Washington Law Review

Volume 7 | Number 3

11-1-1932

The American Law Institute's Restatement of the Law of Contracts with Annotations to the Washington Decisions

Committee of Washington State Bar Association on Annotations to the Restatement of the Law by the American Law Institute

The American Law Institute's Restatement of the Law of Contracts with Annotations to the Washington Decisions*

Chapter 3

FORMATION OF INFORMAL CONTRACTS **

Section 27 Auctions, Sales Without Reserve.

At an auction, an auctioneer merely invites offers from successive bidders unless, by announcing that the sale is without reserve or by other means, he indicates that he is making an offer to sell at any price bid by the highest bidder.

Comment

a. An auction as ordinarily conducted furnishes an illustration of the principle stated in Section 25. The auctioneer, by beginning to auction property, does not impliedly say "I offer to sell this property to whichever one of you makes the highest bid," but rather requests that the bidders make offers to him, as indeed he frequently states in his remarks to those before him.

b. It is a corollary of the principle stated in this Section taken in connection with Section 41 that, where the auctioneer merely invites offers, a bidder may withdraw his bid at any time before the fall of the hammer. A bid in such a case is a revocable offer. If the auctioneer has made an offer inviting acceptances, a bid is an acceptance and completes a contract, binding both auctioneer and bidder; but the contract is conditional on no higher bid being made before the fall of the hammer.

Section 28. To Whom an Offer May be Made.

An offer may be made to specified person or persons or class of persons, or it may be made to anyone or to everyone to whom it becomes known. The person or persons in whom is created a power of acceptance are to be determined by the reasonable interpretation of the offer.

Comment

a. An offer may give many persons a power of acceptance. In some such cases the exercise of the power by one person will extinguish the power of every other person, in other cases this will not be true. The decision depends on interpretation of the offer.

---

* The absence of annotations to particular sections of the restatement indicates that no Washington decisions have been found on the principle therein stated. The sections dealing with the definition of terms, obviously require no annotations.

** Continued from last issue.

Section 29. How an Offer May be Accepted.

An offer may invite an acceptance to be made by merely an affirmative answer, or by performing or refraining from performing a specified act, or may contain a choice of terms from which the offeree is given the power to make a selection in his acceptance.

Section 30. Offer May Propose a Single Contract or a Number of Contracts.

An offer may propose the formation of a single contract by a single acceptance or the formation of a number of contracts by successive acceptances from time to time.

Comment.

a. An offer may request several acts or promises as the indivisible exchange for the promise or promises in the offer, or it may request a series of contracts to be made from time to time. Such a series may be a series of unilateral contracts or a series of bilateral contracts, depending upon the terms of the offer. Whether several promises create several contracts or are all part of one contract is determined by principles of interpretation stated in Chapter 9.

Section 31. Presumption That Offer Invites a Bilateral Contract.

In case of doubt it is presumed that an offer invites the formation of a bilateral contract by an acceptance amounting in effect to a promise by the offeree to perform what the offer requests, rather than the formation of one or more unilateral contracts by actual performance on the part of the offeree.

Comment.

a. It is not always easy to determine whether an offeror requests an act or a promise to do the act. As a bilateral contract immediately and fully protects both parties, the interpretation is favored that a bilateral contract is proposed.

Section 32. Offer Must be Reasonably Certain in its Terms.

An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain.

Comment.

a. Inasmuch as the law of contracts deals only with duties defined by the expressions of the parties, the rule of this Section is one of necessity as well as of law The law cannot subject a person to a contractual duty or give another a contractual right unless the character thereof is fixed by the agreement of the parties. A statement by A that he will pay B what A chooses is no promise. A promise by A to give B employment is not wholly illusory, but if neither the character of the employment nor the compensation therefor is stated, the promise is so indefinite that the law cannot enforce it, even if consideration is given for it.

b. Promises may be indefinite in time or in place, or in the work or the property to be given in exchange for the promise. In dealing with such cases the law endeavors to give a sufficiently clear

meaning to offers and promises where the parties intended to enter into a bargain, but in some cases this is impossible.

c. Offers which are originally too indefinite may later acquire precision and become valid offers, by the subsequent words or acts of the offeror or his assent to words or acts of the offeree.

ANNOTATION:

A contract between two promoters of a sawmill company, who had each subscribed for one-third of its capital stock, and a third party by which the latter, in consideration of his purchase of the remaining one-third of the capital stock, should have "the option to come into the mill and take part in its management on the same terms as ourselves" is too indefinite to be specifically enforced as it does not guarantee to the third person any particular office in the corporation or necessarily imply that he shall have the same salary as the other contracting parties: *Hampton v. Buchanan*, 51 W. 155, 98 P. 374 (1908). A contract for the purchase of water rights by the owners of 500 acres of land "for the purpose of irrigating the following described lands" (comprising 2,500 acres) "pro rata" and which prescribes that the rights agreed to be purchased "shall be in all essential respects the same as those described in the blank contract hereto annexed—in so far as the same may be made to apply under this agreement," and the terms of the two contracts are irreconcilable, is so indefinite and uncertain that it can not be enforced: *Pasco Reclamation Co. v. Cox*, 70 W 549, 127 P. 107 (1912). Recovery can not be had for breach of an agreement to form a corporation by which each party agrees to subscribe for and purchase a specified amount of its capital stock, where none of the essentials to the organization of a corporation, such as corporate name, purpose, amount of capital stock and number of shares, number and names of trustees, and principal place of business, have been agreed upon: *Watson v. Bayliss*, 71 W 499, 128 P. 1061 (1913).

A written agreement by which the parties thereto agree to form a corporation for the manufacture of shoes with a capital stock of $80,000, to be contributed equally by the parties thereto, each of whom is to forfeit $2,500 in default of performance of the agreement, is too indefinite to be binding, the agreement not specifying under the laws of what state incorporation is to be made, the place of doing business, the pay value of the shares, or the directors: *Weldon v. Degan*, 86 W 442, 150 P. 1184 (1915).

A contract by which the defendant agreed that if she should thereafter decide to erect a building in either Seattle or Everett, she would employ the plaintiff architect to draw the plans and superintend the construction, the contract not specifying the terms of the employment, is too indefinite to be enforced: *Ryan v. Hanna*, 89 W 379, 154 P. 436 (1916) Where defendant, in reply to plaintiff's request for one to five cars Star shingles at $2, telegraphed, "Stars all sold out. Quote two fifteen additional business," to which plaintiff responded, "Book us five cars Stars two fifteen. Advise return wire how soon can ship," to which defendant made no reply, no contract was concluded because, even if defendant's language, "Quote two fifteen additional business," be construed as an offer of prices, there was no agreement as to the number of cars or time or place of delivery· *Chinook Lumber & Shingle Co. v. McLane Lumber & Shingle Co.*, 107 W 587, 182 P. 625 (1919). A contract for the purchase of a new automobile is not established by proof that the owner of an old car left it with dealers to be sold and the proceeds applied on account of the contemplated purchase of a new automobile, the terms of which were not otherwise agreed upon, and the parties after sale of the old car could not agree upon the terms of payment for the new one: *Morrison v. Ahrens*, 131 W 310, 230 P. 137 (1924). The agreement of a pawnbroker who loaned $50 upon the security of a ring as a pawn, that the pledgor might reclaim the ring by the payment of $65 within a year or $75 after one year, is not unilateral because of the indefiniteness of the time of redemption, as redemption may be made within a reasonable time after the expiration of one year· *Andrews v. Uncle Joe Diamond Broker*, 44 W 668, 87 P. 947 (1906). A contract upon which the lessee, upon the expiration of his lease, is given the right to demand a new lease "for such period

as may then be agreed upon at a yearly rental then to be agreed upon," or to be determined by arbitration in case of disagreement, is not so uncertain as to warrant refusal of specific performance, especially where the tenant is required to use the premises for factory purposes, and, upon termination of the new lease, to restore the land to cultivable condition, since the reservation of a "yearly rental" implies that the tenant is entitled to at least a lease for two years: *Faucett v. Northern Clay Co.*, 84 W 382, 146 P 857 (1915).

Section 33. AN INDEFINITE OFFER MAY CREATE A CONTRACT UPON PERFORMANCE BY OFFEREE.

An offer which is too indefinite to create a contract if verbally accepted, may, by entire or partial performance on the part of the offeree, create a contract.

ANNOTATION:

Where plaintiffs, under a contract to furnish defendants the "necessary funds to assist in financing and performing" a contract which defendants had with third parties for the construction of a railroad, for which plaintiffs were to have one-third of the profits, had advanced $10,000 to defendants which they used in the execution of the construction contract, an action by plaintiffs for their share of the profits can not be defeated on the ground that the contract sued upon was void for uncertainty and indefiniteness in that it failed to specify the amount of financial aid plaintiffs were to furnish, where the construction contract had been completed, final payments therefor received and the contract between the parties fully performed except with respect to the division of profits: *McDougall v. McDonald*, 86 W 334, 150 P 628 (1915)

Section 34. OFFER UNTIL TERMINATED MAY BE ACCEPTED.

An offer until terminated gives to the offeree a continuing power to create a contract by acceptance of the offer.

Section 35. HOW AN OFFER MAY BE TERMINATED, EFFECT OF TERMINATION.

(1) An offer may be terminated by
(a) rejection by the offeree, or
(b) lapse of time, or the happening of a condition stated in the offer as causing termination, or
(c) death or destruction of a person or thing essential for the performance of the proposed contract, or
(d) supervening legal prohibition of the proposed contract;
or, except as stated in Sections 45, 46 and 47, by
(e) revocation by the offeror, or
(f) the offeror's death or such insanity as deprives him of legal capacity to enter into the proposed contract.
(2) Where an offer is terminated in one of these ways a contract cannot be created by subsequent acceptance.

ANNOTATION:

(1) (*b*). An offer to a stockholder to return to him his promissory notes, executed in favor of a corporation, upon his surrender for cancellation of his shares of stock in said corporation, which was not accepted until after the lapse of more than a year, can not be enforced. *Libby v. Packwood*, 11 W 176, 39 P 647 (1895)

(1) (*e*). A memorandum delivered to a bank, authorizing payment for certain corporate stock if delivered within thirty days, may be rescinded any time before delivery of the stock: *Herrin v. Scandinavian-American Bank*, 65 W 569, 118 P 648 (1911) A contractor making a bid for the doing of construction work under an invitation reserving the right to reject any and all bids, may withdraw the bid and enjoin the cashing

or transfer of his accompanying certified check at any time before acceptance of the bid: *Seattle Construction & Dry Dock Co. v. Newell*, 81 W 144, 142 P. 481 (1914).

Section 36. WHAT IS A REJECTION OF AN OFFER.

An offer is rejected when the offeror is justified in inferring from the words or conduct of the offeree that the offeree intends not to accept the offer or to give it further consideration.

Comment·

a. This Section states a general definition of what amounts to a rejection. The more particular rules in the two following Sections state the common methods of rejection.

Section 37 COMMUNICATION BY OFFEREE DECLINING THE OFFER IS A REJECTION.

A communication from the offeree to the offeror, stating in effect that the offeree declines to accept the offer is a rejection.

Section 38. COUNTER-OFFER BY OFFEREE IS A REJECTION.

A counter-offer by the offeree, relating to the same matter as the original offer, is a rejection of the original offer, unless the offeree at the same time states in express terms that he is still keeping the original offer under advisement.

Comment·

a. A counter-offer amounts in legal effect to a statement by the offeree not only that he is willing to do something different in regard to the matter proposed, but also that he will not agree to the proposal of the offeror. A counter-offer must fulfill the requirements of an original offer. There is none unless there is a manifestation sufficient to create a power of acceptance in the original offeror. This distinguishes a counter-offer from a mere inquiry regarding the possibility of different terms, a request for a better offer, or a comment upon the terms of the offer. Likewise, an offer dealing with an entirely new matter and not proposed as a substitution for the original offer is not a counter-offer.

ANNOTATION:

Where a contract for the purchase of real estate, prepared by the agent of the owner, and executed by the plaintiff, provided for a cash payment and fixed the time and amount in which deferred payments should be made, with the rate of interest thereon, but did not provide for attorney's fees or for acceleration of the maturity of deferred payments in case of default, and stipulated that the contract was to be approved by the owner, tender by the owner of a deed, together with notes for the deferred payments and a mortgage to secure the same, each of the notes and the mortgage containing a provision that in case the interest was not paid semi-annually, the whole sum of principal and interest should be immediately due at the holder's option, was a refusal of the contract as made by his agent and the proffer of a sale, upon new conditions, and plaintiff could recover the earnest money paid by him: *Bridge v. Calhoun, Denny & Ewing*, 57 W 272, 106 P. 762 (1910).

Section 39. TIME WHEN REJECTION IS EFFECTIVE.

Rejection by mail or telegram does not destroy the power of acceptance until received by the offeror, but limits the power so that a letter or telegram of acceptance started after the sending of the rejection is only a counter-offer un-

less the acceptance is received by the offeror before he receives the rejection.

Section 40. WHAT LAPSE OF TIME TERMINATES AN OFFER.

(1) The power to create a contract by acceptance of an offer terminates at the time specified in the offer, or, if no time is specified, at the end of a reasonable time.

(2) What is a reasonable time is a question of fact, depending on the nature of the contract proposed, the usages of business and other circumstances of the case which the offeree at the time of his acceptance either knows or has reason to know

(3) In the absence of usage or a provision in the offer to the contrary, and subject to the rule stated in Section 51, an offer sent by mail is seasonably accepted if an acceptance is mailed at any time during the day on which the offer is received.

Comment

a. An offeror may fix any time that he wishes as that within which acceptance must be made. He need not make the time a reasonable one. If, however, no time is fixed the offeree is justified in assuming that a reasonable time is intended, and the law adopts this assumption.

b. Where a bilateral contract is contemplated a reasonable time for making the return promise requested is generally brief. Especially is this true in regard to commercial contracts.

c. Where a unilateral contract is contemplated, assent to the proposition is manifested by performing or refraining from performing an act, and a reasonable time for so doing is necessarily a reasonable time for acceptance. If, therefore, in the nature of the case what is requested cannot be done without considerable delay, the time within which acceptance may be made is equally long.

Section 41. REVOCATION BY COMMUNICATION FROM OFFEROR RECEIVED BY OFFEREE.

Revocation of an offer may be made by a communication from the offeror received by the offeree which states or implies that the offeror no longer intends to enter into the proposed contract, if the communication is received by the offeree before he has exercised his power of creating a contract by acceptance of the offer.

Comment

a. Revocation, as stated in Section 35, does not terminate an offer in cases within the rules stated in Sections 45, 46 and 47

b. What amounts to receipt of revocation within the meaning of the rule is considered in Section 69.

Section 42. ACQUISITION BY OFFEREE OF INFORMATION THAT OFFEROR HAS SOLD OR CONTRACTED TO SELL OFFERED INTEREST.

Where an offer is for the sale of a property interest of any kind, if the offeror, after making the offer, sells or contracts to sell the interest to another person, and the offeree acquires reliable information of that fact, the offer is revoked.

Comment

a. Since revocation does not terminate offers falling within the rules stated in Sections 45, 46 and 47, the present Section has no application to such offers.

Section 43. How an Offer Made by Advertisement or General Notice May be Revoked.

An offer made by advertisement in a newspaper, or by a general notice, to the public or to a number of persons whose identity is unknown to the offeror, is revoked by an advertisement or general notice given publicity equal to that given to the offer.

Comment

a. In the case of such an offer as is stated in this Section, revocation is not likely to be inoperative within the rules stated in Sections 45 and 46, but the rule stated in Section 47 may prevent a revocation within the rule of the present Section from being operative.

Section 44. Revocation of Offer Contemplating a Series of Contracts.

A revocable offer contemplating a series of independent contracts by separate acceptances may be effectively revoked so as to terminate the power to create future contracts, though one or more of the proposed contracts have already been formed by the offeree's acceptance.

Comment

a. An offer may propose several contracts, to arise at separate times (see Section 30) Such an offer is divisible, and the power to make an effective revocation continues *pari passu* with the continuing power of the offeree to accept.

b. Where an offer contemplates a series of unilateral contracts, beginning performances of the consideration for any one of the series makes the offer for that one irrevocable (see Sections 45 and 52)

Section 45. Revocation of Offer for Unilateral Contract, Effect of Part Performance or Tender.

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.

Comment

a. What is rendered must be part of the actual performance requested in order to preclude revocation under this Section. Beginning preparations though they may be essential to carrying out the contract or to accepting the offer, is not enough.

b. Tender, however, is sufficient. Though not the equivalent of performance, nevertheless it is obviously unjust to allow so late withdrawal. There can be no actionable duty on the part of the offeror until he has received all that he demanded, or until

the condition is excused by his own prevention of performance by refusing a tender, but he may become bound at an earlier day It may be fairly contended that the main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted. Part performance or tender may thus furnish consideration for the subsidiary promises. Moreover, merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding (see Section 90)

Section 46. OFFERS WHICH ARE THEMSELVES CONTRACTS CANNOT BE TERMINATED.

An offer for which such consideration has been given or received as is necessary to make a promise binding, or which is in such form as to make a promise in the offer binding irrespective of consideration, cannot be terminated during the time fixed in the offer itself or, if no time is fixed, within a reasonable time, either by revocation or by the offeror's death or insanity

Section 47 OFFERS WHICH OFFEROR HAS COLLATERALLY CONTRACTED TO KEEP OPEN CANNOT BE TERMINATED.

An offer cannot be terminated during the term therein stated, or if no term is therein stated for a reasonable time, either by revocation or by the offeror's death or insanity, if by a collateral contract the offeror has undertaken not to revoke the offer.

Comment·

a. The promise of the offer itself may be a contract (see Sections 24, 46) For practical purposes the situation is the same where the offer is accompanied by a collateral contract to keep the offer open. This collateral contract is in effect specifically enforced without suit by denying the offeror the power to terminate his offer.

b. Whether a contract based on such an offer as is within the rule stated either in this Section or in Section 46 can itself be specifically enforced, or, if not, what damages are recoverable if the offeror repudiates or refuses to perform the contract, is determined by the law governing the performance of contracts.

Section 48. TERMINATION OF OFFER BY OFFEROR'S DEATH OR INSANITY.

A revocable offer is terminated by the offeror's death or such insanity as deprives him of legal capacity to enter into the proposed contract.

Section 49. TERMINATION OF OFFER BY DEATH OF ESSENTIAL PERSON OR DESTRUCTION OF ESSENTIAL THING.

Where a proposed contract requires for its performance the existence of a specific person or thing, and before acceptance the person dies or the thing is destroyed, the offer is terminated unless the offeror assumes the risk of such mischance.

Comment·

a. If the essential person is not dead, but ill or otherwise appar-

ently disabled or the essential thing is injured, it cannot be said that the offer is automatically terminated, though such facts may justify the offeror in refusing to fulfill any contract formed by acceptance.

Section 50. TERMINATION OF OFFER BY ILLEGALITY.

Where after the making of an offer and before acceptance the proposed contract becomes illegal the offer is terminated.

Section 51. EFFECT OF DELAY IN COMMUNICATION OF OFFER.

If communication of an offer to the offeree is delayed, the period within which a contract can be created by acceptance is not thereby extended if the offeree knows or has reason to know of the delay, though it is due to the fault of the offeror; but if the delay is due to the fault of the offeror or to the means of transmission adopted by him, and the offeree neither knows nor has reason to know that there has been delay, a contract can be created by acceptance within the period which would have been permissible if the offer had been despatched at the time that its arrival seems to indicate.

Section 52. ACCEPTANCE OF OFFER DEFINED.

Acceptance of an offer is an expression of assent to the terms thereof made by the offeree in a manner requested or authorized by the offeror. If anything except a promise is requested as consideration no contract exists until part of what is requested is performed or tendered. If a promise is requested, no contract exists, except as qualified by Section 63, until that promise is expressly or impliedly given.

Comment

a. In a unilateral contract the act requested and performed as consideration for the contract ordinarily indicates acceptance as well as furnishes the consideration, and, under Section 45, performing or tendering part of what is requested may both indicate assent and furnish consideration. In a proposal for a bilateral contract the mere assent of the offeree, whether manifested by words or acts, is by implication the promise requested and therefore here also mutual assent and consideration are indicated by the offeree at one and the same time.

b. A bilateral contract by definition consists of mutual promises. It is therefore essential that the offeree shall give the promise requested by the offeror, and doing this clearly indicates acceptance of the offer. The fact that this promise is given may be shown by any words or acts which indicate the offeree's assent to the proposed bargain.

c. As appears from Section 64 acceptance may be complete as soon as it is started on its way

ANNOTATION

An offer by G to H that if H would purchase certain mining claims and hold a one-fourth interest therein in trust for G, H should have a one-fourth interest in all mineral claims thereafter located by either G or W or both of them, is not accepted so as to become a contract until H has purchased said mining claims; and H is not entitled to any interest

in a mineral claim located by G and W in the interval between the making of said offer and the purchase by H of said mining claims: *Ranahan v. Gibbons*, 23 W 255, 62 P. 773 (1900). An agreement to purchase all cedar poles that plaintiff may deliver at a certain railroad spur during the year 1921, being in the nature of a continuing offer, is accepted and converted into an enforceable contract by plaintiff's delivery of poles at the place during the year designated. *Laswell v. Anderson*, 127 W 591, 221 P. 300 (1923). The promise of a vendor not to declare a forfeiture of a contract for the sale of land for five years if the vendee would remain on the land and cultivate it and plant an apple orchard thereon, and that at the end of said five years, if the vendee had not previously paid for the land, there would be an abundance of fruit growing on the land to pay for the same, is void for indefiniteness and lack of mutuality, the vendee not being bound to remain on the land, or to cultivate it or to pay for it within five years: *Spokane Canal Co. v. Coffman*, 61 W 357, 112 P 383 (1910). The agreement of defendant that if, at any time, he should purchase a certain timber tract, he would do so through the plaintiff and pay him a commission if plaintiff was then engaged in the brokerage business, is lacking in mutuality and not supported by sufficient consideration where the only consideration therefor is the agreement of the plaintiff to use his best efforts to secure the timber for defendant at the lowest possible price and to represent the defendant and protect his interests, since the plaintiff did not obligate himself to sell to defendant, or to purchase as his agent, or to refrain from selling to someone else: *Brown v. Brew*, 99 W 560, 169 P 992 (1918) The agreement of a corporation to provide facilities for the warehousing and loading of a grower's fruit is void for lack of mutuality, where the grower agrees to have all fruit delivered packed in plainly marked boxes with grade variety and sizes stamped thereon, and to pay 7½ cents per box for all fruit delivered, but does not agree to deliver any fruit: *Brewster District Unit v. Monroe*, 117 W 21, 200 P 841 (1921). A promise to employ a lawyer to do the law work of the promissor, without an agreement on the part of the lawyer to do the work, is unenforceable for lack of mutuality· *Osner & Melhorn v. Loewe*, 111 W 550, 191 P 746 (1920). The written agreement of an ice company to sell ice to a certain dealer during the ice season at a certain price per ton, in consideration of the dealer's "soliciting and delivering ice" in a certain district, upon which writing the dealer wrote "Accepted," is unenforceable for lack of mutuality or consideration since the dealer made no promise to solicit, deliver, or buy ice. (Inasmuch as the offer was not made for a promise, but for acts, it seems that even if the word "Accepted" could be construed as a promise to solicit, deliver, or buy ice, it would not be an acceptance of the offer.) *Mowbray Pearson Co. v. E. H. Stanton Co.*, 109 W 601, 187 P 370, 190 P 330 (1920).

Section 53. NECESSITY FOR KNOWLEDGE OF OFFER.

The whole consideration requested by an offer must be given after the offeree knows of the offer.

Comment

a. Consideration is defined in Section 75. In Section 53 no reference is made to the technical requirements of the sufficiency of consideration, it is only stated that in order to constitute acceptance, whatever the offeror requests must be given.

Section 54. WHO MAY ACCEPT AN OFFER.

A revocable offer can be accepted only by or for the benefit of the person to whom it is made.

Comment

a. The words "for the benefit of" are inserted to cover such contracts as are permitted by Section 75 (2), namely those in which the offeror's promise to B is conditional on an act being done or a promise made by C in exchange for the offeror's promise. C's act or promise is an acceptance.

b. An offer may also be accepted by an agent of the offeree, and even if one who accepts, purporting to be such an agent is not authorized by the offeree so to do, his act may be ratified, but throughout the Re-statement of this Subject it is assumed, in the absence of contrary statement, that any necessary act may be done by an agent.

Section 55. ACCEPTANCE OF OFFER FOR UNILATERAL CONTRACT, NECESSITY OF INTENT TO ACCEPT.

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.

Comment.

a. 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.

b. This is not the same as saying that the offer must be the cause of the acceptance. The offer is, indeed, usually the sole cause of the acceptance, but frequently there are other causative factors, and occasionally contracts may exist where if the offer is in any sense a cause of the acceptor's action it is so slight a factor that a statement that the acceptance is caused by the offer is misleading.

c. Except to the extent stated in Sections 71 and 72, no question of intent to accept by words or acts apparently indicating assent arises when a bilateral contract is proposed. If, in accordance with Section 20, an offeree does acts with intent to do them which indicate his assent to an offer of a bilateral contract communicated to him as required by Section 23, the offeree comes under a duty to the offeror; and as he is bound by the contract, he is also entitled to take advantage of it. Indeed, this is a necessary consequence of the axiom that both parties to a bilateral contract must be bound or neither is bound. Whereas when a unilateral contract is proposed and the offeree does the act requested, he may do it either to make a gift or a bargain.

Section 56. ACCEPTANCE OF OFFER FOR UNILATERAL CONTRACT, NECESSITY OF NOTICE TO OFFEROR.

Where forbearance or an act other than a promise is the consideration for a promise, no notification that the act or forbearance has been given is necessary to complete the contract. But if the offeror has no adequate means of ascertaining with reasonable promptness and certainty that the act or forbearance has been given, and the offeree should know this, the contract is discharged unless within a reasonable time after performance of the act or forbear-

ance, the offeree exercises reasonable diligence to notify the offeror thereof.

Comment

a. In the formation of a unilateral contract where the offeror is the party making the promise, as is almost invariably the case, a compliance with the request in the offer fulfills the double function of a manifestation of acceptance and of giving consideration. It is only in the exceptional case where the offeror has no convenient means of ascertaining whether the requested act has been done that notice is requisite. Even then, it is not the notice which creates the contract, but lack of the notice which ends the duty

ANNOTATION

The promise of a landlord to the creditor of his tenant to guarantee the tenant's debt if the creditor would extend the time of payment to a certain day, is binding where the creditor in reliance on the promise forebore suit until after the day mentioned, although no formal communication of acceptance was made by him. *Palmer & Co. v. Chaffee*, 129 W 408, 225 P 65 (1924) Where stockholders of a corporation requested a bank to make advances to the corporation and guaranteed payment, without notice, of such advances, notice of acceptance by the bank is not necessary to make the guaranty binding, where the bank made advances to the corporation in reliance on the guaranty. *Bank of California v. Union Packing Co.*, 60 W 456, 111 P 573 (1910)

Section 57 UNILATERAL CONTRACT WHERE PROPOSED ACT IS TO BE DONE BY OFFEROR.

If in an offer of a unilateral contract the proposed act or forbearance is that of the offeror, the contract is not complete until the offeree makes the promise requested.

Comment

a. This Section covers a particular and rather peculiar case covered by the more general language of Section 52. It occurs only where the performance of the offer automatically occurs at the moment the promise requested is given. This may happen where the proposal relates to the transfer of personal property The very act of the acceptor in promising to pay the price may, if the offer so specifies, transfer the ownership of the goods to the offeree.

Section 58. ACCEPTANCE MUST BE UNEQUIVOCAL.

Acceptance must be unequivocal in order to create a contract.

Comment

a. An offeror is entitled to know in clear terms whether the offeree accepts his proposal. It is not enough that the words of a reply justify a probable inference of assent.

ANNOTATION

Retention by defendants, for several days, of plans for the mechanical equipment of a hospital, submitted by plaintiff under a contract to furnish such plans, and their indorsement of the same as "Approved," is not such acceptance as to entitle plaintiff to recover the contract price where there was evidence that defendants had no technical knowledge of what such plans should consist of or require, that the plans were not workable, and that such indorsement of approval is no more than an identification or authentication and does not exempt the one offering the plans from his implied contract to offer a workable plan. *Moore v. Saunders*, 88 W 602, 153 P 329 (1915).

Section 59. ACCEPTANCE MUST COMPLY WITH TERMS OF OFFER.

Except as this rule is qualified by Sections 45, 63, 72, an acceptance must comply exactly with the requirements of the offer, omitting nothing from the promise or performance requested.

Comment.

a. This rule is a necessary corollary of the basic idea of contracts that duties are imposed by the law for only such performance as the parties have expressed a willingness to assume.

ANNOTATION

Where one copy of a contract employing an attorney, signed by one of the parties, provided, "In case said action is settled prior to judgment, the first party is to receive fifteen per-cent of amount for which action is settled," and the other copy, signed by the other party, by reason of an interlineation therein, provided that in such case the first party is to receive fifteen per-cent of the amount *of attorney's fees* for which the action is settled, there is no contract as to the amount of compensation, and the attorney can recover only upon a *quantum meruit*: *Thayer v. Harbcan*, 70 W 278, 126 P. 625 (1912). The acceptance, to constitute a binding contract, must be as broad as the offer· any conditions in the nature of new proposals attached to the offer must themselves be accepted: *Coleman v. St. Paul & T. Lumber Co.*, 110 W 259, 188 P. 532 (1920). Where the parties to a contract of employment of an architect both contended that there was an express agreement with respect to the amount of compensation to be paid the architect but differed as to what the amount was, and the evidence left it doubtful whether the parties had agreed upon the amount, a finding that no agreement was entered into is justified, and the architect may recover upon a *quantum meruit*: *Holmes v. Radford*, 143 W 644, 255 P. 1039 (1927).

Section 60. PURPORTED ACCEPTANCE WHICH ADDS QUALIFICATIONS.

A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptence but is a counter-offer.

Comment.

a. A qualified or conditional acceptance is a counter-offer, since such an acceptance is a statement of what the person making it is willing to do in exchange for what the original offeror proposed to give. A counter-offer is a rejection of the original offer (see Section 38 and Comment thereon). An acceptance, however, is not inoperative as such merely because it is expressly conditional, if the requirement of the condition would be implied from the offer, though not expressed therein.

ANNOTATION

A bid to do the public printing of a county at a specified rate of compensation, which was accepted by the board of county commissioners upon condition that the delinquent tax list should be included therein at the same rate, which was not acceded to by the bidder, does not constitute a contract which the bidder can enforce, notwithstanding that the clerk of the board erroneously entered a minute that the contract was awarded to said bidder, especially as it was understood that a written contract was to be prepared and signed by the parties which was not done: *Olympian-Tribune Pub. Co. v. Byrne*, 28 W 79, 68 P. 335 (1902). Where defendants by letter offered to supply plaintiffs with certain materials at prices stated, and plaintiffs replied accepting the offer at the prices stated, but fixing a time certain for the delivery of the materials and defendants responded, "Should there be any question about us not

being able to make the delivery required by you" will "advise you at once of such time as we may be able to fill your order," and later telegraphed and wrote that on account of previous contracts they could not fill the order, no contract resulted: *Bringham v. American Bridge Co.*, 39 W 3, 80 P. 788 (1905). Where defendant, upon the application of plaintiff for a loan, wrote, offering to loan him $30,000 for five years at 5½%, and added, "We will expect, however, to write at least one-half of the fire insurance carried on the building in our office," the reply of the plaintiff, "I hereby accept the loan applied for—I agree to write $20,000 insurance through your office upon expiration of present policies," is not an unconditional acceptance as it permits the writing of $20,000 only and at expiration of existing policies, and does not present withdrawal of the offer: *Sillman v. Spokane Sav. & L. Soc.*, 103 W 619, 175 P 296 (1918).

Where defendant, in reply to plaintiff's offer, communicated through an agent, to purchase defendant's land at a price and upon terms stated, authorized the agent to accept plaintiff's deposit, but the agent's receipt for plaintiff's deposit stated, "sale is subject to approval of owner of premises," and defendant, when informed that he would be required to pay certain taxes and accept a certain rate of interest on deferred payments, declined to assent thereto, there was no meeting of minds and no binding contract: *Kuh v. Lemcke*, 107 W 45, 180 P 889 (1919)

Where, after exchange of several telegrams between parties negotiating for the purchase and sale of poles, defendant telegraphed, "Accept proposition," but added, "Will mail acceptance on receipt of telegraphic reply," and plaintiff, instead of wiring his assent, sent a telegraphic reply materially changing date of delivery, terms of payment and price, which changes were not assented to by defendant, no completed contract was consummated: *Schulze v. General Electric Co.*, 108 W 401, 184 P 342 (1919)

Section 61. ACCEPTANCE OF OFFER WHICH STATES PLACE, TIME OR MANNER OF ACCEPTANCE.

If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded.

Comment

a. If the offeror prescribes the only way in which his offer must be accepted, an acceptance in any other way is a counter-offer. But frequently in regard to the details of methods of acceptance, the offeror's language, if fairly interpreted, amounts merely to a statement of a satisfactory method of acceptance, without positive requirement that this method shall be followed.

Section 62. ACCEPTANCE WHICH REQUESTS CHANGE OF TERMS.

An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms.

Section 63. EFFECT OF PERFORMANCE BY OFFEREE WHERE OFFER REQUESTS PROMISE.

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, subject to the provisions of Section 56, provided that such performance is completed or tendered within the time allow-

able for accepting by making a promise. A tender in such a case operates as a promise to render complete performance.
Comment.

a. This section states an exception to Sections 52 and 59. If within the time allowed for accepting the offer full performance has been given, the offeror has received something better than he asked for and is bound, since the only object of requiring a promise is ultimately to obtain performance of it. Beginning to perform within the time allowed for accepting the offer will not amount to an acceptance, unless the offeror also gives an assurance that performance will be completed.

Section 64. How Acceptance May Be Transmitted, Time When it Takes Effect.

An acceptance may be transmitted by any means which the offeror has authorized the offeree to use and, if so transmitted, is operative and completes the contract as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror.

Section 65. Acceptance by Telephone.

Acceptance given by telephone is governed by the principles applicable to oral acceptances where the parties are in the presence of each other.

Section 66. When a Particular Means of Transmission is Authorized.

An acceptance is authorized to be sent by the means used by the offeror or customary in similar transactions at the time when and the place where the offer is received, unless the terms of the offer or surrounding circumstances known to the offeree otherwise indicate.

Section 67 Acceptance by Mail or From a Distance, When Valid Upon Despatch.

An acceptance sent by mail or otherwise from a distance is not operative when despatched, unless it is properly addressed and any other precaution taken which is ordinarily observed to insure safe transmission of similar messages.

Section 68. When an Acceptance Inoperative When Despatched is Operative Upon Receipt by Offeror.

An acceptance inoperative when despatched only because the offeree uses means of transmission which he was not authorized to use is operative when received, if received by the offeror within the time within which an acceptance sent in an authorized manner would probably have been received by him.

Section 69. What Constitutes Receipt of Revocation, Rejection, or Acceptance.

A written revocation, rejection or acceptance is received when the writing comes into the possession of the person addressed, or of some person authorized by him to receive it for him, or is deposited in some place which he has author-

ized as the place for this or similar communications to be deposited for him.

Comment

a. Under Section 41, a revocation when sent from a distance must be received in order to be effectual. Under Section 64 acceptance from a distance need not be received if started on its way in a method authorized, unless receipt is made a condition of the offer. This, however, may be the case, and though there is no such condition, an acceptance sent by an unauthorized method may, under Section 68, create a contract when received by the offeror. What amounts to receipt in all these cases is defined by the present Section, under which a written communication may be received though it is not read or though it does not even reach the hands of the person to whom it is addressed.

Section 70. AN OFFEROR OR ACCEPTOR OF A WRITTEN OFFER IS BOUND BY ITS TERMS.

One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation.

Comment

a. The effect of fraud and mistake as ground for avoiding a contract induced thereby is stated in a later portion of the Restatement of this Subject. When mistake prevents the existence of a contract is stated in Section 71.

Section 71. UNDISCLOSED UNDERSTANDING OF OFFEROR OR OFFEREE, WHEN MATERIAL.

Except as stated in Sections 55 and 70, the undisclosed understanding of either party of the meaning of his own words and other acts, or of the other party's words and other acts, is material in the formation of contracts in the following cases and in no others.

(a) If the manifestations of intention of either party are uncertain or ambiguous, and he has no reason to know that they may bear a different meaning to the other party from that which he himself attaches to them, his manifestations are operative in the formation of a contract only in the event that the other party attaches to them the same meaning.

(b) If both parties know or have reason to know that the manifestations of one of them are uncertain or ambiguous and the parties attach different meanings to the manifestations, this difference prevents the uncerain or ambiguous manifestations from being operative as an offer or an acceptance.

(c) If either party knows that the other does not intend what his words or other acts express, this knowledge prevents such words or other acts from being operative as an offer or an acceptance.

Comment.

a. The mental assent of the parties is not requisite for the formation of a contract. If the words or acts of one of the parties have but one reasonable meaning, his intention is material only in the exceptional case, stated in Clause (c), that an unreasonable meaning which he attaches to his manifestations is known to the other party If the words or other acts of the parties have more than one reasonable meaning, it must be determined which of the possible meanings is to be taken. If either party has reason to know that the other will give the words or acts only one of these meanings and in fact the words or acts are so understood, the party conscious of the ambiguity is bound in accordance with that understanding. On the other hand, if a party has no reason to suppose that there is ambiguity, he may assert that his words or other acts bear the meaning that he intended, that being one of their legitimate meanings, and he will not be bound by a different meaning attached to them by the other party

ANNOTATION

Where the vendor of a carload of shingles delivered to a bank the order bill of lading therefor, and assigned to it the invoice which bore a notation, "Due on or before 60 days from date of shipment," and upon these documents obtained from the bank a loan represented by a draft, his intention, not disclosed to the bank, to retain title to the shingles until they were paid for, did not prevent recovery on the draft by the bank, although it had forwarded the bill of lading to the purchaser, who thereby obtained possession of the shingles but did not pay for them: *Citizens Bank & Trust Co. v. Everbest Shingle Co.*, 135 W 575, 238 P. 644 (1925).

(*b*). Where defendant quoted plaintiff a price on potatoes of a described grade, and a lower price for an inferior grade, and plaintiff, desiring the inferior grade, ordered one carload but did not specify the grade desired, and defendant, believing the higher grade was ordered, shipped a carload of that grade, there was no meeting of the minds and no contract: *Mutual Sales Agency v. Hori*, 145 W 236, 259 P 712 (1927)

Section 72. ACCEPTANCE BY SILENCE.

(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases and in no others.

(a) Where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would indicate to a reasonable man that they were offered with the expectation of compensation.

(b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.

(c) Where because of previous dealings or otherwise, the offeree has given the offeror reason to understand that the silence or inaction is intended by the offeree as a manifestation of assent, and the offeror does so understand.

(2) Where the offeree exercises dominion over chattels which are offered to him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance. If other circumstances indicate that the exercise of dominion is tortious the offeror may at his

option treat it as an acceptance, though the offeree manifests an intention not to accept.

ANNOTATION

A contract to sell fish is not rescinded by a letter written by the vendor to the vendee offering to rescind, to which the vendee made no reply: *Parks v. Elmore*, 59 W 584, 110 P 381 (1910) An offer by telephone to extend the time for closing a sale of real estate, to which no response is made by the other party, does not establish a contract of extension: *Flood v. Von Marcard*, 102 W 140, 172 P. 884 (1918) "Mere silence when an offer is made does not constitute an acceptance of the offer. The failure to reject an offer is not equivalent to assent": *Troyer v. Fox*, 162 W 537, 298 P 733 (1931)

Section 73. EFFECT OF RECEIPT BY OFFEROR OF A LATE OR OTHERWISE DEFECTIVE ACCEPTANCE.

An offeror who receives an acceptance which is too late or which is otherwise defective, cannot at his election regard it as valid. The late or defective acceptance is a counter-offer which must in turn be accepted by the original offeror in order to create a contract.

Comment.

a. How such a counter-offer as is referred to in the last sentence of the section may be accepted depends on the general principles which govern acceptance. In some cases Subsections (b) or (c) of Section 72 (1) may be applicable.

Section 74. TIME WHEN AND PLACE WHERE A CONTRACT IS MADE.

A contract is made at the time when the last act necessary for its formation is done, and at the place where that final act is done.

ANNOTATION

Where negotiations in the state of Washington finally culminated in a written contract formally entered into in the state of California, the locus of the contract is in the latter state: *Gerrick & Gerrick v. Llewellyn Iron Works*, 105 W 98, 177 P 692 (1919). A written agreement for the distribution of motion picture films which contains a clause that it shall not be binding until its contents are submitted to the president of the distributor and accepted in writing by him, or "until this contract is executed in writing by such president," is complete and binding as a contract when signed by the distributor's president: *United Artists Corporation v. Praggastis*, 144 W 284, 257 P. 843 (1927). Where parties, negotiating for an exchange of properties, executed deeds and left them with an agent, pending determination by one of them as to whether the offer to exchange would be accepted by him, and the deeds were not to be delivered until the agent was notified of such acceptance, there was no completed contract, the minds of the parties having met only as to matters preliminary to the ultimate exchange of properties: *Nelson v. Davis*, 102 W 313, 172 P 1178 (1918). *

* To be continued.