# POSTAL REGULATION 289 AND ACCEPTANCE OF AN OFFER BY POST

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## I

It is essential for the law of Contract to select some occasion or event as the one which converts negotiation into binding agreement. Thus in order to convert an offer into a binding agreement an overt statement or act of acceptance must be communicated to the offeror. The need for the communication of an acceptance is clear.[1] For example, if X offers to sell Y ten cats at £2 each then it is essential for X to know if his offer has been accepted or rejected. If it has been rejected, then he can sell his cats to somebody else. On the other hand, if Y wants to buy the cats it is essential for him to let X know of his acceptance in order that he will not try to sell them elsewhere. If Y assents to the offer but makes no attempt to communicate his acceptance to X then he can not be said to have accepted the offer at all.[2] The law requires the communication of a statement or act of acceptance.

There are, however, two qualifications which must be made to this basic principle. The first of them is that an offeror may, by the terms of his offer, indicate a manner of acceptance which does not require a communication of it to him. Thus the mere performance of some act has been held to constitute an acceptance.[3] This, however, is not really a qualification of the principle at all because it arises from a basic assumption about the nature of contract law. The parties to a contract may provide any rule they choose as to acceptance, but in the absence of such a provision the law must have a rule to work with. Contract, after all, exists as a social institution in order to give effect, within limits, to the intention of the parties.

The second qualification is that whenever a letter[4] is a valid[5] mode of conveying a notification of acceptance, then the contract is completed when the letter is posted. This is the only real qualification of the general rule. It does not depend upon any *a priori* assumptions about contract law but represents a quite arbitrary solution to the

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[1] So obvious that in English law it has been largely a matter of assumption rather than decision. As late as 1867, Baggally Q.C. was able to submit with truth in *Hebb's Case* that 'It has never been decided that notice of acceptance is necessary to complete a contract'. (1867) L.R. 4 Eq. Cases 9, 11. See the remarks of Lord Blackburn in *Brogden v. Metropolitan Railway Co.* [1877] 2 A.C. 666, 692, 698. See further *Entores v. Miles Far East Corporation* [1955] 2 Q.B. 327.

[2] *Brogden v. Metropolitan Railway Co.* [1877] 2 A.C. 666.

[3] *Carlill v. Carbolic Smokeball Co.* [1893] 1 Q.B. 256.

[4] A telegram also comes within the rule.

[5] *I.e.*, whenever this means of communication might reasonably be expected to be used. See *Henthorn v. Fraser* [1892] 2 Ch. 27.

problem of determining at what stage of negotiations, carried on by letter, the parties will be bound. The rule has been subjected to much criticism and this note will be devoted to a discussion of the most recent and ingenious of these criticisms.

## II

The crucial need for some rule to determine at what stage a contract by correspondence is finally binding is highlighted by the following situations:

(a) The lost letter of acceptance.
(b) A revocation of an acceptance which arrives before the acceptance but is despatched later.
(c) A revocation of offer which arrives between despatch of an acceptance and its actual communication.

If the rule adopted is that an acceptance is not effective until it is actually received by the offeror, then in (a) the letter would not constitute an acceptance, and in (b) the revocation would be effective. This solution would operate harshly upon offerees as they would be uncertain for some time as to the receipt or non-receipt of the acceptance. Their position would be one of hope against loss in the mails, or revocation of the offer. On the other hand, if the rule is that an acceptance is effective upon posting, then this uncertainty will be on the offeror. The choice therefore is between fixing an offeror with a contract of which he does not know and fulfilling the expectation of an offeree that there is a binding contract. Neither party is at fault but one must suffer the loss.

It is not surprising that, faced with such a choice between innocent parties, different legal systems have adopted different solutions.[6]

English law adopted the effective upon posting rule[7] and this was followed in Australia,[8] New Zealand,[9] Canada[10] and the United States.[11] The formulation of the rule in England was dependent upon two quite distinct steps.

[6] See Winfield, 'Some Aspects of Offer and Acceptance' (1939) 55 *Law Quarterly Review* 499, 506-508; Nussbaum, 'Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine' (1936) 36 *Columbia Law Review* 920.

[7] *Dunlop v. Higgins* (1848) 1 H.L.C. 381; 9 E.R. 805; *Household Fire Insurance Co. v. Grant* (1879) L.R. 4 Ex. 216; *Henthorn v. Fraser* [1892] 2 Ch. 27.

[8] *Paterson v. Dolman* [1908] V.L.R. 354; *Tooth v. Fleming* (1859) Legge 1152; *Tellerman & Co. v. Nathan's Merchandise* (1957) 31 *Australian Law Journal* 176.

[9] *Wenkheim v. Arndt* 1 J.R. 73; *Sommerville v. Rice* (1911) 31 N.Z.L.R. 370.

[10] *Magann v. Auger* (1901) 31 S.C.R. 186; *Ellard v. Waterloo Manufacturing Co.* [1926] 3 D.L.R. 207; *Charlebois v. Baril* [1927] 3 D.L.R. 762.

[11] *Corbin on Contracts* (1950) i, 245; *Re-statement of the Law of Contracts* s. 64. Only in Massachusetts is the position undecided. *McCulloch v. Eagle Insurance Co.* (1822) 1 Pick. 278, decided the reverse, but it has been doubted in *Brauer v. Shaw* (1897) 168 Mass. 198. It probably is not now the law: see Bergin, 'Offer and Acceptance in Contracts by Correspondence' (1949) 59 *Yale Law Journal* 374, n. 5. However,

The first was the holding by the Court of King's Bench in *Adams v. Lindsell*[12] that an offer made in a letter was capable of acceptance so as to form a binding contract at some time before the actual communication of the acceptance to the offeror. The court[13] held that a letter must be regarded in law as making, during every instant of time it is travelling, the same identical offer to the offeree and that, 'then the contract is completed by the *acceptance* of it by the latter.'[14] All that was required was an *acceptance* on the part of the offeree to conclude the contract.[15] The case does not state what form that acceptance should take, *e.g.*, writing a letter or posting it. The case has, however, been cited by English[16] and American[17] writers as authority for the proposition that an acceptance is binding when it is deposited in the mails. The proposition is a gloss on the word 'acceptance' in the court's judgment and was not established until a much later date.

The second step was the holding that an acceptance was only binding when it was actually deposited in the mails. The history of this rule is very obscure. It is to be found first the subject of an express decision[18] in the judgment of Sir James Wigram V.C. in *Potter v. Sanders*[19] which was decided in 1846. That learned judge said: 'I think the vendor, when he put into the post office the letter to the Plaintiff . . . did an act which, unless it were interrupted in its progress, concluded the contract between himself and the plaintiff.'[20]

In the thirty-three years between this decision and *Household Fire Insurance Co. v. Grant*[21] in 1879, which finally settled the law, the rule had a chequered career which included the blessing of the House of Lords,[22] and disapproval by the Court of Exchequer.[23] After that

for contrary view, see Stimson, 'Effective Time of an Acceptance' (1950) 33 *Minnesota Law Review* 776, 779, n. 12.

[12] (1818) 1 Barn. & Ald. 681.

[13] The members of which do not appear in the report.

[14] *Ibid.* 682. Italics supplied.

[15] As a matter of interest, the question may be asked if it were really necessary for the court to decide this point. The holding depended upon the acceptance by the court of defendant's counsel's submission that a revocation of offer is valid even though uncommunicated. *Cooke v. Oxley* (1790) 100 E.R. 785, and *Payne v. Cave* (1789) 100 E.R. 502, were relied upon by counsel but neither of these cases decided this point. See Lush J. in *Stevenson v. McLean* (1880) 5 Q.B.D. 346, 351. If the court had perceived this then the point decided in *Byrne v. Van Tienhoven* (1880) 49 L.J.Q.B. 316 would have arisen 62 years earlier. The holding that the revocation was ineffective because it was uncommunicated would have meant that there was no reason to adopt the view that there was a binding contract at any time before the actual receipt of the acceptance. It should, however, be noted that there was no guarantee that the court would have so held, as the subjective theory of contract was at its height. Indeed, it is arguable that the court assumed that not even acceptance need be communicated.

[16] See, *e.g.*, Cheshire and Fifoot, *Law of Contract* (4th ed. 1956) 42; Wilson, *Principle of the Law of Contract* (1957) 28.

[17] See, *e.g.*, Bergin, *op. cit.*; (1948) 62 *Harvard Law Review* 1231; Zilber (1956) 54 *Michigan Law Review* 557; (1955) 44 *Kentucky Law Journal* 361.

[18] Reference is made to it in argument in *A.G. v. Sitwell* (1835) 160 E.R. 228, 234.

[19] (1846) 6 Hare 1, 67 E.R. 1057. [20] *Ibid.* 9-10, 1061. [21] (1879) L.R. 4 Ex. D. 216.

[22] *Dunlop v. Higgins* (1848) 1 H.L.C. 381; 9 E.R. 805.

[23] *British and American Telegraph Co. v. Colson* (1871) L.R. 6 Ex. 108.

date, although much criticism was made of the rule, no one had doubted that it was the law.

In 1949, however, the United States Court of Claims, in *Dick v. United States*,[24] handed down a decision that could have the effect of abolishing the effective-upon-despatch rule. The facts of the case were these.

In July 1944, the plaintiff contracted to supply the U.S. Navy with one set of new type propellers to be used on ice-breaking vessels. In December 1944, the Coast Guard opened negotiations with the plaintiff for two sets of propellers of the same type. After an extended exchange of telegraphic communications, in each one of which the plaintiff made some reference to his contract with the Navy, the Coast Guard finally submitted a request for a tender. In January 1945, the plaintiffs submitted a quotation by telegram, which was based on the erroneous assumption that one set of propellers, instead of two, was required. After a further exchange of communications, the plaintiff, on 22 February, telegraphed a revised price which was adopted by the Coast Guard on 24 February, subject to the execution of a formal purchase order to the plaintiff and the plaintiff mailed his acceptance.

While the letter of acceptance was in transit, the plaintiff discovered his mistake and wired the Coast Guard that there had been an error and the price should be doubled. The wire arrived before the letter of acceptance. Being assured by the Coast Guard contracting officer that a new contract would be entered into, the plaintiff manufactured and delivered the propellers. The Government, claiming that the contracting officer had no authority to modify the contract formed when the letter of acceptance was mailed, and pursuant to a ruling by the Comptroller General, paid only the price set forth in the purchase order.

The plaintiff brought an action for the difference between the sum he received and the amount subsequently agreed to by the Coast Guard's contracting officer. The Government demurred to the statement of claim.

The court, in the way it handled the case,[25] had to decide whether the contract was binding when the acceptance was mailed or only when it was actually received as altered. Jones C.J., who delivered the judgment of the majority of the court, answered the argument based on the effective-upon-despatch rule in the following manner:

[24] (1949) 82 Fed. Supp. 326.

[25] Even following the *Dunlop v. Higgins* rule the court could have achieved the same result by different courses. It could have been held that in view of all the conferences, previous contracts and communications, the defendants were aware of the mistake. Again, a similar decision could have been reached by adopting a rule that where revocation of acceptance is received before the acceptance then it is valid. But the court preferred to attack *Dunlop v. Higgins* head on.

> Upon the old authorities the depositing in the mails was final as to both parties. This was on the basis that when a letter was deposited in the mails it was beyond the control of the person mailing it. However some years ago the post office department changed its regulation and provided that anyone depositing a letter in the mail might reclaim it and might even require the Postmaster at the point of sending to wire the Postmaster at its destination to return the letter and that the post office department would be required to return it to the sender.[26]

He therefore held, that as the plaintiff had control over his letter of acceptance up until the moment it was delivered, it was not effective until then.

The Government's demurrer was therefore overruled. Madden J. dissented on the point and preferred to follow the English authorities.

The decision was followed in similar circumstances by the same court[27] in *Rhode Island Tool Co. v. United States*[28] in 1955. Jones C.J. amplified the view he had taken in the earlier case:

> When this new regulation became effective, the entire picture was changed. The sender now does not lose control of the letter the moment it is deposited in the post office, but retains the right of control up to the time of delivery. The acceptance, therefore, is not final until the letter reaches its 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. . . .[29]

Again,

> Under the new regulation, the Post Office Department becomes, in effect, the agency of the sender until actual delivery. . . . To apply an outmoded formula is not only unjust, it runs counter to the whole stream of human experience. It is like insisting on an oxcart as the official means of transportation in the age of the automobile. The cart served a useful purpose in its day, but is now a museum piece.[30]

The importance of these two decisions, as far as Australia is concerned, lies in the fact that in our Commonwealth postal regulations[31] a similar power is to be found. Postal Rule No. 289 (1) provides: 'When the sender of a postal article (other than a parcel) desires to withdraw it from the post before delivery to the addressee he must make application, in writing, to the Director, and furnish such particulars as are required by the Department.'

In seven other sub-rules there is provided a machinery to carry this power into operation. There is no similar power in England.[32]

A question immediately arises as to whether the existence of this power in the Australian postal regulations is sufficient basis for an argu-

[26] (1949) 82 Fed. Supp. 326, 331. [27] This time a three to two decision.
[28] (1955) 128 Fed. Supp. 417. [29] *Ibid.* 419. [30] *Ibid.* 420.
[31] Commonwealth of Australia, *Post Office Guide* 1955.
[32] Halsbury, *Laws of England* (2nd ed. 1937) xxv, 472.

ment as to the inapplicability of the effective-upon-despatch rule. As both *Dick v. United States* and the *Rhode Island Tool Case* base themselves on an explanation of the rule in terms of the lack of control over a letter despatched by the acceptor, some investigation of the reasons that have been given for the existence of the rule is called for.

## III

There seem to have been three principal reasons given for the existence of the effective-upon-despatch rule. The first is what might conveniently be called the 'agency' argument. In this view the offeror has constituted the post office as his agent for delivery and therefore he has notice of the acceptance as soon as it is placed in the post box. There is also a variation of this argument which treats the post office as the common agent of both parties.[33] The argument is clearly artificial and has been the subject of much criticism. It requires little argument to demonstrate that the post office is no-one's 'agent', but is a public institution under a public duty to carry the mails.[34] This has been pointed out by Kay L.J. in *Henthorn v. Fraser*[35] where he says:

> That reason is not satisfactory. The Post Office are only carriers between them. They are agents to convey the communication, not to receive it. . . . The difference is between saying, 'Tell my agent A., if you accept', and 'Send your answer to me by A.' In the former case A. is to be the intelligent recipient of the acceptance, in the latter he is only to convey the communication to the person making the offer which he may do by letter, knowing nothing of its contents. The Post Office are only agents in the latter sense.

It seems that an explanation of the rule on this basis would be quite fictional and provide no compelling reason for its existence.

The second explanation that is to be found in the cases is formulated in terms of the lack of control over an acceptance once it has been despatched. Lord Cottenham has put this view as follows:

> If a party does all that he can do, that is all that is called for. If there is a usage of trade to accept such an offer, and to return an answer to such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done everything he was bound to do? How can he be responsible for that over which he has no control?[36]

This argument depends upon the assumption that the acceptor cannot retract his acceptance from the mails. It has been the reasoning most relied[37] upon in the English cases and provided the basis for

[33] See, *e.g.*, *Hebb's Case* (1867) L.R. 4 Eq. Cases 9, 12; *Household Fire Insurance Co. v. Grant* (1879) L.R. 4 Ex. 216, 223; *Henthorn v. Fraser* [1892] 2 Ch. 27, 32; *In Re London and Northern Bank* [1900] 1 Ch. 220, 224.

[34] Mechum, *Agency* (2nd ed. 1914) i, s. 41; *Corbin on Contracts* (Revised ed. 1950) i, 247.

[35] [1892] 2 Ch. 27, 35.

[36] *Dunlop v. Higgins* (1848) 1 H.L.C. 381, 398; 9 E.R. 805, 812.

[37] See *Wall's Case* (1872) L.R. 15 Eq. Cases 18, 25; *Potter v. Sanders* (1846) 6 Hare 1, 9-10; 67 E.R. 1057, 1060; *Ex parte Cote* (1873) L.R. 9 Ch. App. 27, 32.

the decision in *ex parte Cote.*[38] In that case the question before the court was whether certain bills were a part of a bankrupt's assets. C. had posted to D. five bills from a post office in France. Before the mail had left the post office C. applied to have the letters returned to him. However, due to a clerk's mistake, they were not returned to him but sent on to D.

The rules of the French Post Office permitted this withdrawal at any time before it was despatched from the office where it was posted.

Sir G. Mellish L.J. in the course of his judgment said: 'I am inclined to think that the effect of that rule is that the post office is the agent of the sender of the letter *until it leaves the town,* and that the indorsement of the bills contained in it is not complete till the letter is despatched from the town'.[39] The use of the word 'agent' is merely to show that the sender retains control over the letter until it leaves the town.

If this reasoning is accepted as being the sole foundation of the effective-upon-despatch rule, then the existence of the power of recovery from the mails under the Commonwealth Postal Regulations must logically cast doubt on its very existence.

But there has been a third justification of the rule, that is couched in terms of practical utility. It is argued that the rule permits the offeree to make immediate commitments in reliance on there being a contract in existence.[40] If the rule were otherwise, then there would be a period of uncertainty. The offeror could not rely upon the acceptance as it would be unknown to him, and neither could the offeree as he could be thwarted by an exercise of the power of revocation.

This was possibly in Lord Cottenham's mind when he asserted that 'Common sense tells us that transactions cannot go on without such a rule'.[41]

Thus two foundations have been found for the effective-upon-despatch rule, one in terms of the lack of control of the acceptor and the other in terms of commercial certainty. The explanation of the rule as depending upon a lack of control by the acceptor cannot, in view of the power of withdrawal from the mails that exists in Australia, be accepted as satisfactory. We are therefore left with the rule as an expression of commercial certainty. Perhaps this is the reason why the *Dick* and *Rhode Island* cases were not a death blow to the rule in the United States.[42] It rested upon firmer foundations than a test of control.

[38] *Supra,* n. 37.
[39] (1873) L.R. 9 Ch. App. 27, 32. Italics supplied.
[40] P. H. Winfield, 'Some Aspects of Offer and Acceptance' (1939) 55 *Law Quarterly Review* 499, 505-515; Llewellyn, 'Our Case Law of Contract' (1938) 48 *Yale Law Journal* 779, 795.
[41] (1848) 1 H.L.C. 381, 400; 9 E.R. 805, 813.
[42] There has been no following of the decisions in the United States. See Zilber,

When a letter of acceptance is lost or delayed in the mails, then the consequences of that loss or delay must be borne by the offeror or the offeree. One factor that has led the law to choose the offeror is because the offeree is relying upon the existence of a contract from the moment he sends his letter of acceptance. The offeror, on the other hand, is merely awaiting an answer which in 999 cases out of 1,000 will reach him. The rule therefore protects the offeree in *all* cases whereas hardship will only be caused to the offeror in a few. Another consideration to be borne in mind is that in every case the offeror could make it a term of the offer that an acceptance be actually communicated to him. It may be argued that the law should not protect him if he has not protected himself. Again, if the contract is not to be regarded as binding until the acceptance is actually communicated, then there will be a long period of uncertainty before the offeree receives acknowledgment of the receipt of the acceptance.

These sorts of considerations seem to be the commercial reasons which underlie the effective-upon-despatch rule. It is true that they have been the subject of criticism by learned judges and writers,[43] but the merit of that criticism will not be the subject of discussion here. It is enough to meet the point made by the United States Court of Claims, and by the Court of Appeal in *ex parte Cote,* that there are other reasons for the existence of the rule. The mere fact that the offeree has a power to remove his letter of acceptance from the mails does not automatically remove the whole basis of the effective-upon-despatch rule.

The present writer has tried to recover six letters from the mails under postal rule No. 289, and on each occasion has been unsuccessful. It would indeed be strange if the theoretical right to such a cumbersome method of recovery had the effect of abolishing a rule which has stood in English law at least since 1846.

## IV

Even if it is accepted that the mere existence of Postal Regulation 289 does not abolish the rule, then there still remains the problem presented by an actual operation of this power in a given case. What will be the legal consequences of a letter of acceptance being withdrawn from the mails prior to its delivery to the offeror? This problem

*op. cit.*, 557-559. Williston states emphatically that the right to remove a letter from the mails should in no way affect the rule. *Contracts* (Revised ed. 1930) i, s. 86. Both cases have been criticized. See *e.g.* (1949) 35 *Virginia Law Review* 508; Weinberg (1949) 18 *University of Cincinnati Law Review* 381; Bergin, *op. cit.* (1948) 62 *Harvard Law Review* 1231; Zilber, *op. cit.*

[43] *British and American Telegraph Co. v. Colson* (1871) L.R. 6 Ex. D. 108; *Household Fire Insurance Co. v. Grant* (1879) L.R. 4 Ex. 216, 232, *per* Bramwell L.J. (dissenting); Langdell, *Summary of The Law of Contract* (2nd ed. 1880) 20 ff; Stimson, *op. cit.;* Nussbaum, 'Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine' (1936) 36 *Columbia Law Review* 920.

is similar to the one where an offeree by telephone or telegram purports to recall an acceptance after it is posted but before it reaches the offeror. The question in both cases is the same; can an offeree ever revoke an acceptance once it has been posted? There seem to have been only two cases where the point has been raised.[44] As the solutions propounded in both cases are divergent and both are of slight authority in Australia, the question must be answered as a matter of general principle. Most writers suggest that the effective-upon-despatch rule means what it says and that the revocation cannot be of any effect because a binding contract is already completed when the acceptance is put into the post box.[45] The argument runs that to allow the revocation to take effect would be to give the offeree the best of both worlds. He has the choice of either holding the offeror to the contract or recalling his acceptance by telegram or telephone. With respect, the present writer has never been able to appreciate the conclusiveness of this argument. It is true that a contrary view would allow the offeree to change his mind but the question may be asked if this really matters. The offeror will, in point of fact, receive the notification of rejection of the offer at a time before he would have received the acceptance, so he will be in no worse position. The offeror is not relying on anything but merely keeping the bargain open during this period. He will actually be in a better position if the revocation is effective because he will know at an earlier point of time what his position is. The period of 'offeror-uncertainty' will thus be reduced.

There is, however, a much more fundamental objection to the acceptance-on-despatch rule in this area. The whole basis of that rule is, as has been pointed out above, to protect the offeree as against the offeror. Why should that rule apply when the offeree has made his own arrangements about his protection? It is submitted that to apply the rule to these problems would be purely mechanistic and without any regard to the realities of the situation.

If this conclusion is accepted, then it is interesting to note that the decisions in *Dick v. United States* and *Rhode Island Tool Co. v. United States* were perfectly correct. It is suggested that the mistake made by the United States Court of Claims was to attack the whole effective-upon-despatch rule, instead of deciding that it simply didn't apply to revocation of acceptance problems.

The exercise of the power contained in Postal Rule 289 may therefore be regarded as an exception to the rule in *Dunlop v. Higgins*.

[44] *Dunmore (Countess) v. Alexander* (1830) 9 Sh. (Ct. of Sess.) 190; *Wenkheim v. Arndt* (N.Z.) 1 J.R. 73.

[45] See, *e.g.*, *Benjamin on Sale* (8th ed. 1950) 83; Cheshire and Fifoot, *Law of Contract* (4th ed. 1956) 44; *contra 3rd ed.* (1952) 38.