

12-1-1952

Contracts—Offer and Acceptance

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Recommended Citation

Maynard Schaus, *Contracts—Offer and Acceptance*, 2 Buff. L. Rev. 83 (1952).

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THE COURT OF APPEALS, 1951 TERM

manifested the intention not to be bound until the writing shall have been executed,⁷ in which case the agreement must be assented to as written before it becomes binding.⁸ Signing and delivery commonly are sufficient proof of assent.⁹ Actual physical delivery of the instrument is not always necessary, since assent may be shown in various ways.¹⁰ But where the intention is that the writing shall take effect only upon delivery, no contract exists until the document is delivered.¹¹

The instant case clearly shows that where the intention of the parties is not to be bound until delivery of the formal document, the actual signing and retention of that document, coupled with an objection to the manner of payment of the purchase price, is not an acceptance or delivery of the writing, even though no objection was made to the document as written.

Offer and Acceptance

It is not uncommon that parties choose to completely ignore an offer. The difficulty is that silence may be tantamount to acceptance. In *Schultz & Co. v. Camden Fire I. Ass'n.*,¹² the plaintiff alleged that defendant insurer by its agent had orally agreed over the telephone to transfer a certain policy covering plaintiff's 1922 Mack truck to his 1933 Mack truck. Subsequent to this alleged agreement to transfer and insure, the 1933 Mack truck was stolen. Plaintiff now seeks recovery under the theft clause of the policy. The plaintiff's agent testified that she had mailed a post card with the motor number of the 1933 Mack to the agent of the defendant, after telephoning a person who said she was the secretary of the defendant's agent. The telephone conversation was excluded as it was not shown that it was with a person qualified to bind the defendant. The Court of Appeals held that when an application for insurance is made, the silence of the insurer without other circumstances does not operate as an acceptance. As a matter of law, the plaintiff failed to prove acceptance.

7. *Commercial Telegraph Co. v. Smith*, 47 Hun. 494 (N. Y. 1888); 1 WILLISTON, CONTRACTS §28A (rev. ed. 1936).

8. 1 CORBIN, CONTRACTS §30 (1951).

9. 1 CORBIN, *op. cit. supra* n. 8.

10. *Sarasohn v. Kamaiky*, 193 N. Y. 203, 86 N. E. 20 (1908). Simply reading over the terms may not be enough; even signing the written contract and retaining possession of it may not express a sufficient assent. *W. T. Rawleigh Co. v. Royal*, 30 Ga. App. 706, 199 S. E. 339 (1923).

11. *Dietz v. Farish*, 79 N. Y. 520, 523 (1880).

12. 304 N. Y. 143, 106 N. E. 2d 273 (1952).

Generally, silence cannot be construed as acceptance of an offer,¹³ for "assent" which is purely mental is too ambiguous.¹⁴ The offeror has no power to force the offeree to act in order to reject the offer.¹⁵ The general rule is that delay by an insurer in acting upon an application for insurance in itself is not to be construed as an acceptance of the offer.¹⁶ But the silent retention of a renewal policy by an insured will operate as acceptance where previous dealings are shown.¹⁷ Likewise, unreasonable delay in notifying an applicant of rejection of a solicited policy will bind the insurer.¹⁸ Evidence of usage in a particular trade is admissible with other circumstances to show an assent from silence.¹⁹ The burden of proof is on the party who asserts the existence of the policy.²⁰

The plaintiff in the instant case simply failed to show facts sufficient to bring his case within the exceptions to the general rule.

Statute of Frauds

An oral agreement may be valid as such, yet unenforceable because by its terms it cannot be fully performed within one year from its making.²¹ In *Nat Nat Service Stations v. Wolf*,²² the action was for money due upon an oral contract which provided that so long as the plaintiff purchased his requirements of gasoline through the defendant, plaintiff would be paid a certain rebate. The defendant set up the Statute of Frauds in answer and moved for summary judgment. The Court of Appeals, three judges dissenting, held that the agreement did not fall within the scope of

13. *Lee v. Woodward*, 259 N. Y. 149, 181 N. E. 81 (1932).

14. *Mactier v. Frith*, 6 Wend. 103, 119 (N. Y. 1830); *White v. Corlies*, 46 N. Y. 467 (1871); 1 CORBIN, *op. cit.* § 72 (1951).

15. *More v. N. Y. B. F. Ins. Co.*, 130 N. Y. 537, 547, 29 N. E. 757, 759 (1892).

16. *More v. N. Y. B. F. Ins. Co.*, *supra* n. 15; VANCE, INSURANCE § 64 (1930).

17. *National Union Fire Ins. Co. v. Ehrlich*, 122 Misc. 682, 203 N. Y. Supp. 434 (Sup. Ct. 1924).

18. *Thompson v. Postal Life Ins. Co.*, 226 N. Y. 363, 123 N. E. 750 (1919).

19. *Rose Inn Corp. v. National Union Fire Ins. Co.*, 258 N. Y. 51, 179 N. E. 256 (1930).

20. *Lavine v. Indemnity Ins. Co.*, 260 N. Y. 399, 410, 183 N. E. 897, 900 (1933).

21. N. Y. PERS. PROP. LAW § 31 (1.): "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking; (1.) By its terms is not to be performed within one year from the making thereof . . ." "Year" is defined in GENERAL CONSTRUCTION LAW § 58.

22. 304 N. Y. 332, 107 N. E. 2d 473 (1952).