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Contracts—Account Stated

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CONTRACTS

Offer And Acceptance

In *Valashinas v. Koniuto*¹ the partnership agreement provided that either partner might give written notice of intent to dissolve the partnership, stating the sum for which he would buy his partner's interest or sell his own, and that if within ninety days after receiving notice recipient failed to elect to buy or sell, the partner giving such notice might make such election. Defendant here gave such notice on December 12 and plaintiff elected on December 15 to accept the offer and sell his interest, expressing his readiness to close the transaction on or before December 31. Judge Desmond, speaking for the majority, affirmed the Appellate Division and Special Term in denying the defendant's motion to dismiss the complaint for specific performance for failure to state a cause of action.² The court held that reference to December 31 as a closing date was not a rejection of partner's offer and not a counter-offer.

It is a fundamental principle of the law of contracts that an acceptance must be positive and unambiguous. It must not change, add to or qualify the terms of the offer.³ Qualified or conditional acceptances are counter-offers which reject the original offer.⁴ However, an acceptance which states that a party will be ready to close at a certain time and place has been held to be a mere suggestion for the convenience of the parties rather than a conditional or qualified acceptance.⁵

The dissenters felt that the proposal of the closing date made time of the essence, and thereby placed an unjust burden on the offeror and rejected the offer. However, the more reasonable interpretation would seem to be that of the majority, that someone had to fix or suggest a closing date as the partnership agreement did not do so. Plaintiff's notice that he would be ready to close on December 31 should be regarded as a routine business detail rather than an express condition or a peremptory insistence on making time of the essence.

Account Stated

In *Sea Modes v. Cohen*,⁶ an employer sought to recover alleged overpayments to his salesman while the defendant salesman sued to recover commissions allegedly due him. The agreement by which the salesman was hired contained the following provision, "We will render to you statements monthly showing business done and

1. 308 N. Y. 233, 124 N. E. 2d 300 (1954).

2. Rules of Civil Practice, rule 106.

3. 1 WILLISTON, CONTRACTS, § 72 (Rev. ed. 1936).

4. *Ibid.*, § 77.

5. *Winslow v. Moore*, 30 Hun 311, 17 N. Y. Week Dig. 429 (1833).

6. 309 N. Y. 1, 127 N. E. 2d 723 (1955).

re-orders received from your accounts, and unless you submit objections or corrections to such statements within 10 days from the date when they are rendered to you, the same shall be deemed conclusive and binding upon both of us and shall form the basis upon which computation of your compensation shall be made." Judge Desmond, writing for the court in affirming the employer's motion for summary judgment, held (5-2) the agreement was conclusive and the salesman was foreclosed from disputing the account submitted in a later suit.

An account stated is nothing more or less than a contract express or implied between parties. It is an agreement which they have come to regarding the amount due on past transactions. Unless the party receiving the account objects within a reasonable time, his silence will be construed as an acquiescence in its correctness. An account stated is conclusive unless fraud, mistake or other equitable considerations are shown which make it improper to be enforced.⁷ A fiduciary relationship may be a factor in determining the presumption of correctness, but it does not preclude parties who are capable of contracting with each other from entering into

such an agreement.⁸

Judge Burke, in his dissent, contends that the salesman was not in a position to have knowledge of all of the accounts and transactions between his employer and large national accounts, thereby creating an issue of fact for trial. However, as the majority points out, the parties were dealing at arms length and there was nothing in the record to show that the salesman could not or was prevented by his employer from investigating the facts as to sales made by the corporation. The position of the majority effectuates the purpose of the contract and is consistent with sound business policy. The view of the dissent would seem to unduly encourage parties to "sit on their rights."

Arbitration

For the third time in three years the Court of Appeals was faced with the problem of a contract of sale which referred to an outside agreement containing a mandatory arbitration clause. In *Level Export Corp. v. Aiken & Co.*,⁹ the court held that an agreement incorporating by direct reference the provisions of the Standard Cotton Textiles Sales Note bound the buyer to arbitration. In *Riverdale Fabrics Corp. v. Tellingbest Stiles Co.*,¹⁰ a sales memorandum providing, "this contract is also subject to the Cotton Yarn Rules of 1938 as amended" was held

7. *Radkinson v. Haecker*, 256 N. Y. 254, 176 N. E. 383 (1931).

8. *Carr v. Hoffman*, 256 N. Y. 254, 176 N. E. 383 (1931).

9. 305 N. Y. 82, 111 N. E. 2d 818 (1953). See 3 BFLD L. REV. 86 (1953).

10. 306 N. Y. 288, 118 N. E. 2d 104 (1954). See 4 BFLD L. REV. 55 (1954).