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MUTUAL ASSENT IN UNILATERAL CONTRACTS
SINCE THE RESTATEMENT

ARTHUR ANDERSON

A COURT said in 1922: "A unilateral contract is exactly as impossible as any other one-sided thing of two sides." Twenty years later another court said:

When a person makes an offer, he can couch it in such terms that it may be accepted by a promise, express or implied, so that a bilateral contract arises, executory on both sides. Or he may so frame his offer that it can be accepted only by an act, so that a unilateral contract is formed, executory on the part of the offerer alone.

The former quotation came before, and the latter quotation came after, the publication of the Restatement of Contracts in 1932. The contrast is dramatic, but the former statement, of course, does not accurately picture the state of the pre-Restatement law of unilateral contracts, and the analysis since the Restatement is not always as good as the latter statement might imply. Likewise, the teachings and treatises of Williston have probably been more influential than the Restatement in bringing about the improvement which has occurred in the analysis of unilateral contract law. But the Restatement is important and is growing more so, and the date of its publication is accordingly taken here as the starting point in an examination of the modern developments in mutual assent in unilateral contracts.

2 Martindell v. Fiduciary Counsel, 131 N.J. Eq. 523, 525, 26 A. 2d 171, 172 (Ch., 1942), aff'd 133 N.J. Eq. 408, 30 A. 2d 181 (Ct. Err. & App., 1943).
3 Williston, Contracts (1st ed., 1920); Williston, Contracts (rev. ed. by Williston and Thompson, 1936).

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I. OFFEREES KNOWLEDGE OF THE OFFER

The matter of the offerees knowledge of the offer required the attention of a court in a related pair of very recent cases. A man had been murdered in the District of Columbia, and a veterans organization and the District of Columbia each offered a separate reward for information leading to the arrest of the guilty parties. The police called upon the plaintiff, who was the mother of a girl who was a friend of Wheeler, a suspect. In response to questioning, the plaintiff told the police that the daughter and Wheeler had left the city together. The police asked for names and addresses of relatives, and the plaintiff accordingly gave the name and address of a relative in South Carolina, where the police arrested Wheeler, in the daughter's company, two days later. The plaintiff did not learn of the rewards until after she had given her information to the police.

After Wheeler's conviction, the plaintiff sued the veterans' organization and the District of Columbia in two separate law suits, both of which came before the same court. In each case the principal defense was that there was no contract because the plaintiff had no knowledge of the offer when she gave her information.

In the first case, which was against the veterans' organization, the court in a scholarly opinion followed the standard doctrine and denied recovery, being careful to limit its holding to the situation of a privately-offered reward, saying:

So far as rewards offered by private individuals and organizations are concerned, there is little conflict on the rule that questions regarding such rewards are to be based upon the law of contracts.

Since it is clear that the question is one of contract law, it follows that, at least so far as private rewards are concerned, there can be no contract unless the claimant when giving the desired information knew of the offer of the reward.

In the second case, which was against the District of Columbia, the court likewise denied recovery, but it recognized a conflict in the cases where the reward is to be paid by a governmental body or officer, saying:


5 The court quoted from 1 Williston, Contracts § 33 (rev. ed., 1936); it also quoted Rest., Contracts § 53, Comment a, in part, and illustration (1932).


The issue is now before us and we meet it by deciding that the rule applies to governmental as well as private agencies (or individuals) under the circumstances of this case, and that one giving information leading to the arrest of a criminal without any knowledge that a reward had been offered for such information is not entitled to collect the reward.

We have again examined the state decisions expressing the minority view. We think that when rewards are offered by governmental agencies, no less than when offered by private organizations, the rules of contract law apply and a claimant is put to the necessity of showing that he knew of the offer and acted upon it.

The court continued by distinguishing the “reward statute” cases, saying that such cases “rest on the theory that the right to the reward follows by operation of law when compliance with the provisions of a reward statute has been shown. This is not such a case.” With this dictum, the court completes a very satisfactory analysis of the three familiar situations involving knowledge of the existence of the reward.

II. NECESSITY OF INTENT TO ACCEPT

The New York Court of Appeals squarely held in the 1941 case of Reynolds v. Eagle Pencil Co., that there is no contract if the offeree of an offer for a unilateral contract performs the act without the intent to act upon the offer. The plaintiff, an employee of the defendant, had been assaulted by a group of pickets and strikers. The defendant offered a reward “for information leading to the arrest and conviction of any person or persons responsible” for the assault. The plaintiff testified without contradiction that he learned of the offer on the morning of its publication, and the same afternoon he gave information to a detective which led to the arrest and conviction of one of the guilty parties, but apparently his motive for giving the information was to bring about the punishment of his assailant. A finding of fact was made

8 The court cited Smith v. Nevada, 38 Nev. 477, 151 Pac. 512 (1915), where the state legislature had enacted a special statute authorizing the governor to offer rewards in connection with a particular crime, namely, the massacre of four ranchers by a band of Indians. The Nevada court said, page 482 and 513: “The circumstances surrounding the offer of reward in the case at bar are such, we think, that the legislature never contemplated that knowledge of the offer should be a prerequisite to a right to recover. . . It may reasonably be assumed that the legislature had knowledge at the time of the passage of the act that one or more posses were already in pursuit of the outlaws.” Another case where it appears even more clearly that the right to the reward is non-contractual and “follows by operation of law,” is Flood v. City National Bank, 218 Iowa 898, 253 N.W. 509 (1934), cert. denied 298 U.S. 666 (1936), where a state statute entitled a finder of lost goods to recover a ten per cent reward from the loser.

9 Note 7 supra, at 791.

that he did not act upon the defendant's offer when he gave the information. The court said:11

We are thus constrained to determine plaintiff's legal right to the reward in suit upon a basis which includes the fact that in giving information which led to the arrest and conviction of his assailants the plaintiff did not act upon the defendant's offer. That fact defeats the plaintiff's legal right to the reward.

The problem goes back to 1833 and the famous English case of Williams v. Carwardine,12 where the court held that the plaintiff was entitled to recover a reward for information leading to the discovery of a murderer, even though the jury found that "she was not induced by the offer of the reward, but by other motives." She had been severely beaten by the murderer and she gave the information believing that she had not long to live and to ease her conscience. The tenor of the judges' opinions was that she should recover the reward because she had given the information; Patteson, J. said:13 "We cannot go into the plaintiff's motives."

The very few American cases14 took the view opposite to Williams v. Carwardine, and they were followed by the Restatement,15 which states: "If an act or forbearance is requested by the offeror as the consideration for a unilateral contract, the act or forbearance must be given with the intent of accepting the offer." The Restatement argument seems conclusive:16

When an offeror requests a certain act or forbearance as the consideration for his promise, the act or forbearance when furnished is an ambiguous expression of intent, since acts, like words, often have more than one objective meaning. The reasonable interpretation may be that the offeree accepts the proposal, but it is possible that the true interpretation is that the offeree as a free man has exercised his privilege of acting or forbearing in the manner requested, without accepting the proposal. The only way to determine what his conduct actually means, even objectively, is to ascertain his intent.

The holdings of the earlier American cases17 plus the logic and standing of the Restatement plus the very high authority of the Reynolds

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12 4 B. & Ald. 621 (K.B., 1833).
15 Rest., Contracts § 55 (1932).
16 Ibid., § 55, Comment a.
17 Note 14 supra.
case would seem to leave two points fully settled: (1) *Williams v. Carwardine* is bad law, and (2) it is not the law in the United States. A difference of opinion on these two points does exist, however, as is shown by an examination of Volume 1 of Corbin’s new treatise on the law of contracts,18 which appeared late in 1950.

Corbin states the facts of *Williams v. Carwardine* in the text of Section 58, and continues with his discussion of the case in four succeeding paragraphs. To avoid possible unfairness by a quotation out of context, these four paragraphs are quoted in full, together with Corbin’s footnotes, which, however, are re-numbered:

We shall not here attack this decision, although some courts have stated a contrary opinion19 and some persons who have rendered the requested service from other motives than a desire for the offered reward may forbear to seek the reward or even refuse it when tendered.20 Generally, however, a bargaining contract is explained as the result of mutual expressions of agreement or as requiring the intentional acceptance of an offer. Like other definitions and rules, these are rationalizations from the decided cases. They are useful; but they are not consistent with all past court decisions and they do not necessarily control future decisions. Contracts are not always consummated by the machinery of offer and acceptance. If two persons repeat in unison, and in each other’s presence, the terms of a contract prepared for them by a third person, they make a valid contract. So also, if two persons simultaneously sign duplicate copies of a contract prepared for them by a third person. In these cases, no doubt they are consciously expressing mutual assent to the same terms; and usually the motive of each is his desire for what the other gives or promises.

In another English case,21 a dealer published an advertisement promising to pay £100 to anyone who should use his carbolic smoke ball according to directions for two weeks and thereafter catch the influenza. The plaintiff did as requested and caught the influenza. Judgment was rendered for the £100. Without doubt the paramount motive of the offeror was the desire to make sales and receive money. Probably the paramount motive of the plaintiff, the offeree, was to gain immunity from a disease. If the plaintiff attained this chief object of desire, he would receive no money at all. That these were the motives of offeror and offeree did not prevent the formation of a valid unilateral contract.

Whatever the motive or motives may be, it is generally asserted that there must be an expression of intention to agree upon definite terms. Even this, however, is not always true. If one person tenders delivery of a unilateral promise under seal, there is a contract if the promisee receives the document; he need

18 Corbin, Contracts § 58 (1950).
19 Ibid., n. 11. “N.Y.-Vitty v. Eley, 51 App. Div. 44, 64 N.Y.S. 397 (1900).”
20 Ibid., n. 12. “The following item appeared in a newspaper: ‘Little Rock, Ark., Dec. 12.—James Howard, convict who killed Tom Slaughter, notorious outlaw, in a communication to Gov. McRae today relieved the state from any and all obligations of paying him the $500 reward offered for the apprehension and killing of Slaughter. Howard declared that when he shot and killed the bandit he did not know that any reward had been offered.’”
not know its contents. Also when a debtor makes a new promise to pay a barred debt, this promise is a binding contract without any expression of assent by the creditor.22

In any case, it is certain that in rendering a requested performance it is not necessary that the sole motive of the offeree shall be his desire for the offered reward. It need not even be his principal or prevailing motive. The motivating causes of human action are always complex and are frequently not clearly thought out or expressed by the actor himself. This being true, it is desirable that not much weight should be given to the motives of an offeree and that no dogmatic requirement should be embodied in a stated rule of law.

In forbearing to attack Williams v. Carwardine, it would seem that Corbin must necessarily be ready to attack Reynolds v. Eagle Pencil Co. The Reynolds case, however, is not mentioned in his new treatise.

III. THE APPLICATION OF THE DOCTRINE OF SUBSTANTIAL PERFORMANCE TO THE ACCEPTANCE OF AN UNREVOKED OFFER FOR A UNILATERAL CONTRACT

The doctrine of substantial performance was applied to the acceptance of an unrevoked23 offer for a unilateral contract in Kaiser v. Better Farms, Inc.,24 which was decided by the Supreme Court of Wisconsin in 1946. The doctrine of substantial performance goes back to Lord Mansfield's opinion in Boone v. Eyre25 in 1776, but it is a part of the law of bilateral contracts. The application of this doctrine, by a court of high standing, to an offer for a unilateral contract, is, therefore, a startling departure.

A detailed statement of the case is in order. The defendant-offeror operated a farm of some 3,000 acres. The plaintiff-offeree had been employed as a farm hand by the defendant for ten years. He "worked and was paid by the day and was simply subject to being docked for the days that he did not work."26 Commencing in 1944, he was paid overtime for Sunday work. The offer was contained in a letter:


23 The problem of the revocation of an offer for a unilateral contract after part performance has been much discussed. Some courts and writers, who have not been satisfied with the results which follow a strict adherence to principle, have formulated special rules to be applied in such cases. These special rules will be discussed in the next section of this paper, which deals with acceptance after attempted revocation, but they are believed to be no part of the law where no revocation is attempted, and they accordingly will not be mentioned in the present section.

24 249 Wis. 302, 24 N.W. 2d 621 (1946).
June 28, 1944

To Better Farms Employees:

At this time when we are trying to operate our dairy barns, and get our field work done with a shortage of help, we realize that everyone must work longer hours and also much harder than in normal times.

In consideration of that fact if you will put forth every effort to co-operate with us in getting the work done, and are still in our employ January 1st, 1945, a bonus of $50.00 will be paid to you.

Sincerely,

Better Farms, Inc.
Clare F. Filiatrault, President

The plaintiff complied with this offer in all respects until January 1, 1945, except that he did not work on July 4. One hundred acres of alfalfa had been cut on July 3, and the foreman had “ordered plaintiff and all of the help to work on July 4th.”27 The plaintiff had asked whether overtime would be paid and had been told that it would not. Nine other men also failed to work on July 4, and the hay was damaged by a heavy rainfall on July 5.

The defendant made no comment when the plaintiff returned to work, and the plaintiff was not notified, until after the bonus period had expired, that he would not receive the bonus.

The plaintiff sued for the $50, and the defendant counterclaimed for one-tenth of the damage to the hay, contending that ten men customarily worked in the hay field, and that therefore one-tenth of the damage was attributable to the plaintiff.

The court held, (1) that the plaintiff worked and was paid by the day and therefore had committed no breach of his contract of employment, and that the counterclaim accordingly had been properly dismissed, and (2) that the plaintiff was entitled to recover the $50 bonus in full.

The court held, in effect, that the underlying employment arrangement was something other than a bilateral contract binding the plaintiff to work on July 4. The non-binding quality of the underlying employment arrangement was the only reason given for sustaining the dismissal of the counterclaim. If the bonus arrangement had resulted in a bilateral contract, it would seem that it would have been necessary for the court to discuss the application of the counterclaim to the bonus arrangement. The court’s failure to discuss the counterclaim in relation to the bonus arrangement may accordingly be some evi-

27 Ibid., at 304 and 622.
dence that the court did not regard the bonus arrangement as resulting in a bilateral contract.

The court's holding that the plaintiff could recover the $50 bonus is the matter of primary interest, and, in connection therewith, the first topics for discussion are (1) whether the court proceeded upon the theory that the offer was for a unilateral contract, and (2) whether the court employed the doctrine of substantial performance.

Unfortunately, it cannot be said to be crystal-clear that the court regarded the offer as being for a unilateral contract. The court makes no direct statement of its views as to the nature of the offer. The closest that the court comes to describing the nature of the offer is to say, "It is of importance that the offer, which contemplated acceptance by performance, was never withdrawn."28 This language is quite meaningful, however, because (1) only an offer for a unilateral contract is accepted by performance,29 and (2) only if this offer were for a unilateral contract would mention of withdrawal be appropriate.30 The foregoing considerations, plus the court's striking down of the counter-claim, justify the discussion to proceed upon the basis that the court regarded the offer as being for a unilateral contract.

It is quite clear that the court employed the doctrine of substantial performance in finally reaching its decision. The court said:31

The precise question in this case is whether plaintiff's refusal to work on July 4th because he thought he ought to have overtime for that day is sufficient to make his performance something less than substantial. On the part of defendant, it is argued with considerable force that the hay was down; that there were possibilities of rain, and that plaintiff knew or should have known the importance of getting in the hay, and that the default was so substantial as to prevent plaintiff's performance from being so.

Two factors lead us to reject this contention. In the first place, this was

28 Ibid., at 307 and 623.
29 There is a real, but rarely observed, exception to this statement which is expressed in § 61 of the Restatement of Contracts as follows: "If an offer requests a promise from the offeree, and the offeree without making the promise actually does or tenders what he was requested to promise to do, there is a contract... provided such performance is completed or tendered within the time allowable for accepting by making a promise...." United States v. John A. Johnson Contracting Corp., 139 F. 2d 274 (C.A. 2d, 1943), cert. denied 321 U.S. 797 (1944) (alternative holding). There is also an apparent, but not real, exception in the case of an offer for a bilateral contract where the offeree makes his promise by acts or conduct other than words. Linder v. Midland Oil Refining Co., 96 Colo. 160, 40 P. 2d 153 (1935); Davis v. Jacob Dold Packing Co., 140 Kan. 644, 38 P. 2d 107 (1934); Rest., Contracts § 21 (1932). It seems quite certain that the court had neither of these two situations in mind.
30 If the offer had been for a bilateral contract, it undoubtedly would have been terminated by acceptance or lapse of time soon after it was made on June 28.
plaintiff's only default—the only instance in which it is even hinted that plaintiff
did not fully measure up to the requirements of the bonus. He worked long
hours, as well as Sundays and holidays. He performed his tasks with efficiency
and competency for all but a single day out of a period extending more than six
months. Quantitatively, his performance appears to us to have been substantial.
Further than this, the fourth of July incident occurred during the early part of
the bonus period. . . Further than this, it ought to be pointed out that plaintiff's
failure to work on the 4th of July arose out of a difference of opinion between
plaintiff and the foreman as to whether plaintiff was entitled to overtime for
that day. It is not important for us to determine that plaintiff was right in his
contention, but it is evident from the record that he made the contention in good
faith, and that his failure to work did not have the quality of wilfulness which is
sometimes said to prevent performance from being substantial. See 3 Williston,
Contracts (rev. ed.), sec. 842.

The court reaches its conclusion that the default was not substantial
by examining and weighing the circumstances surrounding the default.
The court points out (1) that this was the plaintiff's only default,
(2) that his actual performance was large and good, (3) that his default
occurred early in the bonus period, and (4) that it considers that his
default was not wilful. This is the analysis which is made, and these are
the types of influences which are considered, when dealing with a bi-
lateral contract and when attempting to decide whether a given breach
of promise is material or whether a given performance is substantial.32
The principles being applied by the court are further identified by its
citation of authority: Section 842 of Williston on Contracts is en-
titled, "Substantial performance as excusing condition requiring com-
plete performance," and deals with substantial performance in bi-
lateral contracts.

The doctrine of substantial performance has been a part of the law
of bilateral contracts for nearly two centuries. Lord Mansfield evolved
the doctrine in two decisions, of which the first was Kingston v. Prest-
ton,33 where he held that a non-performing plaintiff could not re-
cover,34 and of which the second was Boone v. Eyre, where he held that
a non-performing plaintiff could recover if his breach was not material
and if his performance accordingly was substantial.35 This has been the

32 W. H. Kirkland Co. v. King, 248 Ala. 643, 29 So. 2d 141 (1947); Midway School
Div. 685, 27 N.Y.S. 2d 95 (3d Dep't, 1941); Herkowsky v. School District, 141 Pa.
Super. 526, 52 A. 2d 470 (1949); Tichnor Bros. v. Evans, 92 Vt. 278, 102 Atl. 1031 (1918);


35 Ibid., at § 818.
law ever since. The Restatement of Contracts describes this body of law as the doctrine of "Promises for an agreed exchange," and proceeds upon the fundamental proposition that in every bilateral contract the parties contemplate an exchange of performances, with the result that performance by the defendant is constructively conditional upon substantial performance by the plaintiff. The Restatement expresses the same doctrine in another way, that is, by stating that a material breach by the plaintiff discharges the defendant's duty to give the agreed exchange. The doctrine is the heart of the modern law of bilateral contracts, and it is believed that it has never before been applied to an offer for a unilateral contract.

An offer for a unilateral contract is accepted by performance of the act, and this means the whole act. The Restatement states that "an acceptance must comply exactly with the requirements of the offer, ...

36 Rest., Contracts § 266 (1932).
37 Ibid., at § 274.
38 The law of unilateral contracts does contain a doctrine which bears a superficial resemblance to the doctrine of substantial performance, but which is not the same. It applies to offers for rewards. 1 Williston, Contracts § 74 n. 2 (rev. ed., 1936), refers to it as "the so-called doctrine of 'substantial compliance' with the terms of the offer." A leading case is Haskell v. Davidson, 91 Me. 488, 40 Atl. 330 (1898), where a reward was offered "for the arrest and conviction of the person or persons who entered the room of Alexander Wilson, and stole $35 therefrom." The plaintiffs investigated the crime, confronted the thief with the charge, and obtained his confession, but the actual arrest was made by a deputy sheriff and the actual conviction was made by the judicial branch of the state government. The court allowed the plaintiffs to recover the reward, saying: "An offer of a reward for 'the arrest and conviction' of an offender, can not be taken literally.... The service contemplated by a person making such an offer, and which his proposal should be construed as meaning, must be, the obtaining and giving to some proper person interested, sufficient information in relation to the perpetrator of the crime and his whereabouts as to authorize and secure the arrest of the offender, and subsequently to procure his conviction by a court of competent jurisdiction.... We think that.... the plaintiffs substantially performed the service required by the offer of reward, so as to accomplish the entire object contemplated and desired by those making it." In Marsh v. Wells Fargo & Company Express, 88 Kan. 538, 129 Pac. 168 (1913), the reward was "for the arrest and conviction of" a murderer; the plaintiff arrested Carr and Carr was convicted. The court allowed the plaintiff to recover the reward, saying: "It cannot be said that in a strict literal sense any particular person or persons convicted Carr. That was accomplished through the co-operation of the plaintiff, the special agents of the company, and the prosecuting officers; the court, jury and witnesses also performed appropriate functions in bringing about the result.... Offers must in such cases be liberally construed in the sense in which they are ordinarily understood and acted upon and the purposes for which they are intended. A substantial compliance is sufficient." What the court has done in each of these two cases has been to read and interpret the offer and then to hold that the plaintiff has done everything that the offer, as interpreted, requires. The court does not, it is believed, say that the plaintiff recovers on less than full performance.

40 Rest., Contracts § 59 (1932).
omitting nothing from the ... performance requested.” These words “exactly” and “nothing” are precise. The Comment goes on to say, “This rule is a necessary corollary of the basic idea of contracts that duties are imposed for only such performance as the parties have expressed a willingness to render.”

In the present case, the defendant made an offer for a unilateral contract. It offered to pay a bonus of $50 for the plaintiff's act of putting forth “every effort to co-operate with us in getting the work done.” The plaintiff did not perform that act, but instead absented himself from the hay field on July 4, which was a day when he was needed to get the work done. There was a non-compliance with the requirements of the offer, and an omission from the performance requested.

The court held that the plaintiff’s performance was substantial and that he therefore should recover the bonus, just as any nonperforming plaintiff recovers on a bilateral contract when his performance is substantial. The court allowed recovery of the entire $50, and not some lesser amount, and the court did not explain the place that was to be occupied in its theory by a rule which is basic to the doctrine of substantial performance, namely, the rule that a plaintiff, whose performance is merely substantial rather than complete, is subject to suit in a cross action for damages for breach of his own promise. If the bonus arrangement had been a bilateral contract, in which the plaintiff promised to put forth every effort to co-operate in exchange for the defendant's promise to pay the bonus, the plaintiff would have recovered the bonus upon substantial performance, but he would have been liable for damages for breach of contract to the extent that his substantial performance was less than full performance. The defendant would have been able, in effect, to deduct such damages from the $50, and his net payment to the plaintiff would have been something less than $50. It does not appear that any existing rule of law would permit any similar deduction from the liability of the maker of an offer for a

41 The court argued, in part, that the plaintiff contended in good faith that he was entitled to overtime pay, and that his default accordingly lacked “the quality of wilfulness.” Wilfulness is an influential circumstance when appraising a performance to determine whether it is substantial. But an experienced farm hand, such as the plaintiff, knows when he takes the job that certain farm operations demand performance at the appropriate time: cows must be milked twice a day seven days a week, and hay must be made when the sun shines. This plaintiff, however, at a critical time, followed, or accompanied, or led nine other men away from the hay fields in a dispute over overtime, not regular, pay. Viewed in this light, the plaintiff's default appears quite wilful, particularly when he sues for a bonus promised for extra effort.

42 Rest., Contracts § 275, Comment a (1932); Ibid., § 313, Comment c; 3 Williston, Contracts § 841 (rev. ed., 1936).
unilateral contract. Certainly, the offeree is not a promisor and he cannot be held for breach of promise; certainly, also, the law cannot put a different promise into the offeror’s mouth—not even a smaller one.

Whether the decision will be followed remains to be seen. There is something engaging about a rule which does not require the exact, but instead is satisfied with the almost, and this new point of view may have a future in a law of contracts which has on other occasions embraced a doctrine not strictly in accord with logic. If this new point of view does develop, however, some provision must be made for reducing the amount of the offeror’s net liability where he receives substantial, rather than complete, performance of the act for which he bargained. How this provision will be made will be interesting to observe.

IV. ACCEPTANCE AFTER REVOCATION

Before the Restatement, most of the discussion of the revocation problem in offers for unilateral contracts took place in the law reviews, the treatises, and the classrooms. The judicial discussions were infrequent and sometimes unsatisfactory.

The pre-Restatement academic discussion centered around the feeling that the standard doctrine, as laid down by Langdell, which would permit an offeror to revoke after the offeree had performed a part of the act, might lead to hardship and injustice. Langdell’s suggestion, that the parties could have made a bilateral contract instead and had only themselves to blame for any possible hardship, did not satisfy. Other solutions were offered. Ashley suggested that some kind of an estoppel be invoked to bar revocation; McGovney suggested the collateral-offer-not-to-revoke theory; Ballantine suggested the concept of a uni-promissory obligation formed by the beginning of the performance of the act. Wormser defended the standard doctrine, saying that the offeree was not bound to perform the act and therefore the offeror should be free to revoke his offer. The academic discussion included a vigorous criticism of the 1902 case of Los Angeles Traction Co. v. Wilshire, where the court held that an offer for a uni-

44 Ashley, Offers Calling for a Consideration Other than a Counter Promise, 23 Harv. L. Rev. 159 (1910).
46 Ballantine, Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested, 5 Minn. L. Rev. 94 (1921).
48 135 Cal. 654, 67 Pac. 1086 (1902).
lateral contract, plus part performance of the act, yielded a bilateral contract.

Williston's viewpoint was expressed in 1920, in his First Edition, as follows:

It seems impossible on theory successfully to question the power 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.\(^49\)

The leading case of the pre-\textit{Restatement} period was \textit{Petterson v. Pattberg},\(^50\) where the Court of Appeals of New York adhered to the standard doctrine and allowed an offeror to revoke his offer through a closed door while the offeree was outside anxious to accept.

In 1932 came the \textit{Restatement} and its Section 45:

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.

In declaring that the offeror was bound as soon as a part of the consideration had been given, the \textit{Restatement} departed from the standard doctrine. It was argued in support of the Section that "the courts generally by some form of argument hold that the offer cannot be terminated," and that "justice is best served by the rule stated."\(^51\) For this departure, the law has not been grateful: Section 45 has been cited in fourteen cases, but not one of them can properly be regarded as a case which actually applies the \textit{Restatement} rule.\(^52\)

\(^49\) Williston, Contracts § 60 (1st ed., 1920).

\(^50\) 248 N.Y. 86, 161 N.E. 428 (1928).

\(^51\) Rest., Contracts, Explanatory Notes § 45 (Official Draft, Chap. 1-7, 1928).

\(^52\) Hollidge v. Gussow, Kahn & Co., 67 F. 2d 459 (C.A. 1st, 1933) (handled by the court as a bilateral contract); Campbell v. Jones & Laughlin Steel Corp., 96 F. Supp. 189 (W.D. Pa., 1951) (court says it might construe the contract as either bilateral or unilateral, and that the outcome would be the same under either construction); Cohen v. Johnson, 91 F. Supp. 231 (M.D. Pa., 1950) (court cites Section 45 in a dictum on implied contracts, but says there was no implied contract in the case); McManus v. Newcomb, 61 A. 2d 56 (Mun. C.A., D.C., 1948) (real estate broker, who never found a buyer, recovered a commission when owner violated terms of exclusive agency); Lyon v. Goss, 10 Cal. 2d 659, 123 P. 2d 11 (1942) (bilateral contract and lease); Ruess v. Baron, 10 P. 2d 518 (Cal. App., 1932) (the District Court of Appeal cited § 45 in holding an option to be irrevocable, but in 217 Cal. 83, 17 P. 2d 119 (1932), the Supreme Court reversed, and held that the option was revocable and that it had been revoked); American University v. Todd, 30 Del. 449, 1 A. 2d 595 (Super. Ct., 1938) (a charitable subscription was held to be not binding); I. & I. Holding Corp. v. Gainsburg, 276 N.Y. 427, 12 N.E. 2d 332 (1938) (in an action upon a charitable subscription, the complaint was held to state a cause of action, but there is no demonstration that the specific facts required by
Following the Restatement came the Revised Edition of Williston's treatise, where the Restatement view is explained. 58

A collateral contract to keep an offer open is in effect specifically enforced by holding any attempt to revoke it ineffectual, so that the offeror becomes bound from the time performance is begun by a contract, liability upon which is conditional on the completion by the offeree of the requested performance. . . .

For present purposes, the academic discussion ended in 1938-9, with an article by Llewellyn, 54 wherein inter plurima he suggested that unilateral contracts were not entitled to be recognized as co-ordinate with bilateral contracts. He said: "The great dichotomy in the orthodox doctrine of Offer and Acceptance is that between bilateral and unilateral contract," 55 and

The suspicion is that that dichotomy represents doctrine divorced from life, and therefore does not comfortably hold the cases, and therefore is misleading; and that it spawns unnecessary difficulties. To be sure, no line of analysis can properly be said to be wrong, merely because it divides mankind, say, into such a dichotomy as those who are bearded ladies and those who are not. But such a line of analysis does suggest the presence of more bearded ladies than there are, which tends to mislead. And it raises questions as to just who is a bearded lady, and what the consequences are of being one. . . . 56

Llewellyn went on to say that "it is not courts' business to be looking for acts in contrast to promises, or for promises in contrast to acts. It is their business to be looking for overt expression of agreement—any overt expression of agreement." 57

If, as a consequence, the distinction between bilateral and unilateral contracts is dropped, and if any overt expression of agreement is operative, the result would emerge that any offer might be accepted by either the promise or the act. This result is of particular interest in con-

§ 45 had occurred); Charles E. Quincy & Co. Arbitrage Corp. v. Cities Service Co., 156 Misc. 83, 282 N.Y. Supp. 294 (S. Ct., 1935) (an offering of stock by a corporation to its debenture holders was held to be cancelable); Bell v. Dimmerling, 149 Ohio St. 165, 78 N.E. 2d 49 (1948) (complaint of real estate broker under exclusive right of sale held to state a cause of action, although the broker never found a buyer); Brezv v. Union Central Life Insurance Co., 134 Ohio St., 171, 16 N.E. 2d 272 (1938) (discussed in the text, infra); Petroleum Research Corp. v. Barnsdall Refining Corp., 188 Okla. 62, 105 P. 2d 1047 (1940) (written bilateral contract); Tile-Rite Co. v. Hartsuff, 75 Pa. D. & C. 127 (1950) (defendant relied upon Section 45, but the court allowed plaintiff to recover); Hutchinson v. Dobson-Bainbridge Realty Co., 31 Tenn. App. 490, 217 S.W. 2d 6 (1946) (discussed in the text, infra).

58 1 Williston, Contracts § 60A (rev. ed., 1936).
55 Ibid., at 32.
56 Ibid., at 36.
57 Ibid., at 803.
connection with two topics later to be discussed: (1) Llewellyn reached this result to an extent in the Uniform Commercial Code, and (2) the result emerged in fact in a 1950 decision of the Supreme Court of Washington, where the court squarely held that an offer for a unilateral contract, plus a promise to do the act, yielded a bilateral contract. Ironically, however, Llewellyn cannot be pleased with the decision, for the outcome was most unfair.

The discussion of the revocation problem in unilateral contracts, since 1938, has been mainly judicial rather than academic, and centers in four outstanding cases. These four cases grow in interest in the chronological order in which they were decided, and the amount of space devoted herein to each of them will increase in the same order.

The first case is *Bretz v. Union Central Life Insurance Co.*, 58 decided by the Supreme Court of Ohio in 1938. Union held a first mortgage in the amount of $10,348, on Bretz' farm. In connection with a refinancing loan to be made by a federal lending agency, Union made a 90-day offer to Bretz to accept $8,100 in full satisfaction. Bretz thereafter took steps to complete the loan, such as to have a survey made and an abstract of title prepared. Twenty-eight days after making the offer, Union revoked. Bretz tendered the $8,100 nearly two months after the ninety days had expired, but Union refused to accept it. Bretz filed an action for specific performance of Union's promise, but the court held in favor of Union. The court quoted the *Restatement* definition of a unilateral contract, and stated the standard doctrine in clearest language:

An offer, continuing or otherwise, to enter into a unilateral contract, unsupported by a valuable consideration, is not binding upon the offeror, and is revocable at his will at any time prior to its acceptance. Though time for acceptance was prescribed, there was no obligation upon appellant to keep the offer open for the remainder of the period, and the right to revoke it before its expiration, if not accepted, is clear. . . . Nothing less than performance will tender acceptance, and until such time the right to revoke remains unimpaired. . . . The withdrawal of the offer was made before the promise therein contained became binding.59

The lateness of the acceptance would have furnished the court a different argument for the same decision, but in fact the court limited itself almost exclusively to the argument that the offer had been effectively revoked.

58 *134 Ohio St. 171, 16 N.E. 2d 272 (1938).*

59 *Bretz v. Union Central Life Ins. Co., 134 Ohio St. 171, 175, 16 N.E. 2d 272, 274 (1938).*
Bretz contended also that it was the revocation which had delayed the consummation of the loan beyond the 90-day period, but the court disposed of that contention, too, in strict accordance with the standard doctrine:

However, it is one thing for a party wrongfully to prevent performance of a contract to which and by which he is bound and another thing for a party to revoke his offer to which he is not bound. If revocation of an offer before acceptance is at all an exercise of a legal right, it is of no moment that the effect of revocation is to make acceptance by the offeree impossible.60

The Bretz case is outstanding in containing a modern, judicial exposition of the standard doctrine.

The second case is Hutchinson v. Dobson-Bainbridge Realty Co.,61 which was decided by the Court of Appeals of Tennessee in 1946, and approved and recommended for publication by the Supreme Court of Tennessee in 1949. Defendant-owner appointed plaintiff-broker as exclusive agent for 90 days to sell defendant's house, promising inter alia to pay the full commission if the house should be sold by the defendant or any other broker during the period. Plaintiff spent time and money trying to find a buyer, but never found one. Five days before the 90 days expired, defendant sold the house through another broker. Plaintiff brought suit for the full commission and recovered. The court said:

1. It was an offer for a unilateral contract;
2. The plaintiff "made no promise, did not agree to try to sell, but was free to do as it chose."62
3. The question is whether plaintiff's efforts constituted an acceptance;
4. Some authorities hold that "the offeror may revoke his offer at any moment before full performance, whatever the hardship that may result to the offeree."63
5. "A greater number of courts, however, hold that part performance of the consideration may make such an offer irrevocable. . . ."64
6. "We think this is the better rule. The theoretical difficulties, formidable as they seem, are outweighed by considerations of practical justice."65
7. "This rule avoids hardship to the offeree, and yet does not hold the offeror beyond the terms of his promise. It is true by such terms he was to be bound only if the requested act was done; but this implies that he will let it be done, that he will keep his offer open till the offeree who has begun can finish

60 Ibid., at 178 and 275.
63 Ibid., at 496 and 9.
64 Ibid., at 497 and 10.
65 Ibid., at 498 and 10.
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doing it. At least this is so where the doing of it will necessarily require time and expense."; 66

(8) "In such a case it is but just to hold that the offeree’s part performance furnishes the ‘acceptance’ and the ‘consideration’ for a binding subsidiary promise not to revoke the offer, or turns the offer into a presently binding contract conditional upon the offeree’s full performance."; 67

(9) This is the rule stated in Section 45 of the Restatement;

(10) "So our conclusion is that plaintiff’s part performance of the consideration made this writing a contract binding defendant according to its terms. This being so, he could not revoke it."; 68

(11) The “contract continued in force during the 90 days stipulated. Upon a sale within that period defendant became bound to pay plaintiff the commission, as provided by the contract.”; 69

(12) Defendant’s insistence that plaintiff cannot recover because it did not find a purchaser “overlooks the provision of the contract that defendant was to pay plaintiff the commission in case of a sale within 90 days, regardless of who made such sale.” 70

The first nine points constitute what is believed to be the best judicial exposition of the theory underlying Section 45 of the Restatement that has appeared in the reports, but in Point 10, the court makes an unsound application: the plaintiff in fact had not performed the act of finding a buyer, and the plaintiff in fact had not given or tendered any part of the consideration. The Restatement rewards performance, not effort. The offeror’s duty of immediate performance is conditional on the full consideration being given or tendered. As far as the Restatement provides, until the act of finding a buyer is performed, the agency and its promises to pay commissions are all unbinding.

The third case is Abbott v. Stephany Poultry Co.; 71 decided in 1948 by the Superior Court of Delaware. Plaintiff was in the business of buying baby chicks and raising them to broiler age. Defendant wrote a letter to plaintiff containing a “blanket arrangement” whereby defendant promised to buy broilers at ceiling prices. The court described the letter as an offer for a unilateral contract, saying:

Plaintiff could have delivered ‘broilers’ or not, as he saw fit.... As long as the offer remained open, Defendant was bound to accept and pay for such deliveries of ‘broilers’ as Plaintiff chose to make. Conversely, Defendant was free at any time to notify Plaintiff that its outstanding offer was cancelled. 72

Subsequently, plaintiff bought 7,000 baby chicks, raised them to broiler age, and delivered them to defendant, who paid $2.24 per pound

66 Ibid., at 498 and 10.  
67 Ibid., at 498 and 10.  
68 Ibid., at 499 and 10.  
69 Ibid., at 499 and 11.  
70 Ibid., at 499 and 11.  
71 44 Del. 513, 62 A. 2d 243 (Super. Ct., 1948).  
for them, which was less than the ceiling price referred to in the offer. Plaintiff filed the present suit for the difference, and the case came up on motions by the respective parties for summary judgment, both of which were denied.

The controversy arises out of defendant's contention that the offer was revocable and had been revoked in fact by a notification, prior to the delivery of the broilers, that defendant would not pay ceiling prices. The court said:

(1) It is purely a question of law "whether or not the offer . . . constituted an enforceable agreement at the moment Plaintiff, in reliance thereon, put in 'chicks' for future delivery to Defendant . . . ".

(2) Whether, "in a unilateral agreement of this sort, a promisor may cancel his outstanding offer subsequent to partial performance on the part of the promisee is one of the most debatable subjects in the law of contracts.

(3) "A study of the numerous text authorities and decisions convinces me that there are but two approaches to the question (1) Regardless of the equities, to apply strictly the principles of law peculiar to unilateral contracts—that is, to treat them as offers calling for completed acts and, so long as the required act remains but partially performed, then subject to the right of cancellation by the offeror (2) To weigh the equities and, when the offeree has suffered a serious detriment or disadvantage in undertaking, but has been unable to complete, the performance sought by the offer, then, to treat the part performance by offeree as giving rise to a consideration which will convert the unilateral offer into an enforceable, bilateral contract.

(4) "Though a rare occurrence, to-day, the unilateral contract is clearly recognized in our system of law."

(5) "The substantial majority of the cases seem to treat a part performance of a unilateral offer as though the acceptance of a bilateral agreement."

(6) "After careful reflection I have concluded that a part performance of the terms of a unilateral offer affords the consideration necessary to support a binding contract. While to some extent disturbing the ancient principles of law applicable to unilateral offers, this result not only has the support of the weight of authority but also is in accord with common principles of justice."

(7) "Here, acting in reliance upon an unrevoked unilateral offer, Plaintiff purchased and put into houses 7,000 baby 'chicks' for future delivery to Defendant, thereby incurring a substantial detriment. I am of the opinion that this act constituted a part performance sufficient to convert the unilateral offer into a binding, bilateral agreement from which Defendant could not extricate himself by the subsequent revocations . . . ".

(8) "To summarize, Plaintiff, by partly performing Defendant's open offer of November 8, 1944, converted it from a unilateral into a binding bilateral agreement under which Defendant is liable unless, in fact, Defendant's revocation of the offer . . . preceded the purchase of the 'chicks' here involved or,
unless it should be hereafter found that Plaintiff agreed to the modification of price.

Concerning the *Abbott* case the following points may be noted: (1) it contains a straightforward presentation of the unilateral-offer-yields-a-bilateral-contract theory, which, with very scanty discussion, was the basis for the decision in *Los Angeles Traction Co. v. Wilshire*, (2) the court applied the theory, although the plaintiff's act of buying the 7,000 chicks was not part performance of, but only preparation for, the bargained-for act of delivering broilers, and (3) under Section 45 of the *Restatement*, the defendant's offer would have remained revocable until delivery or tender of at least some of the broilers.

Concerning the unilateral-offer-yields-a-bilateral-contract theory, the following points may be noted: (1) the theory still clashes with standard doctrine, (2) no case is known where a court has applied the theory so as to hold that the offeree was bound as a promisor, (3) inasmuch as only the offeror has ever been held to be bound, the use of the incongruous word "bilateral" has actually been *obiter*, and (4) if the dicta, that the offeree is bound and that the liability is bilateral, were deleted, the valid remainder of the theory would coincide closely with Section 45 of the *Restatement*: the offeror could not revoke after performance or tender of part of the act—and, presumably, his duty of immediate performance would be conditional upon full performance by the offeree.

In the fourth case, an offer for a unilateral contract was squarely held to have been accepted by a promise to do the act. The case is *Cook v. Johnson*, decided in 1950, by the Supreme Court of Washington. A full statement is in order:

December 20, 1947—Defendant wrote a letter to plaintiff containing an offer for a unilateral contract: a promise to pay for plaintiff's act of cleaning out and extending the drainage ditch on defendant's ranch;

December 23, 1947—Plaintiff wrote a reply promising to do the work;

January 22, 1948—Defendant sold the ranch to Fink on a conditional sales contract, and Fink went into possession;

Shortly after—Plaintiff learned of the sale to Fink and of Fink's possession;

Early April, 1948—Plaintiff moved his equipment to the ranch;

April 19 to May 19, 1948—Plaintiff did the work;

Shortly after June 1, 1948—Plaintiff presented his bill to the defendant in the amount of $1,790, a reasonable charge for the work done.

80 Ibid., at 523 and 248.
81 135 Cal. 654, 67 Pac. 1086 (1902).
The defendant refused to pay, and the plaintiff sued. The trial court dismissed the action, but the supreme court reversed, with directions to award judgment to plaintiff for the amount claimed, saying:

(1) "The law recognizes, as a matter of classification, two kinds of contracts—bilateral and unilateral. A bilateral contract is one in which there are reciprocal promises. . . . A unilateral contract is a promise by one party—an offer by him to do a certain thing in the event the other party performs a certain act. The performance by the other party constitutes an acceptance of the offer and the contract then becomes executed. Until acceptance by performance, the offer may be revoked either by communication to the offeree or by acts inconsistent with the offer, knowledge of which has been conveyed to the offeree."; 83

(2) When defendant made the offer to plaintiff, plaintiff "was not obligated to perform. He could have accepted the offer by performance. But he went further than that and promised to do the work. The promises of the two men thereby became reciprocal and binding, each upon the other. The two letters constitute a binding reciprocal agreement between the parties. There was a definite proposal by respondent which was unconditionally accepted by appellant. The minds of the parties met."; 84

(3) Plaintiff "did more than to indicate an intention to accept respondent's offer by performance. He promised to do the work. His promise was just as binding as that of the respondent."; 85

(4) Defendant contended that plaintiff's knowledge of Fink's purchase and possession had the consequence that plaintiff "proceeded with the work at his peril. That might have been true if the contract were unilateral. However, we are here considering the reciprocal promises of the parties, each to the other—a bilateral contract. It was respondent's duty, if he wished to be relieved of his obligation to pay for the work, to contact appellant and attempt to have him agree to a rescission." 86

The following comments on the Cook case are offered:

(1) It is believed that this is the only reported case where a decision was required to be made, and was made, on the precise point as to whether an offer for a unilateral contract can or cannot be accepted by a promise;

(2) It is not necessary to guess at the court's meaning: the court explains the nature of bilateral and unilateral contracts and the nature of an offer for a unilateral contract, and it then goes on to say that, while the plaintiff could have accepted by performance, he actually made an effective acceptance by a promise;

(3) The result is incompatible with the standard doctrine. Under the standard doctrine, the promise was ineffective as an acceptance because it did not conform to the offer; 87

84 Ibid., at 527, 528. 85 Ibid., at 528. 86 Ibid., at 529.
87 Rest., Contracts § 59, illustration 2 (1932); 1 Williston, Contracts §§ 73, 75 (rev. ed., 1936).
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(4) The holding that the offer had been accepted by the plaintiff's promise is compatible with Llewellyn's suggestion that "it is not courts' business to be looking for acts in contrast to promises, or for promises in contrast to acts. It is their business to be looking for overt expression of agreement—any overt expression of agreement."

An offer for a unilateral contract plus an "overt expression of agreement" in the form of a promise to do the act, would result in a contract—a bilateral contract;

(5) The result was unfair to the defendant and gave to the plaintiff a recovery to which he was not fairly entitled. Fink got the work, but the plaintiff collected his pay from the defendant;

(6) It is true (and this may afford some comfort to a supporter of Llewellyn's view) that the result would have been less unfair if the court had applied the rule of damages, appropriate to a repudiated bilateral contract, that a party may not recover for damage caused by his own enhancement. The argument would be that the defendant's sale to Fink was tantamount to a repudiation of his contract with the plaintiff, and that the plaintiff should not have started the work when he knew that the defendant probably had no further interest in having the work done and no wish to pay for it. When the plaintiff went ahead, in disregard of the requirement that he mitigate damages, he became entitled to recover only for the loss of profits and not for the price of the work;

(7) A fair result would have been reached if the court had adhered to the standard doctrine and had declared: (a) the defendant's offer for a unilateral contract was not accepted by the plaintiff's promise to do the work, (b) the defendant's offer was revoked when the plaintiff learned of the sale to Fink and of Fink's possession, and (c) the plaintiff's performance of the work three months later gave him no rights against the defendant.

V. THE UNIFORM COMMERCIAL CODE

Section 2-206 of the Uniform Commercial Code contains provisions concerning mutual assent in unilateral contracts:

Llewellyn, op. cit. supra, note 54, at 803.

Rockingham County v. Luten Bridge Co., 35 F. 2d 301 (C.A. 4th, 1929); Rest., Contracts § 336 (1932); 5 Williston, Contracts §§ 1298-1300 (rev. ed., 1936).

Accord: Bancroft v. Martin, 144 Miss. 384, 109 So. 859 (1926); Rest., Contracts § 44 (1932); 1 Williston, Contracts §§ 57, 57A (rev. ed., 1936).

Section 2-206. Offer and Acceptance in Formation of Contract.92

(1) Unless the contrary is unambiguously indicated by the language or circumstances
(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
(b) an order or other offer to buy goods for prompt or current shipment can be accepted either by such shipment or by a prompt promise thereof.
(2) Unless the seller states the contrary a shipment sent in response to an order to which it does not conform is an acceptance and at the same time a breach. But a shipment of non-conforming goods offered as an accommodation to the buyer in substitution for the goods described in the order is not an acceptance.
(3) The beginning of a requested performance can be a reasonable mode of acceptance but in such a case an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

Section 2-206 abolishes, to an extent, the distinction between unilateral and bilateral contracts for the sale of goods. Subsection (1) (a) states that an offer may be accepted “in any manner and by any medium reasonable in the circumstances.” This provision may be construed to mean that the offeree has the choice of accepting by making a promise to perform, or by performing, the requested act, but, in any event, Subsection (1) (b) is specific to the effect that an offer to buy goods for prompt or current shipment can be accepted by either the promise or the act.

Subsection (2) is broader and permits acceptance by something which is neither the promise to perform nor the requested act: acceptance occurs when nonconforming goods are shipped. The standard doctrine is that a buyer’s offer to pay for the act of shipping specified goods can be accepted only by shipping those goods, but Subsections (1) and (2) recognize three methods of acceptance: (a) by promising to ship the goods, (b) by shipping goods which conform to the offer, and (c) by shipping goods which do not conform to the offer.

Subsection (3) is narrower and provides that even the performance of the requested act is not effective as an acceptance: under this rule, if a buyer offers to buy goods to be made by the seller, the seller’s beginning to make the goods would be an acceptance, but if the seller fails to notify the buyer within a reasonable time, the seller cannot hold the buyer even though he makes the goods exactly as requested—the buyer may treat the previously accepted offer as having lapsed before it was accepted. The concept, that an offer can be accepted and can there-

after be treated as having lapsed before it was accepted, is illogical beyond respect.

As far as unilateral contracts are concerned, the Uniform Commercial Code is not a codification of the common law. Indeed, the Code has been analyzed as having quite a different character: 93

The following theses, relating to the projet of the UCC, are ventured:

(2) The projet shows awareness of the technique of codification and legislation of the modern Roman law.

(3) Section 1-102.1,3 of the projet cautiously replaces the legal method of the Anglo-American common law with the legal method developed in Roman and modern Roman law, not only in regard to genuine interpretation, but also in regard to the use of the code itself as a general source of law to solve new problems.

VI. CONCLUSION

The post-Restatement period has been marked by a great increase in the amount of judicial discussion on the subject of mutual assent in unilateral contracts. The discussion has been carried on in the terminology of the standard doctrine as laid down in Williston on Contracts and the Restatement, and, on the matters of knowledge of the offer, and intent to accept, the standard doctrine has been stated and followed in outstanding cases.

A new doctrine has appeared in an important case, namely, that an offer for a unilateral contract may be accepted by substantial performance of the act. This doctrine presents considerable difficulty, but it may be a step in the common law development of the subject.

The problem of acceptance after revocation remains unsolved. The solution presented in Section 45 of the Restatement has not received support; four outstanding cases adopted four different analyses, running all the way from the standard doctrine that an offer can be revoked until the act has been completed, to the extreme that it cannot be revoked after the offeree has promised to perform the act.

The Uniform Commercial Code, which has been said to have a Roman law flavor, does not codify the common law as to unilateral contracts for the sale of goods. Instead, the Code favors the idea that an offer may be accepted by either performance or a promise to per-


form, and the Code thereby largely abolishes the distinction between unilateral and bilateral contracts for the sale of goods.

If a single sentence can show the present state of the law, the following gem, cut and polished in 1949 by the very learned Circuit Judge Swan, may do so:

The seller's shipment of the stamps in February 1944 was an acceptance of the buyer's offer and created a unilateral contract which obligated the buyer to pay in accordance with the terms of the contract.95