

G156 LAW OF CONTRACT
SPECIAL STUDY MATERIAL

SOURCE MATERIAL

SOURCE 1

Extract adapted from the judgment of Lord Justice Bowen in *Carlill v Carbolic Smoke Ball Co.* [1893] 1 QB 256 CA.

The defendants produced and sold a patent medicine called the 'Carbolic Smoke Ball'. In their advertisement ... they stated that anybody who used it for a prescribed period in the prescribed manner and still caught flu would receive £100 [and] that they had lodged £1,000 at a bank for such purposes. The plaintiff used the medicine in the prescribed manner and still caught flu, and so wished to claim the £100. The company claimed that ... they had no contract with Mrs Carlill ... since they had made no offer directly to her which she could then accept. The Court of Appeal held that there was indeed a contract based on acceptance of a unilateral offer. 5

BOWEN LJ:

The first observation which arises is that the document itself is not a contract at all, it is only an offer made to the public. The defendants contend next, that it is an offer the terms of which are too vague to be treated as a definite offer, inasmuch as there is no limit of time fixed for the catching of the influenza, and it cannot be supposed that the advertisers seriously promised to pay money to every person who catches the influenza at any time after the inhaling of the smoke ball. It was urged also, that if you look at this document you will find much vagueness as to the persons with whom the contract was intended to be made – that, in the first place, its terms are wide enough to include persons who may have used the smoke ball before the advertisement was issued; at all events, that it is an offer to the world in general, and, also, that it was unreasonable to suppose it to be a definite offer, because nobody in their senses would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense. It seems to me that in order to arrive at a right conclusion we must read this advertisement in its plain meaning, as the public would understand it. It was intended unquestionably to have some effect. And it seems to me that the way in which the public would read it would be this, that if anybody, after the advertisement was published, used three times daily for two weeks the carbolic smoke ball, and then caught cold, he would be entitled to the reward. 10
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It was also said that the contract is made with all the world – that is with everybody; and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to anyone who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement. It is not like cases in which you offer to negotiate, or you issue advertisements ... in which case there is no offer to be bound by any contract. If this is an offer to be bound, then it is a contract the moment the person fulfils the condition. 30
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Then it was said that there was no notification of the acceptance of the contract. One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done, the two minds may be apart, and there is not that consensus which is necessary according to the English law to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

SOURCE 2

Extract adapted from *Contract Law*. 6th Edition. Ewan McKendrick. Palgrave Macmillan Law Masters. 2005. Pp 32-34.

[T]he courts adopt the 'mirror image' rule of contractual formation; that is to say they must find a clear and unequivocal offer which is matched by an equally clear and unequivocal acceptance

[O]n a number of occasions ... great difficulty is experienced in accommodating many everyday transactions within the offer and acceptance framework

An offer is a statement by one party of a willingness to enter into a contract on stated terms

Care must be taken, however, in distinguishing between an offer and an invitation to treat. An invitation to treat is simply an expression of willingness to enter into negotiations which, it is hoped, will lead to the conclusion of a contract at a later date. The distinction between the two is said to be primarily one of intention; that is, did the maker of the statement intend to be bound by an acceptance of his terms without further negotiation or did he only intend his statement to be part of the continuing negotiation process? Although the dichotomy is easy to state at the level of theory, it is not so easy to apply at the level of practice, as can be seen from the case of *Gibson v Manchester City Council* [1978] 1 WLR 520 (CA) and [1979] 1 WLR 294(HL)

The difficulty in a case such as *Gibson* arises from the fact that it is not easy to ascertain when the preliminary negotiations end and a definite offer is made. The court must examine carefully the correspondence which has passed between the parties and seek to identify from the language used and from the actions of the parties whether, in its opinion, either party intended to make an offer which was capable of acceptance. *Gibson* shows that judges can and do differ in the results which they reach in this interpretative exercise and that each decision must ultimately rest on its own facts

SOURCE 3

Extract adapted from *Contract Law in Perspective*. 4th Edition. Linda Mulcahy and John Tillotson. Cavendish Publishing. 2004. Pp 60-61 and 65.

Critics of [the] formalist approach assert that the offer – acceptance – consideration model presents an unrealistic, rigid and oversimplified view of business arrangements. They argue that undue emphasis is placed on the idea of binding promises, or on the notion of offer and unqualified acceptance. ... [They] complain that the degree of certainty required by the law offends against the need for a degree of flexibility in business

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In the everyday world of business, promises seldom occur in the manner suggested by the case law

However, although the courts' rules relating to agreement are based to a great extent on the relatively simple contractual situations of a century or more ago, it could be argued that they are not as immobile or 'black letter' as some would suggest

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Collins suggests that many of the leading cases can be much better understood if seen as attempts to determine the exact point at which it is *reasonable* for the parties to rely on what the other has said rather than an analysis of whether they have done particular things at particular points ... this alternative construction may get no closer to determining whether there has been a true agreement but it does produce results which are more flexible and attuned to business culture and practice. Lord Wilberforce argued in a similar vein:

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It is only the precise analysis of this complex of relations into the classical offer and acceptance, with identifiable consideration, that seems to present difficulty, but this same difficulty exists in many situations in life, e.g. sales at auctions; supermarket purchases; boarding [a bus]; purchasing a train ticket; tenders for the supply of goods ... these are all examples which show that English law, having committed itself to a rather technical and schematic doctrine, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the worked slots of offer, acceptance and consideration

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A number of problems have arisen over whether the display of goods in a shop window or on the shelves of a shop with prices attached amounts to an offer. One would think so ... However, as early as the mid-19th century, the courts have taken a different view, which was endorsed in the supermarket case of *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* (1953) [1 QB 401] When did the sale take place? The society argued that it was when the customer put the goods into her wire basket, so accepting the offer constituted by the display on the shelves However, the Court of Appeal disagreed and ruled that the sale took place at the cash desk. They argued that the display of the goods did not mean that they were an offer. Instead, they argued that an offer to buy was made by the customer at the cash desk subject to supervision and possible refusal. In their view the display of goods was merely an invitation to treat.

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The decision really rests on a policy choice which supported commercial innovation and convention rather than on orthodox analysis of contract formation

SOURCE 4

Extract adapted from the judgment of Lord Langdale MR in *Hyde v Wrench* [1840] 3 Beav 334.

The defendant offered to sell his farm to the plaintiff for £1,000. The plaintiff, instead of agreeing, offered to pay £950 instead which the defendant then rejected. The plaintiff at a later stage then claimed to accept the original offer and brought an action for specific performance. The court rejected the claim that there was a contract since the original offer had been rejected and was no longer open to acceptance.

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LORD LANGDALE MR:

Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of the property. The defendant offered to sell it for £1,000, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract; instead of that, the plaintiff made an offer of his own, to purchase the property for £950, and he thereby rejected the offer previously made by the defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that, therefore, there exists no obligation of any sort between the parties; the demurrer must be allowed.

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SOURCE 5

Extract adapted from the judgment of Thesiger LJ in *Household Fire Insurance Co. v Grant* [1879] 4 Ex. D. 216.

Grant agreed with an agent to buy 100 shares in a company, paying a £5 deposit and agreeing to pay the balance of £95 within 12 months of the date of allotment. The agent forwarded his application. Grant's name was entered on the register of shareholders. A letter of allotment was then posted to Grant, but it never arrived. When the company went into liquidation the liquidator sued Grant for the balance of money owing on the shares. His argument that there was no contract failed. The contract was formed when the letter was posted. It was irrelevant that he had never received the letter, and the fact his name was on the register was proof that he was indeed a shareholder.

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THESIGER LJ:

Now whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless, therefore, a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment. This was pointed out by Lord Ellenborough in *Adams v Lindsell*. But on the other hand it is a principle of law, as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance, which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offeror, is no binding acceptance. How then are these elements of law to be harmonised in the case of contracts formed through correspondence through the post? I see no better mode than that of treating the post office as the agent of both parties. If the post office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offeror himself as his agent to deliver the offer and receive the acceptance. The contract is actually made when the letter is posted. How then can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon acceptance actually reaching the offeror, and I can see no principle of law from which such an anomalous contract can be deduced.

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SOURCE 6

Extract adapted from *The Modern Law of Contract*. 5th Edition. Richard Stone. Cavendish Publishing. 2003. Pp 51, 52 and 62-63.

In the modern world, contracts may well be made by much more sophisticated means of communication than the post. Telexes, faxes and e-mail are all widely used, in addition to letters and the telephone, as means of transmitting offers, counter-offers, acceptances and rejections

The starting point for the law in this area is the case of *Entores v Miles Far East Corp.* [1955] 2 QB 327. This was concerned with communications by telex machine. The primary issue ... was the question of where the acceptance took effect, if it was sent from a telex machine in one country and received on a telex machine in another country 5

The leading judgment in the Court of Appeal was given by Lord Denning. His approach was to take as his starting point a very simple form of communication over a distance ... two people making a contract by shouting across a river ... he argued there would be no contract unless and until the acceptance was heard by the offeror ... he argued by analogy, that the same approach should be applied to all contracts made by means of communication which are instantaneous or virtually instantaneous (as opposed to post ... where there is a delay) 10

The same answer is generally presumed to apply to all other forms of more sophisticated electronic communication which can be said to be more or less instantaneous in their effect. They will all take effect at the place where they are received. It is at least questionable, however, whether Lord Denning's analogy with a face to face conversation does really hold up when applied to telexes, faxes and e-mails. The only true instantaneous types of communication are face to face, by telephone, or possibly, by the kind of electronic message service where both participants are on line at the same time. A telex and a fax can sit unread in somebody's in-tray for some time, and an e-mail may not be opened as soon as it arrives. In that respect they are more analogous to posted communications 20

Revocation of an offer must be communicated to be effective. This was implicit in the decision in *Byrne v Van Tienhoven* (1880) 5 CPD 344 where the withdrawal of an offer, which was sent by telegram, was held not to take effect until it was received. The *Adams v Lindsell* postal rule does not apply to revocation of offers, but there may still be difficulties as to what exactly amounts to communication, and when a revocation takes effect 25

As soon as an acceptance takes effect, then a contract is made, and both parties are bound. It would seem, then, that in the normal course of events ... revocation, of an acceptance will be impossible [A broad based] exception is now to be found in the Consumer Protection (Distance Selling) Regulations 2000. 30

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