

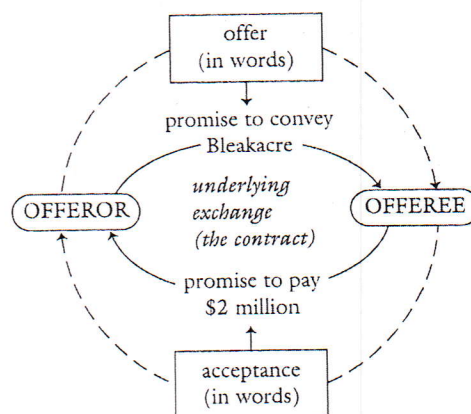
#### 4. The Objective Test and Basic Principles of Offer and Acceptance

acceptance. Second, the distinction does not come up often because most contracts are clearly bilateral.

##### §4.12.2 The Offer for a Bilateral Contract

As stressed in sections 4.5, 4.9, and 4.11, the offeror has the power to prescribe the time, effective date, and method of acceptance. Included in this power is not only the ability to authorize or require a particular medium of acceptance (such as the mails, telephone, or personal delivery) but also a particular action to manifest acceptance. The most common action used to signify acceptance is the use of words, oral or written, to express assent. When words are used to accept, the acceptance invariably constitutes a promise of future performance. For example, if the owner of "Bleakacre" offers to sell it for \$2 million and the offeree replies by expressing acceptance, a contract is created under which both the parties make promises of future performance. The offeror promises to convey the farm and the offeree promises to pay the price. Because, at the point of contract formation, both parties have outstanding promises to be performed in the future, the contract is said to be bilateral. This is represented in Diagram 4B.

Diagram 4B



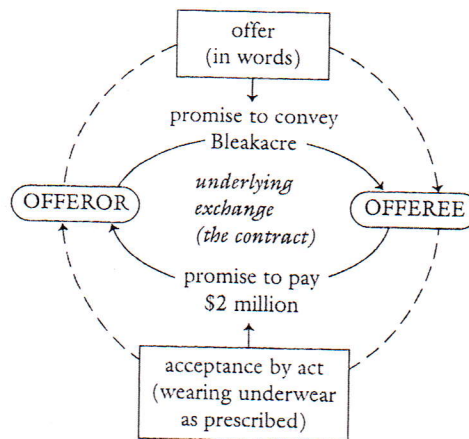
Instead of authorizing acceptance in the form of words, the offeror could demand a nonverbal signification of acceptance. The offer could state, for example, "I offer to sell you 'Bleakacre' for \$2 million. If you wish to accept this offer, you must stand in your underwear at the corner of Main and Broadway at 2 P.M. today. This is the only way that you may accept this offer." If the offeree complies with this request, the offer is accepted. At that point a contract comes into being under which the offeror promises to



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convey "Bleakacre" and the offeree promises to pay \$2 million. Although this offer required the offeree's assent to be signified by conduct instead of words, this is still a bilateral contract. The prescribed act of acceptance has exactly the same legal effect as the delivery of a piece of paper on which the words "I accept" are written. By performing the act, the offeree signifies assent and impliedly promises to perform the consideration (payment of \$2 million) demanded in the offer. This is represented in Diagram 4C.

Diagram 4C



#### §4.12.3 The Offer for a Unilateral Contract

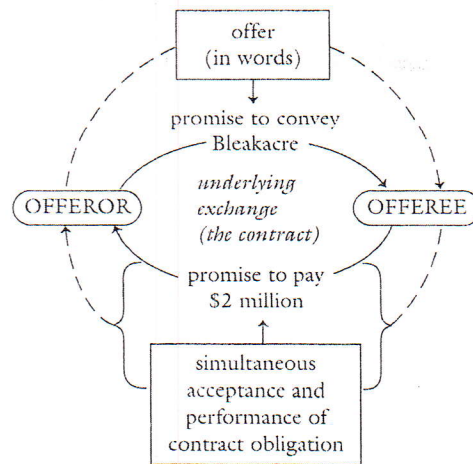
In the last example, the prescribed act of acceptance was merely intended to symbolize assent to the offer. It is nothing more than a mode of acceptance and has nothing to do with the actual performance—the exchange of detriments—called for by the contract. However, the offeror could have structured the offer so that the act of acceptance is not merely symbolical, but is at the same time also the performance of the offeree's side of the contract. For example, the offer could have stated: "I offer to sell you 'Bleakacre' for \$2 million. To accept this offer you must come to my office today at 2 P.M. and pay me \$2 million in cash. This is the only way that you may accept this offer." The act of acceptance is also the complete act of performance. The offeree's consideration under the contract is furnished in full immediately upon acceptance, and the offeree has no further duty under the contract. All that remains is for the offeror to perform the promise in the offer and to transfer title and possession of "Bleakacre." Because, at the moment of formation, only one of the parties



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has a promise outstanding, the contract is said to be unilateral. This is represented in Diagram 4D.

Diagram 4D



Note, therefore, that “unilateral” does not mean one-sided, in the sense that only one party has given or done something. As explained in Chapter 7, a transaction in which one of the parties has made a promise and the other has given or promised nothing in return lacks consideration and is not a valid and enforceable contract. Rather, the word “unilateral” signifies that although both parties have given consideration, only one of them has made a promise as consideration. The other has furnished consideration by rendering the required exchange performance at the very point of contract formation.

#### §4.12.4 When the Offer Does Not Clearly Prescribe Promise or Performance as the Exclusive Mode of Acceptance

In the last example, the offeror made it clear that acceptance could only be made by performance of the offeree’s consideration, so there is no doubt that a unilateral contract was called for. Similarly, the offer could use clear language that makes promise the only permissible means of acceptance. An offeror who really cares about prescribing either a promise or performance as the exclusive mode of acceptance should use clear language to this effect in the offer to remove any doubt as to her intent. However, even in the absence of such clear language, the nature of the contract itself may lead to



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the conclusion that acceptance has to be only by promise, or only by performance. In most contracts, the performance is to take place some time after the prescribed or reasonable time for acceptance, so acceptance by promise is the only permissible mode. For example, an offer of employment, made on May 1, calls for the employee to begin work on June 1, but requires acceptance by May 7. In some cases, even in the absence of express language limiting acceptance to performance, the nature of the transaction makes it clear that the offer may be accepted only by performance. For example, a sign posted on a fence around a construction site reads, "\$1,000 reward to anyone who reports theft of equipment or materials from this site." It is obvious that this offer does not contemplate formation of a contract by a promise to report theft, but may be accepted only by the actual performance of reporting a theft.

However, there are situations in which neither the language of the offer nor its nature and circumstances require either promise or performance to be the exclusive mode of acceptance. If the offer is ambivalent on this question and acceptance by either promise or performance is feasible, the general approach, as reflected in Restatement, Second, §32 and UCC §2.206 (and discussed in section 4.9) applies. The court assumes that the offeror is indifferent to whether acceptance is by promise or performance, so the offeree may choose to accept either way.

For example, the offeror delivers an offer to the offeree on Monday stating, "I offer to sell you 'Bleakacre' for \$2 million. If you wish to buy it, you must pay me \$2 million in cash at my office on Friday at 2 P.M." Clearly, it is a term of the proposed contract that the buyer's performance—the delivery of her consideration under the contract—must take place on Friday at 2 P.M. at the seller's office. However, the offer does not clearly restrict acceptance to the payment of money on Friday at 2 P.M. Therefore, if the offeree is anxious to close the deal immediately and to bind the offeror before Friday at 2 P.M., she could write to the offeror on Monday, stating "I accept." A contract immediately comes into existence on dispatch of the letter. The offeree has accepted by making a promise on Monday to perform as required on Friday, and the offeror's offer immediately becomes a promise to convey the property at some future (unspecified but reasonable) time. The early acceptance by promise creates a bilateral contract that binds both parties. The importance of this is that the offer has now become a contract, so the offeror is bound and has lost the right to revoke the offer. Alternatively, if the offeree chooses not to accept by promise before Friday at 2 P.M., she could show up at that time with the money and accept by performance. Diagrams 4E and 4F represent these alternative choices of acceptance. Diagram 4E represents the offeree's election to accept by promise on Monday, and Diagram 4F shows his election to accept by performance on Friday.



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Diagram 4E. Acceptance by Promise on Monday

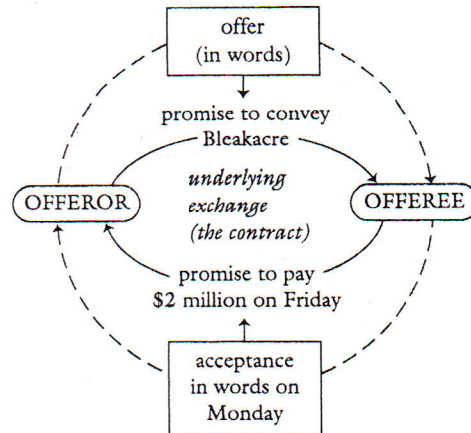
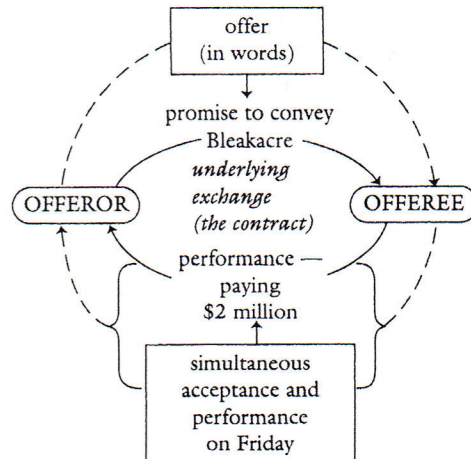


Diagram 4F. Acceptance by Performance on Friday



#### §4.12.5 Acceptance by a Performance That Cannot Be Accomplished Instantly

In the examples concerning the offer to sell "Bleakacre," the offeree's contractual performance was cash payment, a single, relatively instantaneous act. Not all performance can be accomplished in one stroke. For example, "Bleakacre" is run-down and overgrown. The owner writes to her nephew, "If you come down and clean up the property for me this summer, I will pay you \$2,000 when the work is complete. You need not make a decision now."

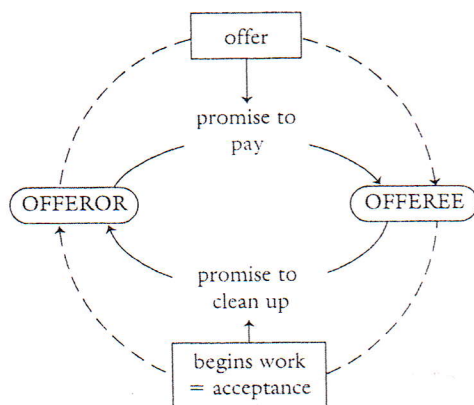
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If you wish to accept my offer, just come down this summer and do the work."

If the nephew did respond early by making a promise, and the aunt thereafter revoked before the summer, we would have to decide if the offer called for acceptance only by performance. We would probably conclude that it did not, because neither the language used nor the circumstances reasonably indicate that performance was intended as the exclusive mode of acceptance. However, assume that the nephew did not make an early promissory reply and that the aunt did not revoke before the summer. The nephew came down in early summer and began the work of clearing the property. Before he completed the task, the aunt changed her mind about cleaning up the property and revoked her offer.

If acceptance only takes place on completion of performance, the nephew risks revocation while he is in the process of performing. To protect him from this risk, Restatement, Second, §§62 and 45 give legal effect to the commencement of performance. Section 62 applies where the offer does not mandate acceptance by performance, so that it can be accepted either by performance or promise. The commencement or tender<sup>17</sup> of performance constitutes an implied promise to complete the performance within the time called for by the offer. Therefore, the commencement or tender of the performance is, in effect, an acceptance by promise creating a bilateral contract. In the present example, as soon as the nephew began work, a bilateral contract came into being under which he was committed to complete the work by the end of summer, and the aunt was committed to pay him \$2,000 on completion. The creation of an implied promise by beginning performance is represented in Diagram 4G.

Diagram 4G



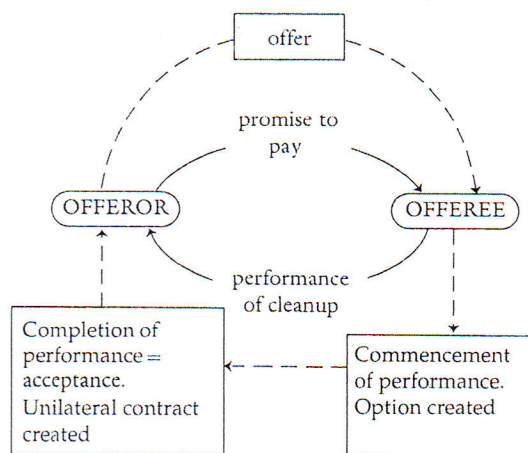
17. A tender is an offer of performance by a party who is willing and able to begin it.



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Restatement, Second, §45 applies where the offer calls for performance as the exclusive mode of acceptance (that is, it is clearly an offer only for a unilateral contract), so that the commencement of performance cannot be an acceptance by promise, because such an acceptance is not authorized. Restatement, Second, §45 treats the beginning or tender of performance as creating an option in favor of the offeree, so that the offeror loses the right to revoke once performance has been tendered or begun. To exercise the option, the offeree must complete the performance in the required time. If he fails to do so, the option is not taken up and the offer lapses. This means that the offeror is discharged from her own performance under the offer, so the offeree receives no contractual payment<sup>18</sup> for the incomplete work. The creation of an option by beginning performance is represented by Diagram 4H.

Diagram 4H



From the offeree's point of view, it is more advantageous to have commencement of performance treated as creating an option instead of an acceptance by implied promise. The latter approach brings the contract into existence as soon as performance begins, so the offeree is bound to complete the work and failure to do so not only precludes his contractual recovery but also makes him liable for damages for breach of contract. This is why the more favorable option approach is confined to the rarer cases where the offeror actually forecloses promissory acceptance.

18. Because the nephew's work may have resulted in an unpaid-for benefit to his aunt, he may be entitled to recover the value of this benefit on the ground that it would unjustly enrich his aunt to allow her to enjoy the benefit of his work without paying for it. That is, he may be entitled to restitutionary relief under the theory of unjust enrichment—a basis of relief distinct from contract. We do not consider this here, but defer discussion of unjust enrichment to Chapter 9.



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The comments to Restatement, Second, §§45 and 62 emphasize that neither the promise nor the option arises merely when preparation for performance starts. The actual performance must be begun or tendered. In some situations it may be relatively clear where the dividing line between preparation and performance is to be drawn, but in others the line could be fuzzy. For example, when the nephew packs his belongings in his car and sets off for the property this is probably preparation, but when he buys necessary tools and equipment for the specific task of clearing the property, this may be closely enough linked to his contract obligation to be actual performance.

##### §4.12.6 Notice When an Offer Is Accepted by Performance

As we have seen, when an offer is accepted by a promise, the offeree must communicate acceptance to the offeror. If an offer is accepted by performance, the acceptance normally comes to the offeror's attention as a matter of course, because the offeror receives the performance. Unless the offer requires notice of performance, the offeree ordinarily has no duty to take action to notify the offeror of acceptance. However, the offeree does have a duty of notification if the performance in question is not rendered directly to or in the presence of the offeror and the offeror has no reasonably prompt and reliable means of learning of it.

Say, for example, that the owner of "Bleakacre" does not live on the land but resides in a distant state. She has no contacts in the area and is not likely to visit the property because she is elderly and in poor health. If her nephew responds to her offer not by promise, but by commencing the clearing work, she is not likely to learn of his acceptance unless he tells her. Therefore, although the nephew may accept by performance and need not communicate with the aunt to accept, he is required to notify her within a reasonable time after commencing performance if he knows or should know that she has no means of learning of his acceptance with reasonable speed and certainty. This notice is not itself the acceptance, which occurred as soon as performance began, but if it is not given (and the aunt does not otherwise hear of the performance) within a reasonable time, the acceptance becomes ineffective and the aunt's contractual duty is discharged.

##### §4.12.7 Reverse Unilateral Contracts

A reverse unilateral contract comes about when the offeree accepts by promise, but the offeror's performance occurs and is completed at the instant of contract formation. This is also a unilateral contract because only one party—the offeree in this case—has a promise outstanding at