American Legal History – Russell

C[hristopher] C[olumbus] Langdell, SUMMARY of THE LAW OF CONTRACTS, (1871).

1. According to the popular apprehension of the term, a promise is the act of the promisor alone; but in truth it requires also an act of the promisee. Before any act by the promisee, the so-called promise is in law only an offer, called by the Romans a pollicitation. It is not until it is accepted by the promisee that it becomes in law a promise. A promise in this respect like a gift of property, which is commonly supposed to be the act of the donor alone, but which requires the acceptance of the donee to pass the title to the property.

* * *

11. Acceptance has hitherto been considered with reference to such offers only as contemplate unilateral contracts. When the contract is to be bilateral, though the principles are the same, the application of them is very different. It still remains true that the offer requires an acceptance and the giving of the consideration to convert it into a binding promise; but as the consideration consists of a counter-promise, so the giving of the consideration is consists in making this counter-promise. It follows also that the original offer cannot become a binding promise until the counter-promise also becomes valid and binding, for until then the consideration is not given. Hence the familiar rules, that in bilateral contracts neither party will be bound unless both are bound, and that both must become bound at the same moment of time; and these rules hold in the civil law, and in the law of Scotland, as well as in our law, for, although the former do not require a consideration to make a promise binding, yet an offer which contemplates a counter-promise is conditional upon the counter-promise being made.

12. There are other important particulars in which a bilateral contract differs from one that is unilateral in respect to the acceptance of an offer: while in the latter the acceptance is merged and lost sight of in the performance of the consideration, in the former the giving of the consideration is merged and lost sight of in the acceptance; while in the latter the performance of the consideration necessarily implies an acceptance of the offer, in the former the acceptance of the offer necessarily implies the giving of the consideration. Therefore, a mere offer in

terms and an acceptance in terms are sufficient to form a bilateral contract, but not a unilateral contract. So an acceptance in terms is a *sine qua non* in a bilateral contract, while in a unilateral contract an acceptance in terms may be, and commonly is, dispensed with. Again in a unilateral contract the offer becomes a contract in consequence of what the offeree *does*, in a bilateral contract in consequence of what he *says*. The reason why an acceptance in terms is necessary, and why it also suffices, in a bilateral contract, is, that what is called an acceptance is in that connection also and chiefly a counter-promise.

13. But how is it, the reader may ask, that a mere offer on one side and an acceptance of it on the other can create a promise on each side? that what purports to be but one offer and one acceptance is in effect two offers and two acceptances? It is because everything except the original offer and the acceptance of it is implied. Thus, it generally appears from the nature and terms of an offer whether it requires a counter-offer, and, if it does, what the terms of such counter-offer must be; and therefore nothing need be said in the offer upon either of those points. Nor is it ever necessary for an offerer to say that he will accept a counter-offer, if made; for if his offer requires a counter-offer, it is necessarily implied that he will accept the latter. So the acceptance of an offer which requires a counter-offer need say nothing about the latter, and the terms of the latter, having been fixed by the original offer, do not need to be repeated. Then, the counter-offer being thus made by implication, no further act of acceptance of it is necessary, for, the original offerer having by implication declared his intention to accept it, he is conclusively presumed to remain in that state of mind so long as his offer continues; and hence the counter-offer, by a conclusive presumption of law, is accepted the moment it is made. The same principle is familiar in transfers of property; for, while the acceptance of the transferee is necessary for the passing of the title, yet it may be, and frequently is, given in advance by soliciting the transfer.

14. It has been seen that the acceptance of the original offer, in the case of a bilateral contract, must be expressed, *i.e.*, must be made by words or signs; and that the reason for this is, that the acceptance contains a counter-offer. Moreover, the reason why the counter-offer makes it necessary that the acceptance should be expressed is, that communication to the offeree is of the essence of every offer. The acceptance, therefore, must be communicated to the original offerer, and until such communication the contract is not made. When the parties are together and contract orally, no question can often arise as to communication; but when they are at a distance from each other and contract by letter, such a question frequently arises. The principles, however, is the same in both cases. In contracts *inter præsentes* the words or signs must be both heard or seen and understood; in

contracts *inter absentes* the letter must be received and read. Upon this latter point, however, there has been much difference of opinion, and it has been supposed to be pretty well settled in England and this country that the contract is complete the moment the letter of acceptance is mailed. Most of the authority on the subject, however, consists of *dicta*, and these *dicta* may be explained by the fact that the nature of the question has been misunderstood. Of actual decision there is indeed very little. Of all the cases contained in the writer's collection of Cases on Contracts, the point in question seems to have been decided in only three, one of them (and the earliest) a Massachusetts case (McCulloch *v.* the Eagle Ins. Co.), another a New York Case (Vassar *v.* Camp), and the third a Scotch case (Thomson *v.* James). All the other cases turned upon some other question. Thus, in Adams *v* Lindsell, it was erroneously supposed that the offer had been revoked between the mailing and the receipt of the letter of acceptance (**181**), and hence that the case depended upon the time when the acceptance became complete. The only real question, however, was whether the acceptance came too late, the letter containing the offer having miscarried. In Potter *v.* Sanders, the contract with Potter was entitled to priority in any view, since the Statute of frauds was not satisfied as to the contract with Coates until April 17, and though the latter contract might relate back to the oral agreement as between the parties to it, it could not so relate as to a third person. In Dunlop *v.* Higgins, the only question was whether the offer was accepted in time; and it was held that it was, whether the acceptance became complete on the mailing or on the receipt of the letter of acceptance. In Hebb's Case, in Br. and Am. Tel. Co. *v.* Colson, and in Harris's Case, the contract was unilateral (**6**), and hence those cases are not in point. In McCulloch *v.* Eagle Ins. Co. the question was actually involved, and the decision was in favor of the view here contended for. In Mactier *v.* Frith, the offer was to sell to Mactier an undivided half-interest in a cargo of brandy already in his possession. As soon, therefore, as Mactier accepted the brandy on the terms offered, the title passed, and he became indebted for the price. No actual promise by him was necessary. It was not even necessary that he should write a letter of acceptance, still less that it should reach Frith. In Averill *v.* Hedge, the only question confessedly was whether the letter of acceptance was mailed in time. In Tayloe *v.* Merchants' Fire Ins. Co. defendant's offer contemplated a unilateral contract, and this offer was accepted and the consideration paid the moment when the plaintiff sent his check for the premium. It was the same as if money had been sent. It is true that the plaintiff became liable to the defendant on his check, but that liability arose when the check was delivered, *i.e.* when the letter containing it was mailed. Vassar *v.* Camp must be admitted to be in point, but the effect of the decision was not such as to recommend it. Indeed, it is doubtful if it can stand in any view that can be take of it; for, assuming that the contract was complete the moment the plaintiff's letter of

acceptance was mailed, there is much ground for holding that the defendants' liability was conditional upon their receiving prompt notice of the acceptance of their offer. This view may be fairly rested upon a necessary implication, though it is much aided by expressions in the defendants' offer. It also detracts from the authority of Vassar *v.* Camp, that the court regarded the question as already conclusively settled by Mactier *v.* Firth. Dunmore *v.* Alexander is opposed to Vassar *v.* Camp, so far as it goes, but the point was not involved. Thomson *v.* James agrees with Vassar *v.* Camp, but the reasoning by which the decision is supported is at least neutralized by the dissenting opinion of Lord Curriehill. The case of S. *v.* F. contains a powerful argument by Merlin in support of the view adopted by McCulloch *v.* The Eagle Ins. Co., but the point was not decided.

15. It remains to notice the principal arguments which have been advanced in support of the view that the contract is complete the moment the letter of acceptance is mailed. 1. It is said that, if the contract is not made until the letter of acceptance comes to the knowledge of the offerer, it can never be made. This proposition assumes that, if the contract cannot be made until the acceptance comes to the knowledge of the offerer, it must be because this knowledge of the offerer is one of the necessary elements of a contract. If the argument be stated in the form of a syllogism, it will stand thus: If the contract must become known to the offeree the moment it is made; it must equally become known to the offeree the moment it is made; but a contract *inter absentes* cannot become known to both parties at the same moment, and so not at the moment it is made; *ergo* need not become known to the offerer the moment it is made. The fault of this syllogism is in the major premise, which is untrue. The reason why the contract must become known to the offerer the moment it is made is an accidental one; namely, because the contract is made the moment the counter-offer is made, and the counter-offer is made the moment the letter of acceptance comes to the knowledge of the offeree. 2. It is said that an offer made through the mail impliedly authorizes an answer to be sent through the same channel; and therefore, when the offeree has mailed a letter of acceptance, he has done everything which the offer requires him to do. It is true that he has done everything required of him as to the mode of communicating his counter-offer; but the offer also requires by a necessary implication that a counter-offer shall be made, and this cannot be done without communication. If, therefore, the offer should expressly declare that the contract should be complete immediately upon mailing a letter of acceptance, such a declaration would be wholly inoperative. 3. It is said that the offerer, by sending his offer by mail, makes the post-office his servant or messenger to receive and return an answer, and therefore that the mailing of an answer is a delivery of it to the offerer. It is unnecessary to question the correctness of this proposition, for it

may be fully admitted, without at all advancing the argument in support of which it is adduced. Even if the offerer should send his offer by his own servant, and the latter should bring back a letter of acceptance, though the delivery of the letter of acceptance to the servant would be a delivery to his master, and so vest the property in the letter in the master, it would not complete the contract. If, indeed, the offerer should send his offer by a messenger, and should authorize the latter to receive a verbal acceptance as the offerer's agent, the case would be different; for the communication of the acceptance to the agent would be a communication of it to the principal, and the knowledge of the agent would be the knowledge of the principal. 4. It has been claimed that the purposes of substantial justice, and the interests of contracting parties as understood by themselves, will be best served by holding that the contract is complete the moment the letter of acceptance is mailed; and cases have been put to show that the contrary view would produce not only unjust but absurd results. The true answer to this argument is, that it is irrelevant; but, assuming it to be relevant, it may be turned against those who use it without losing any of its strength. The only cases of real hardship are where there is a miscarriage of the letter of acceptance, and in those cases a hardship to one of the parties is inevitable. Adopting one view, the hardship consists in making one liable on a contract which he is ignorant of having made; adopting the other view, it consists in depriving one of the benefit of a contract which he supposes he has made. Between these two evils the choice would seem to be clear: the former is positive, the latter merely negative; the former imposes a liability to which no limit can be placed, the latter leaves everything *in statu quo*. As to making provision for the contingency of the miscarriage of a letter, this is easy for the person who sends it, while it is practically impossible for the person to whom it is sent.

EOD