

# Louisiana Law Review

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Volume 1 | Number 1  
November 1938

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## Duration and Revocability of an Offer

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### Repository Citation

Robert A. Pascal, *Duration and Revocability of an Offer*, 1 La. L. Rev. (1938)  
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run in the seamless weave of the law tends to lengthen. Where will it end?

It is submitted that a return to first principles should be effected. Article 333 should be amended to read as it did in the Code of Practice of 1825. The code provision which caused the initial difficulty in *Magee v. Dunbar* should be amended so as to overrule the doctrine of this case and do nothing more.<sup>41</sup> In this way Louisiana will not only solve the problem without producing unfortunate consequences, but the return to our earlier practice would bring us results quite similar to those effected by the new Federal Rules.<sup>42</sup>

GUY WIMBERLY, JR.

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#### DURATION AND REVOCABILITY OF AN OFFER

The basic principles and practical application of Articles 1800-1804 and 1809 of the Louisiana Revised Civil Code of 1870, dealing with the duration of an offer and the timeliness of an acceptance, have never been explained satisfactorily as a system. It is the purpose of this comment to attempt an explanation of them in terms of their probable origin and in conformity with the theories accepted at the time of their redaction.

The Civil Code of 1808<sup>1</sup> and the Code Napoleon<sup>2</sup> were almost identical in the title of Obligations; they contained no specific rules on offer and acceptance and only provided that the consent of the party obligating himself was essential to the formation of the contract.<sup>3</sup> The articles here under consideration were first

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41. Art. 317, La. Code of Practice of 1870, as amended by La. Act 85 of 1922, should be further amended so as to read as follows: "It shall be sufficient in all cases for a defendant to file his answer at any time before the confirmation of a judgment taken by default against him; provided, however, that no exceptions incorporated in any answer filed after a judgment of default has been rendered against defendant shall be admitted."

42. Cf. Rule 12, Federal Rules of Civil Procedure.

1. A Digest of the Civil Laws now in force in the Territory of Orleans, with Alterations and Amendments adapted to its Present System of Government (1808).

2. Le Code Civil des Français (1804) (commonly referred to as the "Code Napoleon").

3. La. Civil Code of 1808, p. 261, 3. 3. 8; Art. 1108, French Civil Code. The rules of offer and acceptance were considered within the field of evidence and not substantive law. See Art. 1797, La. Civil Code of 1870.

proposed in the *Projet* of the Louisiana Civil Code of 1825<sup>4</sup> and entered our law as Articles 1794-1798 and 1803 of that Code. Therefore, in determining the meaning of the articles, research should be centered on the source materials available in 1822, the year in which the code revision committee was appointed.<sup>5</sup>

Of course, the works of Domat and Pothier's treatise on Obligations were available and were used by the members of this commission.<sup>6</sup> And since the Civil Code of 1808 so closely corresponded to the Code Napoleon in the title of Obligations, it is only reasonable to assume that the redactors were acquainted with and used the available French commentaries. When they undertook in 1822 to amplify the rules of offer and acceptance, the works of Toullier<sup>7</sup> and Delvincourt<sup>8</sup> were the only ones which had been published,<sup>9</sup> the former being by far the more satisfactory.<sup>10</sup> Not to be neglected, however, are the old Germanic Civil Codes,<sup>11</sup> which may have been available, especially the Prussian,<sup>12</sup> the *Projet* of which had been translated into French in 1751,<sup>13</sup> and the promulgated text of which was translated by the members of the French bureau on foreign legislation in 1801.<sup>14</sup> The effect which these translations may have had on French legal doctrine will be discussed in the course of this comment.

There can be no doubt that Toullier's commentary formed the basis of the Louisiana articles here considered. This view

4. Proposed Additions and Amendments to the Civil Code of the State of Louisiana, by the Jurists Commissioned for that Purpose (1823). This is commonly referred to as the "*Projet*" and was republished by the State of Louisiana as Louisiana Legal Archives, vol. I (1937).

5. La. Acts 1822, pp. 108, 109 (resolution approved March 14, 1822).

6. Tucker, Source Books of Louisiana Law (1932) 6 Tulane L. Rev. 280, 289 (also in 1 La. Legal Archives xvii, xxvi).

7. Toullier, Le Droit Civil Français (1st ed. 1812). The 4th ed. (1824) was used by the author, earlier editions being unavailable.

8. Delvincourt, Cours de Droit Civil (1st ed. 1813). The 3d ed. (1824) was used by the author, earlier editions being unavailable.

9. Tucker, supra note 6, at 290 (also in 1 La. Legal Archives xvii, xxvi) includes also Maleville, Analyse Raisonné de la Discussion du Code Civil au Conseil d'Etat (1805). Maleville's work was not a true commentary, however, but rather, as indicated by its title, an analysis of the Civil Code based on the legislative discussions.

10. Ibid. See also Dard, Code Civil des Français (3d ed. 1827) 1j.

11. Bavarian Civil Code (1756) and Austrian Civil Code (1811). For the Prussian Codifications, see infra notes 12-14.

12. Allgemeines Landrecht für die preussischen Staaten (1794).

13. Code Frédéric; ou Corps de Droit pour les Etats de Sa Majesté le Roi de Prusse. Traduit de l'Allemand par A. A. de C. (1751).

14. Code Général pour les Etats Prussiens, Traduit par les Membres du bureau de Législation étrangère, et publié par l'ordre du Ministre de la Justice (An IX (1801)).

has been expressed at least twice within recent years,<sup>15</sup> and it is substantiated by the similarity in the language and plan of the Louisiana Civil Code to the work of Toullier.<sup>16</sup> The origin of Article 1798 can be recognized readily,<sup>17</sup> and Articles 1799,<sup>18</sup> 1800,<sup>19</sup> 1803,<sup>20</sup> 1804,<sup>21</sup> 1805-1808,<sup>22</sup> 1809,<sup>23</sup> 1810,<sup>24</sup> 1811,<sup>25</sup> 1816,<sup>26</sup> and 1817<sup>27</sup> can also be identified. Therefore, of the articles involved in this discussion only 1801 and at, first blush, 1802, have no counterpart in the text of Toullier. Since the Louisiana order of treatment is the same as that of Toullier, the nature of the two Louisiana provisions (Articles 1801, 1802) not found in Toullier is more readily understood as limitations on the principle announced in Article 1800. This will be further discussed below.

It is well to remember that the texts of these articles in the Revised Civil Code of 1870 are the same as the corresponding English texts in the Civil Code of 1825, the latter being translations of the original French.<sup>28</sup> Since there are serious discrepancies between the two versions of the articles being interpreted,<sup>29</sup> and since in any case of discrepancy the French text of the Civil Code of 1825 is controlling today,<sup>30</sup> this version has been made the basis of the present inquiry.<sup>31</sup>

There can be no doubt that a contract is not legally formed and binding until the proposition is *accepted* by the person to

15. Tucker, *supra* note 6, at 290. See Comment (1935) 9 Tulane L. Rev. 590, 599-601, which sufficiently refutes the statement in Comment (1931) 5 Tulane L. Rev. 632, n. 5, to the effect that these articles were based on the common law.

16. A concordance between the texts of Toullier and some of the articles being discussed may be found in Comment (1935) 9 Tulane L. Rev. 590, 599-601, n. 69 et seq. See also *infra* notes 17-27.

17. 6 Toullier, *op. cit. supra* note 7, Bk III, Tit. III, n° 24, par. 1.

18. *Id.* n° 24, pars. 2, 3.

19. *Id.* n° 24, par. 6.

20. *Id.* n° 25.

21. *Id.* n° 26, par. 1.

22. *Id.* nos 27, 28.

23. *Id.* n° 29 and n. 2; see also n° 30.

24. *Id.* n° 31, particularly par. 5, sent. 3 et seq., and par. 6, sent. 11.

25. *Id.* n° 33, par. 1.

26. *Id.* n° 33, pars. 4, 5.

27. *Id.* n° 34.

28. Dubuisson, *The Codes of Louisiana (Originals Written in French; Errors in Translation)* (1924) 25 La. Bar Ass'n Rep. 143, 144 et seq. See also Tucker, *supra* note 6, at 291 (also in 1 La. Legal Archives xvii, xxvii).

29. For the seriousness of some discrepancies in text resulting from mistranslations, see Dubuisson, *supra* note 28.

30. *Phelps v. Reinach*, 38 La. Ann. 547 (1886); *Straus v. City of N. O.*, 166 La. 1035, 118 So. 125 (1928); *Sample v. Whitaker*, 172 La. 722, 135 So. 38 (1931) (cited in Tucker, *supra* note 6, at 291, n. 43).

31. Accordingly, the author's translation will be used in the text, but in

whom it has been made,<sup>32</sup> and it is equally clear that once the acceptance is legally made, the contract is complete, and either party may have it enforced judicially.<sup>33</sup> The problem is to fix the time at which the acceptance should be considered binding, assuming for the moment that the proposition is open and that all formalities are fulfilled.

According to Article 1797,<sup>34</sup> since consent is purely a mental operation it can have no effect unless it is manifested in such a manner as to be understood by the other contracting party. In the case of face to face offers the matter is simple for when the person signifies his acceptance the contract is complete. Difficulty is encountered in the case of absent parties. If the consent is binding at the moment that the party *declares* his acceptance (as by writing a letter), then the revocation of the proposal after that time, though the acceptance may not have been known to the proposer, would be inoperative. On the other hand, if the acceptance is not binding until it is received by or comes to the knowledge of the proposer, then either party may still retract.

Article 1819<sup>35</sup> defines consent as "concurrence of intention . . . reciprocally communicated." But an acceptance is not *communicated* if the party proposing has not received *knowledge* of it, even though the other party may have declared his intention and entrusted its delivery to agencies beyond his control. According to Article 1809,<sup>36</sup> the obligation of a contract is not complete until

such cases both the official French and English versions will be given in the footnotes.

32. Art. 1800, La. Civil Code of 1870: "The contract, consisting of a proposition and the consent to it, the agreement is incomplete until the acceptance of the person to whom it is proposed. If he, who proposes, should before that consent is given, change his intention on the subject, the concurrence of the two wills is wanting, and there is no contract."

33. Art. 1803, La. Civil Code of 1870: "But when one party proposes, and the other assents, then the obligation is complete, and by virtue of the right each has impliedly given the other, either of them may call for the aid of the law to enforce it." See also Art. 1799.

34. Art. 1797, La. Civil Code of 1870: "When the parties have the legal capacity to form a contract, the next requisite to its validity is their consent. This being a mere operation of the mind, can have no effect, unless it be evinced in some manner that shall cause it to be understood by the other parties to the contract . . ."

35. Art. 1819, La. Civil Code of 1870: "Consent being the concurrence of intention in two or more persons, with regard to a matter understood by all, reciprocally communicated, and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent, not only where the intent has not been mutually communicated or implied . . ."

36. Art. 1809, La. Civil Code of 1870: "The obligation of a contract not being complete, until the acceptance, or in cases where it is implied by law, until the circumstances, which raise such implication, are known to the party proposing; . . ." This is fully in accord with the views expressed in 6

the acceptance is *known* to the proposer, or in cases where the acceptance is presumed by law, until the circumstances which give rise to such presumption are known. Article 1810<sup>87</sup> contains the exception that "if the contract be accepted before the death of the party offering it, although he had no notice of it, the obligation is complete." This exception makes the meaning of Article 1809 more certain.<sup>88</sup>

Since the acceptance is not binding until the proposer receives knowledge of it, the next point to be considered is the time within which the acceptance must be received in order to be operative. According to Article 1800:

"... If he, who proposes, should *before* that consent is given, *change his intention* on the subject, the concurrence of the two wills is wanting, and there is no contract."<sup>89</sup> (Italics supplied)

And by Article 1804:

"The acceptance need not be made by the same act, or in point of time, immediately after the proposition; if made at any time *before* the person who offers or promises has *changed his mind, or may reasonably be presumed to have done so*, it is sufficient." (Italics supplied)

Thus, the acceptance is binding if knowledge of it reaches the

Toullier, *supra* note 7, at n° 29, according to whom mere knowledge, even though not acquired by means of an official communication, suffices.

37. Art. 1810, La. Civil Code of 1870: "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 contract be accepted before the death of the party offering it, although he had no notice of it, the obligation is complete . . ."

33. The question as to when an acceptance becomes binding gives rise to that of the *date* of the contract. Although the obligations of a contract are not binding until knowledge of the acceptance comes to the proposer, it must be inferred from Article 1810 (*supra* note 37) that the contract dates from the declaration or act of acceptance. This view, expressed in 6 Toullier, *op. cit. supra* note 7, Bk. III, Tit. III, n°s 24, 26, 31, was severely criticized by Spinnael (*Annotations Critiques sur la Doctrine de M. Toullier*, tome 2, pp. 11-19, notes on Bk. III, Tit. III) for inconsistency in theory. There is no inconsistency in theory, however, if the contract is regarded as conditionally complete at the time of the declaration or act of acceptance, the condition being non-revocation of the acceptance by the acceptor and non-revocation of the offer before the proposer receives knowledge of the declaration or act of acceptance. The proposer having died without changing his acceptance, the contract is binding. The theory is found in the German (B.G.B., Arts. 151, 153), Japanese (Civil Code, Arts. 97, 256), and particularly, the Brazilian (Civil Code, Art. 1036) law. Cf. Comment (1935) 9 Tulane L. Rev. 590, 601, which correctly states that the *information* theory should be followed in Louisiana in determining whether a contract is binding, but which seems to infer that the contract dates from the receipt of information by the proposer.

39. For complete text of Article 1800, see note 32, *supra*.

proposer before he has changed his intention, or before the lapse of so long a period after the making of the offer that he would be presumed to have changed his intention.<sup>40</sup> Since there is no requirement that this be expressed or declared in any manner before receipt of the acceptance, it must be concluded from the face of these articles that the mere change of intention (even if unexpressed) prevents the concurrence of wills and bars the completion of the contract.<sup>41</sup> This may seem impractical, and unjust to the party accepting because it would give him no security regarding the formation of the contract; and this would certainly be true if it were not for the limitations imposed by Articles 1801, 1802, and 1809, which make the principle more intelligible and practical.

Article 1800, which provides that there can be no contract if the proposer changes his intention before receipt of the acceptance, is followed by the first limitation on the proposer's freedom to revoke—in Article 1801:

“The party proposing shall be presumed to continue in the intention, which his proposal expressed, if, on receiving the unqualified assent of him to whom the proposition is made, he do not signify the change of his intention.”

Thus, if the proposer is no longer of the intention to contract when the acceptance comes to his knowledge, he must notify the other party immediately or he will be presumed to have continued in his original intention and the contract will be con-

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40. This article must not be interpreted as expressing a “reasonable time” in the common law sense. The civil law principle is that the proposal remains open until revoked. See *infra* at note 61. Of course, this theory was never applied in the case of an acceptance arriving so long after the making of the proposition that it could not be deemed a reply. See *infra* at note 62. This is the meaning of Article 1804. See *Dickson v. Dickson*, 32 La. Ann. 272, 275 (1880).

41. Moreover, this is the only possible interpretation which can be given. If a manifestation of the change of intention were required, then Article 1801 would have to be interpreted as permitting a revocation after acceptance. This would be directly contrary to the express provisions of Articles 1800, 1803, 1804, and 1809 (contra: Comment (1931) 5 Tulane L. Rev. 632, 634). The principle is not unique or original in Louisiana law. The Prussian Civil Code (Part 1, tit. 5, Art. 104) required the proposer to send immediate notice to the other party of a change of intention, but even if he failed to do so, he was not bound unless it was apparent that the acceptance arriving late had been dispatched in due time, and the proposer's liability was in damages for the injury caused and not on a contract. The modern German (B.G.B., Art. 151) and Japanese (Civil Code, Art. 527) law changed the rule so that the contract is considered binding in such cases, but the Brazilian Civil Code (Art. 1082) still adheres to the strict theory of the Prussian law.

sidered complete.<sup>42</sup> If this stood as the only limitation, the party accepting could not be certain of the binding effect of the contract until the lapse of such time as would be necessary for the proposer's notice of change of intention to reach him. However, no such inconvenience and loss of time is necessary if the acceptor acts upon the proposal within the proper time. Thus after repeating that the obligation of a contract is not binding until knowledge of the acceptance is received, Article 1809 continues:

“. . . he may therefore revoke his offer or proposition before such acceptance, but not without having allowed to pass the reasonable time which he may have given to the other party by the terms of his proposition, or which he is presumed to have given him, according to the circumstances of the case, for making known his determination.”<sup>43</sup>

From this article, it seems to be clear that the proposer cannot revoke his offer: (1) during the period he *has given* the other party within which to make known the latter's acceptance (in other words, for the duration of the “option” which the offer contained);<sup>44</sup> or (2) during the time that *he is presumed to have given* the other party for that purpose, the duration of which depends upon the *circumstances of the case*. In the latter situation this is the provision for an “option” (if the term may be so used) which is implied and presumed<sup>45</sup> in every

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42. By means of this presumption the Louisiana Civil Code avoids violation of the principle that there can be no contract if the proposer changes his intention (Art. 1800), and gives more security to the party accepting than if the proposer were required merely to answer in possible damages.

43. (Author's translation.) The official French and the English texts are as follows:

“ . . . elle peut, avant cette acceptation, révoquer son offre, après avoir toutefois laissé passer le temps raisonnable qu'elle peut avoir donné à l'autre partie, par les termes de sa proposition, ou qu'elle est censée lui avoir donné, d'après les circonstances, pour faire connaître sa détermination.” (Art. 1803, La. Civil Code of 1825)

“ . . . He may therefore revoke his offer or proposition before such acceptance, but not without allowing such reasonable time as from the terms of his offer he has given, or from the circumstances of the case he may be supposed to have intended to give the other party, to communicate his determination.”

The phrase “supposed to have intended to give” is misleading and does not connote the presumption of the French text.

44. This term or delay may be given expressly or impliedly. 6 Toullier, *op. cit. supra* note 7, Bk. III, Tit. III, n° 30. The question arises, however, whether the proposer would be held bound to his offer for the full time which he has given, regardless of the length of the period. Certainly no court would hold him to it if it was unreasonably long, because Article 1809 provides that the proposer is irrevocably bound for the *reasonable* time which he has given. See note 45, *infra*.

45. Although there is nothing in the Louisiana Civil Code specifically denying to the proposer the power of stipulating against this presumption,

offer.<sup>46</sup> And since the "option" and the simple offer are basically the same—the only difference being that the duration of the period of irrevocability is in one case determined by the proposer himself and in the other by law—whatever is said of the one applies with equal force to the other.<sup>47</sup>

An apparent similarity to the language of Article 1809 is found in Article 1802:<sup>48</sup>

"The party [proposing] is bound by his proposition and cannot withdraw it . . . if this consent [of the acceptor] is given within the period of time that the party proposing is presumed to have given, taking into consideration the situation of the parties and the nature of the contract."<sup>49</sup>

The duration of the period of irrevocability based upon the presumption that time is given for acceptance during which the proposer cannot revoke his offer, is made to depend upon the "situation of the parties and the nature of the contract." It is only reasonable to assume that the "circumstances of the case" in Article 1809, mean the "situation of the parties and the nature of the contract" in Article 1802.

it might be so inferred from Article 1809 which provides for the *reasonable* time which the proposer has given or is presumed to have given. Thus the proposer, in granting a delay, would have to grant one at least as long as that which he is presumed to have granted. It would be a question whether, in the case where the delay granted is less than the legal delay, the proposal should be presumed to imply the legal delay or be considered of no effect as an offer.

46. Since both of these delays or "options" are *legal* rather than *conventional* obligations, there can be no question of any need of *consideration* for their efficacy or support. See note 47, *infra*.

47. Whether or not Article 1809 is still in effect as far as it relates to options to buy or to sell in view of Article 2462 (as amended by La. Act 249 of 1910, Act 3 of 1910 (2 E.S.), and Act 27 of 1920) will not be considered in this Comment; it is however certain that Article 1809 still applies to all options other than those to buy or sell.

48. (Author's translation.) The official French and the English texts are as follows:

*"La partie est liée par sa proposition et ne peut la retirer, si elle a été faite dans des termes qui annoncent l'intention de donner à l'autre partie le droit de conclure le contrat par son consentement; et si ce consentement est donné dans l'espace de temps que la partie proposante est présumée avoir accordé, eu égard à la situation des parties et à la nature du contrat."* (Art. 1796, La. Civil Code of 1825)

"He is bound by his proposition, and the signification of his dissent will be of no avail, if the proposition be made in terms, which evince a design to give the other party the right of concluding the contract by his assent; and if that assent be given within such as the situation of the parties and the nature of the contract shall prove that it was the intention of the proposer to allow."

The comment in note 43 *supra*, also applies to this article.

49. The omitted clause reads as follows: "if the proposition be made in terms, which evince a design to give the other party the right of conclud-

The first impression of "according to the situation of the parties," is that it may have reference to the physical presence or absence of the parties. And if we accept this view without proof for the moment, the time reasonably necessary for the communication of the acceptance need not be more than but a moment if the parties are in the presence of each other; whereas in other situations, the time reasonably necessary would be that ordinarily required for the transmission of intelligence by the authorized or usual means of communication. In this respect, contracts made in the present day by telephone or by radio should be interpreted as contracts by parties in the presence of each other.

The meaning of the other phrase, the "nature of the contract" is somewhat difficult to determine. It may possibly refer to the time which would be required for acceptance or rejection in the light of the seriousness of the contract contemplated. Such an interpretation would evidently be contrary to the policy of a system which regulates the time for transmission of the acceptance, because it would introduce an element of uncertainty in the duration of the period of irrevocability; whereas the time to be allowed for the *transmission* of the acceptance could be determined as an objective fact with little difficulty, the exact time to be allowed for the *act* of acceptance would be largely a matter of opinion.

Perhaps a better interpretation might be that the phrase refers to the "nature of the contract" in the sense of its unilateral or bilateral character at the moment of inception.<sup>50</sup> Thus if the proposer requests a promise, the acceptance can be made in only a moment. But if he requests an act or a forbearance, the act of acceptance can not be complete until the act or forbearance is

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ing the contract by his assent" (see note 48, *supra*). The meaning of this clause is at first confusing in that an offer is not in reality an offer to contract unless the party making it intends to be bound. The term "offer," however, was and is still used in France for invitations to do business and other proposals the "acceptance" of which require acceptance by the party inviting or proposing the contract. Examples of these "offers" are the lists or catalogs published by merchants, who have the right to change the prices without notice. See Pardessus, *Cours de Droit Commercial* (1st ed. 1814-16; 3d ed. 1821 used by the author) nos 250, 269; 6 Planiol et Ripert, *Traité Pratique de Droit Civil Français* (1930) nos 127, 128. See also Toullier, *op. cit. supra* note 7, Bk. III, Tit. III, no 24, pars. 2, 3; *id.* no 25, note 3, where the commentator points out that the proposer may reserve the right of rejecting the acceptance; and Pothier, *Traité des Obligations*, no 3, par. 5 et seq. (2 Pothier, *Oeuvres* (Bugnet ed. 1861) 4).

50. It is always at this point that the character of the contract is determined; and whether there exists an obligation on only one or on both parties at the time the proposal ripens into a contract by the acceptance is what determines its unilateral or bilateral nature. See note 51, *infra*.

fully performed, and until then the offer can not be converted into a binding obligation by completion of the contract.<sup>51</sup> Thus, an offer to pay the offeree a sum of money to build a certain type of house for the party proposing, would remain open by the operation of law until such time had elapsed as might be necessary for the building of that type of house,<sup>52</sup> and if the house were completed in such time, the contract would be complete. This interpretation is fully in accord with the policy of the Louisiana Civil Code regarding the term to be allowed for the performance of an obligation.<sup>53</sup>

However, unless the proposer has so stipulated, the fact that the acceptance does not come to his knowledge within the time given or reasonably necessary for its communication does not imply that it can be of no effect. As previously stated,<sup>54</sup> Article 1804 merely requires that the acceptance arrive before the proposer has changed his intention, or before the lapse of so long a period that the proposer could not reasonably be presumed to have the same intention. Thus an acceptance which arrives late will nevertheless operate to complete the contract if the proposer is still of the intention expressed in his offer. The only loss to the party accepting is that he is not assured of the acceptance completing the contract, for after the lapse of time given by the proposer or reasonably necessary for the communication of the acceptance, the proposer is free to change his intention; and even if the proposer has changed his intention, his failure to notify the acceptor immediately will cause him to be bound.<sup>55</sup>

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51. This would be an unilateral contract because there would be an obligation on one of the parties alone, the other having fulfilled his part in performing the act which constituted acceptance. Cf. Art. 36, Italian Commercial Code, which provides that offers for bilateral contracts may be revoked before acceptance (with certain limitations), but that offers for unilateral contracts are binding on the proposer from receipt of the offer by the other party.

52. In determining the time to be allowed, the law does not consider the ability of the particular party but rather the objective possibility of performance. Arts. 1891, 2033, La. Civil Code of 1870.

53. Cf. Art. 2050, La. Civil Code of 1870: "When no term is fixed by the parties for the performance of an obligation, it may ("should" would be correct for the French *doit*) be executed immediately, unless, from the nature of the act, a term, either certain or uncertain, must be implied. Thus, an obligation to pay money, without any stipulation for time, may be enforced at the will of the obligee. But a promise to make a crop of sugar is necessarily deferred, until the uncertain period when the cane shall be fit to cut." Cf. Prussian Civil Code, Part 1, tit. 5, art. 101 (*infra* note 57).

54. *Supra* note 40, and text supported thereby.

55. Whether or not an offer remains open after the expiration of the stipulated or legal delay depends upon the manner in which the offer has been made. If the proposer has agreed merely to hold open his offer for a

Thus it appears, in effect, that there are three periods to the offer: first, the period given for acceptance, or if none has been given, that reasonably necessary for the communication of the proposal and the acceptance, during which the proposal is presumed to be open; second, the period after the expiration of the above delays, during which the proposal is not presumed to be open, but during which an acceptance coming to the proposer's knowledge will be considered binding upon him if he does not notify the acceptor immediately that he has changed his intention; and third, the period so long after the making of the offer that the proposer cannot be presumed in any event to be still of the intention which his proposal expressed, during which the arrival of an acceptance cannot be considered more than a counter offer.

In order to ascertain how such principles entered Louisiana law, the inquiry should include an examination of the commentaries on the Code Napoleon which were available to the Louisiana redactors. Toullier, after explaining that the proposer is bound to maintain his offer for the time he has given expressly or impliedly to the other party for acceptance,<sup>56</sup> points out the rule of the Prussian Civil Code<sup>57</sup> requiring that the proposer keep

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certain time, it may not be implied necessarily that the offer lapses after such delay. On the other hand, the proposer might so stipulate in his offer, or might even provide for the maximum duration of the offer without obligating himself to maintain the offer after the lapse of the legal delay. In the modern German (B.G.B., Art. 146), Japanese (Arts. 521, 523) and Brazilian (Art. 1086) Civil Codes, the offer is considered of no effect after the lapse of the stipulated or legal delay.

56. 6 Toullier, op. cit. supra note 7, Bk. III, Tit. III, n° 30.

57. Prussian Civil Code, Arts. 90-105. The principal articles, as translated by the French bureau of foreign legislation (supra note 14), with English translations by the author, are as follows:

Art. 94. "*Ist bei dem Antrage wegen der Zeit zur Annahme gar nichts bestimmt worden, so muss die Erklärung über einen mündlichen Antrag sogleich, als derselbe geschehen ist, abgeben werden.*"

"*Si au moment de l'offre on n'a rien déterminé relativement au temps de l'acceptation, il faut que la déclaration sur une offre faite verbalement soit donnée aussitôt que celle-ci a été faite.*"

"If at the moment of the offer nothing has been determined as to the time for acceptance, it is necessary that the declaration on an offer made verbally be given as soon as the offer has been made."

Art. 96. "*Ist der Antrag unter Abwesenden schriftlich geschehen, so kommt es auf den Zeitpunkt an, da der Brief an dem Orte, wo der Andere sich aufhält, nach dem gewöhnlichen Laufe der Posten hat eingeht können.*"

"*Si l'offre entre des absens a été faite par l'écrit, cela dépendra du moment où la lettre, d'après le cours ordinaire des postes, aura pu arriver à l'endroit où réside l'autre partie.*"

"If an offer between absent parties has been made in writing, [the time to be allowed by the proposer] shall depend upon the time when the letter, in the ordinary course of mail, could have arrived at the place where the other party resides."

open his offer and not be permitted to revoke it for such time as may be necessary to transmit the acceptance to him.<sup>58</sup> Delvincourt does likewise and adds that he presumes the law would be the same in France.<sup>59</sup> That both available French commentaries discussed and advocated the rule of the Prussian Civil Code, is a

Art. 97. *"Mit der nächsten Fahrenden oder reitenden Post, welche nach diesem Zeitpunkte abgeht, muss der Antrag beantwortet werden."*

*"Il faut que celle-ci réponde sur l'offre à la première poste qui part après l'avoir reçue."*

"This party must reply to the offer by the first mail leaving after its receipt."

Art. 101. *"Geschiet der Antrag einer Corporation oder Gemeinde, so muss der Antragende auf die Erklärung derselben so lange Zeit warten, als erforderlich ist, dass über den Antrag ein verfassungsmässiger Entschluss genommen und ihm bekannt gemacht werden könne."*

*"Si l'offre a été faite à une corporation ou commune, l'offrant doit attendre la déclaration pendant tout le temps nécessaire pour qu'il soit pris sur l'offre une résolution conforme aux lois, et qu'elle puisse lui être communiquée."*

"If the offer has been made to a corporation or community, the offeror should await the declaration for the length of time which may be necessary for adopting a resolution according to law, and for its communication to him."

Art. 103. *"Sobald aber die vorstehend §§ 90 sqq. bestimmten Fristen zur Erklärung über den Antrag fruchtlos verlaufen sind, kann der Antragende zurücktreten."*

*"Aussitôt que les délais fixés (90 et suiv.) pour la déclaration sur l'offre sont expirés sans effet, l'offrant est libre de retirer ses offres."*

"As soon as the delays fixed (90 et seq.) for declaration on the offer have expired, the offeror is free to revoke his offer."

58. *"Le principe que l'acceptation, lorsqu'elle n'est pas connue, n'empêche pas la révocation des offres, sert à résoudre la question suivante. J'écris le 1er janvier à un négociant, pour lui demander une partie de marchandises à tel prix. Le 5, il me répond qu'il accepte ma proposition, et qu'il m'expédiera les marchandises. Sa réponse arrive à Rennes le 8, mais le 7 j'avais écrit pour révoquer ma demande. L'acceptation m'étant alors inconnue, la révocation est-elle valide? Elle est sans doute dans la rigueur des principes. Cependant, ne peut-on pas dire qu'en faisant une offre par lettre, on s'oblige tacitement de ne pas la révoquer avant le retour du courrier, ou avant le temps nécessaire pour recevoir la réponse? Cette décision est plus conforme à l'équité, et c'est aussi celle qu'adopte le Code prussien, Ire part., tit. 5 no. 96."* 6 Toullier, op. cit. supra note 7, Bk. III, Tit. III, n° 29, note 2.

"The principle that the acceptance, when it is not known, does not prevent the revocation of an offer, serves to solve the following question. I write to a merchant on Jan. 1st, requesting certain merchandise at a certain price. On the 5th he answers that he accepts my proposition and that he will send me the merchandise. His reply arrives in Rennes on the 8th, but on the 7th I had written a revocation of my order. The acceptance then being unknown to me, is the revocation valid? It is without doubt in a strict application of the principles. However, may it not be said that in making an offer by letter, one tacitly obliges himself not to revoke it before return mail, or before the time necessary for receipt of the answer? This decision is more in accord with equity, and it is also that which is adopted by the Prussian Code, Part 1, tit. 5, n° 96."

The fact that the Louisiana Civil Code incorporates this view has been shown previously in Comment (1935) 9 Tulane L. Rev. 590, 600-601.

59. *"Mais de quand est censée faite la vente par correspondance? Du jour que l'offrant a eu connaissance de l'acceptation des offres. Mais quid,*

fact that must have played an important part when the Louisiana redactors adopted this principle.<sup>60</sup>

Now although Toullier and Delvincourt borrowed from the Prussian law in order to impose a period of irrevocability on an offer, still for the time after the expiration of such period they adhered to the civil law principle that an offer remains open until revoked.<sup>61</sup> But the theory of the indefinite duration of an offer was never strictly applied, and the acceptance which came so long after the offer that the proposer could no longer be considered as having the intention to contract was not deemed binding.<sup>62</sup> The redactors of the Civil Code of 1825 seem to have combined these ideas, and it is therefore the writer's firm conviction that this is the interpretation of the present problem in the Louisiana law of offer and acceptance.

The Louisiana jurisprudence on offer and acceptance is unfortunate. Never have the courts succeeded in interpreting the articles as a system, and the very inconsistency of the decisions

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*si les deux parties sont éloignées l'une de l'autre, et que, dans l'intervalle des offres à l'acceptation, l'offrant ait révoqué ses offres? Il faut distinguer: si l'offrant a fixé un délai pour l'acceptation, il ne peut révoquer avant l'expiration du délai; sinon, il doit attendre un délai suffisant, pour que l'autre partie ait pu répondre, et que la réponse ait pu lui parvenir. C'est ainsi que ces questions sont décidées par le Code Prussien, partie 1re., tit. 5, art. 90 et suivans; et je pense qu'il en seroit de même dans notre droit."* 3 Delvincourt, op. cit. supra note 8, pp. 133-134 (Notes to p. 69; n. 2, par. 2).

"But at what time is a sale by correspondence considered made? At the time when the offeror has received knowledge of the acceptance of the offer. But what if the two parties are at a distance from each other, and in the interval between the offer and the acceptance, the offeror has revoked his offer? It is necessary to distinguish: if the offeror has fixed a delay for acceptance, he may not revoke until the expiration of the delay; if not, he should await a delay sufficient for the other party to have answered, and for the answer to have come to his knowledge. It is in this manner that these questions are decided in the Prussian Code, Part 1, tit. 5, art. 90 et seq; and I suppose that the solution would be the same in our law."

60. Elements of the system, with varying modifications, are found in the old Austrian Civil Code (Art. 862), and exist today in the Brazilian (Civil Code, Arts. 1080, 1081), German (B.G.B., Arts. 147-149), Italian (Commercial Code, Art. 36), Japanese (Civil Code, Arts. 251, 254; Commercial Code, Arts. 269, 270), and Mexican (Civil Code, Arts. 1289-1292) law, as well as being provided for in the *Projet de la Franco-Italian Code of Obligations* (Art. 2).

Cf. the more modern expression of the same underlying idea: "*Il est plus simple de poser en thèse générale que la sécurité des transactions impose que l'offre ait déjà une valeur juridique.*" Demogue, *Traité des Obligations* (1923) 163, n° 553.

"It is simpler to state as a general proposition that the security of transactions makes it necessary that the offer have a juridical value."

61. 2 Delvincourt, op. cit. supra note 8, p. 458 (p. 122, n. 1, par. 1); 6 Toullier, op. cit. supra note 7, Bk. III, Tit. III, n° 26. See also Pardessus, op. cit. supra note 49, n° 250, par. 2.

62. Pardessus, op. cit. supra note 49, n° 250, par. 5.

manifests their confusion. The fact that the articles announced principles of a system of law not generally known in a jurisdiction more familiar with the French, Spanish, and Anglo-American doctrines, rendered difficult their interpretation, and with the two key articles mistranslated in the English from their French originals, this confusion in the jurisprudence could not have been avoided.<sup>63</sup>

#### SUMMARY

Summarizing, the essentials of the doctrine may be expressed as follows:

##### I. An offer remains open and irrevocable:

A. For the time expressly or impliedly given for acceptance;  
or

B. If no time has been given by the proposer in his offer—for the time reasonably necessary for the acceptance and its communication to the proposer; which is computed by considering:

1. The time required for communication to and from the party to whom the proposition was made:
  - a. In face to face offers (or offers by telephone or radio), only an instant is required;
  - b. In proposals to parties at a distance, only the time necessary for the transmission of the proposal and the acceptance by the authorized or usual means of communication is required;

and

2. The time required for the *act* of acceptance, according to the nature of the contract:

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63. Any adequate discussion of the jurisprudence would necessarily be too lengthy, and, in view of what has been stated above, of little use other than to emphasize the confusion in the decisions. For those who may wish to consider the decisions, however, the following citations are given: Corryolles v. Mossey, 2 La. 504 (1831); Ryder v. Frost, 3 La. Ann. 523 (1848); Byrd v. Cox, 15 La. Ann. 609 (1860); Dickson v. Dickson, 32 La. Ann. 272 (1880); Gordon v. Stubbs, 36 La. Ann. 625 (1884); Peet & Co. v. Meyer, 42 La. Ann. 1034, 8 So. 534 (1890); Miller v. Douville & Gallagher, 45 La. Ann. 214, 12 So. 132 (1893); Lachman & Jacobi v. Block, 47 La. Ann. 505, 17 So. 153 (1895); Nickerson v. Allen Bros. & Wadley, 110 La. 194, 34 So. 410 (1903); Union Sawmill Co. v. Lake Lbr. Co., 120 La. 106, 44 So. 1000 (1907); Blanks v. Sutcliffe, 122 La. 448, 47 So. 765 (1908); Shreveport Traction Co. v. Mulhaupt, 122 La. 667, 48 So. 144 (1909); Riley v. Union Sawmill Co., 122 La. 863, 48 So. 304 (1909); Union Sawmill Co. v. Mitchell, 122 La. 900, 48 So. 317 (1909); Heitman Co. v. Kansas City Southern R. Co., 136 La. 825, 67 So. 895 (1915); Miller v. Oden, 149 La. 771, 90 So. 167 (1921); Barchus v. Johnson, 151 La. 985, 92 So. 566 (1922); Haneman v. Uhry, 8 La. App. 534 (1928); Blanchard v. Greater Jefferson Realty Co., 9 La. App. 492 (1929); Times Picayune Publishing Co. v. Harang, 10 La. App. 242

- a. In offers for bilateral contracts, this would be only the moment necessary for the making of the promise;
  - b. In offers for unilateral contracts, this would be only the time necessary for the performance of the act or forbearance requested.
- II. After the expiration of the delays in IA and IB, above, the proposer is free to change his intention, and need not declare so or notify the other party of such fact;
- A. However, if the acceptance comes to his knowledge before the lapse of time mentioned in III, the proposer must immediately notify the acceptor of his change of intention or be presumed to have continued in that intention and be bound to the contract.
- III. Yet, if the acceptance comes to the knowledge of the proposer so long after his proposal that he cannot be presumed to be still of the intention which his proposal expressed, the acceptance need not be considered more than a counter offer.

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## ADOPTION

The scope of the present inquiry includes the form and the civil effects of adoption, particular attention being directed to the new Adoption Act<sup>1</sup> and to its probable effect on Louisiana jurisprudence.

Prior to 1865, adoption in Louisiana was possible only by means of a special legislative act.<sup>2</sup> Although adoption had existed under the Spanish regime,<sup>3</sup> it was abolished by the Code of 1808,<sup>4</sup>

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(1929); *Dreyfous Co. v. Keifer*, 11 La. App. 364 (1929); *Picou v. St. Bernard Parish School Board*, 132 So. 130 (La. App. 1924); *Foster v. Morrison*, 145 So. 13 (La. App. 1933).

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1. La. Act 428 of 1938.

2. For examples of such adoptions, see La. Acts 26 and 65 of 1837; La. Acts 69, 139, 217, and 235 of 1852; La. Act 100 of 1859.

3. *Las Siete Partidas*, 4.16.1-10.

4. La. Civil Code of 1808, p. 50, 1.7.35.