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CONCENSUS PATTERNS IN OFFER & ACCEPTANCE

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The dictionary meaning of "concensus" is agreement. But the quality of the agreement emerging from a concensus is quite different from other types of agreements. In both cases what the agreement is - the quality of the agreement, depends on the social situation from which it emerged. But since no social situation is static the variations in the social process are revaled in the agreement emerged from the concensus patterns.

The object of this paper is to indicate the role of consensus" true, full and free" meeting of minds in the formation of contract. Is the undiluted theory of concensus a true explanation of an agreement? or shallwe say that the pure theory of concensus is in practice diluted by commercial expendiency and the resultant temporal and structural changes in the socio-economic relationships.

The requirement of agreement has led certain juristic writers of the 19th Century to place great emphasis upon the consensual nature of contractual obligations. The essence of the contract according to them is the meeting of the wills of the parties in full and final agreement. The existence of the consensual nature of an agreement which is a prima facie essential to the validity of a contract is from the objective fact of an offer made by one party and acceptance of it by the other.

The reasons for the consensual theory of agreement are:

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Firstly, the politics and policies of the 19th Century encouraged ideas of free trade, commerce and industry and discouraged restrictions upon individual enterprise and initiative. In the words of Sir Hanery Maine the movement of progressive societies was a movement from status to contract. Sir Maine was of -course writing at a time when the individualistic philosphy was deeply enteranched and any kind of legal or social inhibition was abhored. The social philosophy is well expressed in the words" every one for himself and God for us all said a wild elephant dancing among chickings." Today, however, the social and economic out look is changed. The state is no longer considered as a police state but a social welfare state. Freddom of contract is regarded as a social ideal only where the bargaining power of the parties is equal and no injury is done to the community at large. The legislature intercepts in a number of ways with an individuals freedom of contract. The relationship between employer and employee is regulated by such laws as minimum wage legislation and legislation relating to employees' conditions of work and accidents. The interests of public are protected by such measures as the Money Lenders' Act, the Rent Restriction Acts, Hirepurchase Acts and similar other enactments. Again the Restrictive Trade Practices Laws prevent the domination of the economic life of the country by the combinations of manufacturers which run contrary to the interests of consumers. The legislature has also intervened by enacting Restrictive Trade Practices Acts to prevent the domination of the economic life of the country by a few manufacturers' trade combines which are very often against the public interest.

The emergence of standard form contracts or what is known as 'contract of adhension' has made serious inroads on the consensual nature of agreement. The idea of the meeting of the minds of the "free and unfettered will of the parties or a negotiated agreement is replaced by the "standard form contracts." A common man on the street is continually making such contracts. Every time if he travels upon a bus or a train or uses the services of electricity or gas-board, or where he enters into a lease agreement for renting a house accepts, a standard form agreement the conditions of which are set out in a printed document devised by the supplier. In all these transactions the bargaining power of the parties is unequal. The

relationship in a sense does not result from the "free and unfettered" will of the parties but is the result of status. On the one side there is the powerful monopolistic supplier and on the other is the ordinary individuals. He has no choice but to accept the standard form or to go without those services. The idea of consensual nature of agreement in such situations largely becomes illusory.

The second reason for the theory of consensual nature of agreement is the existence of certain subjective nature of defences open for a breach of contract e.g. the contractual relationship is vitiated by the presence of certain elements as incapacity to contract arising either out of mental deficiency as in the case of an infact, lunatic or a drunken person or incapacity arising out of status. Even here in case of an infant's liability for necessaries, where goods are supplied to him, the plaintiff will not necessarily recover the contractual price but only "a reasonable price therefor."[1] The reasoning involved is far from consensual nature of contract. In case of mistake there is no real concensus between the parties and that is why Salmond calls it "error in concensus." The courts under the influence of concensus theory readily held that without a genuine real consent there was no valid contract. At present however the courts are more reluctant to interfere. In misrepresentation, duress or undue influence there is an error in cause or the inducing cause. The presence of these defences indicate the subjective nature and the resultant insistence on the consensual nature of contractual obligation. As Pollock has emphasised" the concent must be true, full and free."

The rule of concensus in agreements is operative only when there is communicated offer and acceptance. In Nevilla v. Kelly[2] and Gibbons v. Proctor[3] the court was inclined to take the view that contractual obligations may arise even where the act was done (or services rendered) in ignorance of the terms of the offer. The Judges gave no reasons for their decision which have

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1. Pontypridd Union v. Drew (1927) 1 K.B. 214.
2. (1862). 12 C.B. (N.S.) 740.
3. 64 L.T. 594.

generally been not accepted as sound by academic writers. It was asked how could the fact of agreement be inferred or concensus exist merely by the coincidence of two independent Acts?. The objections received valid recognition in the American case of of Fitch v. Snediker[4] and in the Australian case R. v. Clarke.[5] In Williams v. Carwardine[6] motive was treated as irrelevant provided the act was done with knowledge of the offer. The principle of conscensus was further extended in Tinn v. Hoffman[7] where each cross-offer was made in igroance of the other. A majority of Judges held that no contract had been concluded. The diversity in the reasoning of the Judges exhibits a pre-occupation with the pure concensus theory. It may as well be argued that there was in this case not only coincidence of acts but also a unaminity of minds.

In case of offer with several terms the exigencies of modern conditions have impelled a more objective view of concensus. In such cases interesting questions might arise as to whether is it the duty of the offeror to bring every term to the knowledge of the acceptor? What should happen if the acceptor be an illeterate or an indifferent person? The law on the point has developed through a series of cases.[8] It is now established that a standard form of contract may be imposed on another who is subjectively ignorant of the several terms or contents if the offeror has done what is reasonably sufficient to bring the several terms to the knowledge of the acceptor.[9]

Sometimes the courts may be driven to construe a contractual relationship, though not justified under the rules of orthodox theory. The classical example is the Satanita case[10] where both the Court

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4. (1868), 38 N.Y. 248.
5. (1927), 40 C.L.R. 227
6. 4 B and Ad. 621.
7. (1873), 29 L.T. 271.
8. Henderson v. Stevenson, (1875) 2 H.L. 470; Parker v. S.E. Rly. (1877) 2 C.P.D. 416.
9. Richardson v. Rountree (1897) A.C. 217.
10. Clark v. Dunraven (1897) A.C. 59.

of appeal and the House of Lords held that a contract was created between the parties even though their immediate relations were not with each other but with the Yatch Club. On the other hand in the British Movietone News case[11] though the court of appeal was prepared to go outside the literal words of contract and read into it partie's presumed intention that the supplementary agreement was only to endure war time conditions the House of Lords however applied the orthodox principle of construction.

As an ordinary rule a communication of acceptance completes the contract only when it is received by the offeror for unless this is so there cannot be the true concensus necessary under rules of English Law. But the application of this rule may be impracticable or inconvenient when the parties are not face to face and have to communicate through post or telegram. In such cases therefore under common Law systems posting is sufficient and the acceptance nedd not reach the offeror. This is supported on what is called the "expedition theory" based on the "general usage of mankind." The law on the point has evolved through a series of cases in the 19th Century. The principle was laid down in Adems v. Lindsell[12] that as soon as the letter of acceptance was put into the post the contract is concluded. The decision was based on emperical grounds since it may be asked how could there be a concensus by putti n g a letter of acceptance into the post. The pure consensus theory had to give way to commercial expediency. The decision may be supported on the ground that the post office is theated as an agent of the offeror not only for carrying offer but also to receive communication of acceptance. The law then percolates in Dunlop v. Higgins[13] a case of implied authority to post inferred from the fact of the offeror starting negotiations by post to House Hold Fire Insurance Co;[14] v. Grant which applies the rule unformely to letters delayed and letters lost in transit and

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11. (1951) 1 K.B. 190; Reversed, (1952) A.C.166
12. (1818) 1 B. & Ald. 681.
13. (1848), 1 H.C.L. 381.
14. (1879), E x D. 216.

finally in Henthorn v. Fraser[15] where authority to post is implied even in a case in which the letter containing the offer was handed in person. Eliason v. Henshaw[16] decides that posting as such carries with it no sanctity and that where the offeror has asked for an acceptance in a particular mode, that mode must be followed and if followed, the contract will be complete inrespective of whether the acceptance is communicated or not.[17] The decisions in Hebbs case[18] and Ex-parte Jones case[19] decides that a letter of acceptance though posted would not conclude the contract unless the posting was done in such a manner as to make the acceptance irrevocable by the acceptor. There is a practical difficulty in the rule that acceptance takes place when a letter is put in the post office - so if telegram revoking acceptance reached the offeror before the letter it would be inoperative. However no hardship need arise in such cases if the offeree sends a qualified acceptance," I accept unless you get a revocation from me by telegram before this reaches you." Similarly a letter of revocation has no effect until it has been brought to the notice of the offeree[19a] so if before a letter of revocation, the offeree sends a letter of acceptance a contract comes into existence, though apparently there is no concensus. It may be conceded that the common law rules relating to offer and acceptance are "unsystematic and contradictory" yet they operate well in practice.

The general rule that acceptance is incomplete unless received by the offeror governs conversation over telephone[20] and the rule as to the risk of the acceptance by letter or by telegram is not extended to conversation on telephone. In Entorse case[21] the Court of Appeal held that in such a case the parties may be treated as if they were in each others presence although separated in spance, communication between them was instantaneous. The rule of convenience or expediency was not applied by the Court. On the question of forum the court held that the contract was completed at the place where communication of acceptance was received.

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15. (1892), 2. Ch.27.
16. (1819), 4 Wheaton 225.
17. Eliason v. Henshaw (1818),4 Wheaton 225.
18. (1867), L.R. 4. E.Q. 9.
19. In Re. London & Northern Bank, Ex-Parye Jones, (1900) 1 C.H. 220.
19.a (1900) 1 C.H. 220.
20. Entoresl1td v. Miles Far East Corpo.(1955)2 Q.B. 327.
21. (1955) 2 Q.B. 327.

In a majority judgment the Indian Supreme Court in Bhagwan Das v. Girdhari Lal[22] where offer and acceptance were spoken on telephone accepted the view of the Court of Appeal. Shah J. giving judgment for himself and Wanchool J. (afterwards C.J.) took the view that the contract is completed only when acceptance is intimated to the offeror and the exception engrafted upon the rule in respect of offers and acceptance by post and telegrams need not be extended to the telephonic conversation. The judgment speaks of the parties being in a sense in the presence of each other, and negotiations are concluded by instantaneous communication of speech, communication of acceptance is a necessary part of the formation of contract and the exception to the rule imposed on grour of commercial expediency is inapplicable.[23]

On the otherhand Hidayatullah J. (now C.J.) dissented and held that on the words of Sec.4 of the Contract Act, the contract was complete at the place where acceptance was spoken to the offeror. In his view S.4 creates a special rule which is rather a peculiar modification of the rule applicable to the acceptance by post under the English Common Law.[24]

The language of S.4 covers acceptance by telephone, wireless etc. In the instant case the communication of acceptance in so far as acceptor was concerned was complete when he (the acceptor at Kahmgonm) put his acceptance in the course of transmission to him the (proposer at Ahmedabad) so as to be out of his (the acceptor's) power to recall. He could not revoke his acceptance thereafter. According to the learned C.J. the clause in the Act that the communication of an acceptance is complete as against the acceptor when it comes to the knowledge of proposer governs the cases of acceptance lost through the fault of the acceptor. He cities the judicial example where the acceptor shouted his acceptance and his words were drowned through noise from an air craft overhead, the communication of acceptance in such a case is not complete against him (the acceptor). It would only be

22. A.I.R. (1966) S.C. 543.
23. Ibid. at p. 550.
24. Ibid. at p. 556.

complete as against him when it comes to the knowledge of the proposer. He is expected to communicate his acceptance reasonably which was not the case here. In view of the C.J. we cannot always import the English Common Law interpretation into our Law since we have to guide ourselves by the language of the statute.[25]

I am inclined to agree with the reasoning of Hidayatullah C.J. that the scope of S.4 is wide enough to cover the case of communication over telephone. It is respectfully submitted the majority judgment ignores the basic fact that the Courts in India have to interpret statutory enactment. On the facts of this case there was "true full and free" concensus since the offer & acceptance were clearly received at both the ends.

25. Ibid. at p. 556.