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Freak-Tent of Contracts

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FREAK-TENT OF CONTRACTS[1]

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I. *"The Classical Classroom Pure Unilateral"*

A says to B, "I will give you $5 if you will climb to the top of that flagpole." B shinnies up, but before he can reach the top A calls out, "I revoke my offer!" The question put to the class is, "What are B's rights?" When the students hear that the proper answer is "None," they are not convinced. The reasoning is logical: "As the performance of the consideration is what converts an offer into a binding promise, it follows that the promise is made in legal intendment at the moment when the performance of the consideration is completed. It also follows that up to that moment the offer may either be revoked, or be destroyed by the death of the offeror, and the offeree thus be deprived of any compensation for what he has done."[2]

The students, still unconvinced, probably will agree with Sir Frederick Pollock, ". . . whatever (the) logic may be, the law really cannot be so absurd as that; and . . . any rational court before whom such a question is moved will surely find a way. . . ."[3] The courts have found ways: "In most of the few cases where the question has arisen, the offeror has been held bound, but it is not clear upon what theory."[4]

Before inquiring into "what theories" have been proposed, the Langdellian view should be more carefully analyzed.

First, the strict theory does have the virtues of logic and simplicity,[5] but not that of substantial justice, which Professor Langdell admitted.[6]

Second, it has authority to support it in the general rules that an offer is revocable at any time before acceptance and that an acceptance must always meet the terms of the offer, i.e., acceptance must be unequivocal. There is also authority in two classes of cases involving unilateral contracts, rewards and brokers' cases. In both classes the offer has been held revocable before complete performance of the act requested[7] (but it should be noted that the offer in these situations is made to more than one person, and that the nature

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[1]"The hypothesis of this paper is that unilaterals, at large, for purposes of studying formation, are not usefully conceived as one of two coordinate bodies of contracts cases; that the classical classroom pure unilateral, in particular, is not an important type on which an innocent law student's teeth should be cut to the eternal misshaping of his view of contract, but belongs in the freak-tent as an interesting and often instructive curiosity." Professor K. N. Llewellyn, 48 Yale L.J. 1, 36. (1938).

[2]Langdell: Summary of Law of Contracts (1880), sec. 4.

[3]28 L.Q.R. 100 (1911).

[4]Williston, Contracts (1920), sec. 60a.

[5]Wormser: The True Conception of Unilateral Contracts, 26 Yale L.J. 136 (1916).

[6]*Op. cit.*, sec. 4.

[7]Rewards: See Shuey v. United States (1875), 92 U.S. 73, 23 L.Ed. 697. Brokers: See Des Rivieres v. Sullivan (1924), 247 Mass. 443, 142 N.E. 111.

of the transactions are such that the offerees should know that someone else [including the offeror] might perform the requested act first). Where a broker is given an "exclusive" agency or the agency is created for a definite time, the offeror is generally held bound.[8]

Third, Professor Langdell's defense against any theory that would deprive the offeror of his right to revoke should be noted. "Such a view, however, would be fanciful and unsound. It does not follow that an offer becomes a promise because it is accepted; it may be, and it frequently is, conditional, and then it does not become a promise until the conditions are satisfied; and in case of offers for a consideration, the performance of the consideration is always deemed a condition. A promise must have a consideration when it is made or it can never have one. Besides, the view in question would not even serve the purpose of substantial justice, as it would protect the offeree, while leaving the offeror wholly unprotected."[9] It can be seen that Professor Langdell saw a necessity for an equality of rights and duties and thought that any theory that held one party bound and left the other free to perform or not at his pleasure was unfair as well as illogical. But this defense has been battered by Professor Corbin,[10] who pointed out that the offeror invited the offeree to take a risk, i.e., full performance before payment. "It appears that it is fair enough for the one who bears the risk to possess the privilege (to withdraw), while the other, bearing no risk, is deprived of both privilege and power."

To summarize, it is seen that the authority for the strict view is based mainly upon general contract rules, that the result is unjust is admitted by nearly all the writers,[11] and that the logic of Langdell is largely neutralized by that of Professor Corbin.

Admitting then that the offeror should be held bound where the offeree has partially performed the act requested, the question is how?

II. *Avoiding the Problem of the Unilateral Contract*

A. Construing the Contract as Bilateral

Professor Langdell sidestepped the question of injustice to the offeree by advising that everyone make bilateral contracts,[12] thus closing the barn door after the horse had departed.

The idea behind his suggestion, that bilateral contracts do not give rise

[8]Williston (1936 ed.), sec. 60a, notes 1, 2.

[9]*Op. cit.*, sec. 4.

[10]Offer and Acceptance and Some of the Resulting Legal Relations (1917), 26 Yale L.J. 169, 194-196.

[11]Possible exception is Professor Wormser, see footnote 5.

[12]*Op. cit.*, sec. 4.

to such troubles, has been at least partly responsible for the creation of section 31 in the Restatement of Contracts, entitled, "Presumption that offer invites a bilateral contract." The presumption has been approved by Williston,[13] and adopted in California in *Davis* v. *Jacoby*,[14] in which case the offeror died before the offerees entered on actual performance of his offer, but after they had accepted by a letter. The court said that between the two extremes of clear-cut unilateral and bilateral contracts "is a vague field where the particular contract may be unilateral or bilateral depending upon the intent of the offer (sic) and the facts and circumstances of each case" and found section 31 well suited to clarify the vagueness.

The presumption has been criticized on two counts.[15] First, "there is certainly scant authority for this,"[16] and second, "It would appear to be much better to presume that it (the offer) was indifferently for either a bilateral or unilateral contract. Then either form of acceptance, a promise or an act, would suffice. This solution permits people to make contracts as they will."

B. Los Angeles Traction Co. v. Wilshire[17]

This case was one of the first to stand as authority for the thesis that the offeror of a unilateral contract cannot revoke after the offeree has partially performed. It has been criticized harshly.[18] The court said, "When the respondent purchased and paid upwards of $1,500 for a franchise, it had acted upon the contract; and it would be manifestly unjust thereafter to permit the offer that had been made to be withdrawn. The promised consideration had been partly performed, and the contract had taken on a bilateral character. . . ." The critics, finding little complaint with the result of the decision, wondered how the offer became a contract, and if a contract, how it became bilateral, and if bilateral how the offeree could be bound, having given no promise. Professor Ashley suggested that the "court had in mind some idea of estoppel,"[19] but the California court has not explained itself further. In the opinion of *Ruess* v. *Baron*,[20] the court cited the L. A.

[13]Contracts (1936 ed.), sec. 60.

[14]1 Cal.2d 370, 34 Pac.2d 1026 (1934). Also adopted in Massachusetts: Bridges Wilson Corp. v. University Contracting Co. (1943), 314 Mass. 257, 49 N.E.2d 896.

[15]Whittier: The Restatement of Contracts and Mutual Assent, 17 Cal.L.R. 441, 453. Criticism approved by Llewellyn (1939), 48 Yale L.J. 779, 809.

[16]There is some authority. "There is the strongest reason for interpreting a business agreement in the sense which will give it a legal support, and such agreements have been so interpreted." Holmes, J., in Martin v. Meles (1901), 179 Mass. 114, 117, 60 N.E. 397; see, also, Cardozo's decision in Wood v. Lucy, Lady Duff-Gordon (1917), 222 N.Y. 88, 118 N.E. 214.

[17]135 Cal. 654, 67 Pac. 1086 (1902).

[18]"Astounding doctrine," Wormser; see footnote 5; "its notion was very vague . . . a remarkable instance of confusion of thought," Ashley; Offers Calling for a Consideration Other Than a Counter-promise, 23 Harv.L.R. 159; "obviously not logical," Trilling, comment, 10 Corn.L.Q. 220.

[19]*Op. cit.*, footnote 18.

[20]Cal. Dist. Ct. of App., 10 Pac.2d 518 (1932).

Traction Co. case without comment and truly remarked that the question of revocability of offers for unilateral contracts "has not so much troubled the courts as the law writers and commentators."

III. *Solutions to the Problem*

A. Quasi Contractual Recovery *(Contract implied in law)*

Recovery in quasi contract for the unjust enrichment of the offeror was the only remedy Professor Langdell would admit existed for the aid of the offeree.[21] The fact that the remedy was limited to cases where the offeror was benefited was merely unfortunate. More recently it has been recognized that the benefit to the offeror may be far less than the detriment to the offeree and the latter would be little better off than if no such remedy existed.[22] For example, where A offers to give a farm to B in return for B's moving to the farm and caring for A for the rest of his life: If B sells his present home and moves many miles to A's farm to perform the requested acts and after a few weeks A revokes the offer, A's benefit is the services received for a few weeks, but B's loss is the breaking up of his home and moving as well as the time spent caring for A.[23] In the "classroom" example of the flagpole it is even clearer that the offeror has not been benefited by the offeree's partial performance and that the offeree would have no remedy in quasi contract. Professor Page,[24] viewing the inadequacy of the remedy, said, "The result seems to most persons immoral and unethical."

B. Quasi Contractual Recovery *(Contract implied-in-fact)*

It has also been suggested that the courts should enforce an implied-in-fact contract after there has been a revocation to compensate the offeree for what he has done for the offeror at the latter's request.[25] The suggestion has been criticized on the ground that no promise can be implied in view of the expressed intent of the offeror.[26] This writer has found no cases supporting the theory.

C. Section 45 of the Restatement of Contracts

In an article[27] in 1914 Professor D. O. McGovney made a careful analysis of the problem of unilateral contracts and found that it was the

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[21]Langdell, *op. cit.*, s. 4, Williston (1920 ed.), sec. 60a.

[22]McGovney, 27 Harv.L.R. 644.

[23]For a case holding A bound by a contract, see Brackenbury v. Hodgkin (1917), 116 Me. 399, 102 Atl. 106. For comment that B would not be adequately compensated by recovery in quasi contract, see Corbin; The Formation of a Unilateral Contract (1918), 27 Yale L.J. 382, 383.

[24]Page, Contracts, 2d ed. (1920), sec. 130.

[25]Costigan: Implied-in-Fact Contracts (1920), 33 Harv.L.R. 376, footnote 35, page 399.

[26]Ashley: (1910) 23 Harv.L.R. 159, 162.

[27]Irrevocable Offers, 27 Harv.L.R. 644.

ordinary understanding of the offeree who commenced performance that the offeror would allow him the stated time, or if not stated, a reasonable time to complete the act requested. He concluded that the principal offer contains an implied subsidiary promise not to revoke, which becomes binding once the offeree has entered upon performance. This theory has been criticized by Professor Corbin[28] on the grounds that the inference may be contrary to fact and that it creates a fiction which is not necessary nor desirable.[29]

Professor Corbin's own view was more direct: the offer becomes irrevocable when the offeree begins performance of the requested acts, unless the offeror expressly reserved the power of revocation.

Section 45 of the Restatement of Contracts seems to be an attempt to compromise the McGovney and Corbin views.[30] It says that the effect of partial performance is to bind the offeror to a contract, his duty to perform being conditional upon complete performance by the offeree. Comment (b) explains that the reason the offeror is bound is that partial performance is an acceptance of the subsidiary offer suggested by Professor McGovney. It should be noted that there is an innovation in the wording of the Restatement theory. Where the ancestor theories went no further than to say that partial performance rendered the offer irrevocable, the offspring says that a "contract" comes into being. The reason for the change lies in the Restatement's definition of a contract (in sec. 1) as a promise or a set of promises for the breach of which the law gives a remedy. This definition differs from the more ancient and accepted one of an "agreement" for breach of which the law gives a remedy.[31] Under the older definition there could be no "contract" until there was agreement which was only arrived at in the case of unilateral contracts by complete performance of the requested act. But under the new definition there is a contract whenever there is a binding promise, regardless of agreement. Thus there is no difference between the two original theories and the resultant one, except for the word "contract," the meaning of which is the same as the older phrase "irrevocable offer."[32]

Section 45 has been approved in California,[33] but was rejected in New York.[34]

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[28]26 Yale L.J. 169, 194-196 (1917). Same criticism also made by Williston (1920 ed.), sec. 60a.

[29]As to the implied promise being a fiction, Professor Whittier (1929), in 17 Cal.L.R. 441, 450, denied that it was, agreeing with the inventor that it was the natural understanding of the parties.

[30]Both were advisers to the reporter, Mr. Williston.

[31]Black's Law Dict., Cal. Civ. Code, sec. 1549, 17 C.J.S. 310-312.

[32]For a suggested amendment of section 45, see Willis (1932), 7 Ind.L.J. 429, 432-433.

[33]Ruess v. Baron, *supra*, footnote 20. Lyon v. Goss (1942), 19 Cal.2d 659, 672, 123 Pac.2d 11.

[34]Charles E. Quincey & Co. v. Cities Service Co. (1935), 156 Misc. 83, 282 N.Y.S. 294. Kovacs v. Countess Mara, Inc. (1949), 90 N.Y.S.2d 172.

D. ESTOPPEL

Professor Ashley suggested in an article in 1910[35] that the offeror be prevented from revoking by an estoppel in pais, when there is no other means of avoiding injustice to the offeree. The doctrine of estoppel was invoked originally only in cases of misrepresentation of past or present facts, and not in the cases of promises as to the future.[36] Later the doctrine was extended and used where there was a misleading in reliance upon a gratuitous promise.[37] The Restatement has adopted Professor Ashley's suggestion in section 90 and one "may well ask, in view of section 90, why section 45?"[38] Both sections seem to answer the problem of unilateral contracts, but section 90 has been used by the courts almost exclusively as authority for the doctrine of promissory estoppel where the promise under consideration did not contemplate a unilateral contract. The only case this writer has found which used the estoppel theory to bind the offeror to a promise which contemplated a unilateral contract was *Ellis* v. *Wadleigh*,[39] where section 90 was cited in support of the opinion, which held that the offeror could not revoke her offer after the offeree had performed the requested acts for almost 20 years. Thus after 37 years Professor Ashley's idea has finally found a reception in a court, and the doctrine of estoppel has been expanded again, enlarging the loophole in the general rule of the necessity for consideration. This encroachment on the doctrine of consideration is justified by "compelling reasons of justice for enforcing promises, where injustice cannot be otherwise avoided, when they have led the promisee to incur any substantial detriment on the faith of them, not only when the promisor intended, but also when he should reasonably have expected such detriment would be incurred, though he did not request it as an exchange for his promise."[40] But this language seems to indicate that the rule of section 90 should not be applied in the case of a promise to make a unilateral contract, and that *Ellis* v. *Wadleigh* erroneously cited it.

Closely related to the theory of estoppel is that of "good faith" advocated by Professor Ballantine.[41] He criticized Professor McGovney's idea of a subsidiary promise, saying, "This theory reaches a just and desirable result, but seems needlessly complex and artificial. It makes two contracts grow where only one was intended. To hold the offer 'irrevocable' is the same in

[35]23 Harv.L.R. 159. Presumably Professor Ashley invented this application of the doctrine of estoppel as he cited no cases.

[36]Williston (1936 ed.), 139.

[37]Ricketts v. Scothorn (1898), 57 Nebr. 51, 77 N.W. 365, 73 Am.St.Rep. 491.

[38]Unilateral Contract Law, 33 Col.L.R. 464, 465, footnote 11.

[39]27 Wash.2d 941, 182 Pac.2d 49, 55 (1947).

[40]Williston (1936 ed.), sec. 139.

[41]Acceptance of Offers for Unilateral Contracts by Partial Performance (1921), 5 Minn.L.R. 94.

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 . . . There is no unfairness . . . 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."[42] It has been suggested that the distinction between this and the estoppel theory is verbal only, to avoid the pitfalls of the word.[43]

E. Other Countries

The English view seems to be much like that of Professor Corbin, that an "unequivocal beginning of the performance requested" is an acceptance of the offer.[44] This has been criticized because it was not explained.[45]

". . . the majority of French commentators . . . agree that there can be no revocation for the stated time or a reasonable time."[46] This would seem to be in accord with the American view in brokerage cases.[47]

A few countries have provided by statute that offers may become irrevocable under certain circumstances.[48]

[42]Citing Zwolanek v. Baker Mfg. Co. (1912), 150 Wisc. 517, 137 N.W. 769, 44 L.R.A. (N.S.) 1214, Anno.Cas. 1914A 793.

[43]4 So.Cal.L.R., Supp. 64, Restatement of Contracts Annotated (1931).

[44]Winfield: Pollock's Principles of Contract, 12th ed. (1946), p. 18. No cases cited.

[45]McGovney, 27 Harv.L.R. 644.

[46]Unilateral Contracts in Louisiana, 16 Tulane L.R. 456.

[47]Williston (1936 ed.), sec. 60a, footnotes 1, 2.

[48]Swiss Code of Oblig., sec. 3; German Civ. Code, secs. 145, 658; Japanese Civ. Code, art. 521. Cited in Corbin's Anson, Contracts, 5th Amer. ed. (1930), page 56, footnote 2.