Fordham Law Review

Volume 23 | Issue 3 Article 5

1954

Intervening Death of Insanity in the Offeror

COMMENT

INTERVENING DEATH OR INSANITY IN THE OFFEROR

THE PROBLEM

At twelve noon, A while insane, makes an offer to B. At 12:02 P.M., B accepts. Assuming B was ignorant of A's mental infirmity and the contract was fair and for a good consideration, a valid enforceable contract arose.[1] Under the same facts, with the exception that A did not become insane until 12:01 P.M., no contract arose. Thus, according to the rule espoused by most authorities, the offeree is, in effect, penalized because he dealt with a party who was sane one minute too long. His fair and reasonable expectations, induced by the offer, are frustrated, whereas, if the offeror had lost his sanity one minute earlier, these same expectations could have been realized. These authorities hold that intervening[2] insanity of the offeror terminates the offer even though the offeree did not know or have reason to know of the offeror's insanity.[3]

This rule is in accord with various dicta[4] but, as is evident from the hypothetical case, it is clearly inconsistent with the law governing the *contracts* of the insane. Whether or not it is justified by an analogy to the rule concerning the intervening *death* of the offeror[5] shall be the subject of this paper. A brief summary of the development and present status of the law governing the contracts of the insane is presented here as a foundation for the afore-mentioned inconsistency.

THE CONTRACTS OF THE INSANE

The type and degree of insanity dealt with in this discussion and in the cases cited is that which renders a person incapable of understanding the nature and consequences of his act.[6] We are not here concerned with persons of weak mentality[7] or even those with some actual mental infirmity unless

1. This contract, though, would be subject to avoidance upon restoration of the consideration. See note 18 infra.

2. "Intervening", as used in this article in reference to the death or insanity of the offeror, shall refer to the occurrence of such death or insanity subsequent to the time of the offer but prior to the acceptance.

3. See Anson, Contracts § 33 (Patterson's ed. 1939); Clark, Contracts § 25 (4th ed. 1931); Salmond and Winfield, Contracts § 13 (1927); 1 Williston, Contracts 183 (Rev. ed. 1936); Restatement, Contracts § 48 (1932).

4. The Palo Alto, 18 Fed. Cas. No. 10,700, at 1067 (D.C. Me. 1847), Chain v. Wilhelm, 84 F. 2d 138, 140 (4th Cir. 1936), cert. granted, U.S. ex rel. Wilhelm v. Chain, 299 U.S. 531 (1936), rev'd on other grounds, 300 U.S. 31 (1937); Beach et al. v. The First Methodist Episcopal Church, 96 Ill. 177, 179 (1880); Wallace v. Townsend, 43 Ohio St. 537, 547, 3 N.E. 601, 604 (1885).

5. The majority rule is that intervening death of the offeror will terminate the offer even without notice to the offeree. See note 27 infra.

6. Parker v. Marco et al., 76 Fed. 510 (C.C.S.C. 1896); Weller et al. v. Copeland et al., 285 Ill. 150, 120 N.E. 578 (1918).

7. Pass v. Stephens, 22 Ariz. 461, 198 Pac. 712 (1921).

it is such as to render them incapable of understanding the character of the transaction in question.[8] A person may lack the degree of mental capacity requisite for the performance of some acts and yet be perfectly capable of contracting, or, he may at times be insane and thus incapable of rationally performing *any* acts and yet, a moment later, possess sufficient rationality to enter into an enforceable contract. For our purposes then, an insane person is one who lacks the requisite mental ability to understand the nature and consequences of the contract in question at the time of the formation of that contract.

A special rule exists as to those who have been judicially declared insane and placed under guardianship. "Contracts" made by these incompetents subsequent to their adjudication are absolutely void.[9] The rationale of this rule is that the adjudication of insanity and the appointment of a guardian constitute constructive notice to the world of the incompetent's incapacity to contract or otherwise manage his affairs.[10]

Although most jurisdictions hold the contracts of the insane as voidable upon condition, a few still adhere to more extreme doctrines.

Absolutely Void—Some courts have held that the contracts of the insane, even before an adjudication of incompetency, are absolutely void.[11] This antiquated rule has, in some jurisdictions, been confined to the lunatic's power of attorney.[12]

Valid—A person *non compos mentis* is bound by his contracts for necessaries[13] just as in the case of infants' contracts and the rules applicable are substantially the same.[14] Early English cases held that, since a person may

8. In Cathcart v. Matthews et al., 105 S.C. 329, 343, 89 S.E. 1021, 1026 (1916), the court stated: "It is well settled that a man may be insane on one subject, but capable of transacting business on all others. There may be a partial derangement; yet capacity to act on many subjects may exist. The question in any case is not merely whether the party was insane at the time of the questioned transaction, but whether he was so insane as to be incapable of doing the particular act with reason and understanding; that is, was he capable of comprehending the nature and effect of the transaction?"

9. This is the actual holding of the Beach case, note 4 supra, although it has been cited for the proposition that intervening insanity of the offeror, even before an adjudication of incompetency and the appointment of a guardian, terminates the offer. In Acacia Mut. Life Ins. Co. v. Jago et al., 280 Mich. 360, 362, 273 N.W. 599 (1937), the court stated: ". . . he is conclusively presumed incompetent to make a valid contract, notwithstanding it was made during a lucid interval." McCarthy v. Bowling Green Storage & Van Co., 182 App. Div. 18, 169 N.Y. Supp. 463 (1st Dep't 1918).

10. Prudential Society Inc. v. Ray, 207 App. Div. 496, 202 N.Y. Supp. 614 (4th Dep't 1924), aff'd, 239 N.Y. 600, 147 N.E. 212 (1924).

11. Dexter v. Hall, 15 Wall. 9 (U.S. 1872); Sampson et al. v. Pierce, 33 S.W. 2d 1039 (Kans. City C.A. 1930). This rule has been limited by statute in Alabama. Hughes v. Bullen, 209 Ala. 134, 95 So. 379 (1923).

12. Plaster v. Rigney, 97 Fed. 12 (8th Cir. 1899). Contra: Williams v. Sapieha, 94 Tex. 430, 61 S.W. 115 (1901).

13. Ex Parte Northington, 37 Ala. 496, 79 Am. Dec. 67 (1861); Kimbel v. Ward, 214 Ky. 726, 283 S.W. 1042 (1926).

14. See 1 Williston, Contracts § 255 (Rev. ed. 1936).

not stultify himself, the contracts of the insane are valid and enforceable.[15]

Voidable—A few American jurisdictions hold that a lunatic's contracts are merely voidable but may be avoided at any time by the lunatic or his representatives without fulfilling any conditions.[16]

Voidable Upon Condition—English courts have now apparently adopted the view that the contracts of the insane may be avoided only if the sane party acted in bad faith.[17]

The view held by the vast majority of American jurisdictions[18] is that the contracts of the insane are voidable if, 1) the sane party had knowledge of the incapacity or, as a reasonable man, should have had such knowledge, or, 2) the contract was unfair, or, 3) not for a good consideration, or, 4) even in the absence of all of the above, if the sane party can be placed *in statu quo*. Of course, if the contract is wholly unexecuted this last requirement is met automatically.[19] But where the sane party can show he has acted in good faith and that the contract was fair and for an adequate consideration, then the restoration of the consideration is a condition precedent to avoidance of the contract. The fact that the insane party has exhausted the consideration does not seem to relax the rule.[20] The incompetent's right to avoid his contracts under the aforementioned conditions may be asserted even against subsequent purchasers for value.[21] This extension of the rule has been criticized and some courts have refused to follow it.[22]

The right to avoid may be exercised by the insane party when he recovers his sanity or during a lucid interval, or by his duly appointed guardian or committee or by his representatives upon his death.[23] But this right may not be exercised by the sane party to the contract.[24]

15. Beverly's Case, 4 Co. Rep. 123b, 16 Eng. Rul. Cas. 702 (1604). This rule was changed in England by Molton v. Camroux, 4 Ex. 17 (1849), which held that insanity is a good defense to an action upon a contract where the defendant can show that the sane party knew of or should have known of the incapacity.

16. Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705 (1866); Brigham v. Fayerweather and another, 144 Mass. 48, 10 N.E. 735 (1887).

17. York v. Jubb, 134 L.T.R. 36 (C.A. 1926).

18. State ex rel. United Mut. Ins. Ass'n. v. Shain et al., 349 Mo. 460, 162 S.W. 2d 255 (1942); Verstandig v. Schlaffer et al., 296 N.Y. 62, 70 N.E. 2d 15 (1946); Carawan v. Clark, 219 N.C. 214, 13 S.E. 2d 237 (1941).

19. North-Western Mutual Fire Insurance Company v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185 (1883). See Houston Land and Trust Co. et al. v. Sheldon, 69 S.W. 2d 796 (C. Civ. App. Tex. 1934).

20. Scanlon v. Cobb, 85 Ill. 296 (1877); Young v. Stephens, 48 N.H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592 (1868).

21. Warren et al. v. Federal Land Bank of Columbia et al., 157 Ga. 464, 122 S.E. 40 (1924).

22. Kentland Coal and Coke Co. et al. v. Keen et al., 168 Ky. 836, 183 S.W. 247 (1916).

23. McCarthy v. Bowling Green Storage & Van Co., 182 App. Div. 18, 169 N.Y. Supp. 463 (1st Dep't 1918).

24. Allen, by his guardian v. Berryhill, 27 Iowa 534, 1 Am. Rep. 309 (1869); Atwell v. Jenkins, 163 Mass. 362, 40 N.E. 178 (1895).

It is clear then that most American jurisdictions now hold the contracts of the insane as valid and enforceable contracts with certain judicial protections provided.[25] They are legal contracts, valid in their inception despite the "incapacity" of one of the parties, but unenforceable under some circumstances. This doctrine is in conformity with the objective theory of contracts in that the courts are concerned only with the expressed intention of the parties and not with the nature of their actual mental assent or lack thereof.[26]

In approaching the problem presented earlier we will examine in order: 1) the law governing the termination of offers upon the death of the offeror before acceptance, 2) the relative merits of the objective and subjective theories of contracts and, finally, 3) the rules controlling the revocation of offers.

Death of Offeror Before Acceptance

The majority rule, supported by most authorities is that the death of the offeror before acceptance, even without notice to the offeree, terminates the offer.[27] Although criticized for divers reasons, principally because of its antithesis to the objective theory, this rule will, nevertheless, in two instances where the continued existence of the offeror is essential to the formation of an enforceable contract, lead to the same result as would follow from the application of the minority rule which requires notice to the offeree of the offeror's death.[28]

The first and most obvious case is an offer looking toward the formation of a personal service contract. A offers to work for B and, before B can return the promise to employ him, A dies without notice to B. Under the minority or objective rule, although a contract would be formed upon B's acceptance in spite of the offeror's death, it would be automatically discharged because the existence of the offeror was essential to the performance of the contract,[29] whereas, under the majority rule the death of the offeror would cause the offer to lapse and there would be no contract. There would not be an enforceable contract under either rule—one rule would create a contract and immediately discharge it while the other would prevent the crea-

25. See 1 Williston, Contracts § 254 (Rev. ed. 1936).

26. This is the actual effect of the decisions, although many courts have expressly based their decisions on equitable grounds.

27. Chain v. Wilhelm, 84 F. 2d 138, 140 (4th Cir. 1936), cert. granted, U.S. ex rel. Wilhelm v. Chain, 299 U.S. 531 (1936), rev'd on other grounds, 300 U.S. 31 (1937); Pratt v. Trustees of Baptist Society, 93 Ill. 475, 34 Am. Rep. 187 (1879); Aitken et al. v. Lang's Adm'r et al., 106 Ky. 652, 51 S.W. 154 (1899); Jordan v. Dobbins, 122 Mass. 168 (1877); American Chain Co. v. Arrow Grip Manufacturing Co. et al., 134 Misc. 321, 235 N.Y. Supp. 228 (Sup. Ct. 1929); See Restatement, Contracts § 48 (1932).

28. Coulthart v. Clementson and another, 5 Q.B.D. 42 (1879); Guy et al. v. Ward et al., 67 Conn. 147, 34 Atl. 1025 (1895); In Re Lorch's Estate, 284 Pa. 500, 131 Atl. 381 (1925). See 1 Corbin, Contracts § 54 (1950).

29. Lacy v. Getman, 119 N.Y. 109, 23 N.E. 452 (1890); 6 Williston, Contracts § 1940 et seq. (Rev. ed. 1938).

tion of a contract. The question of the propriety of the majority rule in regard to personal service contracts is therefore academic.

The second case is where the continued existence of the offeror is essential to the exercise of the offeree's power of acceptance. This situation arises mainly, but not exclusively, with offers looking toward the formation of bilateral contracts. Where the offeror indicates expressly or by implication that the acceptance must be not merely manifested but manifested *to him*, it is evident that his death before such manifestation will render impossible the offeree's acceptance. A, orally and in the presence of B, promises to sell Blackacre to B, if B will promise to pay him $10,000. Here, the circumstances indicate that B's acceptance must be manifested to A, i.e., he must inform A of his acceptance because he has not been given implied permission to accept merely by depositing a letter of acceptance in a mail box or by any other method of acceptance than that which will give A actual notice of acceptance. Such an acceptance will be impossible if A dies beforehand.

The results of this requirement are even more poignant where the offeror bargains for a transfer to him of the subject matter of the contract. A offers to buy B's car and expressly or by implication requires an actual transfer of the car as the mode of acceptance. A now is not only the offeror but also a proposed transferee of a car, the transfer of which is required for the acceptance. His death eliminates the possibility of the transfer and, accordingly, of the acceptance. The majority rule would hold that A's death, even without notice to the offeree, will terminate the offer. The minority rule would hold that A's death without notice to the offeree would render an acceptance impossible. The formation of an enforceable contract is thus barred under either rule.

But in many cases the existence of the offeror is essential neither to the performance of the contract nor to the offeree's effective exercise of his power of acceptance. An offer looking toward the formation of a unilateral contract, e.g., a promise for an act, does not demand as a mode of acceptance that the act be a manifestation to the offeror of the offeree-acceptor's willingness to accept. Provided that the act bargained for is fully performed,[30] a contract will arise at that time with or without the offeror's knowledge,[31] although in some jurisdictions the obligation of the offeror-promisor will be discharged unless notice that the consideration has been given is put in course of communication.[32] Where A promises to pay B $1,000 if B will repair his summer home and B does so although A is unaware that B has so performed, then B's acceptance of the offer, which acceptance is in the form of a performance as bargained for, is not dependent upon A's continued existence for the exercise thereof. The same situation exists in bilateral contracts where the mode of acceptance required by the offeror would be merely manifestation of

30. In most jurisdictions part performance or tender will suffice. Restatement, Contracts § 45 (1932).

31. Restatement, Contracts § 56 (1932).

32. Bishop v. Eaton, 161 Mass. 496, 37 N.E. 665 (1894). Contra: Smith and Crittenden v. Dann, 6 Hill 543 (N.Y. 1844).

the acceptance, not manifestation to the offeror. Where A promises to pay B $1,000 if B will promise to repair A's summer home and the offer is mailed to B, B is impliedly authorized to accept merely by depositing a letter of acceptance in the mail. The contract will then arise regardless of whether A ever receives notice of it,[33] hence the continued existence of A is not a prerequisite to B's acceptance.

We will analyze the effect upon the offer of the death of the offeror before complete acceptance in all these cases where the continued existence of the offeror is necessary neither to performance nor to acceptance.

In our last hypothetical case, if A had died before B had promised to repair the house, and B had no notice of this, then, under the majority rule, B would not be entitled to the $1,000 promised him because the termination of the offer would result in the loss of a possible contract right. It may be argued that although the offeree loses his contract right he may still recoup his loss by suing the deceased offeror's estate in quasi-contract to recover the value of the services rendered. But in such a case this remedy may be inadequate, for B may not recover for the loss of expected profits,[34] and in many cases the damages recovered will not be commensurate with his actual loss, e.g., where the work performed by the offeree is of such a nature that some of the damages are not assessable.[35]

In view of the afore-mentioned hardships foisted upon the innocent offeree by the invocation of the majority rule, possible vindication of that rule must be sought in logic or in allied legal principles.

The decisions of the courts and the opinions of the authorities that have led to the establishment and continuance of the theory that intervening death without notice will terminate an offer, rely on divergent theories of equity and law. The bases of these theories, as stated expressly or by necessary implication, resolve themselves into three groups: 1) the subjective test of contracts, 2) the objective test, and, 3) those arguments that cannot be readily classified into either group and which we shall conveniently term miscellaneous.

The time of the formation of a contract does not date back to the time of the offer but rather dates from the time of the acceptance.[36] Where A makes an offer to B, A dies, then B accepts, the contract, if there be one, arises at the time of B's acceptance. To avoid the apparent absurdity that a dead man can make a contract, it has been held that the offer terminates upon A's death even though B has no notice thereof.[37] It has been held that the underlying theory of an offer is that the offeror continually repeats the offer until

33. Restatement, Contracts § 64 (1932).

34. The contemplated profits, though, might happen to be included in the determination of the amount of the "unjust enrichment."

35. In negotiating for the contract price the offeree would bear in mind the cost, both in money and in time and labor, of the preparatory work necessary for performance. But this cost would not be included in a recovery in a quasi-contract action.

36. Restatement, Contracts § 74 (1932).

37. Pratt v. Trustees of Baptist Society, 93 Ill. 475, 34 Am. Rep. 187 (1879). See

the time of acceptance.[38] If the offeror should die he can no longer repeat the offer and it therefore lapses at such time.

Both of these arguments depend for their efficacy upon the subjective theory. The contractual assent deemed necessary is actual mental assent. Such being the case, then, if at any time the offeror no longer assents to the offer or is unable to do so because of his death or, as we shall see later, his insanity, the offer lapses or dies with him. The offer is said to exist only in the offeror's mind and the manifestations of his assent may be shown only as evidence thereof.[39] Since it cannot exist outside the offeror's mind, the offer can no longer be repeated when the offeror dies. Assuming, *arguendo,* that the subjective theory should govern in these cases, then the conclusions reached are correct. But it must be noted that the absurdity of the statement "a dead man can make a contract" can be shown only where the aforementioned subjective theory is applied. It follows then that, if we hold that the law is concerned with only the manifestations of assent as such—the objective theory—and not as mere evidence of that assent, we are justified in rewording the conclusion drawn from our original example: a contract can be made *at a time when* the offeror is dead. It is true that the original parties to the contract would be the offeree and the dead offeror, but the latter only in so far as he, while alive, set in motion the events which resulted in the emergence of a contract subsequent to his death.

According to the objective theory an offer exists independently of the offeror once it has been made[40] and will retain its legal existence until superseded by a revocation, the lapse of time or happening of a condition, or by rejection. Since the offer does not depend upon the offeror for its continued existence, then it is clear it will survive the offeror in the event of his death. Therefore, if we too may indulge in the legal fiction of the repetition of an offer then, even under the objective theory and in conformity with the minority rule of intervening death, an offer *is* repeated continuously until accepted but here it is not repeated by the offeror but repeats *itself* because of its separate existence.

In some of those jurisdictions where the majority rule is based on the subjective theory, an inconsistency arises in respect to irrevocable offers which have been held not to lapse upon the death of the offeror.[41] If upon application of the subjective theory, the formation of a contract is impossible when the offeror dies because there cannot then be a meeting of the minds, then in the option contract which makes the offer irrevocable, the parties would be contracting to do what is legally impossible to accomplish.[42]

Salmond and Winfield, Contracts § 13 (1927). For criticism, see Corbin, Offer and Acceptance, and Some of the Resulting Legal Relation, 26 Yale L.J. 169, 198 (1927).

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

39. This is not just a question of terminology for it affects the admissibility of evidence.

40. See Ferson, Does the Death of the Offeror Nullify His Offer, 10 Minn. L. Rev. 373, 376 (1926).

41. See 24 Col. L. Rev. 294, 295 note 6 and cases cited (1924).

42. See 24 Col. L. Rev. 294, 295 (1924).

Even assuming that the law as to the effect of intervening death is based on sound reasoning, it would not seem logical to use one of these reasons as a basis for determining the law to be applied to intervening insanity. Under the subjective theory it is properly reasoned that the death of the offeror should terminate the offer because a dead man cannot make a contract. But under the same subjective theory this would not follow as regards intervening insanity because, as has been shown, an insane person *can* make a contract.

Parks attempts to vindicate the majority rule by explaining it in conformity with the objective theory.[43] He theorizes that there is included in the offer an implied condition that the offer will lapse or terminate upon the death of the offeror. Under this theory, when the offeror dies before acceptance his offer terminates not because actual mental assent is now impossible or for other reasons predicated on the subjective theory but because the offeror impliedly made it a condition of his offer that his death would terminate it—thus keeping within the objective theory. In the modern business world such an implication would thrust an unreasonable burden upon the offeree for it would be incumbent upon him in order to safeguard his business interests to ascertain whether the offeror is still alive before he accepts or chance a possible loss which might result from a fruitless acceptance. That this is a reasonable and natural burden implicit in business ventures is open to dispute since it is the offeror who generally takes the initial legal step to a contract and since it would be less of a deterrent to commercial intercourse to cast the burden of possible hardship upon the offeror's estate rather than on the living offeree.

An analogy with a similar rule in the law of agency has been made in support of the majority rule.[44] But that rule itself has been narrowed by some courts[45] and because it too is an outgrowth of the unrealistic subjective theory, it has not escaped criticism.[46]

A possible vindication of the majority rule may be found in the fact that to hold otherwise would in effect render the offer irrevocable.[47] However, it must first be made clear that the offer, even after the offeror's death, may still be revoked if the offeree receives notice of it prior to his acceptance[48] and in such a case the offeror will not be prejudiced by the adoption of the minority rule. Even where no notice is received by the offeree, there is still the possibility that the deceased offeror's representatives or heirs will exercise the right of revocation if so desired. The problem is thus further narrowed to a discus-

43. See Parks, Indirect Revocation and Termination by Death of Offers, 19 Mich. L. Rev. 152 (1920).

44. Long v. Thayer, 150 U.S. 520, 522 (1893) "'. . . no principle is better settled, than that the powers of an agent cease on the death of his principal. If an act of agency be done, subsequent to the decease of the principal, though his death be unknown to the agent, the act is void. . . .' Farmer's Loan & Trust Co. v. Wilson, 139 N.Y. 284, 34 N.E. 784 (1893)."

45. Note, 37 Harv. L. Rev. 253 (1923).

46. Ibid.

47. 3 Proceedings A.L.I. 196, 199 (1925).

48. Restatement, Contracts § 42 (1932).

sion of the interim period between the offeror's death and the time his representative takes action. Three possible situations then arise. First, if the offeror had not died he would have the opportunity to actively revoke the offer himself or to have it revoked by circumstances which would indicate to the offeree a change of attitude on his part. Secondly, if he had died before acceptance, then under the *minority* rule the offeror would, of course, lose the power actively to revoke but would retain the possibility of having his offer revoked by circumstances, e.g., notice from a third person to the offeree of the offeror's death. Thirdly, under the *majority* rule the offer would be automatically revoked. At first blush it would appear that the majority rule would be more favorable, at least to the offeror and his estate, since under it the lapsing of the offer would be automatic while under the minority rule there would be less chance of a revocation. But would this automatic revocation have been necessarily considered an advantage by the dead offeror? His estate would lose the possibility of enforcing a contract which the dead offeror once thought beneficial. We are thus confronted with the choice of either partially depriving the offeror of his right to revoke while partially retaining a possibility of entering into a contract previously considered advantageous, or actually revoking for him while totally depriving his estate of the possibility of forming the contemplated contract. Substantial arguments may be advanced in support of both of these alternatives, a final choice probably being governed by one's advocacy of either the dynamic or static theories of law. But in view of the other arguments advanced in this article, in this writer's opinion, no such difficult and uncertain choice need be made.

Objective and Subjective Theories of Contracts

"The minds of the parties should be brought together at one and the same moment."[49] This statement is often repeated in substance to explain both the subjective theory of contracts and the objective theory as well. Especially in courts of equity we continually find similar expressions, as "meeting of the minds," expressed in ill-considered explanations of the theory which is the antithesis of that theory which the phrase should normally connote, i.e., the subjective theory. It is obvious, then, why the problem of objective versus subjective still persists at a time when the law on that subject is considered settled.

Prior to the nineteenth century this problem received very little attention from the courts but probably the objective test, as then expressed by Brian, C.J.,[50] was in vogue. From approximately 1790 to the middle of the nineteenth century the subjective theory of contracts was prevalent. It was during that period that the rule in conformity with the subjective theory, relating to the mailing of a letter of acceptance, was first adopted. Since then the American courts have almost uniformly applied the objective test with the one

49. Household Ins. Co. v. Grant, 4 Ex. D. 216, 220 (1879).

50. ". . . the thought of man is not triable for the devil himself knows not the thought of man." Y.B. 17 Edw. IV. pl. (1459).

notable exception of the mailing of the letter of acceptance mentioned above which exception has continued to the present time, obviously for practical reasons. Accordingly, it has been held that notice of revocation is essential;[51] unilateral mistake will not prevent the formation of a contract;[52] acceptance must normally be manifested to the offeror[53] and the offeror is bound by the offeree's reasonable understanding of the terms of the offer.[54]

The difference between the two theories is a fundamental one. Is the law concerning the formation of contracts based on the actual mental assent of the parties or on expressions or manifestations of the parties which would normally indicate such assent to a reasonable man?

According to the subjective theory the actual mental assent of the parties is determinative of their subsequent legal obligations and the acts or expressions manifesting such assent constitute rebuttable evidence thereof. If A says to B, "I offer to buy your car for $1,000," and B accepts, A is not under a contractual obligation to buy that car if he can show from other evidence that he did not really intend to buy it. The application of the objective theory, though, since under it only the expressed intention of the parties is material, would impose a contract duty upon A even if ". . . it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them. . . ."[55]

The objective test fulfills the intentions of the parties in the great majority of cases and prevents the frustration of the offeree's reasonable expectations engendered by the offeror's acts and expressions. Where a reasonable man is deluded by another's act or promise into believing he is assuming certain contract rights and duties, it would be unjust for the law to deny him those rights since in the vast majority of cases men normally intend what their acts and expressions indicate. The subjective test not only would create great practical difficulties and uncertainty in the business world but would invite fraud and deception.

The only plausible explanation for the rule of intervening insanity is that it is based on this subjective theory of contracts. In our problem case at the beginning of this article, A, when he made the offer, had the requisite legal capacity to do so and therefore at that time must have intended to enter into an enforceable agreement. In order to hold that his insanity later revoked the offer, the continuation of the offer must have depended upon the retention of that intent by the offeree. When that intent no longer existed in the mind of A, the offer, dependent on it, likewise passed from legal existence. This is a clear application of the subjective test whereby the law recognizes

51. Pennsylvania & Delaware Oil Co. v. Klipsteen & Co., 175 N.Y. Supp. 540 (App. Term, 1919).

52. Weber & Co. v. Hearn, 49 App. Div. 213, 63 N.Y. Supp. 41 (1st Dep't 1900).

53. Restatement, Contracts § 52 (1932).

54. Mansfield v. Hodgdon et al., 147 Mass. 304, 17 N.E. 544 (1888).

55. Hotchkiss v. National City Bank of New York, 200 Fed. 287, 293 (S.D.N.Y. 1911).

only the actual intentions of the parties and therefore the continued existence of the offer depends upon the continued existence of the actual intent to make it. If we apply the objective test, which for reasons advanced above should be applied, then the offer, once having been made by manifesting the intent to the offeree, would exist independently of the offeror and thus would not be subject to his intervening incapacity but only to limitations attached to it originally or to a subsequent communicated revocation.

The reasons for the almost universal application of the objective test have already been discussed. An analysis of the results of its application to intervening insanity reveals no reason militating against its adoption. If the objective test controlled, then, an offeror who had become insane would be held to a contract. The offeree in order to enforce such a contract would have to show his ignorance of the offeror's insanity at the time he accepted. It would also be incumbent upon him to show that the contract was fair and for a good consideration. These conditions to enforcement adequately protect the insane party from unfair dealings. But the courts extend their protection even further so that the insane party when sane, or his representatives, may elect to avoid the contract even if valid in its inception if it is still executory or, even if executed, if the consideration can be and is restored.

Revocation of Offer

"An uncommunicated revocation is for all practical purposes and in point of law no revocation at all."[56] This oft-quoted statement is a recognition of the law's strict adherence to the objective theory in that phase of contract law most analogous to the problem under discussion. In referring to the effect of death or insanity on an offer many writers refer to these conditions as "terminating" or "not terminating" the offer rather than as "revoking" or "not revoking". In the sense used here both words connote the same thought with the exception that the latter requires, in addition, notice to the offeree. Since that is the very problem we are attempting to resolve, viz., whether or not notice to the offeree is necessary in the case of intervening death or insanity, there would seem to be no reason to quibble over the terminology. It is pointed out merely to demonstrate the fact that death and insanity, prescinding from the problem of notice, are merely two more foundations for possible "revocation" of an offer similar to that of a change of mind on the part of the offeror, or selling to another the subject matter of the proposed contract. They all indicate that the offeror no longer *intends* the offer—either because he is no longer able to do so or because he has reversed his intention. It has been consistently held that this mere lack of assent will not of itself "revoke" or end the offer, because the offeree must be aware of it—he must receive notice of the revocation of the offer or change of mind. The majority rules as to the effect of intervening death and insanity are obvious deviations from the normal rules as to what is necessary to accomplish a revocation.

56. Byrne v. Van Tienhoven, 5 C.P.D. 344 (1880).

Conclusion

The rule that intervening insanity will terminate the offer even without notice to the offeree is inconsistent with the law which gives effect to the contracts of the insane. It deviates from the normal rules as to revocation, works unjust hardship upon the offeree and is an outgrowth of the outmoded and unrealistic subjective theory. Supported neither in law nor in logic, the majority rule should be replaced with a rule requiring notice to the offeree.

The companion problem as to the effect of intervening death presents a more difficult task of replacement for it is a well settled principle of law in most jurisdictions, but it is submitted that it is so unfair, so unrealistic and so devoid of legal or equitable foundations that it warrants remedial legislation.