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solved the rights of the litigants, but would have succeeded in clearing up a considerable amount of the confusion which has so long existed in this area.

SPENCER L. BLAYLOCK, JR.

Contracts—Conditional Acceptances—Variations in the Construction of the Offeree's Language

There is uniform adherence to the rules that: (1) "To consummate a valid contract an acceptance must be unequivocal and must not change, add to or qualify the terms of the offer."¹ (2) Variations do not change, add to or qualify the terms of the offer when additional language is framed in words of request² or when additional language merely recites conditions implied in fact or in law from the offer.³ Paradoxically, however, there seems to be little uniformity in the application of these rules to individual cases in which the language, although not changing the terms of the price, or nature of the subject matter of the contract, does to some extent create contingencies. The following cases, all concerned with transactions for the sale of real estate, with the exception of one, are illustrative of this problem.

The phrase "subject to" has traditionally been a conditional expression.⁴ One court, in construing what it determined to be a conditional acceptance said: "The meaning usually attributed to such words as 'subject to' is that a promise that is so limited is a conditional promise, one that is different from that for which the offeror bargained."⁵ However, in a recent North Carolina case, the court had no difficulty in construing the defendant's use of "subject to" as a phrase which did not affect the validity of an acceptance.⁶ Defendant had used the following language in replying to plaintiff's offer. "Your telegram . . . is accepted subject to details to be worked out by you and [my lawyer]."⁷ Defendant contended that his reply did not constitute an acceptance because the language was conditional. The court decided that the phrase "subject to details to be worked out . . ." was "an expression of hope or suggestion."⁸ In the court's discussion may be found

¹ Recent Cases, 20 CIN. L. REV. 68, 69 (1952).

² 1 WILLISTON, CONTRACTS § 79 (rev. ed. 1936).

³ *Id.* § 78.

⁴ 1 CORBIN, CONTRACTS § 61 (1950).

⁵ Lawrence Block Co. v. Palston, 123 Cal. App. 2d 300, —, 266 P. 2d 856, 862 (1954).

⁶ Carver v. Britt, 241 N. C. 538, 85 S. E. 2d 888 (1955).

⁷ *Id.* at 539, 85 S. E. 2d at 889.

⁸ *Id.* at 541, 85 S. E. 2d at 890. The court quoted as follows from 17 C. J. S., CONTRACTS at 384: "If an offer is accepted as made, the acceptance is not conditional and does not vary from the offer because of inquiries whether the offeror will change his terms, or as to future acts, or by the expression of a hope, or suggestion as to terms, or by the intimation that a time be fixed for the con-

an inference to the effect that although the use of "subject to" would not invalidate the acceptance, if "provided" had been substituted for "subject to" the contract would never have been formed.⁹ This distinction without further inquiry into the facts of the case would certainly appear to be precious.

In the following two cases the respective courts reached opposing decisions as to the legal effect of the language in each case, although the language of both cases seems to convey substantially the same meaning. Quære as to which of the following replies is conditional:

"Please send your abstract to me at once, at the address below. I will have same brought up to date and examined and proceed to close up the matter with you."¹⁰

"We would like to have you send on the deed and abstract to the Iowa State Bank of Waterloo, Iowa, and when they are examined, and found to be correct, your money will be turned over to you."¹¹

The first reply was construed to be an acceptance. In referring to the matter of forwarding the abstract, the court said:

"It is not such a change as amounted to a qualification of the original offer. . . . Plaintiff was not bound to accept the conveyance if the title proved to be unsatisfactory. This being so, the matter of furnishing the abstract was merely a detail which did not change the terms of the contract."¹²

In the second case, the court in rejecting the contention that the added language was a "collateral or subsequent suggestion or request" said:

"Unless the so called request or suggestion is a matter clearly apart from the acceptance, and the intention of the writer to declare his acceptance of the offer as made without regard to the matter of his request is apparent, the letter ought to be read as a whole and words which fairly import a new or additional condition to the terms proposed in the offer should be so construed, and the acceptance held to be insufficient."¹³

In this case the court was very much influenced by defendant's use of

summation of the transactions, or because the offeror otherwise expresses dissatisfactions with the offer or adds immaterial words which do not in legal effect qualify the offer. . . ."

⁹ *Ibid.*

¹⁰ *Bushmeyer v. McGary*, 112 Ark. 373, 376, 166 S. W. 168 (1911).

¹¹ *Knox v. McMurray*, 159 Iowa 171, 176, 140 N. W. 652, 653 (1913).

¹² *Bushmeyer v. McGary*, 112 Ark. 353, 378, 166 S. W. 168, 169 (1911).

¹³ *Knox v. McMurray*, 159 Iowa 171, 184, 140 N. W. 652, 657 (1913).

the word "when" in his purported acceptance.¹⁴ Certainly the word "when" was used but what difference should this really make? In the former case, the fact that the offeree did not intend to proceed with "closing up the matter" until he had received the abstract, had it brought up to date and had determined the correctness of the title seems to create the same impression of contingency as the literal use of the word "when."¹⁵

These inconsistencies in the interpretation of language which goes to the making of contracts are not confined to cases which arise in different jurisdictions. A similar comparison may be made of two cases decided by the North Carolina court. In *Hall v. Jones*,¹⁶ the North Carolina court found the following to be conditional: "I accept your offer. . . . I will have the deed fixed up within fifteen or twenty days and mailed to you; then you can sign the deed and send it to the Deposit and Savings Bank . . . with instructions to deliver to me upon the payment of \$1,500.00, or if you prefer, I will come to Bluefield."¹⁷ Yet, in *Ruckers v. Sanders*,¹⁸ the court found the acceptance to be unconditional where the offeree, while not otherwise qualifying his reply added this language: "Just draw on me here at Greensboro with your . . . stock attached to draft and I will honor same."¹⁹ In the first case the court said: "The buyer has no right to attach any conditions, if he proposes to hold the seller upon the original offer."²⁰ The court, in the second case, based its decision upon the theory that a "condition which goes to the making of the contract" should be distinguished from "a suggestion relating to the ultimate performance."²¹ These distinctions, on their face appear to be precious to a degree which certainly seems fortuitous to anyone faced with the business of preparing to litigate a case concerned with the problem of conditional language in the acceptance.²²

¹⁴ *Id.* at 182, 140 N. W. at 676.

¹⁵ Perhaps the essential problem in both of these cases amounted to determining whether the acceptor-offeree intended to promise to buy if title was marketable as distinguished from its being satisfactory (implying greater qualifications than marketability) to the purchaser or to someone approving the property for him. However, neither court seemed to consider this point.

¹⁶ 164 N. C. 199, 80 S. E. 228 (1913).

¹⁷ *Id.* at 200, 80 S. E. at 228. The offer to which this language was a reply read: "I am just in receipt of your letter, inquiring for cash price on the Calloway farm. I will take fifteen hundred dollars (\$1,500.) cash for it. . . ."

¹⁸ 182 N. C. 607, 109 S. E. 857 (1921).

¹⁹ *Id.* at 608, 109 S. E. at 857. This reply was in answer to the defendant's letter stating that he owned 50 shares of stock which he would sell for \$10,000.00.

²⁰ *Hall v. Jones*, 164 N. C. 199, 200, 80 S. E. 228, 229 (1913).

²¹ *Ruckers v. Sanders*, 182 N. C. 607, 609, 109 S. E. 857, 858 (1921).

²² The confusion which results from the varied interpretation of similar language in these cases has not been alleviated by their classification according to the decisions in the cases. Thus, the language of *Hall v. Jones* is classified as conditional, 1 WILLISTON, CONTRACTS, § 77, n. 10 (rev. ed. 1936), whereas the language of *Ruckers v. Sanders* is classified as conditional language which does not qualify

In the way of a guide through the apparent confusion presented by a comparison of these cases, it is submitted that latent in most of the cases involving the problem of conditional language of a borderline nature are elements from which may be inferred a principle of an equitable nature. Although this can in no way replace the objective method of interpreting the language of the offer and acceptance as it appears on its face, it might be helpful in reconciling the apparent inconsistencies of the the judicial construction of "acceptance" language in some of the cases, and it might be helpful in predicting the results of an untried case.

This principle might be said to derive from the fundamental assumption that the law not only redresses injury, but also conserves the value of the expectation of gain which constitutes the substructure of commercial enterprise.²³ A comparison of *Carver v. Britt*²⁴ and *James v. Darby*²⁵ yields a fairly clear illustration of this principle.

The *Darby* case concerned the legal effect of the following language: "If details are satisfactorily arranged, I have decided to accept. . . ."²⁶ This language was held to be conditional. Although there are other differences in the factual situations of these two cases, the substantial difference which very probably accounts for the different construction of the language lies in the character of the actions of the parties. In the *Darby* case, although the defendant sold the property after he had received the plaintiff's letter containing the purported acceptance, he notified the plaintiff of the sale, and in addition explained the reasons he had decided to sell elsewhere. By his explanation (which was presented in evidence) the defendant made it clear that he was genuinely uncertain as to the plaintiff's sincere desire to complete the sale, in spite of the purported acceptance. In a word, the surrounding evidence made it clear that the defendant did not intend arbitrarily to cut the plaintiff off from an expected source of gain.

The character of the defendant's action in the *Carver* case was otherwise. There the defendant, while the plaintiff was endeavoring to "work out the details" with the defendant's lawyer, told the plaintiff that he would "straighten things out with him."²⁷ Yet on the next day the de-

the legal effect of the offer, 1 WILLISTON, CONTRACTS § 78 n. 4 (rev. ed. 1936) without any explanation for the conflict.

²³ Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 580 (1933): "Finally, the recovery that the law allows to the injured promisee is not determined by what he lost in relying on the promise, but rather what he would have gained if the promise had been kept. There are obviously many cases where the injured party is substantially no worse after the breach than if the contract had never been made. He has thus not been in fact injured. . . . *The policy of the law, then, is not merely to redress injuries but also to protect certain kinds of expectation by making men live up to certain promises.*" (Italics added.)

²⁴ 241 N. C. 538, 85 S. E. 2d 888 (1955).

²⁵ 100 Fed. 224 (9th Cir. 1927).

²⁶ *Id.* at 225.

²⁷ *Carver v. Britt*, 241 N. C. 538, 540, 85 S. E. 2d 888, 889 (1955).

fendant abruptly sold the property in question to a third party without further discussing the matter with the plaintiff, although at all times the plaintiff was available to the defendant. The defendant thereafter remained evasive and uncommunicative after he had sold the property to a third party, and never so much as acknowledged the efforts of the plaintiff in attempting to secure a buyer for the plaintiff's property.

Another instance in which it appears that the court in construing the legal effect of an alleged acceptance looked beyond the language to the character of the actions of the parties is found in *Knox v. McMurray*.²⁸ In that case business men used what the court decided was conditional language in attempting to accept the offer of a "layman" who was ignorant of business methods, and who had expressed his ignorance to the buyers in correspondence with them. In spite of the defendant's hesitancy to enter into a binding agreement, the plaintiffs pressed him to make an offer to which they replied with language which the court held to be conditional.²⁹ Similar language had, in another case, been held to constitute a valid acceptance.³⁰

In *Skinner v. Stone*,³¹ the court rejected the defendant's contention that the plaintiff conditionally qualified his acceptance by requesting that the defendant have acknowledged a deed and return it, draft attached, to the plaintiff's bank. In that case, in rejecting the contention that the plaintiff's acceptance was conditional, the court, in its opinion, emphasized the following facts:

"It appears from the testimony that appellant [defendant] made no response to the letter of July 5th, but instead came down to [the county where the land was located] and made inquiry about its then market value without letting appellee [plaintiff-buyer] know of his presence in the neighborhood. Finally, when pressed to close the deal in accordance with the correspondence . . . , appellant declined to do so upon the ground that the mind of the parties had not met upon essential details."³²

From these statements of the court it may be inferred that in deciding that the plaintiff's acceptance was unconditional the court was influenced by the fact that the defendant used the plaintiff's belief that a

²⁸ 159 Iowa 171, 140 N. W. 652 (1913).

²⁹ *Id.* at 176, 140 N. W. at 653. "We would like to have you send on the deed and abstract to the Iowa State Bank of Waterloo, Iowa, and when they are examined, and found to be correct, your money will be turned over to you."

³⁰ *Bushmeyer v. McGary*, 112 Ark. 373, 376, 166 S. W. 168 (1911). In that case the language was: "Please send your abstract to me at once, at the address below. I will have same brought up to date and examined and proceed to close up the matter with you."

³¹ 144 Ark. 353, 222 S. W. 360 (1920).

³² *Id.* at 356, 222 S. W. at 361.

contract had been formed in order to gain an advantage for himself.

In summary, it would appear that although there can be no certain test for determining how a court will construe the language of the offeree which might seem to add contingencies to the original offer, an analysis of these cases seems to indicate that in determining whether a contract has been formed, the courts look beyond the language of the parties to the nature of the actions of the parties. If it appears that one of the parties knowingly allowed the other to rely on him as an expected source of gain, and subsequently, either arbitrarily, or because he has found a better bargain, cuts the other party off from the source of gain, it is probable that the court will construe the language in favor of the expectant party.

HARRIET D. HOLT.

Criminal Law—Search of Private Dwelling—Incident to Arrest

In *Clifton v. United States*,¹ federal revenue agents went to the defendant's home with an informant who told the person answering his knock that he wished to buy whiskey. He was told to see Earl Padgett, who lived down the road. The investigators and the informant returned to the defendant's backyard with Padgett who entered the back door and came out with a half-gallon of non tax-paid whiskey. The investigators paid Padgett for the whiskey, identified themselves and arrested him. Then one of the investigators searched the defendant's home and found illicit whiskey. The investigators had neither a warrant for the arrest of Padgett nor a search warrant for the defendant's house. The defendant's motion to suppress the evidence obtained by this search was denied by the trial court, and he was convicted. The Court of Appeals for the Fourth Circuit affirmed, saying: "The search in this case was reasonable, being incident to the arrest of Padgett. It is not necessary that the owner be the party arrested in such a case."²

This decision has extended the law of search incident to arrest far beyond bounds heretofore established. The court not only sanctioned the search of a private dwelling when the arrest took place outside the dwelling, but also held such a search to be reasonably incident to a lawful arrest where the party arrested was not the owner of the dwelling.

The Fourth Amendment to the United States Constitution guarantees to the people the right "to be secure in their persons, houses, papers

¹ 224 F. 2d 329 (4th Cir. 1955).

² *Id.* at 331. This case is of great importance to North Carolina because this state adopted the federal rule that evidence obtained by unlawful search and seizure is, on proper objection, inadmissible in criminal proceedings. N. C. GEN. STAT. § 15-27 (1951).