office and it was closed and he made diligent inquiry concerning B's whereabouts and was unable to find him. Suppose he had gone off to a horse race or to a football game, would it be the duty of the messenger boy to hunt him up at one of these places? By no means. If B was not at his place of business when he ought to have been, the company would not be bound to deliver the message to him elsewhere, except at his house, unless he had left a special direction with the company concerning its delivery. Generally a telegraph company states very clearly its mode of delivering messages and the time when it will do so, the place, etc., to which it will take them, and it is not obliged to hunt all over creation to find the person to whom a message is addressed. That would be a very unreasonable rule to apply. Therefore, if the company did its duty A could not recover anything from it. Would A, then, it may be asked, be obliged to fulfil his contract with B? He has sent his withdrawal, which if delivered in time would have been received by B before the letter containing the offer. B, however, is away from his place of business, and perhaps is where he ought not to be — perhaps he is playing poker or doing something worse — ought A under such circumstances to be held by his offer? This is a closer question and one that we will leave our readers to think over. Surely A would have a strong reason for claiming that he ought not to be held under such conditions.

A person who makes an offer cannot turn it into an acceptance. An old uncle offered by letter to buy his nephew's horse for $100, adding: "If I hear no more about the matter I consider the horse as mine." The uncle, not hearing from the nephew, proceeded to take the horse. At this stage of the proceedings, however, the nephew was not inclined to suffer his good old uncle to make the contract entirely himself, and refused to give up the horse. The court said that one person could not do all the contracting himself, and this is what he virtually undertook to do. If a person could, by correspondence or otherwise, make a contract in this manner, one can readily see the dangers that might follow. Some positive act must be put forth by the other party showing or indicating his assent before it will be regarded as given. A person, in truth, is not obliged to pay any attention to an offer of this kind.

Rewards are often made. They are found almost every day among the newspaper advertisements. These are binding under various conditions. An interesting question has been raised in the case of a runaway horse whose owner has made an offer to any finder who returns him. Suppose a person at the time of catching the animal did not know of the reward but does know of it when returning the beast to his owner; can he claim the reward? This question has somewhat puzzled the judges, but the more recent opinion is that the catcher can claim the reward like a person who knew at the time of stopping the pleasure of the runaway. Of course, there is no question concerning these rewards when they are known at the time of acting on them.

In one of the cases tried not long since, an old farmer offered a reward of $15 to any one who would find the person who had stolen his harness and also $100 to the man who would prosecute the thief. The harness, in truth,

was worth not even this small sum and the thief still less. Yet he was caught and prosecuted, and then the prosecutor and finder claimed the rewards. The farmer's excitement had cooled off by this time and he was not so loud and liberal as he was at the time of finding out his loss. He refused to pay, saying that he did not really mean to offer these sums as rewards, and the court decided in his favour, declaring that his offer of reward could not be regarded strictly as one, but rather "as an explosion of wrath." In another case a man's house was burning up and his wife was inside, and he offered any one $5000 who would go in and bring her out — "dead or alive." A brave fellow went in and rescued her. Then he claimed the reward. Was the man who made the offer obliged to pay, and could he not have escaped by insisting that this was simply "an explosion of affection" and not strictly an offer or promise of reward? He tried to hold on to his money, but the court held that this was an offer he must pay. Possibly after the recovery of his wife his valuation of her had changed somewhat from what it was while his house was burning up.

One or two more cases may be given. Some persons who prepared "carbolic-smoke balls" offered to pay £100 to any person who contracted influenza after having used one of the balls in the manner clearly set forth and for a stated period. This offer was in the form of a newspaper advertisement. A person bought one of them and followed carefully all the directions about its use. The influenza, though, did not disappear as advertised, so he sued to recover the offer; and, having proved clearly that he had complied faithfully with the directions and had not been cured, the court said that the owners must pay up and compelled them to give him the £100 offered.

Another case may be briefly mentioned. A offered to sell B his farm for $1000. B offered $950, which offer

was declined. Then B offered to pay $1000. By that time A had changed his mind and declined to accept B's offer. Then B sued to get the farm, offering to pay the money; but the court held that B had declined A's offer and consequently that, as A had not made any other offer, there was no contract.

Finally, it may be added that the phrase "by return mail" does not always mean by the next mail, although the person to whom the offer is made cannot delay his answer long. On the other hand, the person to whom such a letter may be addressed can bind the other by an acceptance very quickly after the receipt of the offer, although not literally by the first mail going out.

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VII. WHAT CONTRACTS MUST BE IN WRITING

Some contracts must be in writing to be valid; for instance, contracts relating to the sale and leasing of lands. This writing must be signed by the person who is charged with having made it. Suppose that A has sold his farm to B for an agreed sum and refuses to give him a deed on his payment of the amount or offer to pay, and B wishes to compel A to carry out or execute his agreement. B must show a writing signed by A to that effect, otherwise the court will not pay any attention to the matter. On the other hand, if A claims that such an agreement has been made with B, who is unwilling to pay the money and receive the deed, he must show in court a writing signed by B that he has agreed to purchase the farm at a stated price and to receive a deed of the same. If such a writing is not forthcoming when required, he cannot recover anything from him. This is the meaning of the phrase, therefore, that a writing must be signed by the party charged with having made the agreement.

The writing need not be very formal. It need not specify the amount that is to be paid; in other words, it need not specify the consideration. Some courts say, however, that it must contain this fact or statement. It may be in pencil. I presume it would be sufficient if

written on a blackboard with chalk. But it must be a writing of some kind signed by the party to be charged; that is the essential thing. The courts have also said that this writing need not be on a single piece of paper. If the two parties have made an agreement by a series of letters, an offer on the one side and an acceptance on the other, and the agreement can be fully shown from the series of letters, this is sufficient writing.

If a man buys a farm and pays a part of the price and goes away saying that he will pay the remainder within a week, expecting then to do so and receive a deed, the seller, if he chooses, can escape giving that deed and parting with his farm. The payment of a part of the money does not bind the bargain, nor will the courts, though knowing this, compel the seller to give such a deed. The reader may ask, if this is the law, cannot the farmer practise a fraud on the buyer by receiving his money and keeping it and the farm too? He cannot do both things. If he refuses to give the deed he must, on the other hand, return the money; if he refuses to do this the buyer can compel him by a proper legal proceeding to refund the amount. In this way the buyer gets his money back again, but not the farm that he bought.

It is said that this statute is as often used as a shield to protect men in doing wrong as in preventing frauds. In numberless cases persons, just like the farmer imagined, have used this statute as a means to protect them in not carrying out their agreements. This happens every day.

This statute also relates to other matters. One clause says that an executor or administrator cannot be required to pay anything at all out of his own pocket on any promise that he has made unless it be in writing. Every one knows about the duties of an executor or administrator. An executor is one who settles the estate of a person who

has died leaving a will directing what shall be done with his wealth. An administrator is a person who settles the estate of a deceased person leaving no will. He is appointed by the law, which fully states his duties. Let us suppose that an executor is employed to settle an estate, and that he employs a carpenter to make some repairs on a house belonging to the estate. The contract is fairly enough made between the carpenter and the executor. Let us also suppose that he has no lien on the house for the work that he has done, or that he has lost his lien by reason of not having filed it in time, as the law requires. Afterward he goes to the executor and demands payment for the repairs that he has made. Let us suppose that the estate is insolvent and cannot pay all of its debts in full. At the time of making this contract neither party supposed this would happen. But, unhappily, debts have come to light so large and numerous that there is not property enough to pay all the creditors everything that is due them. The executor says to the carpenter: "There is not property enough to pay all of the creditors and you, unfortunately, must fare like all of the rest, and you cannot be paid a larger percentage on your share than the others." To the carpenter this would be unwelcome news, and he would doubtless say to the executor: "I made this contract with you expecting that you would pay me, and if the property of the estate is not sufficient you ought to pay me this. I am a poor man and cannot afford to lose any of my hard-earned money." The executor might say to him: "I am as poor as you and I cannot afford to pay you out of my own pocket, and in law you cannot compel me to do this." And, in truth, the carpenter could not do this unless the executor had made a contract in writing, agreeing in any event to pay whether there was money enough belonging to the estate or not.

Another clause says that *a person cannot be required to pay the debt of another unless the agreement is in writing.* If A went into a store to buy goods and B should be a little afraid to trust him, and C, a friend of A's, should happen to be present and say to the merchant, "Let A have these goods and if he does not pay you I will," this would be the promise to pay the debt of another; and if A should not pay it C could shield himself behind this statute and escape without paying anything.

There is another clause relating to the sale of ordinary merchandise. The law says that *contracts for ordinary merchandise must be in writing if the amount is over* $50. In some States the amount is $35. Long ago it was decided that this statute did not relate to contracts for work, and they therefore must be carried out or fulfilled in the same manner as though no statute existed, *for work is not merchandise.*

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VIII. CONTRACTS FOR THE SALE OF MERCHANDISE

TO make a contract of sale there must be, as we have seen, two or more parties, and a consideration must also be given. The sale is complete when the *property*, or *title*, or *ownership* in the thing bought passes from the seller to the buyer. It is not necessary in order to make a valid sale to deliver the thing bought. If the *title* or *ownership* in the thing is not transferred, the sale still remains incomplete.

The law supposes or assumes that a person will always pay for a thing purchased. If I should go into a store, inquire the price of a book, and, after learning the price, should say to the salesman, "I will take the book," and he should wrap it up and give it to me and I should then walk out with the book under my arm, he doubtless would come to me and say in his politest manner: "Why, sir, you have forgotten to pay me for it." Suppose I should say: "Oh, yes; but I will come in to-morrow and pay." But if I happened to be a stranger, and especially if there was a suspicious look about me, and he should say they did not give credit in that store, and I was still inclined to walk out with my book, he could insist that there had been no sale and that I must give the book to him. The law would protect him in taking it from me if he did not use undue force. The law assumes, unless

some different rule exists, that the buyer will always pay for the thing purchased, yet in law there is no sale unless the purchase money is actually paid.

Of course, credit may be given in a store — that may be the practice; and if it is understood between buyer and seller that credit is to be given, then a sale is complete as soon as the bargain is struck. Indeed, so complete is the sale that if the buyer should say to the salesman, "I will leave this here and return and take it in a short time," and during his absence the store should be burned up and everything perish, the buyer would be obliged to pay for the book. In other words, after it had been sold, if still kept there the seller would be merely the keeper, or bailee, which is the legal term, and he would be obliged to use only ordinary care in keeping it. Suppose a thief should come in and take it away — would the seller be responsible for the loss? Not if he had used the same care in protecting it as in protecting his own property.

Another illustration may be used to bring out the nature of a sale more clearly. Suppose I have bought a particular work in a store, either paying cash or buying it on credit, if that be the practice of the store, and I should say to the salesman: "I am going down street and on my return will call and take the book." During my absence I meet a friend and tell him of my purchase, and he should say to me: "I am very desirous to get that work; I am sure there is no other copy in town. Will you not sell it to me?" Suppose I gave him an order, directed to the seller, requesting him to deliver the work to the person to whom I have sold it. If he should take the order to the store he could claim the book as his own and the original seller would be obliged to give it to him.

It is very important, however, in many cases *to make a*

delivery of the thing sold. As we have already stated, the title as between the buyer and seller is actually changed or transferred at the time of making the sale and it is therefore complete. But if a delivery of the thing sold is not actually made and another person should come along and wish to buy it, and the seller should prove to be, as he sometimes is, deceitfully wicked, and should sell and deliver it to him, the second buyer would get a good title and could hold it just as securely as though it had not been previously sold to another. Of course, the second buyer must be an innocent person, knowing nothing about the first or prior sale. If he did not know and pays the money for the thing he has bought and takes it away, he gets a perfectly good title as against the first buyer. If he was not innocent the first buyer could claim it and the second one would lose his money unless he was able to get it back again from the seller. Of course, such a transaction is a fraud on the part of the seller. Therefore it is safer in all ordinary transactions for the buyer to take the thing he has purchased unless he is sure that the seller is a perfectly honest man, who will not practise any such fraud upon him.

Suppose the seller had things in his keeping that had been sold but not taken away, and should fail in business, or that persons to whom he owed money should sue him and try to hold not only all of the goods still owned by him but even those which he had sold. Could they succeed as against a person who had bought them in perfectly good faith? It is said that the buyer in such cases can get his goods after clearly showing that he had bought them and paid for them; but the evidence of his purchase must be perfectly clear, otherwise the court will not permit him to take them away and he will lose them.

If a merchant is to deliver a thing as a part of the contract of sale, then, of course, he must do this; otherwise

he is liable for his failure to carry out his contract. This rule applies to most purchases that are made in stores. The merchant intends to deliver the thing sold, the buyer purchases expecting this will be done, and the price paid for them is enough to cover the cost of taking them to the buyer's house; in other words, the price of the goods, whatever it may be, is intended to be enough to pay the merchant for his cost in delivering them, and in such cases the contract is not complete until a delivery has actually taken place.

Again, if the thing purchased is a part of a mass of goods, a separation must be made to complete the contract. If a man should buy 100 barrels of oil which were a part of 1000 barrels, a separation of some kind must be made of the particular ones sold. If one should buy trees in a nursery, to make the contract complete the particular trees must in some way be known, either by rows or every other tree — in short, in some way the trees must be clearly set apart. If part of a mass of timber is bought, the particular logs must be marked or in some way pointed out from the other part of the mass. This rule applies to all things bought that form a part of a large mass. The mode of pointing them out depends on the nature of the thing; a different kind of separation must be made in some cases from what is necessary in others.