Overview | (1879) LR (1879) LR 4 Ex D 216, | 44 JP 152, | 48 LJQB 577, | 27 WR 858, | [1874-80] All ER Rep 919, | 41 LT 298

THE HOUSEHOLD FIRE AND CARRIAGE ACCIDENT INSURANCE COMPANY (LIMITED) v. GRANT. (1879) 4 Ex.D. 216

[COURT OF APPEAL.]

THESIGER, BAGGALLAY and BRAMWELL, L.JJ.

1879 July 1.

Company — Allotment of Shares — Letter of Allotment posted, but not received — Post Office, Agent of Parties contracting by Letter.

The defendant applied for shares in the plaintiffs' company. The company allotted the shares to the defendant, and duly addressed to him and posted a letter containing the notice of allotment, but the letter never was received by him:-

Held, by Baggallay and Thesiger, L.JJ., Bramwell, L.J., dissenting, that the defendant was a shareholder.

British and American Telegraph Co. v. Colson (L. R. 6 Ex. 108) overruled.

ACTION to recover 94*l.* 15*s.* being the balance due upon 100 shares allotted to the defendant on the 25th of October, 1874, in pursuance of an application from the defendant for such shares dated the 30th of September, 1874.

At the trial before Lopes, J., during the Middlesex Sittings, 1878, the following facts were proved. In 1874 one Kendrick was acting in Glamorganshire as the agent of the company for the placing of their shares, and on the 30th of September the defendant handed to Kendrick an application in writing for

shares in the plaintiffs' company, which stated that the defendant had paid to the bankers of the company 5*l.*, being a deposit of 1*s.* per share, and requesting an allotment of 100 shares, and agreeing to pay the further sum of 19*s.* per share within twelve months of the date of the allotment. Kendrick duly forwarded this application to the plaintiffs in London, and the secretary of the company on the 20th of October, 1874, made out the letter of allotment in favour of the defendant, which was posted addressed to the defendant at his residence 16, Herbert Street, Swansea, Glamorganshire; his name was then entered on the register of shareholders. This letter of allotment never reached the defendant. The defendant never paid the 5*l.* mentioned in his application, but the plaintiffs' company being indebted to the defendant in the sum of 5*l.* for commission, that sum was duly credited to his account in their books. In July, 1875, a dividend

at the rate of 2½ per cent. was declared on the shares, and in February, 1876, a further dividend at the same rate; these dividends, amounting altogether to the sum of 5*s.*, was also credited to the defendant's account in the books of the plaintiffs' company. Afterwards the company went into liquidation, and on the 7th of December, 1877, the official liquidator applied for the sum sued for from the defendant; the defendant declined to pay on the ground that he was not a shareholder.

On these facts the learned judge left two questions to the jury. 1. Was the letter of allotment of the 20th of October in fact posted? 2. Was the letter of allotment received by the defendant? The jury found the first question in the affirmative and the last in the negative.

The learned judge reserved the case for further consideration, and after argument directed judgment to be entered for the plaintiffs on the authority of *Dunlop v. Higgins*. [(1)]

The defendant appealed.

May 22. **Finlay** and **Dillwyn**, for the defendant, contended that the defendant was not a shareholder, for it was necessary that the allotment of shares should not only be made but also communicated to the defendant; that a letter posted but not received

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[(1)] 1 H. L. C. 381.

was not a communication to the defendant of the allotment, and that there was therefore no contract between the parties.

Wilberforce, and **G. Arbuthnot** (**W. G. Harrison, Q.C.**, with them), for the plaintiffs, contended that the contract was complete by acceptance when the letter was posted, and that the plaintiffs were not answerable for casualties at the post office preventing the arrival of the letter.

In addition to the authorities mentioned in the judgment, the following cases were cited during the argument: *Reidpath's Case* [(1)] ; *Townsend's Case* [(2)] ; *Wall's Case* [(3)] ; *Gunn's Case* [(4)] ; *Dunmore v. Alexander* [(5)] ; *Pellatt's Case* [(6)] ; *Ex parte Cote* [(7)] ; *Taylor v. Jones* [(8)] ; Pollock on the Law of Contracts, p. 13.

Cur. adv. vult.

July 1. The following judgments were delivered:-

THESIGER, L.J. In this case the defendant made an application for shares in the plaintiffs' company under circumstances from which we must imply that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post. The

company did allot him the shares, and duly addressed to him and posted a letter containing the notice of allotment, but upon the finding of the jury it must be taken that the letter never reached its destination. In this state of circumstances Lopes, J., has decided that the defendant is liable as a shareholder. He based his decision mainly upon the ground that the point for his consideration was covered by authority binding upon him, and I am of opinion that he did so rightly, and that it is covered by authority equally binding upon this Court.

The leading case upon the subject is *Dunlop v. Higgins*. [9] It is true that Lord Cottenham might have decided that case without deciding the point raised in this. But it appears to me equally true that he did not do so, and that he preferred to rest and did

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[1] Law Rep. 11 Eq. 86.

[2] Law Rep. 13 Eq. 148.

[3] Law Rep. 15 Eq. 18.

[4] Law Rep. 3 Ch. 40.

[5] 9 Shaw & Dunlop, 190.

[6] Law Rep. 2 Ch. 527.

[7] Law Rep. 9 Ch. 27.

[8] 1 C. P. D. 87.

[9] 1 H. L. C. 381.

(1879) 4 Ex.D. 216 at 219

rest his judgment as to one of the matters of exception before him upon a principle which embraces and governs the present case. If so the Court is as much bound to apply that principle, constituting as it did a ratio decidendi, as it is to follow the exact decision itself. The exception was that the Lord Justice General directed the jury in point of law that, if the pursuers posted their acceptance of the offer in due time, according to the usage of trade they were not responsible for any casualties in the post office establishment. This direction was wide enough in its terms to include the case of the acceptance never being delivered at all; and Lord Cottenham, in expressing his opinion that it was not open to objection, did so after putting the case of a letter containing a notice of dishonour posted by the holder of a bill of exchange in proper time, in which case he said[1] , "Whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post office he is not responsible." In short, Lord Cottenham appears to me to have held that, as a rule, a contract formed by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put an end to in the event of the letter never being delivered. My view of the effect of *Dunlop v. Higgins* [2] is that taken by James, L.J., in *Harris' Case* [3] , there[4] he speaks of the former case as "a case which is binding upon us, and in which every principle argued before us was discussed at length by the Lord Chancellor in giving judgment," he adds, the Lord Chancellor "arrived at the conclusion that the posting of the letter of acceptance is the

completion of the contract; that is to say, the moment one man has made an offer, and the other has done something binding himself to that offer, then the contract is complete and neither party can afterwards escape from it." Mellish, J., also took the same view, he says[5] "in *Dunlop v. Higgins* [2] the question was directly raised whether the law was truly expounded in the case of *Adams v. Lindsell*. [6] The House of Lords approved of the ruling of that case. The Lord Chancellor Cottenham said, in the course of his judgment, that in the case of

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[1] 1 H. L. C. at p. 399.

[2] 1 H. L. C. 381.

[3] Law Rep. 7 Ch. 587.

[4] At p. 592.

[5] At p. 595.

[6] 1 B. & A. 681.

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a bill of exchange notice of dishonour, given by putting a letter into the post at the right time, had been held quite sufficient whether that letter was delivered or not; and he referred to *Stocken v. Collin* [1] on that point, he being clearly of opinion that the rule as to accepting a contract was exactly the same as the rule as to sending notice of dishonour of a bill of exchange. He then referred to the case of *Adams v. Lindsell* [2] , and quoted the observation of Lord Ellenborough, C.J. That case therefore appears to me to be a direct decision that the contract is made from the time when it is accepted by post." Leaving *Harris' Case* [3] for the moment, I turn to *Duncan v. Topham* [4] , in which Cresswell, J, told the jury that if the letter accepting the contract was put into the post office and lost by the negligence of the post office authorities, the contract would nevertheless be complete; and both he and Wilde, C.J., and Maule, J., seem to have understood this ruling to have been in accordance with Lord Cottenham's opinion in *Dunlop v. Higgins*. [5] That opinion therefore appears to me to constitute an authority directly binding upon us. But if *Dunlop v. Higgins* [5] were out of the way, *Harris' Case* [3] would still go far to govern the present. There it was held that the acceptance of the offer at all events binds both parties from the time of the acceptance being posted, and so as to prevent any retractation of the offer being of effect after the acceptance has been posted. Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless therefore a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment. This was pointed out by Lord Ellenborough in the case of *Adams v. Lindsell* [2] , which is recognized authority upon this

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(1) 7 M. & W. 515.

(2) 1 B. & A. 681.

(3) Law Rep. 7 Ch. 587.

(4) 8 C. B. 225.

(5) 1 H. L. C. 381.

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branch of the law. But on the other hand it is a principle of law, as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance, which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offerer, is no binding acceptance. How then are these elements of law to be harmonised in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the post office as the agent of both parties, and it was so considered by Lord Romilly in *Hebb's Case* (1) , when in the course of his judgment he said: "*Dunlop v. Higgins* (2) decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the post office is the common agent of both parties." Alderson, B., also in *Stocken v. Collin* (3) , a case of notice of dishonour, and the case referred to by Lord Cottenham, says: "If the doctrine that the post office is only the agent for the delivery of the notice were correct no one could safely avail himself of that mode of transmission." But if the post office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offerer, a principle which has been distinctly negatived? This difficulty was attempted to be got over in the *British and American Telegraph Co. v. Colson* (4) , which was a case directly on all fours with the present, and in which Kelly, C.B.,(5) is reported to have said, "It may be that in general, though not in all cases, a contract takes effect from the time of acceptance and not from the subsequent notification of it. As in the case now before the Court, if the letter

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(1) Law Rep. 4 Eq. at p. 12.

(2) 1 H. L. C. 381.

(3) 7 M. & W. at p. 516.

(4) Law Rep. 6 Ex. 108.

(5) At p. 115.

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of allotment had been delivered to the defendant in the due course of the post he would have become a shareholder from the date of the letter. And to this effect is *Potter v. Sanders*. [1] And hence perhaps the mistake has arisen that the contract is binding upon both parties from the time when the letter is written and put into the post, although never delivered; whereas although it may be binding from the time of acceptance, it is only binding at all when afterwards duly notified." But with deference I would ask how a man can be said to be a shareholder at a time before he was bound to take any shares, or to put the question in the form in which it is put by Mellish, L.J., in *Harris' Case* [2] how there can be any relation back in a case of this kind as there may be in bankruptcy. If, as the Lord Justice said, the contract after the letter has arrived in time is to be treated as having been made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted. The principle indeed laid down in *Harris' Case* [2] as well as in *Dunlop v. Higgins* [3] , can really not be reconciled with the decision in the *British and, American Telegraph Co. v. Colson*. [4] James, L.J., in the passage I have already quoted[5] affirms the proposition that when once the acceptance is posted neither party can afterwards escape from the contract, and refers, with approval, to *Hebb's Case*. [6] There a distinction was taken by the Master of the Rolls that the company chose to send the letter of allotment to their own agent, who was not authorized by the applicant for shares to receive it on his behalf, and who never delivered it, but he at the same time assumed that if, instead of sending it through an authorized agent they had sent it through the post office, the applicant would have been bound although the letter had never been delivered. Mellish, L.J., really goes as far, and states forcibly the reasons in favour of this view. The mere suggestion thrown out (at the close of his judgment, at p. 597), when stopping short of actually overruling the decision in the *British and American Telegraph Co. v. Colson* [4] , that although

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[1] 6 Hare, 1.

[2] Law Rep. 586, at p. 596.

[3] 1 H. L. C. 381.

[4] Law Rep. 6 Ex. 108.

[5] *Harris' Case*, Law Rep. 7 Ch. 592.

[6] Law Rep. 4 Eq. 9.

---------- *(1879) 4 Ex.D. 216 at 223*

a contract is complete when the letter accepting an offer is posted, yet it may be subject to a condition subsequent that, if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted, can hardly, when contrasted with the rest of the judgment, be said to represent his own opinion on the law upon the subject. The contract as he says[1] , is actually made when the letter is posted. The acceptor, in posting

the letter, has, to use the language of Lord Blackburn, in *Brogden v. Directors of Metropolitan Ry. Co*. [2] , "put it out of his control and done an extraneous act which clenches the matter, and shews beyond all doubt that each side in bound." How then can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would bb more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer, and I can see no principle of law from which such an anomalous contract can be deduced.

There is no doubt that the implication of a complete, final, and absolutely binding contract being formed, as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the

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[1] At p. 596.

[2] 2 App. Cas. 666, 691.

person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which despatch is, as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

Upon balance of conveniences and inconveniences it seems to me, applying with slight alterations the language of the Supreme Court of the United States in *Tayloe v. Merchants Fire Insurance Co*. [1] , more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication that the parties themselves contemplated, instead of postponing its completion until the notice had been received by the defendant. Upon principle, therefore, as well as authority, I think that the judgment of Lopes, J., was right and should be affirmed, and that this appeal should therefore be dismissed.

BAGGALLAY, L.J. I am of opinion that this appeal should be dismissed.

It has been established by a series of authorities, including *Dunlop v. Higgins*, in the House of Lords[2] , and *Harris' Case* [3] , in the Court of Appeal in Chancery, that if an offer is made by letter, which expressly or impliedly authorizes the sending of an acceptance of such offer by post, and a letter of acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery.

The question involved in the present appeal is, whether the same principle should be applied in a case in which the letter of acceptance, though duly posted, is not delivered to the person to whom it is addressed. Lopes, J., was of opinion that the principle

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[1] 9 Howard S. Ct. Rep. 390.

[2] 1 H. L. C. 381.

[3] Law Rep. 7 Ch. 587.

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was applicable to such a case, and gave judgment in favour of the plaintiffs, and from such judgment the present appeal is brought.

In support of his appeal the defendant relies upon the decisions of the Court of Exchequer in the case of the *British and American Telegraph Co. v. Colson* [1] , to which, for conciseness, I will refer as *Colson's Case*. [1] I propose to consider *Dunlop v. Higgins* [2] and *Colson's Case* [1] and *Harris' Case* [3] somewhat in detail, for the purpose of ascertaining whether the decision of the Court of Exchequer in *Colson's Case* [1] is consistent with the decisions of the House of Lords and of the Lords Justices in the other two cases, and with the principles upon which such decisions were based.

The circumstances of *Dunlop v. Higgins* [2] were as follows: After a preliminary correspondence Messrs. Dunlop & Co., who were merchants at Glasgow, addressed a letter on the 28th of January, 1845, to Messrs. Higgins & Co., who carried on business at Liverpool, offering them 2000 tons of iron pigs at 65*s.* per ton net. This letter reached Higgins & Co. at 8 A.M. on the 30th of January, and on the same day they replied by letter duly addressed to Dunlop & Co. in the following terms: "We will take the 2000 tons pigs you offer us."

It appeared by the evidence that the first post for Glasgow, after the receipt by Higgins & Co. of the letter of Dunlop & Co. left Liverpool at 3 P.M. on the 30th, and that the post next following left at 1 A.M. of the 31st, and also that a letter despatched by the former post would in due course arrive at Glasgow at 2 P.M. on the 31st, and by the latter in time to be delivered at 8 A.M on the 1st of February. The letter so sent by Higgins & Co. was posted after the bags were made up for the 3 P.M. post, and was despatched by the 1 A.M. post on the 31st. In due course

it should have been delivered in Glasgow at 8 A.M. on the 1st of February, but it was not in fact delivered until 2 P.M. on that day, the frosty state of the weather having prevented the train from Liverpool arriving at Warrington in time to meet the down train to Glasgow. It appeared, also, that Higgins & Co., by mistake, dated their letter as of the 31st of January instead of the 30th of

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(1) Law Rep. 7 Ex. 108.

(2) 1 H. L. C. 381.

(3) Law Rep. 7 Ch. 587.

January. On the 1st of February, after the receipt of the letter of Higgins & Co. accepting the offer, Dunlop & Co. wrote to Higgins & Co., "We have your letter of yesterday's date, but are sorry that we cannot now enter the 2000 tons, our offer not being accepted in time." The iron was not delivered, and Higgins & Co. brought their action for breach of contract. The defence of Dunlop & Co. was that their letter of the 28th should have been answered by the first post, viz., by that which left Liverpool at 3 P.M. on the 30th, but that at any rate they were not bound to wait for a third post delivered at Glasgow at 2 P.M. on the 1st of February.

On the trial before the Lord Justice General, he admitted evidence to shew that the letter of acceptance, though dated the 31st, was in fact written and posted on the 30th of January, and he directed the jury that if Higgins & Co. posted their acceptance of the offer in due time, according to the usage of trade, they were not responsible for any casualties in the post office establishment.

It is important to bear in mind the terms of this direction, as it formed the substantial subject of appeal, first to the Court of Session and thence to the House of Lords. The jury found for the plaintiffs; that is to say, they found as a fact that the letter of Higgins & Co. was posted in due time according to the usage of the parties in their business transactions, and having so found they, under the direction of the judge, gave their verdict for the plaintiffs. Exceptions were therefore taken by the defendants, and, amongst other grounds of exception, they objected to the admission of evidence as to the posting of the letter on the 30th of January, and to the direction of the Lord Justice General, to which I have just referred. The exceptions were overruled by the judges of the First Division, and from their decision the defendants appealed to the House of Lords; the appeal was dismissed, and the ruling and direction of the Lord Justice General were upheld.

Though the question in dispute between the parties was whether Higgins & Co. were responsible for the delay in the delivery of the post, it is observed that the direction of the judge went further, for he ruled that if their letter was duly posted they were

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not responsible for any casualties in the post office establishment. During the argument Lord

Cottenham said, "The question is whether putting in the post is a virtual acceptance, though by the accident of the post it does not arrive;" and, in moving the judgment of the House, he observed, "if a man does all that he can do, that is all that is called for; if there is a usage of trade to accept such an offer and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done every thing he was bound to do; how can he be responsible for that over which he has no control?" There is nothing in the language of Lord Cottenham to suggest any distinction between a case in which there is delay in the delivery of the letter and one in which the letter is not delivered at all. But Lord Cottenham went on to illustrate his meaning, and did so in the following terms: "It is a very frequent occurrence that a party having a bill of exchange which he tenders for payment to the acceptor, and acceptance is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time it has been held quite sufficient; he has put the letter into the post, and whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post office he is not responsible." Having regard to the passages in Lord Cottenham's judgment, it appears to me impossible to doubt that the proposition which he intended to affirm, and which was in fact his ratio decidendi, was this, that when the letter accepting the offer was duly posted, the contract was complete, although it might be delayed in its delivery or might never reach the hands of the party making the offer.

I desire however to guard myself against being considered as participating in a view of the effect of the decision in *Dunlop v. Higgins* [(1)] which has been sometimes adopted, and as I think without sufficient reason, viz. that in all cases in which an offer is accepted by a letter addressed to the party making the offer and duly posted, there is a binding contract from the time when such letter is posted. I do not take this view of the effect of the decision in *Dunlop v. Higgins*. [(1)] On the contrary, I think that the principle

[(1)] 1 H. L. C. 381.

established by that case is limited in its application to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized. In *Dunlop v. Higgins* [(1)] the previous correspondence between the two firms was, in my opinion, quite sufficient, not only to authorize the sending of the acceptance by post, but to point to it as the only mode in which, under the circumstances, such acceptance could be communicated, and it was in consequence of the jury finding it as a fact that Higgins & Co. posted their acceptance of the offer to Dunlop & Co. in due time, according to the usage of their business transactions, that they found a verdict for the plaintiffs under the direction of the judge. The principle involved in *Dunlop v. Higgins* [(1)] was recognised by Cresswell, J. upon the trial of the action in *Duncan v. Topham* [(2)] ; upon that occasion he directed the jury that, if the letter accepting the contract was put into the post office and lost through the negligence of the post office authorities, the contract would nevertheless be complete; lind upon an application in the same case, to make absolute a rule which had been obtained for a new trial, though the new

trial was ordered upon other grounds, Wilde, C.J., and Maule, J., expressed views to the same effect as the direction of Cresswell, J.; in that case the letter never reached the hands of the person to whom it was addressed.

I proceed to consider the circumstances of *Colson's Case* [3] , they were as follows. On the 13th of February, 1867, the defendant sent an application to the company, through the post, for an allotment of fifty shares, undertaking by his letter to pay the sum of 2*l.* per share on whatever number should be allotted to him; on the 15th of the same month fifty shares were allotted to him, and a letter informing him of such allotment was posted to his address, as given in his letter of application for shares, viz., 31, Charlotte Street, Fitzroy Square.

Now a letter of application for shares in a public company, expressed in the usual form, must, I think, having regard to the

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[1] 1 H. L. C. 381.

[2] 8 C. B. 225.

[3] Law Rep. 7 Ex. 108.

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usage in such matters, be considered as authorizing the acceptance of the offer by a letter through the post, as was expressed by Lopes, J., in the case now under consideration; such would be the ordinary mode of transmission of an allotment letter. The defendant however swore, and there was no reason to doubt the truth of his statement, that he never received the letter of allotment; that another person of the same name lived opposite to him in the same street: about that time the numbers in the street were changed, his own being altered from 31 to 87; and that several letters then sent to him had never reached him. On the 28th of February the plaintiffs, on being informed that the letter of allotment had not reached the defendant, sent him a duplicate, which he refused to accept; the action was then brought by the company to recover the 2*l.* per share. The jury found that the letter of allotment was posted to the defendant on the 14th of February but that he never received it, and that the second notice was not sent in a reasonable time. The learned judge, Bramwell, B., thereupon directed the verdict to be entered for the plaintiffs, but gave the defendant leave to move to have it entered for himself on the authority of *Finucane's Case* [1] , which had recently been decided by Lord Romilly. A rule nisi was accordingly obtained, and cause was shewn on the 17th of November, 1870, the Court being composed of the Lord Chief Baron and Bramwell and Pigott, BB. Judgment was reserved, and on the 31st of January, 1871, the rule was made absolute to enter the verdict for the defendant.

The Lord Chief Baron, in the course of his judgment, expressed himself as follows: "It appears to me that if one proposes to another by a letter through the post to enter into a contract for the sale or purchase of goods, or, as in this case, of shares in a company, and the proposal is accepted by letter and the letter put into the post, the party having proposed to contract is not bound by the acceptance of it until the letter of acceptance is delivered to him, or otherwise

brought to his knowledge, except in certain cases where the non receipt of the acceptance has been occasioned by his own act or default." Now, unless the proposition so put by the Lord Chief Baron is to be read with some qualifications, it can hardly be considered as consistent with the decision in

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(1) 17 W. R. 813.

Dunlop v. Higgins (1) , as such decision has ordinarily been understood. The view, however, taken by him of that decision does not appear to be in accordance with that generally taken; for after alluding to the circumstances of *Dunlop v. Higgins* (1) he proceeded to express his entire concurrence with the decision of the Court of Session and in the affirmance of it by the House of Lords, upon the ground that, in his opinion, the acceptance of the offer reached Dunlop & Co. in time, and that the House of Lords had acted upon the same view of the circumstances of the case; the distinction which he recognised between that case and the one then under consideration consisted in this, that whereas the letter of acceptance in *Dunlop v. Higgins* (1) was received by the party making the offer in due time, that in *Colson's Case* (2) never reached its destination. Pigott, B., did not give a separate judgment, but it was stated that he concurred in that of the Lord Chief Baron. Bramwell, B., also commented upon the circumstances of *Dunlop v. Higgins* (1) , and referred to several passages in the judgment of Lord Cottenham, including those which I have quoted, and he then expressed himself as follows: "It seems to me that the correct way to deal with those expressions is to refer them to the subject-matter, and not to consider them as laying down such a proposition as the plaintiffs have contended for, but that when the post may be used between the parties it must be subject to those delays which are unavoidable." It would appear, then, that all the judges in the Court of Exchequer treated the case of *Dunlop v. Higgins* (1) as one decided upon its special circumstances, and as not enunciating any general principle beyond what was necessary for dealing with such circumstances. I am unable to concur in this view. It may be that there were special circumstances in the case of *Dunlop v. Higgins* (1) sufficient to have justified the decision of the House, irrespective of the application of the principle involved in the direction of the Lord Justice General; but the decision was not expressed to be based, and apparently was not intended to be based, upon any such ground, but upon an approval and of the direction of that learned judge.

After a careful consideration of the judgments of the Lord Chief Baron and of Mr. Baron Bramwell, I can come to no other

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(1) 1 H. L. C. 381.

(2) Law Rep. 7 Ex. 108.

conclusion than that the decision in *Colson's Case* [1] is inconsistent with that of the House of Lords in *Dunlop v. Higgins*. [2] If I am right in this conclusion it is not for me to choose between the two; I am bound by the authority of the decision of the House of Lords.

But I pass on to consider the circumstances of *Harris' Case* [3] , which came before the Lords Justices in 1872. On the 5th of March, 1866, Lewis Harris, of Dublin, applied to the directors of the Imperial Land Company of Marseilles, by a letter in the usual form, for an allotment of 200 shares, undertaking by his letter to accept that or any less number of shares that might be allotted to him. The directors allotted to him 100 shares, and early on the morning of the 16th of March posted a letter to him at his address, as given in his letter of application, which was received by him at Dublin. He had, however, in the interval between the posting and the delivery of the letter giving him notice of the allotment, written to the directors withdrawing his application and declining to accept any shares. Upon an order being made to wind up the company, Mr. Harris was placed upon the list of contributories in respect of the 100 shares, and a summons having been taken out by him to have his name removed from the list, such summons was dismissed by Malins, V.C. From such dismissal Mr. Harris appealed, but the decision of the Vice-Chancellor was upheld. In giving judgment James, L.J., said that it appeared to him that the contract was completed the moment the notice of allotment was committed to the post, and a similar view was expressed by Mellish, L.J., who, after referring to the decision of the Court of Exchequer in *Colson's Case* [1] , and stating that he had great difficulty in reconciling it with that of the House of Lords in *Dunlop v. Higgins* [2] , observed, with reference to the last mentioned case, that the real question then before the House of Lords was, whether the ruling of the Lord Justice General was correct, and that the House of Lords held that it was.

It is doubtless true, as was observed by both the Lords Justices, that the decision in *Harris' Case* [3] was not necessarily inconsistent with that of the Court of Exchequer in *Colson's Case* [1] ,

[1] Law Rep. 6 Ex. 108.

[2] 1 H. L. C. 381.

[3] Law Rep. 7 Ch. 587.

but it is, I think, clear that, although the Lords Justices did not feel themselves called upon to express any dissent from the decision of the Court of Exchequer, as it was not necessary for the decision of the case before them that they should do so, they by no means recognised the propriety of the distinction drawn by the Court of Exchequer between *Dunlop v. Higgins* [1] and *Colson's Case*. [2] I do not think it necessary to refer to *Finucane's Case* [3] and other cases decided by Lord Romilly, in which he held that the posting of a letter of allotment which never reached its destination was not sufficient to constitute the applicant a contributory, further than to observe that in *Finucane's Case* [3] , *Dunlop v. Higgins* [1] , and *Duncan v. Topham* [4] were

not cited, and that in the others the circumstances were such that the Master of the Rolls deemed himself justified in not following the decision in *Dunlop v. Higgins*. [1] Indeed, in one of those cases, *Hebb's Case* [5] , he distinctly recognised the authority of the decision in *Dunlop v. Higgins* [1] , which he considered to have been decided upon the ground that the post office was the common agent of both parties. For the reasons which I have assigned, I am of opinion that the principle established by the decision of the House of Lords in *Dunlop v. Higgins* [1] is applicable to the case now under consideration, and that the decision of Lopes, J., should be affirmed. I desire, however, to add that I have felt myself bound by authority. My own convictions are entirely in accordance with the principles which I consider to have been established by authority; and in saying this, I bear in mind as well the very forcible remarks made by the Lord Chief Baron and my present colleague upon the subject of the mischievous consequences that might ensue from an adoption of these principles in certain suggested cases, as the equally forcible remarks made by Mellish, L.J., as to the like consequences which would ensue in other cases if those principles were departed from.

BRAMWELL, L.J. The question in this case is not whether the post office was a proper medium of communication from the

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[1] 1 H. L. C. 381.

[2] Law Rep. 6 Ex. 108.

[3] 17 W. R. 813.

[4] 8 C. B. 225.

[5] Law Rep. 4 Eq. 9.

plaintiffs to the defendant. There is no doubt that it is so in all cases where personal service is not required. It is an ordinary mode of communication, and every person who gives any one the right to communicate with him, gives the right to communicate in an ordinary manner and so in this way and to this extent, that if an offer were made by letter in the morning to a person at a place within half an hour's railway journey of the offerer, I should say that an acceptance by post, though it did not reach the offerer till the next morning, would be in time. Nor is the question whether, when the letter reaches an offerer, the latter is bound and the bargain made from the time the letter is posted or despatched, whether by post or otherwise. The question in this case is different. I will presently state what in my judgment it is. Meanwhile I wish to mention some elementary propositions which, if carefully borne in mind, will assist in the determination of this case:

> First. Where a proposition to enter into a contract is made and accepted, it is necessary, as a rule, to constitute the contract that there should be a communication of that acceptance to the proposer, per Brian, C.J., and Lord Blackburn: *Brogden v. Metropolitan Ry. Co*. [1]

Secondly. That the present case is one of proposal and acceptance.

Thirdly. That as a consequence of or involved in the first proposition, if the acceptance is written or verbal, i.e., is by letter or message, as a rule, it must reach the proposer or there is no communication, and so no acceptance of the offer.

Fourthly. That if there is a difference where the acceptance is by a letter sent through the post which does not reach the offerer, it must be by virtue of some general rule or some particular agreement of the parties. As, for instance, there might be an agreement that the acceptance of the proposal may be by sending the article offered by the proposer to be bought, or hanging out a flag or sign to be seen by the offerer as he goes by, or leaving a letter at a certain place, or any other agreed mode, and in the same way there might be an agreement that dropping a letter in a post pillar box or other place of reception should suffice.

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(1) 2 App. Cas. at p. 692.

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Fifthly. That as there is no such special agreement in this case, the defendant, if bound, must be bound by some general rule which makes a difference when the post office is employed as the means of communication.

Sixthly. That if there is any such general rule applicable to the communication of the acceptance of offers, it is equally applicable to all communications that may be made by post. Because, as I have said, the question is not whether this communication may be made by post. If, therefore, posting a letter which does not reach is a sufficient communication of acceptance of an offer, it is equally a communication of everything else which may be communicated by post, e.g., notice to quit. It is impossible to hold, if I offer my landlord to sell him some hay and he writes accepting my offer, and in the same letter gives me notice to quit, and posts his letter which, however, does not reach me, that he has communicated to me his acceptance of my offer, but not his notice to quit. Suppose a man has paid his tailor by cheque or banknote, and posts a letter containing a cheque or banknote to his tailor, which never reaches, is the tailor paid? If he is, would he be if he had never been paid before in that way? Suppose a man is in the habit of sending cheques and banknotes to his banker by post, and posts a letter containing cheques and banknotes, which never reaches. Is the banker liable? Would he be if this was the first instance of a remittance of the sort? In the cases I have supposed, the tailor and banker may have recognised this mode of remittance by sending back receipts and putting the money to the credit of the remitter. Are they liable with that? Are they liable without it? The question then is, is posting a letter which is never received a communication to the person addressed, or an equivalent, or something which dispenses with it? It is for those who say it is to make good their contention. I ask why is it? My answer beforehand to any

argument that may be urged is, that it is not a communication, and that there is no agreement to take it as an equivalent for or to dispense with a communication. That those who affirm the contrary say the thing which is not. That if Brian, C.J., had had to adjudicate on the case, he would deliver the same judgment as that reported. That because a man, who may send a communication by post or

---------- *(1879) 4 Ex.D. 216 at 235*

otherwise, sends it by post, he should bind the person addressed, though the communication never reaches him, while he would not so bind him if he had sent it by hand, is impossible. There is no reason in it; it is simply arbitrary. I ask whether any one who thinks so is prepared to follow that opinion to its consequence; suppose the over is to sell a particular chattel, and the letter accepting it never arrives, is the property in the chattel transferred? Suppose it is to sell an estate or grant a lease, is the bargain completed? The lease might be such as not to require a deed, could a subsequent lessee be ejected by the would-be acceptor of the offer because he had posted a letter? Suppose an article is advertised at so much, and that it would be sent on receipt of a post office order. Is it enough to post the letter? If the word "receipt" is relied on, is it really meant that that makes a difference? If it should be said let the offerer wait, the answer is, may be he may lose his market meanwhile. Besides, his offer may be by advertisement to all mankind. Suppose a reward for information, information posted does not reach, some one else gives it and is paid, is the offerer liable to the first man?

It is said that a contrary rule would be hard on the would-be acceptor, who may have made his arrangements on the footing that the bargain was concluded. But to hold as contended would be equally hard on the offerer, who may have made his arrangements on the footing that his offer was not accepted; his non-receipt of any communication may be attributable to the person to whom it was made being absent. What is he to do but to act on the negative, that no communication has been made to him? Further, the use of the post office is no more authorized by the offerer than the sending an answer by hand, and all these hardships would befall the person posting the letter if he sent it by hand. Doubtless in that case he would be the person to suffer if the letter did not reach its destination. Why should his sending it by post relieve him of the loss and cast it on the other party. It was said, if he sends it by hand it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post, not that the letter can be got back, but its arrival might be anticipated by a letter by hand or telegram, and there is no case to shew that such anticipation would not prevent the

---------- *(1879) 4 Ex.D. 216 at 236*

letter from binding. It would be a most alarming thing to say that it would. That a letter honestly but mistakenly written and posted must bind the writer if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled; suppose a false but honest character given, and the mistake found out after the letter posted, and notice that it was wrong given to the person addressed.

Then, as was asked, is the principle to be applied to telegrams? Further, it seems admitted that if the proposer said, "unless I hear from you by return of post the offer is withdrawn," that the letter accepting it must reach him to bind him. There is indeed a case recently reported in the

Times, before the Master of the Rolls, where the offer was to be accepted within fourteen days, and it is said to have been held that it was enough to post the letter on the 14th, though it would and did not reach the offerer till the 15th. Of course there may have been something in that case not mentioned in the report. But as it stands it comes to this, that if an offer is to be accepted in June, and there is a month's post between the places, posting the letter on the 30th of June will suffice, though it does not reach till the 31st of July; but that case does not affect this. There the letter reached, here it has not. If it is not admitted that "unless I hear by return the offer is withdrawn" makes the receipt of the letter a condition, it is to say an express condition goes for nought. If it is admitted, is it not what every letter says? Are there to be fine distinctions, such as, if the words are "unless I hear from you by return of post, &c.," it is necessary the letter should reach him, but "let me know by return of post," it is not; or if in that case it is, yet it is not where there is an offer without those words. Lord Blackburn says that Mellish, L.J., accurately stated that where it is expressly or impliedly stated in the offer, "you may accept the offer by posting a letter," the moment you post this letter the offer is accepted. I agree; and the same thing is true of any other mode of acceptance offered with the offer and acted on - as firing a cannon, sending off a rocket, give your answer to my servant the bearer. Lord Blackburn was not dealing with the question before us; there was no doubt in the case before him that the letter had reached. As to the authorities, I shall not re-examine those in

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existence before the *British and American Telegraph Co. v. Colson*. (1) But I wish to say a word as to *Dunlop v. Higgins* (2) ; the whole difficulty has arisen from some expressions in that case. Mr. Finlay's argument and reference to the case when originally in the Scotch Court has satisfied me that *Dunlop v. Higgins* (2) decided nothing contrary to the defendant in this case. Mellish, L.J., in *Harris' Case* (3) , says, "That case is not a direct decision on the point before us." It is true, he adds, that he has great difficulty in reconciling the case of the *British and American Telegraph Co. v. Colson* (1) with *Dunlop v. Higgins*. (2) I do not share that difficulty. I think they are perfectly reconcilable, and that I have shewn so. Where a posted letter arrives, the contract is complete on the posting. So where a letter sent by hand arrives, the contract is complete on the writing and delivery to the messenger. Why not? All the extraordinary and mischievous consequences which the Lord Justice points out in *Harris' Case* (3) might happen if the law were otherwise when a letter is posted, would equally happen where it is sent otherwise than by the post. He adds that the question before the Lords in *Dunlop v. Higgins* (2) was whether the ruling of the Lord Justice Clerk was correct, and they held it was. Now Mr. Finlay shewed very clearly that the Lord Justice Clerk decided nothing inconsistent with the judgment in the *British and American Telegraph Co. v. Colson*. (1) Since the last case there have been two before Vice-Chanceller Malins, in the earlier of which he thought it "reasonable," and followed it. In the other, because the Lord Justices had in *Harris' Case* (3) thrown cold water on it, he appears to have thought it not reasonable. He says, suppose the sender of a letter says, "I make you an offer, let me have an answer by return of post." By return the letter is posted, and A. has done all that the person making the offer requests. Now that is precisely what he has not done. He has not let him "have an answer." He adds there is no default on his part. Why should he be the only person to suffer? Very true. But there is no default in the other, and why should he be the only person to suffer? The only other authority is the expression of opinion by

(1) Law Rep. 6 Ex. 108.

(2) 1 H. L. C. 381.

(3) Law Rep. 7 Ch. 596.

(1879) 4 Ex.D. 216 at 238

Lopes, J., in the present case. He says the proposer may guard himself against hardship by making the proposal expressly conditioned on the arrival of the answer within a definite time. But it need not be express nor within a definite time. It is enough that it is to be inferred that it is to be, and if it is to be it must be within a reasonable time. The mischievous consequences he points out do not follow from that which I am contending for. I am at a loss to see how the post office is the agent for both parties. What is the agency as to the sender? merely to receive? But suppose it is not an answer, but an original communication. What then? Does the extent of the agency of the post office depend on the contents of the letter? But if the post office is the agent of both parties, then the agent of both parties has failed in his duty, and to both. Suppose the offerer says, "My offer is conditional on your answer reaching me." Whose agent is the post office then? But how does an offerer make the post office his agent, because he gives the offerer an option of using that or any other means of communication.

I am of opinion that this judgment should be reversed. I am of opinion that there was no bargain between these parties to allot and take shares, that to make such bargain there should have been an acceptance of the defendant's offer and a communication to him of that acceptance. That there was no such communication. That posting a letter does not differ from other attempts at communication in any of its consequences, save that it is irrevocable as between the poster and post office. The difficulty has arisen from a mistake as to what was decided in *Dunlop v. Higgins* (1) , and from supposing that because there is a right to have recourse to the post as a means of communication, that right is attended with some peculiar consequences, and also from supposing that because if the letter reaches it binds from the time of posting, it also binds though it never reaches. Mischief may arise if my opinion prevails. It probably will not, as so much has been said on the matter that principle is lost sight of. I believe equal if not greater, will, if it does not prevail. I believe the latter will be obviated only by the rule being made nugatory by every prudent man saying, "your answer by post is only to bind if it

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(1) 1 H. L. C. 381.

(1879) 4 Ex.D. 216 at 239

reaches me." But the question is not to be decided on these considerations. What is the law? What is the principle? If Brian, C.J., had had to decide this, a public post being instituted in his time, he would have said the law is the same, now there is a post, as it was before, viz., a communication to affect a man must be a communication, i.e., must reach him.

Judgment affirmed.

Solicitor for plaintiff: *Worthington Evans*.

Solicitor for defendant: *J. Davies*.

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