

Offer and Acceptance--Revocation--Qualified Acceptance--Specific Performance (Farago v. Burke, 262 N.Y. 229 (1933))

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have committed or omitted to do something which in the case of an adult would have constituted negligence.⁴ The negligence of a custodian when not acting in that capacity is not chargeable to the child even though it tends to expose the child to injury from other persons.⁵ A child being in a lawful place, and exercising what would be regarded as ordinary care in an adult is entitled to recover for an injury occasioned by a wrongful act of another irrespective of the conduct of the parents.⁶ Negligence of a guardian is not imputable to an infant *non sui juris* who did nothing which would constitute negligence.⁷

In the present case, if the court applied the rule, it would be placed in an anomalous position of barring recovery to the administratrix of the deceased child, while the other who was injured might recover under the same circumstances. The court distinguishes the act of custody from that of driving, in stating that custody ceased at that moment the uncle placed the child in a safe position. As no negligent act of commission or omission on the part of the child contributed to the accident,⁸ the court rightly held that the doctrine of imputable negligence is not applicable in this case.

A. R. L.

OFFER AND ACCEPTANCE—REVOCAION—QUALIFIED ACCEPTANCE—SPECIFIC PERFORMANCE.—After negotiations, plaintiff and defendant met at the office of the attorney for the defendant where an instrument for the sale of land was drawn up and signed by the defendant. Plaintiff refused to sign at that time, saying: “* * * everything is O.K. in the contract but will there be any objection there to have one of his contracts looked over by an attorney?” No objection was made and it was attempted to leave

⁴ *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317 (1872); *Cumming v. Brooklyn R. R. Co.*, 104 N. Y. 669, 10 N. E. 853 (1887); *Lamb v. Ferrell*, 125 Misc. 148, 209 N. Y. Supp. 365 (1925); *Sullivan v. Chadwick*, 236 Mass. 130, 127 N. E. 632 (1920).

⁵ *McMahon v. New York*, 33 N. Y. 642 (1865); *Huerzeler v. Central Crosstown R. Co.*, 1 Misc. 136, 20 N. Y. Supp. 676 (1892), *aff'd*, 139 N. Y. 490, 34 N. E. 1101 (1893); *Hennessey v. Brooklyn R. R. Co.*, 6 App. Div. 207, 39 N. Y. Supp. 805 (2d Dept. 1896); *Smith v. City Realty Co.*, 79 App. Div. 441, 79 N. Y. Supp. 1116 (4th Dept. 1903); *Regan v. International R. R. Co.*, 205 App. Div. 425, 199 N. Y. Supp. 601 (4th Dept. 1923).

⁶ *Lannen v. Albany Gas Light Co.*, 44 N. Y. 459 (1871); *McGarry v. Loomis*, 63 N. Y. 104 (1875); *Serano v. New York C. & H. R. R. Co.*, 188 N. Y. 156, 80 N. E. 1025 (1907); *McNiel v. Boston Ice Co.*, 173 Mass. 570, 54 N. E. 257 (1899).

⁷ *Cavaliere v. Brooklyn City R. R. Co.*, 216 App. Div. 764, 214 N. Y. Supp. 763 (2d Dept. 1926).

⁸ Instant case.

the contract in escrow with defendant's attorney. It was agreed that the plaintiff would return at a later date at which time the parties would exchange contracts. But, by that time defendant had changed his mind and had torn up the instrument. On appeal, *held*, that no contract existed and therefore specific performance was denied for there was no mutuality of obligation or of remedy;¹ that the attempt to create an escrow was ineffectual.² *Farago v. Burke*, 262 N. Y. 229, 186 N. E. 683 (1933).

Here is an exemplification of the misapplication of correct legal principles to facts. It is concededly true that ordinarily an offer made at a personal interview must be contemporaneously accepted.³ But, in holding that there was no contract in fact, the court wholly ignored the universal rule that, in the absence of a statute to the contrary, an offeror, having allowed a definite time within which the offer may be accepted or rejected, must give notice of revocation of such offer to the offeree before there has been an acceptance by the latter.⁴ Undoubtedly, such granting of an extension of time is revocable⁵ unless there be a consideration therefor⁶ or it be under seal.⁷ While at common law it was held that such gratuitous extension could be revoked at any time by an overt act so manifesting even though not communicated,⁸ that doctrine has long since been over-

¹ *Levin v. Dietz*, 194 N. Y. 376, 87 N. E. 454 (1909); *Pomeroy v. Newell*, 117 App. Div. 800, 102 N. Y. Supp. 1098 (2d Dept. 1907); *Kohart v. Boyle*, 140 App. Div. 856, 125 N. Y. Supp. 567 (2d Dept. 1910).

² *Worrall v. Munn*, 5 N. Y. 229 (1851); *Bramen v. Bingham*, 26 N. Y. 483 (1863); *Day v. Lacasse*, 85 Me. 242, 27 Atl. 124 (1892); *Van Valkenberg v. Allen*, 111 Minn. 333, 126 N. W. 1092 (1910); *Sargent v. Cooley*, 12 N. D. 1, 94 N. W. 576 (1902); *Easton v. Driscoll*, 18 R. I. 318, 27 Atl. 445 (1893).

³ 1 WILLISTON, CONTRACTS (1921) §54; 1 N. Y. LAW OF CONTRACTS (1922) §10; RESTATEMENT, CONTRACTS §40(b).

⁴ *Infra* note 9; *Hamilton v. Patrick*, 62 Hun 74, 16 N. Y. Supp. 578 (1891); *Pennsylvania & Delaware Oil Co. v. Klipstein*, 175 N. Y. Supp. 540 (1919); *Boston & Maine R. R. v. Bartlett*, 3 Cush. 224 (Mass. 1849); 1 PAGE, CONTRACTS (2d ed. 1920) §134; 1 WILLISTON, CONTRACTS (1921) §56.

⁵ *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 45, 4 N. E. 2 (1885); *Levin v. Dietz*, *supra* note 1; *Pettibone v. Moore*, 75 Hun 461, 27 N. Y. Supp. 455 (1894); *Pomeroy v. Newell*, *supra* note 1; *Ganss v. J. M. Guffey Petroleum Co.*, 125 App. Div. 760, 110 N. Y. Supp. 176 (1st Dept. 1908); 1 WILLISTON, CONTRACTS (1921) §55. See *Durkee v. Schultz*, 122 Ia. 410, 98 N. W. 149 (1904); *Nolin Milling Co. v. White Grocery Co.*, 168 Ky. 417, 182 S. W. 191 (1916).

⁶ *Scruggs v. Catterill*, 67 App. Div. 583, 73 N. Y. Supp. 882 (1st Dept. 1902); *Electric Fireproofing Co. v. Smith*, 113 App. Div. 615, 99 N. Y. Supp. 37 (1st Dept. 1906); 1 PAGE, CONTRACTS (2d ed. 1920) §122; 1 WILLISTON, CONTRACTS (1921) §61; 1 N. Y. LAW OF CONTRACTS (1922) §24.

⁷ This applies to those jurisdictions wherein the seal still retains its efficacy. 1 PAGE, CONTRACTS (2d ed. 1920) §122; 1 WILLISTON, CONTRACTS (1921) §61.

In New York, the presence of a seal is but presumptive evidence of consideration and may, therefore, be rebutted.

N. Y. C. P. A. (1920) §342.

⁸ *Cooke v. Oxley*, 3 Term Report 653 (1790).

ruled.⁹ The modern rule obviously necessitates the adoption of the theory of continuing offer since it is essential to every contract that there be a meeting of the minds of the parties.¹⁰ It is inescapable that the minds having met, as evidenced by some overt act,¹¹ there exists a contract. Since there is a continuing offer¹² the minds of the parties have met immediately upon the appropriate¹³ manifestation of assent.¹⁴ Logically, the only way in which that result can be prevented is by communicating a revocation, formal or actual,¹⁵ "as direct and explicit as the acceptance"¹⁶ to the offeree.¹⁷ If the court is attempting the formulation of a new rule through the consideration of this as an offer to enter into a unilateral contract¹⁸ then its result may be justified on the grounds that such an offer may be revoked at any time before the completion of the act of acceptance.¹⁹ But, such a construction is entirely against legal principle.²⁰

There remains but one possible justification—that the words of plaintiff be considered as a qualified acceptance. It is generally stated that the conditional acceptance of an offer will be considered

⁹ *Tayloe v. Merchant's Fire Insurance Co.*, 9 How. 390 (U. S. 1850); *Patrick v. Bowman*, 149 U. S. 411 (1893); *Weld & Co. v. Victory Mfg. Co.*, 205 Fed. 770 (E. D. N. C. 1913); *Pennsylvania & Delaware Oil Co. v. Klipstein*, *supra* note 4; *Adams v. Lindsell*, 1 Barnewell & Alderson 681 (1818); *Byrne & Co. v. Leon Van Tienhoven & Co.*, 5 C. P. D. 344 (1880).

¹⁰ *Grierson v. Mason*, 60 N. Y. 394 (1875); *Dietz v. Farish*, 79 N. Y. 520, 525 (1880); 300 West End Ave. Corp. v. Warner, 250 N. Y. 221, 165 N. E. 271 (1929); *Zeltner v. Irwin*, 25 App. Div. 228, 49 N. Y. Supp. 337 (1st Dept. 1898); *Pomeroy v. Newell*, *supra* note 1; *Keller v. Holderman*, 11 Mich. 248 (1863); *McClurg v. Terry*, 21 N. J. Eq. 225 (1870); *Stamper v. Temple*, 25 Tenn. (6 Hump.) 113 (1845). See *Vitty v. Ely*, 51 App. Div. 44, 64 N. Y. Supp. 397 (4th Dept. 1900). *Contra*: see *Williams v. Cowardine*, 4 Barnewell & Adolphus 621 (1833).

¹¹ *Mactier v. Frith*, 6 Wend. 103 (N. Y. 1830); *White v. Corlies*, 46 N. Y. 467 (1871); RESTATEMENT, CONTRACTS §20. See 1 N. Y. LAW OF CONTRACTS (1922) §§44, 45.

¹² *Supra* note 9.

¹³ *Eliason v. Henshaw*, 4 Wheat. 225 (U. S. 1819); *Crompton, etc., Loom Works v. Hornsby*, 204 App. Div. 475, 198 N. Y. Supp. 478 (1st Dept. 1923); *Seymour v. Armstrong*, 10 Kan. App. 12, 61 Pac. 675 (1900); *Wiswell v. Bresnahan*, 84 Me. 397, 24 Atl. 885 (1892); *Vermont Marble Co. v. Mead*, 85 Vt. 32, 80 Atl. 852 (1911); 1 N. Y. LAW OF CONTRACTS (1922) §§55-58.

¹⁴ *Adams v. Lindsell*, *supra* note 9; *Hallock v. Commercial Insurance Co.*, 26 N. J. L. 268, 281 (1857); RESTATEMENT, CONTRACTS §34.

¹⁵ *Pomeroy v. Newell*, *supra* note 1; *J. L. Owens Co. v. Bemis*, 22 N. D. 159, 133 N. W. 59 (1911); *Dickinson v. Dodds*, 2 Ch. Div. 463 (1876); 1 PAGE, CONTRACTS (2d ed. 1920) §132; RESTATEMENT, CONTRACTS §42.

¹⁶ *Linn v. McLean*, 80 Ala. 360, 366 (1887).

¹⁷ *Supra* notes 4 and 9.

¹⁸ *Farago v. Burke*, 237 App. Div. 351, 261 N. Y. Supp. 501, dissenting opinion, per Finch, *P.J.*

¹⁹ *Petterson v. Pattberg*, 248 N. Y. 86, 161 N. E. 428 (1928); *Durkin v. City of New York*, 49 Misc. 114, 96 N. Y. Supp. 1059 (1905); 1 WILLISTON, CONTRACTS (1922) §60. *Contra*: *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 Pac. 1086 (1902); RESTATEMENT, CONTRACTS §45.

²⁰ 1 WILLISTON, CONTRACTS (1921) §60; RESTATEMENT, CONTRACTS §31.

as a counter-offer, thus amounting to a rejection.²¹ In order that a binding contract be thereafter entered into, it is necessary that an acceptance of such counter-offer be made.²² Undoubtedly, if the attempted acceptance in any way alters the context of the original offer, then it is conditional.²³ But, it is well recognized that the mere addition of a hope or an expectation of some additional benefit will not be construed as such alteration.²⁴ If we are to adopt the construction that a mere request for an extension of time so as to permit an attorney to look over the papers is a qualified acceptance, then we shall find ourselves outside of recognized principles.²⁵

W. E. S.

²¹ *National Bank v. Hall*, 101 U. S. 43 (1879); *Minneapolis, etc., Railway Co. v. Columbus Rolling Mill Co.*, 119 U. S. 149 (1886); *Vassar v. Camp*, 11 N. Y. 441 (1850); *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240 (1870); *Barrow Steamship Co. v. Mexican C. R. Co.*, 134 N. Y. 15, 31 N. E. 261 (1892); *Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 110 N. E. 619 (1915); *Mactier v. Frith*, *supra* note 11; *Sidney Glass Works v. A. S. Barnes & Co.*, 86 Hun 374, 33 N. Y. Supp. 508 (N. Y. 1895); *Mahar v. Compton*, 18 App. Div. 536, 45 N. Y. Supp. 1126 (4th Dept. 1897); *Zucker v. Perkins Hosiery Mills*, 141 Misc. 723, 253 N. Y. Supp. 67 (1931); *Porter v. Gossell*, 112 Ark. 380, 166 S. W. 533 (1914); 1 PARSONS, CONTRACTS (7th ed. 1883) 507. See *Denver v. New York Trust Co.*, 229 U. S. 123 (1912).

²² *Sloan v. Wolf Co.*, 124 Fed. 196 (C. C. A. 8th, 1903); *Bank of Buchanan County v. Continental National Bank of Los Angeles*, 277 Fed. 385 (C. C. A. 8th, 1921); *James Curran Mfg. Co. v. Aultman, etc., Machinery Co.*, 62 App. Div. 201, 70 N. Y. Supp. 1074 (1st Dept. 1901), *aff'd*, 172 N. Y. 623, 65 N. E. 1118 (1902); *E. Richard Meinig Co. v. United States Fastener Co.*, 200 App. Div. 522, 193 N. Y. Supp. 106 (1st Dept. 1922); 1 PAGE, CONTRACTS (2d ed. 1920) §184; 1 WILLISTON, CONTRACTS (1921) §77. See *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209, 30 N. E. 75 (1894).

²³ *James v. Darley*, 100 Fed. 224 (C. C. A. 8th, 1900); *Mahar v. Compton*, *supra* note 21.

²⁴ *Mactier v. Frith*, *supra* note 11; *American Woolen Co. v. Moscovitz*, 159 App. Div. 382, 144 N. Y. Supp. 532 (1st Dept. 1913); *Dunlop v. Higgins*, H. L. 381 (1848); *Stevenson, Jacques & Co. v. McLean*, 5 Q. B. D. 346 (1880); 1 PAGE, CONTRACTS (2d ed. 1920) §§78, 178; 1 WILLISTON, CONTRACTS (1921) §79; *cf. Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99 (1913).

²⁵ *Morse v. Tillotson & W. Co.*, 253 Fed. 340 (C. C. A. 2d, 1918); *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195 (1890); *Bennett v. Cummings*, 73 Kan. 647, 85 Pac. 755 (1906); *Cavender v. Waddingham*, 5 Mo. App. 457 (1878); *Curtis Land & Loan Co. v. Interior Land Co.*, 137 Wis. 341, 118 N. W. 656 (1908); 1 WILLISTON, CONTRACTS (1921) §78. See *Nolan v. Whitney*, 88 N. Y. 648 (1882); *Doll v. Noble*, 116 N. Y. 230, 23 N. E. 406 (1889); *Horgan v. Russell*, *supra* note 24; *Hussey v. Horne-Payne*, L. R. 8 Ch. Div. 670 (1878); *cf. Village of Fort Edward v. Fish*, 56 Hun 578, 33 N. Y. Supp. 784 (N. Y. 1895), *aff'd*, 156 N. Y. 363, 50 N. E. 976 (1898); *James v. Darley*, *supra* note 23.