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Contracts-Offer and Acceptance-Lapse of Offer

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as is afforded by a provision for liquidated damages. "In the complexities of modern business, breaches of contract involve more incidental but real damages than when business was less complicated. In later years business men have been more desirous of contracting as to damages in order that their liability may be a known rather than an unknown quantity."10 The modern industrial machine with its large plant overhead and mass production equipment, geared to a specific demand, is a delicate organism and its workings are easily upset. The courts apparently now seek to protect it against the dangers of uncertainty by allowing its managers to hedge their position with contract provisions. There has been no indication, however, that the courts intend to allow a contracting party to take advantage of this tendency towards liberality of construction and permit enforcement of unfair or unreasonable provisions for liquidated damages.11 Such provisions continue to be regarded with disfavor by the courts.

The other reason advanced for the shift of attitude is that the courts are encouraging the tendency away from litigation, which tendency benefits both the courts in relieving them from crowded calendars, and the parties to the agreement in relieving them of the expenses and delay necessarily incident to law suits. The Supreme Court of Wisconsin illustrated the modern tendency by its statement in Sheffield-King Milling Co. v. Jacobs12 that "The removal of managers from the business of a large, highly organized concern during the time necessarily consumed in a trial entails an expense, in excess of recoverable costs, so great as to prevent in many cases any reimbursement to a manufacturer. Modern business is so managed as to avoid litigation—a tendency which should be encouraged in all fair and legitimate ways because it is conducive to the general welfare."

The instant case indicates that the Indiana courts are following the modern tendency to construe these provisions liberally. The liquidated damages provisions of the contract under consideration differed from the established rules of damages used by the courts in that: (1) the damages were not measured in terms of the price of flour, the subject matter of the contract, but by the price of wheat, the raw material from which this commodity was made; (2) the amount of damages was determined by finding the difference between the price of wheat on the date of the contract and its price on the date of breach, the usual rule of determining the damages by finding the difference at the date of breach between the market price at place of delivery and the contract price being waived by the court in favor of the contract provisions.

M. E. W

CONTRACTS—OFFER AND ACCEPTANCE—LAPSE OF OFFER.—By the case as reported, defendant sponsored and conducted a racing stake for horses. Entries were to be permitted according to rules contained in a printed nomination blank used for that purpose. Among the entrance requirements necessary was one providing that entry fees were to be paid by May 1. Plaintiff was the owner of two horses and wishing to enter them sent in the amount required

10 Quaile v. Kelley Milling Co., supra.
12 (1920), 170 Wis. 389, 175 N. W. 796.
as the entrance fee. Tender of payment, however, was sent in several days after May 1. Defendant, therefore, refused to accept the check and returned it to the plaintiff with the explanation that it came too late. Nevertheless the plaintiff, over the protest of defendant, raced his horses in the event. His horses having won, plaintiff now sues for the prize money. In denying recovery, the court reaffirmed the trial court's conclusion that time was the essence of the contractual relation.1

The court apparently found a contract between the plaintiff and the defendant, since the court refers to the "contractual relation" between the plaintiff and the defendant, and again, earlier in the opinion, the court speaks of "the meaning of the term employed in the contract between the parties in this action."2 Accordingly, recovery is denied, because time was held to be of the essence of the contract and tender of payment was made after the time stipulated.3 An examination of the case, however, tends to show that no contractual relation ever existed between the plaintiff and defendant, and that a more proper basis for denying recovery would have been the lack of plaintiff's acceptance of any offer by defendant within the time stated in the offer, and consequently no contract ever existed upon which the plaintiff could have based his recovery.4 The nomination blank promulgated by the defendant amounted to a general offer.5 The defendant, as offeror, was at liberty to prescribe any rules and regulations it wished before it could be bound by an acceptance of the offer.6 One of the requirements was that an acceptance of the offer should be manifested by payment of the entrance fee within the time prescribed in the offer.7 Cases are numerous which hold that an offer lasts only for the length of time set in the offer, if time is specified, and, if no time is specified, the offer will last for a reasonable time. An acceptance, to be of operative effect, must be timely made.8 It follows then, in the principal case the offer lapsed at the expiration of the time stated, and thereafter there could not possibly be a valid operative acceptance.9 In other words, defendant's offer gave to the offeree a power to accept and create a new relationship by the offeree's own volitional act.10 By the offer itself, a relationship was established which might be called the "power" relationship, or the relationship of "legal power in the offeree

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1 Baker et al. v. Western Horseman Co. (1935), 197 N. E. 697.
4 Williston, Contracts (1926), Sec. 64, Restatement of Contracts, Sec. 40; Corbin, Offer and Acceptance, and Some of the Resulting Legal Relations (1917), 26 Yale L. J. 183.
5 13 C. J., Sec. 68.
6 Williston, Contracts (1926), Sec. 53 and cases cited, Corbin, Offer and Acceptance, and Some of the Resulting Legal Relations (1917), 25 Yale L. J. 183, 13 C. J., Sec. 82.
7 Williston, Contracts (1926), Sec. 73, and cases cited; Restatement of Contracts, Sec. 52.
8 13 C. J., Sec. 83, 111, and cases cited, In re Aurora Gaslight, etc. (1916), 64 Ind. App. 690, 113 N. E. 1012.
10 Herndon v. Armstrong (1934), 148 Ore. 602, 38 P (2nd) 44, 13 C. J., Sec. 83 and cases cited.
and legal liability of the offeror,"12 who would have had no privilege to withdraw his offer or promise in case it had been properly accepted. The offeree then has a power to accept and create a contract, but the power is limited by the terms of the offer.13 Here the offeree had the power to create a contractual relationship by accepting in the manner stipulated, by submitting his entrance fee to the offeror during the time stated in the offer.14 The offeree had no power to create a contract by accepting after the power given him had elapsed.15 So in the principal case, it is submitted there was no contract of which time could be called the essence, but rather it was simply the case of an offer which was not duly accepted, thus imposing no obligation on the defendant.

H. B.

13 Williston, Contracts (1926), Sec. 25, Restatement of Contracts, Secs. 52, 59.
15 Restatement of Contracts, Sec. 35.