Overview | **[1955] 2 QB 327**, | [1955] 2 All ER 493, | [1955] 3 WLR 48, | [1955] 1 Lloyd's Rep 511, | 99 Sol Jo 384

ENTORES LD. v. MILES FAR EAST CORPORATION. [1955] 2 Q.B. 327

[COURT OF APPEAL]

Denning, Birkett and Parker L.JJ.

1955 May 3, 17.

Contract — Offer and acceptance — Where contract made — Contract by telephone — Offer made by Telex communication from London — Acceptance by Telex message from Holland — Acceptance received in London — Contract made in London — Service of writ out of the jurisdiction — Subsequent variation of contract — Effect on where made — R.S.C., Ord. 11, r. 1 (e) (i).

House of Lords — Leave to appeal — Court of Appeal, by — Interlocutory matter.

Practice — Writ — Service out of jurisdiction.

The plaintiff company in London made an offer by Telex to the agents in Holland of the defendant corporation, whose headquarters were in New York, for the purchase of a quantity of copper cathodes, and their offer was duly accepted by a communication received on the plaintiffs' Telex machine in London.

The plaintiff company sought leave to serve notice of a writ on the defendant corporation in New York claiming damages for breach of the contract so made:-

Held that, although where a contract is made by post acceptance is complete as soon as the letter of acceptance is put into the post box, where a contract is made by instantaneous communication, e.g., by telephone, the contract is complete only when the acceptance is received by the offeror, since generally an acceptance must be notified to the offeror to make a binding contract; and that, since

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communications by Telex were virtually instantaneous, the contract in this case was made in London. Accordingly it was a proper case for service out of the jurisdiction under R.S.C., Ord. 11, r. 1 (*e*).1

Dicta of Hill J. in *Newcomb v. De Roos* (1859) 2 E. & E. 271 disapproved.

Decision of Donovan J. affirmed.

INTERLOCUTORY APPEAL from Donovan J.

The facts, which are stated in more detail in the judgment of Denning L.J., were as follows: The

plaintiffs, Entores Ld., were an English company with a registered office in London, and the defendants, Miles Far East Corporation, were an American corporation with headquarters in New York, and with agents all over the world, including a Dutch company in Amsterdam. Both the plaintiffs and the defendants' agents in Amsterdam had in their office an equipment known as Telex Service, by which messages could be dispatched by a teleprinter operated like a typewriter in one country, and almost instantaneously received and typed in another. The plaintiffs desired to make a contract with the defendants' agents in Amsterdam for the purchase of copper cathodes from the defendant corporation. In September, 1954, a series of communications by Telex passed between the plaintiffs and the Dutch company, the material one for the present purposes being a counter-offer made by the plaintiffs on September 8, 1954, and an acceptance of that offer by the Dutch agents on behalf of the defendants received by the plaintiffs in London by Telex on September 10, 1954.

The plaintiffs later alleged that there had been a breach by the defendants of the contract. They accordingly applied for leave to serve notice of a writ on the defendants in New York on the ground that the contract was made in England and, therefore, fell within the terms of R.S.C., Ord. 11, r. 1 (*e*).

It was contended for the defendants that the contract was made in Holland.

The plaintiffs' application was granted by a master, and on appeal his decision was affirmed by Donovan J.

The defendants appealed.

Gerald Gardiner Q.C. and **S. B. R. Cooke** for the defendants. The contract in the present case was not made in London and

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1 R.S.C., Ord. 11, r. 1, provides that service out of the jurisdiction of a writ of summons may be allowed (*e*) to enforce a contract (i) "made within the jurisdiction."

was not therefore within the jurisdiction. The principal question raised by the appeal, on which English law is devoid of authority, is, when and at what place is a contract made when the negotiating parties are practically in instantaneous communication with each other by means of a telephone or, as in the present case, a Telex machine. So far as a contract made by correspondence is concerned, it has long been settled that the offer of a contract made by post is accepted when an acceptance is put in the post, and the contract is made at the place where that act was performed: see *Adams v. Lindsell*2; *Dunlop v. Higgins*3; *In re Imperial Land Co. of Marseilles (Harris's case*4; *British and American Telegraph Co. v. Colson*5; *Household Fire Insurance Co. v. Grant*.6 In *Henthorn v. Fraser*7 Lord Herschell L.C. said: "Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."

So far as telegrams are concerned, the same rule has been applied: see *Henkel v. Pape*,8

*Cowan v. O'Connor*9 and *Bruner v. Moore*.10 With regard to a contract made verbally between the parties, in *Newcomb v. De Roos*11 Hill J., in considering the question of the place where the contract was made, said: "Suppose the two parties stood on different sides of the boundary line of the district: and that the order was then verbally given and accepted. The contract would be made in the district in which the order was accepted."

The question of jurisdiction in relation to the place where a contract is made arises more frequently in the United States than in this country and, so far as concerns contracts made by letter or telegram, there is no difference between English and American law: see American Restatement, _ 64. In the case of a contract made by telephone, it has been held in America that the contract is made at the place where the acceptance is spoken, thus applying to such a contract the same principle as that applicable in the case of a letter or telegram. In the present, case acceptance by Telex was clearly within the contemplation of the parties, and if

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2 (1818) 1 B. & Ald. 681.

3 (1848) 1 H.L.C. 381.

4 (1872) L.R. 7 Ch. 587.

5 (1871) L.R. 6 Exch. 108.

6 (1879) 4 Ex.D. 216.

7 [1892] 2 Ch. 27, 32; 8 T.L.B. 459.

8 (1870) L.R. 6 Exch. 7.

9 (1888) 20 Q.B.D. 640.

10 [1904] 1 Ch. 305; 20 T.L.R. 125.

11 (1859) 2 E. & E. 271, 275.

the offeree in Holland did everything in accepting the offer which the offeror in London expected him to do, which was clearly the case, a contract was made in Holland and was made at the time when the acceptance was typed on the Telex machine. That being so, the contract was not made "within the jurisdiction" within the meaning of Ord. 11, r. 1, and service of the writ in New York should not have been ordered. If the law in relation to a contract made by telephone or Telex is different from that which applies in the case of one made by letter or telegram it is desirable that it should so be laid down in clear and precise terms. [*The Hagen*12 was also referred to.]

Maurice Lyell Q.C. and **Dennis Lloyd** for the plaintiffs. The contract in this case was made within the jurisdiction, and consequently service out of the jurisdiction could properly be allowed under Ord. 11, r. 1. When a contract is negotiated by telephone, Telex or other form of instantaneous communication, the contract is not complete until the acceptance is actually received by the offeror, and further, the contract is made at the place where that acceptance is received and not at the place where it is spoken or, in the case of Telex, typed. If, therefore, the offeree begins to tap out an acceptance to an offer made by Telex and the message never gets through, there is no contract. The authorities on contracts made through the post office by letter

or telegram, on which reliance is placed for the defendants, have no bearing on the present case.

When a new method of communication, such as a telephone or a Telex, is employed in the making of a contract, one must beware of treating the rule in regard to postal communications as being sacrosanct, since that rule was only arrived at after long consideration of what was most convenient in regard to postal services. In the American Restatement, Contracts, _ 65, it is stated that "Acceptance by telephone is governed by the principles applicable to oral acceptance when the parties are in the presence of each other," and it has been held in America that the contract is made at the place where the acceptor speaks his acceptance into the telephone. It is submitted that that view should not be adopted in this country either in the case of a contract by telephone or Telex, and that the contract is only complete when the offeror has received the acceptance. Further, the contract is also made at the place where the acceptance is received, in the present case in London. That view has received

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12 [1908] P. 189.

Quarterly Review, p. 514, "Some Aspects of Offer and Acceptance," and of Professor Williston in America: see Contracts, _ 82, p. 239.

Donovan J. was right in holding that the contract was made in London when the acceptance by Telex of their offer was received by the plaintiffs, and consequently an order for the service of a writ out of the jurisdiction could properly be made.

Gerald Gardiner Q.C. replied.

Cur. adv. vult.

May 17. The following judgments were read.

DENNING L.J. This is an application for leave to serve notice of a writ out of the jurisdiction. The grounds are that the action is brought to recover damages for breach of a contract made within the jurisdiction or by implication to be governed by English law.

The plaintiffs are an English company. The defendants are an American corporation with agents all over the world, including a Dutch company in Amsterdam. The plaintiffs say that the contract was made by Telex between the Dutch company in Amsterdam and the English company in London. Communications by Telex are comparatively new. Each company has a teleprinter machine in its office; and each has a Telex number like a telephone number. When one company wishes to send a message to the other, it gets the Post Office to connect up the machines. Then a clerk at one end taps the message on to his machine just as if it were a typewriter, and it is instantaneously passed to the machine at the other end, which automatically types the message onto paper at that end.

The relevant Telex messages in this case were as follows: September 8, 1954: Dutch company:

"Offer for account our associates Miles Far East Corporation Tokyo up to 400 tons Japanese cathodes sterling 240 longton c.i.f. shipment Mitsui Line September 28 or October 10 payment by letter of credit. Your reply Telex Amsterdam 12174 or phone 31490 before 4 p.m. invited." English company: "Accept 100 longtons cathodes Japanese shipment latest October 10 sterling £239 10*s.* longton c.i.f. London/Rotterdam payment letter of credit stop please confirm latest tomorrow." Dutch company: "We received O.K. Thank you." September 9, 1954: English company: "Regarding our telephone conversation a few minutes

ago we note that there is a query on the acceptance of our bid for 100 tons payment in sterling and you are ascertaining that your Tokyo office will confirm the price to be longton we therefore await to hear from you further." September 10, 1954: English company: "Is the price for the sterling cathodes understood to be for longton by Japan as you were going to find this out yesterday?" Dutch company: "Yes, price £239 10*s.* for longton."

At that step there was a completed contract by which the defendants agreed to supply 100 tons of cathodes at a price of £239 10*s.* a ton. The offer was sent by Telex from England offering to pay £239 10*s.* a ton for 100 tons, and accepted by Telex from Holland. The question for our determination is where was the contract made?

When a contract is made by post it is clear law throughout the common law countries that the acceptance is complete as soon as the letter is put into the post box, and that is the place where the contract is made. But there is no clear rule about contracts made by telephone or by Telex. Communications by these means are virtually instantaneous and stand on a different footing.

The problem can only be solved by going in stages. Let me first consider a case where two people make a contract by word of mouth in the presence of one another. Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait till the aircraft is gone and then shout back his acceptance so that I can hear what he says. Not until I have his answer am I bound. I do not agree with the observations of Hill J. in *Newcomb v. De Roos*.1

Now take a case where two people make a contract by telephone. Suppose, for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes "dead" so that I do not hear his words of acceptance. There is no contract at that moment. The other man may not know the precise moment when the line failed. But he will know that the telephone conversation was abruptly broken off: because people usually say something to signify the end of the conversation. If he wishes to make a contract, he must therefore get through again so as to make sure that I heard. Suppose next, that the line does not go dead, but it is nevertheless so indistinct that I

1 (1859) 2 E. & E. 271.

do not catch what he says and I ask him to repeat it. He then repeats it and I hear his acceptance. The contract is made, not on the first time when I do not hear, but only the second time when I do hear. If he does not repeat it, there is no contract. The contract is only complete when I have his answer accepting the offer.

Lastly, take the Telex. Suppose a clerk in a London office taps out on the teleprinter an offer which is immediately recorded on a teleprinter in a Manchester office, and a clerk at that end taps out an acceptance. If the line goes dead in the middle of the sentence of acceptance, the teleprinter motor will stop. There is then obviously no contract. The clerk at Manchester must get through again and send his complete sentence. But it may happen that the line does not go dead, yet the message does not get through to London. Thus the clerk at Manchester may tap out his message of acceptance and it will not be recorded in London because the ink at the London end fails, or something of that kind. In that case, the Manchester clerk will not know of the failure but the London clerk will know of it and will immediately send back a message "not receiving." Then, when the fault is rectified, the Manchester clerk will repeat his message. Only then is there a contract. If he does not repeat it, there is no contract. It is not until his message is received that the contract is complete.

In all the instances I have taken so far, the man who sends the message of acceptance knows that it has not been received or he has reason to know it. So he must repeat it. But, suppose that he does not know that his message did not get home. He thinks it has. This may happen if the listener on the telephone does not catch the words of acceptance, but nevertheless does not trouble to ask for them to be repeated: or the ink on the teleprinter fails at the receiving end, but the clerk does not ask for the message to be repeated: so that the man who sends an acceptance reasonably believes that his message has been received. The offeror in such circumstances is clearly bound, because he will be estopped from saying that he did not receive the message of acceptance. It is his own fault that he did not get it. But if there should be a case where the offeror without any fault on his part does not receive the message of acceptance - yet the sender of it reasonably believes it has got home when it has not - then I think there is no contract.

My conclusion is, that the rule about instantaneous communications between the parties is different from the rule about the

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post. The contract is only complete when the acceptance is received by the offeror: and the contract is made at the place where the acceptance is received.

In a matter of this kind, however, it is very important that the countries of the world should have the same rule. I find that most of the European countries have substantially the same rule as that I have stated. Indeed, they apply it to contracts by post as well as instantaneous communications. But in the United States of America it appears as if instantaneous communications are treated in the same way as postal communications. In view of this divergence, I think that we must consider the matter on principle: and so considered, I have come to the view I have stated, and I am glad to see that Professor Winfield in this country (55 Law Quarterly Review, 514), and Professor Williston in the United States of America (Contracts, _ 82, p. 239), take the same view.

Applying the principles which I have stated, I think that the contract in this case was made in London where the acceptance was received. It was, therefore, a proper case for service out of the jurisdiction.

Apart from the contract by Telex, the plaintiffs put the case in another way. They say that the contract by Telex was varied by letter posted in Holland and accepted by conduct in England: and that this amounted to a new contract made in England. The Dutch company on September 11, 1954, wrote a letter to the English company saying: "We confirm having sold to you for account of our associates in Tokyo: 100 metric tons electrolitic copper in cathodes: £239 10*s.* for longton c.i.f. U.K./ Continental main ports: prompt shipment from a Japanese port after receipt of export licence: payment by irrevocable and transferable letter of credit to be opened in favour of Miles Far East Corporation with a first class Tokyo Bank. The respective import licences to be sent directly without delay to Miles Far East Corporation." The variations consisted in the ports of delivery, the provisions of import licence and so forth. The English company say that they accepted the variations by dispatching from London the import licence, and giving instructions in London for the opening of the letter of credit, and that this was an acceptance by conduct which was complete as soon as the acts were done in London.

I am not sure that this argument about variations is correct. It may well be that the contract is made at the place where first completed; not at the place where the variations are agreed.

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But whether this be so or not, I think the variations were accepted by conduct in London and were therefore made in England. Both the original contract and ensuing variations were made in England and leave can properly be given for service out of the jurisdiction.

I am inclined to think also that the contract is by implication to be governed by English law, because England is the place with which it has the closest connexion.

I think that the decisions of the master and the judge were right, and I would dismiss the appeal.

BIRKETT L.J. I can state very briefly my agreement with the judgment just delivered by my Lord. [His Lordship stated the facts and continued:] The plaintiffs contend that the contract was made in England and, therefore, comes within Ord. 11, r. 1 of the Rules of the Supreme Court, whereby the court or a judge may allow service of a writ outside the jurisdiction where the action is one brought against a defendant for damages for breach of a contract made within the jurisdiction. The defendants say that the contract was not made in England but was made in Holland.

I am of opinion that in the case of Telex communications (which do not differ in principle from the cases where the parties negotiating a contract were actually in the presence of each other) there can be no binding contract until the offeror receives notice of the acceptance from the offeree.

Mr. Gardiner submitted that the proper principle to be applied to a case like the present could be thus stated: "If A makes an offer to B, there is a concluded contract when B has done all that he can do to communicate his acceptance by approved methods." He further submitted that great

difficulties would arise if Telex communications were treated differently from acceptances by post or telegram. In my opinion, the cases governing the making of contracts by letters passing through the post have no application to the making of contracts by Telex communications. The ordinary rule of law, to which the special considerations governing contracts by post are exceptions, is that the acceptance of an offer must be communicated to the offeror, and the place where the contract is made is the place where the offeror receives the notification of the acceptance by the offeree.

If a Telex instrument in Amsterdam is used to send to London the notification of the acceptance of an offer the contract is complete when the Telex instrument in London receives the notification of the acceptance (usually at the same moment that

the message is being printed in Amsterdam), and the acceptance is then notified to the offeror, and the contract is made in London.

I agree with the judgment of Donovan J. and this appeal should be dismissed.

PARKER L.J. I have come to the same conclusion, and would only add a few words on the basis that the contract sued on is that created by the Telex messages. As was said by Lindley L.J. in *Carlill v. Carbolic Smoke Ball Co.*2: "Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified." In the same case Bowen L.J. said3: "One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to English law - I say nothing about the laws of other countries - to make a contract." Accordingly, as a general rule, a binding contract is made at the place where the offeror receives notification of the acceptance, that is where the offeror is.

Since, however, the requirement as to actual notification of the acceptance is for the benefit of the offeror, he may waive it and agree to the substitution for that requirement of some other conduct by the acceptor. He may do so expressly, as in the advertisement cases, by intimating that he is content with the performance of a condition. Again, he may do so impliedly by indicating a contemplated method of acceptance, for example, by post or telegram. In such a case he does not expressly dispense with actual notification, but he is held to have done so impliedly on grounds of expediency. Thus, in *Adams v. Lindsell*,4 the court pointed out that unless this were so "no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum. "Again, in *Dunlop v. Higgins*,5 Lord

2 [1893] 1 Q.B. 256, 262; 9 T.L.R. 124.

3 [1893] 1 Q.B. 256, 269.

4 (1818) 1 B. & Ald. 681, 683.

5 (1848) 1 H.L.C. 381, 400.

Cottenham L.C. pointed out that "Common sense tells us that transactions cannot go on without such a rule"; and in *In re Imperial Land Co. of Marseilles* (*Harris's case*6, Mellish L.J. referred to the mischievous consequences which would follow in commerce if no such rule was adopted. To the same effect is the judgment of Thesiger L.J. in *Household Fire Insurance Co. v. Grant*,7 in which he points out that where the parties are at a distance the balance of convenience dictates that the contract shall be deemed complete when the acceptance is handed to the Post Office.

Where, however, the parties are in each other's presence or, though separated in space, communication between them is, in effect, instantaneous, there is no need for any such rule of convenience. To hold otherwise would leave no room for the operation of the general rule that notification of the acceptance must be received. An acceptor could say: "I spoke the words of acceptance in your presence, albeit softly, and it matters not that you did not hear me"; or, "I telephoned to you and accepted and it matters not that the telephone went dead and you did not get my message." Though in both these cases the acceptor was using the contemplated or, indeed, the expressly indicated mode of communication, there is no room for any implication that the offeror waived actual notification of the acceptance. It follows that I cannot agree with the observations of Hill J. in *Newcomb v. De Roos*.8

So far as Telex messages are concerned, though the dispatch and receipt of a message is not completely instantaneous, the parties are to all intents and purposes in each other's presence just as if they were in telephonic communication, and I can see no reason for departing from the general rule that there is no binding contract until notice of the acceptance is received by the offeror. That being so, and since the offer - a counter-offer - was made by the plaintiffs in London, and notification of the acceptance was received by them in London, the contract resulting therefrom was made in London. I would accordingly dismiss the appeal.

Cooke. Would your Lordships give me leave to take the matter further? It is a matter of some considerable importance. It appears that communications of this kind are on the increase, and your Lordships have at any rate disposed of a certain amount

6 (1872) L.R. 7 Ch. 587, 594.

7 (1879) 4 Ex.D. 216.

8 2 E. & E. 271.

of authority. I think your Lordships have also indicated that the courts here may depart from the rule which the American courts have observed with regard to the telephone.

DENNING L.J. This is an interlocutory appeal. It means that the trial of the action will be still further held up.

Cooke. We do not wish to hold up the trial of the action further than necessary. On the other hand, it is an American corporation trading all over the world. It is a matter of considerable importance to them and others in like position as to what their position really is.

DENNING L.J. On the whole we do not think that we ourselves should give leave to appeal.

Appeal dismissed.

Leave to appeal to House of Lords refused.

P. B. D.

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