

expressed attitude of the Supreme Court in allowing state legislative bodies a wide scope of discretion in the adoption of their police laws.²⁰ It is, at this time, necessary to recall that "the prohibition of the Equal Protection Clause goes no further than the invidious discrimination."²¹

The determination of the Washington legislature to follow the constitutional distinction between local and interstate commerce and its express rejection of the opportunity offered by the Federal Act to obliterate the distinction in this specific area of regulation, was not an unreasonable or arbitrary course, but was a classic state legislative action following the basic constitutional guide lines previously demonstrated as acceptable to the United States Supreme Court and was an affirmation of the right, protected by the Tenth Amendment, of a state government to legislate within an area reserved for it and, as such, beyond the reach of federal action.

The case as decided by the State Supreme Court will probably be ineffective as precedent beyond Washington. The Supreme Court of the United States adheres to the self-imposed principle that it will not review a state court judgment based upon an adequate and independent non-federal question, even though a federal question be involved and wrongly decided.²² The case relies in part upon the Equal Protection Clause of the state constitution²³ which, it seems clear, is broad enough, standing alone, to sustain the Washington Court's judgment. This is so notwithstanding the fact that the Court relied basically on Federal reports in its interpretation of this equal protection problem.

BARRY J. WALKER

Contracts—Acceptance—Rendering of Act where Promise Requested.—*Allied Steel and Conveyers, Inc. v. Ford Motor Company.*¹—Following contracts for the sale and installation of machinery executed and performed by the parties, the buyer submitted to the seller a so-called "Amendment number 2" which proposed the purchase of additional machinery to be installed by the seller on the buyer's premises. Although designated an amendment, the proposal was in effect a purchase order for a new contract substantially similar in form to the previous ones between the parties. Amendment No. 2, which provided that the acceptance of the proposal should be "executed on the acknowledgment copy," contained a printed form of a broad indemnity clause which, unlike the identical provision contained in the same form in previous purchase orders, was not marked "VOID." A further provision stated that the terms and conditions "inconsistent with the provisions herein above set forth are hereby superseded." Before the acknowledgment copy was returned to the buyer, the seller began

²⁰ *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 62, 78 (1910).

²¹ *Morey v. Dowd*, 354 U.S. 457 (1957).

²² *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

²³ Wash. Const. art. I, § 12.

¹ 277 F.2d 907 (8th Cir. 1960).

installation of the machinery in the course of which an employee of the seller was injured due to negligence of the buyer's employees. The injured employee having successfully brought action against the buyer, the latter secured a judgment of indemnity against the seller who had been joined as a third party defendant in the proceedings. On appeal from the District Court in Michigan the Court of Appeals for the Sixth Circuit affirmed. HELD: The indemnity clause is binding, the provision for acknowledgment and return of the document not constituting an exclusive method of acceptance but merely being suggestive only. Part performance of the contract by the offeree in accordance with the terms of the offer and with the offeror's knowledge is sufficient to constitute acceptance of a bilateral contract.

The case raises the problem of the validity of acceptance of a bilateral contract by an act where an acceptance in writing has been requested by the offeror. The problem seems not to have arisen in Michigan prior to this case, the previous decisions in that jurisdiction not having gone beyond the point of holding to the well-established proposition that acceptance may be implied from the acts of both parties.²

Certainly in a majority of states it would be held that the seller's filling of an order for goods within a reasonable time and in accordance with the terms of the offer constitutes a valid acceptance,³ even where the offeror's purchase order suggests that the acceptance be in writing.⁴ On the other hand, if the offer expressly requires a written acceptance, courts will generally honor the provision and accept no substitute,⁵ although in two jurisdictions there has been a refusal by the courts to do so.⁶ The crucial language of the offer

² *Malooly v. York Heating and Vent. Corp.*, 270 Mich. 240, 258 N.W. 622 (1935); *Ludowici-Celadon Co. v. McKinley*, 307 Mich. 149, 11 N.W.2d 839 (1943). In neither case was there a suggestion that acceptance be made in writing.

³ *Annot.*, 29 A.L.R. 1352 (1924); see also, *Meadow River Lumber Co. v. Black*, 26 Ala. 28, 153 So. 290 (1933); *Anderson, Clayton and Co. v. Mangham*, 32 Ga. 152, 123 S.E. 159 (1924); *Gibson v. Miller*, 215 Iowa 631, 246 N.W. 606 (1933); *Spero Electric Corporation v. Wilson*, 211 Ill. 43, 71 N.E.2d 827 (1947); *Haskell and B. Bar Co. v. Allegheny Forging Co.*, 47 Ind. App. 392, 91 N.E. 975 (1910); *Columbia Weighing Machine Co. v. Vaughan*, 123 Kan. 474, 255 P. 973 (1927); *Hollidge v. Gussow, Kahn and Co.*, 67 F.2d 459 (1st Cir. 1933) (applying Massachusetts law); *Lewis v. Marsters*, 139 Me. 17, 26 A.2d 649 (1942); *McDonald v. Henry Becker and Son*, 110 N.J.L. 535, 166 A.345 (1933); *Sheridan Coal Co. v. C. W. Hull Co.*, 87 Neb. 117, 127 N.W. 218 (1910); *Van Benschoten v. Rondos*, 213 App. Div. 874, 209 N.Y.S. 427 (1925); *Eckhart v. Schoch*, 155 Pa. 530, 26 A. 654 (1893); *Smith v. Droubay*, 20 Utah 443, 58 P. 1112 (1899); *Lowenthal v. McCormack*, 144 Wash. 229, 257 P. 632 (1927).

⁴ *Electric Neon Clock Co. v. Cooper* 83 So. 2d 678 (La. Ct. App. 1955); *La. Civ. Code Ann. arts. 1803, 1804* (Dart 1932); *Durasteel Co. v. Great Lakes Steel Corp.*, 205 F.2d 438 (8th Cir. 1953). *Restatement, Contracts*, § 63 (1932).

⁵ *Venters v. Stewart*, 261 S.W.2d 444 (Ky. Ct. App. 1953); *Pioneer Box Co. v. Price Veneer and Lumber Co.*, 132 Miss. 189, 96 So. 103 (1923); *Shortridge v. Ohio*, 253 S.W.2d 838 (Mo. Ct. App. 1952); *Restatement, Contracts* § 61 (1932); 1 *Williston, Contracts* §§ 75, 76 (3rd ed. 1957).

⁶ *Case Threshing Machine Co. v. Donalson*, 10 Ga. App. 428, 73 S.E. 618 (1912) (A careful analysis of authorities cited reveals this as a good example of "judge-made law." *Allied v. Ford* relies heavily upon this case). *Hercules Mfg. Co. v. Wallace*, 124 Miss. 27, 86 So. 706 (1921) (The provision may be waived if it is the

in the instant case smacks more of a "requirement" than a "suggestion." For this reason the soundness of the holding is questionable. Until the case is reversed, if ever, an offeror in Michigan, desirous of not being contractually bound except by a written acceptance would do well to adopt the strongest possible contract language indicative of a lack of efficacy of any other method of acceptance. Probably the words "prescribe exclusively a written acceptance" would be effective in view of the court's usage of these terms.⁷

Under § 2-206 of the Uniform Commercial Code⁸ the result would probably be the same as that had in this case. While the Code language does not absolutely exclude the possibility of restricting an acceptance to a single designated mode, the Commissioners in their comments have indicated that the purport of § 2-206 is to reject "the artificial theory that only a single mode of acceptance is normally envisaged by an offer."⁹ They have also indicated a desire that the section shall remain flexible.¹⁰ Let the offeror beware!

BRIAN E. CONCANNON

Contracts—Illegal Performance As Bar To Recovery—Public Policy.—*McConnell v. Commonwealth Pictures Corporation.*¹—In an action for an accounting an agent sued his principal on a written agreement providing that upon successful negotiation of a contract for the principal with a motion picture producer, the agent would receive an initial fee and in addition, a percentage of the principal's gross receipts from distribution of the pictures. The principal in his answer alleged that he had paid the initial fee, but had refused to perform further upon learning that the agent had obtained the contract by bribing an employee of the producer, contending that because of the illegality of the agent's performance,² recovery

benefit of the offeree. This case has yet to be reconciled with *Pioneer Box Co. v. Price Veneer and Lumber Co.*, supra note 5). *Wales Adding Machine Co. v. Hurer*, 98 N.J.L. 910, 121 A. 621 (1923).

⁷ *Allied Steel and Conveyors, Inc. v. Ford Motor Company*, supra note 1, at 910, 911.

⁸ UCC § 2-206 Offer and Acceptance in Formation of Contract

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

⁹ UCC § 2-206, Comment 2.

¹⁰ UCC § 2-206, Comment 1.

¹ 7 N.Y.2d 465, 166 N.E.2d 494, 199 N.Y.S.2d 483 (Ct. App. 1960).

² N.Y. Pen. Law § 439 makes it a misdemeanor to give, offer, or promise to an agent of another any gift or gratuity whatever without the knowledge and consent of the principal, with intent to influence such agent's action in relation to his principal's business.