Export 3.10.1.1 Unilateral vs. Bilateral Contracts – Manufactured Difficulties Introduction

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The common law, as the Sixth Interim Report of the English Law Revision Committee 23 (1937) informs us,

> traditionally divides parol contracts into two classes, the bilateral contract of a promise for a promise, and the unilateral contract of a promise for an act. In the case of bilateral contracts one promise is held to be consideration for the other, the agreement, therefore, becoming effective at the moment when the promises are exchanged. In the case of a unilateral contract, however, the promise does not become binding until the act has been completely performed. A promisor may therefore withdraw his promise at any time before completion of the act, even though he knows that the promisee has already entered upon the performance and has nearly completed it.

Not so long ago, the practical wisdom of "the great dichotomy," ingeniously elaborated and defended by Langdell in his Summary of the Law of Contracts 248 (2d ed. 1880) and by Williston, 1 Williston §13, was accepted as if grounded in the nature of things, and its application was not regarded as difficult, at least in theory. Its implications, however harsh in an individual case, were treated as just, since the division purported to be in keeping with the intentions of the offeror, "the master of the bargain." In terms of this analysis, the doing of the act constitutes acceptance, the bargained-for consideration, and the offeree's performance

The case material that follows serves to show the powerful influence of the famous distinction and its gradual erosion. Some courts have not hesitated to apply the distinction literally even where performance of the requested act would require considerable time and effort, and have permitted the offeror to revoke his offer as long as he had not received the whole consideration. These courts regarded the offeree as adequately protected by a recovery in quantum meruit. Other courts, however, have found the rigid application of the division, when applied to actual life situations and not to the hypothetical case of the climbing of a flag-pole, difficult to reconcile with their sense of justice. Small wonder that they did not regret the discovery that the line of demarcation between the two institutions is often blurred; nor did they hesitate to tamper with the whole doctrine, even at the risk of an over-correction. The Restatement of Contracts, reflecting modern case law, has narrowed the gap between unilateral and bilateral contracts. See §§31, 45, 56, 63.

The reform movement received a powerful impetus by the attack on the famous distinction in Llewellyn's article, On Our Case-Law of Contract: Offer and Acceptance, 48 Yale L.J. 1, 779 (1938-1939), which makes the argument that "the great dichotomy," based

on the erroneous assumption that businessmen always bargain in terms of acts or of promises, fails to correspond to the notions of businessmen as to when "a deal is on." His observations are worth quoting.

> . . . The great dichotomy in the orthodox doctrine of Offer and Acceptance is that between bilateral and unilateral contract.[131] But there have been signs over thirty years or more of difficulty with it and its implications. Perhaps it is time to recanvass the life-situation with which it has to deal. And so to recanvass the cases which its office is to reflect and to guide.
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> This will not be easy doing. The rules of Offer and Acceptance have been worked over; they have been written over; they have been shaped and rubbed smooth with pumice, they wear the deep rich polish of a thousand class rooms; they have a grip on the vision and indeed on the affections held by no other rules "of law," real or pseudo. For it was Offer and Acceptance which first led each of us out of laydom into The Law. Puzzled, befogged, adrift in the strange words and technique of cases, with only our sane feeling of what was decent for a compass, we felt the warm sun suddenly, we knew that we were arriving, we knew we too could "think like a lawyer." That was when we learned to down seasickness as A revoked when B was almost up the flag-pole. Within the first October, we had achieved a technical glee in justifying judgment then for A; and succulent memory lingers, of the way our dumber brethren were pilloried as Laymen still. This is therefore no area of "rules" to be disturbed. It is an area where we want no disturbance, and will brook none. It is the Rabbit-Hole down which we fell into the Law, and to him who has gone down it, no queer phenomenon is strange; he has been magicked; the logic of Wonderland we then entered makes mere discrepant decision negligible. And it is not only hard, it is obnoxious, for any of us who have gone through that experience to even conceive of Offer and Acceptance as perhaps in need of re-examination.

(Id. at 32)

The impact of this criticism is reflected in the Uniform Commercial Code and the Restatement of Contracts. U.C.C. §2-206, "Offer and Acceptance in Formation of Contract," reads as follows:

> (1) Unless otherwise unambiguously indicated by the language or circumstances
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> (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in circumstances;
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> (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.
>
> (2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

The Restatement Second has followed this trend by deleting §12 of the original Restatement which defined unilateral and bilateral contracts. These terms are no longer used because of doubts as to the utility of the distinction (Reporter's note to §12).[132] While §31 of the original Restatement laid down a presumption that an offer invites a bilateral contract, §32 of the Restatement Second favors a different interpretation. It reads:

> Invitation of Promise or Performance
> In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses.[133]

This does not mean, however, that the Restatement Second has ignored the fact that a promise is often binding on the promisor even though the promisee is not bound by any corresponding obligation. This is strikingly illustrated by the rule laid down in §45.[134] Consult Braucher, Offer and Acceptance in The Second Restatement, 74 Yale L.J. 302 (1964).

[131] The argument is that the classical bilateral-unilateral distinction dies as it approaches fact either of life or of case decision. I put forward as a major piece of evidence the prominence which that distinction has in the table of contents of 1 Williston and Thompson, [Contracts (1936)], and the lack of correspondence of the text, and much more of the notes, to the suggestions in the table of contents. The Restatement shows the distinction only in the background, coloring much, but not explicitly, as a fundamental cleavage.

[132] Restatement Second §12, Reporter's Note (Tent. Draft No. 1, 1964):

> As defined in the original Restatement, "unilateral contract" included three quite different types of transaction: (1) the promise which does not contemplate a bargain, such as the promise under seal to make a gift, (2) certain option contracts, such as the option under seal (see §§24A, 45), and (3) the bargain completed on one side, such as the loan which is to be repaid. This grouping of unlike transactions was productive of confusion.

[133] See also §30. It reads:

> Form of Acceptance Invited
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> (1) An offer may invite or require acceptance to he made by an affirmative answer in words, or by performing or refraining from performing a specified act, or may empower the offeree to make a selection of terms in this acceptance.
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> (2) Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.
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> [See also §55].

[134] It reads:

> Option Contract Created by Part Performance or Tender
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> (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree begins the invited performance or tenders part of it.
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> (2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

Consult also, §25; §87, *supra* p. 315.