

OFFER AND ACCEPTANCE IN THE SECOND RESTATEMENT

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TENTATIVE Draft No. 1 of the Restatement of Contracts Second was approved by the American Law Institute at its 1964 annual meeting, and it seems appropriate to make a report of progress. As the reporter, I am in no position to evaluate; but I can perhaps describe the work in briefer compass than the 300 pages of the draft, and can give some account of the nature and purpose of the project as seen by those engaged in it. Such an account is peculiarly appropriate in a collection of essays dedicated to Professor Corbin. He was a special adviser for the original Restatement and reporter for part of it; as consultant for the Restatement Second he has provided a critical review of the original which has been the foundation on which the revision has proceeded.

The Restatement of Contracts was begun in 1923, with Professor Williston as reporter, and the two volumes published in 1932 were the first completed product of the work of the Institute. Sections 19-74, dealing with offer and acceptance, were discussed at the annual meeting in 1925. At that time it was contemplated that the Institute would publish a supporting treatise, but the preparation of treatises was left to the individual efforts of the reporters and others. The result is that in the later restatements, and even more in the Restatement Second, the role of the comment has been expanded to provide a context for the summary statement in black letter.¹

The expanded comments explain the bases of the rules stated in black letter and give warning of variations from the stated rules which have been effected by statute or decision. Particular effort has been made to reconcile both black letter and comment with related parts of other restatements and with such statutory formulations as the Uniform Commercial Code, and to provide appropriate cross-references.

The basic organization and structure of the original Restatement have been preserved, and the subject matter dealt with under particular section numbers has been changed as little as possible. But stylistic and terminological changes in black letter have been freely made in the interest of clarity and consistency, and substantive changes have not been limited to legal developments since the publication of the original Restatement. Because of the existence of the monumental Williston and Corbin treatises, documentation has not been made exhaustive; but citations to illustrative cases and to secondary materials are given in Reporter's Notes in the style inaugurated in the Restatement Second.

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1. For accounts of the history of the Restatement see Lewis, *History of the American Law Institute and the First Restatement of the Law*, in *RESTATEMENT IN THE COURTS* 1-23 (Perm. ed. 1945); Goodrich, *The Story of the American Law Institute*, 1951 *WASH. U.L.Q.* 283. For a critical review, see HART AND SACHS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 748-71 (tentative ed. 1958).

In short, the main innovations in the revision may be described as stylistic rather than substantive. But it should not be surprising that a stylistic revision may be symptomatic of fundamental shifts in modes of thought. The crisply authoritative style of the original not unnaturally tended to reflect the doctrinal temper of the latter part of the nineteenth century. Explanation and rationalization, in contrast, are likely to force attention to social change, to produce qualification and restraint in the interest of realism, and to end in reliance on utilitarian ideals. All these tendencies can be discerned in the later restatements, and the Restatement of Contracts Second is no exception.

Professor Williston provided a bridge between the contrasting dogmatisms of O. W. Holmes and C. C. Langdell, on the one hand, and the focus of mid-twentieth-century thought on purpose and function, on the other. Twenty-five or thirty years ago a fundamental element in a sound legal education was the discovery that the conservatism of Williston and the modernism of Corbin were hard to distinguish in specific result. Yet Corbin was acceptable to the "realists" of the 1930's as Williston was not.² Philosophic discussion too has its deposit, somewhat disguised perhaps, in the Restatement of Contracts Second. Indeed, philosophy may be an essential ingredient; it may not be an accident that the list of Contracts men include so many professors of jurisprudence: Beutel, Franklin, Fuller, Gilmore, Havighurst, Jones, Kessler, Patterson, Sharp. I limit myself to survivors who are my elders and betters.

A word must also be said about the late Karl N. Llewellyn, romantic,³ self-styled "realist," and Corbin disciple in both jurisprudence and contracts, whose work has particular relevance to restatement of the law of offer and acceptance. In a series of articles published in 1938 and 1939, he attempted a comprehensive analysis of the law of offer and acceptance, criticized "modern orthodox" doctrine as found in the first Restatement, and made numerous suggestions for modification in concept, doctrine, and approach.⁴ Beginning the next year, with Corbin as one of his advisers, he worked most of those suggestions into the Uniform Revised Sales Act, which became Article Two of the Uniform Commercial Code, and is now law in 29 states and the District of Columbia.⁵

2. See Llewellyn, *Some Realism about Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1235 n.36 (1931), citing Corbin, *The Law and the Judges*, 3 YALE REV. 234 (n.s. 1914).

3. See, e.g., Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 894 (1939): "the theme of forward contract which had been rumbling in the bass gets picked up by the violins and then the brass."

4. See Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243 (1938); Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance (Parts I & II)*, 48 YALE L.J. 1, 779 (1938-39) [hereinafter cited as LLEWELLYN]. A promised fourth article which was to provide documentation, see LLEWELLYN at 818, never appeared, perhaps because his efforts were diverted to the Uniform Commercial Code.

5. Llewellyn was the chief reporter throughout. See Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958).

Against this background, let us turn to more specific matters. The discussion below follows roughly the order in which problems first appear in the Restatement, but assembles the later related sections.

Unilateral and bilateral contracts. Llewellyn's central concern in his 1938-39 articles was the "Great Dichotomy" between unilateral and bilateral contract: "the classical dichotomy in Offer and Acceptance," he said, "has little relation to the living fact of the business contracting which it divides."⁶ In a preliminary draft of the Restatement of Contracts Second, the reporter sought to introduce similar concern by way of comment to the definitions of unilateral and bilateral contracts in Section 12. Discussion with the advisers led instead to deletion of the unilateral and bilateral definitions and to the use of substitute phrases such as "acceptance by performance" and "acceptance by promise."

The reasons for this decision appear in the Reporter's Note to Section 12 in Tentative Draft No. 1, which the reporter is not in a position to paraphrase or improve:

Section 12 of the original Restatement defined unilateral and bilateral contracts. It is deleted because of doubt as to the utility of the distinction, often treated as fundamental, between the two types. 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 Sections 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.

Moreover, as to bargains, the distinction tends to suggest, erroneously, that the obligation to repay a loan is somehow different if the actual delivery of the money was preceded by an advance commitment from the obligation resulting from a simultaneous loan and commitment. It also causes confusion in cases where performance is complete on one side except for an incidental or collateral promise, as where an offer to buy goods is accepted by shipment and a warranty is implied. Finally, the effect of the distinction has been to exaggerate the importance of the type of bargain in which one party begins performance without making any commitment, as in the classic classroom case of the promise to pay a reward for climbing a flagpole.

The principal value of the distinction has been the emphasis it has given to the fact that a promise is often binding on the promisor even though the promisee is not bound by any promise. This value is retained in new Section 24A on option contracts. But the terms unilateral and bilateral are not used in the statement of rules in this Restatement as revised.⁷

Manifestation of mutual assent. In the Restatement Second, as in the original, Sections 20-23 are devoted to the general concept of "agreement," defined in Section 3 as a "manifestation of mutual assent." That phrase embodies the "objective" theory that it is in general the deed rather than the thought that

6. LLEWELLYN 787, 789.

7. RESTATEMENT (SECOND), CONTRACTS § 12, Reporter's Note (Tent. Draft No. 1, 1964).

counts, and that one can agree by negligently appearing to agree. Professor Whittier observed that the theory was an innovation introduced about 1850, and doubted its wisdom.⁸ But he seemed to concede that it is now so imbedded in our law that it would take more than a restatement to eradicate it. It remains undisturbed in the revision.

Accurate statement of the principle governing responsibility for unintended appearance of assent poses some difficulty. In the original Restatement, Section 20 required "intent to do" the acts by which assent is manifested, but "neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding." Section 70 provided for binding a party to a writing "which he should reasonably understand to be an offer or a proposed contract," even though he is "ignorant of the terms of the writing or of its proper interpretation." Section 71 made the undisclosed understanding of a party material in certain cases of "uncertain or ambiguous" manifestations of intent.

All this is rewritten in the Restatement Second. According to Section 21, "conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents." The new black letter refers to the possibility of avoidance for mistake or other invalidating cause in cases of no assent in fact. The standard of what the party "knows or has reason to know" is carried through in a new Section 21A on misunderstanding. Intent to be legally bound is the subject of a new Section 21B. At Professor Corbin's instigation the scope of the parol evidence rule in this context and the propriety of a rule conditioned on "ambiguity" are left to the later chapter on the scope and meaning of contracts. The new comments and illustrations expand on the problems of sham or jest, assent by conduct as in cases of services in the home, mistake of one party of which the other party knows or has reason to know, gentlemen's agreements, social engagements, and domestic arrangements. The net effect is to give a rather more central position to concepts based on the case of the two ships *Peerless* than might result from rigorous distinction between equivocation and vagueness.⁹

The concept that assent must be "mutual" also requires exposition. The original Section 23 required "that there should be a proposal by the offeror to the offeree, and that the offeree should know that a proposal has been made to him." Section 53 required in addition that the whole consideration requested by an offer be given "after the offeree knows of the offer." Exception was made for negligent manifestation of assent to a writing which the offeree "should reasonably understand to be an offer." (Section 70) The revised version requires instead that each party manifest assent "with reference to"

8. Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CALIF. L. REV. 441, 442 (1929).

9. *Raffles v. Wichelhaus*, 2 Hurl. & Co. 906, 159 Eng. Rep. 375 (Ex. 1864); see Young, *Equivocation in the Making of Agreements*, 64 COLUM. L. REV. 619, 647 (1964).

the manifestation of the other, leaving the effect of misunderstanding to the standard of what each party "knows or has reason to know" under the new Section 21A. Section 53 is limited to cases where performance is complete before the offeree learns of the offer. Comments and illustrations deal with cases of unrecognized offers, unknown offers of reward, cross offers, and unknown terms.

Offer; option contract. The definition of offer in Section 24 has been rewritten to take account on non-promissory offers.¹⁰ "Option" is relabelled "option contract" in the interest of clarity, and transferred to a new Section 24A. Sections 46 and 47, which overemphasized a bootless distinction between irrevocable offer and collateral contract not to revoke, are omitted. A new Section 35A is added to state the rule that termination of the power of acceptance under an option contract is governed by the requirements for discharge of a contractual duty. Section 64(b), following the cases, newly excepts option contracts from the rule that an acceptance is operative on dispatch.

These matters are elaborated and explained in comments. The related succeeding sections are treated similarly, without great change of substance. Thus Section 25 on preliminary negotiations is rephrased and the comment expanded. Following a Llewellyn suggestion,¹¹ a paragraph is added to the comment to Section 26 to indicate circumstances which may be helpful in determining whether a contract has been concluded where a written memorial is contemplated but has not been executed. Section 27 on auctions is revised to conform to Section 2-328 of the Uniform Commercial Code, and comment paragraphs are added to deal with analogous invitations to bidders and with the effect of published and announced terms.

Invitation of promise or performance. Sections 28-31 continue to embody an element of the orthodoxy that troubled Llewellyn: the offeror is master of his offer.¹² But rephrasing and comment reduce the significance of that principle; and a new Section 29(2), following UCC Section 2-206(1), states a countervailing presumption that "an offer invites acceptance in any manner and by any medium reasonable in the circumstances."¹³ In Section 31 the former presumption that an offer invites the formation of a bilateral contract is replaced by a presumption that the offeror is indifferent whether acceptance takes the form of words of promise or acts of performance. This change follows a suggestion of Professor Whittier which was adopted by Professor Llewellyn and incorporated in UCC Section 2-206(1).¹⁴ The requirement of notification

10. See Goble, *The Non-Promissory Offer*, 43 NW. U. L. REV. 590 (1953).

11. LLEWELLYN at 14.

12. LLEWELLYN at 780.

13. RESTATEMENT (SECOND), CONTRACTS § 29(2) (Tent. Draft No. 1, 1964). Compare LLEWELLYN 788; UNIFORM REVISED SALES ACT 124-125 (Proposed Final Draft No. 1, 1944).

14. See Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CALIF. L. REV. 441, 453 (1929); LLEWELLYN at 809.

to the offeror is treated separately, as Llewellyn urged;¹⁵ it is discussed hereafter.

To illustrate:

An order or other offer to buy goods for prompt or current shipment normally invites acceptance either by a prompt promise to ship or by prompt or current shipment. Uniform Commercial Code Section 2-206 (1) (b). If non-conforming goods are shipped, the shipment may be an acceptance and at the same time a breach. But there is no acceptance if the offeror has reason to know that none is intended, as where the offeree promptly notifies him that non-conforming goods are being shipped and are offered only as an accommodation to him.¹⁶

This concept of an offer to enter into a contract which may be either unilateral or bilateral did not appear in the original Restatement. Performance or tender in response to "an offer for a unilateral contract" bound the offeror under Section 45: he could not revoke once the offeree began to climb the flagpole. But Section 63 applied if the "offer requests a promise from the offeree;" performance or tender in such a case created a contract even though there was a violation of the basic principle that the offeror is master of his offer. Hence exceptions were required in Sections 52 and 59, which stated that an acceptance must comply with the requirements of the offer.

The recognition that an offer may invite the offeree to choose between acceptance by promise and acceptance by performance makes possible a more elegant statement without change of practical result. The flagpole case in the Restatement Second involves an offer which "invites an offeree to accept by performance and does not invite a promissory acceptance;" Section 45, providing for an option contract, is limited to such cases. Cases where the offeree is invited to choose are left to Section 63: here acceptance by performance "operates as a promise to render complete performance," and both parties are bound. Exceptions to the principle that the offeror is master of his offer are eliminated, and the purity of the concept of voluntary agreement is retained.¹⁷ As the comment adds, these rules of course yield to manifestations of contrary intention.

Certainty. According to Section 32 of the original Restatement, offer and acceptance must be such "that the promises and performances to be rendered by each party are reasonably certain." Section 33 then provided for the creation of a contract "by entire or partial performance on the part of the offeree" under an indefinite agreement. The Restatement Second preserves both principles, but expands both black letter and comment. The net effect, harmonizing with the Uniform Commercial Code and with a growing body of authority, tends toward greater toleration of indefiniteness and more readiness to enforce agreements where the parties intended to be bound.

15. LLEWELLYN at 32 n.61, 812, 814 n.53.

16. RESTATEMENT (SECOND), CONTRACTS § 31 Comment c (Tent. Draft No. 1, 1964).

17. This meets the objections to the original § 63 raised in Goble, *Is Performance Always as Desirable as a Promise to Perform?* 22 ILL. L. REV. 789 (1928).

The new Section 32 distinguishes between uncertainty which shows that the parties had not intended their conduct to be understood as offer or acceptance and uncertainty which defeats their mutual intention to be bound. As to the latter, following UCC Section 2-204(3),¹⁸ the black letter provides a new standard: Do the terms of the contract provide a basis for determining the existence of a breach and for giving an appropriate remedy? As the comment puts it, "contracts should be made by the parties, not by the courts," but where the parties have intended to make a contract and there is a reasonably certain basis for granting a remedy, "the same policy supports the granting of the remedy." A corollary was troubling to some of the orthodox in the ALI: "the degree of certainty required may be affected by the dispute which arises and by the remedy sought It is less likely that a reasonably certain term will be supplied by construction as to a matter which has been the subject of controversy between the parties than as to one which is raised only as an afterthought."

As to the effect of part performance, the new Section 33 distinguishes between the removal of uncertainty and the effect of reliance in making a remedy appropriate even though uncertainty is not removed. It also provides for choice of terms in the course of performance, and the comment refers to implied limitations set by reasonableness, good faith, and standards of fair dealing.¹⁹

Notification of acceptance. In the original Restatement, Section 55 required that "an act or forbearance" requested "as the consideration for an unilateral contract" be given "with the intent of accepting the offer." Section 56 stated that the acceptance was complete without notification, but that in some circumstances failure to notify would discharge the contract. No similar provision was made for bilateral contracts unless it was implicit in Section 52 or Section 58. Section 52 stated in effect that acceptance by promise was not operative "until that promise is expressly or impliedly given;" Section 58 required acceptance to be "unequivocal."

The revision makes explicit the requirement of notification, and eliminates the reference to "intent" to accept.²⁰ The new Section 52 divides acceptances into acceptances by performance and acceptances by promise, and defines acceptances by performance to include an acceptance by a performance which operates as a return promise. Section 55(2) negates acceptance by performance where the performing offeree exercises reasonable diligence to notify the offeror of nonacceptance, except where the offeree takes the benefit of offered

18. See also UCC §§ 2-305, 2-309, 2-311. For an application of § 2-204(3), see *Pennsylvania Co. v. Wilmington Trust Co.*, 166 A.2d 726 (Del. Ch. 1960).

19. See UCC §§ 1-102(3), 1-203, 2-103(1)(b), 2-302; Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963); Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 855-61 (1964). For recent application of § 2-302 to deny enforcement of an "unconscionable" contract in a case not involving uncertainty, see *American Home Improvement, Inc. v. MacIver*, 201 A.2d 886 (N.H. 1964).

20. Compare text at note 25 *infra*.

goods or services or where prior conduct of the offeree justifies the offeror in inferring assent. Section 55(3) negates acceptance by performance where a promissory acceptance is not invited if before the offeror performs his promise the offeree rejects the offer. Section 56 carries forward the provision for discharge by failure to notify, but dispenses with notification if the offeror learns of the performance within a reasonable time or if the offer indicates that notification is not required.

Similar provisions are newly made for acceptance by promise.²¹ A new Section 57A states that notification is "essential to an acceptance by promise" unless the offeror seasonably receives the acceptance or the offeree takes the benefit of offered goods or services or the offer manifests a contrary intention. Section 58 on equivocal acceptances is limited to cases where notification is essential, and protects the offeror who reasonably understands an equivocal communication as an acceptance.

The mailbox rule. The new provisions on notification may render unnecessary Section 64, providing that an acceptance is operative when put out of the offeree's possession. But in the interest of clarity Section 64 is retained substantially unchanged except for an added provision for option contracts. An expanded comment rationalizes the rule in terms of the offeree's need for "a dependable basis for his decision whether to accept,"²² and distinguishes cases of (1) revocation of offer, where that rationalization applies directly, (2) loss or delay in transit, where the rule rests on simplicity and symmetry rather than demonstrated convenience, (3) revocation of acceptance, where the problem is one of the offeree's speculation at the offeror's expense, and (4) application of tax and regulatory laws, choice of law, venue of litigation, and other miscellaneous issues.

Professor MacNeil has recently expressed regret that Section 64 "is still worded as a unitary rule."²³ He contrasts the black letter with the comment, suggesting that "the comments constitute a basis for some workable principles, but that the blackletter rule continues to invite the application of obscurantist fictions."²⁴ With deference, it may be suggested that the comment is not so out of harmony with the black letter as he indicates, and that his goal of judicial candor may be promoted rather than retarded by simplicity of rule. Elsewhere he suggests that "the dispatch rule," coupled with the law of mistake, may resolve some of the problems satisfactorily.²⁵ Much the same point is made in the comment to Section 64, and it may be that he should hold his fire until the Restatement Second has reached the subject of mistake.

21. See LLEWELLYN at 812.

22. See Nussbaum, *Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine*, 36 COLUM. L. REV. 920 (1936).

23. MacNeil, *Time of Acceptance: Too Many Problems for a Single Rule*, 112 U. PA. L. REV. 947, 979 n.91 (1964).

24. *Ibid.*

25. *Id.* at 972. For a recent case of first impression supporting the unitary rule, see *Morrison v. Thaelke*, 155 So. 2d 889 (Fla. App. 1963).

Acceptance by silence. Section 72 on acceptance by silence or exercise of dominion is a fair average illustration of the revision technique. The black letter has been subjected to minor revision, but the principal innovation is in expanded comment. The offeree's unexpressed intent continues to be given effect when the offeror invites acceptance by silence, despite Llewellyn's suggestion that "in a systematics centering on overt manifestations" this is "almost lewd;"²⁶ but the comment follows his injunction to recognize that "sometimes courts hold one party to an envisaged mutual obligation when they will not hold the other" and to try "to get the reasons stated." The phrasing with respect to prior conduct of the offeree is revised to harmonize with the common reference to "duty to speak" in judicial discussion. And involuntary acceptance by exercise of dominion is limited by excluding offered terms which are "manifestly unreasonable," as suggested by Professor Whittier.²⁷ The comment ties the stated rules to basic concepts of unjust enrichment and detrimental reliance.²⁸

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The foregoing does not exhaust the matters considered or the changes made in the reformulation of the law of offer and acceptance in the Restatement Second. It does enumerate the principal subjects of controversy during the course of the work, and it is hoped that it gives some clue to method and spirit. If an impression is conveyed that the reporter is not entirely dissatisfied, that is probably inevitable. If the impression is added that caution and restraint are thought appropriate, that is no accident at all. But conservative tenderness for tradition and precedent should not be mistaken for fear.

26. LLEWELLYN at 801 n.35.

27. Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CALIF. L. REV. 441, 452 (1929).

28. See Laufer, *Acceptance by Silence: A Critique*, 7 DUKE L.J. 87 (1939).