University of Missouri Bulletin Law Series

Volume 31 *December 1924* Article 5

1924

Masthead

LAW SERIES

Published four times a year by the University of Missouri School of Law

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DECEMBER, NINETEEN HUNDRED AND TWENTY-FOUR

"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—Mr Justice Holmes, Collected Legal Essays, p. 269.

NOTES ON RECENT MISSOURI CASES

CONFLICT OF LAWS—AVOIDING MORTGAGE FORECLOSURE SALE OF LANDS SITUATED IN ANOTHER STATE, WHERE THE SALE IS MADE PURSUANT TO A POWER VESTED IN THE MORTGAGEE—*Guels v. Stark.*[1]

Plaintiff's intestate duly mortgaged land to defendant, the mortgage covering, among other parcels of real estate, one located in Arkansas. The mortgage was executed and delivered in Missouri, where both of the parties resided, contained a power of sale, and gave the mortgagee the privilege of buying the land in at any sale held pursuant to an exercise of the power. The petition alleged all of the foregoing facts, and, in addition thereto, that after the intestate's default, defendant sold the Arkansas land and purchased it in himself at an inadequate figure; that the sale was illegal because made pursuant to a notice of sale containing an incomplete and misleading description of the property. The petition also asserted that an Arkansas statute required fourteen days' notice of an intended sale to be given in this type of

1. (1924) 264 S. W. 693.

mortgage foreclosures. The petition, however, contained no statement concerning other requirements of this statute, nor any other allegations as to Arkansas law.

Plaintiff prayed for an accounting, and upon payment of the money thus found to be due to defendant, asked that the latter be required to reconvey to plaintiff the land which he had purchased at the foreclosure sale. The theory of plaintiff's case was that defendant was under a duty to exercise his power of sale legally, and in a manner calculated to bring the best possible price; that as defendant had not done this, the sale should be regarded as voidable at the election of plaintiff.[2]

Defendant demurred to the petition, claiming that it did not state a cause of action for the reason that it did not plead the Arkansas law. It was urged that plaintiff's right to avoid the sale depended upon the Arkansas law being to this effect upon the law in force in the state where the alleged fraudulent sale took place. It was further claimed that there could be no presumption as to the Arkansas law, as Arkansas did not have a common law origin. It was contended that as this was the case, it could not be assumed that the common law, or English equity (which would have allowed plaintiff to avoid the sale) was there in force.[3] The demurrer was sustained in the lower court, but this judgment was reversed by the Supreme Court, it being held that plaintiff was not required to plead the Arkansas law; that the petition stated a cause of action without such allegations.

In reaching this conclusion, our Supreme Court took the position that it was free to determine plaintiff's rights, regardless of Arkansas law, according to its own notions of the equities of the case. It was held that, as a result of the making of the mortgage in Missouri, defendant came under the duties of a trustee in exercising the power of sale; that these duties he had violated, and consequently he was liable in an action *in personam* to make amends for his breach of trust by reconveying the land to plaintiff. Said the court in this connection, "The gravamen of the charge in the petition is not dependent upon any statute, nor a violation of any statute by defendant*** but is in substance a charge of violation of the duty of defendant in his relation as trustee.*** This was an injury for which there was a common law remedy. The grounds alleged are grounds for common law relief, to be pursued in a court of equity. To seek that remedy in this case, under the facts pleaded in the petition, it was not necessary to plead the laws of Arkansas, *because the cause of action pleaded is not one created by, nor dependent upon the laws of Arkansas, but upon grounds* actionable under the general principles of equity."[4] It was easy for the court, proceeding on this basis,[5] to find power to compel defendant to convey the land even though it was situated without its jurisdiction, and the judgment

2. 264 S. W. l. c. 695.

3. If defendant's theory of the case was right, he would seem to be correct in his contention that Arkansas law should have been pleaded; see note, Law Series 20, Mo. Bulletin 47, where the Missouri authorities dealing with this point are fully collected.

4. 264 S. W. l. c. 697. The italics are the writer's.

5. See *infra*, note 6 and cases cited.

was accordingly reversed and the case remanded. Is the decision proper? Should the validity of a sale of foreign land made by a mortgagee, pursuant to a power given him by the mortgage, executed within the *forum's* jurisdiction, be tested by the *forum's* own law, or by what is necessarily the same thing, by general principles of equity as understood and administered by the *forum*?

"In a case of fraud, or trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."[6] When a court of equity has jurisdiction of a defendant, and it has been found that such defendant is under a specifically enforceable duty to convey to the plaintiff an interest in foreign land, it can, by virtue of its *in personam* jurisdiction over the defendant, order him to make the needed conveyance. Moreover, if the defendant makes a valid conveyance as directed, the grant will be effective at the *situs* of the land, and as a matter of federal constitutional law is unimpeachable.[7] This power of a court of equity has been sustained ever since the days of the early English chancellors, and is not open to question at this time. But when, and upon what principles, is it to be held that a defendant is under a duty to convey foreign lands? Is it a matter for any *forum* to decide in any way and upon any principles that it sees fit?

Whether law be territorial in its jurisdiction or not, most American courts have usually assumed the position that if an act is legal where committed, it will be regarded in the same light everywhere else, and an actor cannot be hailed before any *forum* and made liable there by a showing that had he acted, as he did elsewhere, within the *forum's* jurisdiction a liability would have resulted. Surely such an attitude is proper. It would be most unjust to hold a defendant responsible for an act done in another state, if his conduct there was legal, within his rights, and subjected him to no liability. Suppose that A in state 1 injuried B; that A would not have been liable, however, for the injury according to the laws of 1, because his act was regarded by the law as one of self-defense. Clearly it would be contrary to justice if B were able to sue A in state 2 and recover damages for the latter's act, merely because 2's laws differed in this respect from those of 1.[8] The orthodox formulation of this proposition is that 2's law is territorial; that that law had no jurisdiction over the alleged

6. Marshall, C. J., in *Massie v. Watts* (1810) 6 Cranch (U. S.) 148, 160. See also *accord Olney v. Eaton* (1877) 66 Mo. 563; *McCune v. Goodwillie* (1907) 204 Mo. 305, 102 S. W. 997 (*dictum*); *Cooley v. Scarlett* (1865) 38 Ill. 316; *Paget v. Ede* (1874) L. R. 18 Eq. 118; 4 Pomeroy, Equity (4th ed.) sec. 1318. But see *State ex rel. v. Grimm* (1912) 243 Mo. 667, 148 S. W. 868.

7. *Fall v. Eastin* (1909) 215 U. S. 1, 54 L. Ed. 65, while not standing squarely for this proposition, clearly intimates that a deed executed pursuant to the forum's decree would be effective to pass the title it purported to pass. See also *Brunley v. Stevenson* (1873) 24 Ohio St. 474; *McCune v. Goodwillie, supra* note 6, 204 Mo. l. c. 336; Barber, Equitable Decrees, 17 Mich. Law Rev. 527.

8. "The defendant having done no wrongful act in this commonwealth, and the injury for which the plaintiff seeks to recover damages having taken place in New Hampshire, and not being the subject of an action or indictment by the laws of that state, this action cannot be maintained." *Le Forest v. Tolman* (1875) 117 Mass. 109, 110. See also *Phillips v. Eyre* (1870) L. R. 6 Q. B. 1.

assault in 1, and could for this reason, neither impose a duty upon A, nor create a right in favor of B. Scholars today (and perhaps rightly so) might hesitate to state the principle in this way. They might insist (absent constitutional requirements) that a court in state 2 could impose a liability upon A,[9] but at the same time they would at least agree that a judgment to this effect by 2's courts would be bad policy; that the matter was no concern of 2's courts save to refuse to hold A to any liability contrary to that enjoined by the law of 1.[9a]

Assuming that all that defendant did in the instant case was to act in Arkansas, it is difficult to see, in the light of the foregoing discussion, how plaintiff stated a complete cause of action in his petition without alleging that defendant's exercise of the power of sale resulted in an obligation under Arkansas law to reconvey. If that law did not require defendant to reconvey the land, he was free to keep it, and to be unmolested in this respect at any *forum*. It was incumbent therefore upon plaintiff to show to the court that the duty existed by virtue of provisions in the foreign law to this effect. To hold that defendant was bound to make a reconveyance upon general principles of equity, regardless of whether or not such principles were in force in Arkansas, is to say in substance that Missouri's law was in force in Arkansas, and to cause its laws to affect a transaction occurring beyond its domain.[10] This is an unwarrantable interference with Arkansas' affairs—an attempt to govern transactions taking place there, and is contrary to recognized principles of conflict of laws. It is proper, therefore, at this time to inquire whether all that happened in the transaction complained of was action by defendant in Arkansas? If this did constitute the sole cause of complaint, it is believed that the decision overruling the demurrer cannot be sustained, and is unfortunate. It may be

9. "My conclusion is, that while, so long as we have the territorial organization of modern political society, the law of a given state or country can be *enforced* only within its territorial limits, this does not mean that the law of that state or country cannot, except in certain exceptional cases, affect legal relations of persons outside its limits." Cook, Bases of Conflict of Laws, 33 Yale Law Journal 457, 485. See also note by the same learned author in 28 *id* 67. Professor Cook there suggests that a court may attribute any legal consequences that it sees fit to any state of facts occuring entirely without its domain. Doubtless Professor Cook would not, however, regard such action by a court as desirable if the transaction did not affect domestic matters.

9a. In *Fauntleroy v. Lum* (1908) 210 U. S. 230, 52 L. Ed. 1039, plaintiff made a contract with defendant in Mississippi, which was illegal by that law. In some way or other, in spite of the illegality, plaintiff had the matter submitted to arbitration and gained an award. The award, however, would have been unenforceable in Mississippi. Plaintiff sued upon the award in Missouri, and recovered judgment. Plaintiff then sued upon the Missouri judgment in Mississippi. The federal supreme court held that the judgment should have been given full faith and credit. This decision permitted the Missouri court to override the Mississippi law, and seems unfortunate. There was a strong dissent by the late Chief Justice, concurred in by three other justices. Holmes, J., who wrote the prevailing opinion, conceded that the case was a hard one but concluded that courts will not often make mistakes of this kind and apply the wrong law to the facts, 210 U. S. l. c. 237. It appears therefore that even though the Missouri court did have the power to overrule the Mississippi law, that good policy should have prevented its so doing. "No court would give judgment for a plaintiff unless it believed that the facts were a cause of action by the law determining their effect." *per* Holmes, J., 210 U. S. l. c. 237.

10. See *supra* note 8.

answered that probably no injustice in this particular case was done, because it is safe to assume that the sale was voidable under Arkansas' law of fiduciaries. That may well be the case, and if that is so, the court unwittingly reached the right result. But it is to be noted that our Supreme Court proceeded on no such theory as this; it was not interested in the law of the State of Arkansas. It decided the case and determined the extent of defendant's duty on general principles of equity, and distinctly asserted that Arkansas law had no bearing whatever on defendant's liabilities and obligations.[11]

Defendant acquired his power in Missouri (pursuant to Arkansas' laws of conveyancing) by plaintiff's intestate there delivering the mortgage deed to him. What defendant actually obtained under this deed would seem to have been an incorporeal interest in Arkansas land, which he was to use in that state by taking *action* there. The law regards a power of sale, when given to secure the payment of a mortgage debt, as indestructable,[12] holding that when it is exercised, title to the land affected passes. It would therefore appear that the right of the donee-mortgagee, to the extent that is exists, is analogous to a right in land—to an estate or interest in land. This power is, within its limited sphere of operation, in its nature substantially identical with a title. This is so because the mortgagee may, at any time after default, regardless of the mortgagor's wishes or action, dispose of the property, for purposes of secutiry, as if he owned it, and pass a title on. The position of the defendant therefore, as owner of the power, can be said to be entirely comparable with the position of an owner of a fee to land in Arkansas,[13] and his exercise of the power can be said to have been an *act* in Arkansas by which he availed himself of the benefits of a title there located, just as the holder of a fee acts at the *situs* of the land when he disposes of the same.

What an owner of a fee to land may do with the land so owned depends altogether upon what the law of the *situs* allows.[14] If that which is done is legal according to that law, it should be legal everywhere. His liability must be measured by that law. It follows easily enough from this that if defendant had, as a result of his power, title to land in Arkansas, whether or not he was liable for the act of exercising his power, as plaintiff claimed he was before the Missouri courts, depended upon Arkansas law creating such a liability. What defendant could do with this power was for Arkansas law to say. Accordingly, it is suggested that, under the above analysis of the transaction, it was improper for the Supreme Court to impose a duty upon defendant to reconvey upon any general equitable principles not shown to have been in force in Arkansas.

11. 264 S. W. l. c. 697.

12. Mechem, Agency (2nd ed.) secs. 570 and 655.

13. That such powers are an interest in the property seems to be recognized by Professor Mechem, *op cit.* sec. 570; see also Terry, Principles of Anglo-American Law, sec. 127 *et seq.* The learned author intimates that such a right might be classified as an interest in the property, but expresses some doubt.

14. *United States v. Crosbey* (1812) 7 Cranch (U. S.) 115, 3 L. Ed. 287; *Sells v. Miller* (1860) 11 Ohio St. 331.

Perhaps the analysis of the transaction complained of, contained in the two preceding paragraphs, is not correct. Possibly when plaintiff's intestate gave defendant a power of sale, defendant, by implication, assumed certain executory obligations with respect to its exercise. These obligations might have been governed by the law of Missouri, but not, however, by any general equitable principles unincorporated in the law of any particular jurisdiction. If this should happen to be so, there is authority which would sanction the Missouri court's compelling defendant to reconvey to plaintiff, even though Arkansas law, under similar conditions, would not have imposed a like duty.

Suppose that A in state 1 makes an agreement with B, in consideration of money to him loaned by B, to give B a mortgage upon land situated in state 2; that such an agreement, according to the law of 1, is specifically enforceable, but that it is not binding by the law of 2. It has been held on substantially this state of facts that 1's court could compel A to give the mortgage if it is legally possible to give such form of security in 2.[15] It has also been held, upon practically similar facts, that such a decree should be made in 2 by 2's own courts.[16] The reasoning back of these decisions is that a contract affecting land in another jurisdiction, if legal where made according to the law *there* existing, is legal everywhere and should be enforced everywhere if only the contract can be carried out at the *situs*, and is not contrary to the policy of the *situs*. It is said that the mere fact that the law of the *situs* does not afford a similar liability, under similar circumstances, does not indicate a positive policy against the existence of such a right; that there is nothing immoral in the transaction, and that it is important that foreign made contracts should be held binding even though they affect land at the *situs* in a way that such a contract, if made there would not have affected the land.

It might be possible to hold that when defendant's intestate obtained this power, he took it by agreement in trust, according to the law of Missouri, to the extent at least of exercising it in such a way as to bring to the mortgagor from the sale as much money as possible. It might also be said that defendant was under the further obligation, if he bought the mortgaged land in himself under conditions unfavorable to the mortgagor, to hold the title so acquired in trust for the mortgagor. Perhaps in addition to merely taking a power of sale, defendant did by implication assume these trust duties. If this is the proper construction to place upon the transaction, the Missouri court, upon the authority heretofore cited, would have been free to hold defendant to the duty of reconveying, applying its own law, because it was the *proper law of the contract*; because Missouri law was the law which had jurisdiction of the transaction whereby defendant took his power, assuming these trust duties.

15. *Ex parte Pollard* (1840) Mont. & C. 239, Lorenzen, Cas. Conf. of Laws, (2nd ed.) 116.

16. *Polson v. Stewart* (1897) 167 Mass. 211, 45 N. E. 737. But there is authority *contra*, it being held that a contract affecting land, which would have been invalid if made at the *situs*, will not be enforced there. This decision is understandable. Such an agreement might well be considered contrary to the established policy of the *forum*. An exhaustive note is to be found in L. R. A. 1916-A 1044.

The accuracy of the above construction seems doubtful to the writer. Did defendant, by virtue of an implied trust agreement, assume any duties, when he acquired the power? It is believed that he did not. The donee of a power does not assume any duties with respect to the exercise of the power. Whatever duties he may be under are imposed upon him as a matter of law. If the power is fairly exercised, well and good; if it is not so exercised, equity steps in and, in the absence of a *bona fide* purchase, imposes certain equitable burdens upon the donee, or upon the party purchasing at the sale with notice. The burdens are not agreed upon; they are burdens which the law implies and imposes, just as the law implies a promise to pay for unjust enrichment. For these reasons it is urged that defendant was bound only according to Arkansas law. All that happened in Missouri was that he obtained a power. This was an interest in Arkansas. What could be done with that interest depended upon the burdens Arkansas law imposed upon defendant, and upon no other law.

J. L. PARKS.

UNILATERAL CONTRACTS—REVOCATION OF ORDER FOR DELIVERY OF GOODS. *Malloy v. Egyptian Tie & Timber Co.*[1]

Defendant wrote plaintiff requesting delivery of all the oak ties that plaintiff might cut and deliver until further notice, promising to pay for the same as supplied and inspected. Pursuant to this order, plaintiff cut and delivered a quantity of ties such as ordered, but defendant refused to receive or pay for the same. This action was brought for such refusal. Plaintiff had judgment in the circuit court, and the Springfield Court of Appeals affirmed this decision, holding that upon the delivery of the ties, defendant was contractually bound to pay as promised.[2] The actual decision is to the effect that when plaintiff performed the requested act, he afforded consideration to support defendant's promise and by so doing converted it into a binding and enforceable bargain.

The result of the case is clearly just,[2a] but it is believed that the learned

1. (1923) 212 Mo. App. 429, 247 S. W. 469.

2. 212 Mo. App. l. c. 432.

2a. *Roberts v. Harmount etc. Co.* (1924) 264 S. W. 448; *Reynolds v. Walsh etc. Co.* (1921) 227 S. W. 438; *Royal etc. Co. v. U. S. etc. Co.* (1920) 205 Mo. App. 616, 226 S. W. 656; *White Oak etc. v. Squire* (1920) 219 S. W. 693; *Riddle v. Castner* (1919) 202 Mo. App. 584, 209 S. W. 127; *Warren v. Ray etc. Co.* (1918) 200 Mo. App. 442, 207 S. W. 883; *Barnes v. Bragg* (1917) 198 S. W. 73; *Wallace v. Workman* (1915) 187 Mo. App. 113, 173 S. W. 35; *Hirsch etc. Co. v. Paragould etc. Co.* (1910) 148 Mo. App. 173, 127 S. W. 623; *Rozier v. St. Louis etc. Co.* (1910) 147 Mo. App. 290, 126 S. W. 532; *Nicholson v. Acme etc. Co.* (1909) 145 Mo. App. 523, 122 S. W. 773; *Campbell v. American etc. Co.* (1906) 117 Mo. App. 19, 94 S. W. 815; *Jones v. Durgin* (1885) 16 Mo. App. 370; *Schlitz Co. v. Missouri etc. Co.* (1921) 229 S. W. 813; *Halloway v. Mountain etc. Co.* (1921) 228 S. W. 451; *Hudson v. Browning* (1915) 264 Mo. 58, 174 S. W. 393; *Underwood etc. Co. v. Century etc. Co.* (1909) 220 Mo. 522, 119 S. W. 400 (same case 118 Mo. App. 197, 94 S. W. 787); *Quigley v. King* (1904) 182 Mo. 196, 168 S. W. 285; *Laclede etc. Co. v. Tudor etc. Co.* (1902) 169 Mo. 137, 69 S. W. 384; *Blaine v. Knapp* (1897) 140 Mo. 241, 41 S. W. 787; *Glover v. Henderson* (1895) 120 Mo. 367, 25 S. W. 175; *Lewis v. Mutual etc. Co.* (1876) 61 Mo. 538; *Lindell v. Rokes* (1875) 60 Mo. 251; *Offord v. Davies* (1862) 12 Com. B. (N. S.) 748.

court's analysis of the transaction is not altogether accurate, and is likely to cause confusion. In the course of its opinion, the court said in substance that defendant's order, before being filled by plaintiff was a "nude unilateral agreement", lacking in mutuality, binding neither party, but that plaintiff's delivery of the ties remedied this defect and imposed upon the former the duty of carrying out his original promise.[3] The characterization of defendant's order as a contract of any kind appears to be unfortunate and is misleading. The order was not intended as a contract of any kind, and could not have been one. It was a mere offer; as such it was valid, and if accepted according to its terms (as it was) it *then ripened for the first time into a valid and binding agreement.*

If A promise to pay B $100 for a stipulated act, he has made no contract with B unilateral or otherwise; he has only extended an offer to B, which the latter is privileged to either accept or reject. Moreover, before B accepts, or at least commences to perform his act of acceptance,[4] A is free to withdraw his proposal. It is elementary in the law of simple contracts that an unaccepted offer is only a step in negotiations, which may possibly culminate in a contract through its being accepted, but until such offer is accepted, or possibly performance of the act of acceptance is begun, neither the offeror nor the offeree is contractually bound.[5]

Suppose, however, that in the assumed case B does the requested act, A not having revoked his offer; in this event B has accepted A's offer, and a unilateral contract results. It is unilateral, as distinguished from bilateral, because when the offer is accepted, B has done all that A has demanded of him, and all that remains of the transaction is A's promissory obligation to pay for the completed act.[6] It is to be noted also that consideration appears at this point in the transaction for the first time. This fact, however, is natural enough. An offeror is always furnished with the consideration, which makes his promise binding, through the acceptance of his offer by the offeree.[6] In fact the very purpose of an offer is to secure for the offeror his consideration, or acceptance. The offer is the means by which the offeror acquires his considera-

3. 212 Mo. App. l. c. 433.

4. As to whether or not commencement of performance of acceptance makes an offer irrevocable, see *infra* note 15 and text in connection therewith.

5. *Payne v. Cave* (1789) 3 Term Rep. 148; *Boston etc. Co. v. Bartlett* (1849) 3 Cush. (Mass.) 224; see also *Lapsley v. Howard* (1894) 119 Mo. 489, 24 S. W. 1020; *Sooy v. Winter* (1894) 188 Mo. App. 150, 175 S. W. 132. Williston, Contracts, sec. 55.

6. ". . . where a man requests another to perform services for him, and the latter does so, the request is an offer of a promise to pay for the services, and performance of the services is an acceptance of the offer—one of the parties in the formation of the contract does all that he can be required to do and there remains an outstanding obligation on the other side only. The contract is unilateral." Lamm, J., in *Underwood etc. Co. v. Century etc. Co.* (1909) 220 Mo. 522, 527, 119 S. W. 400. See also Williston, *op. cit.* sec. 65.

6a. "The request is an offer of a promise to pay for the services, and performance of the services is an acceptance of the offer. This is described as consideration executed upon request", *Underwood etc. Co. v. Century etc. Co., supra,* note 6, 220 Mo. l. c. 527. "The requirement, usually stated for the sufficiency of consideration to support a promise, is in substance a detriment incurred by the promisee, or a benefit received by the promisor *at the request of the promisor;* Williston, *op. cit.* sec. 102.

tion. In order, therefore, to find that a transaction has culminated in a contract, we do not need to demand the presence of the element of consideration until the offer has been accepted. For these reasons, it is believed that the court made an incorrect analysis of the facts in the instant case.[7] There was no void unilateral contract when defendant gave its order to plaintiff; defendant merely made a proposition to plaintiff. Plaintiff did not, by delivering the ties to defendant, validate a contract, which until such time had been lacking in mutuality and void. By this delivery he accepted an outstanding offer, and a contract then, and only then, arose.[8]

In the instant case defendant did not attempt to withdraw his offer until after plaintiff had actually delivered some ties. To the extent of such delivery, therefore, there was a contract, and defendant was rightly held bound.[9] Suppose, however, that A asks B to build him a coach, and promises to pay B $500 for the coach when delivered; that it is clear from the terms of the offer that A is asking for B's *act* and not for a *promise* to deliver the coach; if B spends his time and money preparing the coach for delivery, can A withdraw his offer before the coach is completed and delivered, but after B has changed his position as assumed? Some cases hold that A is privileged so to do upon the broad proposition that an offer does not bind the offeror, but is revocable at any time before its acceptance. It is said that inasmuch as B has not accepted until the coach has been completed and delivered, A acts within his legal rights in recalling his offer.[10] Such a decision is obviously hard on B, and should be avoided if possible. It is most unjust to leave B with an unfinished coach on his hands, with no duty resting on A to at least compensate B for the expense that he has been put to as a result of relying on A's offer. Most courts have

7. That such a faulty analysis is calculated to cause confusion is demonstrated by the dissenting opinion of Woodson, J., in *Underwood etc. Co. v. Century etc. Co.*, *supra*, note 6. In discussing the validity of an offer, such as defendants' in the case under review, the learned judge said in substance (220 Mo. l. c. 535) that a promise to pay for an act cannot become binding by the promisee's performance of such act, because the act "could not change the agreement into a bilateral contract" nor could it "perform the two fold office of furnishing a consideration for the contract, and at the same time constitute an agreement to accept" (*id* 536).

8. "There are two modes of making simple contracts . . . . The one is, when one party promises to do a certain thing and in consideration of that promise the other party engages to do something on his part. Then as nothing is done but the making of the promises, it is absolutely necessary that mutual, valid promises, amounting to an express contract, should appear; otherwise one of the parties might claim the benefit of the promise of the other, without in return doing any act or being liable for any loss whatever . . . . The other mode is, when one party promises in consideration that the other will or will not do some act. Then no mutual promise need be set forth or exist; but it is necessary and sufficient to show the act done. It is not requisite that it should appear the plaintiff might have been sued for not doing the act; for he may recover after the thing done, though it was at his election whether he would do it or not up to the moment of its execution." Ruffin, C. J., in *Gurvin v. Cromartie*, 11 Ired (N. C.) 174, 179 (1850); cited in Costigan, Cas. Contracts, 43.

9. See cases cited *supra* note 2a; *Great Northern Co. v. Witham* (1783) L. R. 9 Com. Pleas 16.

10. Williston *op. cit.* sec. 60. Professor Williston advocates this view saying that "any other result involves either a violation of recognized principles of contracts (i. e. that all offers are revocable) or the invention of new ones."

realized this element of injustice in such a rule and have endeavored in one way or another to reach a different conclusion.

The problem has been before the Missouri courts on two occasions, and in each case the offeror has been held to his offer, and the offeree allowed to recover as if the contract were bilateral.[11] In fact the court intimates in one case that the contract becomes bilateral—as if the parties had exchanged promises in the first instance, upon the offeree's commencing to perform his acceptance.[12] A holding of this kind, where the offeree is suing, reaches a desirable result. But suppose the case was that the offeree refuses to continue in his acceptance, and the offeror insists upon his full performance; if the contract is truly bilateral, the offeror could hold the offeree to such a duty, for in every bilateral contract both parties thereto are bound to perform their respective promises.[13] It is believed, however, that an offeree in a case like that assumed should be free to stop performance at any time. It is to be noted that the offer does not ask the offeree for a promise to perform. It asks for an act, and the offeror promises to pay for the act if it is done. This would seem to indicate that the offeree is to have the privilege of performing or not as he sees fit. For these reasons cases which hold that the contract becomes bilateral, when the offeree commences to perform the acceptance seem unsound, and to improperly construe the transaction, and the offer.[14]

It has been suggested that every offer which looks to the formation of a bilateral contract contains a collateral offer whereby the offeror binds himself to keep the main offer open upon condition that the offeree will commence to perform his acceptance within a reasonable time, and continue the same to completion.[15] This construction is reasonable, and reaches the proper end. The main offer upon the offeree's commencing to perform becomes irrevocable (as in cases of options), and protects the offeree from an improper withdrawal of the offer. It also protects the offeror, because the obligation is to keep the offer open only so long as the offeree proceeds with his act of acceptance in a reasonable and proper way. At the same time the offeree is free to stop performance at any time, just as an optionee is free to accept or reject the offer which is the subject matter of the option, if he so desires. Interpreting the arrangement in this way seems to construe the transaction as the parties actually intended. The offeree as a reasonable man must have expected that he would have a chance to accept the offer. On the other hand, the offeror could not have expected that the offeree would be bound to perform, because he did not stipulate for a promise. He expressly stipulated against such an obligation and only asked for an act. J. W. M.

11. *Jones v. Durgin* (1885) 16 Mo. 370; *American etc. Co. v. Walker* (1901) 87 Mo. App. 503.

12. *American etc. Co. v. Walker, supra*, note 11.

13. See *supra* note 8.

14. See Williston *op. cit.* sec. 60.

15. McGovney, Irrevocable Offers, 27 Harv. L. Rev. 644. See also, Ballantine, Acceptance of Offers, 5 Minn. L. Rev. 94. Professor Ballantine has collected cases from other jurisdictions which hold an offer to be irrevocable after the offeree has commenced acceptance.