

## CONTRACTS BY CORRESPONDENCE

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### FORMATION — MUST ACCEPTANCE BE COMMUNICATED?

How does the law determine if and when a contract has been created? The traditional method has been to employ the terms "offer" and "acceptance". By considering the behaviour of the parties we can determine whether an offer has been made. An offer may be described as a promise by the offeror to do, not to do, or to give something, on certain conditions, leaving the option of acceptance or rejection of this offer to another party, the offeree. By this first step, the offeror indicates to the offeree his desire that a contract containing certain terms should arise between them. At this point, the intent and wish of one party only is known.

The offeror has thus created a power in the offeree. If the offeree rejects the offer by not acting on it, or by informing the offeror that he is not interested,<sup>1</sup> after a reasonable time we may consider the offer rejected or lapsed. If, on the other hand, there is a manifestation by the offeree that he wishes the proposed arrangement contained in the offer to ripen into a contract, we can say that he has accepted the offer. The manifested assent of the offeree shows that the parties are of one mind — there is offer and acceptance of the offer — hence the contract is formed.<sup>2</sup>

An offer must always be communicated to the offeree. Otherwise it can have no existence as an offer, for there must be an offer *to* someone.<sup>3</sup>

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<sup>1</sup>But cf. *Devarenes v. Halle et al*, (1881), 7 Q.L.R. 252 where the Court of Review held that an offer which did not specify any time limit, not having been withdrawn, could be accepted twelve days after it was made, notwithstanding a refusal by offeree in the interval.

<sup>2</sup>Given a clear offer specifying object, price, and an unequivocal acceptance, the contract is formed and the parties are bound. Because we are dealing with the problems surrounding time and place of formation it is assumed throughout this paper that whenever the terms 'offer' and 'acceptance' are used they refer to offers and acceptances defined by law as capable of leading to formation. The question as to whether a particular letter or telegram constitutes an offer or an acceptance is irrelevant to the subject matter under discussion. For cases dealing with this problem, see *Keating v. Dillon*, (1905), 28 S.C. 323; *Robinson v. The E. P. Charlton Co. Ltd.*, (1911), 39 S.C. 22.

<sup>3</sup>This has been generally assented to. It was well stated in the American decision *Fitch v. Snedaker*, (1868), 38 N.Y. 248, where Woodruff J. said: "How can there be assent or consent to that which a party has never heard?" The problem of communication of the offer may also arise in that rare but possible occasion where one party, by letter, offers to sell a certain object and asks for a certain sum, and the other party offers to buy that same object for the same price asked. The letters cross in the mail, giving rise to what is known as cross-offers. In the English decision

With acceptance we face a similar problem — can there be acceptance without communication? We have already seen that an offer has no existence if there is no communication. Assuming there can be acceptance without communication, is the contract formed immediately, or must the acceptance be communicated to the offeror before the perfection of the contract takes place?

Let us assume, for the sake of exposition, that an uncommunicated acceptance does perfect the contract. This means we have a lapse in time between formation and actual knowledge of such formation by the offeror. In this interval one of two things, or both, might conceivably occur. The offeror might withdraw his offer, or the offeree, having accepted, may find a better bargain elsewhere and, desiring to free himself from any ties with the offeror, may attempt by some speedier means of communication to inform the offeror that his letter of acceptance is to be disregarded.

Revocation by either party is intimately bound up with acceptance. If we set formation at a particular point in time during the period beginning with and including acceptance by the offeree and ending with knowledge of acceptance by the offeror, that point in time will determine how long it is open to the offeror to withdraw his offer. In other words, revocation can only take place as long as the contract has not been perfected. The time of acceptance, assuming it to be the time of formation, will determine when the offeree has done enough to bar the offeror from revoking.

Revocation is only one of the many issues relating to the time of formation. Place of formation can be, and frequently is, a very important factor as well.

Although every contract made by parties who are not face to face is a contract between absents, contracts between absents are not necessarily contracts by correspondence. A New York manufacturer, who contracts with a Montreal merchant through his agent or travelling salesman in Montreal, is concluding what can be called a contract between absents. Yet, the offer and acceptance both take place in the Montreal merchant's office.<sup>4</sup> The agent binds his absent principal, but he binds him in Quebec, i.e. the contract is created wholly in Quebec by two people who are present, although the parties to the contract are absents.

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*Tinn v. Hoffmann & Co.*, (1873), 29 L.T. 271, Blackburn J. said: "When a contract is made between two parties, there is a promise by one in consideration of a promise made by the other; there are two assenting minds, the parties agreeing in opinion and one having promised in consideration of the promise made by the other — there is an exchange of promises. But I do not think that exchanging offers would, on principle, be at all the same thing . . . The promise or offer being made on each side in ignorance of the promise or offer made on the other side, neither of them can be construed as an acceptance of the other." See also Valery, Jules, *Des Contrats par Correspondance*, Paris, (1895) at p. 202 where he points out that the concurrence of wills necessary for formation of a contract must be intentional and not fortuitous.

<sup>4</sup>Performance may take place outside Quebec if, for example, the terms of the sale are delivery F.O.B. New York; but as to formation, there can be no question of foreign jurisdiction and both parties may bring an action under article 94 C.P.

On the other hand, if the same manufacturer was to send an illustrated catalogue of his merchandise giving price and all other relevant details, or a letter offering a certain specific item, and the Montreal merchant was to mail, or telegraph, or telephone his acceptance, there would be a contract between absents, which would also be a contract by correspondence.

What, then, is it that makes the latter a contract by correspondence? It is simply the fact that the contract is concluded *directly between the absents via modes of communication uniquely designed to transmit the will of the parties with the greatest possible accuracy*<sup>5</sup>

The first example is not truly a contract between absents because the formation takes place between presents. The agent does not simply transmit his principal's will, but, within the limits of his power to bind, the agent's expression of will on behalf of the principal creates a contract. Indeed, the contract is *formed* by two people negotiating face to face and is subject to the general rules of contract. Those problems which characterize contracts by correspondence, (e.g. time of formation, place of formation, jurisdiction, etc.) can never arise in connection with the formation of such a contract. The problems surrounding contracts between presents and those surrounding contracts by correspondence are different, and we should not and can not apply the same principles to both *insofar as communication is concerned*. The fundamental distinction is the absence of any intermediary between the contracting parties when the contract is one between presents. The agent can never be an intermediary because he "is" the party he represents.

Vipond,<sup>6</sup> in his penetrating criticism of the Supreme Court judgment in *Charlebois v. Baril*,<sup>7</sup> has not made this distinction and he says:

An offer may be sent by mail and the contract becomes complete and binding from the moment the offeree dispatches a telegram of acceptance at the telegraph office... Likewise, as soon as the offeree may deliver a letter of acceptance to the representative of the proposer, especially sent for the purpose of receiving the reply, then from that moment... both parties are bound. In both cases the contract is negotiated by correspondence and the acceptance of the offer automatically binds the parties.

Both contracts are *negotiated* by correspondence and both bind from the moment of acceptance. The statement is true as far it goes, but it creates an erroneous impression. The second contract which Vipond mentions binds immediately on acceptance for the same reason that a contract between presents binds immediately when acceptance is given — because giving the letter to a "representative... especially sent for the purpose of receiving the reply" is

<sup>5</sup>Valery, *op. cit.*, p. 1. See also Planiol & Ripert, *Traité Pratique de Droit Civil Français*, (1952), Vol. 6, No. 155, where the authors state that a contract made by the representative of one of the parties in the presence of the other must be treated as a contract between presents since this is a consequence of the idea of representation.

<sup>6</sup>Obligations Arising from Contracts, (1945), 5 R. du B. 443 at p. 475.

<sup>7</sup>[1928] S.C.R. 88.

the same as if the offeree were to hand his acceptance to the offeror himself. By grouping these two contracts together, Vipond is led to accept the "Agency" theory which was fully expounded in *Charlebois v. Baril* and has, in turn, led to a restriction of the rule laid down in *Magann v. Auger*.<sup>8</sup>

Thus, one must keep in mind that what is meant when the term "Contracts by Correspondence" is used, is a contract concluded *directly* between the absents via such modes of communication as mail, telegraph, etc.

## THE THEORIES ADVANCED TO DETERMINE THE TIME OF FORMATION

The offer is a power created by the offeror and he can make this power as broad or as narrow as he wishes. He may state in the offer that acceptance will not bind until it comes to his notice, or, on the other hand, he may state that as soon as the offeree performs a certain act the offer will be accepted. Where the offeror has been specific and express the question of time of formation can rarely, if ever, be subject to uncertainty. But where, as in most cases, he does not specify any definite method of formation or communication, we must determine when formation takes place.

At this point we shall examine the various theories which have been advanced to pinpoint the moment of formation, and later we shall ascertain the answer to the problem given by the positive law in Quebec. The different theories advanced may be divided into two main categories:

### 1. *Declaration Theories:*

- (a) Declaration '*strictu sensu*'
- (b) Expedition
- (c) Reception

### 2. *Information Theory:*

1. *Declaration Theories:* When the two parties are dealing face to face, the offeror brings the offer to the knowledge of the offeree. The latter manifests his intention to accept the offer. The concurrence of wills required for the conclusion of a contract exists as soon as the party has obliged himself, i.e. accepted. Both have consented to the creation of a *lien de droit* between them — a contract is formed.

(a) Declaration '*strictu sensu*': In contracts by correspondence, as soon as the will of the offeree finds itself in the presence of the express and existing will of the offeror, and adheres to it in a manner equally express, the consent of the two parties is realized and their wills take reciprocal possession of

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<sup>8</sup>(1901), 31 S.C.R. 186.

one another. The agreement is perfect from that instant. Such is the opinion of those who hold the theory of Declaration '*strictu sensu*'.<sup>9</sup>

The consent of the offeree must of course be manifested, for in law, we deal with outward acts, not feelings. Some have chosen the mailing of a letter, or the dispatch of a telegram, as definitive acceptance.<sup>10</sup> But these acts are only two of many which are equally definitive. Consider the offeree who, immediately upon reading the offer, orders raw material of the nature and quantity necessary to satisfy the offer. Or, take the case where the offeree makes certain entries in his books,<sup>11</sup> or calls in a partner and tells him the firm is going to accept the offer. Another illustration would be dictating a letter of acceptance and signing it.

All of these examples, given surrounding circumstances which validate them, might well be considered as "acceptances". Unfortunately, they all take place at different times. While each one taken separately is truly an acceptance, a judge would have a merry time rummaging through the facts of each case to find when that particular offeree accepted. More important would be the terrible uncertainty on both sides as to when the contract was actually formed. There is no guiding principle, no definitive time which determines formation.

(b) Expedition: The acceptance of the offer binds, only now we select that one point in time which is common to *all* acceptances — the time of mailing a letter or dispatching a telegram, etc.

The offeree receives an offer, considers it, writes or dictates a letter of acceptance, signs it and *mails it*. He has performed a series of acts which require time and careful thought. He has made a conscious effort and done something positive to 'close the deal'. Is not the mailing a true, final, and definitive acceptance?

We do not have to examine the facts to find that point in time, that event which in this man's method of operation can be considered as final and binding. The posting of a letter, or the dispatch of a telegram, are easy to prove. They are recorded and preserved by an impartial third party. Neither party can "move" the time of formation backward or forward to suit his convenience.

Thus, a clear cut acceptance is easily discernible and easily proved. It is the final act by the offeree, an act which can properly be held to be the last connecting link forming a solid *lien de droit* between the parties. The mailing is manifest; it is final; it is unequivocal.

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<sup>9</sup>Duranton, Vol. 16, No. 45; Demolombe, *Obligations*, 1, No. 75; Story, *Commentaries on the Conflict of Laws Foreign and Domestic*, Boston, 3rd ed., (1846) Ch. 8, No. 285. For a detailed and comprehensive list of the adherents of the various theories see Valery, *op. cit.*, pp. 128-133.

<sup>10</sup>Such is the contention of the Expedition theory.

<sup>11</sup>*Borgfield v. La Banque d'Hochelaga*, (1905), 28 S.C. 344, where the court held that an acceptance of an order by correspondence, although noted on the company's books, is not completed until the letter of acceptance is posted.

No one can deny that it is manifest, but there are still those who do not view the posting of a letter of acceptance as final. Until it reaches the offeror the offeree can, in fact, nullify it in one of two ways: either by informing the offeror by a speedier means of communication that he no longer desires the offer and he wishes to retract his acceptance, or by withdrawing his letter from the post.

Thus the offeror can change his mind and withdraw his acceptance by speedier means. *But why should he be able to change his mind?* He has considered the proposal and taken definite action. Surely the letter can be taken as a valid acceptance. In truth, if the mailing of the letter is considered as the acceptance which forms the contract and thus binds both parties, there is no possibility for the offeree to change his mind, nor need there be. The argument is fallacious, for it assumes what it is attempting to prove: merely mailing the letter of acceptance is not binding because the offeree can, *in fact*, change his mind until the letter arrives or comes to the knowledge of the offeror. Therefore, if he can change his mind up to the time of arrival then the letter is not binding. To put it more succinctly: *assuming* a letter of acceptance will not be binding until receipt by the offeror, it *will not* be binding until that time.

This error, which some claim is based on common sense, arises from a failure to distinguish between the "world of fact" and the "world of law". *Factually*, no one can deny that the offeree can cable or 'phone before his letter arrives and inform the offeror that he has changed his mind. But *legally*, once he has accepted the offer he is bound. As Mathieu J. said in *Hislop v. Bernatz*:<sup>12</sup>

Deux choses l'une: ou le contrat est parfait, ou il ne l'est pas. S'il est parfait par la mise de la lettre d'acceptation à la poste, il ne peut pas être révoqué par une dépêche contraire.

(c) Reception: The adherents of this theory state that the contract is formed only when the letter containing the offer is received by the offeror. They argue that only on receipt is the acceptance truly definitive for then the offeree cannot withdraw his acceptance.

We must note that receipt in this context is receipt *in fact*. The offeror need not know the contents of the letter or even that it has arrived.

Although this theory eliminates the possibility of withdrawal of the acceptance, the exact time of reception is difficult to establish. The offeror might even claim that he never received the letter.<sup>13</sup>

**2. Information Theory:** With this theory we have returned to the classical situation. The written word must be seen just as the spoken word is heard. The acceptance contained in a letter or telegram is of no legal consequence

<sup>12</sup>(1901), 3 P.R. 451 at p. 459.

<sup>13</sup>This would not be true if the acceptance was sent by registered mail, but as a rule, this method is not used.

until it comes to the knowledge of the offeror. Only when he knows that his offer has been accepted is the contract formed.

This approach seems quite reasonable, yet when it is applied to contracts by correspondence it creates a bias in favour of the offeror. He knows when the contract has been formed but the offeree is left in the dark. The offeree does not know when his acceptance came to the knowledge of the offeror. Should not he have knowledge of the offeror's "knowledge"?

This problem was aptly stated in an English decision of one hundred and fifty years ago:<sup>14</sup>

For if the defendants were not bound by their offer, *when accepted by the plaintiff*, till the answer was received, then the plaintiffs ought not to be bound till after they received notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*.

If we follow this line of thought (i.e. that both parties must know) to its logical conclusion we find the real solution would be to have both parties know simultaneously that the contract has been formed.

Were knowledge by each party that the contract has arisen essential, it would be necessary to reach the logical but absurd conclusion that the parties could not contract unless in each others' presence, because where the contracting parties are not together it is impossible for each to know that the contract has arisen at the precise point it arises, the knowledge of at least one of the parties must come at a time subsequent to the origin of the contract.<sup>15</sup>

Therefore, if we accept this reasoning, contracts by correspondence are no longer possible and cannot ever come into existence.

### QUEBEC JURISPRUDENCE ON FORMATION

Having examined briefly the various theories advanced to solve this problem we can now consider the jurisprudence. The problems involved in contracts by correspondence have not led to an excessive number of cases. Since 1863 there have been some thirty-odd cases and they may be grouped conveniently into three periods:

1. Information
2. Expedition
3. "Agency"

In each period a particular time was selected as the time of formation. In determining that time the emphasis shifted. First the question was one of deciding amongst the different theories. Later the judicial mind sought justification for the theory which had been chosen. As a result of this attempt to justify, the legal approach tended to become involved in pure theory and appeared to lose sight of the practical aspects of the law as defined and applied up to that point.

<sup>14</sup>*Adams v. Lindsell*, 1 Barn. & Ald. 681.

<sup>15</sup>Ashley, *Formation of Contracts Inter Absentes*, (1902), 2 Columbia L. Rev. 1.

### 1. Information

Beginning with *Clarke v. Ritchie*<sup>16</sup> in 1863, until 1901, the Quebec courts adhered to the Information theory. At first the treatment of the problem was simple and direct. In dealing with an order made in Toronto and sent to Montreal, where a Toronto merchant alleged that because of his order the whole cause of action had not arisen in Montreal, the court had this reply:

The defendant in fact could not have given the order at Toronto because his order was a mere piece of waste paper until it had been executed here (Montreal). The order was nothing at all till it had been accepted here.

The subject was treated in greater detail in *Underwood v. Maguire*,<sup>17</sup> where the court considered the opinion of many celebrated French jurists who support the Information theory.

In his dissenting opinion, Bosse J. cited two reasons advanced for adhering to this theory: (a) the letter merely represents the spoken word; as the spoken word is heard so the written word must be seen.<sup>18</sup> (b) concurrence of wills only occurs when the offeror knows of the offeree's acceptance; till then we have merely a co-existence of wills.<sup>19</sup>

However, the learned judge also cited Marcadé,<sup>20</sup> who opposes the Information theory with the same objection raised in the English decision, *Adams v. Lindsell*<sup>21</sup> — that letters would keep going back and forth between the parties to inform each other that they are bound. In view of the confusion and delay such a situation would engender, and for the sake of commercial expediency, Bosse J. decided in favour of the Expedition theory, with the proviso that the offeree did not notify the offeror of his withdrawal between the time of posting and time of arrival. His opinion was not adopted in the later case of *Magann v. Auger*.<sup>22</sup> However, his justification for adopting time of dispatch as time of formation, in view of commercial expediency, was cited with approval.

Wurtele J., who spoke for the majority of the court, in *Underwood v. Maguire*, quoted the same authors as Bosse J. and also cited certain articles of the Civil Code as concrete instances that the Information theory was truly the approach adopted by our legislators. Thus, having combined the theoretical arguments

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<sup>16</sup>(1863), 9 L.C.J. 234. This case was followed by *McFee v. Gendron*, (1889), M.L.R. 5 S.C. 337; *Underwood v. Maguire*, (1897), 6 Q.B. 237; *Beaubien Produce & Milling Co. v. Richardson et al*, (1901), 3 P.R. 464; *Hislop v. Bernatz*, (1901), 3 P.R. 451; *Reeves v. McCulloch*, (1902), 4 P.R. 285. In almost all these cases a declinatory exception was made and thus the issue of place of formation arose.

<sup>17</sup>*Supra*, footnote 16.

<sup>18</sup>Troplong, *Vente*, Vol. 1, No. 22 *et seq.*

<sup>19</sup>Laurent, Vol. 15, No. 479.

<sup>20</sup>Vol. 4, Art. 1108, No. 2.

<sup>21</sup>*Supra*, footnote 14.

<sup>22</sup>(1901), 31 S.C.R. 186.



and the positive enactments, he felt that the Information theory was the one which must be adopted.

The attempt to prove that the Information theory must be adopted because it is applied in the Civil Code was also made by Mathieu J. in *Hislop v. Bernatz*<sup>23</sup> and by Dorion J. in *Association Pharmaceutique de la Province de Québec v. T. Eaton Co.*<sup>24</sup> This argument has been widely debated in France. It has been carefully analyzed by Mazeaud<sup>25</sup> and his discussion applies equally well to Quebec.<sup>26</sup>

What is the basis for the assertion that the Information theory is the one which our codifiers adopted?

In dealing with gifts *inter vivos*, the Code expressly states that such gifts "do not bind the donor nor produce any effect until after they are accepted."<sup>27</sup> As for the kind of acceptance necessary: "If the donor be not present at the acceptance, they (i.e. the gifts) take effect only from the day on which he acknowledges or is notified of it."<sup>28</sup> There can be no question that acceptance must be communicated. However gifts are made by a specific type of contract which is surrounded with a rigorous formalism.

Mathieu J.<sup>29</sup> has attempted to answer the objection that Gifts are "contrats solennels" by saying that we are confusing solemnity with the juridical act, which must be expressed in solemn form. But if a gift is not in the proper "form" it has no existence as a juridical act.

A second instance where the Code deals specifically with a communicated acceptance is in determining whether or not a "stipulation pour autrui" is revocable: "he who makes the stipulation cannot revoke it, if the third person have signified his assent."<sup>30</sup> The binding force of the stipulation depends on whether or not the acceptance has been "signified".

Wurtele J. felt that these positive enactments were clear and express indications of what the codifiers had in mind but Mathieu J. was dubious

<sup>23</sup>*Supra*, footnote 16.

<sup>24</sup>(1933), 50 K.B. 482.

<sup>25</sup>*Leçons de Droit Civil*, Paris, (1955), Vol. 2, p. 114 ff.

<sup>26</sup>Both articles 787 C.C. and 1029 C.C. have their source in the Code Napoléon; articles 932 and 1121 respectively.

<sup>27</sup>Article 787 C.C.

<sup>28</sup>*Ibid.*

<sup>29</sup>In *Hislop v. Bernatz* at p. 458. The codifiers, in their fifth report at p. 155 make the following statement about Gifts: "It is believed that the exposition of the subject will be found to agree with the actual law which restrains the freedom of gifts a little more than that of contracts in general", and later on the same page: "Article 13 [art. 766 C.C.] is merely an assimilation of gifts to other contracts as regards the capacity of acquiring possessed by corporations." Both these statements point to the fact that in the minds of the codifiers, gifts are a special type of contract, *outside* the law of contracts in general.

<sup>30</sup> Article 1029 C.C.

about the force of article 1029 C.C. It does not specify to whom acceptance must be signified, so at least it does not conflict with the article on Gifts.

One can reasonably object to the suggestion that the notice of acceptance necessary in a "stipulation pour autrui" is really outside the issue: a "stipulation pour autrui" does not consist of an *offer* made by the stipulator to the third person who *accepts* it; a direct right exists as soon as the stipulation is made. The acceptance merely *consolidates* an already existing right, it does not *create* a new one.<sup>31</sup>

Both judges mentioned article 1701 C.C., the first article in the section of the Code that deals with Mandate. It describes the nature of the contract and states that the acceptance of the mandatory "may be implied from the acts of the mandatory, and in some cases from his silence." Thus we do have an acceptance which need not be communicated to be valid. This, however, is a special case. "Il nous semble que la réponse se trouve dans la nature particulière du mandat."<sup>32</sup> The agent must act immediately without waiting for acceptance and the acts of the agent can subsequently be ratified. Mandate is really an exceptional contract and we must not generalize its application to the whole field of contract.

Articles 1025 and 1026 C.C.<sup>33</sup> deal with one of the *effects of formation* — the transfer of ownership and when it takes place. If the thing is certain, the transfer takes place simultaneously with the perfection of the contract. On the other hand, when the thing is uncertain the transfer of ownership does not take place until two conditions have been fulfilled. One of these conditions is that the buyer must be "legally notified". Notification here has nothing to do with formation.

Dorion J.<sup>34</sup> pointed to the fact that article 1026 C.C. made notification imperative, and in answer to those who said that this was really an exception to the general rule he stated:

Mais une disposition particulière ne crée une exception que lorsqu'elle s'écarte de la règle générale... Or, où prend-on la règle générale qui engage une personne par l'effet d'une déclaration qui ne lui est jamais parvenue?

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<sup>31</sup>Mazeaud, *op. cit.*, footnote 25, at p. 116. This notion of an acceptance merely consolidating an existing right was raised in the plea of *Dunlop v. Higgins*, (1848), 1 H.L.C. 381. Had counsel for the appellant in that case succeeded, the law on contract by correspondence might have followed quite a different line of development from the one it actually took.

<sup>32</sup>Mathieu J. in *Hislop v. Bernatz*.

<sup>33</sup>1025: A contract for the alienation of a thing certain and determinate makes the purchaser owner of the thing by the consent alone of the parties, although no delivery be made.

1026: If the thing to be delivered be uncertain or indeterminate, the creditor does not become the owner of it until it is made certain and determinate and he has been legally notified that it is so.

<sup>34</sup>In *Association Pharmaceutique de la Province de Québec v. T. Eaton Co.*, *supra*, footnote 24.

He then proceeded to cite article 1029 C.C. as an illustration of the fact that notification must be made.

It is respectfully submitted that the word "engage" is not appropriate in this context. As illustrated above, 1026 C.C. deals with the time of transfer of ownership and not with the question of whether or not one party is "obliged" toward the other. On the issue of communication of acceptance we can derive little or no guidance from these articles.

Thus, until the year 1899 an acceptance had to be communicated to the offeror.

## 2. Expedition

In 1899 the Supreme Court decided the case of *Magann v. Auger* and the result was a complete reversal of the law on contract by correspondence. We must consider this case carefully because subsequent interpretation of it has brought the law to where it stands today.

Many references, both to decisions and learned texts, were cited by both sides. After considering these references the Court had this to say:<sup>35</sup>

If counted merely, the respondent's contention that the question should be answered in the affirmative would seem to have a majority [of references] in its favour. But if the reasoning is weighed, the question [must acceptance be communicated] should we think be answered in the negative.

Taschereau J. then raised the objection to communication which we saw raised earlier,<sup>36</sup> that if acceptance must be communicated so the acknowledgment of acceptance must also be communicated, and so on *ad infinitum*. Thus the Information theory was not the answer. On the other hand, the Expedition theory was undoubtedly the most desirable from the commercial point of view, and also, the law in Quebec would then be similar to the law in England and in the rest of Canada. This similarity of law was extremely important in view of the increased trade and commerce that was developing, both inter-provincially and internationally. The learned judge clearly stated that *Underwood v. Maguire* was overruled and held that:

...in the Province of Quebec, as in the rest of Canada, in negotiations carried on by correspondence, it is not necessary for the completion of the contract that the letter accepting the offer should actually have reached the party making it, but is complete on the mailing of such letter...

Note that the Court spoke of completion of the contract, and did not refer to or imply communication or presumed communication.

To sum up, the decision was based on three points:

- (1) the reasoning of the adherents to the Expedition theory is superior;
- (2) the necessity for communication leads to an endless chain of communications in order that both parties be bound, thus effectively crippling commercial operations;

<sup>35</sup>Per Taschereau J. at p. 192.

<sup>36</sup>In *Adams v. Lindsell*, *supra*, footnote 14, and by Bosse J. in *Underwood v. Maguire*, *supra*, where he cited Marcadé to the same effect.

(3) the law would be uniform throughout Canada and the same as that in England.

It is unfortunate that in choosing the Expedition theory the learned judge was not more specific as to the reasons for his choice. Because he merely said that the reasoning was superior, but did not explain why, a subsequent decision<sup>37</sup> was able to read into this judgment a justification for the selection of the Expedition theory which was never intended. However, until 1928, the Quebec courts followed the instant case and applied it correctly.

This case was followed immediately as it came to the attention of the Quebec judiciary. In *Ward v. Johnson*,<sup>38</sup> dealing with an acceptance by telegram, decided some six months after *Magann v. Auger*, Dorion J.<sup>39</sup> in the Court of Review made the following statement, after mentioning the judgment of the court in *Underwood v. Maguire, Beaubien Produce & Milling Co. v. Richardson et al.*,<sup>40</sup> etc.: "Nonobstant ces décisions je me sens lié par le jugement de la Cour Suprême, re *Magann v. Auger*."

In *Schmidt v. Crowe*,<sup>41</sup> which came just a few months after the *Ward* case, the Court held:

That a contract by correspondence is made at the place where the acceptance is sent, by letter or telegram, to the party making the offer.

This case illustrates that the acceptance is valid when dispatched, whether it is a letter or a telegram, because it is the fact that a definitive acceptance is dispatched. The mode of communication used for the acceptance is not affected by the mode of communication used for the offer.

Subsequent cases<sup>42</sup> affirmed *Magann v. Auger* and applied it. In one of these cases,<sup>43</sup> Carol J.<sup>44</sup> suggested that since the law was silent and did not specify when formation took place in contracts by correspondence, we must look to the *droit commun* to determine how contracts by correspondence are perfected. He concluded that once the letter of acceptance was posted, the offeree was definitely bound. (The court did not apply the holding of *Magann*

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<sup>37</sup>*Charlebois v. Baril*, [1928] S.C.R. 88.

<sup>38</sup>(1902), 5 P.R. 123.

<sup>39</sup>*Ibid.*, at p. 123.

<sup>40</sup>*Supra*, footnote 16.

<sup>41</sup>(1902), 5 P.R. 361.

<sup>42</sup>*Timosi v. Palangio*, (1904), 26 S.C. 70; *Borgfield v. La Banque d'Hochelega* (1905), 28 S.C. 344; *United Shoe Co. v. Caron*, 11 R. de J. 59; *Beaudoin v. Watterson*, (1910), 19 K.B. 530; *Butler v. Mechanical Equipment Co. of Canada Ltd.*, (1912), 22 K.B. 199, also reported at 7 D.L.R. 77, affirming (1911), 13 P.R. 410; *Bell et al v. Chase & Co.*, (1916), 22 R.L.N.s. 438; *Laferte v. Martel*, (1917), 19 P.R. 249; *Gagnon v. Labrecque*, (1919), 25 R.L.N.s. 376. In addition, see the following cases from other provinces holding the same as above but not citing *Magann v. Auger*: *Horsenail v. Shute*, 27 Brit. Col. Rep. 474, in Court of Appeal; *Clark v. Barrick et al* [1950] 1 D.L.R. 260; *R. v. Steel Co. of Canada*, [1952] Ex. C.R. 200.

<sup>43</sup>*Gagnon v. Labrecque*, *supra* footnote 42.

<sup>44</sup>*Ibid.*, at p. 380.

*v. Auger* here because the so-called "acceptance" had changed conditions in the offer and hence could not be considered a true definitive acceptance.)

In *Beaudoin v. Watterson*,<sup>45</sup> a reply had been requested by telegram and the offeree had answered by mail. The offeror did not raise this point in his pleading. Archambault J.<sup>46</sup> mentioned this fact and pointed out that since the offeror had specifically requested a reply by telegram, the offeror could have pleaded the delay in reply.

In this case, in a dissenting judgment, Cross J.<sup>47</sup> pointed out that where the offeror had expressly indicated a mode of acceptance, a reply by some other mode would only bind when it arrived and not when it was posted — but only when there is a definite specification, e.g. "Please answer by telegram."

In only one case<sup>48</sup> decided during this period was an attempt made to explain *Magann v. Auger*. Archibald J.<sup>49</sup> stated that "two wills must agree upon the same thing, at the same time, and together." We have already suggested that this reasoning cannot be applied to contracts by correspondence because the two parties can never know simultaneously that the contract is formed. The learned judge then continued and said of *Magann v. Auger*:

That was a judgment overruling the jurisprudence of our own court of appeals which had existed up to that time; but that judgment was founded upon the consideration that when the Post Office receives a letter addressed to a person it is the agent of that person, and the letter is supposed to be in the possession of that person by his agent. The sender of the letter has lost all control over it and nobody but the person to whom it is addressed can receive it.

### 3. "Agency"

The Expedition theory was applied in Quebec law as the result of *Magann v. Auger*. This approach was maintained in both the trial court and the provincial appeal court in *Charlebois v. Baril*.<sup>50</sup> The facts were quite simple. Charlebois made an offer in writing, to purchase some property that belonged to Baril. About ten days after the offer was made, Baril mailed an acceptance to Charlebois which the latter claimed he never received. About three weeks after he made the offer, and also after the acceptance was mailed, Charlebois mailed a letter containing a withdrawal of his offer.

Baril formally instituted an action against Charlebois on the basis of the contract created by his acceptance, praying that Charlebois perform the contract or pay damages. In both Superior Court and Appeal Court, the main issue was the question of whether the plaintiff was entitled to either specific performance or damages. The issue as to formation was never doubted — the contract

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<sup>45</sup>(1910), 19 K.B. 530.

<sup>46</sup>*Ibid.*, at p. 535.

<sup>47</sup>*Ibid.*, at p. 538.

<sup>48</sup>*Martin v. Joly*, (1913), 44 S.C. 134.

<sup>49</sup>*Ibid.*, at p. 139.

<sup>50</sup>(1926), 64 S.C. 421; affirmed in (1927), 43 K.B. 295.

was considered formed when acceptance was posted, as laid down in *Magann v. Auger*.

Baril proved to the trial court's satisfaction that he had mailed the letter. The court was somewhat less satisfied with Charlebois' claim that he never received the letter of acceptance: "Les objections de défendeur ne sont pas sérieuses; c'est un prétexte que le défendeur prend pour essayer de se soustraire à son obligation de passé titre."<sup>51</sup>

On appeal, the decision of the trial court as regards formation was affirmed. As Lafontaine C.J. said,<sup>52</sup> "Mais comme la question du moment de la formation d'un contrat par correspondance se trouve définitivement décidée par le jugement de la Cour suprême dans la cause de *Magann v. Auger*, il serait bien inutile de recommencer la discussion de cette question." Rivard J. entered a dissenting opinion but on other grounds; he too affirmed the holding in *Magann v. Auger*.

In the Supreme Court,<sup>53</sup> however, things took a different turn. The judgment of the court, which was very brief, was delivered by Anglin C.J.C. He set out the facts and then continued:

The courts below, while they undoubtedly cast serious doubt on the defendant's denial of the receipt of the plaintiff's acceptance, refrained from making a finding on this question of fact, no doubt deeming it unnecessary because they regarded the judgment of this court in *Magann v. Auger* as determining that the mailing of the plaintiff's letter of acceptance to the defendant constituted communication of it to him.

With great respect this is an erroneous view of the scope and effect of the decision of this court. That case was one of contract by correspondence, i.e., the offer was sent by mail and that was held to constitute a nomination by the sender of the post office as his agent to receive the acceptance for carriage to him. The civil law of Quebec was held to be the same in this regard as the law of England. . . . But this decision has no application to a case where the offer is communicated, as here, not by mail, but by another means. To make a contract the law requires communication of offer and acceptance alike either to the person for whom each is respectively intended, or to his authorized agent.

Here there was nothing to constitute the post office the defendant's agent and a finding of actual receipt by him of the plaintiff's acceptance was, therefore, essential. The burden of procuring such a finding was upon the plaintiff. Without it he cannot succeed.

The learned judge, in distinguishing between this case and *Magann v. Auger*, stated that the latter dealt with a "contract by correspondence, i.e., the offer was sent by mail and that was held to constitute a nomination by the sender of the post office as his agent to receive the acceptance for carriage to him." We can only apply the doctrine of *Magann v. Auger* to a case where both offer and acceptance are by mail. However, we must note that *Magann v. Auger* considered the problem as one of when completion takes place and *did not* deal with communication or "agency".

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<sup>51</sup>At p. 424 of the Superior Court judgment.

<sup>52</sup>At p. 310 of the Appeal Court judgment.

<sup>53</sup>*Supra*, footnote 37.

Anglin C.J.C.'s remarks immediately following indicate that he did not intend so narrow an interpretation, because he stated that the offer may be communicated to the offeror *or* his authorized agent. Hence if the offer is communicated to an authorized agent, whether or not it is the same means of communication, the contract will be formed.

Just as the courts had followed the holding in *Magann v. Auger* for some 28 years, so they followed this new interpretation of it.

In a case decided in the Quebec Court of Appeal very shortly after *Charlebois v. Baril*, we find this statement by Letourneau J.:<sup>54</sup>

Mais il faut rappeler à l'intimée que cette jurisprudence qu'elle invoque pour prétendue qu'une mise à la poste est suffisante, ne reçoit pas d'application dans le cas qui nous occupe: *Magann v. Auger*, telle que récemment interprétée par la Cour suprême du Canada dans *Charlebois v. Baril*, nous oblige de dire que cette mise à la poste ne peut suffire que si l'offre est venue par cette intermédiaire de la poste.

The offer had been made by messenger and the acceptance was mailed in Quebec. The place of formation was of crucial importance because the appellant had withdrawn an offer before the expiration of the time he had granted to the offeree. Had the contract been formed in Quebec, Quebec law would apply and the offeror could not have withdrawn his offer with impunity. On the other hand, if the contract was formed in Ontario, by that law an offer could always be revoked (so long as there had been no consideration) before expiration of the time allotted. Applying the interpretation of Anglin C.J.C. to these facts, the only possible way to achieve acceptance would be to send the answer by messenger. Mailing a letter of acceptance — the logical, usual and practical method for most dealings — would not, and in fact did not, suffice.

Some 10 years later in *Premier Trust Co. v. Turcotte*,<sup>55</sup> *Charlebois v. Baril* was again applied with the following result: where an offeror had mailed a catalogue and asked the offeree to "reply at once" and the offeree wisely telegraphed his acceptance, the Court held that such an acceptance "s'en est fait *non par la poste mais par telegramme*, c'est à dire *par l'entremise d'un autre agent* choisi par l'acceptant, le contrat se trouve conclu à l'endroit où l'acceptation est parvenue à l'offrant."

How is one to reconcile the holding with the judgment of the court in *Schmidt v. Crowe*,<sup>56</sup> where the Court held that the contract was made where

<sup>54</sup>*Renfrew Flour Mills v. Sanschagrin*, (1928), 45 K.B. 29 at p. 36. See *supra*, the remark by Dorion J. in *Ward v. Johnson* to the same effect.

<sup>55</sup>(1938), 64 K.B. 401. The same reasoning was applied in the following cases: *Allaire v. Lamontagne*, (1934), 72 S.C. 69; *Gagnon v. La Foundrie de St. Anselm Ltd.*, (1933), 36 P.R. 40; *Poulin v. Regent Lumber*, [1951] P.R. 188.

<sup>56</sup>*Supra*, footnote 41.

acceptance was sent, by letter *or* telegram, which is also based on *Magann v. Auger*?

The answer lies in the new element introduced by Anglin C.J.C. in *Charlebois v. Baril* — “agency”. That medium which the offeror uses is his agent to receive communication; communication to his agent has the same effect as communication to him personally. The contract can then be formed by communication to his authorized (i.e., the mode he uses to send the offer) agent. The contract then is made by communication.

It is true that *Magann v. Auger* laid down that the contract is complete on mailing, but it is respectfully submitted that it *did not provide for completion of the contract for the reason that the acceptance was then deemed communicated*.

The word or even the notion of communication was not raised and certainly nowhere was agency mentioned or even suggested. This fact is of utmost importance, for Anglin C.J.C. stated explicitly that the law required communication to offeror or his agent, and he also said that the only reason a contract could be completed on mailing was because the acceptance was *communicated* to the agent of the offeror. In other words, the Expedition theory applies, but not because dispatch constitutes a definitive acceptance and hence there is consent and a completed contract exists, but because dispatch really constitutes communication to the agent. Also, since the agent has received the letter it is just as if we have communication to his principal — the offeror. This is, in fact, the Reception-Information theory with the concept of reception being extended to the Post Office or mail box in the place where the offeree is. The “agency” is necessary because communication is necessary, and thus we are back with the Information theory — the very theory which the Supreme Court clearly overruled in *Magann v. Auger*!

The writer respectfully submits that this analysis of the judgment in *Charlebois v. Baril* is a logical consequence of the judgment. The cases cited above which followed this decision substantiate this. The *Premier Trust* case affords a pertinent illustration: a telegraphed acceptance to a mailed offer will not bind on dispatch because the offeree *chose* his own agent; if the acceptance had been mailed then it *would* bind on dispatch because it was communicated to his agent — hence we apply the Information theory. However, in this latter instance it “looks like” the Expedition theory. This is the result of reasoning from and insisting on communication.

We see then that this paradoxical result is achieved because we have attempted to *explain* the Expedition theory by “Agency”. If we can show that the notion of “agency” has no application here, and is, in fact, erroneous, it follows that we cannot use it as the logic or rationale behind the Expedition theory.



"AGENCY": ITS SOURCE AND  
A CRITICAL EVALUATION

It is submitted, with all due respect, that, as illustrated above, nowhere in the judgment of *Magann v. Auger* did the court mention "agency". It is true that in *Martin v. Joly*<sup>57</sup> the courts did interpret *Magann v. Auger* in the same way, but this judgment was never followed or referred to and no reference was made to it by Anglin C.J.C.

That the "agency" notion is not uncommon as an explanation is true, but one must look for the source. Its omission in *Magann v. Auger* is especially noteworthy because it was quite definitely referred to in the pleadings of that case by counsel for Respondent, who cited Addison's book on contracts, where *Household Fire Insurance Co. v. Grant*<sup>58</sup> — a celebrated English case on contracts by correspondence — is referred to.

This approach had little currency in France. The dispute there was based on the merits of one theory over the other and the question usually turned quite properly on the nature of acceptance. "Agency" was considered only in determining precisely what was the function of the post office in transmitting the offer and acceptance.<sup>59</sup>

In common law jurisdictions the approach is more pragmatic<sup>60</sup> and because the *Household* case can be said to be based on the same grounds as *Charlebois v. Baril*, it is respectfully submitted that it was the former case on which the learned judge in the Supreme Court based his decision. For that case held that in order for a contract to be formed there must be communication, and this is achieved if we treat the post office as agent of both parties.

In view of the fact that the English decision is undoubtedly the primary source of the "agency" doctrine, it appears worth while to examine how this notion was evolved. At the same time we shall examine the manner in which the English law, in regard to contracts by correspondence, was established.

On the facts, the decision in *Household Insurance v. Grant* seems at first

<sup>57</sup>*Supra*, footnote 48.

<sup>58</sup>(1879), 4 Ex.D. 216.

<sup>59</sup>Valery, *op. cit.*, at p. 71, points out that those who consider the relationship between the sender and the post as one of Mandate are mistaken, since Mandate (or "Agency") usually has the accomplishment of some juridical act as its goal. This is not the usual service rendered by the post. It is surely closer to the factual situation to characterize this legal relationship as one of Lease and Hire of Service. See also Dorion J. in *Association Pharmaceutique de la Province de Quebec v. T. Eaton Co. Ltd.*, (1933), 50 K.B. 482, to the same effect.

<sup>60</sup>The English authors and judges never deal with the problem of formation, or offer and acceptance, in terms of theories. Cheshire and Fifoot, *The Law of Contract*, at p. 30, state that "the rules which the judges have elaborated from the promise of offer and acceptance are neither rigid deductions of logic nor the inspiration of natural justice. They are only presumptions, drawn from experience, to be applied insofar as they serve the ultimate object of establishing the phenomena of agreement."

somewhat startling. The defendant, Mr. Grant, had applied for shares in the plaintiff company. The company allotted the shares to Grant and duly addressed and posted a letter accepting his offer and notifying him of the allotment. The letter was never received by him. It was held by Baggallay and Thesiger L.J.J., Bramwell L.J. dissenting, that the defendant was a shareholder.

The judgment of most importance for us was that delivered by Thesiger L.J. who referred to a leading case on this subject, *Dunlop v. Higgins*.<sup>61</sup> This case held that once an acceptance had been duly posted in good time, the acceptor should not lose the benefit he would derive even if the letter did not arrive when it ordinarily should. He was not to suffer for accidents which might occur in the post. He continued: "This direction was wide enough in its terms to include the case of the acceptance never being delivered at all." He concluded that a letter of acceptance, once posted, will bind even if it never arrives. This is truly a remarkable conclusion and one senses that the learned judge felt he had to 'retreat' somewhat and, as Cheshire and Fifoot say<sup>62</sup> "he felt bound to pay lip service to the doctrine of communication", for Thesiger L.J. went on to say:

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 mind of the parties should be brought together at one and the same time, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless therefore a contract 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.

Quite so. But at this point the anomaly presented by a contract by correspondence manifested itself, for the learned judge continued:

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 contract is absolutely concluded when acceptance takes place] that the minds of the parties must be brought together by mutual communication... 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*<sup>63</sup> when in the course of his judgment he said: '*Dunlop v. Higgins* 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'.

The learned judge based his decision on two previous cases which we shall consider chronologically.

In *Dunlop v. Higgins*,<sup>64</sup> the acceptor had posted his letter promptly but it arrived late due to an accident in the post. The court found that by mailing the letter of acceptance the offeree had done all he could. Thus, "if a party

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<sup>61</sup>(1848), 1 H.L.C. 381.

<sup>62</sup>*Op. cit.*, at p. 42.

<sup>63</sup>(1867) L.R. 4 Eq. 9 at p. 12.

<sup>64</sup>*Supra*, footnote 61.

does all he can do that is all that is called for".<sup>65</sup> He cannot be held responsible for accidents in the post. Is the party who posted the letter on the right day to lose the benefit he would have had if the letter had arrived in due course?

The court cited as an instance of this principle the fact that notice of dishonour is validly made if posted at the right time, and whether the letter is delivered or not is quite immaterial, because the sender is not responsible for accidents in the post office.

Arrival may not be an issue of great moment for notice of dishonour but it is surely of prime practical importance that an offeror *learn* of acceptance to his offer. This argument was raised by counsel for Appellant, who pointed out that:<sup>66</sup>

... when a person seeks to acquire a right he is bound to act with a degree of strictness such as may not be required where he is only endeavouring to excuse himself from a liability. The question of reasonableness of notice, which may be admitted in cases of bills of exchange, *cannot be introduced in a case where one party seeks to enforce on another the acceptance of a contract.* A bill of exchange is already a binding contract; no new right is acquired by notice. It is merely a necessary proceeding to enable the party giving it to *enforce a right previously created.*

Had the court accepted this argument it is quite conceivable that the law on contracts by correspondence might have followed a very different line of development. However, this contention, which seems valid, was not accepted. The case laid down the principle that once the acceptance was posted the contract was formed so long as the acceptance was posted on time. The offeree had accepted the offer and had done all that could possibly be expected of him. The question to be decided was, had the offeree posted his letter in time? In *Hebb's Case*<sup>67</sup> this principle was given an "explanation".

Hebb applied to the agent of a company for shares. The directors allotted the shares to him, but they sent the letter of acceptance to *their own agent for transmission* to Hebb. Before the agent had delivered the letter, Hebb withdrew his offer. On the facts described above, and in view of the principle laid down in *Dunlop v. Higgins*, it seems reasonable to state the issue in this case as follows: assuming that a letter of acceptance will cause formation of the contract and bind both parties *once it is posted* to the offeror, *will it have the same effect when it is posted to the agent of the offeree who is to transmit it to the offeror?*

Unfortunately, however, Lord Romilly did not see the issue in *Hebb's Case* in this way. He confused transmission and communication, for he said:<sup>68</sup>

These applications for and allotments of shares must be treated upon the same principle as ordinary contracts between individuals. If A. writes to B. a letter offering to buy land from B. for a certain sum of money and B. accepts the offer.

<sup>65</sup>*Ibid.*, at p. 389.

<sup>66</sup>*Ibid.*, at p. 387.

<sup>67</sup>*Supra*, footnote 63.

<sup>68</sup>*Ibid.*, at p. 12.

and sends *his servant* with a letter containing his acceptance, I apprehend that until A. receives the letter, A. may withdraw his offer, and B. may stop his servant on the road and alter the terms of the acceptance or withdraw it altogether; he is not bound by communicating his acceptance to his own agent. *Dunlop v. Higgins* decides that the posting of a letter constitutes a binding contract, but the reason for that is that the post office is the common agent of both parties. In the present case, if Mr. Hebb had authorized the agent of the company to accept allotment on his behalf, there would be a binding contract, but he gave no such authority...

Therefore, Lord Romilly stated the issue as a question of whether or not Hebb had authorized the agent to receive the communication.

But it seems that he has confused two separate questions. On the one hand, there was a question of transmission. The learned judge stated that the contract was binding because the post office was the common agent for transmission. On the other hand, there was the question of reception or communication, i.e., did Hebb appoint the company's agent *his* agent to receive the letter of acceptance? This was the issue as Lord Romilly saw it. Surely *Dunlop v. Higgins*, which dealt with transmission, has no application here.

This discrepancy was pointed out by Lord Justice Kay in *Henthorn v. Fraser*,<sup>69</sup> a later case, where he said:<sup>70</sup>

In his judgment Thesiger L.J. refers to the cases in which the decision in *Dunlop v. Higgins* has been explained (i.e. *Hebb's Case*) by saying that the post office was treated as the common agent of both parties. That reason is not satisfactory. The post office are only carriers between them. They are agents to convey the communication, but not to receive it. The communication is not made to the post office, but by their agency as carriers. The difference is between saying 'Tell my agent A. if you accept,' and 'Send your answer to me by A.' In the former case A. is to be the *intelligent recipient of the acceptance*, in the latter he is only to convey the communication to the person making the offer which he may do by a letter knowing nothing of its contents. The post office are only agents in the latter sense. All that *Dunlop v. Higgins* decided was that the acceptor of an offer having properly posted his acceptance, was not responsible for the delay of the post office in delivering it; so that after receipt the said party could not rescind on ground of that delay.

Thus "agency" as an explanation for the principle laid down in *Dunlop v. Higgins* has arisen as a result of an error in discerning the issue which arose out of the facts. This principle, which has no basis in law or logic, was unfortunately reiterated and applied in the *Household* case.<sup>71</sup> Lord Herschell, in the *Henthorn* case commenting on the same judgment, said:<sup>72</sup>

And . . . Lord Thesiger based his judgment on the defendant having made an application for shares under circumstances from which it must be implied 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 learned judge was really applying the rule he was about to lay down in this case to a case which had preceded it, thus giving consistency to the various decisions on this point. He continued:<sup>73</sup>

<sup>69</sup>[1892] 2 Ch. 27.

<sup>70</sup>*Ibid.*, at p. 35.

<sup>71</sup>*Supra*, footnote 58.

<sup>72</sup>[1892] 2 Ch. 27 at p. 32.

<sup>73</sup>*Ibid.*, at p. 33.

I am not so sure that I should myself have regarded the doctrine that an acceptance is complete as soon as the letter containing it is posted as resting upon implied authority by the person making the offer to accept it by those means. It strikes me as somewhat artificial to speak of the person to whom the offer is made as having the implied authority of the other party to send his acceptance through any particular channel; *he may select what means he pleases*, the post office no less than any other. The only effect of the *supposed* authority is to make the acceptance complete so soon as it is posted, and authority will obviously be implied only when the tribunal considers it is a case in which this result ought to be reached. I should prefer to state the rule thus: *where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usage of mankind the post might be used as the means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.*

There is no agent here. The offeree is not obliged to use the same method of communication as the offeror. As long as he uses a logical common-sense method to reply, his acceptance will bind on dispatch.

One question remains. Here, Henthorn took away with him a written offer he had received from the offeror in person. The offer was "communicated" face to face. On this point, Lord Herschell said:<sup>74</sup>

Although the plaintiff received the offer at the defendant's office in Liverpool, he resided in another town and it must have been in contemplation that he would take the offer, which by its terms was open for some days, with him to his place of residence, and those who made the offer must have known that it would be according to the ordinary usages of mankind that if he accepted it he should communicate this acceptance by post.

This case extended the rule to an instance where the offer was delivered by hand and accepted by post, and at the same time, by necessary implication, overruled the "explanation" given in the *Household* case.

It is interesting to note how two leading English texts treat the "agency" notion. After citing Lord Thesiger's remarks, Ansen states:<sup>75</sup>

This is to treat the post office as the agent of the offeror, not only for delivering the offer, but for receiving the notification of its acceptance, and there is a certain artificiality in looking on the transaction in that way... but... some rule is necessary and the rule (i.e., that of 'agency') at which the Courts have arrived, whether or not it can be logically justified, is probably as satisfactory as any other would be.

Cheshire and Fifoot<sup>76</sup> take the matter somewhat further, and in this writer's opinion reflect the true state of the English law, in the light of the decision in *Henthorn v. Fraser*:

The difficulties felt to arise from the assumption that the post office was the offeree's agent were met at first by suggesting that it might be regarded as the joint agent of both parties and later by *denying the assumption in toto*. The courts could take their stand on business practices . . .

However, we submit that one can safely say that the English courts have discarded the "agency" notion.

<sup>74</sup>*Ibid.*, at p. 33.

<sup>75</sup>*Principles of the English Law of Contract*, (20th ed., 1954), p. 38.

<sup>76</sup>*Op. cit.*, p. 63.

In addition to the statement on the "agency" notion made by Cheshire and Fifoot, one finds remarks of other authors:

If the offer itself was made by mail it has been *supposed* that this made the post office an agent of the offeror to receive the letter of acceptance. This theory has been disproved and has little to support it.<sup>77</sup>

This is quite true. As we saw above, the idea was arrived at by an earnest desire to reconcile the notion that acceptance must be communicated, with contracts by correspondence and the rapidity and certainty necessary for commercial dealings. Wherever "agency" is cited as an explanation, we find that it almost always rests on the *Household* case.

We find criticism of the "agency" notion in many places. Bramwell J. in his dissenting judgment in the *Household* case said this:<sup>78</sup>

I am at a loss to see how the post office is agent for both parties. What is the agency as to sender? Merely to receive?... But if the post office is the agent of both parties then the agent of both parties has failed (if the letter is not delivered) in his duty, and to both.

D. M. Gordon,<sup>79</sup> has put it this way:

The offeree has a perfect right to say: 'Make the post office your agent if you like; but it is as much my agent as yours; I have as much right to its service as you, and I treat it as my own agent.' So treating it, he appears to have a perfect right to revoke any acceptance in his hands... The result is that the offeree can treat the acceptance as binding when posted, or not, according to his inclination.

For this reason Mr. Gordon decided to reject the Expedition theory. A leading South African jurist raised this same objection.<sup>80</sup>

We do not know whose agent the post office really is. But assuming it is the offeror's, then by using it to explain the Expedition theory, in fact we deny it. This was established in a note on Canadian law<sup>81</sup> (referring to *Charlebois v. Baril*), where it was demonstrated that by making the post office the agent we combine Reception and Expedition theories. When a letter is posted the offeror receives, and once received, knowledge is presumed, therefore we have knowledge when the letter is posted and a contract is formed because there is *knowledge of acceptance*, not because there has been a *definitive acceptance*.

In discussing the reasons why a letter of acceptance binds when posted, Corbin<sup>82</sup> mentioned:

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<sup>77</sup>Corbin, Offer and Acceptance, (1916-17), 26 Yale L.J. 169. The "Agency" doctrine is most often dismissed in this cursory fashion because it has little currency today. However, because of the direction given to our law by *Charlebois v. Baril* and the application of this decision, a more detailed and comprehensive rebuttal of this notion must be made.

<sup>78</sup>At p. 238.

<sup>79</sup>(1931), 9 Can. Bar Rev. 55.

<sup>80</sup>Kahn, Some Mysteries of Offer and Acceptance, (1955), 72 South African L.J. 246 at p. 256

<sup>81</sup>(1928), 27 Rev. Trim. du Droit 1013.

<sup>82</sup>*On Contracts*, Vol. 1, p. 247.

Sometimes it is said that the post office is the common agent of both parties. It requires only slight consideration to see that this reasoning is defective. The term 'agent' is generally used to refer only to some human person with power to act on his principal's behalf. The 'post' is not a person although there are many persons in the postal service; and it is by no act of any such person that the making of the contract is consummated. A letter box on the corner is neither a person nor an agent and yet the acceptance is effective when the letter of acceptance is dropped into that box. It is the offeree himself (or some person authorized by him) who drops the letter in the box. It is he who has the power and who exercises it by his action. The 'box' has no power and it does not act. It is true that the postman may thereafter remove the letter from the box; but the contract has already been made and removal has no legal operation.

Both Valery<sup>83</sup> and Dorion J.<sup>84</sup> have pointed out that the true legal relationship between the post office and the sender of a letter is one of lessee and lessor of services for the transmission of a letter.

Thus, in attempting to support and explain a judgment which stated emphatically that in a contract by correspondence formation takes place when and where a letter is dispatched, and which expressly overruled an earlier decision of the Quebec Court of Appeals upholding the Information doctrine, the Supreme Court used "agency" of post office. The notion of "agency" derived its origin and support chiefly from an English decision and we have attempted to indicate that it is based on a misconception of the true portent of the Expedition theory. Upon examining the notion of "agency" itself we found that that application led to confusion and contradiction.

Therefore, we submit that "agency" should not be applied in contracts by correspondence.

#### A SUGGESTED RATIONALE

In view of the analysis presented thus far, we can conclude that "agency" must be discarded as an explanation for the Expedition theory. We are left with the judgment of the Supreme Court in *Magann v. Auger*. The judgment is sound but it does not go into any detail. We must therefore attempt to give a reasonable and usable explanation.

Before we proceed, three points must be clarified. First, it is impossible that both parties can know simultaneously that a binding contract has been formed between them. An oft-quoted American case<sup>85</sup> has put the issue in this way:

If a bargain can be completed between absent parties it must be when one of them cannot know the fact whether it be or not completed. It cannot begin to be obligatory on the one before it is on the other; there must be a precise time when the obligation attaches to both and this time must happen when one of the parties cannot know that the obligation has attached to him; the obligation does not therefore arise from a knowledge of present concurrence of wills of the contracting parties.

<sup>83</sup>*Op. cit.*, p. 71.

<sup>84</sup>In the *Association Pharmaceutique* case, *supra*, footnote 24.

<sup>85</sup>*Maetier v. Firth*, 6 Wend. 103, 21 Am. Dec. 262 (1830).

Because both parties can never know simultaneously, no matter what point in time we pick (and it must be one point in time),<sup>86</sup> one party will not know he is bound.

Secondly, formation of a contract and communication of acceptance are separate and distinct matters. There is no positive enactment in the law requiring that assent be communicated to the offeree. Art. 984 of the Quebec Civil Code is quite clear: one of the four requisites necessary for the validity of a contract is "Their (i.e., the parties') consent legally given".<sup>87</sup> Once we have consent, the contract is formed. Consent must of course be manifested otherwise, as far as the law is concerned, there is nothing. However, communication of a manifested assent is a different matter — communication of completion is quite different from completion by communication.

The third point that must be kept in mind is that there can be acceptance without communication.

It is not indispensable that consent should be express. Civil Code Art. 1805 [Louisiana]. It may be implied . . . For it is not true to say, at least in all cases, that there must not only be acceptance of the proposition, but a knowledge of acceptance by the proposer. The authority of the code is clear on this point.

"If the party making the offer die before it is accepted, or he to whom it is made die before he has given his assent, the representatives of neither party are bound, nor can they bind the survivor. But, if the offer be accepted before the death of the party offering it, although he had no notice of it, the obligation is complete."<sup>88</sup>

Mignault<sup>89</sup> deals briefly with this matter.

However, our positive law<sup>90</sup> does provide for acceptance without communication, i.e., implied. If I offer by mail to pay a farmer \$50.00 to cut down a tree on my country estate, and he does so — even if I do not know exactly when, surely I am bound when he cuts down the tree. If he first cut down the tree and then notified me, we would have a contract that was first executed and then formed.

There still remain, however, those contracts which involve future performance. Will the offeror be bound when all the offeree has done is post his acceptance?

Because both parties can never know simultaneously, the logic behind the Information theory collapses. The only problem now is to select that point in time for completion of the contract which is most consistent with law and

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<sup>86</sup>As Planiol & Ripert, *op. cit.*, Vol. 4, p. 182 ff. point out, two points in time will mean two different "formations". Which formation will be binding so that ownership passes?

<sup>87</sup>As to the meaning of "legally given", suffice it to say that one can reasonably infer from the remarks of the Codifiers at p. 9 of the First Report the reason for this qualification is to cover consent obtained by fear, error or fraud. These words can have no bearing on communication.

<sup>88</sup>*Ryder v. Frost*, 3 La. Ann. 523 (New Orleans, 1848).

<sup>89</sup>*Droit Civil Canadien*, Vol. 5, p. 198.



fact. The time selected by the vast majority of courts and writers is the time when the acceptance has been dispatched. This moment in time is also the one accepted in business practice.

Let us also consider the relative position of the parties:

If we hold the offeror bound on mailing the acceptance he may change his position in ignorance of the acceptance; even though he waits a reasonable time before acting, he may still remain unaware that he is bound by contract because the letter of acceptance is delayed, or is actually lost or destroyed in the mails. Therefore the rule is going to cause loss and inconvenience to the offeror in some cases. But if we adopt the alternative rule, that the letter of acceptance is not operative until receipt, it is the offeree who is subjected to the danger of loss and inconvenience. He can not know that his letter has been received and that he is bound by a contract until a new communication is received by him. His letter of acceptance may never have been received and so no letter of notification is sent to him; or it may have been received and the letter of notification may be delayed or entirely lost in the mail.<sup>91</sup>

We can put the risk on either party and there seems little to choose between them, for the business community could insure itself against either case. Yet the time of posting, when the risk would be on the offeree, does have a slight but significant advantage.

By selecting the moment of dispatch as the moment of formation *we are closing the deal more quickly and enabling performance more promptly than otherwise*. There is good reason for this.

The offeree is already relying with the best reason in the world on the deal being on; the offeror is holding things open; and in view of the efficiency of means of communication (in the vast majority of cases the acceptance is neither lost nor delayed) we can protect the offeree in all these deals at the price of hardship on the offeror in very few of them.<sup>92</sup>

Consider this same situation in a factual, business setting. What the offeror really wants is agreement from the offeree. Agreement does not merely mean that the offeree is legally bound. As Lewellyn puts it: "Buying law suits is junkyard business."<sup>93</sup> He wants agreement for the future in order to arrange his affairs.

For a valid *de facto* acceptance there must be overt expression of assent, and news of this assent must be given to the offeror. If the overt expression of agreement occurs *before* efforts at notification, will that overt expression by itself be enough to cause formation and hence bar revocation from that time forward (provided only that it is followed in due time by the proper effort at notification)?<sup>94</sup> Or,

...if two facts of importance have been treated as coincident, and proceed to occur separately, then: (1) Are we to take either as being the only significant one?

<sup>90</sup>Article 988 C.C.: "Consent is either express or implied . . ."

<sup>91</sup>Corbin, *op. cit.*, footnote 82, at p. 248.

<sup>92</sup>Lewellyn, *Our Case-Law of Contract: Offer and Acceptance II*, (1939), 48 *Yale L.J.* 779 at p. 794.

<sup>93</sup>*Ibid.*, at p. 793.

<sup>94</sup>This is merely another way of opposing the Declaration or Expedition theories.

And if so, which? or (2) Are we to re-examine the situation, and give each fact its due weight and its specialized legal effect? And if so, how?<sup>95</sup>

In face to face dealings, the two requirements coincide, but when dealing with negotiations between parties at a distance we are forced to discriminate.

The courts have decided that the *whole legal effect* lies in the offeree's *attempt to communicate*. This is the justification given in American law, and although no English writer has dealt with the subject in such detail, this analysis would probably be acceptable in English law, because of the common origin of both legal systems.

The situation in France was quite unclear until 1933. Before then the Cour de Cassation had refused to give a definitive opinion as to the time and place of the formation. The Court had stated that each case was to be decided on its merits, and time and place of formation was solely a question of fact. This approach was widely criticised for the following reason:

Il y a certes une question de fait, qui est de discerner, dans les correspondances échangées, la lettre qui a eu pour but de consacrer un accord définitif. Mais ce point une fois fixé, la question de savoir si, dans le silence des parties à cet égard, l'accord des volontés est réputé s'être réalisé au départ ou à l'arrivée de la lettre, est une question de droit et d'interprétation de la loi, sur laquelle la Cour de Cassation devrait exercer son contrôle.<sup>96</sup>

In a very detailed and comprehensive note on a case dealing with contract by correspondence, Salle de la Marnière,<sup>97</sup> after surveying the various approaches one might take, adopts a theory of risk. The risk, as we saw above, could fall on either party. He determines that the risk shall fall on the person who chooses the mode of communication. If the offeror has specified some means of communication, any accident or delay is his responsibility. If he has not specified, then it is assumed the answer is to be sent in the same way as the offer. Thus, once the letter of acceptance is dispatched, the contract is formed and risk from that point is on the offeror and he will be forced to withstand any damage. If the offeree could withdraw before the letter arrives, no damage would be suffered by the offeror and hence revocation by a speedier means is possible.

The offeree then has the best of both worlds. The contract exists from the moment of posting *but* if he finds a better opportunity elsewhere and is able to inform the offeror before the letter has arrived, the contract is revoked. In other words, Marnière, in seeking a solution to the problem of the precise moment of formation in order to establish greater certainty and to conform to the world of fact, selected a solution which would lead to the wildest forms of speculation. Setting the time of formation at posting and allowing the offeree to revoke is akin to having both "a bird in the hand *and* two in the bush".

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<sup>95</sup>Lewellyn, *op. cit.*, at p. 794.

<sup>96</sup>D.P. 1926.2.15. note signed A.C. See also Valery, *op. cit.*, and the note at D.P. 1933.1.65.

<sup>97</sup>D.P. 1933.1.65-68.

The "equality" which is supposed to exist between contracting parties does not exist at all.

Such a solution makes formation dependent solely on the will of one of the parties. "An obligation conditioned on the will purely of the party promising, is void."<sup>98</sup> Further, as was pointed out in *Maetier v. Firth*,<sup>99</sup> both parties are bound by a contract at the same time, i.e., one cannot be bound before the other. Thus Marnière's solution can not be adopted although it does help to emphasize the problem of withdrawal. The question of withdrawal of the acceptance either by a speedier means of communication, or by the actual withdrawal of the letter from the post, remains to be considered.

We have seen that legally withdrawal is quite impossible, since the party is bound by his acceptance. Notwithstanding the legal impossibility, the *de facto* power still remains in the offeree to withdraw, and some countries, e.g. the United States, France, do provide that a sender can retrieve his letter from the mail.

In the United States the long accepted rule in *Henthorn v. Fraser* was reversed in the decision *Dick v. United States*.<sup>100</sup> The Court held that because of the regulation allowing withdrawal from the mails the old rule, *which depended on the loss of control*, was no longer applicable. "It has been said that this rule is harsh upon the acceptor; but there is no reason for giving him an advantage that he would not have been entitled to if the contract had been made by word of mouth."<sup>101</sup> This truly is a valid argument. The fact that the offeror does not know of the offeree's acceptance does not strengthen or weaken the acceptance. He has accepted and he is bound.<sup>102</sup>

How can the authors and the courts glibly assert that once the acceptance is dispatched the offeree is able cancel it? Surely the fact that the offeree has considered the offer, written a letter and then mailed it, indicates his active consideration of the offer and his acceptance. If we are forced to weigh one acceptance against the other, it appears that an acceptance by post is equally as strong as a spoken acceptance. However, this logic has not always prevailed.

This problem received careful consideration and a suitable solution in a case comment<sup>103</sup> in 1914 in the United States. In that article, the author pointed out that the "agency" theory was unsatisfactory and suggested that we adopt

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<sup>98</sup>Article 1081 C.C.

<sup>99</sup>*Supra*, footnote 85.

<sup>100</sup>F. Supp. 326 (Ct. Cl. 1949).

<sup>101</sup>Turnbull, *Revocability of Acceptance in Correspondence Contracts*, (1930), 8 Can. Bar Rev. 615.

<sup>102</sup>Mazeaud, *op. cit.*, demonstrates that the law does not require communication but merely acceptance. This notion has been explicitly adopted in draft of the new French Code. Article 13 in the chapter on contracts is as follows: "Sauf stipulation contraire, le contrat se forme entre présents comme entre absents au temps et au lieu ou l'acceptation de l'offre a été émise."

<sup>103</sup>(1914), 13 Michigan L. Rev. 672.

the moment of expedition "because then acceptance is first irrevocably manifested and notice of such acceptance put into reasonable course of communication to the offeror."<sup>104</sup> Communication is not necessary for formation, which takes place when acceptance is manifested, but it is necessary, before the offeror can be held liable for breach of contract. Thus he harmonised the English cases with the necessity to fit communication into the picture.

Various solutions have been proposed in different countries. In France it has been decided that contracts by correspondence, like other contracts, will be formed at the time and place acceptance is manifested. The United States have also suggested the time of dispatch.<sup>105</sup> Finally, there is a draft code<sup>106</sup> on contracts by correspondence in Private International Law. Because parties to contracts by correspondence often reside in different countries with different systems of law, these contracts presented formidable problems.

The committee which drew up the draft felt that where both countries (i.e., that of the offeree and that of the offeror) followed the same system, e.g. Reception, or Expedition, then that system should apply. However, where

the two laws differ on this point, the place and moment in which the acceptance is dispatched are the place and moment of the conclusion of the contract, because this is the system followed by the law more often applied in international commerce... The draft only makes exception in the case where a different stipulation exists or where so unusual a means of acceptance is employed to make it known.<sup>107</sup>

Now, what is the situation in Quebec? Firstly, if we assume that *Charlebois v. Baril* is an erroneous interpretation of the law we are left with the decision of the Supreme Court in *Magann v. Auger*. Secondly, there are no regulations in Canada permitting withdrawal of letters from the post. On the contrary, the Post Office Act<sup>108</sup> expressly states:

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<sup>104</sup>*Ibid.* On this point he is surely a precursor of Lewellyn and Corbin.

<sup>105</sup>Restatement of The Law of Contract (American Law Institute), St. Paul, (1932) at p. 70.

Sec. 64. An acceptance may be transmitted by any means which the offeror has *authorized* the offeree to use and, if so transmitted, is operative and completes the contract as soon as put out of the offeree's possession without regard to whether it ever reaches the offeror, unless the offer otherwise provides.

This section appears to reflect the holding in the *Household* case and *Charlebois v. Baril*. It turns on the meaning of "authorization".

Sec. 66. An acceptance is *authorized* to be sent by the means used by the offeror or *customary in similar transaction* at the time when and the place where the offer is received, unless the terms of the offer or surrounding circumstances known to the offeree otherwise indicate.

It appears then that *Charlebois v. Baril* could not be supported.

<sup>106</sup>Explanatory Report to the Preliminary Draft Code on Contracts by Correspondence, "Unification of Law" published by the International Institute for the Unification of Private Law, Rome, (1948).

<sup>107</sup>*Ibid.*, at p. 91.

<sup>108</sup>1952 R.S.C. c. 212, s. 39.

Subject to the provisions of this Act and the regulations respecting undeliverable mail, *mailable matter becomes the property of the person to whom it is addressed when it is deposited in a post office.*<sup>109</sup>

Thus we have a positive enactment which indirectly prohibits withdrawal of acceptance. This statute has absolutely no bearing on formation of the contract and obviously cannot create or dissolve any agreement between the parties. It may, however, be used to counter the objection that an offeree can withdraw his acceptance.

The suggested rationale may be set out as follows:

1. The "agency" doctrine can have no application in contracts by correspondence.
2. The decision of the Supreme Court in *Magann v. Auger* is still good law.

This means that a contract by correspondence in Quebec is completed by dispatch, whether or not the offeree uses the same mode of communication as the offeror as long as it is a reasonable mode under the circumstances.

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<sup>109</sup>"Post office" is defined in s. 2i as "letter box or other receptical or place authorized by Postmaster General for the deposit, receipt, sortation, handling or dispatch of mail"