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DEATH AS AFFECTING OFFERS AND AGENCIES

Behind the law of offer and acceptance runs the theory, though in truth it is but a fiction, that contractual agreement is predicated upon a literal meeting of the minds of the contracting parties.

“It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the moment of acceptance. If there was not such a continuing offer, then the acceptance comes to nothing.¹

“The defendants (the seller-offerors) must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs”²

“It is elementary that there must be a meeting of two minds in one and the same intention in order that there may be a contract”³

Sine a dead mind cannot agree, it has with logic inevitably followed that an offer is *eo instanti* revoked upon the death of the offeror.⁴

“The continuation of an offer is in the nature of its constant repetition, which necessarily requires someone capable of making a repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man”⁵

The Lord President of the Court of Session of Scotland has more fully explained the theory, saying, *arguendo*

“Death or insanity may prevent the completion of the contract as effectually as the most complete revocation, but they are not properly revocations of the offer. They are not acts of the will of the offerer, and their effect does not rest upon a supposed change of purpose. They interrupt the completion of the contract,—that is, the making of the contract,—because a contract cannot be made directly with a dead man or a lunatic. The contract is not made until the offer is accepted, and if the person with whom you merely intend to contract dies or becomes insane before you have contracted with him, you can no longer contract directly with him. You cannot, by abhibiting your acceptance to an offer, and addressing it to a dead man or a lunatic, make it binding on him,

¹ *Dickinson v. Dodds*, L. R. 2 Ch. Div. 463, 34 L. T. Rep. N. S. 607 (1876).

² *Adams v. Lindsell*, 1 B. & Ald. 681 (1818).

³ *Ross v. Savage*, 66 Fla. 106, 63 So. 148 (1913).

⁴ 13 C. J. 298 and cases there cited.

⁵ *Pratt v. Trustees of Baptist Society*, 93 Ill. 475 (1879)

whether his death or insanity be or be not known to you. In such a case there is an interruption—an effectual obstacle to the completion of the contract, equivalent in result to a revocation, though operating by very different facts and very different principles”⁶

Contrary to the usual rule that revocation must be communicated to the offeree before it becomes effective,⁷ a revocation by death operates regardless of the offeree’s knowledge of the death.⁸ Even though the offeree not knowing of the death, but after it chronologically, accepts the offer and in reliance thereon changes his position, there is no contract and the offeree must suffer the consequences. In *Browne v. McDonald*⁹ an uncle promised to pay a reasonable compensation for the board, tuition, and clothing to be furnished his niece. His promise was in the nature of a continuing offer. It was held to be terminated by the death of the promisor, the plaintiff being unable to recover for services rendered the niece after the death, even though the plaintiff did not know of the death and the offeror’s executor failed to notify her. In *Michigan State Bank v. Leavenworth*¹⁰ it was decided that the efficacy of a letter of credit is confined to the life of the writer. Hence no recovery can be had upon it for goods sold or advances made after his death.

In *Jordan v. Dobbins*¹¹ the Court said

“The guaranty is carefully drawn, but it is in its nature nothing more than a simple guaranty for a proposed sale of goods. The provision, that it shall continue until written notice is given by the guarantor that it shall not apply to future purchases, affects the mode in which the guarantor might exercise his right to revoke it, but it cannot prevent its revocation by his death. No liability existed under it against the guarantor at the time of his death, but the goods for which the plaintiffs seek to recover were all sold afterwards.

“We are not impressed by the plaintiff’s argument that it is inequitable to throw the loss upon them. It is no hardship to require traders, whose business it is to deal in goods, to exercise diligence so far as to ascertain

Thomson et al. v. James, 18 Sc. Sess. Cas. (Dunlop) 1 (The Court of Session) (1855).

⁷ *Patrick v. Bowman*, 149 U. S. 411, 37 L. ed. 790 (1893). Recognized in *Malloy v. Drumheller* 68 Wash. 106, 122 Pac. 1005 (1912).

⁸ *Aitken et al. v. Lang’s Admrs.*, 106 Ky. 652, 51 S. W. 154 (1899) *The Palo Alto*. 13 Fed. Cas. 1062, No. 10,700 (1847).

⁹ 129 Mass. 66 (1880)

¹⁰ 2 Williams, 209 (Vt. 1856).

¹¹ 122 Mass. 168 (1877). See WILLISTON, CONTRACTS (1921) Sec. 62, footnote 1.

whether a person upon whose credit they are selling is living.¹²

California has apparently put upon its statute books the rule that death instantly revokes an offer.¹³ So has Louisiana.¹⁴

The inequitable results of this rule reach into many of the most frequent types of business transactions. A merchant who sells to a distant sole trader inevitably assumes a life insurance risk. Typically A, an Alaskan retailer, ordered goods of B, a Seattle wholesaler, the order from A having been posted on May 1, reaching B on May 25. B shipped the goods north by the first boat. A had died on the twenty-third of May, but B did not learn thereof until the Steamship Company reported a refusal to take the goods. Losses because of deterioration and obsolescence and freight costs fall on B. A broker or importer who resells goods on the faith of an accepted offer to sell from a third person, meanwhile deceased, or one who buys on the faith of an accepted offer to buy made by a third person, meanwhile deceased, is similarly situated.

Closely kindred to the principle that minds must meet to contract is the common law doctrine of renewal or continuity of authorization in principal-agent and partnership relationships. The cases hold that at each moment of time a new impulse of authorization goes out from the principal to his agent and renews the power of the latter to act on behalf of the principal or partner.

So with Anglo-Saxon fidelity it follows that since a dead principal cannot send out invigorating impulses, an agent's authority is terminated the moment death occurs,¹⁵ even though the authority expressly provides that it is irrevocable and shall survive the death of the principal,¹⁶ and even though innocent third parties have been misled into supposed contractual obligations with the late principal and have acted (as by delivering goods) in reliance thereon.¹⁷ Thus a payment made to an agent after the death of

¹² But how can a trader be sure that his guarantor is living other than by insisting that no sale be made without his physical presence at the place of business? Such would render offers of guaranty utterly impracticable. *Jaffee v. Jacobson*, 48 Fed. 21 (1891), reports an interesting instance of the defeat of a clearly proved intention.

¹³ Civil Code of California, Sec. 1587, as interpreted in *Shaw v. King* 63 Cal. App. 13, 213 Pac. 50 (1923), where it was (apparently) held there was no contract where a brother after forwarding his sister money on which to come to him, and offering to maintain her during the rest of her life, died before the offer was accepted.

¹⁴ Civil Code of Louisiana, 1810.

¹⁵ *Long v. Thayer*, 150 U. S. 520, 37 L. ed. 1167 (1893) *Gilmore v. Continental Casualty Co.*, 58 Wash. 203, 108 Pac. 447 (1910).

¹⁶ *Weaver v. Richards*, 114 Mich. 395, 108 N. W. 382 (1906) Ex parte Welch 2 N. B. Eq. 129 (1900)

¹⁷ *Blades v. Free*, 7 L. J. K. B. O. S. 211 (1829)

the principal will not discharge the debt, although made in actual ignorance of the principal's death.¹⁸ In *Riggs v. Cage*,¹⁹ an agent purchased goods for his principal after the latter's death but before either the agent or the seller had notice thereof. The estate was not liable.

Occasional, perhaps frequent, hardship to individuals is of course of less importance to the State than is the maintaining of consistent and definite legal principles upon which its courts may base their decisions. But upon inquiry it seems that the courts do not consistently demand that a meeting of the minds precede contractual obligation, it appears that the doctrine of constant renewal of an agent's authority is unnecessary, has been judiciously termed harsh and regretfully followed, and has been subjected to statutory modification, it is seen that under some circumstances, though a contract be wanting, the estate of a decedent is required to indemnify third persons who have changed their positions in reliance upon the decedent.

A LITERAL MEETING OF THE MINDS IS UNNECESSARY

A meeting of the minds—an agreement at a given instant of time—is unnecessary to a contract. In illustration Jones, in Seattle, handed to Brown an offer to sell securities at a specified price, the offer to be open two weeks. It was understood that Brown was leaving for a trip south and would mail his acceptance or refusal. A few hours after Brown's departure Jones received from X an offer substantially higher than he had himself quoted to Brown. Jones at once devoted his energies to the task of finding Brown in order to revoke his offer and clear the way for an acceptance of the offer of X. But Brown could not be found. Telegrams, letters, and even personal messengers failed to reach him. On the twelfth day Brown mailed a properly stamped and addressed acceptance. That there was a contract between Jones and Brown cannot be questioned. Yet the minds of Jones and Brown were never in accord. When the offer was made, Jones was willing but Brown was doubtful. When Brown accepted, Jones had for ten days been strongly against the contract. As said in *Thomson v James*²⁰

“In a great many cases the maxim that there must be a concurrence of will at the moment of completion of the contract cannot be rigidly or literally applied. The very opposite may be the fact. Although one cannot, by ac-

¹⁸ *Long v. Thayer supra*, *Michigan Inc. Co. v. Leavenworth*, 30 Vt. 11 (1856). See also *Blades v. Free, supra*.

¹⁹ 2 Humphr. 350, 37 Am. Dec. 559 (Tenn. 1829)

²⁰ See note 6.

cepting an offer, bind a dead or insane person, he may bind an unwilling person, one who has altogether changed his mind. Such cases are not unfrequent. If an offer bears that it is to be binding for a certain number of days or hours, the offeror may repent before the lapse of the given time, and yet at the end of it may find himself unwillingly bound, or if an offeror changes his mind, but does not take the proper steps to have his change of mind conveyed to the offeree,—either writes no letter, or writes a letter which he omits to send or sends it by mistake to a wrong place,—he may find himself unwillingly bound. Other cases may be figured. Mere change of mind on the part of the offeree will not prevent an effectual acceptance,—not even although that change of mind should be evidenced by having been communicated to a third party, or recorded in a formal writing, as for instance in a notarial instrument. In all these cases a binding contract may be made between the parties without that consensus or concursus which a rigidly literal reading of the maxim or rule would require.”

Likewise although a person’s intent is not to contract, he will be contractually bound if by his words or actions he indicates the contrary to another who in good faith accepts his apparent offer, the criterion of intent being the reasonable impression of the offeree rather than the hidden *though actual* intent of the offeror.

Not strictly germane, but perhaps worthy of mention are the cases which hold that an acceptance mailed before but not received until after the death of the proposer results in a binding contract.²¹

In a significant line of cases concerned with the death of a guarantor under a continuing guaranty, the guarantee was said to be entitled to recover from the guarantor’s estate when, without knowledge of the death, he extends credit in reliance on the guarantor’s promise to pay if the debtor should not.²² The guarantor’s promise is of course but an offer unless there be a consideration supporting it.²³ There has been an acceptance after the death of the offeror.

²¹ *Mactier v. Frith*, 6 Wend. 103 (N. Y., 1830)

²² *Gay v. Ward*, 67 Conn. 147, 34 Atl. 1025 (1895). *Knotts v. Butler*, 31 S. C. Eq. 143 (1858) *Bradbury v. Morgan*, 31 Law J., Exch. 462, 158 Reprint 877 (1862). The guaranty read: “Messrs. Bradbury & Co.—I request you will give credit in the usual way of your business to H. L., and, in consideration of your doing so, I do hereby engage to guarantee the regular payment of his account with you, until I give you notice to the contrary, to the extent of £100.” This case was cited at the argument of *Offord v. Davies*, 12 C. B. (N. S.) 748, which is contrary. Professor Williston thinks the *Bradbury* case not an authority on the point in connection with which here cited. *Fennell v. McGuire* (Ont. 1870), 21 U. C. C. P. 134, cites both the *Bradbury* and the *Offord* cases, and holds with the former. Other cases have refused to follow it.

²³ See *Offord v. Davies*, *supra*.

In *Egbert v. National Crown Bank*²⁴ the guarantor promised that the guaranty should remain in force until revoked by notice. In principle, the status is that of a naked promise to keep an offer open for a specified time or until revoked. More particularly, the guaranty (offer) in the *Egbert* case provided that it should be a continuing guarantee "until the undersigned, or the executor or administrator of the undersigned, shall have given the bank notice in writing to make no further advances on the security of this guarantee." It was held that actual notice of the subsequent death of one of the signers did not terminate the liability of the estate of the deceased under the continuing offer of guaranty, but that the guaranty remains in force against all the guarantors until each and all of them or their respective executors and administrators give notice to terminate it.

Recognizing the inequities resulting from an instant and unannounced revocation should the offeror die, systems of law other than our own have provided to the contrary

The German code provides

"One, who proposes to another the conclusion of a contract, is bound by the proposition unless he has provided that he shall not be bound."

"The conclusion of the contract is not prevented by the death or incompetence of the proponent before acceptance, unless a different intention of the proponent is to be presumed."²⁵

As translated in Pollock, the *Burgerliches Gesetzbuch* reads, "A contract is not prevented from coming into existence by the death or incapacity of the offeror before acceptance, unless the offeror has expressed a contrary intention."²⁶

Japan, following in general the German law, holds

"An expression of intention made to a person at a distance takes effect when the notification thereof reaches the other party

"Even though the person expressing intention dies or loses capacity subsequent to the dispatch of the notification the validity of the expression of intention is not affected thereby"

"(However) The provisions of Article 97, Paragraph 2, do not apply in case the offerer has expressed a contrary intention or the other party had knowledge of the fact of his death or loss of capacity"²⁷

And the Indian Contract Act which, it would seem, should not

²⁴L. R. 1918 A. C. 903.

²⁵German Civil Code, secs. 145 and 153, Loewy's Translation.

²⁶WALD'S POLLOCK ON CONTRACTS, 3rd Ed. p. 42 note.

²⁷Civil Code of Japan, Arts. 97 and 525, *ae* Becker's Translation.

be markedly at variance with the English Common Law, makes the knowledge of the other party before acceptance a condition of the proposal being revoked by the death of the offeror.²⁸

As will be shortly seen, the Civilians, and following them the French, somewhat inconsistently provide for the continuation of an agent's authority after the death of his principal but neglect to protect the very similar situation of an offeree whose offeror has died.²⁹

Thus it is apparent that a literal meeting of the minds, an *eo instanti* concurrence, is not a contractual necessity

NOR IS THE DOCTRINE OF CONSTANT RENEWAL OF AN AGENT'S
AUTHORITY NECESSARY, ITS RESULTS ARE INEQUITABLE

It is not necessary to predicate the law of agency upon a theory of constant repeated authorizations.³⁰ The civilians do not³¹ If an analogy not available to the founders of the doctrine be permitted, the common law and civil law theories may be electrically illustrated. Under the common law the agent receives the authority—his power—to represent the principal as thru a wire. A current of authority is instantly flowing from the principal to the agent. It stops when the wire is cut by death. Even the ostensible authority of the agent, that authority which is his by virtue of appearances and is perhaps beyond his actual authority, ends although from the eyes of a third person appearances are as before. In contrast, the authority given under the civil law is carried as in storage batteries, the life of which is determined by their contents. Since the agent carries his power with him it is not without his knowledge terminated by the death of the principal.³²

Nevertheless, in spite of its apparent logical severity, the common law, in response to the demands of commerce, has strayed far from a strict adherence to the doctrine of an inevitable revocation should the principal die.

The economic demand underlying such departure is strongly put in *Ish v. Crane*³³ The court insists that the great and practical purposes and interests of trade and commerce, and the imperious necessity of confidence in the social and commercial relations of men, require that an agency, once constituted, continue.

²⁸ Anglo-Indian Codes, Stokes (1887), p. 550.

²⁹ VALERY, Contracts par correspondance, sec 204.

³⁰ For reasons obvious, there will be no discussion of agencies coupled with an interest.

³¹ Inst. 3, 27, 10; Digest 17, 1, 26, Story Ag., secs. 491, 495.

³² In part borrowed from 6 L. R. A. (N. S.) 855.

³³ 8 Ohio St. 520, 540 (1858).

In order that there may be this confidence in the authority of the agent, mere revocation will not be sufficient as to persons who have been dealing with the agent as such. There must be actual or implied notice of the revocation. And the court could conceive of no reason why the law should be different in cases of revocation by mere operation of law. It seemed,

“ that in all such cases the party who has by his own conduct purposely invited confidence and credit to be reposed in another as his agent, and has thereby induced another to deal with him in good faith, as such agent, neither such party nor his representatives ought to be permitted, in law, to gainsay the commission of credit and confidence so given to him by the principal. The extensive relations of commerce are often remote as well as intimate. The application of this doctrine must include factors, foreign as well as domestic, commission merchants, consignees, and supercargoes, and other agents remote from their principal, and who are required for long periods of time, not infrequently, by their principal, to transact business of immense importance, without a possibility of knowing perhaps even the probable continuance of the life of the principal. It must not unfrequently happen that valuable cargoes are sold and purchased in foreign countries by the agent, in obedience to his instructions from his principal, after and without knowledge of his death. And so, too, cases are constantly occurring of money being collected and paid by agent, under instructions of the principal, after and without knowledge of his death. In all these cases there is certainly every reason for holding valid and binding the acts so done by the agency which the principal had, in his life, constituted and ordered. ”

Since the opinion in *Ish v. Crane* was written, communication has been much accelerated, we are inclined to think that the communication of messages is but a matter of moments. This is in part true. But it is a factor favoring the communication of the fact of death, rather than a point supporting the practicability of an inquiry as to the principal's existence *at the moment* of signing a contract. Death comes but once, it is natural and reasonable that all interested parties be notified. Many contracts are signed, payments on account are hourly made, it is farcical to assume the feasibility of repeated inquiries as to the health of the man with whom one at a distance deals.³⁴

³⁴In *Deweese v. Muff*, 57 Neb. 17, 77 N. W. 361 (1898) it was said, "Undoubtedly the rule is that the death of a principal instantly terminates the agency but it by no means follows that all dealings with the agent thereafter are absolutely void. Where in good faith one deals with an agent within his apparent authority in ignorance of the death of the principal, the heirs and representatives of the latter may be bound, in case the act to

Despite New York's adherence to the common law doctrine that death revokes an agent's power even as to third parties dealing with the agent in good faith and without notice³⁵ and the general rule that a check of itself is a mere order for the payment of money, not operating as an assignment of any part of the fund,³⁶ it was held in *Glennan v. Rochester Trust & Safe Deposit Company*,³⁷ that the rule does not apply to the payment of a check by a bank without knowledge of the drawer's death.

*Carriger v. Whittington*³⁸ and *Cassiday v. McKenzie*³⁹ have refused to follow the common law rule. These cases have, of course, been criticized in decisions following the established doctrine.⁴⁰

In *Davidson v. Provost*⁴¹ a partner's authority to superintend the construction of a building was held to continue after the death of his partner.

In response to commercial needs, at least six states have through statutory enactment provided that within specified limits a bank may pay a check after the death of the drawer.⁴²

In France the law is.

"If the agent does not know of his principal's death, or of any other cause terminating the agency, then what he does in ignorance that his authority has terminated is valid.

"In the above mentioned cases any contract entered into

be done is not required to be performed in the name of the principal." It is suggested that the mentioned distinction upon the basis of whether or not the act need be done in the name of the principal is unsound. The name in which the contract is made is not the gist. The philosophy really behind the case is one of response to commercial need.

³⁵*Farmers' Loan & Trust Co. v. Wilson*, 139 N. Y. 234, 34 N. E. 784. (1893)

³⁶*Atty. Gen. v. Continental Life Ins. Co.*, 71 N. Y. 325 (1877). *O'Connor v. Mechanics Bank*, 124 N. Y. 324, 26 N. E. 816 (1891) see WASH. COMP. STAT. (Remington, 1922) §3579.

³⁷209 N. Y. 12, 102 N. E. 537 (1913) See also *Deweese v. Muff*, *supra*.

³⁸*Carriger's Administrator v. Whittington's Administrator* 26 Mo. 311, 72 Am. Dec. 212 (1853).

³⁹4 Watts & S. (Pa.) 282, 39 Am. Dec. 76 (1842). See also: *Murdock v. Leath*, 10 Heisk. 166 (Tenn. 1870) *Lenz v. Brown*, 41 Wis. 172 (1876) *Garrett v. Trabue et al.*, 82 Ala. 227, 3 So. 149 (1887) *Davis v. Davis*, 92 Ala. 173, 9 So. 736 (1891)

⁴⁰*Clayton v. Merrett*, 52 Miss. 353, 357 (1876) *Travers v. Crane*, 15 Cal. 12, 17 (1860).

⁴¹35 Ill. App. 126 (1889).

⁴²New Jersey, Chap. 125 Laws 1916 (10 days after date of check) Connecticut, Gen. Stat. 1918, Chap. 204, sec. 4001-2; Maine, Rev. Stat. 1916, Chap. 52, sec. 23; Massachusetts, Chap. 73, sec. 17, Revised Laws; West Virginia, Anno. Code, 1913, Chap. 54, sec. 3105, Vermont, Gen. Laws 1917, Chap. 139, sec. 2854.

or anything done by the agent with third parties who acted in good faith is binding."⁴³

AN ESTATE MAY BE BOUND OUTSIDE OF CONTRACT

The rights and obligations of the estate of a decedent are not limited to those incurred by contract. The acts or words of the decedent may later estop his personal representative from asserting a claim which would otherwise accrue to the benefit of the estate or from denying a claim which is asserted against the estate.⁴⁴

Certain tortious injuries are subject to redress even though the tortfeasor has meanwhile died.

Likewise claims arising in quasi-contract are enforceable against the estate. A quasi-contract lacks the element of agreement, it is not a contract, though frequently referred to as such.⁴⁵ It is founded upon the principle that one person should not be unjustly enriched at the expense of another.⁴⁶ It is difficult to conceive of a basic distinction between a *profit* and a *saving* so far as the net result is concerned.⁴⁷ An estate which is saved the loss of \$1,000 is benefited to the extent of \$1,000 just as is an estate which has been rendered services or received goods to the value of \$1,000. While it is not suggested that a recovery under quasi-contract should be allowed in instances of offers innocently accepted after the death of the offeror, it is submitted that same legal concept of equity and fairness which prompted a fictional system of recovery under quasi-contract should discover a means of recovery against an estate which seeks to be enriched through saving (the avoidance

⁴³ Secs. 2008, 2009, French Civil Code, Wright's Translation. But the onus of showing that he acted in good faith lies on the third party (LAURENT, Vol. XXVIII, par. 113)

⁴⁴ See cases compiled 21 C. J. 1182.

⁴⁵ "To say that the law supplies the privity and the promise is but to indulge in legal fiction. There is no place for fiction in modern law. At a time when it was thought that no new right could be recognized unless it could be enforced through some old form of procedure, a fiction which undertook to clothe a newly-recognized right with the semblance of the garb of an old one, may have served a purpose, but fictions of the law never did deceive, nor can they now serve any real useful purpose. They should not be allowed to help or to hurt any man's cause, but should be discarded as the archaic contrivances which they are. If a man has suffered a wrong which on recognized principles of right and justice the law ought to redress a remedy should be given him, otherwise not." *Heywood v. Northern Assur Co.*, 133 Minn. 360, 158 N. W. 632 (1916). See also *Starke v. Cheeseman*, 1 Ld. Raym. 538; *Siems v. Bank*, 7 S. D. 338, 64 N. W. 167 (1895) *Harty Bros. v. Polakok*, 237 Ill. 559, 86 N. E. 1085 (1908).

⁴⁶ KEENER ON QUASI-CONTRACTS, p. 19 *et seq.*, WOODWARD, QUASI-CONTRACTS, SECS. 3, 4.

⁴⁷ Professor Woodward points out that enrichment in the sense of profit is not the proper test. It is sufficient to show that defendant received something desired by him. This would strengthen the argument here; decedent desired the offeree to do that which he did do. See: WOODWARD, QUASI-CONTRACTS, SECS. 8, 107, 118, 119, and 125.

of a contract which the executor deems undesirable) though at the expense of a person who had been led into his costly position by the acts or words of the decedent. In fact, enforcement of offers innocently accepted after the offerer's death does not constitute a judicial interference with decedent's estate to the extent that a quasi-contractual decision against an estate is the imposition of another's (the court's) judgment in the conduct of the decedent's affairs. A man lies unconscious in the street, a bystander calls a physician, because of or in spite of his care, the man dies without recovering consciousness, the estate must pay a sum which the court decides represents the amount the decedent during his life was enriched at the expense of the time and skill of the physician. The decedent had no say in the matter whatsoever; he may not have believed in calling physicians. In contrast, in a contract case the decedent himself sets in motion the forces which result in the unjust position in which the offeree is unwittingly placed. The decedent deliberately made an offer, he intended to enjoy the benefits of the contract should his offer be accepted, he planned to bear the cost of his part of the contractual obligations. His estate should bear the loss, if any, rather than third parties who relied upon decedent's expressed intention.

CONCLUDING

To be consistent, a legal system which decides that engagements are binding when entered into between an agent and a third person, neither knowing of the principal's death, should likewise hold that an accepted offer completes a contract when the offeree accepts not knowing of the offeror's death.

Equally consistent would be a system wherein a contract entered into between an agent and a third party, neither knowing of the principal's death, is binding except that at the election of the representatives of the decedent, it may be abrogated upon indemnifying the third party⁴⁸ and wherein a good faith acceptance of an offer, the offeree not knowing of the offeror's subsequent death, results in a binding contract except that at the election of the representatives of the decedent it may be abrogated upon indemnifying the offeree.

It is submitted that the latter set constitute the proper rules.

⁴⁸ Where the third party knows of the death and the agent does not, there should be no contract, there being no reasonable impression on the third party that under the circumstances a contract would be intended. But where the agent knows of the death and deceives, should there not still be a contract, the decedent, rather than the third party, being responsible for the choice of an untrustworthy agent?

They give to the estate the advantage of withdrawing from the contract if such withdrawal be made without injury to others. They protect routine business transactions which, despite eminent suggestion to the contrary,⁴⁹ cannot be practically said to be negotiated with an implied provision that an offer is good *unless* the offeror meanwhile dies and that the agent is authorized *unless* the principal has meanwhile passed away. Such an impression is not that of the business, or professional, or other person entering into contractual relationships.

The need of fiction is long since passed.⁵⁰ But if fiction be needed, it may be found in an extension of estoppel to comprehend such situations.⁵¹ The franker method would be to openly bring the law into conformity with economic need and usage and for purpose of legal reasoning, when needed, to imply with each offer and agency a proviso that should the offerer or principal die the contract may be rescinded upon indemnifying the offeree or third party for this actual loss, if any

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⁴⁹ Professor Parks suggests that implied in every offer is the provision that it will terminate upon the death of the offeror, i. e., an offer upon a contingency. (19 MICH. L. REV. 150, 159).

⁵⁰ Note 44 *supra*. "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." Judge Cardozo in *Berkey v. Third Ave. Ry. Co.*, 244 N. Y. 84, 155 N. E. 58 (1926).

⁵¹ The principles underlying *Seavy v. Drake*, 62 N. H. 393 (1882) would not have to be far extended to enfold the instant problem. Discussions of this subject, or aspects of it, are found: 24 COLUMBIA L. REV. 294, 27 HARVARD L. REV. 644, 14 ILLINOIS L. REV. 85, 18 MICHIGAN L. REV. 201, 19 MICHIGAN L. REV. 152; 23 MICHIGAN L. REV. 475, 10 MINNESOTA L. REV. 373.

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