REVOCATION OF UNILATERAL CONTRACTS

D. M. McRae, LL.B.*

> If I say to another 'If you will go to York, I will give you £100' this is in a certain sense a unlateral contract. He has not promised to go to York. But if he goes it cannot be doubted that he will be entitled to receive £100. His going to York at my request is a sufficient consideration for my promise.

These words of Brett J. in *Great Northern Railway* v. *Witham*[1], and the problem which they imply are well known to students of the law of contract. The case itself concerned a tender to supply goods which was held to be a standing offer. Thus each individual order for goods created a separate contract. The question arising from Brett J's statement is whether the offer to pay £100 can be revoked once the person to whom it is directed is halfway to York intent upon fulfilling the condition. In other words can a promise in return for an act be revoked once the act has been commenced although not completed. The scope of this article is to examine the law relating to revocation of offers for unilateral contracts and to suggest that in certain cases such offers cannot be revoked once performance has begun.

The general rule it that an offer may be revoked at any moment before it matures into a contract by acceptance, *Payne* v. *Cave*[2]. At what stage then is an offer which contemplates a unilateral contract accepted? Cheshire & Fifoot[3] suggest that once the required act is performed acceptance is deemed to be complete. In such a case, communication of acceptance would be impliedly waived, *Carlill* v. *Carbolic Smoke Ball Co.*[4]. However, the fact that performance of the act is 'deemed an adequate indication of assent' does not preclude the possibility that something less than *complete* performance may also signify assent. Once this assent has been given the offer has then matured into a contract and thus the offeror would be unable to revoke his original promise even though the performance has not been completed.

In 1937, however, the Law Revision Committee (6th Interim Report p.23) stated, *inter alia* that

> In the case of a unilateral contract . . . the promise does not become binding until the act has been completely performed. A promisor may therefore withdraw his promise at any time before completion of the act, even though he knows that the promisee has already entered upon the performance and has nearly completed it.

The Committee went on to suggest that this result would cause some hardship and recommended . . .

> . . . that a promise made in consideration of the promisee performing an act shall be enforceable as soon as the promisee has entered upon performance of the act . . . .

While agreeing that hardship would result *if* the first statement of the Committee were the law, it is submitted that their *recommendation* is in fact a statement of the present rule.

The problem was discussed in the early case of *Offord* v. *Davies*[5], during counsel's argument. Wililams J. said to Jones Q.C., 'Suppose

* Assistant Lecturer in Law, University of Otago.

I guarantee the price of a carriage to be built for a third party who before the carriage is finished and consequently before I am bound to pay for it becomes insolvent—may I recall my guarantie', Counsel replied 'Not after the coach-builder has commenced the carriage'. However, Erle C. J. then interposed and said 'Before it ripens into a contract either party may withdraw and so put an end to the matter. But the moment the coach-builder has prepared the materials he would probably be found by the jury to have contracted.'

It is submitted that the first statement of Erle C. J. does no more than state the general principle that an offer may be revoked at any time before it is accepted. He is not suggesting (as some commentators seem to believe) that the offer may be revoked at any time before the act has been completed. (cf. Cheshire & Fifoot supra, p.43). This is supported by his second statment which implies that once the act is commenced than a contract has been entered into and the offer cannot be revoked.

Certainly some authority can be found in favour of the view that the contract has not been entered into until the act has been completed. The views of Kellogg J. in *Petterson* v. *Pattberg*[6] are relevant here. The brief facts were that a mortgagee wrote to his mortgagor saying that if a lesser sum were paid by a certain time prior to due date, it would be accepted in full satisfaction of the mortgage. When the mortgagor took the money to the mortgagee's house he was told (before he could tender the money) that the mortgage had been sold. This, the Court decided, was a valid revocation of the offer. Although in this case the act (of paying the lesser sum) had not commenced Kellogg J. inclined to the view that even if tender had been made before the offer was withdrawn, the withdrawal would have been valid. In other words the commencement of performance would not signify such acceptance that the offer could not be revoked. (Lehman and Andrews J.J. both dissented from the majority but they considered that the act required by the terms of the defendant's offer had been completed.)

By analogy some support may be drawn also from the case of *Luxor (Eastbourne) Ltd (in liquidation) and others* v. *Cooper*[7]. The facts of this case were that the appellant companies wished to dispose of two cinemas and they agreed to pay the respondent a commission if he introduced a person *who purchased* the two properties. The respondent then found a prospective purchaser and preliminary negotiations were entered into. It was formally agreed that the respondent would be paid his commission on the completion of the sale. Although the appellants decided not to go through with the sale to the purchaser introduced by the respondent such purchaser remained at all times able and willing to complete the sale. The respondent then sued for his commission but the House of Lords held he was not entitled to it. Viscount Simon L.C. stated the matter this way (p.37):

> It seems to me that the express bargain was simply this. If a party introduced by the respondent should buy the cinemas for at least £185,000, each of the two appellants would pay to the respondent £5,000 on the completion of the sale. No such sale, however, took place. Accordingly there can be nothing due to the respondent on the terms of the express bargain.

The respondent had claimed that there was a term implied into the commission agreement that the appellants . . .

> would do nothing to prevent the satisfactory completion of the transaction so as to deprive the respondent of the agreed commission.

However, the House of Lords refused to imply this into the contract and stated that such a term had to be express before they could give effect to it.

To translate this case into the terminology of unilateral contracts, the respondent had asked the Court to imply into an offer a term that the appellants would not revoke once the respondent had found and introduced a purchaser able and willing to purchase. This of course would be quite contrary to the general principle of revocation of offers; an offer may be revoked at any time before it is accepted and in this case "acceptance" was the conclusion of the sale with the person introduced by the respondent. An option to keep an offer open requires separate consideration (*Routledge* v. *Grant*)[8] and thus the House of Lords refused to act in the absence of an express term.

It is submitted that both *Petterson* v.*Pattberg* (supra) and *Luxor's* case (supra) must be understood in the light of the distinction between an act which can be performed almost instantaneously e.g. the signing of a contract, and an act which is spread over a period of time, is almost continuing in nature, e.g. the building of a house. In *Petterson's* case the act was tendering the lesser sum in payment of the mortgage whereas in *Luxor's* case it was the entering into a contract by theperson introduced by the respondent. It can be seen that in both these cases the commencement of performance and the completion of the "act" required followed one another in a very short space of time—in fact they are hardly severable. Thus the revocation of the offer was made prior to the commencement of the act necessary for the performance of the contract. These cases are not therefore contrary to the view that once performance has begun then revocation is impossible.

It has been considered that the traditional view that the promisor may repudiate his promise at any time before completion of the act may cause much hardship. This is understandable, as an unsuspecting offeree may spend time or money attempting to fulfil the required condition only to find that the promise on which he is relying is then withdrawn. In order to mitigate the unfairness of such a position commentators have sought to avoid the rigours of that rule. D. O. McGovney[9] makes the suggestion that an offer which contemplates a unilateral contract involves two promises, first the substantive promise in return for an act and secondly a collateral offer to keep the principal offer open for a reasonable time. He says (p.659)

> Let us assume a concrete case: A says to B, 'I have had enough of your promises in the past and want no promise from you, but if you will put my sugar-house machinery in good repair I will pay you $100 for the job, and if you will begin immediately I will give you a reasonable time to complete the work.

McGovney's reasoning is that by commencing work on the machinery the offeree has accepted the collateral offer which is to keep the principal offer open for a reasonable time. No liability could accrue under the principal offer until the work is completed. He claims it is a 'fair inference' from most unilateral contracts that they were intended to involve this double promise in the same way.

An early Australian case *Abbott* v. *Lance*[10] seems to follow the form of McGovney's suggestions. In this case there was an offer by the defendant to sell a farm, the offer to remain open if the plaintiff went and inspected the farm. In their memorandum the parties had agreed that the sum of £100 should be forfeited by the defendant

if the farm was sold before inspection thereby making him in breach of his collateral offer i.e. to keep the original offer open. The plaintiff started out to inspect the farm but it was sold before he reached it; the Court held him entitled to the £100 agreed damages.

The pitfall in McGovney's views in that of *implying* a collateral promise. In both the example he gives and in *Abbott* v. *Lance* (supra) there is no need to imply such a promise; in both cases the promise is express. It is doubted whether New Zealand Courts would be prepared to go to the length of implying such a term into all offers for unilateral contracts. To use McGovney's own terminology. it would be an equally 'fair inference' to assume that the promisor considered himself able to revoke only up to the commencement of performance or even until the completion of the act required. It is not a *necessary* inference that he intended a collateral promise to keep the main promise open.

More appealing, however, are the views of Sir Frederick Pollock[11], who draws a distinction between the acceptance of an offer and the consideration that supports the contract. To Pollock acceptance is complete once there has been an 'unequivocal beginning' of performance. This view however can create certain difficulties. If it is conceded that acceptance and consideration must be separated then the position could arise where any offer is accepted but there is no binding contract because of a lack of consideration. This would mean that neither party is bound, they have entered into no contractual relations. But the essence of a unilateral contract is that one party *is* bound.

It has been suggested by one commentator[12] that it is unfair to bind the promisor while the person who undertakes to perform the required act is not bound at all. Thus, the promisor is unable to revoke his promise whilst the act is being carried out, but this obligation is not reciprocated as the promisee is under no duty to finish the act that he has commenced. The view that this is unjust results it is submitted, from a misunderstanding of unilateral contracts. The Shorter Oxford English Dictionary defines unilateral, when used in a legal sense as,

> binding or imposed upon one party only without reciprocal obligation

Mozley &Whiteley's New Zealand Law Dictionary describes unilateral as

> one sided, a word used especially of a bond or contract by which one party is bound.

It would seem from these two definitions that the essence of a unilateral contract is that an obligation is imposed upon one party without a similar obligation upon the other—hence it is unilateral. Thus a promisor who makes a promise which contemplates the performance of an act to create a contract is binding himself only—there is no suggestion of an undertaking on behalf of the offeree. Hence, it is not a valid objection to say that since the offeree is 'will-free', the offeror should also be 'will-free'.

Although Pollock's approach (supra) has often been discounted it will be shown that his view, that an "unequivocal beginning" by the offeree imposes an obligation on the offeror not to revoke his promise, has been tacitly accepted by the Courts in cases relating to an offer for a unilateral contract which contemplates the performance of a "continuing" act. As stated previously this is the only type of unilateral contract which causes any difficulty. The principle can be illustrated in the two following cases:

In *White Trucks Pty Ltd* v. *Riley*[13], the defendant placed an order for a bus on the plaintiff's order form. On receipt of the order the plaintiffs placed orders for materials with various firms. Before the plaintiffs were able to proceed any further with the building of the bus the defendant cancelled his order. The Court, however, held that there was a binding contact created once the plaintiffs had done the overt acts of ordering portions for the bus (cf. the views of Erle C.J. in *Offord* v. *Davies*, supra).

There had been a provision in the *White Trucks* case that the contract became binding once the plantiffs signed their order form. This had not been done but the Court considered that this was not the only way in which acceptance was contemplated. Had the plaintiffs signed the form it would have been a simple bilateral contract, they had not done so and thus the agreement was unilateral. This commencement of the act (i.e. ordering the portions of the bus) was sufficient to create a binding contract and the defendant was unable to revoke his original order.

The second case is a 1952 decision of the English Court of Appeal in *Errington* v. *Errington & Woods*[14]. The facts, relevant to this discussion, were that a father purchased a house for his son and daughter-in-law. He paid the deposit and secured the remainder of the purchase moneys by a building society mortgage. The building society passbook was given to the daughter-in-law, the understanding being that she and her husband pay the instalments on the mortgage. The father's words were unequivocal, 'The house will be your property when the mortgage is paid'.

The son and daughter-in-law were successful in retaining possession of the house against the father's widow. The Court of Appeal considered that the father had entered into a unilateral contract with his son and daughter-in-law, i.e. if they paid the mortgage off, they could keep the house. per Denning L. J. (at p.295),

> The father's promise was a unilateral contract—a promise of the house in return for their act of paying the instalments. *It could not be revoked by him once the couple entered on performance of the act,* but it would cease to bind him if they left it incomplete and unperformed which they have not done. (emphasis added).

Since the father could not revoke the promise, then it could not be done by his successors after his death.

In spite of his assumption that the "father's promise was a . . . contract . . . " Denning L. J.'s statement shows clearly the nature of the obligation on the promisor. He was *bound by his promise* while, and only while, the couple were performing the act. If they ceased to pay the instalments then his obligation ceased. It is to be noted that there was no suggestion of an obligation imposed upon the son and daughter-in-law to continue with the payments. Although it has been suggested (Anson's Law of Contract 22nd ed. p.60) that the principle in the *Errington* case applies only where express notice of acceptance is received by the offeror, it is submitted that the principle has a wider application. It is obvious that Denning L. J. did not regard it as being so limited. He seems to consider that the relevant factor was that the couple had entered on the performance of the act required, not that they informed the father that they intended to accept his offer.

The problem of revocation of unilateral contracts was adverted to in the judgment of Richmond J. in *Wright & Co. Ltd* v. *Maunder*[15].

The case related to the practice of cordial manufacturers in Christchurch to return to each other bottles belonging to the other in exchange for bottles of their own or equivalent cash payments. The defendant refused to accept or pay for bottles owned by him and held by the plaintiff. The learned judge found that there was an implied undertaking by the defendant to accept bottles returned by the plaintiff, but found on other grounds that such offer had been validly withdrawn.

In the course of his judgment Richmond J. said (p.357).

> "It will be seen that . . . the standing offer of Wright & Co was one which could be accepted from time to time by the act of the plaintiff in returning bottles. An offer may in general be revoked at any time before acceptance and the injustices which may result to the offeree in this type of situation are discussed in Cheshire & Fifoot 5th ed., 47, 48. It would appear that the law is not yet finally settled as to tthe rights of the offeree who has expended money or effort in reliance upon a "unilateral" undertaking which is revoked before acceptance is complete.

His Honour did not find it necessary to "resolve this very difficult question."

With respect, it is submitted that the law relating to the type of offer in *Wright & Co's* case (i.e. a standing offer to be accepted by the tender of bottles) is quite clear. The distinction must be referred to again between performance by a single, almost instantaneous act, e.g. payment of a sum of money (*Petterson* v. *Pattberg*, supra) and performance by a continuing act e.g. building a bus (*White Trucks* case, supra). With the former type of act acceptance and performance are unable to be separated, whereas in the latter case the commencement and completion of performance are separated by some distance in time. Thus in *Wright & Co. Ltd* v. *Maunder* (supra) the traditional rule that an offer can be revoked at any time before it is accepted would apply *simpliciter*. The act required there was the tendering of the bottles—at any time before such tender the offer was able to be withdrawn.

It seems then that the view that a unilateral contract may be revoked at any time before complete performance of the act cannot be supported. The view arises from a failure to distinguish between a promise in return for a single act and a promise in return for a continuing act. As stated previously the former follows the general contractual principle that an offer can be revoked at any time before acceptance. With 'single act' cases the acceptance and performance are not severable. Difficulty arises with a promise in return for an act which is continuing in nature. In this situation it is quite possible that an offeror may purport to revoke once performance has been commenced but before it is completed. The only authority relating to 'continuing act' cases is found in the dicta of Erle C.J. in *Offord* v. *Davies* and the decisions in *White Trucks Pty Ltd* v. *Riley* and *Errington* v. *Errington & Woods*. However, all these cases clearly show that once performance of the act has begun the offer becomes irrevocable.

1 (1873) L.R. 9C. P. 16.
2 (1789) 3 T.R.148.
3 Law of Contract 2nd N.Z. ed., p.35.
4 [1893] 1Q.B.256
5 (1862) 12C.B. (N.S.) 748, 753

6 (1928) 248 N.Y. 86
7 [1941] 1 AII E.R. 33
8 (1828) 4 Bing. 653
9 Irrevocable Offers ,(1913-14) 27 Harv. L. R. 644
10 (1860) Legge 1283, reference is made to this case in Cheshire & Fifoot Aust. ed. 138.
11 Pollock on Contracts 12th ed. 19.
12 Wormser, 26 Yale L. J. 136
13 (1948) 66 N.S.W.W.N. 101, digested in Eng & Emp. Digest Cont. Vol. A 273.
14 [1952] 1 K. B. 290
15 [1962] N.Z.L.R. 355.