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TIME OF ACCEPTANCE: TOO MANY PROBLEMS FOR A SINGLE RULE*

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A Texan writes a friend in New Mexico making a business proposal which his friend accepts by mail. A few weeks later they have a falling out and the New Mexican refuses to go along with the deal. The particular type of agreement involved has been held to be against the public policy of New Mexico and relief would be denied if New Mexican law is applicable, but it is not against the public policy of Texas, and plaintiff would have relief if Texas law controls.

A municipality asks for bids on a building project. A builder sends in a low bid by mail. The appropriate municipal officers post a letter accepting the bid. A few minutes later the builder calls long distance and tries to withdraw his bid because of an error in calculation. The municipality refuses to release him, and the builder refuses to do the work.

The New York owner of a seldom traded corporate stock air mails an offer to sell it at \$60 a share to a San Francisco businessman. The morning the San Franciscan receives the offer he air mails a letter accepting it. That day there is active trading result-

* This Article is an attempt to resolve some of the problems I met in the preparation in 1961 of a report on American law for The General Principles of Law Seminar, Cornell Law School. This seminar has been engaged for several years in searching out the common core of agreement between various legal systems in the area of formation of contract. See Schlesinger, *The Common Core of Legal Systems: An Emerging Subject of Comparative Study*, in *XXTH CENTURY COMPARATIVE AND CONFLICTS LAW, LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA* 65 (1961); Schlesinger & Bonassies, *Le fonds commun des systèmes juridiques—Observations sur un nouveau projet de recherches*, 15 *REVUE INTERNATIONALE DE DROIT COMPARÉ* 501 (1963).

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ing in a decline to \$40, and the San Franciscan succeeds in withdrawing his letter from the mail.

The buyer for a Kansas City department store mails an order for 100 dozen neckties to a jobber in New York City, delivery to be in two months, notice of acceptance of the order to be within two weeks. The jobber drops his acceptance of the order in a mailbox in Greenwich Village. Through error of the post office the acceptance goes astray. After hearing nothing for three weeks, the buyer, assuming the jobber cannot fill the order, orders elsewhere. The jobber ships the neckties on schedule and objects strenuously when the buyer returns them.

The owner of a farm, in return for \$100, gives an out-of-state farmer an option to purchase the farm on or before June 30. On June 30 the optionee mails his acceptance and the down payment, which arrive in due course of the mail on July 1. The owner says the acceptance was too late and refuses to sell.

A man mails an application for accident insurance to an insurance company together with the premium for one year. The company mails the policy to him. Before he receives the policy he loses a leg in an accident. He demands the \$5,000 provided for loss of a leg; the company refuses to pay.

Only the most abstract conceptualism could lead to the conclusion that the foregoing situations are but one problem. Yet, in Anglo-American law one pervasive rule, disregarding the obvious functional differences found among the diverse problems,¹ covers them all. De-

¹ This point is made in FULLER, BASIC CONTRACT LAW 181-86 (1947), in which are described five of the situations to which a unitary time-of-acceptance doctrine is applied. Also, after setting forth the argument for an offeree in a case of revocation of offer, Professor Fuller points out how little relevance it has to a case where the acceptance is lost:

If in this case, too, the acceptance "takes effect" on dispatch it must be for other reasons, or because it is thought wise to avoid nuances and complexities by establishing a categorical rule on the basis of policies which are relevant in only a portion of situations to which the rule is applied.

Id. at 184; see DAWSON & HARVEY, CONTRACTS AND CONTRACT REMEDIES 410 (1959).

In addition to the six types of situations about which this Article is organized, "time of acceptance" has been in issue in a number of other situations:

(1) *Time at which parties to a contract acquire rights to property as against claims of creditors or others contracting with regard to the same property.* In *McDonald v. Chemical Nat'l Bank*, 174 U.S. 610 (1899), the account of Capital Bank with Chemical Bank was overdrawn. Capital Bank and some of its debtors dispatched remittances for credit to the account. Before Chemical Bank received the remittances Capital Bank was taken over by the bank examiner. The receiver sued to recover the remittances, and the Court held for Chemical Bank. In *Fitzgerald v. W. F. Sebel Co.*, 295 F.2d 654 (10th Cir. 1961), the buyer returned merchandise to seller, by mail for credit on account. After dispatch the buyer went into bankruptcy. As the case is described by the court, the return of the merchandise was only an offer. The court mistakenly relied on the Court of Claims cases, *Rhode Island Tool Co. v. United States*, 128 F. Supp. 417 (Ct. Cl. 1955) and *Dick v. United States*, 82 F. Supp. 326 (Ct. Cl. 1949). In *Chapman v. Mills & Gibb*, 241 Fed. 715

pending on the jurisdiction, the rule is that in a contract to be formed at a distance an acceptance of an offer is effective either on dispatch²

(S.D.N.Y. 1917), *aff'd per curiam*, 250 Fed. 1018 (2d Cir. 1918), the debtor endorsed and mailed checks of third parties to a creditor, then went into receivership before the creditor received the checks. The court held that the checks belonged to the creditor not the receiver. This too is an offer case. See *Hatchett v. Molton*, 76 Ala. 410 (1884) (successive contracts to sell the same property); *Sutton Elec. Supply Co. v. Fourth Nat'l Bank*, 145 Kan. 160, 64 P.2d 34 (1937) (bank which owed creditor was garnisheed after mailing a check in payment of the debt, but before creditor received the check); *Chiles v. Nelson*, 7 Dana 281 (Ky. 1838) (same as *Hatchett*); *Dick v. Vogt*, 196 Okla. 66, 162 P.2d 325 (1945) (same as *Hatchett*); *Potter v. Sanders*, 6 Hare 1, 67 Eng. Rep. 1057 (Ch. 1846) (same as *Hatchett*).

(2) *Time at which a drawee of a check or draft becomes irrevocably bound to pay it.* A number of cases have involved attempts of a bank to withdraw from the mails or otherwise revoke the acceptance of a draft or check drawn on it. *Cohen v. First Nat'l Bank*, 22 Ariz. 394, 198 Pac. 122 (1921); *Guardian Nat'l Bank v. Huntington County State Bank*, 206 Ind. 185, 187 N.E. 388 (1933); *Bohlig v. First Nat'l Bank*, 233 Minn. 523, 48 N.W.2d 445 (1951); *Traders Nat'l Bank v. First Nat'l Bank*, 142 Tenn. 229, 217 S.W. 977 (1920); *Farmers' Guar. State Bank v. Burrus Mill & Elevator Co.*, 207 S.W. 400 (Tex. Civ. App. 1918); *Canterbury v. Bank of Sparta*, 91 Wis. 53, 64 N.W. 311 (1895). These negotiable instrument cases form a slippery foundation for generalization about other kinds of cases. See the comment on this point in *Morrison v. Thoelke*, 155 So. 2d 889, 897 (Fla. Dist. Ct. App. 1963). The "contract" formed by the acceptance of a drawee is practically always a middle step in a series of "contracts" or other relationships. The drawee has a relationship, probably contractual, with the drawer, under which it is likely to be under a duty to the drawer to pay properly presented checks. Moreover, through statutes, clearing house associations, etc., the drawee bank may have certain obligations to the collecting bank (offeror). See generally *Bunn, When Is a Check Paid?*, 43 MINN. L. REV. 289 (1958); *Malcolm, Article 4—A Battle With Complexity*, 1952 WIS. L. REV. 265. If the special customs and history of mercantile transactions and law are added to the foregoing, it can be seen how unsafe it is to jump from the negotiable instrument cases to other areas. Unfortunately, this has not kept courts from making the leap. See, e.g., *Dick v. United States*, 82 F. Supp. 326 (Ct. Cl. 1949).

(3) *Death of a party after sending, but before receipt, of notice of termination of an agreement or change of beneficiary of a contract.* *United States v. Wadlington*, 333 S.W.2d 771 (Ky. 1960); *Mactier's Adm'rs v. Frith*, 6 Wend. 103 (N.Y. 1830); *Flowers v. Sovereign Camp, Woodmen of the World*, 40 Tex. Civ. App. 593, 90 S.W. 526 (1905); *Haarstick v. Fox*, 9 Utah 110, 33 Pac. 251 (1893), *aff'd*, 156 U.S. 674 (1895); cf. *Re Irving*, [1928] 3 D.L.R. 268 (App. Div. Ont. Sup. Ct.). The only aspect of this problem considered in this Article is in connection with life insurance policies. See text accompanying notes 82-90 *infra*.

(4) *Completion of a contract at an improper time, e.g., on Sunday.* *J. R. Watkins Co. v. Hill*, 214 Ala. 507, 108 So. 244 (1926); *Bryant v. Booze*, 55 Ga. 438 (1875). It makes little sense to apply "contract" rules to these cases. Whether the placing of an acceptance in a mailbox on Sunday disturbs the Sabbath hardly seems to turn on whether months or years later a court will say that a contract had been formed at that instant. Unfortunately, the courts may be forced by the wording of the Sunday statute to make decisions with such a nonsensical basis. However, surely nothing forces them to use such decisions as *stare decisis* when later faced with a true contract case.

(5) *Where the acceptance consists of sending property rather than simply a communication.* In these cases there may be numerous other problems, even assuming that a contract is formed by the dispatch. For example, if the offeror revokes, does the sender have a right to the whole price promised him, or only to damages, thus being treated as still owning what he sent? Under what circumstances can the offeree stop the property in transit and get it back, and what are his rights when he does? Who bears the loss if the property is delayed, damaged, or destroyed in transit? As of what time does the property belong to the respective parties in connection with claims of creditors or other third parties? While these problems are very properly problems of formation of contract, they are too extensive to receive anything but a passing mention here.

² This oversimplification of the rule should not be misleading in the context of this Article. The numerous exceptions clustered around questions concerning the

or receipt.³ Neither of these rules is adequate to achieve the goals of contract law. Those goals demand more flexibility than can be provided by a simple "dispatch" rule or a simple "receipt" rule. The purpose of this Article is to demonstrate how that flexibility could be achieved, and, incidentally, how the courts already often achieve it without admitting to doing so. Another purpose is to show that the dispatch rule, often under attack on theoretical grounds,⁴ is a sound foundation upon which to base needed flexibility.

I. JURISDICTION, VENUE, OR CHOICE OF LAW

The substance of these cases is outside the scope of this Article, but they nevertheless require brief mention. For one thing, they illustrate, perhaps more than any other group of cases, the absurdity of applying a time-of-acceptance rule outside its functional setting. The problems of risks of transmission delays, of mistakes, of changing markets, of the burning of almost "insured" houses, etc., simply do not bear any functional relationship to the questions of jurisdiction or choice of law involved in the conflicts⁵ cases when a court asks: "Where was the contract made?" *Shurter v. Ricker*⁶ is a good illustration. A married woman living in New York made an offer by mail to a friend in Texas. He accepted the offer by telegram. If Texas law were applicable, the contract was unenforceable; if New

means of transmission of the acceptance and alleged requirements by the offeror of actual receipt are a part of hornbook law. SIMPSON, CONTRACTS § 28 (1954). Those exceptions based on the means of transmission occur in the gaps created by the various theoretical justifications for the dispatch theory. For example, if the only justification of the dispatch rule recognized by a court is that by using the mail an offeror makes the postal authorities his agent, then a telegraphed response to a mailed offer cannot be effective on dispatch. At least this is the case so long as the same legal entity does not operate both the mails and telegraph services. These technical exceptions to the dispatch rule have not been overtly recognized by the courts as growing out of differences in functional problems and theoretically are largely unresponsive to the various functional problems considered here. It is my belief, however, that in practice these technical exceptions are often unconsciously used by the courts to accomplish functional purposes.

³ The United States Court of Claims is the only American court currently clearly adhering generally to the "receipt rule." *Pacific Alaska Contractors v. United States*, 157 F. Supp. 844 (Ct. Cl. 1958); *Rhode Island Tool Co. v. United States*, 128 F. Supp. 417 (Ct. Cl. 1955); *Dick v. United States*, 82 F. Supp. 326 (Ct. Cl. 1949); cf. *Fitzgerald v. W. F. Sebel Co.*, 295 F.2d 654 (10th Cir. 1961).

⁴ Samek, *A Reassessment of the Present Rule Relating to Postal Acceptance*, 35 AUSTR. L.J. 38 (1961); Stimson, *Effective Time of an Acceptance*, 23 MINN. L. REV. 776 (1939); Winfield, *Some Aspects of Offer and Acceptance*, 55 L.Q. REV. 499 (1939). For a list of earlier criticisms see Nussbaum, *Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine*, 36 COLUM. L. REV. 920 (1936). Too much well-worked ground would be harrowed anew by examination of the theoretical arguments which have been advanced generally in support of the dispatch rule. The fallacies in those arguments have been exposed many times. But the weakness in theoretical arguments does not undermine the functional bases for the rule which are discussed in various parts of this Article.

⁵ For simplicity's sake, all the choice of law, jurisdiction, and venue cases will be called conflicts cases.

⁶ 62 F.2d 489 (5th Cir. 1932), cert. denied, 289 U.S. 732 (1933).

York law were applicable, it was enforceable. The court held that because the offeree used a different means of communication from that used by the offeror, the acceptance was only effective on receipt, and therefore the contract was made in New York and subject to New York law. The court, however, suggested that if the offeree had mailed his acceptance it would have been effective on dispatch, the agreement would have been made in Texas, Texas law would have applied, and the contract would have been unenforceable. It is rather difficult to see how the gallant interest of Texas in protecting married women from making ill-considered contracts is in any way reduced if an acceptance is sent by telegram or increased if an acceptance is sent by mail.

The second reason for mentioning the conflicts cases is that unfortunately they are very much alive. Under the influence of Beale and the first *Restatement of Conflicts*,⁷ the "place of making" gained decisive importance, it being assumed that a contract could be formed in one place only. Fortunately, in the conflicts field itself the trend is very much away from such mechanistic rules. More modern rules are evolving from the notion that the key questions concern the location of the most substantial contacts of the contract.⁸ Under this notion, one contact is the place where the acceptance is sent, another is where it is received. The contact is the same irrespective of which event "creates" the contract. However, even assuming the substantial contacts doctrine will sweep every court in the nation, there will remain a vast body of old conflicts cases holding that a particular contract is formed upon dispatch or upon receipt as the case may be. These cases will be dead for conflicts purposes, but they may be kept alive by unwary jurists and other legal scholars for contract purposes. That this is a distinct possibility is shown by the ease with which the courts and some textwriters have in the past jumped blissfully from one type of case to the other, and back again.⁹ Thus, the mechanistic conflicts cases may plague contract law long after they have been deservedly interred by the conflicts experts.¹⁰

⁷ See generally RESTATEMENT, CONFLICT OF LAWS ch. 8 (1934).

⁸ RESTATEMENT (SECOND), CONFLICT OF LAWS ch. 8 (1958); EHRENZWEIG, CONFLICT OF LAWS 453-540 (1962).

⁹ See, e.g., *Entores, Ltd. v. Miles Far East Corp.* [1955] 2 All E.R. 493 (C.A.); 1 WILLISTON, CONTRACTS § 81, at 266 (3d ed. 1957) (numerous cases for the dispatch rule cited without distinguishing between "contract" cases and "conflict" cases). Most of the cases involving telephoned acceptance or other acceptances made by instantaneous methods of communication are and will be "conflict" cases. For a collection of the instantaneous transmission cases, see 1 CORBIN, CONTRACTS § 79 (1963); 1 WILLISTON, CONTRACTS § 82A (3d ed. 1957).

¹⁰ This Article deals with contract law and not with conflict of laws problems. Therefore, the strictly conflict of laws cases will hereafter be ignored, since they are not fungible with the contract law cases. When reference is made to "one case" or

II. REVOCATION OF OFFER AFTER DISPATCH BUT BEFORE RECEIPT OF ACCEPTANCE

Of all the "time of acceptance" situations, the case for the offeror is least appealing when he tries to revoke his offer after dispatch of the acceptance. The offeror initially made the promise. Not only did that promise create expectations of performance in the offeree, there is substantial possibility that he in some way relied on the promise. Moreover, his reliance may have taken a form, *e.g.*, inaction, which he will be unable to prove successfully in court. These expectations and this reliance may occur even before the offeree dispatches his acceptance, since the only apparent condition to the offeror's being bound is the offeree's accepting, and he is likely to think of that as something fully in his control. Some legal systems protect these interests of the offeree before he dispatches the acceptance. For example, German law generally makes offers irrevocable.¹¹ Other civil law systems protect at least the reliance interest by the doctrine of *culpa-in-contrahendo*.¹² Except for limited and recent American developments in the doctrine of promissory estoppel¹³ and a handful of statutory provisions of

"a few cases," the reader should understand that no strictly conflict case is included. However, since the courts commonly treat conflict and contract cases as fungible, anyone trying to sense a trend in a particular jurisdiction cannot afford to give the conflict cases so cavalier a treatment. Indeed, if there appeared to be a trend, especially in the newer conflict cases, toward or away from the dispatch rule, they could not be discarded even in a general Article like this. My review of the many conflict cases showed no particular trend differing from the contract cases, and I feel some confidence in putting them aside. Although no special effort was made to search out these cases, such a cascade of them emerged from other research that no purpose would be served by their extensive citation. However, in view of the notoriety of the Court of Claims cases in 1949 and 1955, see text accompanying notes 21-26 *infra*, rejecting the dispatch rule, it is interesting to note that the conflicts cases found since 1949 still adhere stoutly to the dispatch rule. See *Roto-Lith, Ltd. v. F. P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962); *Packard Englewood Motors, Inc. v. Packard Motor Car Co.*, 215 F.2d 503 (3d Cir. 1954); *Hunt Truck Sales & Service Inc. v. Omaha Standard*, 187 F. Supp. 796 (S.D. Iowa 1960) (receipt rule applied because answer to a mailed offer was telegraphed, but court does not show any inclination to undermine dispatch rule generally); *Walrus Mfg. Co. v. New Amsterdam Cas. Co.*, 184 F. Supp. 214 (S.D. Ill. 1960); *Rosenberg v. Andrew Weir Ins. Co.*, 154 F. Supp. 6 (D. Md. 1957); *Joseph v. Krull Wholesale Drug Co.*, 147 F. Supp. 250 (E.D. Pa. 1956), *aff'd*, 245 F.2d 231 (3d Cir. 1957); *Compania de Astral, S.A. v. Boston Metals Co.*, 205 Md. 237, 107 A.2d 357, 108 A.2d 372 (1954), *cert. denied*, 348 U.S. 943 (1955) (receipt rule applied pursuant to option exception to dispatch rule); *Linn v. Employers Reinsurance Corp.*, 392 Pa. 58, 139 A.2d 638 (1958); *Anschell v. Sackheim*, 145 F. Supp. 447 (D.N.J. 1956) (dictum); *Sam Finman, Inc. v. Rokuz Holding Corp.*, 130 Cal. App. 2d 758, 279 P.2d 982 (Dist. Ct. App. 1955) (dictum); *Fairchild v. Fairchild*, 125 N.W.2d 191 (Neb. 1963) (dictum) (not a conflicts case).

¹¹ Nussbaum, *supra* note 4, at 923. See generally Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).

¹² Nussbaum, *supra* note 4, at 924-25.

¹³ Where the offer is for a return promise, and is stated to be irrevocable, or called a firm offer, or it is otherwise made clear that the offer is accompanied by a promise not to revoke, reasonable reliance before acceptance would very likely make the offer irrevocable. *Cf. R. P. Farnsworth & Co. v. Albert*, 79 F. Supp. 27 (E.D. La. 1948), *rev'd*, 176 F.2d 198 (5th Cir. 1949); *Harris v. Lillis*, 24 So. 2d 689 (La.

limited application,¹⁴ the inexorable logic of the consideration dogma has prevented similar protection in Anglo-American law. The expectation and reliance interests¹⁵ of the offeree thus being naked to the whims of the offeror prior to acceptance, it is not surprising that the Anglo-American courts have kept that period of nakedness as short as possible by adoption of the dispatch rule. Indeed, it may be said that one of the prime functions of the dispatch rule is to shorten the duration of the offeror's right to revoke.¹⁶ Moreover, not only does the dispatch rule shorten the period of revocability, it removes an element of uncertainty from the contract relationship. In most Anglo-American jurisdictions a revocation is effective only upon receipt.¹⁷ The offeree in close cases has no idea whether he received the revocation before or after the offeror received the acceptance. Under the receipt rule that question is of vital importance, but under the dispatch rule the offeree will generally know whether he received the revocation before or after dispatching the acceptance. The offeror, of course, is in doubt under either rule. Thus, the dispatch rule protects the offeree from uncertainty which is caused by somewhat undesirable conduct of the offeror. Perhaps influenced by such considerations, numerous decisions have held the dispatch of an acceptance

App. 1946); RESTATEMENT, CONTRACTS §§ 45, 90 (1932). Moreover, a number of cases have indicated that the offer becomes irrevocable by virtue of a contractor's reliance on a subcontractor's bid, even though the bid does not indicate any intent that it be irrevocable. *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F.2d 654 (7th Cir. 1941) (dictum); *Air Conditioning Co. v. Richard Constr. Co.*, 200 F. Supp. 167 (D. Hawaii 1961), *aff'd*, 318 F.2d 410 (9th Cir. 1963) (court of appeals expressed doubt on this point); *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958); *Northwestern Eng'r Co. v. Ellerman*, 69 S.D. 397, 10 N.W.2d 879 (1943). *Contra*, *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933).

¹⁴ N.Y. PERS. PROP. LAW § 33; UNIFORM COMMERCIAL CODE § 2-205; MODEL WRITTEN OBLIGATIONS ACT § 1.

¹⁵ Expectation and reliance interests are used in the sense developed in the landmark article on this subject, Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1-2), 46 YALE L.J. 52, 373 (1936-37).

¹⁶ This notion, advanced by Professor Nussbaum, *supra* note 4, at 925-27, has been criticized.

Whether or not an offer should remain irrevocable for a certain time, although no consideration for keeping it open has been given is an entirely different question. The present rule relating to acceptance by letter must be supported on its own merits, and not on the merits of a rule which the common law has not adopted.

Samek, *supra* note 4, at 42. This criticism is erroneous. The questions referred to are not "entirely different" questions; they are exactly the same question: When does the offeror lose his right to withdraw from the proposed transaction? Some civil-law systems, *e.g.*, Germany, would answer that the offeror loses his right to withdraw as soon as he communicates the offer. Anglo-American law would commonly answer that he loses it as soon as an acceptance is dispatched.

The purported favoring in American law of the receipt rule in option contracts in other situations, see text at notes 78-80 *infra*, suggests further support for Professor Nussbaum's position. See RESTATEMENT (SECOND), CONTRACTS § 64, comment f (Tent. Draft No. 1, 1964).

¹⁷ 1 CORBIN, CONTRACTS § 39 (1963); 1 WILLISTON, CONTRACTS § 56 (3d ed. 1957).

proof against revocation by the offeror.¹⁸ The cases have so held even when it was clear that there was no reliance by the offeree before or after the dispatch of acceptance and the time of receipt of the revocation.¹⁹

The only²⁰ important exception to this line of authority has been where the offeror has made a mistake. Both the widely noted cases

¹⁸ *Patrick v. Bowman*, 149 U.S. 411 (1893) (revocation never received, but sent before acceptance); *United States v. Sabin Metal Corp.*, 151 F. Supp. 683 (S.D.N.Y. 1957), *aff'd*, 253 F.2d 956 (2d Cir. 1958) (revocation because of alleged mistake in a bid); *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 17 Fed. Cas. 447 (No. 9635) (C.C.D. Minn. 1876) (dictum); *McCleskey & Whitman v. Howell Cotton Co.*, 147 Ala. 573, 42 So. 67 (1906) (offeree relied by reselling after sending acceptance); *Kempner v. Cohn*, 47 Ark. 519, 1 S.W. 869 (1886); *Carlson v. Hay*, 69 Colo. 485, 195 Pac. 103 (1921); *L. & E. Wertheimer, Inc. v. Wehle-Hartford Co.*, 126 Conn. 30, 9 A.2d 279 (1939) (offeree had a contract to resell the subject matter of the contract in question); *Wagner v. McClay*, 306 Ill. 560, 138 N.E. 164 (1923); *Ziehme v. McInerney*, 167 Ill. App. 577 (1912) (shipment of goods); *Port Huron Mach. Co. v. Wohlers*, 207 Iowa 826, 221 N.W. 843 (1928) (shipment of goods was the acceptance); *Cyrus W. Scott Mfg. Co. v. Stoma*, 10 La. App. 469, 121 So. 335 (1929) (dictum); *Wheat v. Cross*, 31 Md. 99 (1869) (no obvious reliance by offeree); *Logan v. Waddle*, 238 S.W. 516 (Mo. App. 1922) (unclear whether offeree relied by agreeing to resell the subject matter of the contract in issue after sending acceptance); *Senaca Co. v. Ellison*, 203 Mo. App. 179, 184 S.W. 1177, 208 S.W. 103 (1919) (dictum) (shipment of goods); *Stein-Gray Drug Co. v. H. Michelsen Co.*, 116 N.Y. Supp. 789 (N.Y. Munic. Ct. 1909) (dictum); *Owen M. Bruner Co. v. Standard Lumber Co.*, 63 Pa. Super. 283 (1916) (offeree apparently resold the subject matter of the contract between dispatch of acceptance and receipt of revocation); *Felt & Tarrant Mfg. Co. v. Northwestern Egg & Poultry Co.*, 178 Wis. 552, 190 N.W. 431 (1922); *In re Imperial Land Co. (Harris' case)*, L.R. 7 Ch. 587 (1872) (reliance of offeree unclear, but case illustrative of the situations in which there might be reliance that could not be proven); *Raeburn & Verel v. Burness & Sons*, 11 T.L.R. 399 (Q.B. 1895); *In re Imperial Land Co. (Wall's case)*, L.R. 15 Eq. 18 (1872); *Henthorn v. Fraser*, [1892] 2 Ch. 27; *Stevenson, Jacques & Co. v. McLean*, L.R. 5 Q.B.D. 346 (1880); *Sommerville v. Rice*, 31 N.Z.L.R. 370 (1911); *Thomson v. James*, 34 Sess. Cas. 1 (Scot. 1st Div. 1855); *cf. The Palo Alto*, 18 Fed. Cas. 1062 (No. 10700) (D. Me. 1847) (revocation of remission of a customs forfeiture held too late where received after court ordered restoration of the property).

¹⁹ *Stephen M. Weld & Co. v. Victory Mfg. Co.*, 205 Fed. 770 (E.D.N.C. 1913) (court even allowed recovery of damages occurring after the revocation was received, on the dubious ground that since the revocation was only an anticipatory breach the offeree could elect to stand by the contract, continue its performance, and collect its losses in doing so); *Paramount Pictures Distrib. Corp. v. Gehring*, 283 Ill. App. 581 (1936); *Cobb v. Foree*, 38 Ill. App. 255 (1890); *Peck v. Freeze*, 101 Mich. 321, 59 N.W. 600 (1894); *Berwald Stewart Co. v. Mitchell*, 37 Ohio App. 121, 174 N.E. 148 (1930) (suit by a broker for commission, offeree arguing unsuccessfully for receipt rule); *Farmers' Produce Co. v. McAlester Storage & Comm'n Co.*, 48 Okla. 488, 150 Pac. 483 (1915) (statutory provision assisted the court; offeror revoked because it discovered that it had insufficient supplies to meet offeree's order).

²⁰ A second arguable line of exceptions is to be found in a number of cases which have approved the dispatch rule, but have gone on to find that no contract had been formed because the acceptance was not unqualified. In some the difference between the terms of the acceptance and the terms of the offer was so slight that one wonders if the real reason for the result was perhaps judicial dissatisfaction with the dispatch rule. See, e.g., *Anderson v. Stewart*, 149 Neb. 660, 32 N.W.2d 140 (1948); *Polhamus v. Roberts*, 50 N.M. 236, 175 P.2d 196 (1946); *Hess v. Holt Lumber Co.*, 175 Wis. 451, 185 N.W. 522 (1921). Avoidance of a charge of historical ignorance also requires a mention here of *M'Culloch v. Eagle Ins. Co.*, 18 Mass. (1 Pick.) 278 (1822), in which Massachusetts rejected the dispatch rule. This case is now dubious authority in Massachusetts, see *Brauer v. Shaw*, 168 Mass. 198, 46 N.E. 617 (1897), although Dean Stimson argues that *M'Culloch* is still good law there. Stimson, *supra* note 4, at 799 n.12. Incidentally, it is interesting to note that in *M'Culloch* apparently there was no reliance by the offeree between the time of dispatch and the time of receipt. A note by the reporter of the case suggests that possibly a different

in the Court of Claims, *Dick v. United States*²¹ and *Rhode Island Tool Co. v. United States*,²² were cases involving substantial unilateral mistakes. Instead of facing up to the functional problem of mistake, each time the court repudiated the dispatch rule generally.²³ This approach to the problem was undoubtedly encouraged by the extreme weakness of the reasons in support of the dispatch rule usually put forth in cases and texts.²⁴ Such a repudiation was not, however, necessary. The state of the law of mistake would have permitted relief in those cases without overthrowing the dispatch rule.²⁵ Moreover, in *Rhode Island Tool* the court lost a good opportunity to recognize that an offeror calling a mistake to the attention of the offeree before receipt of the acceptance is probably entitled to better treatment than if he makes his play after receiving the acceptance. In any attempted rescission for mistake there is always a possibility that the one claiming relief is dissatisfied with the contract for other reasons and is using the mistake as an excuse, or indeed is trumping up the mistake. The notion of certainty of contracts to which judges habitually refer in denying relief for mistake rests in part on this always present possibility of duplicity. But such conduct is less dangerous when the party seeking relief is not aware that a contract has been formed. If he

result might be reached if there were such reliance. 18 Mass. (1 Pick.) at 283. One of the few other revocation-of-offer cases applying the receipt rule is *McCone v. Eccles*, 42 Nev. 451, 181 Pac. 134 (1919). An offer of modification of an earlier contract provided for the offeree's signing of notes and that "upon their return, . . . [offeror] will attend to the matter of a bill of sale." *Id.* at 454, 181 Pac. at 135. It is arguable that the offeror required receipt but certainly not in unequivocal terms.

²¹ 82 F. Supp. 326 (Ct. Cl. 1949), 13 ALBANY L. REV. 94 (1949), 34 CORNELL L.Q. 632 (1949), 38 GEO. L.J. 106 (1949), 62 HARV. L. REV. 1231 (1949), 44 ILL. L. REV. 394 (1949), 25 IND. L.J. 202 (1950), 34 MINN. L. REV. 140 (1950), 17 U. CHI. L. REV. 375 (1949), 18 U. CINC. L. REV. 381 (1949), 35 VA. L. REV. 508 (1949), 59 YALE L.J. 374 (1950). *Dick* will be considered in more detail later, since it involved not a revocation by the offeror, but a withdrawal of an acceptance by an offeree.

²² 128 F. Supp. 417 (Ct. Cl. 1955), 43 GEO. L.J. 679 (1955), 54 MICH. L. REV. 557 (1956), 8 STAN. L. REV. 279 (1956), 7 W. RES. L. REV. 103 (1955).

²³ This repudiation has had unfortunate effects. In *Pacific Alaska Contractors, Inc. v. United States*, 157 F. Supp. 844 (Ct. Cl. 1958), the court, without noting the difference, extended the rule of *Rhode Island Tool* to a non-mistake case, compounding its error by indicating that a revocation is effective on dispatch. *Id.* at 846. *Dick* and *Rhode Island Tool* seem to have vigor only in the house of their fathers. Only one other court has taken their lead, although as the reader will note from citations throughout this article a number of time-of-acceptance cases have come down since 1949. One of these involved an alleged mistake in a bid for a federal government contract, in which the court was unaware of or disregarded *Dick* and *Rhode Island Tool*. *United States v. Sabin Metal Corp.*, 151 F. Supp. 683 (S.D.N.Y. 1957), *aff'd per curiam*, 253 F.2d 956 (2d Cir. 1958). The case purporting to follow *Dick* and *Rhode Island Tool* is *Fitzgerald v. W. F. Sebel Co.*, 295 F.2d 654 (10th Cir. 1961), although the court was in reality dealing with an offer, not an acceptance. The lower court in *Morrison v. Thoeilke*, 155 So. 2d 889 (Fla. Dist. Ct. App. 1963), followed *Dick* but was reversed on appeal.

²⁴ See the criticisms in the materials cited in note 1 *supra*.

²⁵ For example, see *Kutsche v. Ford*, 222 Mich. 442, 192 N.W. 714 (1923), in which the court adopted the dispatch rule, but gave relief for a unilateral mistake by the offeree where he notified the offeror of the mistake before receiving notice of acceptance. See generally 3 CORBIN, CONTRACTS § 609 (1960); PALMER, MISTAKE AND UNJUST ENRICHMENT (1962).

knows that a contract has been formed, there is a danger that he is simply speculating at the other party's expense. If the contract looks favorable to him he will abide by it; if it begins to look sour he will trot out his mistake calling "Foul!" But he does not have this opportunity if the other party is not bound. The danger of a conscious attempt to speculate does not exist when the offeror still thinks that he is the only one even partially bound to the deal. Thus, one factor which surely should be weighed in the offeror's favor in a mistake case is his absence of knowledge of the acceptance. This is not to suggest that the offeror's absence of knowledge be given conclusive weight. The other elements of certainty may and often do far outweigh the element of injurious speculation. The key element in certainty is the need of the party later resisting rescission to be able to rely on the promise of the other. Thus, presence or absence of change of position by the party seeking to uphold the contract may properly dominate the picture, even though the erring party did not know of the formation of the contract. Moreover, it is essential to ascertain whether the offeror in fact knew of the acceptance when he protested. Courts would not err in being suspicious in such cases, especially if there has been competitive bidding. The maintenance of the integrity of competitive bidding systems is both an essential and a difficult task. There is some evidence that mistakes are used to nibble away at the integrity of government competitive bidding.²⁶ Often the offeror-bidder will know precisely when the bids are to be opened, and thus when the acceptance, if there is one, is likely to be dispatched. The possibility of his learning of the award, of the range of bids, or of other information from an inside source some time before receipt of the formal acceptance should induce caution by the courts in weighing claims of ignorance of the acceptance.

In summary, it is difficult to see any practical reason why the courts should allow an offeror to revoke after dispatch of the acceptance, except in mistake cases, and then only cautiously, especially

²⁶ Gantt, *Selected Government Contract Problems: Construction Contract Standard Forms "Mistakes in Bids" Revisited*, 14 Fed. B.J. 388, 400 (1954). It is by no means unknown for government bidders who allege mistakes to seek initially an increase in the price rather than rescission of the contract. See *Rumley v. United States*, 285 F.2d 773 (Ct. Cl. 1961) (offeror-bidder wrote concerning his mistake before he knew of the award; the court refused rescission).

In a matter closely related to the subject of this Article, the Government has recently tightened its regulations. Various procurement regulations, *e.g.*, 41 C.F.R. § 1-2.303 (1963), permit a contracting officer to consider bids received before an award is made, but after the opening of the bids, where the tardiness is due to delay in the mails for which the bidder was not responsible. Under older regulations, such consideration could be given to bids sent by ordinary mail, thus giving rise to such possibilities as the use of easily rigged postage meter dates as evidence of time of mailing. The newer regulations limit this special provision for late bids to those sent by certified or registered mail, thus making fraudulent claims of delay in the mails more difficult to effect.

because the possible reliance of the offeree calls for protection beyond that which promissory estoppel ordinarily gives.

III. WITHDRAWAL OF ACCEPTANCE FROM TRANSMISSION OR NOTICE OF REVOCATION OF ACCEPTANCE RECEIVED BEFORE OR AT THE SAME TIME AS THE ACCEPTANCE

The relations of the parties are quite different in these situations than when the offeror revokes. In the revocation of offer cases the problem is the possible or actual reliance of the offeree after sending his acceptance. Here, however, it is the offeree who "wants out," and here reasonable reliance by the offeror is impossible, since he knows before or at the time of receiving the acceptance that the offeree withdraws his promise. Reliance would be reasonable only if the law says it is, and even then the law would normally limit its definition of reasonableness by the doctrine of mitigation of damages. Thus, there is no obvious counterpart to the offeree's reasonable reliance in the revocation of offer cases. If the offeree is unable effectively to terminate his acceptance after dispatch, some other reason must be found.

A one-sided arrangement is created if the offeror loses his power to revoke at the time of dispatch, while the offeree retains both the physical ability and legal power to withdraw or revoke the acceptance before its receipt. This situation suggests three possible solutions: make the acceptance effective only upon receipt; deprive the offeree of the legal power to terminate his acceptance after dispatch even though he may retain the physical power to get it back or to communicate by a faster means; or effectuate the one-sided arrangement.

The first solution may have been the one adopted by the Court of Claims in *Dick v. United States*,²⁷ the reason given being the alleged change in American postal regulations²⁸ permitting with-

²⁷ 82 F. Supp. 326 (Ct. Cl. 1949). It is not completely clear whether the court adopted this solution or the third rule suggested. In *Rhode Island Tool* and subsequent Court of Claims cases the Court of Claims treats *Dick* as adopting the first solution.

²⁸ In *Rhode Island Tool* the court states that it knows of no decision in favor of the dispatch rule since the effective date of the new regulations where the new regulations were called to the attention of the court. The statement is an unfortunate one. The regulations could hardly be described as new. There is no clear agreement as to when such regulations came into effect, because the right to withdraw letters has been expanded over the years. Thus Dawson and Harvey put the date at 1885. DAWSON & HARVEY, *CONTRACTS AND CONTRACT REMEDIES* 409 (1959). *American Jurisprudence* puts it at least 1887 or earlier. 12 AM. JUR. *Contracts* § 49, at 541 (1938). However, there were some rights to withdraw a letter as early as 1873. Note, 8 STAN. L. REV. 279, 281 (1956). At any rate, the regulations antedate some cases in which the courts applied the dispatch rule where the letter had in fact been withdrawn. *Scottish-Am. Mortgage Co. v. Davis*, 96 Tex. 504, 74 S.W. 17 (1903); *Farmers' Guar. State Bank v. Burrus Mill & Elevator Co.*, 207 S.W. 400 (Tex. Civ. App. 1918); *Canterbury v. Bank of Sparta*, 91 Wis. 53, 64 N.W. 311 (1895). In at least two cases prior to 1949 the courts applied the dispatch rule after

drawal of posted mail by the sender. To the extent that this reason assumes that the dispatch rule is based on the idea that the carrier is agent of the offeror it is attacking a straw man. The dispatch rule does not depend on the oft-destroyed agency concept.²⁹ It has sounder functional foundations, some of which have already been discussed.

To the extent that the dispatch rule presupposes some loss of control by the offeree, further discussion is required. Speaking broadly, there are two reasons why the acceptance of an offer should be communicated to the offeror. If the offeror does not know about the acceptance he will not know that he has obligations and will be unable to perform them. In addition, without communication there may be no evidence other than the unsupported word of the offeree that he intended to be bound to the contract. Both these points will be considered in connection with acceptances which are never received or are delayed in transmission. The second, however, also involves the problem of control which so concerned the Court of Claims. The question is whether the dispatch of an acceptance by means of the mail, telegraph, etc., is a manifestation of intent adequate to protect the offeror from denials by the offeree that he manifested such an intent. The answer is not clear.³⁰ Obviously, the mere fact that the offeree could communicate an overtaking revocation of the acceptance by telephone, or other mode of communication, does not affect this question, since in most cases the offeror would still receive the acceptance. But what of the offeree's power to remove the acceptance physically from the channel of communication, so that the offeror never receives it? It is not hard to think of cases where the offeror would never learn of the acceptance, and yet would have been bound, under the dispatch rule, had things turned sour for him rather than for the offeree. In such a case the offeree may have been speculating for a time with the offeror's money. There are several answers to this problem, which seem a sufficient basis for rejecting the approach

explicit consideration of the right of the sender to withdraw the letter from the mail. *Chapman v. Mills & Gibb*, 241 Fed. 715 (S.D.N.Y. 1917), *aff'd mem.*, 250 Fed. 1018 (2d Cir. 1918); *Sutton Elec. Supply Co. v. Fourth Nat'l Bank*, 145 Kan. 160, 64 P.2d 34 (1937).

²⁹ See note 4 *supra*.

³⁰ Professor Williston expresses doubts on this question:

If the law is open to criticism for taking the moment of mailing a letter as important, it is because that outward act is not so certain an outward indication that a promise has been made as a receipt of the letter by the offeror would be, and the law should select such an outward act as normally and ordinarily connotes the actual making of a promise by communication.

1 WILLISTON, CONTRACTS § 81, at 269 (3d ed. 1957). Certainly some forms of "dispatch" are not adequate for this purpose, and the courts will not treat them as effective acceptances. *E.g.*, *Maclay v. Harvey*, 90 Ill. 525 (1878) (giving a letter to a boy to mail); *Bal v. van Staden*, [1902] Transvaal L.R. 128 (1901) (mailing when, because of wartime conditions, there was no regular postal communication between the offeree's and the offeror's places of residence). The point is ably discussed in *Morrison v. Thaelke*, 155 So. 2d 889, 900 (Fla. Dist. Ct. App. 1963).

of *Dick*. Neither the physical power of the offeree to withdraw a communication nor the duration of that power must be overestimated. Anyone who has tried to retrieve a letter or package from the mails is aware of the difficulties of doing so, difficulties compounded by vast quantities of other mail, by lack of tracing facilities, by dispersal of bureaucratic authority, by the natural reluctance of those trained to speed mail onward to make any of it go backward.³¹ In short, whatever the postal regulations may say, the offeree has lost a great deal of control over the acceptance when he drops it through a letter slot. Moreover, if the offeror has an inkling of what happened, he may be able to prove that the acceptance was sent. Telegraph companies keep duplicate copies of telegrams. Order or sales forms and checks are commonly serially numbered, and subject to discovery procedures. A man who will withdraw an acceptance from the mail will not necessarily lie under oath when his deposition is taken.³² Finally, the most important answer is that the dispatch rule is sufficiently valuable and useful that it should not be overthrown for an occasional instance of injustice.

A second possible handling of revocations of acceptance is to hold that the acceptance is effective on dispatch and is irrevocable.³³ This answer has whatever virtue there is in symmetry, in that it is completely consistent with the rule respecting revocation of offers after dispatch of the acceptance. It also has a more useful virtue in that it prevents, during the period of transmission, any possibility of speculation by the offeree at the offeror's expense.

The third solution is to permit the offeree to withdraw his acceptance or notify the offeror of its revocation, at any time up to or

³¹ Professor Pannam reports trying six times to retrieve letters from Her Majesty's post under the Australian regulations, each time unsuccessfully. Pannam, *Postal Regulation 289 and Acceptance of an Offer by Post*, 2 MELBOURNE U.L. REV. 388 (1960). There has been judicial recognition that in spite of a right to withdraw the letter the sender loses control over it upon mailing. *Chapman v. Mills & Gibb*, 241 Fed. 715 (S.D.N.Y. 1917), *aff'd mem.*, 250 Fed. 1018 (2d Cir. 1918).

³² It may also be possible to secure information from the post office concerning the fact that a letter addressed to the offeror was withdrawn from the mails. Requests for withdrawal of mail must be made on a special form, 39 C.F.R. §§ 43.5, 51.8, 137 (1962), which is kept by the post office. However, records regarding mail matters "are privileged matter, and may not be disclosed by subordinate officers, or employees of the Department without authorization." 39 C.F.R. § 4.3 (1962). Thus, the offeror may have some difficulty in breaking this barrier of silence. It is not clear from the regulations whether department authorization would be granted an offeror in such a case. 39 C.F.R. § 4.4 (1962). On the subject of privilege in mail and telegraph matter generally, see 8 WIGMORE, EVIDENCE § 2287 (McNaughton ed. 1961).

³³ In the following cases the dispatch rule was applied either to a withdrawal of the acceptance or to an overtaking revocation of the acceptance: *Cohen v. First Nat'l Bank*, 22 Ariz. 394, 198 Pac. 122 (1921) (check case); *Morrison v. Thaelke*, 155 So. 2d 889 (Fla. Dist. Ct. App. 1963); *Sutton Elec. Supply Co. v. Fourth Nat'l Bank*, 145 Kan. 160, 64 P.2d 34 (1937); *Farmers' Guar. State Bank v. Burrus Mill & Elevator Co.*, 207 S.W. 400 (Tex. Civ. App. 1918).

contemporaneous with receipt.³⁴ At first glimpse it seems atrocious to bind one party but not the other.³⁵ And so it is whenever the subject matter of the contract is such that the offeree can enjoy any material opportunity to speculate at no risk to himself.³⁶ But it is questionable whether there is anything more than a love of legal symmetry to justify refusing to allow an offeree to change his mind in the following cases:

A wealthy man writes to a prominent artist offering him \$10,000 if the artist will paint a mural on the living room wall of the man's mansion. The artist mails an affirmative reply, but shortly thereafter has an opportunity to work in Europe, and telegraphs a rejection which reaches the offeror before the acceptance.

A man sends in a health insurance application, the policy to be noncancellable to age 65. The company mails the policy. Shortly thereafter a directive comes to the underwriting section not to issue such policies to people engaged in the applicant's occupation. The company recovers the policy from the post office, and thereafter mails a rejection. The applicant's health remains the same until after he has received the rejection.

When the subject matter of the contract is something not likely to fluctuate in value during the period of transmission, nor the type of commodity likely to be resold, there seems singularly little reason to bind the offeree as soon as he dispatches the acceptance, even though the offeror is bound at that point.³⁷ The purposes underlying mutuality

³⁴ The Tennessee court adopted this position in *Traders' Nat'l Bank v. First Nat'l Bank*, 142 Tenn. 229, 217 S.W. 977 (1920) (check case, see caveat, *supra* note 1). In *Linn v. McLean*, 80 Ala. 360 (1885), the court held that a mailed acceptance could be revoked before receipt because the parties generally dealt face to face. The court went on to hold that the purported revocation was inadequate.

³⁵ The dissenting judge in *Dick* said: "I think little can be said in justification of such a doctrine." 82 F. Supp. at 331. Professor Llewellyn points out:

regarding the time of closing, the risk of the market shifting against the offeror, unbalanced by the chance of gain if it shifts in his favor, rests under our law on the offeror during one transmission period plus time for answer He wants to deal; he takes that risk. But to fail to close the deal as against the offeree until the letter of agreement arrives is to extend that imbalanced risk of the market without observable reason. We have seen that it will be rough on the offeree if he is not permitted to rely on having obligated the offeror; but it will be even rougher on the offeror if he is obligated whereas the offeree, at the offeree's option, is not—*when there is no reason for the inequality*. It is not a question of principle that both must be bound, or neither; it is a question of principle that there must be a *good reason* for "binding" one while leaving the other free.

Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance, II*, 48 YALE L.J. 779, 795 n.23 (1939).

³⁶ The Indian Contract Act of 1872, § 5, 2 UNREPEALED GENERAL ACTS 275 (4th ed. 1909), gives the offeree power to do precisely this. See Saxena, *Selected Modern Problems in Offer and Acceptance: A Comparative Study of the Law of India, England and the United States* 157 (1961) (unpublished thesis in Cornell Law Library).

³⁷ Professor Winfield, while not advocating the one-sided obligation argued for here did suggest that, "There is something to be said for adopting different rules for

doctrines simply do not apply to such cases. It is interesting to note that of the few modern cases which have rejected the dispatch rule in whole or in part under the "new" postal regulations, three have involved withdrawals of acceptance. Two of these were check collection cases,³⁸ in which drawee banks mailed drafts or letters of advice and credit to the collecting bank, but then withdrew the communication from the mail. These specialized types of contracts do not involve a subject matter which appears to permit the offeree (drawee-bank) to speculate at the offeror's (collecting bank's) expense. They are, therefore, appropriate cases in which to permit the drawee bank to revoke its acceptance.³⁹ The other modern case applying the receipt rule to withdrawals of acceptance is *Dick*, which involved a wartime contract to supply ship propellers. It was not an open bid contract, but was individually negotiated. Two factors stand out: the mistake made by the offeree was so great that it seems most unlikely that it was trying either to speculate or to trade the Government up; and in view of the special nature of the ship propellers and of the wartime situation, it is inconceivable that the offeree was trying to hold open this deal while shopping around for something better elsewhere.⁴⁰

In contrast to the facts of the three cases holding the offeree unbound after dispatch are the facts of several cases holding him bound. One involved an offer to sell farm machinery, with the buyer to receive credit of \$1,078 for an engine to be turned in to the seller, together with a rescission of an earlier contract whereby the seller was

different species of contracts. In a purely personal contract, like that originating in a proposal of marriage, it might well be urged that until the offeror actually receives the acceptance, there ought to be no contract, however well suited the Anglo-American view might be to commercial contracts." Winfield, *supra* note 4, at 512.

³⁸ *Guardian Nat'l Bank v. Huntington County State Bank*, 206 Ind. 185, 187 N.E. 388 (1933); *Traders' Nat'l Bank v. First Nat'l Bank*, 142 Tenn. 229, 217 S.W. 977 (1920). See the caveat in note 1 *supra*, about using check collection or draft cases as authority in other areas. *Buehler v. Galt*, 35 Ill. App. 225 (1889), might be included here if it were a "modern" case. There *D* and *L* were indebted to Galt. They had Buehler certify a check payable to Galt and then mailed it to him; it was returned without delivery to Galt and *D* took it to Buehler who canceled it and recredited *D* and *L*'s account. The court held for the defendant. See *Ex parte Cote*, [1873] 9 Ch. App. 27, where the parties had an arrangement whereby one would send bills of exchange to the other drawn on third parties, the recipient would then send bills drawn on other third parties. *D* sent Cote in France a bill drawn on a firm in Milan. Cote mailed a letter containing bills to *D*, but on learning that the Milan firm refused to accept the bill drawn on it, Cote sought return of his letter and its enclosures. The return was approved pursuant to French postal regulations, but through a misunderstanding Cote's clerk failed to pick up the letter at the appropriate time and it was forwarded to *D*. The court held that the property in the bills did not pass to *D*.

³⁹ The court in *Guardian Nat'l*, *supra* note 38, reached this result by adopting the receipt rule generally; the court in *Traders' Nat'l*, *supra* note 38, apparently took the course of holding the acceptance effective as to the offeror, but revocable by the offeree.

⁴⁰ The court in *Dick* apparently held that the acceptance was effective on dispatch but nevertheless revocable by withdrawal from the mail. Later Court of Claims cases, cited note 23 *supra*, however, proceeded on the basis of a generalized receipt rule. See note 27 *supra*.

to purchase the engine outright for \$1,000.⁴¹ Three others involved sales of land,⁴² and one involved a lease of land.⁴³ The subject matter of all those contracts were things regularly bought and sold, and likely to fluctuate in value, or to be the subjects of better offers. In one, at least,⁴⁴ the reason for recall of the acceptance was a better offer from another source.

Thus, the results of the relatively few cases⁴⁵ fall into a pattern unlike the rationalizations enunciated by the courts. When the period of transmission gives the offeree a chance to secure better opportunities elsewhere, or to enjoy possible speculative gains, he cannot revoke by withdrawing the acceptance; when such opportunities or speculative gains are unavailaible or very unlikely, he may effectively withdraw the acceptance before it reaches the offeror. A doctrine based on these results would be more salutary than hard and fast adherence to either the dispatch or receipt rule.

IV. NONRECEIPT OR DELAY IN THE TRANSMISSION OF THE ACCEPTANCE

Before analyzing the cases between the parties to the alleged contract, suits against telegraph companies, an offshoot with quite different problems, should be considered. In these suits the conflict between the dispatch rule and the receipt rule should be irrelevant. Nevertheless, many opinions of the courts largely ignore the fact that something different is involved in these suits.⁴⁶ A number of courts have mechanically applied the dispatch rule against the offeree whose acceptance the telegraph company delivered late, or not at all, holding that since a contract was formed on dispatch, the offeree's remedy was against the offeror, not the telegraph company.⁴⁷ Such treatment

⁴¹ Ellard v. Waterloo Mfg. Co., 20 Sask. 601, [1926] 2 D.L.R. 257.

⁴² Morrison v. Thoeke, 150 So. 2d 889 (Fla. Dist. Ct. App. 1963); Hayne v. Cook, 252 Iowa 1012, 109 N.W.2d 188 (1961); Scottish-Am. Mortgage Co. v. Davis, 96 Tex. 504, 74 S.W. 17 (1903).

⁴³ Geary v. Great Atl. & Pac. Tea Co., 366 Ill. 625, 10 N.E.2d 350 (1937).

⁴⁴ Hayne v. Cook, 252 Iowa 1012, 109 N.W.2d 188 (1961).

⁴⁵ In addition to the cases already mentioned, the Scottish case, Countess of Dunmore v. Alexander, 9 Sess. Cas. 190 (Scot. 1st Div. 1830), permitted revocation of an acceptance in circumstances where there was little danger of any speculative harm to the offeror. The acceptance which was revoked was in response to an offer of a lady's maid to serve the offeree. A later Scottish case makes plain that for other purposes, *e.g.*, revocation of offer, the acceptance is effective on dispatch. Thomson v. James, 34 Sess. Cas. 1 (Scot. 1st Div. 1855). A New Zealand court apparently held as an alternative ground for decision that a postal acceptance of an offer to marry could not be revoked by an overtaking telegram. Wenkheim v. Arndt, 1 J.R. 73 (1873). The court, however, awarded only one farthing damages.

⁴⁶ The same criticism might be made of some textwriters. See, *e.g.*, 1 WILLISTON, CONTRACTS § 94, at 342-43 (3d ed. 1957), where suits against telegraph companies are lumped indiscriminately with suits against parties to the contract.

⁴⁷ McKeown v. Western Union Tel. Co., 240 Ill. App. 559 (1926); Postal Tel.-Cable Co. v. Willis, 93 Miss. 540, 47 So. 380 (1908) (the court refused even to allow

leaves the offeree in a difficult position. In order to recoup the loss he has suffered he must proceed against the innocent offeror. He has to utilize a rule of law which many laymen would consider technical or wrong. The victim of that rule may be an important customer or supplier of the offeree. At the very minimum, such a suit will hardly enhance the offeree's reputation as a good man with whom to deal. Meanwhile, the party whose breach of duty is responsible for the problem stands behind the shield of a technical rule of law to which it is hardly entitled.⁴⁸ Moreover, the shield may face but one direction, thus leading to circuity of actions. The offeror who was to receive the telegram probably has a good cause of action against the telegraph company either on a theory of tort or as a third party beneficiary.⁴⁹ Indeed, he may even be able to convince the court that by his originally using the telegraph to transmit the offer, the telegraph company comes under a contractual duty to him to receive and duly transmit an acceptance if there is one.⁵⁰ Thus, in disallowing a recovery by the offeree, the courts may simply be causing unnecessary additional litigation. The rather obvious desirability of allowing the offeree to recover from the erring telegraph company in spite of the possible applicability of the dispatch rule between the parties may account for the relatively large proportion of successes by offerees before courts purporting to apply traditional technical interparty rules.⁵¹ One

the offeree to show a business custom that acceptance was only effective on receipt); *Chesebrough v. Western Union Tel. Co.*, 76 Misc. 516, 135 N.Y. Supp. 583 (Sup. Ct. 1912), *aff'd*, 157 App. Div. 914, 142 N.Y. Supp. 1112 (1913); *Western Union Tel. Co. v. Wheeler*, 114 Okla. 161, 245 Pac. 39 (1926); *Western Union Tel. Co. v. F. Connell Land Co.*, 61 Tex. Civ. App. 168, 128 S.W. 1162 (1910) (suit for broker's commission).

⁴⁸ It could be argued that these decisions are justified because higher rates would result if the telegraph companies are liable, and that other telegraph users should not be forced into such an "insurance" scheme. The companies, however, have a good deal of protection against broad liability under the doctrine of *Hadley v. Baxendale*, 9 Exch. Rep. 341 (1854). Moreover, this question is better considered with reference to the validity of clauses limiting liability than with reference to the initial question of liability v. nonliability. See generally Sutton, *Contractual Exemptions From Liability*, 34 AUSTL. L.J. 290, 311 (1961); Note, *Contractual Limitations of Contract Liability*, 47 IOWA L. REV. 964 (1962); Note, *Limitations on Freedom To Modify Contract Remedies*, 72 YALE L.J. 723 (1963).

⁴⁹ 1 CORBIN, *CONTRACTS* § 105 (1963); 5 *id.* § 1019, at 107 (1951).

⁵⁰ *Western Union Tel. Co. v. Allen*, 30 Okla. 229, 119 Pac. 981 (1911); *Western Union Tel. Co. v. Fletcher*, 208 S.W. 748 (Tex. Civ. App. 1919) (plaintiff sent an offer by telegraph to X, who returned a counteroffer by telegraph; plaintiff never received the counteroffer; held that if plaintiff could show he would have accepted the counteroffer he could recover against the telegraph company).

⁵¹ None of the following cases is rationalized on the basis suggested, but the decisions are consistent with it. *Lucas v. Western Union Tel. Co.*, 131 Iowa 669, 109 N.W. 191 (1906) (telegraphed reply to mailed offer not effective on dispatch because telegraph not an impliedly authorized means of communication since offer was by letter); *Postal Tel. Cable Co. v. Louisville Cotton Seed Oil Co.*, 140 Ky. 506, 131 S.W. 277 (1910) (court found that offeror had provided for actual receipt); *Squire v. Western Union Tel. Co.*, 98 Mass. 232 (1867) (only damage questions were raised by the exceptions); *Western Union Tel. Co. v. Gardner*, 278 S.W. 278 (Tex. Civ. App. 1925) (even though telegraph was the accepted method of transmission, court held it proper to consider the prior course of agreement between offeror and offeree that contracts would be formed only upon receipt of the acceptance).

court has allowed the offeree to recover from the telegraph company in spite of a conclusion that as between the parties a contract was formed on dispatch.⁵² Moreover, analogous support for this result can be found in several cases in which an offeree was permitted to recover damages from the telegraph company for its misstating of the price in a telegraphed offer, even though in the particular jurisdiction the offeror would have been liable on a contract at the correct price.⁵³

There is thus substantial support in the cases for allowing either the offeror or offeree to recover from the telegraph company for its failure to deliver the acceptance, on time or at all, irrespective of whether a contract is formed between the parties by dispatch of the telegram. It would be a salutary thing for contract law if the courts would rationalize these results in terms of protecting the reasonable expectations of both parties rather than becoming involved in involuted discussions of agency problems.

⁵² *Naive-Spillers Corp. v. Postal Tel.-Cable Co.*, 4 Tenn. App. 435, 442 (1926): "[T]he plaintiff had a right of action against Collins Company for the breach of contract, and also had another right of action for the loss against the telegraph company for violation of a public duty and contractual obligation, as the injury did not result from the intervening act of a third person, but the injury flowed directly from the negligent act of [telegraph company's] . . . agents in delivering the telegram to the wrong person."

⁵³ *Western Union Tel. Co. v. T. C. Davis Cotton Co.*, 170 Ark. 506, 280 S.W. 977 (1926); *New York & Washington Printing Tel. Co. v. Dryburg*, 35 Pa. 298 (1860); *Pepper v. Telegraph Co.*, 87 Tenn. 554, 11 S.W. 783 (1889); *Postal Tel. Co. v. Miller*, 5 Higgins 544 (Tenn. Civ. App. 1914), *approved*, 4 Tenn. App. 442 (1926).

Williston cites five American cases against telegraph companies as squarely in point for the proposition that "the offeror [is] treated as having made the offer in the form in which it was received by the offeree." 1 WILLISTON, CONTRACTS § 94, at 342 n.11 (3d ed. 1957). He cites fourteen cases for the proposition that the trend of the more recent United States cases is toward adoption of the opposite view. *Id.* at 342 n.12. His authority hardly supports the proposition. The five cases cited in n.11 were suits by the sender and allowed recovery against the telegraph company. *Des Arc Oil Mill, Inc. v. Western Union Tel. Co.*, 132 Ark. 335, 201 S.W. 273 (1918); *Western Union Tel. Co. v. Chappelle*, 180 Ark. 422, 21 S.W.2d 964 (1929); *Western Union Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576, 40 S.E. 815 (1902); *Western Union Tel. Co. v. Shotter*, 71 Ga. 760 (1883); *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 Atl. 495 (1887). Four of the fourteen in n.12 were suits by the sender, who was allowed recovery. *Western Union Tel. Co. v. Anniston Cordage Co.*, 6 Ala. App. 351, 59 So. 757 (1912); *Jackson Lumber Co. v. Western Union Tel. Co.*, 7 Ala. App. 644, 62 So. 266 (1913); *Penobscot Fish Co. v. Western Union Tel. Co.*, 91 Conn. 35, 98 Atl. 341 (1916); *Murray Oil Prods. Co. v. Poons*, 190 Misc. 110, 74 N.Y.S.2d 814 (New York City Ct. 1947), *aff'd mem.*, 191 Misc. 1005, 80 N.Y.S.2d 28 (App. T. 1948). In four more, it was held that the sender could recover very substantial damages from the telegraph company even though no contract was formed at the erroneous price. *Strong v. Western Union Tel. Co.*, 18 Idaho 389, 109 Pac. 910 (1910); *Postal Tel.-Cable Co. v. Schaefer*, 110 Ky. 907, 62 S.W. 1119 (1901); *Holtz v. Western Union Tel. Co.*, 294 Mass. 543, 3 N.E.2d 180 (1936); *Pepper v. Telegraph Co.*, *supra*. Thus, thirteen of nineteen cases cited by Williston point towards liability of the telegraph company, as do, of course, the cases cited at the beginning of this footnote. See also *Estherwood Rice Mill, Inc. v. Western Union Tel. Co.*, 127 So. 2d 231 (La. App. 1961); *Sherrerd v. Western Union Tel. Co.*, 146 Wis. 197, 131 N.W. 341 (1911). The trend of results is then perhaps in the direction of liability rather than towards use of either the dispatch rule or the receipt rule in such cases. There is a good discussion of where the ultimate losses should lie in 1 CORBIN, CONTRACTS § 105 (2d ed. 1963).

Turning to the mainstream of the delay and nonreceipt disputes, those between the parties,⁵⁴ strict application of the dispatch rule puts all risks resulting from loss or delay in transmission of the acceptance on the offeror.⁵⁵ It will be helpful in resolving the question of allocation of these risks to consider the nature of the risks when an acceptance goes astray. The offeror thinks that there is no contract, and he may rely on that belief. The offeree thinks there is a contract and he may rely on that belief. Strict application of the dispatch rule will leave the offeror's reliance and expectations⁵⁶ unprotected, and strict application of the receipt rule will leave the offeree's reliance and expectations unprotected.

There are three possible functional arguments why the interests of the offeree are more deserving of protection than those of the offeror. It will, however, be seen that none of them justifies the universal application of either an ironclad dispatch rule or an ironclad receipt rule.

⁵⁴ An apology is in order for the excursions into the tributaries of the mainstream of this Article. Unfortunately, where the traditional approach of both courts and commentators has largely been that there are no tributaries but only a single large stream, an attempt to chart the stream itself requires some exploration of the tributaries.

⁵⁵ In addition to the more general reasons given for the dispatch rule, the reason sometimes given for thus allocating such risks is that the offeror chose the means of communication and ought to bear the risks of its use. *E.g.*, *Household Fire & Carriage Acc. Ins. Co. v. Grant*, 4 Ex. D. 216 (C.A. 1879). It is, however, often untrue that the offeror chooses the means of communication. The offeree in many cases initiates the means of communications, as it is often largely fortuitous which of the parties turns out to be offeror and which offeree. Note, 8 *STAN. L. REV.* 279, 282 (1956). The blackletter rule is: "The mode authorized for transmittal of the acceptance is the mode used by the offeror to transmit the offer." *SIMPSON, CONTRACTS* § 28, at 71 (1954). More extensive texts make similar although more elaborate statements. *E.g.*, 1 *WILLISTON, CONTRACTS* § 83, at 273 (3d ed. 1957); *RESTATEMENT, CONTRACTS* § 66 (1932). There are, however, a few cases which have held, stated, or otherwise indicated that the person who first used the means of communication which later went awry is the one who suffers thereby, whether or not he is ultimately the offeror. *E.g.*, *Pepper v. Telegraph Co.*, 87 *Tenn.* 554, 11 *S.W.* 783 (1889). Other cases, however, follow the hornbook even though the offeree started the use of the particular means of communication. *E.g.*, *L. & E. Wertheimer, Inc. v. Wehle-Hartford Co.*, 126 *Conn.* 30, 9 *A.2d* 279 (1939); *E. Frederics, Inc. v. Felton Beauty Supply Co.*, 58 *Ga. App.* 320, 198 *S.E.* 324 (1938); *Butler v. Foley*, 211 *Mich.* 668, 179 *N.W.* 34 (1920) (word allegedly left out of communication).

The argument is not a strong one even apart from its inapplicability to many cases. If the natural and normal commercial way to communicate is by mail, it is difficult to see why the risks of that particular means should be allocated to the party who happened to use it first. This is equally true if telegraph, teletype, telephone, or even radio is an ordinarily acceptable means of making deals. The idea doubtless goes back to the days when the only normal way to make agreements was face-to-face, with either the offeree or his agent delivering the acceptance personally. In a day when contracts are often normally made through delivery of communications by a common carrier who is really the agent of no one, the idea no longer is based on reality.

⁵⁶ The offeror's reliance and expectation interests in loss or delay cases are, of course, his reliance on the nonexistence of the offeree's promise and his expectation that there is *no* such promise and that he is therefore free of the proposed contract.

One argument which has been advanced is that the dispatch rule is better for evidentiary purposes.⁵⁷ There is some difference on this score between cases of delay and cases of nonreceipt. In both situations the offeror tardily becomes aware of the alleged existence of the acceptance—in delay cases when it arrives, and in nonreceipt cases when the offeree or someone else so advises him in a subsequent communication, at the latest in the pleadings of the case. Just as the subsequent communication may come a short time or a long time after the lost acceptance should have arrived, so the delay in transmission of an acceptance itself may be a short or a long delay. But in one respect nonreceipt is usually different from delay. Where the acceptance is delayed the offeror knows that it was sent; from a postmark or from the telegraph company, he knows usually when it was sent; and he knows what it says. The evidentiary problem in delay cases thus is little affected by the determination to choose one rule or the other governing time of acceptance. This is also true when the acceptance is never received.⁵⁸ In this situation, the offeror has only the offeree's word for its having been sent, for when it was sent, and for what it said, bolstered by whatever evidence the offeree has to support his word. This is a heavy burden for the offeror to bear, but it is one which he bears under either the dispatch rule or the receipt rule. Under the dispatch rule the fact finder must decide whether the acceptance was sent. The offeror's denial of receipt is one factor which should go into that determination. Another factor is the likelihood that a letter or telegram properly addressed, stamped, or paid for is delivered in the ordinary course of mail or telegraphy. These two factors must be weighed against the offeree's evidence that the acceptance was in fact sent. Under the receipt rule the same factors are present, but the likelihood of timely delivery now must be considered *with* rather than *against* the offeree's testimony of dispatch. The fact finding should be the same in either case. If the offeror's evidence of nonreceipt is more plausible than the offeree's evidence of dispatch, then it would be found that the acceptance was neither dispatched nor received; if the offeree's evidence is the more plausible, then it would be found that the acceptance was both dispatched and received.⁵⁹ Thus, from an

⁵⁷ Professor Winfield has concluded that there is little to choose between the two rules on this score. Winfield, *Some Aspects of Offer and Acceptance*, 55 L.Q. REV. 499 (1939). This is a conclusion with which I agree.

⁵⁸ For the purpose of this discussion, a case will be considered a delay case where the offeror is able to secure a telegraph company copy of the acceptance. In such a situation he has, practically speaking, received the acceptance, however late he may have done so.

⁵⁹ Without being unduly prolix, it is not possible to go into the intricacies of the solutions to these evidentiary problems in the cases. Sometimes the likelihood of receipt is treated as a presumption which cannot be rebutted by certain types of evidence, see *e.g.*, *Barneby v. Barron G. Collier, Inc.*, 65 F.2d 864 (8th Cir. 1933),

evidentiary standpoint there is little choice in alleged nonreceipt cases between the dispatch rule and the receipt rule. This is also true as to content of the alleged acceptance, because even under the receipt rule the fact finder will have to rely on what the offeree says were the contents of the acceptance, for the offeror denies that there was an acceptance, and hence is unable to say what was in it. Therefore, the evidentiary argument, the first functional argument allegedly favoring the dispatch rule turns out to be quite unpersuasive.

The second argument has more force. The offeree may in fact rely on the deal's being closed as soon as he sends the acceptance, and, since this immediate reliance is useful to both parties in the vast majority of cases, it should be protected.⁶⁰ But this argument carries only to those cases in which there is or might be reliance by the offeree. It does not justify the dispatch rule when it is clear that the offeree has in no way relied.

The third argument, closely related to the second, is that the offeree should be encouraged to rely immediately and, if he knows the law, the dispatch rule gives him such encouragement. Such encouragement to rely during the normal transmission time will tend to produce results desirable to both parties in most cases, and therefore should be fostered. But again, this argument carries only to those cases where there is or might be reliance by the offeree. It does not justify the dispatch rule where the encouragement had no effect and where it is clear that the offeree has in no way relied.

Encouragement, however, is not necessarily limited to the normal transmission time. The dispatch rule does more than that. Under the receipt rule the offeree will be in doubt about the formation of the contract whenever he receives no further communication from the offeror,⁶¹ and this will be equally true whether or not his acceptance

and sometimes it is treated (as it should be) as simply evidence, see, *e.g.*, *Rosenthal v. Walker*, 111 U.S. 185 (1884); *Rowntree Bros. v. Bush*, 28 Ga. App. 376, 111 S.E. 217 (1922); *Corcoran v. Leon's, Inc.*, 126 Neb. 149, 252 N.W. 819 (1934); *Potts v. Whitehead*, 20 N.J. Eq. 55 (Ch. 1869) (court inferred from nonreceipt that the letter had not been mailed). Moreover, the treatment may vary depending upon whether the alleged receiver is maintaining that the communication was never sent or the alleged sender is maintaining that it was received. See generally 1 WIGMORE, EVIDENCE § 95 (3d ed. 1940); 9 *id.* § 2519; 1 WILLISTON, CONTRACTS § 87, at 280 (3d ed. 1957).

⁶⁰ Llewellyn, *Our Case-Law of Contract: Offer and Acceptance*, II, 48 YALE L.J. 779, 795 (1939).

⁶¹ *Id.* at 795 n.23, argues that the harm caused the offeree by the receipt rule in this situation would generally be greater than the harm to the offeror by the dispatch rule:

The ingrained usage of business is to answer letters which look toward deals, but the usage is not so clear about acknowledging letters which close deals. The absence of an answer to a letter of offer is much more certain to lead to inquiry than is the absence of an answer to a letter of acceptance, so that

is one of those relatively rare communications which goes astray. But, given the ease of checking by phone or telegraph, the dispatch rule hardly seems either necessary or adequate to encourage reliance after the normal transmission time. It is not necessary because an offeree who is hesitating because of worries about the mails is most likely to pick up a telephone and find out whether his acceptance was received. It is not adequate because, in spite of the rule, the offeree with genuine doubts is not likely to go ahead and perform in reliance upon his right to sue. Such action, if the doubts turn out to be well founded, will not enhance his business reputation; nor do many people voluntarily "buy" law suits. Thus, the third argument for the dispatch rule, that it encourages reliance by the offeree,⁶² is not completely persuasive.⁶³

The foregoing functional arguments do no more than justify the dispatch rule as a starting point; they do not justify its inflexible use. If I were to formulate a general rule to effect the purposes suggested, it might be as follows:

Even though an acceptance sent by an appropriate method is delayed or lost in transmission, a contract is formed (1) if by the time the acceptance arrives or the offeror otherwise learns of it, the offeror has not detrimentally changed his position in the belief that no acceptance had been made, or (2) if, by the time the offeree learns of the delay or nonreceipt, he has detrimentally changed his position in reliance on the "contract." The burden of showing

the party bitten by the mischance has under our rule a greater likelihood of being aware of uncertainty and of speedily discovering his difficulty.

No empirical evidence of the foregoing usages is offered, and one is accordingly entitled to weigh one's own intuition and general knowledge in the scales in support of or against Professor Llewellyn's conclusions.

⁶² The encouragement argument of course presupposes that the offeree knows of the dispatch rule, which will often not be the case. See, e.g., the limited survey of Connecticut businessmen in Note, *Offer and Acceptance in Contracts by Correspondence*, 59 YALE L.J. 374 (1950). Of ten business concerns interviewed, five had never heard of the rule, and eight considered a contract binding only upon receipt of the acceptance, some of them in spite of some knowledge of the dispatch rule.

⁶³ A fourth possible argument hardly dignifies discussion. It is the opposite of a conceptualistic position argued by Langdell:

Adopting one view, the hardship consists in making one liable on a contract which he is ignorant of having made; adopting the other view, it consists of depriving one of the benefit of a contract which he supposes he has made. Between these two evils the choice would seem to be clear; the former is positive, the latter merely negative; the former imposes a liability to which no limit can be placed, the latter leaves everything *in statu quo*.

LANGDELL, SUMMARY OF THE LAW OF CONTRACTS 21 (2d ed. 1880). In response to the argument, it might be maintained that in more cases than not the quantum of risk to the offeror under the dispatch rule is less than the quantum of risk to the offeree under the receipt rule. The theory would be that the status quo (*i.e.* no contract) which the offeror believes to exist would less likely induce the offeror to change position than the change of status quo (*i.e.* contract) which the offeree believes to exist would be likely to induce the offeree to change position. Suffice it to say that however sound such a statement of fact is generally, it is so far removed from the realities of any one case that it should be ignored.

change of position by the offeror and of showing the absence of change of position by the offeree is on the offeror.

How does such a rule fit the reported cases? It certainly does not fit the rationalizations of those cases. They follow the traditional pattern that the risks of delay and loss are on the offeror, unless an unauthorized means of transmission is used or unless he indicated that actual receipt was necessary. But, if we turn away from the rationalizations and look at the results, we find them generally consistent with this statement of principle. There is hardly a single case applying the dispatch rule to loss or delay in transmission where it is clear both that the offeree had not relied on the contract and that the offeror had relied on its nonexistence.⁶⁴ Moreover, in a large number of the

⁶⁴ The following are the loss or delay cases (other than insurance cases) which have held the acceptance effective on dispatch. In none did the offeree clearly not rely on the contract where the offeror did rely on its nonexistence. *Barneby v. Barron G. Collier, Inc.*, 65 F.2d 864 (8th Cir. 1933) (probably no reliance by the offeree, but there was also no claim of a change of position by the offeror); *National Ref. Co. v. Wagner*, 169 F.2d 43 (10th Cir. 1948) (oil lease delay rental clause; court assumes dispatch rule to be applicable; no reliance by offeree); *Gloyd v. Midwest Ref. Co.*, 62 F.2d 483 (10th Cir. 1933) (oil lease delay rental clause; no evident reliance by offeror); *Harvey v. Benmo Oil Co.*, 272 Fed. 475 (E.D. Okla. 1921) (oil lease delay rental clause; no evident reliance by offeror; heavy reliance by offeree); *Young v. Moncrief*, 117 Kan. 698, 232 Pac. 871 (1925) (oil lease delay rental; heavy reliance by offeree); *Carter & Co. v. Hibbard*, 26 Ky. L. Rep. 1033 (Ct. App. 1904) (no claim of change of position by offeror); *Baker v. Potter*, 223 La. 274, 65 So. 2d 598 (1953) (oil lease delay rental); *Farmers' Handy Wagon Co. v. Newcomb*, 192 Mich. 634, 159 N.W. 152 (1916) (one of the parties to a sales contract had a right to withdraw up to a certain date; his notice of intention to do so was mailed but not received; the other party relied heavily by performing the contract); *Powell v. Aldridge*, 202 Miss. 648, 32 So. 2d 146 (1947) (acceptance consisted of seller-offeree's shipping the goods); *Logan v. Waddle*, 238 S.W. 516 (Mo. App. 1922) (reliance by either party extremely unlikely); *Corcoran v. Leon's, Inc.*, 126 Neb. 149, 252 N.W. 819 (1934) (clear and substantial reliance by offeree); *Watson v. Russell*, 149 N.Y. 388, 44 N.E. 161 (1896) (offeror relied by filling the acting job which had been offered to offeree; offeree relied by failing to seek other employment for over a month just before the beginning of the theatrical season); *Howard v. Daly*, 61 N.Y. 362 (1875) (similar to *Watson*); *Trevor v. Wood*, 36 N.Y. 306 (1867) (offeror relied by selling the 50,000 Mexican dollars involved; it is by no means clear that the offeree did not also rely by refraining from trying to secure the dollars elsewhere); *Vassar v. Camp*, 11 N.Y. 441 (1854) (offeror relied by failing to secure the subject matter of the contract; it is by no means clear that offeree did not rely by refraining from purchasing elsewhere in an ascending market); *Hitz v. Ohio Fuel Gas Co.*, 43 Ohio App. 484, 183 N.E. 768 (1932); *McAlister v. Klein*, 81 Okl. 291, 198 Pac. 506 (1921) (offeree may well have relied on contract because offeror's bid on steel work was one of a number submitted to offeree who was a general contractor); *Oldfield v. Gypsy Oil Co.*, 123 Okla. 293, 253 Pac. 298 (1926) (offeror may have changed position by entering a new lease, but evidently this was an immaterial change since the new lease was apparently conditioned on the termination of the old one); *Washburn v. Fletcher*, 42 Wis. 152 (1877); *Duncan v. Topham*, 8 C.B. 225, 137 Eng. Rep. 495 (C.P. 1849) (both parties relied; court accepted the dispatch rule, but reversed a verdict for the plaintiff and granted a new trial on the ground of a variance between the declaration and the proof); *Naudé v. Malcolm*, 19 Cape of Good Hope 482 (1902) (no indication of reliance by offeror, but the offeree may have relied); *cf. Kays v. Little*, 103 Kan. 461, 175 Pac. 149 (1918) (heavy reliance by offeree). *But cf. Peck v. Freeze*, 101 Mich. 321, 59 N.W. 600 (1894). *Peck* is arguably such a case, because the court approved a dispatch instruction to the jury where offeree probably did not rely and offeror did. But in result the case does not stand for this because the jury found in favor of the countermanding

cases applying the dispatch rule there was very heavy reliance by the offeree.⁶⁵ The facts of these cases stand out in considerable contrast to those cases applying the receipt rule where the issue upon which the court based its decision could have gone either way, *e.g.*, where it is argued that the offeror required receipt of the acceptance, yet it is not possible to tell whether the offeror had actually insisted upon receipt, or indeed if he even had the problem in mind.⁶⁶ In the latter type of case the use of technical rules, such as the unauthorized means of transmission rule, obscures what the court actually did in the case. The obscurity can, however, be removed by looking at the facts and the results. Limiting our view to these "toss-up" cases, an interesting, although not surprising, pattern evolves. In most of these cases there appears to have been little or no reliance on the "contract" by the offeree before he learned of the loss or delay.⁶⁷ In several there

offeror. It might also be argued that *Adams v. Lindsell*, 1 B. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818) is such a case, but it is not. The delay there was in the offer, not the acceptance, and was caused by an error made by the offeror. In *Dunlop v. Higgins*, 1 H. L. Cas. 381, 9 Eng. Rep. 805 (1848), the dispatch rule was applied in spite of heavy reliance by the offeror, but the delay was a very short one, and there may have been reliance by the offeree in not purchasing elsewhere in a rising market.

⁶⁵ See the short abstracts of the cases cited in note 64 *supra*. In addition are those cases involving insurance policies which authorize the mailing of premiums. It is widely held that the policy is duly continued or renewed by the placing of the premium in the mail even though it is delayed or lost. See generally 14 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 7990 (1944). A recent case which probably carries this doctrine farther than necessary to protect any reasonable reliance or expectancies of the insured is *Colonial Life & Acc. Ins. Co. v. Wilson*, 246 F.2d 922 (5th Cir. 1957), *cert. denied*, 355 U.S. 927 (1958). Although there was no way the insured could know immediately that the premium check had gone astray, it would seem reasonable to hold him to such knowledge within a few months, since he should have noticed that his check had never been cleared back to his bank account. The court allows recovery even though the insured died about eleven months after he allegedly sent the premium.

⁶⁶ In some cases applying the receipt rule, the reasons given for the result are clearly founded on the facts, *e.g.*, the offeror had made it plain that he required actual receipt of the acceptance, or the purported acceptance clearly was only a counteroffer. Such cases are not included among those cited in notes 67-68 *infra*.

⁶⁷ *Keeler v. Dunbar*, 37 F.2d 868 (5th Cir. 1930) (oil lease delay rental clause); *E. Frederics, Inc. v. Felton Beauty Supply Co.*, 58 Ga. App. 320, 198 S.E. 324 (1938); *Haas v. Myers*, 111 Ill. 421 (1884) (offeree's only reliance, consisting of a trip from Chicago to Billings, Montana, took place after he should have known that his acceptance had gone astray); *Lewis v. Browning*, 130 Mass. 173 (1880); *Elkhorn-Hazard Coal Co. v. Kentucky River Coal Corp.*, 20 F.2d 67 (6th Cir. 1927) (offeree relied by immediately subleasing to parties undesirable to the offeror but this reliance was unreasonable; the alleged offer was sketchy, with much essential detail left out; thus, either it was not an offer at all or it had to be fleshed out by standard conditions, and the standard conditions tendered by the offeree in evidence included a prohibition of subleasing); *Starr v. Holck*, 318 Mich. 452, 28 N.W.2d 289 (1947); *Kibler v. Caplis*, 140 Mich. 28, 103 N.W. 531 (1905); *Egger v. Nesbit*, 122 Mo. 667, 27 S.W. 385 (1894); *Appling v. Morrison*, 227 S.W. 708 (Tex. Civ. App. 1921) (oil lease delay rental); *British & Am. Tel. Co. v. Colson*, L.R. 6 Ex. 108 (1871), *overruled*; *Household & Carriage Acc. Ins. Co. v. Grant*, 4 Ex. D. 216 (C.A. 1879); *In re Constantinople & Alexandria Hotel Co. (Reidpath's Case)* L.R. 11 Eq. 86 (1870); *Charlebois v. Baril*, [1928] Can. Sup. Ct. 88 (1927), [1927] 3 D.L.R. 762; *Public Trustee v. Bottoms (Knauff Estate)*, 33 West. Weekly R. (n.s.) 427 (Alberta 1960); *Smith v. Osberg, Ltd. v. Hollenbeck*, 3 West. Weekly R. (n.s.) 704 (B.C. 1938).

was also heavy reliance by the offeror on the nonexistence of the "contract."⁶⁸ Thus, the actual results of numerous cases involving losses and delays in transmitting the acceptance give substantial support for the rule of law suggested above.

Before leaving the loss and delay cases, one further element should be considered. Every bona fide delay or nonreceipt case is a mistake case. Each of the parties has made a different unilateral mistake concerning the same subject. The offeror had an erroneous belief that the offeree did not intend to contract. The offeree had an erroneous belief that the offeror in due time knew of his intention to contract. The presence of this mistake element has been obscured over the years by judicial and academic concentrations on establishing such things as fictional agencies or nonexistent authorizations. Such mechanistic

⁶⁸ *Averill v. Hedge*, 12 Conn. 424 (1838) (offeror-seller, faced with an advancing market, and not having heard from offeree, sold the subject matter of the "contract"; court accepted the dispatch rule, but held that where an offer arrived late on March 18, an acceptance written March 19 and postmarked on March 20 was too late); *E. Frederics, Inc. v. Felton Beauty Supply Co.*, *supra* note 67 (offeree claimed the acceptance was mailed on March 1; offeror claimed that it was never received nor had it been mailed; on March 2 offeree sent a letter which rejected the offer and on March 4 a letter indicating that some things remained to be settled; offeree testified that the rejection of March 2 had been dictated before his acceptance on March 1, and had been transcribed and sent by error, and that the letter of March 4 referred to modifications in the agreement; after receiving the letters of March 2 and 4, the offeror contracted to give the exclusive franchise in question to another party; court held offeror to be entitled to an instruction that if the offeror did not receive the alleged acceptance of March 1, the letters of March 2 and 4 estopped offeree from claiming under the contract); *Haas v. Myers*, *supra* note 67 (offeror of a partnership in purchasing a herd of cattle, after not hearing, finally raised all the money himself and purchased them on his own account); *Egger v. Nesbit*, *supra* note 67 (extent of offeror's reliance is not clear, but he wrote that he had "made other arrangements"); *Collins v. Hoover*, 205 Mo. App. 93, 218 S.W. 940 (1920) (offeror had sold the property in question); *L. & M. Holding Co. v. Karp*, 194 N.Y. Supp. 476 (Sup. Ct. 1922) (offer to enter new lease at expiration of old; when lessee did not receive the new lease back he vacated the premises believing he was free to do so).

Only one case was found in which the issue was raised and the receipt rule applied, even though the offeror had not relied and the offeree had. *Bluthenthal v. Atkinson*, 93 Ark. 252, 124 S.W. 510 (1910). In this case there was an option to renew a lease, notice to be given 60 days before expiration; there was some reliance by offeree in staying on past the term of the lease, but evidently the offeror did not initially insist on payment of rent for the extra time; the offeree received the benefit of an instruction to the jury about presumption of receipt, etc., and since jury found against him it may be that it concluded that he had never sent an acceptance. The case involved an offer which was itself part of a contract. The courts are more prone to apply the receipt rule here than where there is only a bare offer, see text accompanying notes 77-78 *infra*. In *Central Guar. Co. v. Fourth & Cent. Trust Co.*, 244 Ill. App. 61 (1927), the court applied a receipt rule, in spite of some reliance by the offeree. But the major portion of offeree's reliance had already been reimbursed by the offeror, and even if a bilateral contract had been formed, by its terms the offeror had a right to cancel the contract.

In the oil lease delay rental cases which held the risk of delay or loss to be on the offeree, see note 67 *supra*, it is arguable that because of the highly speculative nature of the oil and gas business, any period of delay causes reliance by the offeror. See opinion in *Canadian Fina Oil Ltd. v. Paschke*, [1957] 21 West. Weekly R. (n.s.) 260 (Alberta 1957), quoted in note 77 *infra*. If this were correct, such cases could properly be cited here, but where the offeror is obviously inactive during the period of delay such reasoning seems incorrect.

approaches have prevented the flexibility achieved by a patent application of mistake doctrines. Of course, some of the factors taken into account in mistake cases, *e.g.*, change of position of the parties, seem *sub silentio* to have worked their way into the results, but often only under cover of some of the most dogmatically technical doctrines in contract law. A frank recognition that a loss or delay causes a species of mistake⁶⁹ would permit a more rational handling of the cases. Such recognition is likely to become even more important in the future because of the Uniform Commercial Code, which greatly restricts two techniques much favored by the courts for giving relief from the stringencies of the dispatch rule—calling the acceptance a counteroffer⁷⁰ and finding that an unauthorized means of transmission was used.⁷¹

This is not the place to launch into a general discussion of mistake in contract law.⁷² However, the point made before in connection with revocation of offers in mistake cases⁷³ should be repeated here. If the court is convinced that the offeror relied detrimentally before learning of the acceptance, one of the objections to relief for mistake is absent, for it will usually follow that the offeror is not simply seeking escape from the contract for some reason unconnected with the mistake. However, if the mistake doctrine is utilized, astuteness will be required to avoid giving relief when the offeror really did receive the acceptance or when he did not change his position and is simply using the delay or nonreceipt as an excuse.⁷⁴

⁶⁹ The only authority found recognizing delay or loss in transmission as a species of mistake has been in the law of oil and gas leases. *E.g.*, *Gloyd v. Midwest Ref. Co.*, 62 F.2d 483 (10th Cir. 1933); 2 SUMMERS, OIL AND GAS § 344, at 434-40 (1959); 3 WILLIAMS, OIL AND GAS LAW § 606.6, at 185 (1962).

⁷⁰ See UNIFORM COMMERCIAL CODE § 2-207.

⁷¹ UNIFORM COMMERCIAL CODE § 2-206(1) provides:

Unless otherwise unambiguously indicated by the language or circumstances

- (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances

⁷² See generally 3 CORBIN, CONTRACTS §§ 597-621 (1960); PALMER, MISTAKE AND UNJUST ENRICHMENT (1962).

⁷³ See text accompanying notes 20-26 *supra*.

⁷⁴ If the mistake aspect of these cases is recognized, use of the dispatch rule as a starting point will be more important than ever. If the courts hold that a contract was formed on dispatch, mistake doctrines will give them much flexibility in adjusting the respective interests of the parties. But if the receipt rule is adopted, the courts will run into a conceptualistic barrier; no contract was formed, and the losses will stay where they started. Nothing eternal prevents the courts from adjusting reliance and expectation losses without benefit of a "contract," but anyone familiar with Anglo-American contract law would not realistically expect such adjustment in any case in which the losses cannot be squeezed into a notion of benefit to the other party and thus brought under the restitutionary mantle.

V. OCCURRENCE OF THE DISPATCH WITHIN THE TIME LIMIT
REQUIRED BY THE OFFER, WHERE THE ACCEPTANCE IS RECEIVED
IN THE ORDINARY COURSE OF TRANSMISSION

What happens when an acceptance is dispatched before the time limit specified in the offer but arrives, even though not delayed, after that time?⁷⁵ The functional problems here are related to those in the loss and delay cases but are not exactly the same. Once again the offeree may rely on the contract, and the offeror may rely on its non-existence. But the reliance of the offeror is much less likely than in most delay or loss cases, since there is usually only a very short period between the time when he may think he should have heard and when he does hear. In fact, I have found no case in which the offeror evidently changed his position during that period. Thus, the dispatch rule seldom is oppressive to the offeror in such cases. In spite of this the cases are about evenly divided between those applying the dispatch rule⁷⁶ and those applying the receipt rule.⁷⁷ It is difficult to discern any pattern in these cases. It is, however, sometimes said that where the offer is itself part of a contract, *i.e.*, in options, the

⁷⁵ The problems of this section occur only when the offer specifies a time in which acceptance must be made. If no time is specified, then the acceptance must be made in a reasonable time. If the proper means of transmission is used, if the acceptance is dispatched in a reasonable time and is received in the ordinary course of transmission, obviously it is received in a reasonable time. Problems can arise here, *e.g.*, whether a reasonable time for dispatch is the same for a telegram as for a letter if each is a proper means of transmission, see 1 WILLISTON, CONTRACTS § 87, at 279 (3d ed. 1957), but they do not relate directly to this Article.

⁷⁶ The cases in this note and note 77 *infra* were all cases in which either rule might arguably have been applicable. National Ref. Co. v. Wagner, 169 F.2d 43 (10th Cir. 1948) (oil lease delay rental; dispatch rule assumed by the court to be proper rule); North Texas Oil Co. v. Fuller, Reaser & Co., 276 Fed. 708 (5th Cir. 1921) (alternative holding); Morello v. Growers Grape Prods. Ass'n, 82 Cal. App. 2d 365, 186 P.2d 463 (Dist. Ct. App. 1947) (option to purchase in a cooperative contract; contract provided for "delivery" of the acceptance); Gorman v. General Outdoor Advertising Co., 320 Ill. App. 339, 50 N.E.2d 854 (1943) (renewal option in a lease); Kantowitz v. Dairymen's League Co-op. Ass'n, 272 App. Div. 470, 71 N.Y.S.2d 821 (1947), *aff'd mem.*, 297 N.Y. 991, 80 N.E.2d 366 (1948) (right to cancel a contract during certain period each year); Reed v. St. John, 2 Daly (N.Y.) 213 (C.P. 1867) (renewal option in a lease); Baxter Laundries, Inc. v. Lucas, 43 Ohio App. 518, 183 N.E. 538 (1932) (alternative holding) (renewal option in lease); Falconer v. Mazess, 403 Pa. 165, 168 A.2d 558 (1961); Bruner v. Moore, [1904] 1 Ch. 305 (1903) (alternative holding); *cf.* Holmes v. Myles, 141 Ala. 401, 37 So. 588 (1904) (option to purchase real estate "for 20 days"; held that letter left at optionor's residence on last day was timely, even though optionee's agents knew optionor was out of town); State v. Agostini, 139 Cal. App. 2d 909, 294 P.2d 769 (Dist. Ct. App. 1956) (option to purchase in a lease; acceptance effective on dispatch for purpose of determining whether state became bound by the contract during the fiscal year authorized by statute); Campbell v. Beard, 57 W. Va. 501, 50 S.E. 747 (1905) (acceptance effective on dispatch for purpose of determining whether the authority of the agent of the offeror had expired).

⁷⁷ Scott-Burr Stores Corp. v. Wilcox, 194 F.2d 989 (5th Cir. 1952) (option to extend a lease); Wheeler v. McStay, 160 Iowa 745, 141 N.W. 404 (1913) (parties entered a contract which was to become binding in 30 days unless one of the parties sooner notified the other); Gasaway v. Teichgraber, 107 Kan. 340, 191 Pac. 282 (1920)

receipt rule is applicable.⁷⁸ The merit, if any, in the distinction lies in two facts. The duration of the power of acceptance in options

(oil lease delay rental); *Brown Method Co. v. Ginsberg*, 153 Md. 414, 138 Atl. 402 (1927) (where a patent license was to run from year to year, notice of cancellation must be received, not just sent, before the beginning of the year); *Cities Service Oil Co. v. National Shawmut Bank*, 342 Mass. 108, 172 N.E.2d 104 (1961) (option in lease to purchase; court explicitly leaves open that there might be relief for forfeiture); *Hoban v. Hudson*, 129 Minn. 335, 152 N.W. 723 (1915) (sale of stock, giving purchaser a right to recover the purchase price if he gave written notice of his election to do so "on or before April 8, 1912; and time is the essence"); *McGrory Stores Corp. v. Goldberg*, 95 N.J. Eq. 152, 122 Atl. 113 (Ch. 1923) (renewal option in a lease); *Sasmor v. V. Vivaudou, Inc.*, 200 Misc. 1020, 103 N.Y.S.2d 640 (Sup. Ct. 1951) (dictum) (employment contract automatically renewable unless notice given by either party by a certain date); *Public Trustee v. Bottoms (Knauft Estate)*, 33 West. Weekly R. 427 (n.s.) (Alberta 1960) (other grounds given for result); *Canadian Fina Oil Ltd. v. Paschke*, 21 West. Weekly R. (n.s.) 260 (Alberta 1953); *cf. Haldane v. United States*, 69 Fed. 819 (8th Cir. 1895) (the court holds that where an offer provides for "notice," there must be receipt; holding is not strong because there was clearly a rejection of the offer which terminated it before the alleged acceptance); *James v. Hutchinson*, 211 S.W.2d 507 (Mo. Ct. App. 1948) (renewal option in lease; held that offeror was bound by receipt of the acceptance even though she did not read it); *Spratt v. Paramount Pictures, Inc.*, 178 Misc. 682, 35 N.Y.S.2d 815 (Sup. Ct. 1942) (where stock is convertible by the surrender of shares on or before a certain date, mailing the shares on that date is not an exercise of the option to convert).

The question here should not be confused with cases where the problem is to determine when a notice of cancellation starts to run and when the contract ended. See, e.g., *Oldfield v. Chevrolet Motor Co.*, 198 Iowa 20, 199 N.W. 161 (1924); *Sonotone Corp. v. Ladd*, 17 Wis. 2d 580, 117 N.W.2d 591 (1962).

One type of oil and gas lease commonly provides that the lease shall terminate if no well is commenced by a certain date unless the lessee shall pay a delay rental by that date. Questions sometimes arise whether the payment must be received by that date, or whether dispatch is enough. Cases of this nature involving delay or loss in transmission are cited *supra* notes 65-68. A good statement of the basis for the receipt rule in such cases appears in *Canadian Fina Oil Ltd. v. Paschke*, *supra* at 264-65:

Having regard to the nature of the oil business and the fact that time is of the essence within it, it seems to me that the privilege of mailing payments, or what is more impressive, making tender by cheque, must mean that the cheque arrive within the stipulated time. I cannot believe that the grantor by these words intended to place himself in the position where each year for ten years, with exploration and discovery at one stage or another of progress all about him, he should have to wait perhaps for days to decide whether the grantee had elected to abandon or pay. That would be the consequence if mail alone constituted payment. Conceivably a letter could be mailed containing a check to be borne by some primitive means of transportation from remotest Africa or the interior of China, while the grantor waited unaware of his rights and unable to protect them in the swiftly changing circumstances which might destroy or enhance them overnight.

⁷⁸ 1A CORBIN, CONTRACTS § 264, at 521 (1963):

If in an option contract the duty of the promisor is conditional on "notice within 30 days," does this mean notice received or notice properly mailed? It is believed that, in the absence of an expression of contrary intention, it should be held that the notice must be received. As above explained, the notice is in one aspect a notice of acceptance of an offer; but in another respect it is a condition of the promisor's already existing contractual duty. It is more likely to be regarded in this latter aspect by the parties themselves. The rule that an acceptance by post is operative on mailing was itself subjected to severe criticism; and even though it may now be regarded as settled, it should not be extended to notice of acceptance in already binding option contracts.

The foregoing statement is not limited to the normal transmission cases being considered here.

is almost always a substantial length of time, whereas in ordinary commercial offers it is likely to be relatively short. Since the offeree has plenty of time in which to exercise the option, there is little reason why he should not exercise it soon enough so that the offeror receives it before the end of the period. Also, where the offer is irrevocable, one of the prime reasons for the dispatch rule is lacking, namely the protection of the offeree against the consequences of revocation.

These factors perhaps lend support to Professor Corbin's belief that the parties are likely in such cases to think of receipt as a condition to the promisor's already existing duty. On the other hand, the reasons for treating options differently from bare offers are not exactly overwhelming, and the distinction perhaps adds a rather useless complication to contract law.⁷⁹ In any event, in the hard cases, *i.e.*, where there will be a forfeiture if no contract is formed, there is a tendency to extend the duration of the power of acceptance beyond the option period, providing the offeror had not materially changed his position.⁸⁰

One pattern is, however, discernible in these cases. Where one of the parties has a right within a certain period either to rescind the contract completely or to terminate it, almost all the decisions have been that notice of the exercise of that right must be received within the specified period.⁸¹ Theoretically, more pressing reasons for the receipt rule are presented here than in options to start or renew a contract. When he does not hear, the offeror thinks the contract will not be terminated and is likely to rely on that belief. In the new contract or renewal cases, when he does not hear, he thinks that there is no contract. But he may be less likely to rely on that belief since

⁷⁹ This complication may get worse. How are "bare offers" which are irrevocable pursuant to statutory provisions to be treated? The courts already reflect the heads-or-tails choice in option cases by splitting quite evenly in their decisions. *Gorman, Reed, and Baxter*, *supra* note 76, were option cases in which the dispatch rule was applied; *Scott-Burr, Cities Service*, and *McGrory Stores*, *supra* note 77, were option cases in which the receipt rule was applied.

⁸⁰ 1 WILLISTON, CONTRACTS §76, at 249 (3d ed. 1957); 1 CORBIN, CONTRACTS §35, at 146-47 (1963); 1A *id.* §273, at 593-95. In addition to the cases cited by Professors Williston and Corbin, see *American Houses, Inc. v. Schneider*, 211 F.2d 881 (3d Cir. 1954); *Jones v. Gianferante*, 305 N.Y. 135, 111 N.E.2d 419 (1953). In *Cities Service Oil Co. v. National Shawmut Bank*, 342 Mass. 108, 172 N.E.2d 104 (1961), the court explicitly left open the possibility of equitable relief against forfeiture where the acceptance was dispatched before the end of the period and received afterwards. A similar policy was effectuated in *Meierdierck v. Miller*, 394 Pa. 484, 147 A.2d 406 (1959), where the court held that mailing a notice of an accident met the requirements of an insurance policy that notice of the accident was a condition precedent to the company's liability for the accident.

⁸¹ *Scott-Burr Stores Corp. v. Wilcox*, 194 F.2d 989 (5th Cir. 1952); *Wheeler v. McStay*, 160 Iowa 745, 141 N.W. 404 (1913); *Brown Method Co. v. Ginsberg*, 153 Md. 414, 138 Atl. 402 (1927); *Hoban v. Hudson*, 129 Minn. 335, 152 N.W. 723 (1915); *Sasmor v. V. Vivaudou, Inc.*, 200 Misc. 1020, 103 N.Y.S.2d 640 (Sup. Ct. 1951) (dictum). *Contra*, *Krantowitz v. Dairymen's League Co-Op. Ass'n*, 272 App. Div. 470, 71 N.Y.S.2d 821 (1947), *aff'd mem.*, 297 N.Y. 991, 80 N.E.2d 366 (1948).

it may call for no action on his part. The trouble with this reasoning is that the time in question is so short, often a few hours, that there is in fact almost never any reliance in either type of case. Furthermore, if the reason for the result is that the offeror *may* rely, it would make more sense to base the decision on the likelihood of reliance in the particular case, rather than on a nebulous idea as to the likelihood of reliance in a class of cases.

In summarizing this section it is not possible to draw much enlightenment either from the results of the cases, which are in conflict, or from the judicial rationalizations, which also are in conflict. In such a situation it is perhaps not amiss to suggest a desirable doctrine which describes the results in at least some of the cases:

Where an acceptance, dispatched before the end of the period provided in the offer by a means reasonable under all the circumstances, is received in the ordinary course of transmission after the end of that period, a contract is formed if the offeror has not materially changed his position in reasonable reliance on a belief that no contract has been formed, or if a forfeiture substantially out of proportion to any reliance by the offeror would result from the absence of a contract.

VI. TIME AT WHICH THE PARTIES ACQUIRE RIGHTS UNDER A CONTRACT WHERE THE ACCEPTANCE IS DULY RECEIVED

This question has arisen often in insurance cases.⁸² For example,

A mails an application for accident insurance to an insurance company together with the premium for one year. The company mails the policy to him. Thereafter *A* loses a leg in an accident. Then he receives the policy. He demands the \$5,000 indemnity provided for loss of a leg; the company refuses to pay.

If the court applies traditional notions of contract formation, it is undebatable, except in life insurance cases, that a contract is formed. Even in life insurance cases it is arguable that a contract is formed although the receipt rule is applicable and the insured dies before re-

⁸² In addition see the situation mentioned in note 1 *supra*. Other cases in which time was important are *F. A. R. Liquidating Corp. v. McGranery*, 110 F. Supp. 580 (D. Del. 1953), *rev'd on other grounds*, 209 F.2d 375 (3d Cir. 1954), *upholding judgment on remand*, 140 F. Supp. 535 (D. Del. 1956) (dispatch rule used to determine whether an assignment was made before executive order requiring government approval of certain transactions with aliens); *Tooth v. Fleming*, 2 Legge 1152 (New South Wales 1859) (cattle ranch was sold together with the stock thereon at fifty shillings a head; held that calves born after the dispatch of the acceptance were not to be counted in determining the purchase price); *Meggesson v. Groves*, [1917] 1 Ch. 158 (1916) (tenant of a farm prohibited from selling certain types of produce during the last year of a lease; court held that the time a sale was made was the time when the acceptance was handed to the agent who had delivered the offer).

cept.⁸³ But the question now posed concerns the time at which the contract was formed: Had the risk shifted to the insurer when the event insured against occurred?

The functional questions here presented are not the same as those raised when an acceptance of an offer to sell something is lost or delayed in the mails, when an offeror tries to revoke his offer, or when an offeree succeeds in retrieving his acceptance from the mail. In insurance cases the duties of the insurer do not call for substantial reliance as soon as the contract is formed. Thus, when the insurer is the offeree,⁸⁴ it is an offeree which usually neither needs nor wants the dispatch rule,⁸⁵ and the reasons supporting the rule in other situations⁸⁶ do not apply. Yet, there is authority applying the dispatch rule in these cases,⁸⁷ thus suggesting that some interest of the insured requires early protection even though the insured is the offeror. This interest seems to be twofold. First, whatever the policy application may say, the offeror may, in fact, rely on coverage from the time he submits his application, dependent, of course, on a later finding that at that time the risk was insurable. Second, in a great many of these cases the offeror pays some premium with the application. The insurer thus has the benefit of the use of the premium in the interim period. Moreover, in many cases the premium period is calculated from a date earlier than the receipt of the policy by the insured. The insurer thus will receive a premium for that period.

The interests of the insured in early formation of the insurance contract will be even greater if he is the offeree. Not only does he have the interests mentioned in the preceding paragraph, but he also may rely on the acceptance from the moment of dispatch by refraining from securing coverage elsewhere. These multiple interests have been protected in a number of cases.⁸⁸

⁸³ See 1 CORBIN, CONTRACTS § 54 (1963).

⁸⁴ More often than not in the formation of the insurance contract the insurer will be the "offeree" because of the terms of insurance forms, but not always. *Compare* Phenix Ins. Co. v. Schultz, 80 Fed. 337 (4th Cir. 1897), *with* Pauley v. Business Men's Assur. Co. of America, 217 Mo. App. 302, 261 S.W. 340 (1924).

⁸⁵ Except in the relatively rare case of a suit by the insurer for a premium.

⁸⁶ See text accompanying notes 11-26 *supra* (revocation of offer); 27-45 *supra* (withdrawal of acceptance); 46-74 *supra* (delay or loss in transmission).

⁸⁷ See Kentucky Mut. Fire Ins. Co. v. Jenks, 5 Ind. 96 (1854); Hartwig v. Aetna Life Ins. Co., 164 Wis. 20, 158 N.W. 280 (1916); New v. Germania Fire Ins. Co., 171 Ind. 33, 85 N.E. 703 (1908) (dictum).

⁸⁸ See *Taylor v. Merchants' Fire Ins. Co.*, 50 U.S. (9 How.) 390 (1850); *Pennsylvania Lumberman's Mut. Fire Ins. Co. v. Meyer*, 126 Fed. 352 (2d Cir. 1903); *Schultz v. Phenix Ins. Co. of Brooklyn*, 77 Fed. 375 (C.C.W.D. Va. 1896), *rev'd*, 80 Fed. 337 (4th Cir. 1897); *Cottingham v. National Mut. Church Ins. Co.*, 290 Ill. 26, 124 N.E. 822 (1919); *Nertney v. Nat'l Fire Ins. Co.*, 199 Iowa 1358, 203 N.W. 826 (1925).

In contrast to the cases dealing with initiation of insurance policies are those dealing with provisions for cancellation by the insurer. Here, where the reliance of the insured on the continuance of the policy is likely to be great, the insurance companies have had an uphill fight in establishing the dispatch rule, in spite of explicit language in their policies.⁸⁹

Nothing would be served by considering in isolation the many insurance cases which have involved disputes over the dispatch rule. The issues are too intertwined with agency problems, varying provisions of "binding receipts," duties of the insurance companies to act promptly on applications, and other issues,⁹⁰ to give a meaningful treatment to this one small facet. Suffice it to say that, because insurance cases involve an inversion of interests, coupled perhaps with loss distribution notions, a proper analysis of them differs greatly from the analysis of the other "time of acceptance" cases. Nevertheless, these interests properly weighed may favor the dispatch rule.

VII. CONCLUSION

As the title of this Article suggests, it is not possible to come up with a simple working rule for the cases considered, but certain conclusions can be drawn:

1. Some problems classically considered as "time of acceptance" questions are virtually unrelated to those questions, *e.g.*, conflict of laws problems.
2. A desirable balancing of the respective interests of the parties cannot be achieved by a blanket application of the dispatch rule, nor by the use of *stare decisis* to jump from one type of "time of acceptance" case to another.
3. In a great many situations the dispatch rule is a highly functional one giving the restitutionary, reliance, and expectation

⁸⁹ See generally 8 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 5015 (1962); 3 RICHARDS, *INSURANCE* § 531 (5th ed. 1952). In addition to the cases cited by Appleman and Richards, compare *Lumberman's Mut. Cas. Co. v. Stone*, [1955] Can. Sup. Ct. 627, [1955] 4 D.L.R. 167, with *London & Lancashire Fire Ins. Co. v. Veltre*, 56 Can. Sup. Ct. 588, 42 D.L.R. 79 (1918). The problem presented here is not to be confused with cancellation by the insured in which the insured (offeree) is striving for the receipt rule, sometimes successfully, *e.g.*, *Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N.Y. 608, 28 N.E. 653 (1891), and sometimes not, *e.g.*, *Nobile v. Travelers Indem. Co.*, 4 N.Y.2d 536, 152 N.E.2d 33 (1958). In these cases the insurer (offeror) relies little or not at all while the cancellation is in transmission, and there is little reason, other than extreme loss distribution theories, justifying relieving the insured from the bed of regrets he has made for himself.

⁹⁰ See generally PATTERSON & YOUNG, *CASES ON INSURANCE* ch. 12 (4th ed. 1961); Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198 (1919). On the last point see Note, *Insurance—The Effect of the Insurer's Delay in Acting on an Application for Insurance*, 36 TEMP. L.Q. 84 (1962). ..

interests of the parties the protection they should have; thus, its wholesale overruling would be destructive of a satisfactory system of contract formation.

4. A frank recognition by the courts of the diverse functional problems facing them in so-called "time of acceptance" cases would serve in the long run to simplify the law of contracts. This assertion by its nature is not subject to documentation. But one emerges from a long immersion in the muddied waters of the law as it is now rationalized with a distinct belief that the functional approach would bring more clarity and certainty to the law than it now enjoys with the fictional obscurantism dominating "time of acceptance" doctrines.⁹¹

⁹¹ The RESTATEMENT (SECOND), CONTRACTS §§ 1-74 (Tent. Draft No. 1, 1964) became available for general usage only after this Article was in galley proof. It has not, therefore, been feasible to consider its details here. A few general remarks, based on a necessarily hasty perusal, are, however, appropriate.

I note with regret that the blackletter portion of § 64, Time When Acceptance Takes Effect, is still worded as a unitary rule, except that it does distinguish between acceptance under an option contract and other acceptances. The extensive comments to the rule do, however, recognize the variety of problems to which the rule applies. The contrast between the blackletter rule and the comments is quite startling. For example, the rule says: "an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror" Comment *a* accepts the notion of the rule wholeheartedly where the offeror attempts to revoke. But Comment *b* suggests that the courts lean over backward to avoid the rule where there is a loss or delay in transmission. "The convenience of the rule is less clear in such cases than in cases of attempted revocation of the offer . . . and the language of the offer is often properly interpreted as making the offeror's duty of performance conditional upon receipt of the acceptance." I emerged from a reading of § 64 and the comments with the distinct impression that the comments constitute a basis for some workable principles, but that the blackletter rule continues to invite the application of obscurantist fictions. Maybe the American Law Institute should consider publishing only the comments!