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NOTES AND COMMENTS

ACCEPTANCE OF UNILATERAL CONTRACT OFFER REQUIRING TIME IN PERFORMANCE

SUPPOSE *A* tells *B* that the city of Metropole needs a hotel and that if *B* will build a hotel there, he will pay him one thousand dollars. *A* makes this offer to *B* because he thinks the community as a whole will benefit from a new hotel. *B* starts building the hotel, but before he has completed it, *A* revokes his offer. The question dealt with in this comment is whether a binding contract exists between *A* and *B* so as to make the attempted revocation of the offer a nullity.

Until fifty years ago, it was generally accepted that an offer could be revoked at will unless it was supported by a seal, consideration, or a collateral contract.¹ For years the sealed instrument gave the business man a method to escape the defense of "want of consideration." With this device the needs of business could be satisfied, and certain offers could be made irrevocable in a simple way. Legislation, however, has destroyed the effectiveness of the seal in a majority of the states.² In these states the courts have been faced with the problems of whether certain offers should be considered as irrevocable. It was apparent that where an offer called for a series of acts, ordinarily involving considerable trouble and expense, it would be unjust to allow the offeror to revoke his offer after the offeree had started performance. However, some courts³ and writers⁴ refused to depart from

¹ McGovney, *Irrevocable Offers*, 27 Harv. L. Rev. 644 (1914).

² 47 AM. JUR. 493, *Seals*, § 8.

³ Although the issue was not clear-cut since there was evidence of bad faith, and the question of tender, not part performance, was involved, see *Petterson v. Patberg*, 248 N. Y. 86, 161 N. E. 428 (1928). For a discussion of this case see Note, 29 Col. L. Rev. 199 (1929). See also *Biggers v. Owens*, 79 Ga. 658, 5 S. E. 193 (1888), and *Zwolanek v. Baker Mfg. Co.*, 150 Wis. 517, 137 N. W. 769, 44 L. R. A. 1214 (1912). For a discussion of the latter case see *Recent Cases*, 26 Harv. L. Rev. 274 (1913).

⁴ Wormser, *The True Conception of Unilateral Contracts*, 26 Yale L. J. 136 (1916). Professor Williston at first seemed to think that the offer could be revoked up until anytime the act called for had been performed, 1 WILLISTON, CONTRACTS (1st ed. 1920) §§ 60, 60A, but he seems to have been won over to the RESTATEMENT OF CONTRACTS view in his revised edition, 1 WILLISTON, CONTRACTS (Rev. ed. 1936) §§ 60-60AA.

the strict principle that an offer calling for an act could be revoked at any time before the act called for had been completely performed. By accepted contract principles this seems to be the logical view. However, "logic in law must to some extent be tempered by considerations of public policy and justice."⁶

SURVEY OF DIFFERENT THEORIES⁶

Generally, the writers and courts defending the doctrine that where an offer is made calling for an act, the offeror should be allowed to revoke his offer at any time until the offeree shall have completed his performance argue: (1) the parties can dictate any terms they wish; (2) since they have made this type of agreement, they should be left alone, and it is not the business of the courts to write in clauses that do not exist; (3) the supposed "hardship" does not exist in a case of this kind; and (4) a greater hardship would be created by outside interference from the courts.⁷ Some writers admit that there is hardship but argue that courts should not depart from sound contract principles simply because in certain cases hardship results.

Although the majority of writers and courts agree that injustices are perpetrated in some cases, as to the solution there is no agreement. Various solutions have been offered. (1) In a California case⁸ *A* promised to pay to *B* a certain sum upon the completion of a railway track. *B* obtained a franchise from the city and commenced work on the railway, but he did not start work with the idea of completing the railway. *A* notified *B* that he was not liable on his agreement for other reasons. Shortly thereafter *B* started to work in earnest and completed the railway. The court said that this was an offer for a unilateral contract, but once *B* obtained the franchise and started to work, the contract took on a

⁶ *First National Bank v. Ford*, 30 Wyo. 110, 216 Pac. 691, 696 (1923).

⁶ Professor Williston says that the majority of courts in cases of this type have always held the offeror bound on one theory or another. 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 60.

⁷ Wormser, *supra* note 4.

⁸ *Los Angeles Traction Co. v. Wilshire et al.*, 135 Cal. 654, 67 Pac. 1086 (1902).

“bilateral character.” Unfortunately, the court did not say what it meant by “bilateral character.” If it meant that once performance had started, the offer for a unilateral contract was converted into a bilateral contract, a serious question is raised; for to say that a unilateral contract can be converted into a bilateral contract by the commencement of performance is pure fiction.

(2) Most courts strain to allow recovery on a quasi-contractual basis, and this protects the offeree adequately in some cases. However, in a suit on a quasi-contract the offeree ordinarily must show that the offeror has been unjustly enriched because of the offeree’s actions. It is apparent that there are situations where the offeree has suffered a detriment but the offeror has received no benefit. For example, *A* offers to pay *B* twenty dollars if *B* will walk around the Cotton Bowl in Dallas. *B* gets two-thirds of the way around, and *A* revokes his offer. *A* has received no apparent benefit from *B*’s actions, but *B* has suffered a detriment. Therefore, the quasi-contractual theory is a limited one.

(3) A few courts hold that substantial, not strict, performance of the requested act is all that is necessary.⁹ Such expansion of the “substantial performance” doctrine, too, is limited in effectiveness, since in some cases the offeree could have spent a great amount of money and still have just begun performance.

(4) Professor McGovney suggested that there is an implied offer to keep the main offer open for a reasonable time; that once performance has started, the offeree has accepted the collateral offer; and that, in the event of revocation of the main offer by the offeror, the offeree has a cause of action on the collateral offer.¹⁰ This theory reaches the desired results, but it has been criticized on the grounds that it makes two contracts out of one. It is too complex and artificial, and a much simpler theory could be devised.

(5) It has also been suggested that the doctrine of “promis-

⁹ *Elkins v. Board of Commissioners*, 86 Kan. 305, 120 Pac. 542, 46 L. R. A. (N. S.) 662 (1912).

¹⁰ McGovney, *supra* note 1.

sory estoppel"¹¹ be applied in cases of this type, since there is foreseeable reliance by the offeree in nearly every case.¹² However, the doctrine of "promissory estoppel" is still in its infant stage, and it, too, is outside strict contract principles.

(6) Professor Ballantine advanced the theory that once the offeree has begun performance, there is a contract although the offeror does not have to perform until the offeree shall have completed performance.¹³

(7) The American Law Institute, in the *Restatement of Contracts*, Section 45, adopted the following rule:

"If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time."¹⁴

One objection to this statement is that the offeree has the power to bind the offeror while the offeree can withdraw from a bad bargain at any time.¹⁵ It would seem that some theory could be developed to bind the offeree after the offeree has started performance. The California case¹⁶ does bind the offeree, but it seems that the offeree could be bound without the court's indulging in fictions.

¹¹ RESTATEMENT, CONTRACTS (1932) § 90.

¹² Note, 13 Minn. L. Rev. 366 (1929).

¹³ Ballantine, *Acceptance of Offers for Unilateral Contracts*, 5 Minn. L. Rev. 94 (1920).

¹⁴ The explanatory notes to this section state that while tender is not the equivalent of part performance, it is sufficient to make a binding contract. Beginning preparations, though they are essential to carrying out the contract, do not bind the offeror. This could in some cases create a great injustice because in some cases the beginning preparations consume more time and money than the act called for itself. It would seem that some way should be developed to hold the offeror even during the "beginning preparations." 1 RESTATEMENT, CONTRACTS (1932) § 45.

¹⁵ In effect, there is no mutuality of obligation, but the mutuality doctrine has no application to unilateral contracts because at no time are both parties bound simultaneously, N. Y. Law Rev. Comm. Leg. Doc. 65D, p. 55 (1936); Ballantine, *supra* note 13.

¹⁶ Discussed at note 8 *supra*.

THE NEW YORK STATUTE

Faced with the abolition of the seal and the case of *Petterson v. Pattberg*,¹⁷ the New York Legislature decided upon a simple device of making certain offers irrevocable. The New York statute reads as follows:

“When hereafter an offer to enter into a contract is made in a writing signed by the offeror, or by his agent, which states that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability. When such a writing states that the offer is irrevocable but does not state any period or time of irrevocability, it shall be construed to state that the offer is irrevocable for a reasonable time.”¹⁸

Since the instant statute covers only written offers expressly stated to be irrevocable, this adds a new Statute of Frauds with its inherent difficulties in interpretation. While one must admit this gives the person who is adequately advised a device to get an irrevocable offer without consideration, it affords no relief to the person who gets a parol offer or a written offer that does not state it is irrevocable. As to the problem of a promise calling for an act, the New York Law Review Commission considered the problem but made no specific recommendations before the adoption of the statute.¹⁹ It would seem that the instant statute was not designed to do away with the rule stated in Section 45 of the *Restatement of Contracts* but to supplement it because the section was not designed to do away with consideration but finds consideration in part performance by the offeree. Therefore, one would imagine that the rule of Section 45 can be applied in New York. The statute adds impetus to the recent movement to take some of the harshness out of the common law doctrine of consideration, but it

¹⁷ 248 N. Y. 86, 161 N. E. 428 (1928).

¹⁸ N. Y. REAL PROP. LAW, § 279(4), N. Y. PERS. PROP. LAW § 33(5) (N. Y. LAWS, 1941, c. 328). For comments on the statute see Note, 43 Col. L. Rev. 487 (1943); Comment, 46 Mich. L. Rev. 58 (1947).

¹⁹ N. Y. Law Rev. Comm. Leg. Doc. 65D, pp. 58-59 (1936).

also adds to the confusion in the field of unilateral contracts. Faced with the same problem, an English law review committee adopted the view set down in the *Restatement*.²⁰

TEXAS CASES

In most of the Texas cases where the question has arisen, the offeror has been held bound once performance has been started by the offeree.²¹ However, the theory on which he is held is not always clear. As pointed out earlier,²² it would seem that the doctrine of mutuality has no application to unilateral contract cases, but the Texas courts still talk mutuality of obligation in these cases. Another difficulty encountered in reading the Texas cases is the court's use of the word, "unilateral." The term can refer to either a unilateral contract or a bilateral contract.²³ For example, *A* contracts to sell *B* ice next year, and *B* accepts with the promise to buy all he needs from *A*. In a situation such as this the Texas court might say the offer by *A* to *B* was unilateral, apparently meaning *B* in no way obligated himself to *A*. To avoid confusion, "unilateral" should be confined to unilateral contracts.

The early cases indicated that Texas had adopted the *Restatement* view. For example, in the case of *Edwards v. Roberts*²⁴ the court in speaking of unilateral contracts said, "Such a contract is not supported by a sufficient consideration, and therefore, unless there has been some performance, or other equitable reasons to prevent, either party may declare the contract null and void, and it will not thereafter be binding upon him; but when there has been partial or full performance, such performance operates as a sufficient consideration, and renders the contract binding upon the other party."

²⁰ Gt. Brit. Law Rev. Comm. 6th Int. Rep. ¶ 50(2) (1937).

²¹ 10 TEX. JUR. 171, 172, *Contracts*, § 100; cases cited in 9 Tex. Dig. 20, 31, *Contracts*, Key Numbers 10, 19; RESTATEMENT, CONTRACTS, Tex. Ann. (1933) § 45.

²² See text at note 15, *supra*.

²³ *Morgan v. Young*, 203 S. W. 2d 837 (Tex. Civ. App. 1947) *er. ref. n. r. e.*; *Big Four Ice and Cold Storage Co. v. Williams*, 9 S. W. 2d. 177 (Tex. Civ. App. 1928) *er. ref.*

²⁴ 209 S. W. 247, 251 (Tex. Civ. App. 1918), *rehearing denied*, 212 S. W. 673 (1919).

In *Halff Co. v. Waugh*²⁵ *A* offered in writing to furnish *B* with a truck to use for hauling purposes. All of the gross income above a certain sum derived from the use of the truck each month was to be divided equally between *A* and *B*. *A*'s part was to be applied as purchase money from *B* for the truck. This arrangement was to go on until the truck was paid for by *B*. After *B* had paid \$729.83 to *A* in this manner, *A* attempted to repudiate the agreement. In holding *A* was bound the court said, "It is true that the contract does not bind the defendant to perform any of its provisions, and that it is for this reason unilateral; but the mere want of mutuality did not render the contract unenforceable after defendant had accepted the possession of the truck, and in all things performed his part of the agreement, especially after he had paid \$729.83 in part performance and offered to strictly carry out its terms until the full purchase price of the truck should be paid."²⁶

However, not all the cases have followed the rule laid down in the *Restatement of Contracts*. In *Johnson v. Breckenridge-Stephens Title Company*²⁷ *A* agreed to let *B* use his abstract indexes for making abstracts so long as *B* had need of the indexes. *B* was to pay a certain percentage of the profits to *A* for the use of the indexes, but *B* made no return promise to *A* that he would use the indexes. *B* paid out a considerable amount of money in beginning preparations prior to his actual use of the files. *A* permitted *B* to use the indexes for a few months and then terminated the relationship between the parties. *A* filed suit for the agreed price of the use of the indexes for the time that they had been used by *B*. *B* filed a cross-action alleging breach of contract by *A* because of *A*'s failure to give *B* access to the indexes. The court distinguished *Edwards v. Roberts* and held that *B* had no right to recover on his cross-action. The court said:

²⁵ 183 S. W. 839 (Tex. Civ. App. 1916) *er. ref.*

²⁶ *Id.* at 843.

²⁷ 257 S. W. 223 (Tex. Comm. App. 1924), *aff'g* 241 S. W. 195 (Tex. Civ. App. 1922). For a discussion of this case see Recent Cases, 1 Tex. L. Rev. 346 (1923).

"While from the very nature of a unilateral contract mutuality of obligation is not essential, such is the case only where some other consideration for the option passed to the promisor at the time of making the promise. . . .

"The fact that for about two months the abstract company continued to permit the use by plaintiffs in error of its indexes and files did not serve to render valid for any future time a contract originally not binding for its lack of consideration."²⁸

Let us analyze the problem presented by the case at bar. It is clear that there was no bilateral contract involved, and there should have been no talk of mutuality of obligation by the court. The first question presented is, "Did the offer here invite a series of unilateral contracts or one single unilateral contract?" If the offer invited a series of unilateral contracts, with each use of the indexes constituting an acceptance by *B*, then the case would not be contrary to Section 45 of the *Restatement of Contracts*. If, however, the offer was for a single unilateral contract, it seems clear that the court's decision was contrary to Section 45 of the *Restatement*, since the initial use of the files was part performance and *B* should have been allowed to use the files for a reasonable time.

In a recent case²⁹ the court, commenting on the problems involved in a sale of land, said, "It is elementary that a naked agreement by one party to sell land to another in consideration of a stipulated price to be paid therefor which does not obligate the other party to pay the price is void for want of mutuality." This language is too broad, and, finding language of this type in a case, one wonders just what the rule is today. It seems that there is a need for legislation or a clear enunciation of the rule by the courts.³⁰

²⁸ *Id.* at 225, 227.

²⁹ *Stanfield v. Kaufman*, 195 S. W. 2d 848, 849 (Tex. Civ. App. 1946) *er. ref. n.r.e.*

³⁰ For an excellent discussion of unilateral contracts see *Hutchison v. Dobson-Bainbridge Realty Co.*, 217 S. W. 2d 6 (Tenn. App. 1946).

A MODEL STATUTE FOR TEXAS

Fully realizing the difficulties inherent in a new statute, the author of this comment has combined the New York statute and parts of Section 45 of the *Restatement of Contracts* to make a single statute for Texas, as follows:

I

When hereafter an offer to enter into a contract is made and the offeror states in writing that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability. When the offer states that the offer is irrevocable but does not state any period of time of irrevocability, it shall be construed to state that the offer is irrevocable for a reasonable time.

II

If an offer, oral or written, calling for an act is made, whether the offeror states that the offer is irrevocable or not, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract. Once the offeree enters upon the performance, the obligation is fixed, and the parties are bound to carry out the contract. While tender is not the equivalent of performance, it is sufficient to make a contract.

This statute meets the objections leveled against the *Restatement* rule. It may seem to be a startling proposition that once performance has started both parties are bound, but actually there are dicta in a few Texas cases to support this proposition.³¹ The above statute takes some of the harshness from the *Restatement* view and gives the businessman a simple way of making offers irrevocable for both unilateral and bilateral contracts.³²

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³¹ *E.g.*, Missouri, K. & T. Ry. v. Smith, 98 Tex. 47, 53, 81 S. W. 22, 24 (1904): "The authorities go further, and hold that where a particular, definite thing is to be done by the promisee, and he enters upon the performance, that fixes the obligations and binds both parties to carry out the contract."

³² While beginning preparations will not suffice to make binding a unilateral contract under Section II of the Model Statute, the businessman has a device to protect himself during that stage. If he wishes, he can meet the requirements of Section I and obtain an irrevocable offer.