

1921

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## Recommended Citation

Ballantine, Henry W., "Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested" (1921). *Minnesota Law Review*. 1452.

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ACCEPTANCE OF OFFERS FOR UNILATERAL CONTRACTS BY PARTIAL PERFORMANCE OF SERVICE REQUESTED

BY HENRY W. BALLANTINE\*

ONE of the most interesting conundrums in the elementary theory of contract law relates to the revocability of proposals which call for acts requiring time for completion, once performance has been entered upon by the offeree. Does part performance bind the offeror? May the offeror still revoke his offer, and will it lapse in case of his death before completion?

Take the following case as raising the issues involved. A by writing purports to give B the exclusive sale on certain terms for three months from date, of Blackacre owned by A, and promises to pay him a commission of five per cent in case he procures a purchaser, or in case A finds a purchaser himself. B proceeds to perform services in pursuance of this authorization by listing and advertising the property and endeavoring to sell it. Thereafter A personally sells and conveys the property, but refuses to pay B a commission. He contends that the writing is on its face *unilateral*, and that it contains no engagement or promise on B's part to do any act, and hence is not binding on either party.

The case of *Stensgaard v. Smith*<sup>1</sup> seems to hold that the broker would have no claim under such an authorization. But *Lapham v. Flint*<sup>2</sup> in effect overrules the earlier case, and holds that the offer of a unilateral contract may be accepted by the agent's partial performance and that the owner is liable. The court purports to distinguish the *Stensgaard* case but on untenable grounds. That case might perhaps have been distinguished on the construction of the writing, in that it called for an *agreement* or promise to act as agent for sale on the part of *Stensgaard*, and there was no showing of notification to defendant that he had undertaken to sell the land.<sup>3</sup> The court, however, construed the

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<sup>1</sup> (1890) 43 Minn. 11, 44 N. W. 660.

<sup>2</sup> (1902) 86 Minn. 376, 90 N. W. 788.

<sup>3</sup> *White v. Corlies*, (1871) 26 N. Y. 467.

offer as giving the broker power either to convert it into a complete bilateral contract by a promise to act as agent, or to act upon it as an offer of a unilateral contract that if the plaintiff would sell the land, he would receive the stated compensation. As such an authorization or offer it remained revocable by defendant, and the fact that for a day or a month he availed himself of the authority to sell conferred by defendant, by attempting to make a sale, does not constitute an acceptance so as to bind defendant for the three months' exclusive agency. This is placed on the ground that he might have discontinued his efforts to sell without rendering himself liable in damages. It is argued that there was thus no completed contract and the offer remained a mere authorization to sell, revocable by the owner.

On this point, however, the case is now in effect overruled, and Minnesota law is brought into line with the general trend of the authorities, that if an agent proceeds in good faith to comply with the proposal for a unilateral contract, and spends time, money and effort in prosecution of the employment to find a purchaser, a contract is at once formed, although the compensation is not earned until the conditions have been fully complied with.<sup>4</sup> The obligation which arises in such a case is unilateral, not bilateral. The agent is under no duty to continue his efforts but the owner is bound to allow him a reasonable opportunity to do so. Is this result justifiable on legal principle?

Professor Williston says:<sup>5</sup>

"To deny the offeror the right to revoke is therefore, in effect to hold the promise of one contracting party binding, though the other is neither bound to perform nor has actually performed the requested consideration."

Thus if A offers B \$100 if B will complete a piece of work, (e. g., build a coach or saw a cord of wood) and B sets about the work and nearly finishes it, it is a hardship upon B, if, while the work is still incomplete, A may revoke his offer. Yet, says Professor Williston,<sup>6</sup> "any other result involves either a violation

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<sup>4</sup> Peterson v. Hall, (1895) 61 Minn. 268, 63 N. W. 733; Cloe v. Rogers, (1912) 31 Okla. 255, 121 Pac. 201, 39 L. R. A. (N.S.) 266; Schoenmann v. Whitt, (1908) 136 Wis. 332, 9 L. R. A. (N.S.) 598 note; Goward v. Waters, (1868) 98 Mass. 596, Braniff v. Baier, (1917) 101 Kan. 117, 165 Pac. 816, 28 Yale Law Journal 575.

<sup>5</sup> Williston's Wald's Pollock on Contracts 3rd ed. 311, 339. See also 2 Mechem, Agency secs. 2450-2455.

<sup>6</sup> I Williston's Contracts Sec. 60.

of recognized principles or the invention of new ones." So, he concludes:

"It seems impossible on theory successfully to question the power (right?) of one who offers to enter into a unilateral contract to withdraw his offer at any time until performance has been completed by the offeree, though obvious injustice may arise in such a case."

There is apparently something radically wrong with the legal theory which is unable to deal with so simple a situation and impotently acquiesces in obvious injustice. If recognized theories or principles do not achieve substantial justice, so much the worse for them. There is a plain duty for the law to invent or discover new ones.

The courts usually cut the knot by finding a *bilateral* contract, and holding that the beginning of work by B amounts to an assent binding both A and B.<sup>7</sup> In *Mooney v. Daily News Company*<sup>8</sup> it is held that a newspaper after making and publishing rules governing a prize contest for new subscriptions can not change the rules during the contest. The court speaks as if a contract were made between the newspaper and the individual contestants, by which the defendant was bound to abide by the rules under which they entered on the contest. After part performance by rendition of services the offer became an executory contract between the person making and the person so partially accepting the terms of the offer.

It is hard to see how partial acceptance can make the contract take on a *bilateral* character as some courts suggest. It is not possible, however, for legal theory to recognize a *unilateral* contract upon a consideration which is partially executory. That is what the cases in fact do. It is true that an offer must be accepted according to its terms. But if the offeree assents to the offer and begins performance on the faith of it, we have all the essential elements of contractual obligation. It is true that the offeree assumes no obligation by beginning to perform. He may unquestionably stop performance half-way without liability, unless, indeed, he has induced the other party to change his position in reliance on his undertaking. But because completion of per-

<sup>7</sup> *Mooney v. Daily News*, (1911) 116 Minn. 212, 133 N. W. 574, 37 L. R. A. (N.S.) 183 note; *Plumb v. Campbell*, (1888) 129 Ill. 101, 106, 107; 18 N. E. 790. See *Branniff v. Baier*, (1917) 101 Kan. 117, 165 Pac. 816; *Los Angeles Traction Co. v. Wilshire*, (1902) 135 Cal. 654, 67 Pac. 1086.  
<sup>8</sup> (1911) 116 Minn. 212, 133 N. W. 573, 37 L. R. A. (N.S.) 183. See also *Wachtel v. Natl. Alf. Journ. Co.* (Iowa 1920) 176 N. W. 801.

formance is still optional with the offeree it does not follow that the proposer may not be bound. He has not yet, it is true, actually received the full consideration requested. But that is always true of executory consideration in bilateral contracts. It is not even true in bilateral contracts that both parties must always come under legal obligation.<sup>9</sup> It is sufficient "consideration" or ground of enforcement of defendant's promise that he has invited action by the offeree in reliance on the offer. The first substantial act is all that need be required in the way of performance to found the defendant's obligation.<sup>10</sup>

The fundamental policy of the law of contracts is to enforce the demands of good faith in business dealings. Where a proposal calls for acts requiring time for their completion good faith demands that the proposal become binding when performance is begun, at least until the offeree has had a reasonable opportunity to complete what he has undertaken. It is certainly not contemplated by the parties that the offer should be revoked in the midst of performance; the injustice of that is at once felt. The suggestion has been made to protect the offeree, that there is an implied or tacit promise contained in such an offer to hold it open for a reasonable time in consideration of the beginning of performance by the offeree.<sup>11</sup> This theory reaches a just and desirable result, but seems needlessly complex and artificial. It makes two contracts grow where only one is intended. To hold the offer "irrevocable" is the same in effect as to hold the promise binding. The law imposes the obligation precluding the offeror from arbitrarily revoking the offer, after inducing a person to act on the faith of it, because this is demanded by good faith and common honesty. It does not depend upon a collateral contract or a tacit promise to hold the offer open.<sup>12</sup>

<sup>9</sup> See Ballantine, *Mutuality and Consideration*, 28 Harv. L. Rev. 121; *Lawler v. Dunn*, (Minn. 1920) 176 N. W. 989. "Nothing is more fundamental" than this specious axiom except when it is not true.

<sup>10</sup> *Y. M. C. A. v. Estill*, (1913) 140 Ga. 291, 78 S. E. 1075, 48 L. R. A. (N.S.) 783; *Brokaw v. McElroy*, (1913) 162 Ia. 288, 143 N. W. 1087, 50 L. R. A. (N.S.) 835, 27 L. R. A. (N.S.) 308, 310; *Albert Lea College v. Brown*, (1903) 88 Minn. 524, 529, 93 N. W. 672. (Note given as subscription to college endowment fund. Action in reliance thereon supports the promise.) *Martin v. Meles*, (1901) 179 Mass. 114, 60 N. E. 397; *Welch v. Lawson*, (1856) 32 Miss. 170, 177, 66 Am. Dec. 606.

<sup>11</sup> *McGovney, Irrevocable Offers*, 27 Harv. L. Rev. 644, 645; 1 Wisc. Law Rev. 57; 1 Page, *Contracts*, sec. 130 (194, 195).

<sup>12</sup> *Zwolenek v. Baker*, (1912) 150 Wisc. 517, 137 N. W. 769. See 26 Harv. L. Rev. 274 note. *Glover v. Henderson*, (1894) 120 Mo. 367, 25 S. W. 175.

There is no unfairness in thus holding the proposer to a unilateral obligation.<sup>13</sup> He is simply held to the exercise of good faith where revocation would result in cheating one who was rendering him services at his request. He is protected by the doctrine of implied conditions against having to pay until he receives the full consideration. If the offeree fails to perform with due diligence this would terminate the contract just as a breach would excuse a party to a bilateral contract. A countermand would likewise require cessation of work; but B would recover both the reasonable value of what he had already done and also the loss of profit he would have made. If the compensation were contingent on success, as in an offer of reward, the plaintiff would have to show that he was within reach of success, when defendant revoked the offer and denied him the chance to complete.<sup>14</sup>

Professor Williston certainly has the courage of his convictions and declares that even a refusal of tendered performance will prevent the formation of a unilateral contract. Suppose A offers to buy goods for cash, to be delivered by the seller B. If A refuses to accept a tender of the goods is he not liable in damages to B? Professor Williston, in his authoritative new treatise on contracts, says, no.<sup>15</sup> There must surely be some weakness in the legal logic or the premises which produce this monstrous result, this *reductio ad absurdum*. Where the offer calls for actual performance as consideration, what is the nature of the contract arising from mere tender? The offeror has as yet received no consideration, Williston argues. But the offeree has incurred detriment at his request, and that is sufficient ground to make the promise binding. The fact that the offeror does not receive benefit is his own fault.<sup>16</sup>

There is no reason why a "uni-promissory" contract should not arise as soon as detriment is incurred by beginning to perform the acts which the offeror has requested. The duty to perform

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<sup>13</sup> See Corbin, 26 Yale L. J. 196.

<sup>14</sup> *Wachtel v. National Alfalfa Journal Co.*, (Iowa 1920) 176 N. W. 801.

<sup>15</sup> I Williston, Contracts sec. 60b.

<sup>16</sup> *Brankenburt v. Hodgkin*, (1917) 116 Me. 399, 102 Atl. 106; *Louisville, etc., R. Co. v. Goodnight*, (1874) 10 Bush (Ky.) 552, 19 Am. Rep. 80. "If the party to whom such an offer is made acts upon it in the manner contemplated, either to the advantage of the offeror or to his own disadvantage, such action makes the contract complete." *Knowlton, J.*, in *First National Bank v. Watkins*, (1891) 154 Mass. 385, 387, 28 N. E. 275.

is subject as in a bilateral contract to an implied condition of performance of the executory part of the consideration. A distinction may thus be drawn between the time when the unilateral contract arises and the time when the duty of performance or payment becomes operative. A's proposal does not say when it shall become binding, but only when payment shall be made. It is for the law to recognize an obligation as arising from a promise as soon as justice requires. "Consideration" may be found even though the acts or services requested have not been fully rendered. Partial performance and change of position in reliance on the offer may be sufficient to make the proposal binding. It is better to call this a unilateral contract than an irrevocable offer. A unilateral contract is thus not necessarily a contract which is fully executed on one side. It is a uni-promissory or uni-obligational contract of which the consideration may be partly executory and partly executed.