

Waver

American Law Institute  
Contracts, Restatement of C-1012

0

10

6-15-20 1923

711525

**THE LAW OF CONTRACTS.**

CHAPTER 1.

DEFINITIONS.

SECTION 1. Contract. A contract is a promise or set of promises of which the law seeks to compel the performance or to punish the non-performance.

*Comment:* A contract may consist of a simple promise by one person to another, or mutual promises by two persons to one another; or, there may be, indeed, any number of persons or any number of promises. One person may make several promises to one person or to several persons, or several persons may join in making a single promise to one or more persons. The essential fact determining that only a single contract has been formed is that the promises shall all be a part of a single transaction.

It has been pointed out<sup>1</sup> that the word contract is often used to express indifferently:

1. The acts which create the legal relations between the parties;
2. A writing which is itself such an act, or which is the evidence of such acts;
3. The legal relations resulting from the operative acts.

As here defined, contract is used with a slight modification of the first meaning, for not all the operative acts which are essential to create the legal relations between the parties are included. Consideration is necessary to make a simple contract, but the consideration of a unilateral contract is not part of the

<sup>1</sup> Corbin's edition of Anson on Contracts, page 13, note 2.

<sup>2</sup> See Treatise, § 1.

0

contract as here defined. Similarly, delivery is necessary to make a sealed promise binding, but delivery is not part of the contract. This definition is adopted partly because it is believed that it is, after all, the prevailing meaning in ordinary legal speech and writing, but also because it keeps clearly before the mind the essential basis of contractual liability, namely, that promises, if made in due form or if <sup>sufficient</sup> consideration is given for them, should be kept according to their terms. The expressions contractual rights and contractual duties accurately and clearly give the third meaning. As to the second meaning, when a writing is itself the act which creates the legal relation, the first meaning is inclusive enough to cover the situation. If a writing is merely evidence of the promises of the parties, it conduces to clearness of thinking to call it so.

SECTION 2. Contracts may be classified as express or implied; as formal or simple; as unilateral or bilateral.

SECTION 3. Express contracts are those in which the promise or promises are stated in express words whether oral or written. Implied contracts are those in which the promise or promises are inferred from acts or circumstances which justify the promisee in understanding that the promisor intended to make such promise or promises, although the intention was not manifested in words.

*Comment:* Implied contracts must be distinguished from quasi contracts which have often also gone by the name of implied contracts, or contracts implied in law. Quasi contracts unlike true contracts are not based on the apparent intention of the parties, but are imposed by law for reasons of justice without

reference either to actual or apparent intention. Such obligations were ordinarily enforced at Common law in the same form of action (assumpsit) that was appropriate to true contracts, and some confusion with reference to the nature of quasi-contracts has been caused thereby.<sup>2</sup>

*Illustrations:*

A telephones to his grocer "Send me a barrel of flour." The grocer sends a barrel. A has thereby impliedly contracted to pay a reasonable price for the flour.

A on passing a market, where he has an account, sees a box of apples marked "5 cts. each." A picks up an apple, holds it up so that a clerk of the establishment sees the act. The clerk nods, and A passes on. A has impliedly contracted to pay 5 cts. for the apple.

Mrs. A for justifiable cause has separated from A and, in order to secure clothing and supplies, has charged their cost to A. A is liable though he has given express notice not to furnish his wife with such supplies; but his liability is not contractual, it is quasi-contractual.

SECTION 4. A promise is an undertaking that something shall happen, or shall not happen, in the future whether caused by the promisor or not. An undertaking as to the happening or failure to happen of something not within human control or as to the existence of a present or past state of facts is in effect a promise or undertaking to be answerable for such proximate damage as may be caused by the failure to happen or the happening of the specified event, or by the nonexistence of the asserted state of facts.

<sup>2</sup>Treatise, § 3.

*Comment:* The word promise, though in ordinary use, frequently bears different shades of meaning. It is sometimes understood to imply necessarily that the promisor shall cause what is promised to occur. But so far as legal conceptions in the law of contracts are concerned, it is immaterial whether a party to a contract undertakes that he will personally do something or that he will cause someone else to do it, or that it shall happen, though human agency is powerless to promote or prevent the happening. Even where the undertaking relates to an existing or past fact, as in case of a warranty that a horse is sound, or that a ship arrived in a foreign port some days previously, the law deals with the undertaking in the same way as if the warrantor could cause the fact to be as he asserted. Such contracts are made when the parties are ignorant of the actual facts regarding which they bargain, and in view of their ignorance it is immaterial for purposes of contract that the actual condition of affairs is irrevocably fixed before the contract is made.

A promise must be distinguished from mere prophecy. As even a promise unless under seal is binding only if sufficient consideration is given for it, and statements sounding merely in prophecy are not ordinarily given for consideration, the distinction is not usually difficult. The problem is, however, sometimes presented in determining whether a seller's words amount to a warranty.

*Illustrations:*

A on seeing a house of thoroughly fire-proof construction says to the owner "This house will never burn down." This is not a promise but merely a prophecy.

The builder of a house, or the inventor of the material used in part of its construction, says

“I warrant that this house will never burn down.” This is in effect a promise to be answerable for any proximate damage if the house should burn down and if made for sufficient consideration is a contract.

SECTION 5. Formal contracts are those in which the binding force or the effect of the obligation depends upon the transaction being given a certain form as distinguished from having substantial attributes. Contracts of this sort in English and American Common law are:

1. Promises under seal
2. Recognizances
3. Negotiable instruments.<sup>3</sup>

SECTION 6. A written promise to which the promisor attached a seal constituted at common law a contract when delivered by the promisor and this still remains true where the effect of seals has not been abolished or altered by local statutes.

*Comment: Full discussion of sealed contracts is deferred until §§——<sup>4</sup>*

SECTION 7. Recognizances are acknowledgments in court by the recognizer that he is bound to make a certain payment unless a specified condition is performed, and are binding promises to that effect, because of the formality of the acknowledgment in court.

*Comment: Recognizances are in use only to secure the attendance in court at a future day of the person giving the recognizance.<sup>5</sup>*

SECTION 8. The instruments which are negotiable by virtue of the custom of merchants, are Bills of

<sup>3</sup> Treatise, § 4.

<sup>4</sup> Treatise, § 5.

<sup>5</sup> Treatise, § 6.

Exchange, and Promissory Notes. The formal requisites of such instruments are an unconditional written and signed order or promise to pay a sum of money, certain in amount, at a fixed or determinable future time, to the bearer or to the order of a named person, without the addition of other orders or promises, except subsidiary ones intended merely to give the holder of the instrument greater certainty of obtaining the principal sum promised. In modern times the custom of merchants has been extended to bonds payable to order or bearer. Such bonds have been held not deprived of negotiability because of being sealed, though in the earlier law no sealed instrument was negotiable. By statute also, in many states, bills of lading and warehouse receipts if running to bearer or the order of a specified person, have been given the attributes of negotiability.

*Comment:* The foregoing section is inserted for the purpose of definition, but detailed treatment of the instruments referred is out of place here.<sup>6</sup>

SECTION 9. Simple contracts are those which derive their legal force from the substance of the transaction rather than from its form. They may be written or oral, and, except as statutes have made written evidence of certain contracts essential for their enforceability, there is no difference in the requisites for the formation of written and oral contracts or in their respective binding force.

*Comment:* A written contract is regarded as a simple contract and, therefore, requires the same elements for validity as an oral contract. Even promissory notes and bills of exchange are often called simple

<sup>6</sup> Treatise, § 7.

contracts though they derive certain peculiar legal incidents from their form. They are ordinarily called simple contracts because consideration is essential for the creation of an obligation between immediate parties to such an instrument as maker and payee, indorser and immediate indorsee.

By the English statute of frauds enacted in 1677, a number of contracts were made unenforceable unless in writing. The major part of this statute has been reenacted in all of the United States, and other contracts besides those enumerated in the English statute have frequently been subjected to the same requirement. Such statutes are dealt with hereafter in sections.....

Reducing any contract to writing is, however, not without legal consequences because of the so-called parol evidence rule. Where a contract has not been reduced to a writing accepted by the parties as a final statement, any evidence showing the intent of the parties as expressed to one another is admissible for determining the provisions of the contract. But if the parties have agreed upon a writing as the expression of their intent the terms set forth in the writing conclusively fix the terms of the contract.<sup>7</sup>

Moreover, in a number of states by statute a written promise is presumed to have been made for sufficient consideration, though lack of consideration if proved establishes the legal nullity of the promise. In a very few states, the local statutes enact that the written promise, like a sealed contract at common law, shall be binding without consideration.<sup>8</sup>

SECTION 10. A unilateral contract is one where one person only or several persons acting as a unit make a promise or promises. A bilateral contract is

<sup>7</sup> See *infra*, §§ .....

<sup>8</sup> Treatise, § 218.

one where there are mutual promises between parties to the contract.

*Comment:* This designation of contracts has sometimes been criticized, but it is not only true that some brief name for each of the two kinds of contracts thus defined is essential, and that the names given in the above definition are now in common use by lawyers and courts, though only in recent years, but also that the names accurately describe a fundamental distinction between two classes of contracts.

In a unilateral contract there is in fact a contract on one side only. There are two parties to the contract it is true, and an expression of assent on the part of each is necessary to its formation. But the requisites for making the contract should not be confused with the contract itself. The contract is merely the promise, not the mutual expression of assent nor the consideration paid for the promise. In a bilateral contract, on the other hand, as there are binding promises on both sides, the contract is properly called bilateral.

Contracts are possible where there are more than two parties, but even in such cases, in disputes between any two of them, the principles applicable to the simpler forms of contracts will generally aid in the analysis of the rights and duties of the parties.<sup>9</sup>

SECTION 11. A promise or a set of promises which produces no legal obligations is often called a void contract, but this is a contradiction in terms under the definition of contract in section one.

*Comment:* In Jenks' Digest of English Civil Law, Section 182, a contract is defined as including any agreement where the parties *intended* to create a legal obligation; and under this nomenclature which, however, seems artificial, an agreement which the parties intend shall create such an obligation but which does

<sup>9</sup> Treatise, § 13.



not accomplish their intention, may properly be called a void contract.<sup>10</sup>

SECTION 12. A contract is called voidable when one or more parties thereto have the power, by a manifestation of election to do so, to invalidate the contract with the consequence either of entitling the party or parties so electing to be restored to a position as good as that which he occupied immediately before the formation of the contract, or of leaving the status of the parties in the same condition as existed at the time of the avoidance. Usually the power of avoiding a contract is confined to one party, but sometimes is allowed in favor of all the parties.

*Comment:* Typical instances of voidable contracts are those where one or both parties are infants, where the contract was induced by fraud, mistake, or duress; or where a breach or warranty or other promise justifies the injured party in rescinding or avoiding a bargain. Usually the right to avoid is confined to one party or one side of the contract, but, where for instance, both parties are infants, or where both parties entered into the contract under such a mutual mistake as would afford ground for relief by a court of equity, the contract may be voidable by either one of the parties to it. Where this is the case the propriety of calling it a voidable contract rather than calling the transaction void, is due to the fact that action is necessary in order to prevent the contract from producing the ordinary legal consequences of a contract; and often this action in order to be effectual must be taken promptly.

It is in many cases a condition qualifying a right of avoidance that the original status of the parties can be and shall be restored at least substantially, but

<sup>10</sup> See Treatise, § 15.

this is not necessarily the case. An infant for instance is in many jurisdictions allowed to avoid his contract without this qualification. When an infant exercises his privilege, the parties frequently are left in a very different status from that which existed when the contract was made.<sup>11</sup>

SECTION 13. Contracts may be unenforceable though not falling within the definition of voidable contracts or of void transactions. A contract may be unenforceable from lack of such evidence as the law requires—as in case of contracts within the Statute of Frauds where the statute has not been satisfied. So contracts with the Government are not enforceable in any ordinary sense since even if the Government allows itself to be sued, it does not allow execution to be levied on its property. Yet contracts of both these classes may give rise to legal consequences which are not capable of avoidance.

*Comment:* Both voidable and what have been called unenforceable contracts frequently involve a power on the part of one or the other of the parties to the contract to create the full contractual rights and duties of an ordinary contract. If this were their only effect the propriety of calling them contracts until the power was exercised might be questioned; but in the transactions classified under this heading some consequences follow without any further action by either party. In a voidable contract there is rather a power to avoid than a power to create. In an unenforceable contract the difficulty is usually that the ordinary procedure for enforcing contracts is not permitted but various collateral consequences flowing from the transaction may indicate a recognition by the law of rights and duties arising therefrom.<sup>12</sup>

<sup>11</sup> Treatise, § 15.

<sup>12</sup> Treatise, § 16.

*Illustrations:*

A is indebted to B, but the Statute of Limitations has barred the remedy. As will be seen, *infra* §——A has the power to create an enforceable simple contract without consideration by making a new promise or part payment of the debt. But even without such further acts, legal consequences may flow from the barred debt. If the creditor has security, he may apply it towards payment of the debt. If the creditor becomes executor of the debtor he may retain the amount of the debt in accounting for the estate. If he can obtain service of process on the debtor in another jurisdiction, the debt may be enforced unless enforcement is prohibited by the laws of that jurisdiction.

A has a claim against a foreign government for some injury committed by the citizens of that Government in violation of International law. The only method by which A can obtain compensation is through diplomatic negotiations entered into by his own country with the offending government, and if the latter Government makes a payment on account of the injury, it will be made not to A but to A's Government, from which A cannot obtain it by any legal remedy. Yet legal consequences flow from the fact that A claims the money as of right rather than as a favor. Any money ultimately obtained by him will be regarded as money to which he was entitled from the time of the injury. Therefore if he becomes bankrupt after the injury, but before the payment, the money will belong to his trustee in bankruptcy and not be dealt with as after-acquired property.

## CHAPTER II.

## FORMATION OF SIMPLE CONTRACTS.

## A.

## GENERAL PRINCIPLES.

SECTION 14. The requirements of the law for the formation of a simple contract are:

1. One or more promisors and one or more promisees having legal capacity to contract.

2. An expression of mutual assent by the parties to a promise or set of promises.

3. An agreed valid consideration, except in cases governed by section 83.

It is also essential that an agreement, though satisfying these requirements, shall not be declared void by statute or Common law.

*Comment:* The explanation of these requirements will be given in the following sections.<sup>13</sup>

SECTION 15. There must be at least two parties to the formation of a contract, but may be any greater number.

*Comment:* It is not possible for a man to make a contract with himself. This rule is one of substance and independent of mere procedural requirements. Even though a man has different capacities, as for instance as trustee, as executor, as partner, as an individual, it is impossible as matter of substance for him by his own individual will or expressions to create a contract. As will be seen under the following sections, it is another question whether a contract may be formed in which the same person is one of several parties on one side of a bargain, when he is either a sole party or one of several parties on the other and the question is also distinct whether a

<sup>13</sup> Treatise, § 18.

contract is necessarily discharged where one party becomes both obligor and obligee and there are no other parties to the contract.

Several persons may act together, as in the case of a partnership, either as promisors or promisees, and where parties are thus acting jointly, they are for many purposes regarded as a single unit. But there are also contracts in which a number of persons are parties and where each has several interests. Thus any number of persons may promise a certain performance to one or any number of persons in return for acts or counter-promises, and all may be part of the same transaction.

*Illustrations:*

A, B, C, and D, enter into a written contract by which A makes certain promises to B, other promises to C, other promises to D. B, C, and D jointly make a promise to A in return, or severally promise different things to A in return. This is a valid contract, and innumerable variations may be made from this illustration in regard to the number of parties and the various promises which they may make jointly or severally, or in groups of two or more.

A as trustee signs and seals a promise to himself as an individual or as an executor. The instrument is void.

**SECTION 16.** Where there are several promisors in a contract, some or all of them may promise jointly as a unit, or some or all of them may each promise severally. Similarly, where there are several promisees in a contract promises may be made to some or all of them jointly as a unit or to some or all of them severally.

*Comment:* Common law procedure recognized the possibility of but two sides to a litigation, that of the plaintiff and that of the defendant. Either the side of the plaintiff or that of the defendant might be represented by several persons, but all the persons joined as plaintiffs must have a common right, and all the persons joined as defendants must be subject to a common liability.

As matter of substantive law, however, there seems no reason why an indefinite number of parties should not contract with one another; each one of the parties or groups of the parties promising either one or any number of the others, whether dealing with them jointly as a unit or individually. If all the promises were entered into as part of a single transaction, they may properly be said to form part of one contract.

In equity there has never been the requirement that all the parties to a suit must represent merely two units; one seeking to enforce a right against the other. On the contrary, any number of diverse and conflicting interests can be dealt with under equity procedure; and in the code procedure, now enacted in most of the United States, the same thing is true.

SECTION 17. A unilateral or a bilateral contract may be formed between several persons acting as a unit and one of these persons acting either singly or with other persons.

*Comment:* The rule thus expressed is at variance with the Common law. That law recognized the possibility of a contract only between two separate legal persons or entities.<sup>14</sup>

How far this rule was one of substantive law and how far dependent on the procedural rule or assumption that no man would sue himself, need not be considered. The rule would cause no difficulty if the

<sup>14</sup> 1 Ames' Cases on Bills and Notes, page 133, n.

law had recognized a partnership, a trust, an unincorporated association a decedent's estate, as legal entities; but this the law never did, though parties to transactions continually act on the assumption that dealings may be made with such interests as if they were separate persons from the individuals who represent them. So vital is it to business interests to recognize the validity of a note given by a partner to a partnership of which he is a member, and the obligation of a member of an unincorporated society to pay debts he has incurred to the society, that in spite of the rule of the Common law stated above, such obligations have been enforced either in equity or by virtue of an assignment, any difficulty in the situation being treated as merely procedural.<sup>15</sup>

It seems desirable to recognize that a contract is not impossible merely because the same person is on both sides of the transaction, provided that on one side at least he is acting jointly with others. If A should attempt to contract with A, B and C severally, no legal relations would be created by the attempt of A to contract with himself, though legal relations might arise between him and B and C.

The rule stated in section 17 does not touch upon the *rightfulness* of making such contracts as fall within its terms. In a particular case such a contract might be voidable for fraud or for other reasons.

*Illustrations:*

A is a member of an unincorporated society, and as such has agreed to pay dues to the society. He is bound by a contract.

A, a trustee of an estate jointly with B has entered into a written agreement by which he individually has agreed to buy and A and B as

<sup>15</sup> Treatise, § 308.

trustees have agreed to sell a piece of land belonging to the trust. This is a contract, and though voidable by the beneficiaries if made without either their consent or the authority of a court may at the election of the beneficiaries be enforced by them.

SECTION 18. No one can be bound by contract who has not legal capacity to incur at least voidable contractual obligations.

*Comment:* The statement in this section is perhaps a truism, but it should be made. The effect of lack of contractual capacity of one party to a transaction on the promises of the other parties is considered hereafter in section——.

Contractual incapacity may be total or may be only partial. It is only where his contractual incapacity is total that it can be laid down broadly that a party to a transaction cannot enter into a contract. The particular instances of partial and total incapacity are considered subsequently in sections—.<sup>16</sup>

## B.

### EXPRESSION OF ASSENT.

SECTION 19. An expression of mutual assent by the parties to a proposed simple contract is essential to its formation; but neither actual assent thereto nor real or apparent intent that the promises of the parties shall be legally binding is essential.

*Comment:* It is customarily said that mutual assent is essential to the formation of simple contracts, but it is clear that such assent is operative only to the extent that it is expressed. Moreover, if the expression is at variance with the mental intent it is the expression which is controlling. It is obvious therefore that not actual mutual assent but an expres-

<sup>16</sup> Treatise, § 222, *et seq.*



sion indicating such assent is what the law requires. Nor are the views of the parties as to the legal relations which their words or acts give rise to, material.<sup>17</sup>

*Illustrations:*

A offers to sell B his library at a stated price and B accepts the offer. A had forgotten that his family Bible, which he did not intend to sell, was in the library. B is entitled to have the Bible.

A orally promises to sell B a book in return for B's promise to pay \$5. A and B both think such promises are not binding unless in writing. Nevertheless, there is a contract.

SECTION 20. Assent may be expressed by acts.

*Comment:* Words are not the only medium of communication. Acts may often convey as clearly as words a promise or an assent to a proposed promise,<sup>18</sup> and where no particular requirement of form is made by the law as a condition of the validity or enforceability of a contract, there is no distinction in the effect of a contract whether it is expressed (1) in writing, (2) orally, (3) in acts, or partly in one of these ways and partly in others. Illustrations are given under Section 3.

SECTION 21. The expression of mutual assent must be made, with exceptions so rare as to be negligible, by an offer or proposal by one party accepted by the other party or parties.

*Comment:* This rule is rather one of logic or necessity than of law. In the nature of the case one party must ordinarily speak first and announce what he will do before there can be any expression of mutual

<sup>17</sup> Treatise, §§ 20, 21.

<sup>18</sup> Treatise, § 22a.

assent. It is theoretically possible for a third person to state a suggested contract to the parties and for them to say simultaneously that they assent to the suggested bargain, but such a case is so unlikely as to be practically negligible.<sup>19</sup>

SECTION 22. It is essential to the existence of an offer that it be communicated by the offerer to the offeree; but if an offeree who, owing to his own negligence, is ignorant of the exact terms of an offer nevertheless expresses assent thereto, a contract is formed.

*Comment:* Two expressions of willingness to make the same bargain do not constitute a contract unless one is made with reference to the other.<sup>20</sup> An offeree, therefore, cannot accept an offer unless it has been communicated to him by the offeror. This may be done through the medium of an agent but mere information indirectly received by one party that another is willing to enter into a certain bargain is not an offer by the latter. If, however, an offeree knowing or having reason to know that an offer has been made to him manifests assent thereto, he cannot assert his ignorance of the terms of the offer as proof that no contract has been formed.<sup>21</sup>

*Illustrations:*

A advertises that he will give a specified reward for certain information; or writes to B a similar proposal. B gives the information in ignorance of the advertisement, or not having received the letter.

A sends B an offer through the mail to give \$500 for B's horse. While this offer is in the mail, B, in ignorance thereof mails to A an offer

<sup>19</sup> Treatise, § 23.

<sup>20</sup> Treatise, § 23.

<sup>21</sup> Treatise, § 35.

to sell the horse to him for \$500. There is no contract.

A sends B a proposed written contract for B's signature. B signs it without reading it, or if he is blind or unable to read, without having it read to him. There is a contract.

SECTION 23. An offer is, with rare exceptions, a promise, and may be a contract if the requisites of a formal or simple contract exist.

*Comment:* An offer necessarily looks to the future. It is an expression by the offeror of his agreement that something shall be done or shall not be done if the conditions stated in the offer are complied with. Even in cases which seem at first sight to involve no promise by the offeror, analysis will disclose that such a promise exists, if the word is given the definition in section 4. If the owner of a chattel says to another in whose possession the chattel happens to be, "you may have that chattel if you promise to pay me \$5 for it," it may be urged that the offeror is expected to do nothing in fulfillment of his offer; that he has simply given a power to the offeree by virtue of which the latter on promising to pay the price will immediately become owner of the chattel. But though the owner need do nothing in fulfillment of his offer, and though it is self-operative if accepted, it nevertheless involves a promise on the part of the offeror that the offeree shall have this power during the continuance of the offer. This is shown by the fact that the offeror would be liable to the acceptor if he had no title to the chattel and therefore the offeree acquired none by his acceptance; yet the question whether the words of the offeror amount to a promise can hardly depend on the extrinsic facts determining his ownership or lack of it. In fact, though the offeror is to do

nothing, he does undertake or promise that something shall come to pass on the performance of the condition stated in the offer.

But it may be supposed that the offeror does not undertake that the buyer shall be owner of the chattel; he may say to the bailee, you shall have all the right, title and interest that I may have in the chattel on making me a promise to pay me \$5. Is not this a mere revocable power? How does it differ in effect terms of the offer but because, there having been no a revocable power to acquire the ownership, if any, which I posses."?

In terms there is even here a promise. The fact that the power is revocable is not because of the terms of the offer but because, there having been no consideration, the law treats the offer as revocable even though the offerer says it shall not be. It may fairly be said that an offer lapses in a reasonable time because that is the natural meaning of an offer not expressly limited, but that an offer can be revoked immediately is not due to the natural meaning of its words. It is not a rule of interpretation, it is indeed a contradiction of the natural meaning of the offer.

Consequently, an offer which does not in terms state that it is revocable includes a promise, though not a binding promise, that the power given by the offer shall continue for the period named in the offer, or, if no period is named, for a reasonable time.

It may ultimately be supposed, however, that an offerer says to one in possession of a chattel belonging to the offeror—"I give you a power to acquire such title as I have if you promise to pay me \$5, but I reserve the right to revoke this power at any moment." Or, what amounts to the same thing, he may say—"I offer you my interest in this chattel in return for your promise of \$5 but I may revoke the offer at any moment." Such a promise, if it can be

called a promise of the offeror, is certainly illusory and the offer gives a bare power to the offeree, revocable at any moment.<sup>22</sup>

The case thus supposed is so unusual that for practical purposes the generality of the statement in this section seems justified.

The matter seems worth emphasizing for confusion sometimes is caused by regarding an offer and a contract as antithetical. But since an offer is a promise, and as a promise becomes a contract if consideration is given for it or if it is under seal (where the Common-law effect of seals is unchanged) an offer may also be a contract.

*Illustration:*

A offers Blackacre to B at a stated price in a writing under seal. Subsequently, within a reasonable time for acceptance, A informs B that the offer is revoked. The revocation is ineffectual.

SECTION 24. If from a promise, or expression of intention, or from the circumstances existing at the time, it should be reasonably apparent to the person to whom the promise or expression is addressed that the person making it does not intend to be bound legally until he has given a further and final expression of assent, he has not made an offer.

*Comment:* It is often very difficult to draw an exact line between offers and negotiations preliminary thereto. It is very common for one who wishes to make a bargain to try to induce the other party to the intended transaction to make the definite offer, he himself suggesting with more or less definiteness the nature of the contract he is willing to enter into. Besides any direct language indicating an intent to defer the formation of a contract the definiteness or indefiniteness of the words used in opening the negoti-

<sup>22</sup> Treatise, § 25.

ation must be considered, and also the customs of business, and indeed all surrounding circumstances.<sup>23</sup>

*Illustrations:*

A, a clothing merchant, advertises a certain kind of overcoats for sale at \$50. This is not an offer but an invitation to the public to come and purchase. It is entirely possible to make an offer by advertisement, but ordinarily mercantile advertisements are not so construed, partly because it cannot reasonably be supposed that a merchant would subject himself to the chance of an indefinite number of persons accepting his offer and thereby rendering him possibly liable for an amount of goods beyond his supply, and partly because custom has authorized a rather liberal degree of preliminary chaffering before a bargain is considered complete.

A writes to B, "I can quote you flour at \$5 a barrel in carload lots." This is not an offer. The word "quote" indicates that the writer is simply naming a current price which he is demanding.

A advertises that he will pay \$5 for every copy of a certain book that may be sent to him. This is an offer and A is bound to pay \$5 for every book sent while the offer is unrevoked.

A writes to B, "I am eager to sell my house. I wish to get \$20,000 for it." B promptly answers saying, "I will buy your house at the price you name in your letter." There is no contract. A's letter is a mere request or suggestion that an offer be made to him.

A corporation or municipality advertises for a bid, or tender, for certain work. This is not an offer but a request for offers. If, however,

<sup>23</sup> Treatise, § 27.

the advertisement expressly states that the highest bidder shall receive the award, this amounts to an offer, and the highest bid creates a contract unless there are other conditions imposed by the terms of the advertisement or by statute which have not as yet been complied with; as for instance, that the contracts of a municipality must be in writing.

SECTION. 25. Where it is mutually understood by the parties to a transaction that a written memorial of their agreement shall be prepared and signed by them, there may, nevertheless, be a contract prior to the making of the writing if the parties definitely assent to all the terms of an agreement, unless they indicate in some other way than by the expression of their purpose to make a written statement or memorial of their bargain, an intention that no legal obligation shall arise until that has been done.

*Comment:* A common and difficult situation is presented by this section. Parties who plan a written contract necessarily discuss its proposed terms before they enter into it, and often, before the writing is made, agree on all the terms which they plan to incorporate therein. There is no impossibility of making an oral contract to execute subsequently a written contract which shall contain certain provisions, and if parties have definitely agreed that they will make a written contract, and that a written contract shall contain certain provisions and no others, they have then fulfilled all the requisites for the formation of a contract. On the other hand, if the preliminary agreement is incomplete, it being apparent that the determination of certain details is deferred until the writing is made out; or if an intention is manifested in any way that legal obligations between the parties shall be deferred until the writing is made, the preliminary

negotiations and agreements do not constitute a contract.<sup>24</sup>

SECTION 26. At an auction, as ordinarily carried on, the auctioneer is not an offerer, but is one who invites offers from successive bidders. A contract is formed with a particular bidder when the auctioneer by letting the hammer fall, or by other clear indication of his purpose, announces that a contract or sale has been made.

*Comment:* An auction furnishes an illustration of the principle stated in Section 25. It has been argued that the auctioneer, by beginning to auction property, impliedly says: "I offer to sell this property to whichever one of you makes the highest bid." But it seems a more accurate interpretation of the facts to say rather that the auctioneer requests that the bidders make offers to him, as indeed he frequently states in his remarks to those before him.

It is a corollary of the principle stated in the section that a bidder may withdraw his bid any time before the fall of the hammer; a bid is merely a revocable offer.<sup>25</sup>

SECTION 27. One who announces that he will sell property at auction on certain terms thereby makes an offer to anyone who, relying thereon, attends the auction that he will observe those terms if the auction takes place; and as soon as bids are requested by the auctioneer for a particular article or piece of property the person who makes the announcement is subject to a contract to carry out the sale of that article or piece of property according to the terms announced.

*Comment:* Since it appears from the previous section that the bidder makes the offer and may re-

<sup>24</sup> Treatise, § 28.

<sup>25</sup> Treatise, §§ 29, 30.



tract it until the fall of the hammer, it would seem to follow that the auctioneer should be similarly free. If the offeror is not bound to buy, how can the auctioneer be bound to sell? This argument is unanswerable unless the auctioneer by merely announcing the proposed sale makes an offer to those who relying on the announcement shall attend the sale. In England it has been decided that such is the proper construction of the facts, and, though the cases in the United States do not go so far, it has been enacted in a majority of the states that if it has been announced that the goods will be sold without reserve, they cannot be withdrawn after the bidding has begun. It seems in conformity with justice and not too great a strain on the facts to hold that the reliance of those who attend the auction should be sufficient to impose liability on the seller to perform his promise with reference to any article or piece of property actually put up for sale. That is the offer made by the announcement is conditional—if the goods are sold they will be sold on the terms announced.<sup>26</sup>

*Illustration:*

A advertises a sale of his household furniture without reserve. An article is put up for sale at the auction and B is the highest *bona-fide* bidder; but A dissatisfied with the bidding either accepts a higher fictitious bid from an agent employed for the purpose, or openly withdraws the article from sale. He also withdraws all the rest of the furniture from the sale. In either case A is bound by contract to B to sell to him the article on which he was the highest *bona fide* bidder, but neither B nor the others at the auction have legal ground for complaint that the remainder of the furniture not yet actually put up for sale is withdrawn from sale.

<sup>26</sup> Treatise, § 30.

SECTION 28. The consideration requested in an offer for a unilateral contract must be furnished with the intent of accepting the offer.

*Comment:* When an offerer requests a certain act or forbearance as the consideration for his promise, the act or forbearance when furnished is ambiguous expression of intent, for acts like words often have more than one meaning. It may mean that the offeree accepts the proposal, but it is possible that the true meaning is that the offeree as a free man has exercised his privilege of acting or forbearing in the manner requested, without intending thereby to accept the proposal. The only way to determine what his conduct actually means is to ascertain his intent. The intent is not a contractual element in itself but it is essential in order to determine the meaning of the offeror's act.

*Illustration:*

A offers a reward for information leading to the conviction of a criminal. B gives the information under circumstances justifying the conclusion that he did not intend thereby to secure the reward but was wholly induced by motives of fear or public duty. There is no contract. It is not enough, however, to deprive B of the reward that, induced by such motives, he would have given the information in any event, provided he did intend, when he gave the information, to accept the proposal in the advertisement.

SECTION 29. An offer may be made to a specified person or persons, or it may be made to anyone or to everyone who shall perform or refrain from performing a specified act or shall make a specified promise.<sup>27</sup>

<sup>27</sup> Treatise, § 32.

*Illustrations:*

A makes an offer of reward to whomsoever will give him certain information. B gives this information and afterwards C gives the same information. There is a contract with B but not with C, as the offer properly interpreted is a proposal to the first person only who gives the information, since it is obvious that a repetition of the information can have no value.

A bank issues a letter of credit promising to repay anyone who makes advances to the holder of the letter up to a certain amount. B advances money on the faith of the letter within the specified amount. The bank has contracted with B.

A offers \$100 to anyone who contracts a certain disease after using a specified medicine as directed. B, C, and D severally use the medicine as directed and contract the disease. A has contracted with each of them to pay him \$100.

SECTION 30. 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.

*Illustration:*

A offers B one hundred tons of coal at \$15 a ton payable in 30 days. B's mere assent creates a bilateral contract.

A offers B any amount of coal up to one hundred tons, for which B will promise to pay \$15 a ton. In order to accept this offer B must specify the amount of coal he desires.

A offers to sell B in monthly instalments the coal which B may require in his business during

the next six months, not exceeding one hundred tons in any one month. It is a question of construction under all the circumstances of the case whether this offer is for a series of contracts to be formed from time to time during the next six months, or is for a single contract to be made immediately by which B undertakes to buy all he requires up to one hundred tons monthly. On the bare facts given the latter is the true construction.

SECTION 31. 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 contract may consist of any number of promises, and where several promises are made it may become important to determine whether they are all part of one contract. The controlling principle is this: If all the promises form part of the same bargain, there is but one contract, unless one or more of the promises are in the form of a negotiable instrument or are under seal, and other promises are not. In that event because of the formal character of negotiable instruments and promissory notes, there are technically several contracts, though all may be examined to determine the meaning of each. An offer, similarly, 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.<sup>28</sup>

SECTION 32. In case of doubt it is presumed that an offer invites the formation of bilateral contract by an acceptance amounting in effect to a promise by the acceptor to perform what the offer requests, rather

<sup>28</sup> Treatise, § 58.

than the formation of one or more unilateral contracts by actual performance on the part of the offeree.

*Comment:* Parties frequently use language in exactly, and 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 such a contract was proposed.<sup>29</sup>

SECTION 33. The whole consideration requested by an offer must be given after the offeree knows of the offer.

*Comment:* If part of the consideration requested has been given gratuitously or as part of a bargain, before the offeree is aware of the offer, performance of the remainder will not create a contract.<sup>30</sup>

SECTION 34. 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; or some standard must be provided for making them certain other than the will of the party himself who makes the promise or who is to render the performance.

*Comment:* This rule is one of necessity as well as of law. In the nature of the case the law cannot subject a person to a duty or give another a right unless the boundaries thereof are fixed. A promise by A to pay what he chooses is in fact no promise at all. A promise by A to give B employment is not wholly illusory, but if neither the character of the employment nor the compensation thereof are stated, the promise is so indefinite that the law cannot enforce it even if consideration were given for it.

<sup>29</sup> Treatise, § 60.

<sup>30</sup> Treatise, § 33a.

Promises may be indefinite in time or in place, or in the work or 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.

*Illustrations:*

A promises to serve B in a certain capacity, and B promises to pay him at a certain rate. For any services actually rendered under such an offer A is bound by the terms of his promise to pay at the agreed rate, but as to the future no executory obligation is created on either side in the absence of usage fixing the length of service customary in employment of the sort agreed upon. In dealing with personal service the presumption that the performance shall continue a reasonable time is not adopted.

A agrees to employ B, and B agrees to serve without stating the full period for which the service is expected to continue, but stating the price to be paid for the first day, week, month or year of the service. This creates immediately an executory contract for one such period. It is often a difficult question of interpretation to determine whether an agreement specifies merely a rate of compensation, or indicates at least impliedly an understanding that the employment shall continue at least for one of the periods for which the rate is stated, in which case there would be a contract for one period and at its expiration an offer for another, in the absence of revocation.

A agrees to employ B, and B agrees to serve as long as the employee is able to do the work, or as long as a specified business is carried on. These

agreements create contracts as a method is provided for determining the length of the engagement.

A promises to sell and deliver goods to B, and B promises to pay a specified price therefor. Though no time for performance is fixed, the presumption is that the parties intended performance to be made within a reasonable time. What is a reasonable time is a question of fact in each case depending on the character of the goods and all surrounding circumstances.

A and B agree that certain performances shall be mutually rendered by them "immediately" or "at once," or "promptly," or "as soon as possible," or "in about one month." All these agreements are sufficiently definite for enforcement.

A agrees to sell and B agrees to buy goods "at cost plus a nice profit." This promise is too indefinite for enforcement.

A agrees with B to execute a lease or a conveyance, and B agrees to pay therefor. These are valid contracts. Although the terms of leases and conveyances vary, the agreement will be regarded as providing for such documents of the sort as are in common local use.

A promises B to give him any one of a number of specified things which A shall choose, and B agrees to pay a specified price. There is a contract. A means is provided for determining what A is to give, and though what he gives is subject to his choice, he must give some one of the things specified. If he fails to do so the law will regard him as choosing the least valuable for the purpose of assessing damages against him.

A promises B to do certain work or transfer certain property and B agrees to pay therefor

if it is satisfactory to him. This is a contract since a method is provided for determining B's performance which is not dependent on his mere whim but requires the exercise of honest judgment.

A promises B to do certain work at a price to be thereafter agreed. As the only method of settling the price is dependent on the future agreement of the parties, and as either party may refuse to agree, there is no contract.

A promises B to build a certain building according to stated plans and specifications, and B promises to pay \$30,000 therefor. But it is also provided that the character of the window fastenings shall be subject to further agreement of the parties. The indefiniteness of the agreement with reference to this one minor matter will not invalidate the whole contract.

A promises to sell and B promises to buy all the goods of a certain character which B shall need in his business during the ensuing year. This is a contract.

SECTION 35. 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, become definite and create a unilateral contract.<sup>31</sup>

*Illustration:*

An offer by A to B in these terms: "I will employ you as long as I like at \$10 a day," when accepted by B either orally or in writing will not create a contract; but if B serves one or more days a unilateral contract arises binding B to pay \$10 for each day's service.

<sup>31</sup> Treatise, § 49.



SECTION 36. An offer may be terminated by—

- (1) rejection by the offeree;
- (2) revocation by the offeror;
- (3) by lapse of time;
- (4) by knowledge on the part of the offeree of the death or insanity of the offeror.

*Comment:* An offer continues as an expression or indication of the offeror's intent until terminated in one of the ways suggested. In the meantime the offeree has power by an acceptance to make the offer binding as the whole or part of a contract.<sup>32</sup>

SECTION 37. An offer which has been rejected by the offeree is terminated and cannot thereafter be accepted.<sup>33</sup>

*Illustration:*

A makes an offer to B and adds: This offer will remain open for a week. B rejects the offer the following day, but within a week from the making of the offer, accepts it. There is no contract.

SECTION 38. A counter-offer by the offeree, relating to the same matter as the original offer, is a rejection of the original offer.

*Comment:* A counter-offer amounts in 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 be distinguished from a mere inquiry by the offeree regarding the possibility of different terms, or a comment upon the terms of the offer.<sup>34</sup>

<sup>32</sup> Treatise, § 50.

<sup>33</sup> Treatise, § 51.

<sup>34</sup> Treatise, § 51.

*Illustrations:*

A offers to sell B Blackacre for \$5000. B replies, "I will pay \$4800 for Blackacre," and on A's declining that, B writes, "I accept your offer to sell for \$5000." There is no contract, although B's acceptance of these terms was made within the time limit originally fixed by A in his offer.

A makes the same offer to B as stated above and B replies, "Won't you take less?" to which A answers, "No." An acceptance thereafter by B, if within the time allowed under A's offer creates a contract.

SECTION 39. Rejection by mail or telegram does not take effect until received by the offeror, but an acceptance between the time when a rejection is transmitted and its receipt will not create a contract if the offeror has changed his position after receiving the rejection in reliance thereon, before learning of the acceptance.

*Comment:* As pointed out in the Treatise,<sup>35</sup> there is a troublesome problem in regard to the moment when rejection takes effect because of the opposite analogies afforded by the law governing acceptance by mail or telegram, and revocation by mail or telegram. The difficulty is avoided by the principle laid down above of holding the rejection ineffectual as such until it is received but subjecting the offeree to an estoppel if the offeror acts in reliance on the rejection before learning of an acceptance.<sup>35</sup>

*Illustration:*

A makes B an offer by mail which B immediately rejects by the same means of communication. Shortly afterwards and within the time limited by the offer B accepts. This acceptance creates a contract unless between the time of re-

<sup>35</sup> Treatise, § 52.

ceiving the rejection and the acceptance A has changed his position on the supposition that the rejection was effectual.

SECTION 40. If an offer states the time when it will terminate, or within which acceptance must be made, no effectual acceptance is possible after the expiration of that time. If the offer fixes no time for its termination or within which acceptance must be made, no effectual acceptance is possible after the lapse of a reasonable time. What is a reasonable time is a question of fact dependent on the nature of the contract proposed, the usages of business and other circumstances of the case.

*Comment:* As an offeror may make any proposal that he will, he may, therefore, put any limits on his proposal that he sees fit. Hence he may fix any time that he wishes as that within which acceptance must be made. He is under no obligation to 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.

Where a bilateral contract is contemplated a reasonable time for making the counter-promise requested will generally be brief. In commercial contracts especially this is true. Where offers of this sort are made orally they usually contemplate an immediate answer; where made by mail, they contemplate an answer on the same day that the offer is received; or, if no mail leaves on that day, then before the departure of the next mail.

Where a unilateral contract is contemplated the 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 will be equally long.<sup>36</sup>

*Illustration:*

A publishes an offer of reward for information leading to the arrest and conviction of a murderer. A, intending to accept the reward, gives the requested information a year after the publication of the offer. There is a contract.

SECTION 41. The offerer may revoke his offer by a communication made to and received by the offeree before the latter has accepted the offer, if the communication states or clearly implies that the offeror no longer wishes to enter into the proposed contract.

*Comment:* What amounts to receipt of revocation within the meaning of the rule is considered in Section 64.

*Illustration:*

A makes by mail an offer to B and subsequently by mail revokes the offer. Before receiving the revocation, however, B has mailed an acceptance, but on receiving the revocation assumes that there is no contract and changes his position in reliance on that assumption. A is not estopped to assert a contract. The case is unlike that stated under Section 38, for here at the time when B changed his position he knew all of the facts and simply made a mistake of law.

SECTION 42. Except as stated in the following section, an offer can be revoked only by a direct communication from the offeror, received by the offeree.

*Comment:* This section is opposed to the English decision of *Dickinson v. Dodds*, 2 Ch. D. 463 (followed

<sup>36</sup> Treatise, §§ 53, 54.

in two or three American cases), which held that information received by the offeree through a third person that the offeror no longer wished to make a contract in the terms proposed amounted in effect to a revocation of the offer. The case has been criticized and seems objectionable chiefly because of the difficulty of fixing any limit to the doctrine short of the principle that wherever the offeree knows, or ought to know, that the offeror no longer wishes to contract, the offer must be regarded as terminated. Under such a principle a change in the market, a change in the pecuniary condition of one party or the other, and, indeed, a variety of circumstances might afford ground for the contention that the offer had come to an end. Certainty is of great importance in the formation of contracts, and it seems better to require the offeror to give notice directly of his purpose to revoke.<sup>37</sup>

SECTION 43. An offer made by a general notice or advertisement to the public or to a number of persons whose identity is unknown to the offeror may be revoked by a general notice or advertisement published in the same way as that in which the offer was made.<sup>38</sup>

*Illustration:*

An offer of reward for the apprehension of a criminal made by posting a notice in a post office, may be revoked by posting a notice in the same place.

SECTION 44. An offer contemplating a series of contracts by separate acceptances may be revoked as to the future, though one or more of the proposed contracts have already been formed by the offeree's acceptance.<sup>39</sup>

<sup>37</sup> Treatise, § 57.

<sup>38</sup> Treatise, § 59.

<sup>39</sup> Treatise, § 58.

*Comment:* As has been seen <sup>40</sup> an offer may propose several contracts, to arise at separate times. Such an offer is divisible.

*Illustration:*

A offers B to buy ten tons of steel from him daily. That amount is furnished daily for a number of days. A contract is thereby formed each day; but a revocation of the offer by B prevents the formation of any contracts thereafter. If A's proposal had been to buy ten tons daily during the ensuing month, the presumption of Section 32 would be applicable and the offer would require prompt acceptance by B after it was first received, and if such an acceptance was given, there could be no revocation during the ensuing month.

SECTION 45. If an offer for a unilateral contract is made, and part of the performance requested in the offer is given or tendered by the offeree in response thereto, the offer is irrevocable until the offeree has failed to complete the requested performance within the time stated in the offer, or, if no time was there stated, within a reasonable time.

*Comment:* This section states the result generally reached by the courts, and the result is clearly desirable. It will be observed that it is only rendering part of the actual performance requested which precludes revocation under this section. Beginning preparations though they may be essential to carrying out the contract or to accepting the offer, is not enough.<sup>41</sup>

Tender, however, is sufficient. Though not the equivalent of performance, nevertheless it is obviously unjust to allow so late withdrawal.<sup>42</sup> It may be asked whether these results can be harmonized with

<sup>40</sup> *Supra*, Sec. 31.

<sup>41</sup> Treatise, §§ 60, 60a.

<sup>42</sup> Treatise, § 60b.

the principles that an offeror can demand whatever consideration he sees fit, and that until consideration is received, there can be no contract. That there can be no liability on the part of the offeror until he has received all that he demanded is clear; but if acting in justifiable reliance on the offer may at least in some cases serve as sufficient consideration to make a promise binding, there is no inconsistency of principle. The section, in fact, states a particular case where the broad principle of Section 83 (1) (e) is applicable.

SECTION 46. 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 revoked during the time fixed in the offer itself or, if no time is fixed, within a reasonable time.

*Comment:* Though it seems possible to suppose a few exceptional cases where an offer is not a promise, yet where consideration is given or a formal instrument prepared, it seems that the offer will always be a promise, and wherever an offer is a promise it may also be a contract if the requisites for the formation of a contract exist.<sup>43</sup>

SECTION 47. An offer is irrevocable during the term therein stated, or if no term is therein stated for a reasonable time, if by a collateral contract the offeror has undertaken not to revoke the offer.

*Comment:* As indicated in the preceding section the promise of the offer itself may be a contract. But 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

<sup>43</sup> Treatise, § 6r.

effect specifically enforced by the law by denying the offeror the power to revoke.<sup>44</sup>

SECTION 48. An offer is terminated by the offeree's knowledge of the death or insanity of the offeror, but not by such death or insanity when unknown by the offeree.

*Comment:* The rule stated in this section is in accordance with the general principle adopted throughout this work that outward indication or expression of assent is the basis of contractual liability. Under the view of the formation of contracts which prevailed formerly, requiring actual mental assent of the parties (though indeed an indication of assent by outward acts was also necessary), it is obvious that death or insanity of the offeror, precluding as it does any real assent, terminated the offer. This result, however, may lead to injustice and the civil law which has had the same rule as the common law was changed by the German Code (Section 153). It seems desirable to establish the rule stated in this section though the weight of authority is unquestionably in favor of the old rule.<sup>45</sup>

SECTION 49. If communication of an offer to the offeree is delayed, the period within which it can be accepted is not thereby extended if the offeree knew or had reason to know of the delay, even though it was due to the fault of the offeror; but if the delay was due to the fault of the offeror or of the means of transmission adopted by him, and the offeror neither knew nor had reason to know that there had been delay, the offer may be accepted within the period which would have been permissible if the offer had been despatched at the time that its arrival seemed to indicate.

<sup>44</sup> Treatise, §61.

<sup>45</sup> Treatise, § 62.



*Illustration:*

A misdirected offer is delayed in delivery, as is apparent from the date of the letter or the post-mark on the envelope, so that the offeree does not receive it until some time later than would normally have been the case. The offeree cannot accept the offer unless he can do so within the time which would have been permissible had the offer arrived seasonably.<sup>46</sup>

SECTION 50. Acceptance of an offer must indicate assent to the terms thereof. If an act (other than a promise) or forbearance is requested, no contract exists until at least part of what is requested is performed or tendered. If a promise is requested, no contract exists until that promise is expressly or impliedly given.

*Comment:* In a unilateral contract the act requested and performed as consideration for the contract ordinarily indicates acceptance as well as furnishing the consideration; and, under Section 44, performing or tendering part of what was requested may both indicate assent and furnish consideration. In a proposal for a bilateral contract the mere expressed assent of the offeree 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.<sup>47</sup>

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. This is the logical method of statement, but the form the transaction usually takes is a mere assent by the

<sup>46</sup> Treatise, § 63.

<sup>47</sup> Treatise, § 65.

offeree which necessarily implies the giving of the promise requested.

SECTION 51. Where the offeror requests an act other than a promise or forbearance as the consideration for his promise, no notification that the act or forbearance has been given is necessary to complete the contract. But if the offeror has not the means of ascertaining with reasonable promptness and certainty that the act or forbearance has been given, the contract will be discharged unless within a reasonable time after acting or forbearing as requested, the offeree notifies the offeror thereof.

*Comment:* 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 performance of the 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 it, as by a condition subsequent.<sup>48</sup>

*Illustrations:*

A writes to B: "Let C have \$100. and I guarantee its repayment." Immediately on receiving this communication, B lets C have \$100. but fails to notify A of the fact. B cannot enforce the guaranty if C fails to pay the debt.

The case may be altered by supposing that an hour after advancing the money B receives a letter from A revoking the offer of guaranty, and that B then notified A of the advance and insisted

<sup>48</sup> Treatise, §§ 68, 69a.

that the guaranty was binding. B's contention is correct. The contract was formed by the advance of the money and notice having been sent by B in a reasonable time the contract was not destroyed.

SECTION 52. In an offer of a unilateral contract where the proposed act is that of the offeror, the contract is not complete until the offeree makes the promise requested.

*Comment:* The case supposed is unusual and takes place only where the performance of the offer automatically occurs at the moment the promise requested is given, and 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.<sup>49</sup>

*Illustration:*

A writes to B, who is boarding A's horse, "I should like to sell my horse to you, and if you will pay \$200 for it, the horse is yours." B makes the requested promise. The title to the horse is thereupon instantly transferred to him.

SECTION 53. Acceptance must be unequivocal in order to create a contract.

*Comment:* 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.<sup>50</sup>

*Illustrations:*

A sends an order for goods to B. B replies that the order will receive his attention. There is no contract.

<sup>49</sup> Treatise, § 71.

<sup>50</sup> Treatise, § 72.

A writes to B offering to sell a piece of land. B replies "I shall meet you with the money in a few days and be ready to arrange particulars." There is no contract.

SECTION 54. Except as this may be qualified by sections 31 and 35 an acceptance must comply exactly with the requirements of the offer omitting nothing from the promise or performance requested.

*Comment:* This rule is a necessary corollary of the basic idea of contracts that only such liability is imposed by the law as the parties have expressed a willingness to assume. The offeror therefore can insist that his liability and his willingness to enter into a contract shall be measured by the exact terms of his offer.<sup>51</sup>

*Illustrations:*

A publishes an offer of reward for the "apprehension and conviction" of a criminal. B gives information leading to his apprehension and C later gives information necessary for his conviction. Neither B nor C is entitled to the reward. Nor are they entitled to it jointly unless they acted jointly. On a fair construction the offer does not require the arrest and conviction to be personally made in order to acquire a right to the reward. Evidence leading to the arrest and conviction would be enough, but both must be accomplished by the act of one who seeks the reward.

A offers a reward for certain information. B gives the information, and shortly thereafter C, acting independently, also gives it. B alone is entitled to reward. On a fair construction the

<sup>51</sup> Treatise, § 73.

offer requests but one giving of all the information and promises the reward to the first person who gives it.

A publishes an offer of £100 to any person who contracts influenza after using A's remedy according to directions. B, C, and D all use the remedy according to directions, and each contracts influenza. Each one is entitled to the amount of the promised payment for in this case there is no implied limitation in the offer to the first person who fulfills the terms of the proposal.

SECTION 55. A reply to an offer which purports to accept it, but adds qualifications or conditions is a rejection of the original offer and is itself a counter-offer.

*Comment:* As to the effect of a counter-offer to reject an original offer. See *supra*, section, 37 and comment thereon. That a qualified or conditional acceptance is a counter-offer is evident when it is considered that it is necessarily a statement of what the person making it is willing to do in exchange for what the original offeror proposed to give. It should be observed, however, that a condition in an acceptance which merely states in express terms what would be implied from the offer, though not expressed therein, is a valid acceptance.<sup>52</sup>

*Illustrations:*

A makes a written offer to B to sell him Blackacre. B replies "I accept your offer if you can convey me a good title." A contract has been formed.

A makes an offer to B, and B in terms accepts but adds "prompt acknowledgment must be made

<sup>52</sup> Treatise, §§ 73-75, 78.

of receipt of this letter.” There is no contract, but a counter-offer, rejecting the original offer.

SECTION 56. 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. But if an offer merely suggests the place, time or manner of acceptance, this will not preclude acceptance in some other way.

*Comment:* For the reasons stated under the preceding section, the offeror may prescribe the only way in which his offer may be accepted. But frequently in regard to the details of methods of acceptance, the offeror’s language, if fairly construed, amounts merely to a statement of the best possible means of acceptance without a positive requirement that these means shall be followed.<sup>53</sup>

*Illustrations:*

A writes an offer to B in which A says “I must receive your acceptance by return mail.” An acceptance sent by any other means which reaches A as soon as a letter sent by return mail would normally arrive, creates a contract.

A makes an offer to B and adds “send your office boy around with an answer to this by 12 o’clock.” The offeree comes himself before 12 o’clock and accepts. This is a contract.

A makes an offer to B and adds “My address is 53 State Street.” B sends an acceptance to A’s house which A receives promptly. There is probably a contract, but it is a question of construction whether A has made a positive requirement of the place where the acceptance must be sent.

SECTION 57. An acceptance which requests a change or addition to the terms of the offer is not thereby in-

<sup>53</sup> Treatise, § 76.

validated unless the acceptance is in terms dependent on the changed or added terms.<sup>54</sup>

*Illustrations:*

A offers to sell B 100 tons of steel at a certain price. B replies "I accept your offer. I hope that if you can arrange to deliver the steel in weekly instalments of 25 tons you will do so." there is a contract, but A is not bound to deliver in instalments.

SECTION 58. An offer can be accepted only by the person or persons to whom it is made.

*Comment:* One of the essential elements of any proposed contract is the person with whom it is to be made. After the formation of a contract, rights under it may often be assigned and duties delegated, but in the formation of contracts the choice of persons is vital.<sup>55</sup>

*Illustrations:*

A sends an order for goods to B, B hands the offer over to C who fills the order without disclosing to A that the performance does not come from B. There is no contract.

If B, before using the goods, discovers that they have come from C, this retention or use is an acceptance of what amounts to an offer from C. and the contract then arises.

SECTION 59. If an offer requests a promise from the offeree, and the offeree without making the promise actually does what he was requested to promise to do, there is a contract, provided that such performance is completed or tendered within the time allowable for accepting by making a promise.

<sup>54</sup> Treatise, § 79.

<sup>55</sup> Treatise, § 80.

*Comment:* As an offeror may propose whatever terms he chooses, an offer requesting an act, other than a promise, cannot be accepted by merely promising to do the act.<sup>56</sup>

It might seem that similarly an offer which requested a promise could not be accepted by performing the act which the offeree was requested to promise to perform. It is true that merely beginning to perform that act will not amount to an acceptance under section 44, for the offeror has not manifested a willingness to be bound, unless given an assurance that performance will be completed, and this assurance he must have within the time allowed by law for accepting the offer; but if within that time full performance has been given, the offeror has received something better than he asked for, since the only object of requiring a promise is ultimately to obtain performance of it, and he should be bound.

SECTION 60. When acceptance is expressly or impliedly authorized to be made from a distance, it may be transmitted by any means expressly or impliedly authorized and, unless sent by a servant of the acceptor, becomes a valid acceptance and completes the contract as soon as delivered to the authorized agency, even though it never reaches the offeror.<sup>57</sup>

*Illustrations:*

A makes B an offer by mail. B promptly accepts by mail. There is a contract as soon as B's letter is mailed.

A makes B an offer by mail adding "telegraph your answer." B promptly telegraphs an acceptance. There is a contract as soon as the telegram is delivered to the telegraph company.

<sup>56</sup> Treatise, § 75.

<sup>57</sup> Treatise, §§ 81-89.



A makes an offer by mail, or messenger, and B promptly sends an acceptance by his own servant or special messenger. There is no contract until the acceptance is delivered by the servant or messenger to the offeror, or to some person authorized to receive it on his behalf.

SECTION 61. An acceptance is impliedly authorized to be sent by the same means of communication which is used by the offeror or which is customary in business usage at the time when and the place where the offer is received, unless the offer otherwise indicates.<sup>58</sup>

SECTION 62. An acceptance sent by mail or otherwise from a distance is not valid when despatched unless it is properly addressed, and any other precaution taken which is ordinarily observed to insure safe transmission of similar messages.<sup>59</sup>

*Comment:* As the only justification for regarding acceptance of an offer as complete when dispatched is that the method of transmission is authorized by the offeror, and as such authorization must be deemed limited to answers where the usual precautions for safety have been taken, an acceptance where such precautions have not been taken, cannot be effective, at any rate before it has been received.

SECTION 63. An acceptance invalid when despatched because the means of communication was unauthorized may become valid 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.<sup>60</sup>

SECTION 64. A revocation or acceptance is received within the meaning of the law when it comes into the

<sup>58</sup> Treatise, §§ 80-83.

<sup>59</sup> Treatise, § 84.

<sup>60</sup> Treatise, § 87.

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

*Comment:* It is the general rule of law that revocations when sent from a distance must be received in order to be effectual. Acceptance from a distance need not be received if started on its way in a method authorized, but receipt may be made a condition of the offer. So even if there is no such condition, an acceptance sent in an unauthorized way for any reason, may, nevertheless, create a contract when received by the offeror. It becomes vital, therefore, to define what is receipt. Must a letter be actually read? Must it even necessarily reach the hands of the person addressed? Such inquiries make it necessary to lay down the rule in the present section.

*Illustrations:*

A sends by mail an offer to B and states as a condition of the offer that an acceptance must be received within three days. B mails an acceptance which reaches A's house and is delivered to a servant or is deposited at a mail box at the door within three days; but A has been called away from home and does not actually receive the letter for a week. There is a contract.

A sends an offer by mail to B, but later desires to revoke the offer and telegraphs a revocation. The messenger boy carrying the telegram from the receiving office, meets a neighbor of B's who volunteers to carry the telegram to B, and accordingly takes it from the messenger boy, but forgets to deliver it to B until the following morning. An acceptance by B mailed just prior to this time creates a valid contract.

SECTION 65. An offeree who signs a document, or who accepts a document which he should reasonably understand to be a contract or evidence of one, is bound by the terms of the document though ignorant of them, in the absence of such fraud or mistake as justifies relief.<sup>61</sup>

*Illustration:*

A signs a document presented to him supposing it to be a receipt. It is in fact a promissory note which is transferred to an innocent purchaser. A is liable to the purchaser unless he was guilty of no negligence in supposing the document to be a receipt.

A carrier, receiving a shipment of goods delivers to the shipper a bill of lading. The terms of the bill of lading form part of the contract between the carrier and shipper unless they are opposed to public policy.

A orders goods from B, and B ships the goods with a label plainly reading "no warranty of kind or quality is given by the seller." Though, apart from this notice a warranty might be implied, the acceptance of the goods bearing this label plainly printed excludes a warranty.

A makes B an offer on a sheet of paper having on the letterhead plainly printed—"All our contracts are subject to strikes." B accepts the offer and a strike subsequently closes A's factory. A is not liable for failing to perform the contract.

SECTION 66. The intention of the offeror to offer and of the offeree to accept and their understanding of the meaning of their words is immaterial unless expressed. If, however, the expression of either party is in fact ambiguous but he has no reason to suppose that

<sup>61</sup> Treatise, §§ 90a-90c.

it may bear a different meaning to the other party than that which he himself had in mind, his intent may be shown in order to determine the meaning of his ambiguous words or acts. Such actual intention may also be shown if both parties knew or had reason to know of the ambiguity.

*Comment:* It is fundamental in the law of contracts as here stated, and as established by the great weight of modern authority, that the actual mental assent of the parties is not a requisite for the formation of a contract. If words or acts could have but one possible meaning, evidence of intention would never be admissible. Unfortunately, however, both words and acts may have more than one meaning, and where this is the case it has to be determined which of the possible meanings is to be taken. If either party has reason to know that the other will understand the words or acts in a particular sense, he should be responsible for the consequences of the other's misunderstanding. On the other hand, if a party has no reason to suppose that there is any ambiguity, he should be justified in asserting that his words or acts bore the meaning that he intended them to, that being one of their legitimate meanings.<sup>62</sup>

*Illustration:*

A offers B to sell goods shipped from Bombay ex steamer *Peerless*. B expresses assent to the proposition. There are, however, two steamers of the name *Peerless*. It may be supposed, (1) that A knew, or ought to know this fact, and B neither knew or ought to know it. (2) Conversely, it may be supposed that B knew or ought to know it and that A did not, or (3) it may be supposed that both knew, or ought to know of the ambiguity, and (4) it may be supposed that nei-

<sup>62</sup> Treatise, §§ 66, 67.

ther of them had knowledge or means of knowledge at the time that the communications between them took place. In the case first supposed there is a contract for the goods from the steamer which B had in mind. In the second case there is a contract for the goods from the steamer which A has in mind. In the third and fourth cases there is no contract unless A and B in fact intended the same steamer. In that event there is a contract for goods from that steamer.

SECTION 67. Where an offeree fails to reply to an offer, his silence and inaction do not amount to an acceptance except in the following cases:<sup>63</sup>

1. Where the offeree takes or retains possession of property belonging to the offeror, and such taking or retention would be wrongful except on the assumption that the offeree agrees to the offeror's proposal.

2. Where beneficial services are received by one who knows, or ought to know, that they are rendered with the expectation of compensation.

3. Where the offeror has stated or given the offeree reason to suppose that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intended to accept the offer.

4. Where because of previous dealings or otherwise, the offeree had given the offeror reason to suppose that his silence or inaction might be construed as an assent.

SECTION 68. An offeror who receives a late or defective acceptance cannot at his election regard it as valid. The late or defective acceptance is a counter-

<sup>63</sup> See Treatise, §§ 91, 91a.

offer which must in turn be accepted by the original offeree in order to create a contract.<sup>94</sup>

SECTION 69. A contract is formed at the time when the last act necessary for the completion of the contract is performed and the contract is made at the place where such final act is done.<sup>95</sup>

### C.

#### CONSIDERATION.

SECTION 70. Subject to exceptions stated in sections—consideration for a promise or promises must be either:

(a) some act other than a promise or some forbearance to act, in which case if the consideration is legally sufficient a unilateral contract is formed; or

(b) a promise to do or to forbear from doing some act, in which case if the mutual promises are legally sufficient consideration for one another a bilateral contract is formed.

*Comment:* Though a promise is itself a kind of act, it is in this connection distinguished from all other acts.

As stated in section 14 the common law imposes no liability on a promisor unless the promise is under seal or is supported by sufficient consideration. And though there are exceptional cases where promises are enforced when either the so-called consideration does not comply with the requisites here stated, or when nothing which can fairly be called consideration can be found, yet, except in these cases, consideration fulfilling the requisites about to be stated must be given or received. The exceptional cases are enumerated later in section 83.

<sup>94</sup> Treatise, §§ 92, 93.

<sup>95</sup> Treatise, §§ 96, 97.

*Illustrations:*

This rule is applicable to negotiable instruments in any action between immediate parties. Therefore, if a note was delivered by the maker to the payee as a gift, he cannot enforce it, nor can an indorsee sue his immediate indorser unless the indorser received consideration or the indorsee gave value.

A recital of consideration which was not in fact given does not validate a written promise.<sup>66</sup>

SECTION 71. Consideration is legally sufficient for the formation of a unilateral contract only if the act or forbearance constituting the consideration involves a detriment to the promisee or a benefit to the promisor. Consideration is legally sufficient for the formation of a bilateral contract only if in each of the mutual promises the act or forbearance undertaken will be, or apparently may be, detrimental to the maker of the promise or beneficial to the promisee.<sup>67</sup>

SECTION 72. An act or forbearance is a detriment to the person acting or forbearing, as that word is used in defining the sufficiency of consideration, only if at the time of acting or forbearing he was under no legal duty so to do; but may be a detriment though it involve no pecuniary loss or material disadvantage. Similarly, an act or forbearance is a benefit to the promisor, as that word is used in defining the sufficiency of consideration, only if at the time of such act or forbearance he had no legal right thereto; but may be a benefit though it give him no pecuniary gain or material advantage.

*Comment:* It is sometimes urged that the use of the words detriment and benefit as here defined is

<sup>66</sup> Treatise, §§ 99-102, 108, 115b.

<sup>67</sup> Treatise, § 102.

artificial. It is doubtless technical in that it narrows the meaning that the words usually bear; but detriment may be of various sorts—pecuniary, moral, legal; and it is essential to find some words to express the effect of parting with something of which the law authorized the retention, and of gaining something without prior legal right thereto. It seems better to continue the use of words which have been habitually used by judges and text writers for many years than to attempt the invention of new ones.<sup>68</sup>

*Illustration:*

A, entirely from motives of pity for animal suffering, promises B \$10 for a worthless, broken-legged horse which B would have gladly given \$10 to have A remove. The transfer of the horse to A is, within the meaning of the above definition, a detriment to B and a benefit to A.

SECTION 73. Consideration may be furnished to the promisor or to some other person.

*Comment:* The rule of this section is a necessary consequence of the general definition of sufficient consideration. It is as detrimental to the promisee to furnish consideration to a third person as to the promisor.<sup>69</sup>

*Illustrations:*

A promises B to guarantee payment for a bill of goods if B will sell the goods to C. Selling the goods to C is a sufficient consideration for A's promise.

For consideration received from B, C draws a bill of exchange on A, who accepts the bill for C's accommodation. A is liable to B.

<sup>68</sup> Treatise, § 102a.

<sup>69</sup> Treatise, §§ 108, 113.



SECTION 74. Consideration may be furnished by the promisee or by some other person.

*Comment:* The rule of this section has been the subject of controversy, but the American cases favor it, and since the act or promise requested by the promisor has been given, the promise should be binding.<sup>70</sup>

*Illustration:*

In consideration of \$1 paid by A to B, B promises C a book. The promise is binding.

SECTION 75. Consideration must be given and received with the express or implied assent that it shall be the price or exchange for the promise.

*Comment:* It is essential for the idea of consideration as here defined that it shall be bargained for as such. That is, the consideration must be agreed upon as the price or exchange of the promise. The mere fact that the promisee incurs a detriment or the promisor receives a benefit without this element of bargain or agreed exchange, will not establish consideration for a promise. Though as seen in section 83 some promises are enforceable without the element of bargain it promotes clearness of thought to keep them in a separate category.<sup>71</sup>

*Illustrations:*

A requests B to give him a book, promising B \$10 therefor; or B offers the book if A will promise \$10 therefor. In either case if the book is given or received A's promise is binding.

A promises B \$100 when B goes to college. If the promise is not made as an inducement to A to go to college but is reasonably to be understood

<sup>70</sup> Treatise, § 114.

<sup>71</sup> Treatise, §§ 100, 112.

as a gratuity payable on a certain contingency. B's going to college is not consideration for A's promise.

SECTION 76. The mere happening of an event is not sufficient consideration.

*Comment:* The rule thus stated is obvious when the event is merely fortuitous, as the occurrence of rain, or fire, or war; but it is also true when the happening of the event is dependent on the power of the promisee, if his act or forbearing to act in bringing the event to pass is not agreed upon as the price or exchange of the promise. A promise of a conditional gift is not binding merely because the condition on which the gift is promised is within the control of the promisee. In practice, however, it is often difficult to distinguish a case where the promisee is requested as matter of bargain to bring about the happening of a condition by some act or forbearance from a case where such an act or forbearance is referred to as a mere contingency, on the happening of which the promisor will make a gift. In doubtful cases the presumption should be made that a bargain was intended.<sup>72</sup>

*Illustration:*

A, evidently from motives of generosity, promises a tramp an overcoat if he will come around the corner to a clothing store. The tramp does so. No contract has been formed.

See also the second illustration under the previous section.

SECTION 77. In a bilateral contract both promises must become simultaneously obligatory. If for any reason the promise of either party is void, the other is equally void.

<sup>72</sup> Treatise, § 112.

*Comment:* This rule necessarily follows from the doctrine of consideration, for each promise is unsupported until the other supports it; and as a void promise can give no support, if for any reason either promise is void the other is equally void<sup>73</sup>. One of the promises may be void and thus bring about this result,

- (a) because of total incapacity to contract on the part of the promisor, or
- (b) because of some kinds of illegality, or
- (c) because the promise itself is not supported by sufficient consideration.

*Illustrations:*

The promise of a married woman at common law was void; therefore any bilateral agreement with a married woman was wholly void.

So a bilateral agreement with a lunatic under guardianship.

A promises B a book in return for B's promise to pay A a debt B owes him. B's promise is insufficient consideration for A's, and therefore A's promise is not binding. In consequence, B's promise also is not binding, though except for the fact that A's promise is itself void for lack of consideration, it might seem sufficient consideration for B's.

SECTION 78. A promise is not insufficient consideration because a privilege given by the law, though not stipulated for in the promise, permits the promisor at his option to avoid it, but a promise which by its very terms may be avoided or cancelled by the promisor without involving a detriment to himself or a benefit to the promisee is insufficient consideration.<sup>74</sup>

<sup>73</sup> Treatise, § 103c.

<sup>74</sup> Treatise, § 105.

*Illustration:*

A's promise, though the contract is voidable by him because of his own infancy, or because of B's fraud, is sufficient consideration for B's promise if in other respects fulfilling the requirements of the law.

SECTION 79. One legally sufficient consideration may support several promises.<sup>75</sup>

*Illustration:*

A's payment or promise of \$5, not then owed by him, will support any number of promises then made by B.

SECTION 80. Consideration is not insufficient because part of it does not fulfill the requirements of legal sufficiency, but if part of the consideration is illegal the whole agreement may thereby become invalid, as stated in sections—

*Comment:* This like the preceding section is a necessary consequence of the definition of sufficient consideration in sections 70 and 71. If something detrimental to the promisee or beneficial to the promisor is given, it matters not how worthless other things also given as consideration may be or how large the exchange the promisor undertakes to give in return.<sup>76</sup>

*Illustration:*

A promises B a book if B will pay A \$5 which B owes A, and \$1 in addition. B does so. A's promise is binding.

SECTION 81. Consideration is insufficient

(a) if the party furnishing it is then bound by public obligation or by a legal duty to the promisor to perform the act or forbearance given or promised;

<sup>75</sup> Treatise, § 141.

<sup>76</sup> Treatise, § 134.

(b) If the consideration is or purports to be a promise of some act or forbearance, but expressly or impliedly reserves to the promisor the privilege of refusing to give the act of forbearance promised, and such refusal will not itself involve a detriment to the promisor or a benefit to the promisee.

*Comments:* There is in neither case a detriment to the promisee or a benefit to the promisor as those words have been defined.

*Illustrations of (a):*

A's payment or promising payment of a debt to B, his performance or promise to perform an existing contractual duty to B, his performance or his promise to perform his official duty, his refraining or promising to refrain from committing a tort against B or against a third person, are all insufficient considerations, even though A would not otherwise have fulfilled his previous obligation.<sup>77</sup>

*Illustrations of (b):*

A agrees with B to act as his agent for three years on certain terms, and B agrees that A shall so act, but reserves the right to cancel the agreement at any time. There is no contract. *Aliter* if B reserves the right to cancel on thirty days notice.

A promise of A to sell, or of B to buy, such quantities of goods as A may desire to sell, or as B may desire to buy, is insufficient consideration.<sup>78</sup>

SECTION 82. Consideration may be sufficient.

(a) Even though far inferior in value to what is promised in return;<sup>79</sup>

<sup>77</sup> Treatise, §§ 120, 130, 130a, 132, 133. Cf. § 82(c).

<sup>78</sup> Treatise, § 104.

<sup>79</sup> Treatise, § 115.

(b) Even though the consideration is a promise of some act or forbearance and reserves to the promisor the privilege of refusing to give the act or forbearance, provided that the exercise of the reservation will itself involve a detriment to the promisor or a benefit to the promisee;<sup>80</sup>

(c) Even though the party furnishing it is then bound by a public duty or by an obligation to the promisor to render some performance analogous to that given or promised, provided that the act or forbearance given or promised as consideration differs in any degree from what was previously due; or provided, in case of a prior legal obligation to the promisor, that there was an honest and reasonable dispute whether the prior legal duty existed or fully covered the act or forbearance given or promised;<sup>81</sup>

(d) Even though the party furnishing it is then bound by a legal duty to a third person to perform the act or forbearance given or promised as consideration;<sup>82</sup>

(e) Even though it is a promise by the terms of which the act or forbearance promised is performable only on a condition, or will be detrimental to the party performing or beneficial to the other party only upon a condition, provided that the condition is

- (1) a fortuitous future event,
- (2) a past event unknown to the promisor,
- (3) a future event the happening of which may be caused or prevented by the promisor, if its failure to happen will itself involve a detriment to him or a benefit to the other party.<sup>83</sup>

<sup>80</sup> Treatise, § 104.

<sup>81</sup> Treatise, §§ 121-129.

<sup>82</sup> Treatise, §§ 131-131b.

<sup>83</sup> Treatise, § 119.

*Illustration of (a):*

A gave a promissory note for \$10,000 without consideration. Subsequently A promises B that if he will surrender the note A will pay him \$10,000. The surrender of the note is sufficient consideration for this promise.

*Illustrations of (b):*

A promises that if he sells any of a certain lot of goods he will sell them to B; A promises to employ B as long as he, A, shall choose to remain in a certain business. These promises are each a sufficient consideration for a counter-promise.

*Illustrations of (c):*

A police officer performs acts requested in an offer of reward and in so doing performs some acts beyond his official duty. He can recover the reward.

A owes B an unliquidated or honestly and reasonably disputed claim. Any payment or performance is sufficient consideration for B's agreement to accept it in full satisfaction.

A owes B a liquidated sum. Any payment at an earlier time, or in a different medium from that required by the prior obligation, is sufficient consideration for B's promise to accept it in full satisfaction.

A owes B a matured liquidated debt bearing interest. Mutual promises to extend the debt for a year are binding though the rate of interest is below that which the law allows on overdue debts for which no interest has been contracted.

*Illustrations of (d):*

A owes B \$10. C promises that he will give A a book if A pays or if A promises to pay B the debt. The payment or promise of payment is sufficient consideration.

*Illustrations of (e):*

A promise to pay B \$5000 if his house burns within a year; a promise to pay B \$5000 if his ship now at sea has already been lost, the fact being, though unknown to the promisor, that the ship has not been lost; a promise to pay B \$5000 if A enters a competing business within three years, are each of them sufficient consideration for a counter-promise.

## SECTION 83.

(1) Where there is no consideration for a promise, it is nevertheless binding whether absolute or conditional if it is one of the following kinds:

(a) A promise to discharge all or part of an antecedent obligation of the promisor which was once enforceable, and which is either still enforceable or would be so except for the effect of a statute of limitations or of bankruptcy.

(b) A promise to perform all or part of an obligation of the promisor originally voidable by him and which has not been avoided prior to the making of the promise.

(c) A promise to correct a plain error in an obligation or performance which the promisor has previously received.

(d) A promise by a guarantor or surety to be bound as such in spite of lack of a requisite notice or of the creditor's failure to exercise diligence in presentment or prosecution of his claim against the principal debtor or the promisor himself, or of variation of the obligation of the principal debtor to the creditor.

(e) A promise which the promisor should reasonably expect to induce the promisee to act upon to his



detriment, and which did induce such action, if great injustice can be avoided only by enforcement of the promise.

(2) Voluntary part performance of an obligation or promise, or an acknowledgment that the obligation or liability still subsists, is conclusive evidence of a new promise under this section unless other circumstances show a contrary intention.

(3) The provisions of this section are subject to any statutes which declare certain promises or contracts unenforceable unless there is written evidence of them signed by the promisor.

(4) A promise under this section is not binding unless the promisor knew or had reason to know the essential facts of the previous transaction to which the promise relates, but his knowledge of the legal effect of the facts is immaterial.

*Comment:* In this section are grouped together a number of cases where promises have been held enforceable, and justly so, though no present exchange was given or received for them. Subdivisions (a), (b), (c) and (d) of subsection (1) cover familiar cases of the sort.<sup>84</sup>

There seems no good reason why antecedent obligations of all kinds should not be included.<sup>85</sup>

Subdivision (e) of the same subsection allows some elasticity in the law to prevent serious injustice if a promisor induces action on the faith of his promise and then refuses to perform it. It seems better to make a general provision of the kind than to attempt by a fiction to find consideration for a gratuitous promise when there is none.

<sup>84</sup> Treatise, §§ 150, 204.

<sup>85</sup> Treatise, §§ 186-188.