But the operation of Statutes of Limitation does not depend on seisin, and the decision only extends to abandonment of possession, their Lordships not having even mentioned remitter.

It is suggested that Fullagar, J.'s remarks have been fully borne out by the decisions, and apart from feoffment and the use of the word "seisin" in a technical way, the doctrine of seisin is of no consequence. We have retained the word seisin to denote title to land, the oldest seisin is still the best title to land, but now seisin means ownership and not possession. Goodeve in his work on *Real Property*[88] defines seisin in modern law as meaning "having the legal estate, either in possession or remainder or reversion", provided that it had not been turned into a mere right of entry. Seisin lost its meaning of "feudal possession" and its position was taken over by possession. Both trespass and ejectment depend not on ownership, but on possession. Since modern law protects possession that is rightful, it is no wonder that seisin has lost its former significance.

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OFFER AND ACCEPTANCE BY TELEX

ENTORES LTD. v. MILES FAR-EAST CORPORATION

In this case,[1] the plaintiffs, Entores Ltd., were an English company with a registered office in London, and the defendants were an American corporation with headquarters in New York and with agents in all parts of the world, including a Dutch company in Amsterdam. The plaintiffs, and also the defendants' agents, i.e. the Dutch company in Amsterdam, had in their offices equipment known as a "Telex Service". A teleprinter operated like a typewriter despatched a message from one country and that message was received (for all practical purposes instantaneously) and typed in another country.

In September 1954, a series of communications by Telex Service passed between the plaintiffs and the Dutch company as to the purchase by the plaintiffs of copper cathodes from the defendant corporation. The material communication was a counter-offer by the plaintiffs on 8th September, 1954, and an acceptance of that offer by the Dutch company on behalf of the defendants received by the plaintiffs in London on 10th September, 1954.

The plaintiffs, later alleging breach of contract, applied for leave to serve notice of a writ on the defendants in New York on the ground that the contract was made in England and therefore fell within the terms of Order XI, r.1 of the Rules of the Supreme Court of Judicature.[2] It was held by the Court of Appeal (Denning, Birkett and Parker, L.JJ.), that the counter-offer was not accepted until the offeror had received notification of its acceptance, that notification was received by the offeror in London, that the contract was therefore made in England, and that leave to serve the writ in New York ought therefore to be granted.

The decision results in two propositions:

1. The rules of private international law for determining *where* a contract is made spring from the rules of municipal law determining *when* a contract is made.
2. That the rule of municipal law is that a contract is made *when* the offeror receives notification of the acceptance by the offeree of his offer.

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[88] (3 ed. 1897) 365.

[1] (1955) 2 All E.R. 493.

[2] Corresponds to s.18(3)(a) of the N.S.W. Common Law Procedure Act. By these provisions the court or a judge may allow service of a writ outside the jurisdiction in which the action is brought, if he is satisfied that the contract for breach of which the action is brought, was made within the jurisdiction.

If we take as accurate Cheshire's definition of private international law as "that part of English law which comes into operation whenever the court is seised of a suit that contains a foreign element",[3] then a question of private international law is involved, for here was a contract involving a foreign jurisdiction and raising the question whether or not such contract was made within the jurisdiction of the English court.

The Court of Appeal solved this question by extending a rule of municipal law relating to the formation of contract to a conflict of laws case. This was also done in *Benaim* v. *Debono*.[4]

In that case an offer to sell anchovies, which had been posted in Greece, was accepted by a cable despatched from Malta. The Judicial Committee of the Privy Council said: "No doubt the contract should be regarded as made in Malta—for thence came the final acceptance by the respondent of the offer made by the appellants".[5] Their Lordships assumed that the answer to the question of private international law (i.e. whether the contract was made in Malta or Greece) was to be found by a simple application of a rule of municipal law as to offer and acceptance (i.e. that an offer by letter is accepted at the moment the letter of acceptance is put in the post-box).

In the *Entores Case*,[6] the Court of Appeal answered a similar point of private international law (i.e. whether the contract was made in Holland or in England) by applying a domestic rule as to offer and acceptance (i.e. that an offer by Telex is accepted at the moment notification of the acceptance is received by the offeror), but came to an opposite conclusion, namely that the offer was accepted at the place where notification of the acceptance was received.

To extend a rule of municipal law as to offer and acceptance to a conflict of laws case is particularly unsatisfactory in the field of Telex communications, because the number of times and the speed with which the respective parties communicate with each other makes it difficult to analyse the facts for the purpose of determining who is offeror and who is offeree. The rules of municipal law deal essentially with the question, At what point of time does a particular contract come into existence? Whereas the private international law rule deals with the question, In what locality was this contract made? It should not be assumed without examination that rules appropriate for determining when a contract becomes binding on the parties are equally appropriate for determining the place of the making of the contract for the purposes of giving a court jurisdiction over it or determining what country's laws are to be applied to it. The policy considerations involved might be quite different.

For these reasons the writer joins issue with Anson's statement that "The rule that a contract is made when the acceptance is communicated *involves as a result* the further rule that a contract is made *where* the acceptance is communicated."[7]

The same assumption that the rules for determining when a contract is made are necessarily appropriate for determining where it is made is to be found in a recent decision of Mr. Prothonotary Walker in *Aviet* v. *Smith & Searls Pty. Ltd.*[8] In that case an offer was made by the Victorian defendant in a letter dated 10th November, 1954. The acceptance was by telephone from the plaintiff, then in New South Wales, to the defendant's office in Victoria. The plaintiff sued the defendant in the New South Wales Supreme Court for damages for breach of contract and the defendant took out a summons to set aside the writ on the ground of lack of jurisdiction. It was held that "the

[3] *Private International Law* (4 ed. 1952) 3.
[4] (1924) A.C. 514.
[5] *Id.* at 520.
[6] (1955) 2 All E.R. 493.
[7] Anson, *Law of Contract* (20 ed. 1952) 37.
[8] (1956) 73 W.N. 274.

decision of the Court of Appeal in *Entores Ltd.* v. *Miles Far East Corporation*[9] is clear authority in favour of Victoria being the place *where* the contract was concluded", and the writ was therefore set aside.

Another point worthy of comment is that the court in the *Entores Case*[10] assumed that the very fact that the contract was made within the jurisdiction made the case a proper one for allowing service of the writ out of the jurisdiction. Thus, Denning, L.J. said, ". . . the contract was made in London where the acceptance was received . . . it was therefore a proper case for service out of the jurisdiction".[11] Neither Birkett, L.J. nor Parker, L.J. thought the point worthy of comment.

But in many cases prior to the *Entores Case* the courts have repeatedly emphasised the conditions which must be satisfied before permission to issue a writ out of the jurisdiction will be granted. "Service out of the jurisdiction is *prima facie* an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected."[12] Another consideration is the annoyance and inconvenience caused to a foreigner owing no allegiance to the country of the forum by his being forced to contest his rights there. Lastly, it has been laid down that, if there is any doubt in the mind of court or judge as to whether the writ should issue, such doubt ought to be resolved in favour of the foreigner.[13]

Insofar as the Court of Appeal referred to the rules of municipal law as to offer and acceptance, it is necessary to consider whether their view as to the nature of those rules is consistent with principle and authority. It is a clear rule of law that mere mental assent to an offer is not sufficient to create legal relations.[15] It is also clear that if the offeror expressly or by implication indicates the mode of acceptance, then acceptance in accordance with that mode is sufficient to conclude the contract.[16] What, however, had not been squarely raised before the decision in the *Entores Case*[17] is the meaning to be attributed to the word "communicated" in Anson's rule that "a contract is made when the acceptance is communicated",[18] in cases other than those in which acceptance is by post or telegram. In the cases of post and telegram the acceptance is complete as soon as the letter is put in the post-box or telegram lodged at the telegraph office.[19] It is implicit in Anson's discussion of this general rule in the light of the then decided cases that the use of the word "communication" in connection with acceptance by post or telegram is different from its use in connection with revocation of an offer; for a revocation, in order to be communicated, must be brought to the *actual* knowledge of the offeror.[20]

The judges in the *Entores Case*,[17] however, regarded the former sense of the word "communication" as confined solely to acceptance by post and telegram and in all other cases attribute to the word the meaning "actual notification to the offeror". Denning, L.J.'s judgment is based upon a distinction between instantaneous means of communication and communication by post or telegram. He equates contracts made by telephone and Telex with contracts made by two people by word of mouth in the presence of each other and holds that the offer in these cases is only accepted at the moment when the offeror hears the offeree's acceptance. The only case, according to his Lordship, in which a contract is completed although the offeror has not heard the offeree's acceptance

[9] *Id.* at 275.
[10] (1955) 2 All E.R. 493.
[11] *Id.* at 496.
[12] *George Munro Ltd.* v. *American Cyanamid & Chemical Corpn.* (1944) 1 K.B. 432, 437.
[13] *The Hagen* (1908) P. 189, 201.
[14] *Felthouse* v. *Bindley* (1862) 11 C.B. (N.S.) 869.
[15] E.g. *McIvor* v. *Richardson* (1813) 1 M. & S. 557
[16] E.g. *Eliason v. Henshaw* (1819) 4 Wheaton 225.
[17] (1955) 2 All E.R. 493.
[18] *Law of Contract* (20 ed. 1952) 53.
[19] *Adams* v. *Lindsell* (1818) 1 B. & Ald. 681; *Cowan* v. *O'Connor* (1888) 20 Q.B.D. 640.
[20] Anson, *Law of Contract* (20 ed. 1952) 45-48.

is where the offeree reasonably believes that the offeror has received his acceptance, whereas in fact the offeror does *not* catch the words of acceptance, and does not trouble to ask them to be repeated.

Denning, L.J. then cites certain examples in support of these propositions.[21] It is submitted that these examples do not support the propositions induced from them. His Lordship instances the case of two people making a contract by word of mouth across a river: the offeree shouts out his answer and just as he does this a plane flies over and drowns his words. Denning, L.J. held that at this stage no contract had come into existence because the words of acceptance had not become present to the offeror's mind. It is submitted, however, that the decision that no contract had been formed could equally have been reached on the basis that the offeree ought to have known that in the circumstances the offeror could not have heard him, and that as soon as the noise of the 'plane had died away, he ought as a reasonable man to have repeated the words of acceptance. On this basis an acceptance would be communicated when the offeree had done all that he could reasonably be expected to have done, having regard to the nature of the offer and the circumstances in which it had been made.

The merits of this approach may be illustrated by another hypothetical example (not used by Denning, L.J.). Suppose a man, having received an offer by post, walks up to a pillar-box and drops in his letter of acceptance; as he walks away, a motor-lorry backs into the pillar-box, the contents of which, to his knowledge, are destroyed in the ensuing fire. The inconvenience of formulating the principles relating to the communication of the acceptance of an offer in the form of a rule and an exception[22] at once become apparent in applying them to this example. If the rule be that acceptance must become present to the mind of the offeror, except in cases of acceptance by post or telegram, then it is difficult to reach any other conclusion than that a binding contract has been formed. If, on the other hand, the rule is simply that an acceptance is complete when the offeree has done all that he, as a reasonable man, could be expected to have done, then it would be easy to hold that, since he *knew* of the destruction of his letter, no binding contract had been formed, a conclusion which appears to be more in accordance with common sense.

This example shows, it is submitted, that it is far more convenient, when seeking to ascertain whether communication of the acceptance of an offer has in fact taken place, to ask *one* question: Would a reasonable man looking at the circumstances as a whole (including the nature and terms of the offer) conclude that communication had in fact taken place rather than ask the three questions which, on the view of the Court of Appeal, must be asked: (i) Did the offeree intend to accept? (ii) Was that intention brought home to the offeror's mind? Or, did the two minds meet? (iii) Was requirement (ii) waived by the offeror either expressly or by implication from the nature and terms of the offer and the circumstances of the particular case?

Inconvenient as it may be, the view which attributes to the proposition "an acceptance must be communicated to the offeror", the meaning that "an acceptance must be actually notified to the offeror unless expressly or impliedly dispensed with" has found favour with such an eminent authority as Halsbury,[23] who cites *Mozley* v. *Tinkler*[24] in support of it. In that case, there was a guarantee in the form of a letter to the plaintiffs. It read as follows: "F. informs me that you are . . . publishing an arithmetic for him. I have no objection to

[21] (1955) 2 All E.R. 493, 495.

[22] By this is meant that in the *Entores Case* the Court of Appeal regarded "actual notification" as the fundamental meaning of "communication", this requirement being waived in postal and telegram cases by the substitution of the requirement of some other conduct by the offeree.

[23] 8 Halsbury, *Laws of England* (3 ed. 1954) 73.

[24] (1835) 1 C.M. & R. 691.

being answerable as far as £50. For my reference apply to B. Signed G.T." B., who was a bookseller in Doncaster through whose intervention the publication of the book by the plaintiffs had been arranged and who was regarded by the court as the common agent for both parties, wrote this memorandum and added: "Witness to G.T. Signed B." It was forwarded by B. to the plaintiffs who never communicated acceptance of it to G.T. In an action against the latter on the guarantee, it was held that the plaintiffs, not proving any notice of acceptance to the defendants, were not entitled to recover. The basis of the decision, implicit in the judgment of Parke, B., was that the form of the guarantee indicated that the guarantor desired the plaintiffs first to be satisfied with regard to his solvency. They ought to have known that this involved not only referring to B. in his character as referee, he letting them have his opinion so that they might form their own judgment on the question, but giving evidence of that judgment by letting the defendant know.

Anson[25] cites *Kennedy* v. *Thomassen*[26] in support of the same view. In that case, V. was entitled under the will of her then husband made in 1903 to two annuities of £200 each. The testator, who was also the settlor, died in 1913. In 1927, the trustees of the will offered to redeem the annuities, and after negotiation, were informed by V.'s solicitors that they would advise her to accept £6,000 for the redemption. V. having informed her solicitors that she would accept the offer of £6,000, her solicitor sent her the release engrossed for her signature, and this she executed on January 12, 1928. She died on January 17, but her solicitors were not informed of this until January 31. In the meantime, the trustees, having been informed by V.'s solicitors on January 24 that she accepted the £6,000, paid over the amount in ignorance of the fact that she had died seven days before. It was held that the offer was not accepted by the mere execution of the release of January 12. The basis of the decision was that the offeree ought to have known that there could be no concluded contract until she had communicated to the purchasers the fact that she accepted £6,000 as the redemption price; thus Eve, J. said: "It is impossible to say that this is an offer which anybody contemplated could be accepted by the mere execution by the vendor of the document of January 12."[27]

Both these cases, when examined in detail, reveal that the court was concerned not with whether or not the offeror knew of an acceptance, but with whether or not the offeree had done anything which, in the light of the negotiations between the parties, could have amounted to an acceptance. Certainly, in both cases the court referred to the knowldege of the offeror, but only *qua* the acts which, in the particular circumstances of each case, could amount to an acceptance, and not *qua* any possible legal prerequisite of *all* acceptances. This being so, neither case supports the rule which Halsbury and Anson seek to draw from them.

It is submitted that there is involved in the *Entores Case*[28] the question whether the basis of the English law of contract is an inward mystic union of the minds of the parties to a contract, or rather the outward manifestation of the intention of the parties as indicated to a reasonable man by their words and conduct and by the nature of the transaction. That the former view was in their Lordships' minds is clear from Parker, L.J.'s citation[29] of the *dicta* of Thesiger, L.J. in *Household Fire Insurance Co.* v. *Grant*,[30] and of Bowen, L.J. in *Carlill* v. *Carbolic Smoke Ball Co.*,[31] particularly the following passage: "An acceptance of an offer . . . ought to be notified to the offeror in order that the two minds may come together . . . unless this is done the two minds

[25] *Law of Contract* (20 ed. 1952) 36.
[26] (1929) 1 Ch. 426.
[27] *Id.* at 433.
[28] (1955) 2 All E.R. 493.
[29] (1955) 2 All E.R. 493, 497.
[30] (1879) 4 Exch. D. 216, 220.
[31] (1893) 1 Q.B.D. 256, 269.

may be apart and there is not that consensus which is necessary according to English law . . . to make a contract."[32]

In order to account for the different rule pertaining in the case of postal and telegraphic communications, Winfield (in an article referred to with general approval by Denning, L.J.[33]) has thought it necessary to argue that the Post Office in such cases is the agent of the offeror not only to deliver the offer but also to receive acceptance of it.[34]

Three comments may be made on this view.

Firstly, it is difficult to see the relevance of the interposition of a third party. For example, surely the same result in law follows if the offeror says: "Accept the offer by putting an 'X' in chalk on the Town Hall door"; yet here there is no third party.

Secondly, even if a third party is relevant, it must be admitted that the notion of the Post Office as a common agent is extremely artificial, because the "agent" gets no knowledge of the contents of the letter; but if so, why cannot the electrical links and converters in a Telex system and the people who operate them be also regarded as agents.

Thirdly, in two English decisions an analogy has been drawn between contracts concluded by post and telegram, on the one hand, and contracts made between persons in the presence of each other, on the other. It will be noted that both these cases assume that the rules for determining where a contract is made flow from the rules for determining when it is made, but show views as to what these rules are which are quite different from those now apparently adopted by the Court of Appeal.

In *Cowan* v. *O'Connor*,[35] it was held that a contract was made in the City of London, and therefore fell within the jurisdiction of the Lord Mayor's Court, because the telegram accepting the offer (which originated from outside the city) was despatched from within the city. Manisty, J. said: "The post office . . . was merely a medium of communication between the parties who are in the same position as if they met together and made a contract."[36]

In *Newcomb* v. *De Roos*[37] (referred to in the *Entores Case*[38]), the defendant, residing and carrying on business in London, wrote to the plaintiffs, residing and carrying on business in Stamford, requiring them to do certain work. The letter was received by the plaintiffs in Stamford and the work done there. A summons was issued against the defendant in the County Court of Stamford, by leave of the Registrar, to recover the amount due for such work.

It was held as follows: "Here the order was accepted within the district of the Stamford County Court and the work was done within that district. The whole cause of action therefore arose within that district."[39] The learned judge had prefaced these remarks by saying: "Suppose the two parties stood on different sides of the boundary line of the district and the order was then verbally given and accepted, the contract would be made in the district in which the order was accepted"[40] (*viz.* the district in which the words of acceptance were uttered). Unfortunately this clear statement of general principles was disapproved in the *Entores Case*.[41]

What of the effect of the decision itself? Cheshire and Fifoot[42] treat it as applying only to cases where the offeror has neither expressly nor by im-

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[32] *Ibid.*
[33] (1955) 2 All E.R. 493, 496.
[34] "Some Aspects of Offer and Acceptance" (1939) 55 *L.Q.R.* 514.
[35] (1888) 20 Q.B.D. 640.
[36] *Id.* at 642.
[37] (1859) 2 E. & E. 271.
[38] (1955) 2 All E.R. 493.
[39] (1859) 2 E. & E. 271, 275.
[40] *Ibid.*
[41] (1955) 2 All E.R. 493.
[42] *Law of Contract* (4 ed. 1956) 39-40.

plication prescribed any particular mode of acceptance of his offer.

It is submitted that this is not the correct ratio of the case, for Parker, L.J., in dealing with cases where the parties to a contract are in each other's presence, or, though separated in space, communication between them is in effect instantaneous, says: "Though in both these cases the acceptor was using the contemplated or indeed the expressly indicated mode of acceptance, there is no room for any implication that the offeror waived actual notification of the acceptance."[43] Thus, the question whether or not actual notification has been waived depends not on whether there is a mode of acceptance, however prescribed, but on rules of what his Lordship calls "common sense".

To sum up, the following conclusions are advanced:

1. That the question of determining *where* a contract is made is one of private international law.

2. That the rules for determining *where* a contract is made need not necessarily flow from the rules of municipal law determining *when* a contract is made.

3. If they do, they are unsatisfactory, and will operate capriciously (a) because the location of the contract will depend on who is offeror and who is offeree, a question which is itself dependent on the mere accidents of negotiation, and (b) because the question of location will also depend on the further accident of the means of communication chosen by the parties.

4. Assuming the rule of municipal law as to acceptance of an offer to be that laid down in the *Entores Case*,[44] it is stated in a form both inconvenient and difficult of application.

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FOREIGN ADOPTIONS: GOVERNING LAW AND EXTENT OF RECOGNITION

RE WILSON AND OTHER CASES

Though the institution of adoption was known in Roman law, it did not exist in the common law countries until quite recently when it was introduced by legislation, starting in Massachusetts in the middle of the last century. In England the principle of adoption was first introduced by the Adoption Act, 1926,[1] and the rights of adopter and adopted were later extended in the present Adoption Act, 1950.[2] In New South Wales the relevant statute is the Child Welfare Act, 1939-1952.[3] Adoption is now possible in most countries,[4] though standards and requirements vary in the extreme. In some systems only children can be adopted, in others only adults; in some countries an adoption needs judicial confirmation, elsewhere it is purely an administrative act, or even a simple contract between the parties concerned. The fact that adoption is a comparative newcomer to the common law world and the lack of uniformity in its standards and requirements generally have caused a great uncertainty about the private international law rules governing the circumstances in which foreign adoptions are to be regarded as valid and the purposes to which such validity is to be regarded as extending. It was left entirely to the text-writers to hazard their views on the subject and these differed greatly, with only slight and conflicting support from decided cases.

The importance of the decision of Vaisey, J. in *Re Wilson*[5] lies in the

[43] (1955) 2 All E.R. 493, 498.
[44] *Ibid.*
[1] 16 & 17 Geo. 5, c. 29. [2] 17 Geo. 6, c. 26.
[3] No. 17 of 1939—No. 9 of 1952 Part XIX. Adoption was first introduced in N.S.W. by the Child Welfare Act, 1923, No. 21 of 1923.
[4] With a few exceptions, e.g. Guatemala.
[5] (1954) 1 Ch. 733.