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# Contracts: Necessity of an Unequivocal Acceptance

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The effect of this decision is to raise again the question of what is state action within the Fourteenth Amendment.[23] Enforcement of a valid private contract by the courts being resolved as state action in the instant case, no private or individual contract rights remain except upon voluntary submission to a contract by the parties, since resort to the courts will subject the contract to the prohibitions of the equal-protection clause of the Fourteenth Amendment. Thus a private restrictive agreement may be valid, though not enforceable in the courts if racially discriminatory. The Supreme Court appears to have destroyed unwittingly all private legal right involving color, as distinct from some other factor; obviously an unenforceable "right" can at best be only a moral right. The *Shelley* case, in so holding, meets an exigency of a transitory period; but whether an action for damages can be brought against the covenantor for breach of the agreement is an issue to be raised[24] and determined.

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## CONTRACTS: NECESSITY OF AN UNEQUIVOCAL ACCEPTANCE

*Baker v. Coleman, 34 So.2d 538 (Fla. 1948)*

The plaintiff acquired from the defendant, without consideration, an "option" to purchase 500 shares of National Airlines common stock. The "option" provided that it should be exercised at the same time the defendant exercised a separate option held by him to purchase 10,000 such shares, out of which the plaintiff was to purchase 500 if he wished. The defendant further stipulated that in any event the "option" would be void unless exercised before April 1, 1944. On December 15, 1943,

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Mo. 448, 196 S. W.2d 780, 783 (1946); Thornhill v. Herdt, 130 S. W.2d 175, 178 (Mo. 1939); Kemp. v. Rubin, 188 Misc. 310, 312, 69 N. Y. S.2d 680, 683 (1947); Ridgway v. Cockburn, 163 Misc. 511, 514, 296 N. Y. Supp. 936, 942 (1937); Hemsley v. Sage, 194 Okla. 669, 670, 154 P.2d 577, 578 (1944); Lyons v. Wallen, 191 Okla. 567, 569, 133 P.2d 555, 558 (1942).

[23]Barnett, *What is "State" Action under the Fourteenth, Fifteenth and Nineteenth Amendments to the Constitution?* 24 ORE. L. REV. 227 (1945).

[24]See Mr. Justice Egerton, dissenting in Hurd v. Hodge, 162 P.2d 233, 240 (App. D. C. 1947).

while the plaintiff was overseas, he wrote the defendant that, "it is my intention to exercise said option," and that his agent had full and legal authority to act in his name. There is proof that the plaintiff's agent was instructed to raise the money needed to purchase the stock; yet at no time prior to April 1, 1944, did the plaintiff or his agent tender cash or demand delivery of the stock. This action was brought for breach of what the parties styled an option to purchase, and from a judgment for the plaintiff the defendant appealed. HELD, the "option" could be exercised only by a tender of cash and not by a mere expression of intention to exercise it. Judgment reversed, Justices Chapman and Barns dissenting.

It may be assumed that the majority opinion uses the designation "option" in deference to the terminology of the parties rather than through failure to understand the nature of the transaction. The fact remains, however, that the supposed option completely lacked consideration, and for all practical purposes it was of no greater efficacy than a continuing revocable offer.[1] Therefore, the rules of simple offer and acceptance should be applied. The principal case depends upon whether the offer was one looking toward the formation of a unilateral contract requiring an act, or toward the formation of a bilateral contract requiring a return promise.[2] It is a fundamental rule that the offeror is master of his offer, and that it can be accepted only in the manner specified.[3] To determine the meaning of the defendant's offer, his intention should be ascertained in the light of the language used and the surrounding circumstances.[4]

It is a well-established principle that an offer contemplating accept-

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[1]Sargent v. Heggen, 195 Iowa 361, 190 N. W. 506 (1922); Comstock Bros. v. North, 88 Miss. 754, 41 So. 374 (1906); Ganss v. Guffey Petroleum Co., 125 App. Div. 760, 110 N. Y. Supp. 176 (1908); 1 WILLISTON, CONTRACTS §25 (Rev. Ed. 1936).

[2]Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 159 N. E. 173 (1927); De Cicco v. Schweizer, 221 N. Y. 431, 117 N. W. 807 (1917); RESTATEMENT, CONTRACTS §12 (1932); 1 WILLISTON, CONTRACTS §§13, 73 (Rev. ed. 1936); Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L. J. 169 (1917).

[3]Webster Lumber Co. v. Lincoln, 94 Fla. 1097, 115 So. 498 (1927); Strong & Trowbridge Co. v. Baars & Co., 60 Fla. 253, 54 So. 92 (1911); Robinson v. St. Louis Ry., 75 Mo. 494 (1882); 1 WILLISTON, CONTRACTS §76 (Rev. ed. 1936). *But cf.* 1 WILLISTON, CONTRACTS §78A (Rev. ed. 1936).

[4]Davis v. Jacoby, 1 Cal.2d 370, 34 P.2d 1026 (1934); see Mr. Justice Lehman, dissenting in Petterson v. Pattberg, 248 N. Y. 86, 90, 161 N. E. 428, 430 (1928).

ance by an act can be accepted only by performing that act.[5] In such a case substantial performance is required—not mere steps preparatory to performance.[6] Although some jurisdictions take the position that part performance creates a binding contract,[7] here the court held that payment was the act contemplated and that the plaintiff's instructions to his agent were only extensive preparation. To bring the case within this line of reasoning, it was necessary to construe the defendant's offer as implying that it looked toward the formation of a unilateral contract.

It is important, however, to distinguish between that which pertains to the performance of a contract and that which pertains to its formation.[8] In the instant case the defendant's offer called for performance of an act but failed to provide the manner of acceptance. In such event some courts construe the defendant's ambiguous offer as one that can be accepted by an assent and return promise, thereby forming an executory bilateral contract of sale[9] with concurrent conditions of payment by the vendee and delivery of the stock by the vendor[10] within a reasonable time. These courts justify their holding by stating that when payment is not a condition stipulated in the offer it is not for the court to incorporate terms which the parties did not express. Justice Barns stated in his dissenting opinion in the principal case that had the defendant intended to require acceptance by a tender of cash he could have so specified.

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[5]Sheffield v. Whitfield, 6 Ga. App. 762, 65 S. E. 807 (1909); Sands & Maxwell Lumber Co. v. Crosby, 74 Mich. 313, 41 N. W. 899 (1889); Petterson v. Pattberg, 248 N. Y. 86, 161 N. E. 428 (1928); Foss Investment Co. v. Ater, 49 Wash. 446, 95 Pac. 1017 (1908); 1 WILLISTON, CONTRACTS §60 (Rev. ed. 1936).

[6]Carr v. Stockton, 84 Fla. 69, 92 So. 814 (1922); Stensgaard v. Smith, 43 Minn. 11, 44 N. W. 669 (1890); Bretz v. Union Central Life Ins. Co., 134 Ohio St. 171, 16 N. E.2d 272 (1938).

[7]Hollidge v. Gussow, Kahn & Co., 67 F.2d 459 (C. C. A. 1st 1933); Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086 (1902); RESTATEMENT, CONTRACTS §45 (1932); 75 U. OF PA. L. REV. 268 (1927). *But cf.* Mr. Justice Wilson, dissenting in Hollidge v. Gussow, Kahn & Co., 67 F.2d 459, 461 (C. C. A. 1st 1933).

[8]McAden v. Craig, 222 N. C. 497, 24 S. E.2d 1 (1943).

[9]Mott v. Jackson, 172 Ala. 448, 55 So. 528 (1911); Daggett v. Kansas City Structural Steel Co., 334 Mo. 207, 65 S. W.2d 1036 (1933); Texarkana Pipe Works v. Caddo Oil & Ref. Co., 228 S. W. 587 (Tex. Civ. App. 1921); See RESTATEMENT, CONTRACTS §21 (1932); Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L. J. 169 (1917).

[10]Stewart v. Gillett, 79 N. Y. Misc. 93, 139 N. Y. Supp. 583 (1913); Lennon v. Habit, 216 N. C. 141, 4 S. E.2d 339 (1939); Burkhart v. Hart, 36 Ore. 586, 60 Pac. 205 (1900).

Another pertinent factor in the defendant's offer which might have allowed the court to construe it as one looking toward a bilateral contract is the stipulation that the plaintiff exercise his "option" simultaneously with the exercise of the option held by the defendant. There was no definite indication that the defendant would do this and acquire the stock prior to the expiration of the limited offer given to the plaintiff; thus, a logical analysis would call for actual payment only when the defendant was in a position to transfer the property.[11]

Even though the court might have construed the defendant's offer as one which could have been accepted by a return promise, the question remains as to whether or not the plaintiff's expression of an intention to exercise the option was a positive and binding acceptance. The expression of an intention to do a thing is not a promise to do that thing. A statement of intention is but an expression of a present state of mind in regard to an act, while a promise is a definite commitment to do or to forbear from doing the act intended.[12] Hence, the plaintiff's reply failed to consummate the contract, since it was not a positive and unequivocal acceptance; the mere fact that the words of the reply justified an inference of probable assent was not enough.[13]

The particular facts of this case, therefore, render immaterial the question of whether the court construed the defendant's offer as one looking toward a unilateral contract or as one looking toward a bilateral contract. The same result would have been obtained, since the defendant's intention to exercise the "option" was not a valid acceptance.

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[11]*Cf.* Lennon v. Habit, 216 N. C. 141, 4 S. E.2d 339 (1939).

[12]Lanagin v. Nowland, 44 Ark. 84; Holt V. Akarman, 84 N. J. L. 371, 86 Atl. 408 (1913); Scott v. Kress & Co., 191 S. W. 714 (Tex. Civ. App. 1917).

[13]Patterson v. Clifford F. Reid, Inc., 132 Cal. App. 454, 23 P.2d 35; Webster Lumber Co. v. Lincoln, 94 Fla. 1097, 115 So. 498 (1927); 1 WILLISTON, CONTRACTS §72 (Rev. ed. 1936).