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Mutual Assent in Contract Under the Civil Code of California¹

"The notion of contract", declared Savigny writing about the middle of the last century,² "is part of man's common stock even outside the field of legal science, and to men of law so familiar and necessary in its various applications that we might expect a settled and just apprehension of it to prevail everywhere. Nevertheless we are yet far short of this." In California, besides the sources of uncertainty and error present in common law jurisdictions generally, there are others arising from the Civil Code. The code sections governing contracts remain, with few exceptions,—none as to mutual assent—as they left the hands of the original draftsmen in 1865.³ Since that time the law of contract has had considerable growth and development. The most that could be looked for in the Civil Code therefore is a clear statement of the obsolescent law. But we do not find even that, because of the frequent failure of the commissioners to grasp the rules sought to be stated, poor draftsmanship, and the omission of fundamental matters.⁴

It is, perhaps, not possible to give a definition of contract that is at once brief, accurate, and intelligible. In general, the fundamental idea is that a contract is a legally enforceable agree-

¹The pertinent sections of the Civil Codes of Montana and the Dakotas are identical with those of the California Civil Code. A number of the provisions of the Indian Contract Act are also the same and several others are similar.

²System des heutigen römischen Rechts, § 140.

³For a sketch of the history of the Civil Codes, see 2 Cal. Law Rev. 171, n. 1. Cal. Civ. Code, §§ 1614 and 1615, which are new, while in form prescribing rules pertinent to consideration, really state rules of evidence.

⁴See Pollock, Indian Contract Act, 3rd ed., p. ix.

ment, and that an agreement is not legally enforceable unless it is between competent parties, supported by consideration and not in conflict with judicial notions of public policy.⁵ This view is taken, without qualification, in sections 1549 and 1550 of the Civil Code,⁶ which have been referred to with approval in several cases.⁷ Still an agreement between incompetent parties or with an unlawful purpose may be a contract, as incompetence usually makes a contract voidable only⁸ and an illegal agreement may be enforced by the justifiably innocent party.⁹ This inquiry need not be pursued, however, as the place of mutual assent or agreement in the law of contract has already been sufficiently indicated.

No analysis of agreement is found in the Civil Code. For all practical purposes it is sufficient to say that an agreement may be resolved into an offer by one party and its acceptance by the other,¹⁰ although it has been suggested by an eminent authority that agreement may also arise from a concurrent expression of intention.¹¹ It seems, however, that "if A and X are discussing the terms of a bargain and eventually accept a suggestion made by M, there must be a moment when A or X says or intimates to the other 'I will accept if you will'."¹²

Agreements may be divided into bilateral and unilateral, depending upon whether the offer contemplates acceptance by a promise or an act. If the offer calls for a promise and the promise is given, the resulting agreement is said to be bilateral because it is made up of mutual promises. If the offer calls for an act and the act is performed, the agreement is said to be

⁵ Indian Contract Act, § 2, subd. h; Wald's *Pollock on Contracts*, 3rd ed., by Samuel Williston, p. 7; Anson on Contract, Huffcutt's 2nd Am. ed., p. 10; Brantly on Contracts, 2nd ed., § 6.

⁶ "A contract is an agreement to do or not to do a certain thing." (Cal. Civ. Code, § 1549.) "It is essential to the existence of a contract that there should be: (1) Parties capable of contracting; (2) Their consent; (3) A lawful object; and (4) Sufficient cause or consideration." (Cal. Civ. Code, § 1550.)

⁷ *Oppenheimer v. Regan* (Mont.), 79 Pac. 695, 697; *Loaiza v. Superior Court*, 85 Cal. 11, 24 Pac. 707, 711; *Am. Can Co. v. Agr. Ins. Co.*, 12 Cal. App. 133, 137, 106 Pac. 720, 722; *Loma Prieta etc. Co. v. Hinton*, 12 Cal. App. 766, 108 Pac. 528, 530.

⁸ Wald's *Pollock*, p. 60; 18 Am. St. Rep. 574, n.; Williston on Sales, §§ 30, 33, 37, 49.

⁹ Williston on Sales, §§ 663 ff; *Kelly v. Riley*, 106 Mass. 339, 8 Am. Rep. 336. See *Seattle Electric Co. v. Snoqualmie Falls Power Co.*, 40 Wash. 380, 82 Pac. 713, 1 L. R. A. (N. S.) 1032.

¹⁰ Anson on Contract, pp. 19-20.

¹¹ Wald's *Pollock*, pp. 5-6; Jenks, *Digest, English Civil Law*, (bk. II, pt. 1, by R. W. Lee), § 189, accord.

¹² Anson on Contract, p. 20.

unilateral because there is but one promise. This distinction which is of much practical consequence¹³ is not taken in the Civil Code, although both the Civil Code¹⁴ and the California decisions¹⁵ recognize unilateral agreements.

Passing from these preliminary matters, let us consider the principles underlying agreement. These principles may be grouped under three heads,—offer, acceptance and communication.

I. OFFER.

There are no sections in the Civil Code dealing with the nature of offer, or the problems peculiar to it except those pertaining to termination and revocation. We shall sketch the law on the topics omitted in order to indicate the scope of the hiatus, although there seems to be nothing novel in the California cases.

An offer of itself, of course, imposes no legal obligation either upon the offeror or the offeree. It may therefore be withdrawn at any time before acceptance¹⁶ even though it stipulates in terms that it shall remain open for a time certain,¹⁷ for not until an offer is accepted does it become a binding promise. So much is obvious. But, when does a proposal constitute an offer? The proposer must intend to enter into legal relations with the party addressed or the proposal is not an offer. So, if the proposal is made in banter¹⁸ or contemplates a mere social engagement¹⁹ or is only an invitation to treat, it is not an offer.

The distinction between an invitation to treat and an offer calls for further comment. This distinction is clear in principle but often difficult of application. The rule is, if the proposer's

¹³ "In a bilateral contract, both parties must be bound at the same time, or neither is bound. In a unilateral contract, the offeree is not bound to perform at all, nor until performance by him is the offeror bound, but upon the performance by the offeree the proposal of the offeror is converted into a binding promise." Professor Williston in Wald's *Pollock*, p. 35, n. 40.

¹⁴ Cal. Civ. Code, § 1584.

¹⁵ *Jones v. Snow*, 64 Cal. 456, 2 Pac. 28; *Baird v. Loescher*, 9 Cal. App. 65, 98 Pac. 49.

¹⁶ *Harvey v. Duffey*, 99 Cal. 401, 33 Pac. 897; *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499; *Burnett v. Potter* (Cal.), 113 Pac. 885, 886.

¹⁷ *Brown v. Savings Union*, 134 Cal. 448; *Vickrey v. Maier* (Cal., 1912), 129 Pac. 273; see *Raiche v. Morrison* (Mont., 1913), 130 Pac. 1074, for distinction between option contract and mere option. See also, article, "Irrevocable Offers", by D. O. McGovney, 27 *Harv. Law Rev.* 644.

¹⁸ *Smith v. Richardson*, 31 Ky. L. R. 1082, 104 S. W. 705; *Keller v. Holderman*, 11 Mich. 248; *Nyulasy v. Rowan*, 17 *Vict. L. R.* 663; s. c. *Williston's Cases on Contracts*, vol. 1, p. 5.

¹⁹ Wald's *Pollock*, p. 3.

intention is to address a proposal which upon acceptance will bind him, the proposal is an offer; if he intends that, upon receiving the reply, he shall retain the right of refusal, the proposal is a mere invitation to treat.²⁰ Illustrations of proposals not reaching the dignity of offer are found in an auctioneer's tender of property for sale,²¹ letters or circulars "quoting prices",²² advertisements announcing theatre tickets for sale at a given box office²³ or calling for bids on public work.²⁴

A question very similar to the one just considered is presented when parties intend to reduce their agreements to a formal instrument but fail to do so. Here, too, an analysis of the intention of the parties suggests the rule that obtains.²⁵ If it is intended that there shall be no agreement until the negotiations take final form, there is none until that time; but if the intention is that the contemplated formal instrument shall be evidence of agreement, and nothing more, then an agreement may exist although the parties have not executed the instrument.²⁶

It remains to notice the rule that the terms of an agreement

²⁰ *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256; *Keener's Cases on Contracts*, vol. 1, p. 373.

²¹ *Hibernia Savings and Loan Soc. v. Behnke*, 121 Cal. 339, 53 Pac. 812; *Payne v. Cave*, 3 T. R. 148.

²² Cases collected in *Wald's Pollock*, p. 19, n. 18, and note, 3 Br. Ruling Cas. 229.

²³ *Pearce v. Spalding*, 12 Mo. App. 141.

²⁴ *Argenti v. San Francisco*, 16 Cal. 255; *Edgemoore Bridge Wks. v. County of Bristol*, 170 Mass. 528. Compare *Denton v. Gt. No. Ry.*, 5 E. & B. 860, 119 Eng. Rep. R. 701, and *Sears v. Eastern R. R. Co.*, 14 Allen 433, 92 Am. Dec. 780, holding advertised railway time card constitutes an offer.

²⁵ *Donnelly v. Currie Hardware Co.*, 65 N. J. Law 388; *Edgemoore Bridge Wks. v. County of Bristol*, supra; *Long v. Needham*, 37 Mont. 408, 422, 96 Pac. 731; *Northam v. Gordon*, 46 Cal. 582; *Fuller v. Reed*, 38 Cal. 99. See also *McPherson v. Fargo*, 10 S. D. 611, 74 N. W. 1057, 66 Am. St. Rep. 723. Compare *Hoen v. Simmons*, 1 Cal. 119; *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797.

²⁶ The point is neatly illustrated in *Am. Can Co. v. Agr. Ins. Co.* (Cal App.), 106 Pac. 720, and *Nash v. Kreling* (Cal.), 56 Pac. 260. See also cases cited in note 25, and *Thomas Whitted & Co. v. Fairfield Cotton Mills*, 210 Fed. 725. In *Am. Can Co. v. Agr. Ins. Co.*, the action was on an alleged oral contract of insurance. The plaintiff had a policy in the defendant's company which expired on the day after the alleged oral contract was made. On April 17th, 1906, the clerk of the plaintiff's brokers went to the office of the defendant's agents, just after the office hours, and threw down on the counter renewal slips for the expiring policy, saying to the clerk in charge, "Here, Fred, are some renewals for you." The clerk answered, "All right." The Court held that this evidence failed to show an agreement between the parties. In *Nash v. Kreling*, the defendant, a theatre owner in San Francisco, had been negotiating with the plaintiff, a stage manager in the East, with a view to em-

must be definite, which is really a requirement that the offer be definite because acceptance must follow the offer. A few illustrations will indicate the operation of this rule. A proposal by A to sell all the articles of a designated make that B may "order" during a specified time is fatally indefinite, because when accepted it imposes no obligation upon B to order.²⁷ A similar proposal to furnish what B might "need" is sufficiently definite because upon acceptance it obligates B to order what he might need.²⁸ A promise by a salesman "to assist in making a success" of a line of cigars "as long as goods found a ready sale" was held good,²⁹ while a promise to pay a "contingent commission" of five per cent without stating upon what the contingency depended,³⁰ and a promise to buy merchandise "for cash or terms to be agreed upon"³¹ have been held bad for indefiniteness. Each case must, of course, turn largely on its own peculiar facts.

The terms of an agreement must not only be definite but they must not be expressed so ambiguously that neither court nor jury can ascertain their meaning. As was said in a recent Montana case,³² quoting from *Thomas v. Gortner*, 73 Md. 474:

"The law is too well settled to admit of doubt that, in order to constitute a valid verbal or written agreement, the parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean. And if an agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void; for neither the court nor the jury can make an agreement for the parties."

ploying him to manage defendant's theatre. After some unsuccessful negotiations, the plaintiff wrote that he would work for one year at \$90 a week. Defendant replied by wire, "Your terms \$90 a week accepted. Letter follows." The letter stated, "You can consider telegram a contract until you get here when I will draw up a proper one to suit." Plaintiff went to San Francisco and commenced work without a formal contract. Held, letters and telegram constituted a contract.

²⁷ *Keller v. Ybarru*, 3 Cal. 147. See also, *Anson*, pp. 41-42; *Wald's Pollock*, p. 49, n. 54.

²⁸ *Bartlett Springs Co. v. Standard Box Co.* (Cal. App.), 117 Pac. 934.

²⁹ *Sutliff v. Seidenberg etc. Co.*, 132 Cal. 63, 64 Pac. 131. See also, *Gallagher v. Equitable Gas Light Co.*, 141 Cal. 699, 75 Pac. 329 (Agreement to furnish gas for specified rate "as long as plaintiff should use it". Held good.)

³⁰ *Van Slyke v. Broadway Ins. Co.*, 115 Cal. 644, 47 Pac. 689, 928.

³¹ *Jules Levy & Bro. v. A. Mautz & Co.* (Cal. App.), 117 Pac. 936. See also *Scholtz v. N. W. Mut. Ins. Co.*, 100 Fed. 573 (Agreement to give a lease in the "usual form", held bad for indefiniteness.)

³² *Price v. Stipek* (Mont.), 104 Pac. 195.

The rules governing termination and revocation of offer are found in sections 1586-1588 of the Civil Code.³³ These sections follow the common law except that (1) revocation is made effective from the time that notice thereof is put in course of transmission,³⁴ and (2) an offer is made revocable "at any time before its acceptance is communicated to the proposer". At common law, revocation dates from the receipt of notice thereof³⁵ and communication of acceptance is not necessary in unilateral agreements.³⁶ The departures from established principles just noticed, which will be discussed under "communication", seem to have been due to inadvertence.

II. ACCEPTANCE.

"The acceptance must be of that which is proposed and nothing else, and must be absolute and unconditional."³⁷ Thus, an offer to sell "nice potatoes" is not accepted by an order calling for "choice potatoes".³⁸ This follows from the fundamental principle that an agreement does not arise unless the minds of the parties meet on the proposition before them. For example, where the intending seller of a partnership interest thinks that he is selling for \$850.00 and the intending buyer understands that

³³ "A qualified acceptance is a new proposal." (Cal. Civ. Code, § 1585.) "A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards." (Cal. Civ. Code, § 1586.) "A proposal is revoked: (1) By the communication of notice of revocation by the proposer to the other party in the manner prescribed by sections 1581 and 1583, before his acceptance has been communicated to the former; (2) By the lapse of the time prescribed in such proposal for its acceptance, or if no time is so prescribed, the lapse of a reasonable time without communication of the acceptance; (3) By the failure of the acceptor to fulfil a condition precedent to acceptance; (a) or, (4) By the death or insanity of the proposer." (Cal. Civ. Code, § 1587.)

(a) This sub-section appears to be unintelligible surplusage. (Pollock, *Indian Contract Act*, 3rd ed., pp. 40-41).

³⁴ *Watters v. Lincoln* (S. D.), 135 N. W. 712.

³⁵ *Byrne & Co. v. Van Tienhoven & Co.*, L. R. 5 C. P. Div. 344, and *Wald's Pollock*, p. 31, n. 35, collecting the cases.

³⁶ *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256; *Wald's Pollock*, p. 21, n. 21.

³⁷ *Brophy v. Idaho etc. Co.*, 31 Mont. 279, 78 Pac. 493; *Harvey v. Duffey*, 99 Cal. 401, 33 Pac. 897; *Meux v. Hogue*, 91 Cal. 442, 27 Pac. 744; *Northam v. Gordon*, 46 Cal. 582. A qualified acceptance rejects the offer. *Wristen v. Bowles*, 82 Cal. 84, 22 Pac. 1136; Cal. Civ. Code, § 1585.

³⁸ *Brophy v. Idaho etc. Co.*, supra; *Ennis Brown Co. v. Hurst* (Cal. App.), 82 Pac. 1056.

he is buying for \$750.00 there is no agreement.³⁹ Logically, meeting of minds and agreement should be interchangeable terms. But the life of the law has not been logic; it has been experience. Consequently, the general rule that there can be no contract without a meeting of minds yields to business convenience in a number of instances, notably the following: (1) When the overt acts and secret purposes of the parties are at variance; (2) when acceptance is properly mailed while notice of revocation is en route; and (3) when an offer erroneously transmitted by telegraph has been accepted as received.

The Civil Code enacts the general rule⁴⁰ requiring meeting of minds and recognizes the first and second exceptions indicated. The first exception, to which we shall confine ourselves for the present, is stated as follows:

"If the terms of a promise are in any respect indefinite or uncertain it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it." (Cal. Civ. Code, § 1649.)

This is not an accurate statement of the law. "We ask not what this man meant," says Mr. Justice Holmes,⁴¹ "but what these words mean in the mouth of a normal speaker of English, using them under the circumstances in which they were used". In *Smith v. Hughes*,⁴² it was said by Mr. Justice Blackburn: "The rule of law is that stated in *Freeman v. Cooke*, 2 Exch. 654, at p. 663. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and the other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms". In brief, then, the common law makes overt acts prevail over secret intention, and interprets those acts according to the standard of that well known figure,—a reason-

³⁹ *Rovengo v. Defferari*, 40 Cal. 459; *Peerless Glass Co. v. Pacific Crockery and Tinware Co.*, 121 Cal. 641, 54 Pac. 101; *Kelly v. Wheeler* (S. D.), 119 N. W. 994; *Yore v. Bankers' etc. Assn.*, 88 Cal. 609, 26 Pac. 514, accord.

⁴⁰ "The consent of the parties to a contract must be: (2) Mutual." (Cal. Civ. Code, § 1565.) "Consent is not mutual unless the parties all agree upon the same thing in the same sense." (Cal. Civ. Code, § 1580.) The acceptance must be absolute and unqualified. (Cal. Civ. Code, § 1585.) See *Pollock*, *Indian Contract Act*, pp. 64-72.

⁴¹ 12 Harv. Law Rev. 417.

⁴² L. R. 6 Q. B. 597, 607.

ably prudent man.⁴³ The Civil Code, on the other hand, while placing overt acts over hidden purposes, interprets them "in the sense in which the promisor believed at the time . . . that the promisee understood [them]". Is not this a wholly subjective test? In California there has been a reversion to the common law rule by construing the code section in the light of the "rule of reason".⁴⁴

The qualification of the principle requiring meeting of minds, in contracts by correspondence, requires no comment, but a word should be said regarding the third exception. The view prevailing in most American jurisdictions, including California, is that the acceptance of an offer erroneously transmitted by telegraph, as received, is binding if the offeree would not reasonably have apprehended the error.⁴⁵ This view, which seems anomalous, has been put on the ground that the telegraph company is the agent of the sender of the message. That, however, is not the case. The telegraph company is an independent contractor.⁴⁶ A practical reason of much weight in favor of the doctrine is that, unless the acceptance were held good, the loss resulting from the error would fall upon either the offeror or the offeree when it really should be borne by the telegraph company.

Another problem growing out of the application of the principle that meeting of minds is necessary to contract, but not always recognized as such, is presented in a class of cases involving mistake and fraud. There is no magic in the terms mistake and fraud. The character of the mistake or fraud is the pivotal thing. If it be such as to prevent a meeting of minds, there is no agreement; or, as the courts put it, the agreement is void; otherwise there is an agreement which may be either voidable or altogether valid.⁴⁷

The distinction between such mistake or fraud as makes an "agreement" void and such as makes it voidable is neatly illus-

⁴³ *Mansfield v. Hodgdon*, 147 Mass. 304; *Williston's Cases*, vol. 1, p. 68, n.

⁴⁴ *Whitney v. Aronson* (Cal. App.), 130 Pac. 700. See also, *Balfour v. Fresno Canal and Irrigation Co.*, 109 Cal. 221, 41 Pac. 876.

⁴⁵ *Fruit Co. v. Tel. Co.*, 137 Cal. 598, 70 Pac. 658; *Sherrerd v. Tel. Co.*, 146 Wis. 197, 131 N. W. 341; *Ayer v. Tel. Co.*, 79 Me. 493; *Eureka Cotton Mills v. Tel. Co.*, 88 S. C. 498, 70 S. E. 1040, Ann. Cas. 1912 C, p. 1273 and extensive note thereto; 9 Cyc. 294.

⁴⁶ *Lawrence v. Shipman*, 39 Conn. 586; *Eureka Cotton Mills v. Tel. Co.*, *supra*.

⁴⁷ *Williston on Sales*, §§ 654, 635. See *Holmes, The Common Law*, Lecture IX. Eminent authorities differ as to whether mistake

trated in *Edmunds v. Merchants' Despatch Transportation Company*,⁴⁸ which involved three consolidated actions in tort against a common carrier. In the first two actions A, a swindler, in the presence of X represented himself to X as Edward Pape of Dayton, Ohio, a man of recognized credit. X, believing that he was dealing with said Pape, accepted A's offer to purchase certain goods. In the third action B, a swindler, represented himself to X, in the latter's presence, as the agent of said Pape, and X relying upon the representation, accepted B's offer for the purchase of goods. X delivered the goods called for by both orders to the defendant for carriage to Dayton. The defendant delivered the goods to A and B respectively. X, discovering the several frauds, sued defendant for conversion. The court held for defendant in the first two actions and for plaintiff in the third, saying in part as to the first two:

"The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price, and time of payment, the person selling, and the person buying. The fact that the seller was induced to sell by the fraud of the buyer made the sale voidable but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name or practiced any other deceit to induce the buyer to sell."

Commenting on the third action, the court observed:

"In that case the contract did not purport, nor the plaintiffs intend, to sell to the person who was present and ordered the goods. . . . The plaintiffs understood that they were selling and intended to sell to the real Edward Pape. There was no contract with him because the swindler who acted as his agent had no authority, but there was no contract of sale with anyone else."

It is beyond the scope of this paper to make an extended inquiry into the results of mistake and fraud upon contract; we are concerned only in so far as they prevent mutual assent. The California Civil Code provides:

as such may make a contract voidable. Sir F. Pollock is of the opinion that it cannot (*Pollock, Indian Contract Act*, p. 73; *Wald's Pollock*, p. 564) while Professor Williston takes the other view (*Williston on Sales*, § 656.)

⁴⁸ 135 Mass. 283.

"The consent of the parties to the contract must be: (1) Free." (§ 1565.)

"The consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties. . . ." (§ 1566.)

"The apparent consent is not real or free when obtained through: (1) Duress; (2) Menace; (3) Fraud; (4) Undue Influence; (5) Mistake." (§ 1567.)

At first glance these sections seem not to recognize that mistake or fraud may make an "agreement" void as well as voidable. As long, however, as there is *consent*,—no matter how obtained—there is an agreement. To say that "unfree consent" does not make an agreement void is, therefore, correct and in harmony with the view that when mistake or fraud prevents consent there is no agreement—a view fully recognized by the California courts.⁴⁹

On principle, it would seem that duress, like mistake and fraud, might go to the existence of an agreement.⁵⁰ In an action upon a promissory note, Mr. Justice Holmes said, *arguendo*:⁵¹

"No doubt, if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name, and the note had been carried off and delivered, the signature and delivery would not have been her acts; and if the signature and delivery had not been her acts, for whatever reason, no contract would have been made, whether the plaintiff knew the facts or not. . . . But duress, like fraud, rarely, if ever, becomes material as such, except on the footing that a contract or conveyance has been made which the party wishes to avoid. It is well settled that where, as usual, the so-called duress consists only of threats, the contract is only voidable. (citing cases.)

"This rule necessarily excludes from the common law the often recurring notion just referred to, and much debated by the civilians, that an act done under compulsion is not an

⁴⁹ *La Marche v. New York Ins. Co.*, 126 Cal. 498, 58 Pac. 1053. See also cases cited in notes 37 and 39, and *Kenney v. Parks*, 137 Cal. 527, 70 Pac. 556; *Gould v. Wise*, 97 Cal. 532, 32 Pac. 576; *Holmes v. Mining Co.*, 5 Cal. App. 659, 91 Pac. 160. See also *Pollock, Indian Contract Act*, p. 73.

⁵⁰ *Williston on Sales*, § 658; *Pollock, Indian Contract Act*, p. 72, citing *Scott v. Sebright*, 12 P. D. 21, and *Ford v. Stier*, [1896] Prob. Div. p. 1.

⁵¹ *Fairbanks v. Snow*, 145 Mass. 153, 154, 1 Am. St. Rep. 446.

act in a legal sense. *Tamen coactus volui*; D. 4. 2. 21, sec. 5; see 1 Windscheid, Pandekten, sec. 80."

The distinction taken by the learned judge seems to find little support in the authorities. The law is apparently settled to the effect that duress will not make an agreement void,⁵² and that rule has been adopted by the California Civil Code and the California cases.⁵³

The operation of the rule is illustrated in *Deputy v. Stapleford*,⁵⁴ an early California case, which arose on a bill in equity to cancel two deeds obtained by fraud and duress, the grantee having conveyed to an innocent purchaser for value. "The circumstances attending [the] coercion were of the most aggravating character. Deputy [the grantor] had been imprisoned, chained to the floor by the leg, manacled, hung two or three times, whipped with a raw hide in the intervals between the hanging, and threatened with death by hanging, unless he executed the deed, which was presented to him for that purpose. Under these intimidations, and in order to save his life, he signed the deed, but without receiving any consideration therefor." The court held for the defendant, saying in part: "It is to be regretted, for the sake of public justice, that the alleged outrage . . . cannot be redressed by a restoration of the property. . . . The deed to Stapleford though procured through fraud and duress was only voidable."

It is submitted that in cases of this character a careful scrutiny of the facts would usually disclose that there was no legal *delivery* of the deed, but that upon execution it was stolen.⁵⁵ In such event the deed would be void.⁵⁶ The report of *Deputy v. Stapleford* does not disclose the circumstances under which *possession* of

⁵² Devlin on Deeds, 3rd ed., § 81; 9 Cyc. 443; Harriman on Contracts, § 444.

⁵³ See Cal. Civ. Code, §§ 1565, 1580, 1585, quoted above. *Deputy v. Stapleford*, 19 Cal. 302; see *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 307.

⁵⁴ 19 Cal. 302.

⁵⁵ There cannot be legal delivery unless manual delivery is made with intent to convey. *Elliott v. Merchants Bank etc.* (Cal. App.), 132 Pac. 280; *Denis v. Velati*, 96 Cal. 223, 31 Pac. 1; Devlin on Deeds, 3rd ed., § 262.

⁵⁶ *Bogie v. Bogie*, 35 Wis. 659. The same rule applied to commercial paper before the Negotiable Instruments Act. *Burson v. Huntington*, 21 Mich. 415, 4 Am. Rep. 497; Neg. Ins. Law, § 17; Brannan's Neg. Ins. Law, pp. 21-22. In *Burson v. Huntington*, *supra*, it was well said by Christiancy, J.: "A note in the hands of the maker before delivery is not property, nor the subject of ownership as such; it is, in law, but a blank piece of paper. Can the theft or wrongful

the deed was obtained after its execution. This is a material omission and makes the decision inconclusive.

Turning now to acceptance in unilateral agreement, we find the following code provision:

"Performance of the conditions of a proposal . . . is an acceptance of the proposal." (Cal. Civ. Code, § 1584.)⁵⁷ The rule thus laid down must be taken with three important qualifications. Performance of the conditions of a proposal does not cause the promise made by the proposer to become binding in law (1) unless such performance was called for as a consideration for the promise; and then not (2) when made in ignorance of the proposal or not pursuant thereto, or (3) when the proposal contemplates a bilateral contract.

(1) "If A says to B, I will give you \$100.00 if you break your leg, it is not probable that A means to request B to break his leg, as the exchange or equivalent for the promise. The breaking of the leg is merely the event upon the happening of which A will give a gratuity. In theory any act whatever may be stated either as the condition or the consideration of a promise."⁵⁸ Whether a contemplated act is one or the other depends upon how it was treated by the parties.⁵⁹ The disposition of the courts is to regard the act as a consideration wherever possible,⁶⁰ indeed in some cases, notably those of charitable subscriptions,⁶¹ this has been done although contrary to the fact.

(2) In 1833 the Court of King's Bench held, in the celebrated

seizure of this paper create a valid contract on the part of the maker against his will, where none existed before?"

⁵⁷ The phrase omitted is: "or the acceptance of the consideration offered with the proposal." The section has found its way into the Indian Contract Act with slight verbal change. Sir F. Pollock comments: "The terms of this section are very wide . . . nothing like them occurs in the original draft of the Indian Law Commissioners, nor, so far as known to us, in any authoritative statement of English law. They appear to have been taken from the draft Civil Code of New York, with slight verbal alteration. In the absence of illustrations their intended scope is not very clear." (Indian Contract Act, p. 46.) . . . "The second branch of the section as to 'acceptance of any consideration' etc. is rather obscure. It is hard to say with any certainty to what particular class or classes of transactions it relates; nor has anything occurred, so far as is known, to throw any light upon it in the generation which has elapsed since the act was passed." (Ibid, p. 50.) See further, *Ibid*, pp. 46-51.

⁵⁸ Professor Williston in Wald's *Pollock*, p. 215, n. 24; *Kirksey v. Kirksey*, 8 Ala. 131, accord.

⁵⁹ Holmes, *Common Law*, pp. 291-292; Langdell's *Summary*, § 66; *Harriman on Contracts*, 2nd ed., §§ 96-97.

⁶⁰ Wald's *Pollock*, p. 215, n. 24.

⁶¹ *Ibid*, p. 186, n. 3; *Grand Lodge v. Farnham*, 70 Cal. 158, 11 Pac. 592.

case of *Williams v. Carwardine*,⁶² that an offer of reward was accepted by giving the information called for, regardless of the fact that the disclosures were not induced by the offer but were made to ease the plaintiff's conscience. *Gibbons v. Proctor*,⁶³ decided in 1891 in the Queen's Bench, went even further and held that giving information called for by an offer of reward before the offer was published constituted an acceptance. These cases seem indefensible, although there are some American courts taking the same stand.⁶⁴ But the weight of American authority establishes this rule: in order to recover a proffered reward, information must be voluntarily given with knowledge of the offer and with a view to obtaining the reward.⁶⁵ The cases in California are in conflict.⁶⁶

(3) It is fundamental that the offeror may impose his own requirements upon the offeree, and unless those requirements are met there can be no acceptance. If, therefore, the offer calls for a promise, the performance of the acts to be promised, without the promise being given, would not constitute an acceptance.⁶⁷ Thus, in *Spinney v. Downey*,⁶⁸ a California case, A and B had been negotiating with a view to entering into an agreement to be evidenced by a written instrument according to the terms of which A should promise to furnish bricks to B at an agreed price. The instrument was drawn and signed by B but not by A. A, thereupon, proceeded to furnish bricks to B pursuant to the terms of the instrument until stopped by B, whereupon he brought action upon the alleged agreement. It was held that there was no agreement because B's offer called for A's promise and not his performance.

It will be observed that cases like *Spinney v. Downey* are distinguishable from those in which both parties treat the conduct of the offeree in commencing performance as evidence of a promise

⁶² 4 Barn. & Adol. 621.

⁶³ 64 Law Times n. s. 594.

⁶⁴ Wald's *Pollock on Contracts*, 3rd ed., pp. 13-14, n. 12; *Burke v. Wells, Fargo & Co.*, 50 Cal. 218.

⁶⁵ *Vitty v. Ely*, 51 App. Div. (N. Y.) 44; *Tobin v. McComb* (Tex. Civ. App., 1913), 156 S. W. 237; note, 9 L. R. A. (N. S.) 1057; *Hewitt v. Anderson*, 56 Cal. 476; Wald's *Pollock*, supra.

⁶⁶ See notes 64 and 65; see also *Berthiaume v. Doe* (Cal. App., 1913), 133 Pac. 515.

⁶⁷ *Spinney v. Downey*, 108 Cal. 666, 41 Pac. 797; *Harvey v. Duffey*, 99 Cal. 401, 33 Pac. 897; *White v. Corlies*, 46 N. Y. 467. Conversely, if the offer calls for performance, promise of performance is insufficient. *Northam v. Gordon*, 46 Cal. 582.

⁶⁸ 108 Cal. 666, 41 Pac. 797.

to perform. In the latter cases there is a tacit agreement.⁶⁹ *Gallagher v. Equitable Gas Light Company*⁷⁰ can be supported on that ground. Plaintiff had been negotiating with defendant for the installation of gas in the former's hotel. Defendant's solicitor, one Cheffens, presented an instrument in writing already executed by defendant for plaintiff's signature. The instrument recited that defendant was to furnish gas as long as plaintiff should use it at a stated price. Plaintiff refused to sign until Cheffens altered the term as to price, which he had no authority to do. Defendant furnished gas under the instrument as altered for some months and then declined to furnish it longer. Plaintiff brought action and the California Supreme Court held there was a contract. "If the change made by Cheffens, to suit the plaintiff," said the court, "may be regarded as a rejection of the contract as originally proposed by plaintiff, and as a new proposal by plaintiff, the voluntary acceptance by defendant of this proposal and its acting under it would constitute a contract binding upon defendant. California Civil Code, secs. 1584, 1589; *Bloom v. Hazzard*, 104 Cal. 310, 37 Pac. 1037."

A troublesome problem in unilateral agreements is presented where the act called for by the offer has been partially performed and the offeree is in course of completing performance, when the offeror withdraws his offer. Has the offeree already accepted the offer by commencing performance?

The California Civil Code is silent on this question and the authority upon it seems to be very meager and in conflict.⁷¹ "On principle", says Professor Williston,⁷² "it is hard to see why the offeror may not revoke his offer. He cannot be said to have already contracted, because by the terms of his offer he was

⁶⁹ *Gallagher v. Equitable Gas Light Co.*, 141 Cal. 699, 75 Pac. 329; *Reed v. Hickey* (Cal. App.), 109 Pac. 38. On tacit agreement see the writer's article "Contract and Quasi Contract", Cal. Law Rev., March, 1914.

⁷⁰ 141 Cal. 699, 75 Pac. 329.

⁷¹ *Biggers v. Owen*, 79 Ga. 658, 5 S. E. 193; *Williams v. St. Ry. Co.*, 191 Ill. 610; *Zwolanek v. Baker Mfg. Co.* (Wis.), 137 N. W. 769; *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 Pac. 1086; *Wald's Pollock*, p. 34, n. 39; note, 26 Harv. Law Rev. 274; article by Professor Ashley, 23 Harv. Law Rev. 159. (Same matter in *Ashley on Contracts*, §§ 30 ff.) See also, *Blumenthal v. Goodall*, 89 Cal. 251, 26 Pac. 906. Compare *Offord v. Davies*, 12 C. B. n. s. 748. See also, article by D. O. McGovney, 27 Harv. Law Rev. 644; *Pollock, Principles of Contract*, 8th Eng. ed., p. 26; *Cornelson v. Sun Mutual Ins. Co.*, 7 La. Ann. 345; *Elkins v. Board of Com'rs*, 86 Kan. 305, 120 Pac. 542, 46 L. R. A. (N. S.) 662.

⁷² *Wald's Pollock*, supra.

only to be bound if something was done, and it has not as yet been done, though it has been begun. Moreover, it may never be done, for the promisee has made no promise to complete the act and may cease performance at his pleasure. To deny the offeror the right to revoke is, therefore, in effect to hold the promise of one contracting party binding though the other party is neither bound to perform nor has actually performed the requested consideration. The practical hardship of allowing revocation under such circumstances is all that can make the decision of the question doubtful."

In applying the principle under discussion one must look closely to the facts before him. Suppose three cases: (1) A, the owner of a factory, publishes an offer of reward for the apprehension of a burglar; (2) A posts notices in his factory stating that workmen (not under contract of employment) remaining in his service for five years will be given a premium of \$1000 at the expiration of said term; (3) A, desiring a machine adapted to his own needs, but of no market value, says to D, a mechanic, "If you will make a machine according to these specifications (indicating) I will pay you \$1000." B, intending to gain the reward, secures a pack of blood-hounds at some expense and trails the burglar, but, when about to pounce upon him, is met by A who announces the withdrawal of the offered reward. C, an employe in A's factory, after four years and eleven months of faithful service, is told by A that the proffered premium is withdrawn. After D has gathered the materials and commenced the manufacture of the machine, he is advised by A that the offer to him is withdrawn.

Is A within his rights in any or all of these cases? That depends upon whether or not A's offers call merely for performances, which, in turn, is a question of construction. In terms A's offers do no more. But the courts do not favor a literal construction of language.^{72a} They gather the intention of parties from their situation, the end in view and the surrounding circumstances, as well as from the words used.^{72b} Applying these criteria, what did A's several offers mean to B, C and D, respectively—that is, what would such offers have meant to reasonable men in their places? In the reward case it seems clear that B must have understood that the offer called for the capture of the burglar and that alone.

^{72a} *Liverpool etc. Ins. Co. v. Kearney*, 180 U. S. 132.

^{72b} See *Clifford v. Watts*, L. R. 5 C. P. 577.

Under the facts put the offer therefore was revocable.^{72c} In the premium case is not the situation somewhat different? Would not any reasonable man in C's place understand that if he remained in A's service for a considerable part of the term, A tacitly promised to retain him for the full period if his work was satisfactory? In other words, did not A really make two promises to C, one—in words—to pay \$1000 upon C's remaining in service five years, and another—to be inferred from all the facts—not to discharge C without cause after the elapse of a substantial part of the term?^{72d} In the machine case, does not still another situation present itself? Here was there not a tacit bilateral contract, A promising to pay for the machine and B promising to make it—A's promise in words and B's evidenced by beginning work?^{72e} If these questions are answered affirmatively, the offers in the two cases last put were irrevocable. If the distinctions just suggested are well taken, authorities hitherto regarded as conflicting may be reconciled.

In *Los Angeles Traction Co. v. Wilshire*,⁷³ defendant and other property owners along plaintiff's proposed right of way executed, in June 1895, several promissory notes, defendant's being for \$2000 payable to plaintiff thirty days after the completion of plaintiff's road to a given point. These notes were placed in escrow with a banker with instructions to make delivery to plaintiff upon the happening of said condition. In November, 1895, plaintiff procured a franchise from the city at the expense of \$1505 and thereafter commenced construction. On July 1, 1897, defendant served notice disavowing further responsibility upon the note and agreement on the ground that the railroad had not been constructed in the time agreed upon. Plaintiff thereupon rushed work and completed the road on May 17, 1898. It then brought suit and recovered judgment. Defendant appealed. The Supreme Court affirmed the judgment. The court observed:

"The contract at the date of its making was unilateral, a mere offer that if subsequently accepted and acted upon by the other party to it would ripen into a binding enforceable obligation. When the respondent purchased and paid up-

^{72c} *Biggers v. Owen*, 79 Ga. 658, 5 S. E. 193.

^{72d} *Zwolanek v. Baker Mfg. Co.* (Wis.), 137 N. W. 769; article, 27 Harv. Law Rev. 644.

^{72e} See *Gallagher v. Equitable Gas Light Co.*, 141 Cal. 699, 75 Pac. 329; *Offord v. Davies*, 12 C. B. n. s. 748.

⁷³ 135 Cal. 654, 67 Pac. 1086.

wards of \$1,500 for a franchise it had acted upon the contract, and it would be manifestly unjust thereafter to permit the offer that had been made to be withdrawn. The promised consideration had then been partly performed, and the contract had taken on a bilateral character, and if appellant thereafter thought he discovered a ground for rescinding the contract, it was, as it always is, a necessary condition to the rescission that the other party should be made whole as to what he had parted with upon the strength of the contract. The notice of withdrawal from the contract was ineffectual, therefore, for several reasons. In the first place, it was based on a wrong theory; the reason given for it was that the road was not constructed within the agreed time, when, as was determined subsequently by the court, there was no time agreed upon. Again, it came too late, after the obligations of the parties had become fixed."

The language quoted does not indicate very clear thinking,⁷⁴ but if the observations made above are sound, it seems that the court reached the correct conclusion.

III. COMMUNICATION.

There can ordinarily be no meeting of minds unless both offer and acceptance are communicated. The general rule, accordingly, is that neither offer nor acceptance is effective without communication; but this rule is subject to exceptions. The California Civil Code provides:

"The consent of the parties to a contract must be: (3) Communicated by each to the other." (§ 1565.)

"If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted." (§ 1582.)

"Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer in conformity to the last section." (§ 1583.)

It is submitted that these sections do not give an accurate statement of the law because (1) in some cases offer need not be communicated, (2) acceptance need not be communicated in unilateral agreements, but must be in bilateral agreements, excepting

⁷⁴ Ashley on Contracts, pp. 83-85.

contracts by correspondence, and (3) in neither case is the requirement that acceptance be placed "in course of transmission".

(1) Few lawyers would perhaps be disposed to admit that a contract could arise without communication of the offer which was its source, and logicians might think it impossible. It is believed, however, that such may be the case. When a person takes passage on an ocean liner without reading the stipulations on his ticket limiting the carriers liability, he is none the less bound if the ticket is in such form that a reasonable man would be put upon inquiry.⁷⁵ Likewise the rights of the shipper of goods are governed by the terms of the bill of lading which he fails to read,⁷⁶ at least if he has signed it, and generally one who negligently signs a contract which he has not read cannot deny his obligation.⁷⁷ In these cases, is not the person bound the offeree? If he has no knowledge of the terms of the offer, is there any communication thereof?

(2) In a bilateral agreement the promise of the offeror calls for a counter promise by the offeree and this has no existence until acceptance is communicated.⁷⁸ In contracts by correspondence this rule yields to business convenience. The situation in unilateral agreements is different than in bilateral. In the former the offer becomes a binding promise when the act called for is performed because the consideration for the offer is performance of

⁷⁵ *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553, 27 N. E. 665.

⁷⁶ *Schroeder v. Schweitzer Lloyd (Cal.)*, 5 Pac. 478; Cal. Civ. Code, § 2176.

⁷⁷ *Kimmell v. Skelly*, 130 Cal. 555, 62 Pac. 1067; *Hawkins v. Hawkins*, 50 Cal. 558; note, 138 Am. St. Rep., 810-817. "The true way of ascertaining whether a deed is a man's deed is, I conceive, to see whether he attached his signature with the intention that that which preceded his signature should be taken to be his act and deed. It is not necessarily essential that he should know what the document contains: he may have been content to make it his act and deed, whatever it contained; he may have relied on the person who brought it to him, as in a case where a man's solicitor brings him a document, saying, 'this is a conveyance of your property', or 'this is your lease', and he does not inquire what covenants it contains, or what the rent reserved is, or what other material provisions in it are, but signs it as his act and deed, intending to execute that instrument, careless of its contents, in the sense that he is content to be bound by them whatsoever they are. If, on the other hand, he is materially misled as to the contents of the document, then his mind does not go with his pen. In that case, it is not his deed." *Buckley L. J. in Carlisle etc. Co. v. Bragg*, [1911] 1 K. B. 489, 495-496.

⁷⁸ *Wald's Pollock*, 3rd ed., pp. 21-22, n. 21; *Brogden v. Metrop. R. Co.*, [1877] 2 App. Cas. 692; *Felthouse v. Bindley*, 47 C. B. n. s. 869; *Harvey v. Duffey*, 99 Cal. 401, 33 Pac. 897. See *Yore v. Bankers' etc. Life Assn.*, 88 Cal. 609, 26 Pac. 514.

the act.⁷⁹ As was well said by Bowen, L. J., in *Carlill v. Carbolic Smoke Ball Company*:⁸⁰

"If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note saying that they had accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary. . . . in order to make the contract binding there should be a notification of acceptance."

The Court of Appeal for the First District in *Baird v. Loescher*⁸¹ recognized and applied the distinction, between unilateral and bilateral contracts, just pointed out. An apparent qualification of the rule in unilateral contracts is found in cases where knowledge of performance would not reasonably come to the offeror. There the offeree must put notice of acceptance in course of transmission to the offeror.⁸² This duty, however, is not a condition precedent to the existence of the contract. It is only a condition subsequent and does not, therefore, vitiate the rule.⁸³ We need scarcely add that the offeror may require communication of acceptance in a unilateral as well as in a bilateral contract.

(3) From the foregoing, it would seem that section 1583 is inapt when it declares that acceptance becomes effective from the time it is put "in course of transmission", for it requires too much in unilateral contracts and not enough in bilateral. The New York Commissioners said in explanation of the section: "This section is intended to recognize the rule that consent is complete as soon as the letter of acceptance is put in the post office."⁸⁴ It is submitted that the section goes much further. First, it extends

⁷⁹ *Baird v. Loescher*, 9 Cal. App. 65, 98 Pac. 49; *Shuey v. U. S.*, 92 U. S. 73; *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256; *Wald's Pollock*, *supra*.

⁸⁰ [1893] 1 Q. B. 256, 270.

⁸¹ 9 Cal. App. 65, 98 Pac. 49. The distinction between unilateral and bilateral contracts of guaranty has often been overlooked. Compare Cal. Civ. Code, §§ 2795 and 2865. See, *London etc. Bank v. Parrott*, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64; *Scribner v. Schenkel*, 128 Cal. 250, 253, 60 Pac. 860; *Standard etc. Co. v. Church*, 11 N. D. 420, 92 N. W. 805; *William Deering & Co. v. Mortell (S. D.)*, 110 N. W. 86, 16 L. R. A. (N. S.) 353. Notes, 16 L. R. A. (N. S.) 353, and 33 id. 960.

⁸² *Bishop v. Eaton*, 161 Mass. 496.

⁸³ *Harriman*, §§ 146 ff.

⁸⁴ *New York Draft Civil Code (1865)*, p. 235.

the rule in correspondence contracts, for "in course of transmission", and depositing in post or telegraph office, are obviously not the same. Secondly, it makes a confessedly exceptional rule—as enlarged—of general application.

Turning now to the usual case, where communication is required, will communication through a stranger be effectual? The California Civil Code provides:

"Consent can be communicated with effect only by some act or omission of the party contracting by which he intends to communicate it, or which necessarily tends to such communication." (§ 1581.)

The draftsmen explained the section as follows: "This is intended to exclude the possible case of the declaration of consent made to a person having no interest in the contract, and communicated by him to the other without authority."⁸⁵ No departure from the common law was apparently intended. Indeed it was not until the case of *Dickinson v. Dodds*,⁸⁶ decided eleven years after the California Civil Code was reported by Mr. Field and his associates, that communication by a stranger was of any legal consequence in Anglo-American law.

It has been held in California that an offer which comes to the offeree through the casual report of a stranger cannot be accepted so as to impose an obligation upon the offeror,⁸⁷ and that signification of acceptance of an offer to a mere messenger is of no effect, for "a contract cannot be made by manifesting to a stranger that assent which the law requires to be communicated between the parties".⁸⁸ In *Watters v. Lincoln*,⁸⁹ however, the South Dakota Supreme Court expressed the opinion that a revocation communicated by a stranger is effective although the Civil Code expressly makes the section above quoted applicable to revocation.⁹⁰

In *Watters v. Lincoln*, the defendant resided in Seattle and the plaintiff in Spink County, South Dakota. Defendant was the owner of two quarters of land in the last named place. On the 17th of August, 1910, he wrote plaintiff a letter offering to sell his land on designated terms at any time on or before September 5th following. This letter was received by plaintiff in due course

⁸⁵ New York Draft Civil Code (1865), p. 234.

⁸⁶ L. R. 2 Ch. Div. 463.

⁸⁷ *Canney v. South etc. R. R. Co.*, 63 Cal. 501.

⁸⁸ *Leszynsky v. Meyer* (Cal.), 53 Pac. 703.

⁸⁹ *Watters v. Lincoln* (S. D.), 135 N. W. 712.

⁹⁰ Cal. Civ. Code, § 1587.

of mail some three or four days subsequent to August 17th. On the evening or night of August 26th, plaintiff wired his acceptance by night letter which was delivered to defendant August 27th. Defendant immediately wired back that the land had been sold. On August 26th, defendant had mailed a revocation at Seattle, directed to plaintiff. This revocation was post marked 6 P. M. It was also in evidence that before plaintiff wired his acceptance he had been informed by the tenant farmer in possession of the land in question that it had been sold. On these facts the court denied the plaintiff's bill for specific performance, and gave defendant judgment on two grounds: (1) that plaintiff could not accept defendant's offer after he had been advised by the tenant of its withdrawal, and (2) that defendant's revocation was effective from the time of mailing. The judgment might have been based on the second ground alone but both points were considered and deliberately passed upon; so the case is a decision upon both.

In discussing the first point the court quoted with approval from *Dickinson v. Dodds* as follows:

"If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere nudum pactum, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible."

Although the court was emphatically of the opinion in *Watters v. Lincoln* that knowledge of revocation coming through a stranger prevents subsequent acceptance, the case, like *Dickinson v. Dodds*, is really an authority only for the proposition that specific performance will not be granted one accepting an offer for the purchase of real estate when there has been an intervening contract with a third person for the sale of the land.

While the doctrine of *Dickinson v. Dodds* has been generally repudiated by the best writers,⁹¹ the decision appears sound

⁹¹ Anson, pp. 46-48; Wald's *Pollock*, p. 34; Langdell, § 181; Hariman, § 168.

enough, for the offeror's contract with the third person was prior in time to the offeree's acceptance. The third person therefore had a prior equity in the real estate and that prevented the offeree from having specific performance, even if it be conceded that his acceptance was effective. These observations are applicable also to the American cases, including *Watters v. Lincoln*, which adopt the doctrine of *Dickinson v. Dodds*.⁹²

The dictum of the court in *Watters v. Lincoln* that acceptance cannot be made after knowledge of revocation coming from a stranger is in direct conflict with the provisions of the California Civil Code⁹³ which were not called to the court's attention in connection with the first point in the opinion although they were considered in passing upon the second point. The dictum in *Watters v. Lincoln*, above referred to, adopting the doctrine of *Dickinson v. Dodds* is, therefore, not law in California.

* * * * *

Summing up our conclusion in a word, it may be said that the provisions of the California Civil Code dealing with agreement are radically defective both in form and content;⁹⁴ agreement is not analyzed and separated into its elements, with the result that most problems relating to offer are overlooked; agreements are not separated into unilateral and bilateral, and the questions peculiar to unilateral agreements are not adequately dealt with; besides these and other omissions there are unexplained departures from established principles, the most conspicuous of which perhaps is found in the provision to the effect that "consent", including revocation, is effective from the time notice thereof is placed "in course of transmission". These shortcomings have not caused much damage, for the Civil Code appears not to have greatly influenced the decisions.

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⁹² *Dickinson v. Dodds*, *supra*; *Watters v. Lincoln*, *supra*; *Frank v. Stratford-Handcock* (Wyo.), 77 Pac. 134; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284.

⁹³ See Sir F. Pollock's comment on similar provision of Indian Contract Act, Pollock, *Indian Contract Act*, 3rd ed., pp. 37-39.

⁹⁴ See Sir. F. Pollock's criticism of Field Civil Code (*Indian Contract Act*, 3rd ed., p. ix.) which is in part as follows: "This code is in our opinion, and we believe in that of most competent lawyers who have examined it, about the worst piece of codification ever produced. It is constantly defective and inaccurate, both in apprehending the rules of law which it purports to define and in expressing the draftsmen's more or less satisfactory understanding of them. The clauses on fraud and misrepresentation in contracts . . . are rather worse, if anything, than the average badness of the whole."