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Offer and Acceptance

Michael W. Mengis

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OFFER AND ACCEPTANCE

Over the years, Louisiana's courts and scholars have struggled with the law of offer and acceptance in Louisiana. OA¹ 1800², 1801³, 1802⁴, and 1809⁵ present a difficult yet interesting problem since the articles are complex and seemingly contradictory. On January 1, 1985, many existing riddles were solved when Act 331 of the 1984 Regular Session of the Louisiana Legislature took effect. The official comments to the obligations revision, for the most part, state that it does not change the law in regard to the revocability of offers. Therefore, in order to examine the changes of Act 331, it is first necessary to examine the old articles themselves, and then to examine their jurisprudential history. The proper interpretation of the new articles can only be reached in light of the old law.

The Old Articles

The law of offer and acceptance has always presented Louisiana courts with an interesting dilemma since these articles seem to contradict each other in many regards. OA 1800 states the general rule that if the offeror should change his mind before acceptance is given, then there is no "meeting of the minds" and no contract. OA 1801 places a limitation on this concept by providing that the offeror must state immediately after the acceptance is received that he has changed his

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1. Articles 1756-2291 of the Louisiana Civil Code of 1870 [hereinafter cited as OA (old articles)] were repeated and replaced by new articles 1756-2059 [hereinafter cited as NA]; see 1984 La. Acts, No. 331, § 1. See also NA 1876-1878 (dealing with impossibility of performance giving rise to dissolution or partial dissolution of a contract).

2. OA 1800 ("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.").

3. OA 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.").

4. OA 1802 ("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 time as the situation of the parties and the nature of the contract shall prove that it was the intention of the proposer to allow.").

5. OA 1809 ("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; 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 to the party, to communicate his determination.").

mind.⁶ This limitation creates uncertainty. If the offeror can reject an acceptance after it is made, the offeree is left not knowing whether his acceptance has bound them or not. OA 1802 tries to temper this by stating that the change of mind will be of no avail if the terms "evince a design to give the other party the right of concluding the contract by his assent" and if that assent is given within the time that the offeror must have intended to give. However, OA 1809 states that a reasonable time must be given for the offeree to accept and the offer is not revocable during that time. This means that, if all the articles apply to the facts of a case, there are four periods in the life of an offer.⁷

- (1) A minimum reasonable time for acceptance in which the offer cannot be revoked. OA 1809.
- (2) A maximum reasonable time to accept the offer that the offeror intended to allow. This second stage, most of the time, is the same length as the first, but it may be longer. The offer may be revoked only before acceptance. OA 1802.
- (3) Once the period of 1802 has passed, the offeror is presumed to keep the offer open. However, he may signify his change of mind after acceptance. OA 1801.
- (4) After a certain time, the offer is deemed dead and cannot be accepted. The offeror need not voice his dissent at all. Even if he remains silent, there is no contract.⁸

It is evident that OA 1802 and OA 1809 provide for different and distinct time periods. OA 1809 deals with a period of irrevocability of an offer and OA 1802 deals mainly with the lapse of that offer.⁹ These two periods do not have to be the same length. The 1809 period is governed by "the terms of his offer . . . or from the circumstances of the case." It is merely a minimum period of time in which the offeree is given a chance to respond to the offer. In a face-to-face situation, it might be no more than a moment. The OA 1802 period is governed by the "situation of the parties and the nature of the contract;" however, this period is for a different purpose. The article provides for the lifetime of an offer.

These four stages are also compatible with another system of interpretation. Many prefer to view these articles in light of whether the acceptance or revocation comes first. In other words, if the offer is

6. For a good discussion of the limits of OA 1800, see generally 1 S. Litvinoff, *Obligations* § 140, at 243-53, in 6 *Louisiana Civil Law Treatise* (1969).

7. For a somewhat similar scheme, see Pascal, *Duration and Revocability of an Offer*, 1 *La. L. Rev.* 182, 195-96 (1938).

8. The existence of this fourth stage has been supported by other authors. S. Litvinoff, *supra* note 6, § 140, at 246; Pascal, *Duration and Revocability of an Offer*, 1 *La. L. Rev.* 182, 192 (1938).

9. 1 S. Litvinoff, *supra* note 6, § 143, at 269-70 (1969).

revoked before it is accepted, then the terms of OA 1809 are applied to the case in order to determine if such a revocation is valid. On the other hand, if the acceptance precedes revocation, the terms of OA 1802 will determine if the parties are bound by the assent of the offeree. If they are not bound because the time given in OA 1802 has passed, then the terms of OA 1801 will apply to the case. Stage one, then, is that minimum "reasonable time" given under OA 1809 in which a revocation is ineffective, even if it precedes acceptance. After that minimum "reasonable time," a revocation which precedes acceptance is valid. However, if acceptance occurs first, the parties will be bound if that acceptance is made during the time allowed by OA 1802. This is stage two. The assent of the offeree concludes the contract and the dissent of the offeror will be of no avail if the acceptance is given within the time allowed under OA 1802. If acceptance comes too late, stage three and OA 1801 apply. In this stage, the offeror may revoke after acceptance if he does so immediately. Stage four finds no authority in the code, but scholars are in agreement that at a certain time the offer dies and an acceptance is simply a counter-offer.¹⁰

As stated above, the two periods are strongly connected and are for the most part the same.¹¹ However, they may be quite different. In a market where price does not fluctuate much, the offer may last past a minimum time for acceptance. For example, if A offers to buy B's house for \$100,000, under OA 1809, A may not revoke until B has had a chance to communicate an acceptance. Under normal circumstances, that period would be no longer than a day or so. However, that offer, under OA 1802, may be valid for several months, or even indefinitely. During this period, the offer can be revoked, but A would have to do so before acceptance. The two periods must be distinct in order for the articles to be reconcilable.

The Jurisprudence

The courts have rarely applied these articles correctly. They have often applied one or more out of context and ignored others.¹² The two articles that present the largest problem are OA 1801 and OA 1809. In an early case the Louisiana Supreme Court addressed this issue and reached a more or less correct result. In *Boyd v. Cox*,¹³ the court applied OA 1801 and 1802 and ignored OA 1809.¹⁴ In this case, the parties

10. See supra note 8.

11. 1 S. Litvinoff, supra note 6, § 143, at 269-70 (1969).

12. Note, Obligations—Revocability of Offers, 23 La. L. Rev. 795, 797 (1963).

13. 15 La. Ann. 609 (1860).

14. However, since OA 1802 and OA 1809 are closely related and both conflict with OA 1801, the court dealt with the problem directly. The reader should note that this case was decided during the regime of the Civil Code of 1825. Under that code, OA 1801 was article 1795 and OA 1802 was article 1796.

were face to face when the offer was made. The court then considered OA 1802 and ruled that the situation of the parties and the nature of the contract did not evince an "intention of the proposer to allow several days for reflection and decision upon his proposition"¹⁵ and that the offer had lapsed. Because of this, OA 1801 governed (stage 3 in the earlier discussion) and the immediate dissent of the offeror after acceptance was necessary to prevent an agreement.¹⁶

This is a correct reading of these articles since it was not necessary for the court to discuss OA 1809. Since the parties were face to face when the offer was made, the stage one period (OA 1809) lasted for only a moment and then stage two (OA 1802) was applicable. The court had to decide between stage two and stage three. Since acceptance preceded revocation, OA 1809 did not apply. The court ruled that stage two had passed and that the revocation of the offer was valid. The court did not apply the articles out of context, rather, it did an adequate job of rendering them compatible.

Another case in which the articles were applied correctly was *Picou v. St. Bernard Parish School Board*.¹⁷ The court quoted from both OA 1802 and OA 1809 and then said:

It is inconceivable from consideration of all the facts involved in this case, and particularly that the plaintiff had for ten years been teaching in the parish of St. Bernard as a public school teacher, and had been so doing even up to the year previous to the signing of the foregoing contract, that the school board could have expected of her an immediate reply to or acceptance of her appointment. Certainly the twelve days taken up by her for deliberation was in no manner unreasonable, and constituted such delays under the provisions of our Code as are to be contemplated as reasonable, and within the intention of the parties making the offer.

Since the court found that OA 1802 and OA 1809 applied, it did not fall back to OA 1801. If the OA 1809 period was applicable, the offer could not have been revoked. If the OA 1802 period was applicable, revocation must have preceded acceptance, which it did not. Either way, the contract was completed.¹⁸

Since 1955, however, the courts have reached some interesting decisions. *Ever-Tite Roofing Corp. v. Green*¹⁹ marks the turning point. In *Ever-Tite*, the defendants had signed a "contract" to re-roof their house. This "agreement" was not binding until approval by the home office

15. *Boyd*, 15 La. Ann. at 611.

16. *Id.*

17. 132 So. 130, 132 (Orl. 1924).

18. The court did not distinguish OA 1802 and OA 1809.

19. 83 So. 2d 449 (La. App. 2d Cir. 1955).

and approval of financing; therefore, it was really just an offer to contract. Meanwhile, the defendants had the work done by someone else. Ever-Tite workers showed up to do the work and were turned away. This was the first notice Ever-Tite had of revocation. The Louisiana Second Circuit Court of Appeal recognized that a reasonable time must be allowed the offeree to accept, and cited both OA 1802 and OA 1809 but did not differentiate the two. Since the loading of the trucks by the offeror was the beginning of performance, the offer was accepted and that acceptance came before revocation. A contract was formed and the dissent of the offeror was of no avail.²⁰

In basically the same fact pattern as *Ever-Tite*, the court in *Loeb v. Johnson*²¹ reached a different result. However, in *Loeb*, the offeror revoked the offer two days after it was made and before it was accepted. The court did not mention OA 1809 specifically but cited *Ever-Tite* with approval and expanded it somewhat. In *Ever-Tite*, since the defendants never communicated their revocation it was not effective. The court did not rule whether such a revocation, if communicated, would have been effective. In other words, was the defendants' offer to re-roof the house an irrevocable one? This question was answered by the *Loeb* court in the negative, and the revocation was deemed effective. Even the fact that a delay for financing was intended by the parties was not enough to make the offer irrevocable. In these circumstances, the OA 1809 period had lapsed, but OA 1802 still applied. The offer is revocable only before acceptance²² (stage 2, *supra*).

In *National Roofing and Siding Co. v. Navarro*,²³ an offer was revoked only one day after it was made. The court considered OA 1809 but determined that the parties intended immediate acceptance; therefore, the offer was revocable at any time prior to acceptance under OA 1802. Again, the *Ever-Tite* decision was applied such that revocation which precedes acceptance was ruled valid.

The courts in *Loeb* and *Navarro* shortened the OA 1809 period. With modern technology, it can be said that all transactions, regardless of the geographic position of the parties, are virtually face to face. Because of this, a reasonable time to communicate an acceptance is only a moment. As technology improves, the period of irrevocability is shortened. Modern courts have held that a "strong fact situation"²⁴ is nec-

20. For a good discussion of this case and others concerning this topic, see 1 S. Litvinoff, *supra* note 6, § 141.

21. 142 So. 2d 518 (La. App. 1st Cir. 1962).

22. While the court said that the revocation was valid, it did not say that acceptance before revocation would have bound the parties. This is inferred from the *Ever-Tite* case, which the *Loeb* court cited.

23. 149 So. 2d 648 (La. App. 4th Cir. 1963).

24. NA 1930, comment (b); the term "strong fact situation" is used by the court in *Wagenvoord Broadcasting Co. v. Canal Auto. Transm. Serv.*, 176 So. 2d 188, 191 (La. App. 4th Cir. 1965).

essary before they will imply that an offer is irrevocable for any substantial length of time.²⁵ In other words, if the revocation precedes acceptance, the revocation will almost always be valid.

In these decisions, the modern courts modified the four stages of the life of an offer:

- (1) The offer is irrevocable for only a moment in most cases because the parties usually contemplate immediate acceptance. OA 1809.
- (2) The offer is open for a reasonable time and is still irrevocable if indicated by the parties' language or the circumstances of the case. If not, the offer is revocable only before acceptance.

Stages 3 and 4 remain unchanged.

The modern courts have blurred the distinction between OA 1802 and OA 1809. Since these two periods are very closely related, it is not difficult to confuse them. Out of this confusion has emerged one "reasonable time" which governs the lapse of an offer. If the facts strongly suggest that the offeror intended to give a period of time for acceptance, then the offer is irrevocable during that reasonable time, after which the offer lapses. If such circumstances do not exist, the offer may be revoked before it is accepted.

To the modern courts, the offer is either revocable or irrevocable. Unlike the above case of the sale of the house for \$100,000 where the offer changed from an irrevocable one into a revocable one, under the modern rule A's offer would be revocable unless accepted immediately. However, if A had granted a certain time to consider the offer, the offer would be irrevocable for the entire time, after which it would lapse. The offer would be either revocable or irrevocable for its entire life span.

The Revision

The revision has codified the recent jurisprudence with one minor change. OA 1809 applied to all offers and made them irrevocable for a time. The new law removes this requirement from all offers and makes irrevocable only those offers in which the offeror manifests an intent to give a delay for acceptance.²⁶ This is a minor change since the courts had severely limited the effect of OA 1809 by requiring a special fact pattern to make an offer irrevocable for a substantial period.

The new articles have completed the separation of the two types of offers. An offer is, for its entire life, either revocable or irrevocable. NA 1928²⁷ defines irrevocable offers and adopts the jurisprudence in

25. *Wagenvoord Broadcasting Co. v. Canal Auto. Transm. Serv.*, 176 So. 2d 188 (La. App. 4th Cir. 1965).

26. NA 1930 & comments.

27. An offer that specifies a period of time for acceptance is irrevocable during that

that for an offer to be irrevocable, the offer must either specify an exact time for delay or "manifest an intent to give the offeree a delay." NA 1929²⁸ states that the irrevocable offer expires if not accepted during that period of delay in NA 1928.

If the offer is not irrevocable, NA 1930²⁹ makes it revocable at any time prior to acceptance. This changes the law, since OA 1809 made all offers irrevocable for some period of time. NA 1930 follows the common law maxim, "The offeror is the master of his offer." The revocable offer under NA 1930 expires after a reasonable time.³⁰

The revisions concerning offer and acceptance are easily read and understood, but they are not without problems. If an offer is irrevocable because an exact time for acceptance is specified, there is no problem,³¹ but what of the second case in NA 1928? When the offeror manifests his intent to give a delay, the offer is open and irrevocable for a reasonable time. The comment to NA 1928 cites both OA 1802 and OA 1809 as source provisions.³² This leaves some confusion as to the measure of a "reasonable time." It would seem that the circumstances of the case would at least be part of the inquiry into determining the limits of a reasonable time,³³ but is that time one of lapse of an offer or simply a minimum time for acceptance? In other words, is the term "reasonable time" to be strictly construed as a minimum time or will it be something longer? Along the same line, the same "reasonable time" governs the lapse of the revocable offer. Is this period also a minimum time for acceptance? This writer suggests that these two reasonable times must be different. Since the offeror of an irrevocable offer is no longer free to withdraw, the law must protect him and strictly construe the reasonable time period of NA 1928.³⁴ An irrevocable offer should only remain open for a minimum reasonable time of

time. When the offeror manifests an intent to give the offeree a delay within which to accept, without specifying a time, the offer is irrevocable for a reasonable time. NA 1928.

28. NA 1929 ("An irrevocable offer expires if not accepted within the time prescribed in the preceding article.").

29. NA 1930 ("An offer not irrevocable under Civil Code Article 1928 may be revoked before it is accepted.").

30. NA 1931 ("A revocable offer expires if not accepted within a reasonable time.").

31. *Box v. Karam*, 252 So. 2d 176 (La. App. 3d Cir. 1971); 1 S. Litvinoff, *supra* note 6, § 140 (1969 & Supp. 1984); Pascal, *Duration and Revocability of an Offer*, 1 La. L. Rev. 182, 190 (1938).

32. 1984 La. Acts, No. 331, § 1, art. 1928, comment (a).

33. Since circumstances of the case encompasses the situation of the parties and nature of the contract, the former is the longer period. Cf. 1 S. Litvinoff, *supra* note 6, § 140, at 247-48.

34. This proposition is strengthened by the provisions in NA 1934 and 1935. The latter article applies the "mailbox rule" to revocable offers only. Such an acceptance of revocable offers is effective upon transmission. However, in an attempt to protect the offeror of an irrevocable offer, NA 1934 makes acceptance effective upon receipt by the offeror instead of its transmission.

acceptance if no exact time is specified. On the other hand, the offeror of a revocable offer is always free to withdraw before acceptance. The law in this case will lend its protection to the offeree and liberally construe the reasonable time as a maximum time for the life of the offer. This is supported by the fact that OA 1809 is not cited as a source for NA 1931.

The courts have yet to provide much guidance on what constitutes a manifestation of intent to grant a delay in order to make an offer irrevocable.³⁵ Assuming that the language of NA 1928 attempts to codify this requirement,³⁶ how does one "manifest an intent to give . . . a delay?" In two of the three roofing cases, it can be seen that even though the fact that a delay was contemplated because of the need to secure financing, the court did not find an intent to give a delay for acceptance,³⁷ but rather called for immediate acceptance.³⁸ This suggests the conclusion that such facts will rarely, if ever, exist unless an exact time is stated. More than simply a need for information or time for reflection is required. When the time is not specified, an express intent to leave the offer open for a period will be necessary. It appears that the only safe thing to do is specify the time exactly.

Summary

The riddles and the complications of the old law are gone, and it is now easy to hold a mental picture of the framework of the new law. There are two types of offers and only one stage in their life spans instead of the old four stage scheme. The revision was faithful to the recent jurisprudence, even when the jurisprudence is not entirely clear. It is important to remember that the new law does not attempt to codify what the redactors meant in the 1820's but rather what the courts did in the 1960's.

The new law is simple. While most of the simplifying changes have come from the courts over the years, the language is now simple, too. This simplicity leaves room for further adaptation by the courts and leaves some uncertainty in many provisions. The need for guidance and firm rules has been replaced by flexibility. The law of offer and acceptance in the modern world needs to be flexible in order to keep pace with changing technology. This new law will keep pace.

Michael W. Mengis

35. *Picou v. St. Bernard Parish School Bd.*, 132 So. 130 (Orl. 1924), comes the closest and may give some guidance.

36. NA 1928 & comment (b) to NA 1930.

37. *Loeb*, 142 So. 2d at 520; *Navarro*, 149 So. 2d at 653.

38. See 1 S. Litvinoff, *supra* note 6, § 141, at 260.