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Hugh Evander Willis
Indiana University

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KEY TO UNDERSTANDING THE LAW OF CONTRACTS (A Modern Rationale of the Law of Contracts)

By HUGH EVANDER WILLIS*

The understanding of the law of contracts requires a correct analysis of the subject and a rationale of all its main theories and doctrines. It involves a new approach to the old subject of contracts and a repudiation of much that is found in the books. It means a correct solution of all the main contract problems and, when these solutions have been found, a stating of them in the terms of fundamental concepts. Most of the old answers to the contract problems have been wrong, and for this reason new solutions must be found. Old premises must be re-examined, and new premises substituted therefor, tested by logic at least before their substitution. The main fundamentals of the law of contracts must be stated in terms of what the judges have done, not in terms of what they continue to say that they have done; in terms of what the law now really is, instead of in terms of what it once was or what the judges and writers have said that it was. This does not mean to exclude or ignore historical growth in contract law, but it means that mistakes in the rationale of the past must be corrected.

Contracts is one of the oldest branches of Anglo-American law, and yet its rationalization has been very poor until recent times. Lack of critical examination of law in this field has

* LL.B., LL.M., Univ. of Minn.; Prof. of Law, Indiana Univ. School of Law. Author of following contract articles: *Rationale of the Law of Contracts* (1936) 11 IND. L. J. 227; *Rationale of Agreement* (1939) 27 Ky. L. J. 284; *Consideration in the Anglo-American Law of Contracts* (1932) 8 IND. L. J. 93, 153; *Rationale of Past Consideration and Moral Consideration* (1934) 19 IOWA L. REV. 395; *Rationale of Bargain Consideration* (1939) 27 GEO. L. J. 414; *The Statute of Frauds—A Legal Anachronism* (1928) 3 IND. L. J. 427, 528; *Restatement of the Law of Contracts of the American Law Institute* (1932) 7 IND. L. J. 429; *Promissory and Non-Promissory Conditions* (1941) 16 IND. L. J. 349.

resulted both in a failure to discover some of the most fundamental principles and in the mistake of teaching many things as contract law which were never contract law. Modern scholarship has discovered so much about contracts that it should not only be re-rationalized, but much of the worthless material printed in the books on contracts should be discarded forever, and people should be taught to stop hanging on to archaic ideas. Modern scholarship has given us not merely one but at least twelve different keys to the understanding of the law of contracts. Some of these keys open only one door to the law of contracts, others of the keys open a number of doors; but for the understanding of the whole subject of contracts all of the keys must be used.¹

What are the main general fundamentals of the law of contracts stated in terms of modern rationalization?

¹ Practicing attorneys may think that they do not need any keys. They may think that the law of contracts is so simple and so well settled that no one should have any difficulty about understanding its principles. That they are mistaken can be easily demonstrated by doing no more than considering the definition of a contract. If almost any group of attorneys was asked to define a contract, most of them would define it in terms of an agreement. All of the text books on contracts, with the exception of Williston's, so define it (following Blackstone). This definition is fundamentally wrong. A contract does not even have to have an agreement. A contract has to have a promise, and Mr. Williston has defined it in terms of a promise; but his definition is also wrong, because he does not define a contract but only one of the operative facts necessary for it. A contract is a right-duty relation. Since it is a relation in personam the phrase legal obligation may be used. It is partly created by a party, or parties, and partly by society. Hence a contract should be defined as a legal obligation, created by a promise, or promises, of the parties, and by the legal redress given therefor by society.

Within the last twenty-five years or so, a few modern contract scholars have done a great deal of research work in the field of contracts, and have re-rationalized practically the whole subject. They claim that most of the old explanations are false. These never really explained, but when this became obvious the old fashioned method was to introduce a myth, like that of a common agent, when the theory of agreement failed. However, this myth generally caused more trouble than it cured, as in the case of the myth of the common agent, which made it harder to explain rejection and revocation. Modern scholarship has apparently found the right answers to contract problems (at least the old ones). They are the keys which will open the doors to the understanding of all the many branches of contract law. They and they alone explain problems and put contracts on a basis of truth. They unlock the doors to true contract knowledge and reveal long hidden secrets.

I.

The first and most important prerequisite to a correct understanding of the law of contracts is learning the scope of freedom of contract. This will lead to the discovery that the law of contracts is a joint product of the parties to the contracts and of society; and the determination of the role which private parties and the role which society as a whole plays in the making, the performance, the discharge, and the enforcement of contracts. The most important thing in contract law is the answer to the question of how far freedom of contract may go and how far social control without freedom of contract may go.

We will first consider the scope of freedom of contract. The private parties are almost always free to make or not to make a contract. If they make a contract, one party, or in case of a bilateral contract, both parties, are free to determine the rights and duties under the contract, that is, practically all matters of substance are within the jurisdiction of the parties. The parties may also measure bargain consideration, determine the conditions for the performance of their contracts, and even promise the impossible. Under freedom of contract the parties have gradually acquired the power to assign their contract rights, to give rights to third party beneficiaries, and to make joint contracts, and of course now they have the freedom to make or not to make any of these kinds of contracts. This private autonomy of the parties to contracts is something characteristic of contract law. In other branches of the law, social control, or law, is made by society either through legislative bodies or through courts. In contracts the social control created by contracts is created by the parties themselves. Contracts is an illustration of personal liberty. Social control is a delimitation of personal liberty. Yet by contracts private parties establish their own social control, and this source of social control is probably the greatest in the world. The social control thus created by the parties is enforced by the courts and executive branches of government in the same way that social control created by legislatures and courts is enforced. In a democracy the people rule themselves. In a contract the parties to the contract really rule themselves. This is democracy with a vengeance.

We will now consider the scope of the social control imposed by society upon the parties who make contracts.

In the first place, it should be noted that the parties have nothing whatever to do with the formalities of contract law. Society prescribes the form in which the parties are allowed to contract. There are some law teachers, at least in one of our leading law schools, who contend that the parties have the power to prescribe the formalities of contracts, at least if those parties are businessmen. They seem to take the position that whatever is the practice of businessmen determines what the law is (or should be). Thus, if businessmen say that contracts is a law of agreement, it is a law of agreement; and if they say that a bill of lading is negotiable, it is negotiable; and apparently if certain law professors (instead of businessmen) say that all that is required by our law for a contract besides a promise is the Roman law *causa*, *causa* is all that is required. This is not what Anglo-American law has been and it is doubtful if it ever will be this. Of course Lord Mansfield for a time almost introduced the Roman law notion of *causa* into English law, but his work in this respect was soon modified and it has stayed modified up to date. Perhaps this rule would be a better rule, but before it can become an Anglo-American rule it will have to be made such by either legislative or judicial action. The same thing must be said about any practices or desires of businessmen. If these men can get their ideas adopted either by the courts in judge-made law or by legislatures by the adoption of uniform acts or otherwise they may become law, but it is incorrect to say that they are any part of our law, now. In Anglo-American law freedom of contract does not extend to matters of formalities, and any law teachers who say that it does are not stating Anglo-American law but are acting as evangelists for the business class or for themselves.

At the present time there are four, and perhaps five, different kinds of contracts, which in the course of the history of Anglo-American law the legal order has created and made available for the use of private parties in making contracts. No other forms are available. If parties attempt to make contracts in any other way, their acts amount to nothing. If they use any one of these forms, they may make a contract.

The oldest kind of contract developed for the use of private parties was the promise under seal, developed in connection with the action of covenant. This was a Norman form of contract

(though an adaptation of the old formal contract of Anglo-Saxon times), and the only kind of contract available in Norman times, except the now obsolete Anglo-Saxon delivery promise and surety promise. The promise under seal was practically the only kind of contract allowed the parties until the seventeenth and eighteenth centuries. It is still a kind of contract which parties may use if they choose. Another kind of contract created by English law for the use of the parties was the promise for moral consideration developed in the seventeenth and eighteenth centuries in connection with the action of general assumpsit. Two other kinds of contracts developed by English law in the sixteenth, seventeenth and eighteenth centuries and which had a common origin in the action of special assumpsit were the promise injuriously relied on and the promise or promises in the form of offer and acceptance and bargain consideration. All of these kinds of contracts are still in existence. The American Law Institute has classified as a contract of record an acknowledgment in court by a recognizer that he is bound to make a certain payment unless a specified condition is performed, and this may therefore be called a fifth kind of contract available in Anglo-American law. Society also prescribes the formalities for the discharge of contracts and gives the parties a choice of about twenty methods of discharge.

The remedies available for breaches of contract are all provided by society. The parties are not allowed any say about these matters, except as they are allowed to provide for limited forms of arbitration. Society also provides the courts and legal procedure for the administration of these remedies.

Society also provides for the voidability of contracts because of infancy and insanity, because of duress, undue influence and fraud, and because of failure to satisfy the Statute of Frauds. Here a freedom is given to one party to a contract to avoid his contract because the law desires to protect some other social interests than freedom of contract and security of transactions, but the party himself has nothing to do with the creation of his liberty.

In addition to all of these functions which are performed by society, society also exercises some social control over the freedom of the parties to make the contracts they desire. The chief limitation on the freedom to make contracts is found in the topic

of illegality. There are many subjects upon which society will not permit people to contract. In other words, society exercises social control to prevent the parties from creating any social control of their own. There are many hundreds of matters which are thus prohibited to the parties as the subject matter of contract. Society also interferes with the making of contracts either through requiring compulsory contracts, or requiring compulsory terms in contracts. Illustrations of compulsory contracts are sometimes found in collective bargaining contracts, compulsory employment contracts, compulsory membership in labor unions, compulsory insurance contracts for automobilists, compulsory licensing of patents and compulsory contracts obtained by consent decrees. Illustrations of compulsory terms are found in implied warranties, in minimum wage and hour provisions, in contracts prescribed by the Interstate Commerce Commission for public utilities, in the standard contracts prescribed for insurance companies and in the uniform sales act, uniform bill of lading act and uniform warehouse receipts act. The judges also have read into contracts constructive conditions where the parties themselves have not in the exercise of their freedom provided for express conditions.

All of the matters enumerated above which fall to the role of society make a substantial list. Yet in spite of all of these matters it probably is still true that in contract law the role of the private parties bulks larger than the role of society as a whole.

Where the line is to be drawn between private autonomy and public authority has not been a static thing. The amount of freedom of contract has been constantly changing through the centuries. The amount of freedom of contract had remarkable growth in the period of maturity in Anglo-American law. But since the coming of the period of socialization the pendulum has swung the other way so far as concerns the common law, and much less freedom of contract is allowed. In this period, for example, practically the whole topic of public utilities has been lifted out of the realm of contracts. In the United States, since about 1890, the question of how much freedom of contract and how much social control without contract we should have has been answered by the United States Supreme Court.² The United

² WILLIS, CONSTITUTIONAL LAW OF THE UNITED STATES, 734-5, 743, 883, 890.

States Supreme Court has not always taken a consistent position upon this question, but has given a different answer in different judicial constitutional periods. Chief Justice Marshall favored freedom of contract and protected corporate charters as contracts against state legislation. Chief Justice Taney and Justice Miller favored social control. Justice Field and his associates, when they commanded a majority upon the Supreme Court, favored freedom of contract, and declared almost all legislation limiting freedom of contract (e.g. hours of labor) to be a violation of due process of law. When Justice Holmes and his associates succeeded these men and dominated the decisions of the Supreme Court more social control was allowed. But with the ascent to the dominancy of the court of Justices Butler, McReynolds, Sutherland and Van Devanter the Court went back to the position of Field and his associates (minimum wages). The present Court has, in its turn, overthrown the work of Justices Butler, McReynolds, Sutherland and Van Devanter and gone back to the decisions of Justice Holmes and his associates, so that at the present time it may be said that the tendency is in the direction of upholding social control without contract and delimiting freedom of contract.

Thus it is seen how important has been the role of private autonomy and freedom of contract in the law of contracts. Freedom of contract is a sort of master-key to the understanding of the law of contracts as a whole. Why this truth has not been known in the past is hard to explain.³ The importance of freedom of contract could not wholly have escaped the attention of people in the years before us, and yet so far as the law of contracts is concerned apparently there might not have been any such phenomenon. To correctly understand the law of contracts in the future, this key must be recovered and used.

II.

A second prerequisite to the understanding of the law of contracts is the analysis of the subject into four separate and

³ Up to date no case books on contracts, used in our schools, and no textbooks on contracts and encyclopedias treating of the subject of contracts, used by practitioners, have used this approach to the understanding of the law of contracts. As a result most class A teachers and practitioners are none too well grounded in contract principles, and some business law and commercial law teachers have a knowledge of the fundamentals of contracts so confused and superficial that they do not know what the law of contracts is about.

distinct kinds of contracts instead of one kind of contract. This is a matter which concerns formalities. It is a part of the law of contracts made by society without any help from the private parties to contracts. However, society, in prescribing the formalities which the parties must observe in making contracts, has prescribed four different sets of formalities which constitute four separate kinds of contracts. The parties are free under the proper circumstances to use any one of the four forms of contracts, but they cannot generally use more than one kind of contract at a time; and whichever kind of contract they choose to use they must make according to the law prescribed for this kind of contract.⁴

These four kinds of contracts are (1) the promise under seal, (2) the promise for moral consideration, (3) the promise injuriously relied on, (4) the promise in the form of offer and acceptance and bargain consideration.

There is only one common element running through all of these contracts and that is promise. All the other elements of each kind of contract differ from the elements of each of the others.

The promise under seal requires no consideration and no offer and acceptance and is never within the Statute of Frauds, but it does require a promise, in writing, under seal, and delivered. The nature of the requirement of the seal has changed from an impression on wax to a scroll or almost any device.⁵ In England, delivery, at first, had to be actual surrender, and in the United States even today there must be some putting of a document out of possession with apparent intention to make delivery. But in England today, apparently intent alone is enough.⁶ Delivery has developed, until delivery in escrow (and even to the promisee) is permitted.⁷ A promise is an undertaking that something will or will not happen in the future. This definition of a promise has not changed through the years. Sign-

⁴ This analysis of the law of contracts has not been that followed in the past either by casebooks or textbooks, and the restatement of the American Law Institute makes the situation worse. This is one reason why there has not been a better understanding of the law of contracts.

⁵ *Jackson v. Security Mut. Life Ins. Co.*, 233 Ill. 161, 84 N.E. 198 (1908); *Warren v. Lynch*, 5 Johns. (N.Y. 1810) 239.

⁶ RESTATEMENT, CONTRACTS (1932) Sec. 102; *Xenos v. Wickham*, (1867) L. R. 2 H. L. 296.

⁷ RESTATEMENT, CONTRACTS (1932) Sec. 101.

ing was not required in earlier law and is not required even today, although it has become a common practice and might very well today be made a substitute for the old requirement of a seal. But this reform has not as yet come to pass.

The promise for moral consideration does not require offer and acceptance, and it is not within the Statute of Frauds; but it does require a consideration. This consideration, however, differs from the consideration found in any other kind of contract. The consideration in the promise for moral consideration is always some antecedent fact or facts; and at the present time it must consist either of a moral obligation which was once a legal obligation or of a moral obligation created by the receipt of prior pecuniary benefits. Lord Mansfield was really the author of the doctrine of moral consideration, and with him the only moral consideration required was that found in the making of the promise itself (but he apparently applied this rule only in the case of a promise in writing);⁸ and some of the judges for a time followed Lord Mansfield.⁹ In the period of maturity there was so much opposition to Lord Mansfield's position that the doctrine of moral consideration was reduced to cases where there was a prior legal obligation as in the case of debts discharged by the statute of limitations or by a discharge in bankruptcy.¹⁰ In most cases of prior legal obligations there was also the fact of prior pecuniary benefits received, but the courts at this time did not emphasize this fact. However, in the present period of socialization the receipt of prior pecuniary benefits has been treated as equally if not more important than a prior legal obligation, and now there are many courts which have held that this antecedent fact is sufficient moral consideration to make a promise enforceable,¹¹ and recovery will be allowed

⁸Hawkes v. Saunders, (1782) 1 Cowper 289; Pillans v. Van Mierop, (1765) 3 Burrows 1663.

⁹Goulding v. Davidson, 26 N. Y. 604 (1863); Lee v. Muggerridge, (1813) 5 Taunt. 36.

¹⁰Niblack v. Goodman, 67 Ind. 174 (1879); Earle v. Oliver, (1848) 2 Exch. 71; Eastwood v. Kenyon, (1840) 11 Ad. & E. 438.

¹¹Gray v. Hamil, 82 Ga. 375, 10 S. E. 205 (1889); Holland v. Martinson, 119 Kan. 43, 237 Pac. 902 (1925); Bagaeff v. Prokopik, 220 Mich. 265, 180 N. W. 427 (1920); Mohr v. Rickgauer, 82 Neb. 398, 117 N. W. 950 (1908); Wilson v. Edwards, 24 N. H. 517 (1852); Bentley v. Morse, 14 Johns. (N. Y. 1817) 468; Landis v. Royer, 59 Pa. 95 (1868); Ferguson v. Harris, 39 S. C. 323, 17 S. E. 782 (1893); Edson v. Poppe,

where pecuniary benefits have been received even though the transaction is illegal if only *malum prohibitum*.¹² When this promise for prior pecuniary benefits is correctly rationalized, there is also found a rationalization for the case of an act for a promise. This has given law teachers quite a problem, and they have tried to rationalize it as a form of bargain contract, either with an offer of an act accepted by a promise or a bilateral offer of a promise performed before acceptance by the other party. Either of these explanations is farfetched and the true rationale should be that liability here is based on a promise given because of the receipt of prior pecuniary benefits.¹³

The promise injuriously relied on and the promise in the form of offer and acceptance and for bargain consideration had a common origin in the action of special assumpsit, but otherwise there is very little resemblance between them. In the promise injuriously relied on there is no offer and acceptance, and no promise within the Statute of Frauds, and the consideration consists of a subsequent fact or facts. The reason for the development of this kind of contract was probably the need of finding a way to enforce oral promises, in order to supplement the law of promises under seal which, of course, had to be in writing. This law was made in the sixteenth and seventeenth centuries by gradually changing the action of special assumpsit from a tort action into a contract action through allowing it to lie when the only wrong was a nonfeasance. But nineteenth century judges were as much opposed to this kind of law as they were to the law based on moral consideration, and they tried to get rid of it. However, there were some promises injuriously relied on which they had to continue to enforce, like gratuitous promises to convey land,¹⁴ gratuitous promises of a license,¹⁵ charitable subscriptions,¹⁶ gratuitous promises of other gifts,¹⁷ gratuitous

24 S. D. 466, 124 N. W. 441 (1910); *Boothe v. Fitzpatrick*, 36 Vt. 681 (1864); *Muir v. Kane*, 55 Wash. 131, 104 Pac. 153 (1909); *Park Falls State Bank v. Fordyce*, 206 Wis. 628, 238 N. W. 516 (1931).

¹² *Brewster v. Banta*, 66 N. J. L. 367 (1901).

¹³ For other discussions of this point see Goble, *Is an Offer a Promise?* (1928) 22 ILL. L. REV. 567, and Corbin, *The Offer of an Act for a Promise* (1920) 29 Yale L. J. 767.

¹⁴ AMES, CASES ON EQUITY, 306-309.

¹⁵ *Bassick Mfg. Co. v. Riley*, 9 F. 2d 138 (1925).

¹⁶ *Presbyterian Church of Albany v. Cooper*, 112 N. Y. 517, 20 N. E. 352 (1889).

¹⁷ *Devecmon v. Shaw*, 69 Md. 199, 15 Atl. 464 (1889).

undertakings of bailees¹⁸ and promises of waiver.¹⁹ In the twentieth century the promise injuriously relied upon apparently is going to have some new development, because the Restatement has extended the law to "a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."²⁰

The bargain contract was developed in order to supply a need for a contract containing bilateral promises. This contract does not require a seal; but does often come within the Statute of Frauds, requires offer and acceptance and the concurrent fact of a price given in exchange for a promise. This is called bargain consideration and this is different from injurious reliance, which requires a subsequent fact, and from moral consideration, which requires an antecedent fact. The promise injuriously relied upon was given a twist so as to make the act following a promise one that was given in exchange for a promise and to include a promise as well as an act. It was also probably influenced by the theory of consideration developed by the equity courts, and by the requirement of a *quid pro quo* for the action of debt. This law which was developed for unilateral contracts in the seventeenth century²¹ and for bilateral contracts in the eighteenth century²² has continued to grow and develop through the years since that time, until now it is the most popular and most used form of contract available. But while it has at various times threatened to supplant the other kinds of contracts, it should be carefully noted that it did not succeed in this respect, but all the other forms of contracts have also continued to endure.

All of the above statements ought to be equally clear to every student of contracts. Yet casebooks and treatises, instead

¹⁸ Siegel v. Spear, 234 N. Y. 479, 138 N. E. 413 (1923).

¹⁹ Underwood Typewriter Co. v. Realty Co., 220 Mo. 522, 119 S. W. 400 (1909).

²¹ RESTATEMENT, CONTRACTS (1932) Sec. 90.

²² Thomas v. Thomas, 2 Q. B. 851 (1842); Freeman v. Freeman, 2 Bulst. 269 (1615).

²³ The fifth kind of contract recognized by the American Law Institute as a kind of contract, to wit: the promise of record, has not been discussed because it is not a contract which parties will employ when they desire to make contracts with each other. RESTATEMENT, CONTRACTS (1932) Sec. 9.

of treating of these different kinds of contracts separately have preferred to jumble them altogether under inappropriate headings (e.g., "consideration"), so that the student of contract law has never acquired the clear comprehension of the law of contracts which he ought to have acquired. Nothing but confusion and disappointment can result from this practice, and, hereafter, these different kinds of contracts should be not only studied separately, but they should be studied in the order in which they have been given above, because this is essentially the chronological order of their origin and development. The last two kinds of contracts should be studied in close connection because of their common origin, but the promise injuriously relied on should be studied first for the aid it will give in understanding the bargain contract. Some people may think that this is making contract law too complex. They have made it complex and hard to understand by attempting to simplify it. It is impossible to simplify something which is not simple. Here, then, is found a second key to the understanding of the law of contracts; and it also is a sort of master key, for it opens a great many doors to contracts.

III.

A third prerequisite to the understanding of the law of contracts is learning that contracts is a law of promises and not a law of agreement. Yet practically all writers on the subject of contracts, with the exception of Mr. Williston, have defined contracts as a law of agreement; and Mr. Williston has taken the position that the bargain contract is a law of agreement.²³ Everyone will admit that there is no agreement in three kinds of contracts. [Seal, injurious reliance and moral consideration.] If there is any agreement at all, it is in the bargain contract. But modern scholarship has discovered that there is no agreement even in this kind of contract. At first, the English cases insisted that there must be a meeting of the minds or a subjective agreement. It almost seemed possible to prove that there

²³ WILLISTON, CONTRACTS (1936) Secs. 22-23; RESTATEMENT, CONTRACTS (1932) Secs. 20-22. 2 BL. COMM. 442 defined contracts as "an agreement upon sufficient consideration, to do or not to do a particular thing." Addison, Anson, Clark, Chipman, Chitty, Elliott, Harri-man, Lawson, Leake, Parsons, Page, Pollock, Salmond, Story, and Wharton all define a contract in the terms of an agreement just as Blackstone did, although they change some of the phraseology of their definitions in slight respects.

always was a subjective agreement in bargain contract, until the parties began to deal with each other from a distance. Then it became impossible to insist upon this subjective agreement. The courts tried to introduce the common agent theory in order to get such an agreement,²⁴ but this explanation worked havoc with the law as to rejection of an offer and to revocation of an offer, which ignored any common agency hypothesis, and the cases did worse than introduce a common agent hypothesis; they held that there was a contract in the case of a mistake by one or both of the parties.²⁵ After this there was no use to continue any pretense that the bargain contract required subjective agreement. Then many judges and law writers began to talk about objective agreement, but the arguments for objective agreement are really no better than those for subjective agreement. An objective agreement without offer and acceptance will amount to nothing. In the case of cross offers there is both a subjective and an objective agreement and yet cross offers will not create a contract.²⁶ It is apparent, therefore, that offer and acceptance are the fundamental essentials for a bargain contract. Any objective agreement that is found is a mere happenstance. It is a shadow of offer and acceptance. It is true there always seems to be this shadow, but, if there could be a case of offer and acceptance without the shadow, there is little doubt that it would be enough for a bargain contract so far as this point is concerned. Objective agreement is irrelevant. In deciding whether or not there is a bargain contract one must find an offer and an acceptance. He does not need to look for objective agreement. The important thing in the bargain contract is offer and acceptance. In every offer and acceptance there is either one promise or two promises; and in the other types of contracts there is always a promise but never an agreement or offer and acceptance. Therefore, the promise is the important thing. This knowledge is a key which will unlock many contract doors.

For a contract, it is true, more than a promise is required, but this is not always the same thing, and it is never agreement. For one kind of contract there is required a seal and delivery in addition to a promise; for another kind, moral consideration;

²⁴ *Adams v. Lindsell*, (1818) 1 Barn. & Ald. 681.

²⁵ *Steinmeyer et al. v. Schroepel*, 226 Ill. 9, 80 N. E. 564 (1907); *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 Atl. 495 (1887).

²⁶ *Tinn v. Hoffman & Co.*, 29 L. T. R. (N. S.) 271 (1873).

for another kind, injurious reliance; and for still another kind, offer and acceptance and bargain consideration. In none of these contracts is there "agreement." Some other operative fact or facts besides a promise are required, but never an agreement. How absurd under these circumstances to define contract in terms of agreement!

IV.

A condition precedent to understanding that part of the law of contracts, found in the law of offer and acceptance, is the use of the law of powers. We have already said that an offer must contain a promise. It also creates a power in the offeree to make a contract according to the terms of the offer.²⁷ The power may be either a revocable power with no right in the offeree; or it may be an irrevocable power with no right in the offeree, as in the case of part performance of an act called for by the offer of a unilateral contract; or an irrevocable power and a right, as in the case of an offer in the form of an option. But in each one of the cases the offeree has the power to make a bargain contract provided he exercises his power in the case of a revocable power before it has been revoked. Communication to the offeree is necessary for the creation of a power in him. An acceptance is an exercise of the power given to the offeree in the way he has been authorized to exercise it. The offeree may be given the power to manifest his acceptance in a great variety of ways, as by waving a flag, or shooting a gun, or mailing a letter.²⁸ The time, manner and place²⁹ of his acceptance may be prescribed. Communication of the acceptance may be prescribed but unless prescribed it is not necessary because the offeree is exercising a power given to him.³⁰ When the offeree exercises his power, he immediately creates a contract, provided there is also sufficient consideration. It is not necessary to have an intermediate agreement before there is a contract created. If he does not exercise the power given to him, and in just the way authorized, there is no contract. His effort may, however, amount to a counter-offer. The law of powers solves all the problems of offer and acceptance, rationalizes the case of cross offers, har-

²⁷ *Taylor v. Merchants Fire Ins. Co.*, 9 How. 390 (1850).

²⁸ *Trevor, et al. v. Wood, et al.*, 36 N. Y. 307 (1867).

²⁹ *Eliason v. Henshaw*, 4 Wheat. 225 (1819).

³⁰ *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. 644 (1878).

monizes the law of offer and acceptance with the law of rejection and revocation of offers, and proves that part performance of an act in case of an offer of a promise for an act does not constitute acceptance but destroys the offeror's power of revocation. Hence, the fourth key is one of the most useful keys to the understanding of the law of contracts, although it only opens one door.

V.

A condition precedent to the understanding of the law of consideration in the bargain contract is learning that there is only one theory of bargain consideration, and that is the theory that such consideration must consist of a right, power, privilege or immunity either given or promised. There are three kinds of consideration in Anglo-American law, moral consideration, injurious reliance and bargain consideration. The first type of consideration requires antecedent facts; the second type subsequent facts, and the third type concurrent facts. The first type of consideration requires benefit to the promisor and the other two types require detriment to the promisee. Such different kinds of consideration cannot be considered together. They have little in common. But when it comes to bargain consideration it has only one theory. However there are many law writers who have contended that there are two theories of bargain consideration, one for forbearance to sue and pre-existing duty cases and another for all other cases.³¹ It will be possible to show that these writers are wrong, and that there is really only one theory of bargain consideration; and that is a right, power, privilege and immunity.

The first proof of this statement is the fact that a right, power, privilege or immunity given up or promised is always sufficient consideration for a bargain contract.³² The second proof is that in pre-existing duty³³ and forbearance to sue cases³⁴ it is expressly held nothing else will amount to bargain consideration. Where the pre-existing duty is owed to a second

³¹ RESTATEMENT, CONTRACTS (1932) Secs. 75, 76, 85, 86, 87, 90, has made a sorry mess of this subject.

³² *Beaumont v. Prieto et al.*, 249 U. S. 554, 39 S. Ct. 383, 63 L. Ed. 770 (1919); *Orr v. Orr*, 181 Ill. App. 148 (1913); *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. 256 (1919); *White v. McMath & Johnson*, 127 Tenn. 713, 156 S. W. 470 (1913).

³³ *Davis & Co. v. Morgan*, 117 Ga. 504, 43 S. E. 732 (1903).

³⁴ *Blount v. Wheeler*, 199 Mass. 330, 85 N. E. 477 (1908).

person it is possible to find consideration for a promise of a third person where it would not be possible to find it for a second promise by a second person, because of the fact that the first person is not under a pre-existing duty to the third and, therefore, has a privilege to try to get a rescission of his contract with the second.³⁵ A third proof is found in the fact that an illusory promise will not amount to sufficient consideration because the promisor does not promise to give up either a right, a power, a privilege or an immunity, but only promises to do so if he chooses to do so. In such cases, of course, there is not even a promise.³⁶ The fourth proof is found in the fact that there are no cases holding anything else to be sufficient bargain consideration. It has been contended that infants and other people who have the power of avoiding their contracts do not promise to give up a right, power, privilege or immunity but only promise to do so if they choose. If this was the nature of their promises, their promises would be illusory and there would be no contract at all. It is true these parties do have the power of avoidance of their contract, but if they do not promise to give up some right, power, privilege or immunity, there would be no bargain consideration. The power of avoidance has nothing whatever to do with the matter of consideration. If an infant or any other person who has the power of avoidance does not in his original contract either give up or promise to give up a right, power, privilege or immunity, there is no bargain consideration. If he does promise to give up one of these things, there is a bargain consideration. In order to make even a voidable contract he must give up or promise to give up exactly what an adult would have to do in order to furnish bargain consideration. When he does this, it is absurd to say that he is furnishing a different kind of consideration from that which the adult has to furnish. Further proof of the soundness of this argument is found in the fact that an adult at the time he gives up or promises to give up a right, power, privilege or immunity may reserve a power to avoid a contract during some short period. Yet in such case there is no difficulty in finding that the adult has given sufficient bargain consideration and that his promise is not illusory.³⁷ Promises on condition also do not have any separate theory of

³⁵ *De Cicco v. Schweizer*, 221 N. Y. 431, 117 N. E. 807 (1917).

³⁶ *Great Northern Railway Co. v. Witham*, (1873) L. R. 9 C. P. 16.

³⁷ *Gurfein v. Werbelovsky*, 97 Conn. 703, 118 Atl. 32 (1922).

consideration. In such case a party must promise to give up a legal right, power, privilege or immunity or there is no sufficient consideration; if he does, there is sufficient consideration. The fact that the promise is conditional has nothing whatever to do with the necessity for consideration.³⁸ Compromise cases have to be rationalized in the same way. Each party must give up or promise to give up some part of his right or at least the privilege to have determined the question of whether or not he has a right.³⁹

These four lines of proof abundantly demonstrate that in Anglo-American law there is only one theory of bargain consideration, and that is a legal right, power, privilege or immunity given or promised. This is the key to the understanding of the law of bargain consideration.

VI.

In order to understand the law as to when performance on the exact time is a condition precedent and when it is not, when part performance is all that is required as a condition precedent and when full performance is required, and when the satisfaction of a reasonable man rather than the satisfaction of the defendant is all that is required as a condition precedent, in case of a promise to render performance to personal satisfaction, it is necessary to master the law as to express conditions and constructive conditions.

A condition is an operative fact, made a term of a contract, on the happening or non-happening, performance or non-performance, of which a duty of immediate performance, or another condition, is made to depend. An "express condition" is a fact stated, or written out, in explicit terms. A condition implied by law ("constructive") is one read into the contract by the courts to meet the needs of justice, because of the assumption that performance is to be given for performance.

Where time is an express promissory condition precedent and where time is made of the essence of a contract, either expressly or by rule of law, the one who has promised to perform this condition must perform on the exact time or he will be

³⁸ *Coleman v. Eyre*, 45 N. Y. 38 (1871).

³⁹ *Seward & Scales v. Mitchell*, (1860) 1 Cold. 87; *Cook v. Songat*, (1588) 1 Leon. 103, 4 Leon. 31.

guilty of breach of duty, and he will excuse the other party from his duty of performance.⁴⁰ Where a promissory condition precedent is express neither substantial nor any other kind of part performance will fulfill the condition, but the one under duty must render full and strict performance,⁴¹ just as express non-promissory conditions precedent must happen.⁴² Where there is an express promissory condition precedent of personal satisfaction, whether the contract involves taste, workmanship, sale on trial, or sale and return, the other party is sole judge as to his personal satisfaction; and the reasonable man standard is irrelevant.⁴³ In all of these cases the rationale is express conditions. The parties have in exercising their freedom of contract settled their rights and duties; and the order and method in which they are to be performed; and the courts will leave the matters where the parties have put them; they do not feel free to mold the conditions in such a way as to accomplish justice.

But, if in the above typical situations the conditions are constructive instead of express, a different result will follow. Where time is not of the essence of the contract, especially in case of real estate, labor and building contracts, the promisor is still liable for breach of promise if he does not perform on the exact time, but by construction of law he has performed all that is required as a condition precedent if he performs or tenders performance within a reasonable length of time from the time fixed, so that he may hold the other party to his performance.⁴⁴ Where a promissory condition precedent is such by construction of law, all that the promisor has to do to put the other party in default is to perform either a substantial part of his duty or at least more than half of it, though of course he is still liable for his breach of promise. He does not have to perform all of his promise as a condition precedent.⁴⁵ Where there is a promise to do something to the personal satisfaction of another, but the

⁴⁰ *Mazzotta v. Bornstein et al.*, 104 Conn. 430 (1926).

⁴¹ WILLISTON, CONTRACTS (1932) Sec. 805.

⁴² *Martinsburg v. March*, 114 U. S. 549, 15 S. Ct. 1035 (1885); *Second National Bank v. Pan American Bridge Co.*, 183 Fed. 391, 105 C. C. A. 611 (1910).

⁴³ *Williams Mfg. Co. v. Standard Brass Co.*, 173 Mass. 356, 53 N. E. 862 (1899); *Gibson v. Cranage*, 39 Mich. 49 (1878); *Gerisch v. Herold*, 82 N. J. L. 605, 83 Atl. 892 (1912).

⁴⁴ *King v. Conners*, 222 Mass. 261, 110 N. E. 289 (1915).

⁴⁵ *Tickner Bros. v. Evans*, 92 Vt. 278, 102 Atl. 1031 (1918); *Pickens v. Bozell*, 11 Ind. 275 (1858).

condition is constructive, the question of whether or not the condition has been performed as a condition precedent is answered by the reasonable man standard; and the other party is not the sole judge, although he may have a counter claim for breach of promise.⁴⁶ The rationale for all of these situations is the nature of constructive conditions. Where the law constructs the conditions it can mold them as it thinks best, so as to make them accomplish justice. The courts have felt that where it does not make any material difference to the other party whether or not a promise is performed at the exact time named for performance a party should not be punished by being denied all relief against the other party; that where a person has performed more than half of his promise he should not be denied all contract recovery but should be allowed to require the other party to begin performance, with an allowance in the way of a counter claim for any injury; and that where a person has promised to perform to the personal satisfaction of another, justice requires that the other party should act as a reasonable man. The way to accomplish all of these results is to mold the constructive condition so as to require only the kind of performance which has been indicated. This does not allow one party to take advantage of the other but undertakes to give each of them what is justly due him. Express and constructive conditions are a key to the understanding of the most bothersome problems of performance.

VII.

In order to understand the law of assignment, the law of waiver, and the law of breach, a mastery of the law as to promissory conditions and non-promissory conditions is necessary.

A "non-promissory" or "casual condition" is a fact other than a promise which merely suspends a duty of immediate performance, or another condition, until it happens or extinguishes such duty, or condition, upon its happening. A "promissory condition" is a promise in a bilateral contract which either suspends the duty of immediate performance of another promise until it is performed, or extinguishes such duty on its performance. It also creates a right-duty relation and if breached gives rise to a secondary duty.

⁴⁶ *Bridgford & Co. v. Meagher*, 144 Ky. 479, 139 S. W. 750 (1911); *Janssen v. Muller*, 38 S. D. 611, 162 N. W. 393 (1917).

Rights are capable of assignment unless in some way the assignment of a right varies the duty of the promisor or the assignment has been forbidden by statute, public policy, or contract.⁴⁷ Privileges and powers are not capable of assignment.⁴⁸ A promissory condition creates a right and a privilege; a non-promissory creates only a privilege (or power). It therefore follows that non-promissory conditions can never be assigned, but promissory conditions may be assigned. However, anyone taking such a right takes it subject to any conditions, promissory or non-promissory, which affected it before the assignment.⁴⁹

A right can not be waived.⁵⁰ Because of the establishment of this principle it has been contended that there is no such thing as a waiver; that what we have called waiver has been either estoppel,⁵¹ or election,⁵² or a new contract.⁵³ Probably this view is correct so far as concerns rights, but privileges, powers and immunities can be waived. Any number of these are guaranteed by federal and state constitutions, but they have been held subject to waiver.⁵⁴ The powers and privileges created by offers and the power of avoidance of a contract may be waived.⁵⁵ Hence, it is seen that there is still such a thing as a waiver, and it has not been distributed; but it should be redefined as a voluntary relinquishment of a privilege, power or immunity. Non-promissory conditions create only privileges or powers and, therefore, of course, can be waived.⁵⁶ Promissory conditions create rights as well as privileges and, therefore, the rights can not be waived, but the conditions or privileges parts of the promissory conditions may be waived.⁵⁷ Prevention may amount to a waiver of a condi-

⁴⁷ *Jemison v. Tindall*, 89 N. J. L. 429, 99 Atl. 408 (1916).

⁴⁸ *Marston v. Carter*, 12 N. H. 159 (1841); *Boulton v. Jones*, (1857) 2 H. & N. 564.

⁴⁹ *Homer v. Shaw*, 212 Mass. 113, 98 N. E. 697 (1912); *American Bridge Co. et al. v. Boston*, 202 Mass. 374, 88 N. E. 1089 (1909).

⁵⁰ *Foakes v. Beer*, (1884) L. R. 9 App. Cas. 605.

⁵¹ *Jobst v. Hayden Bros.*, 84 Neb. 735, 121 N. W. 957 (1909).

⁵² *Catholic Foreign Missionary Society of America v. Cussani*, 215 N. Y. 1, 109 N. E. 80 (1915).

⁵³ *Shallenberger v. Standard Sanitary Mfg. Co.*, 223 Pa. 220, 72 Atl. 500 (1909).

⁵⁴ *Patton v. United States*, 281 U. S. 276, 50 S. Ct. 253 (1930).

⁵⁵ *Wittwer v. Hurwitz*, 216 N. Y. 259, 110 N. E. 433 (1915).

⁵⁶ *Germania Fire Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. 921 (1902).

⁵⁷ *Craig v. Lane*, 212 Mass. 195, 98 N. E. 685 (1912).

tion.⁵⁸ A prevention by the promisee of the promisor of a promissory condition precedent will amount to a waiver of the condition and a breach by the promisee.⁵⁹ Prevention by the promisor of himself of a promissory condition precedent will amount to a breach and in the case of a concurrent condition will excuse performance by the other party.⁶⁰

A breach is a legal wrong. For this reason, there can be no breach of a non-promissory or the non-promissory phase of a promissory condition and it makes no difference whether the condition is express or constructive, precedent, concurrent or subsequent. But in the case of promissory conditions, whether express or constructive, precedent, concurrent or subsequent, a breach may arise either by failure of performance,⁶¹ or by prevention,⁶² or by repudiation.⁶³ Thus, it is seen that the key to understanding the problems of law involved in these topics is a mastery of the distinction between promissory and non-promissory conditions.

VIII.

In order to understand the law of pleading and proof of the performance and happening of conditions it is necessary to understand precedent, concurrent and subsequent conditions.

A "precedent condition" is a fact (generally an act) which must occur before the duty of immediate performance of a promise, or another condition, arises. A "concurrent condition" is a fact which must occur at the same moment as the duty of immediate performance of a promise (performance on each side, simultaneous). A "subsequent condition" is a fact which must occur after another condition, or the duty of immediate performance of a promise has arisen.

The plaintiff has the burden of pleading and proving conditions precedent, except in the case of insurance contracts. The performance or happening of these conditions is necessary to his cause of action and it makes no difference whether the conditions

⁵⁸ *E. I. Du Pont de Nemours Powder Co. v. Schlottman*, 218 Fed. 353, 134 C. C. A. 161 (1914).

⁵⁹ *Patterson v. Meyerhofer*, 204 N. Y. 96, 97 N. E. 472 (1912).

⁶⁰ *Clark v. Gulesian*, 197 Mass. 492, 84 N. E. 94; *Mary Short v. Stone*, (1846) 8 Q. B. 358.

⁶¹ *Bettini v. Gye*, (1876) 1 Q. B. D. 183.

⁶² *Canada v. Wicks*, 100 N. Y. 127, 2 N. E. 381 (1885).

⁶³ *Torkomain, Jr. v. Russell, et al.*, 90 Conn. 481, 97 Atl. 760 (1916).

are express or constructive, promissory or non-promissory.⁶⁴ The plaintiff also has the burden of pleading and proving a readiness and willingness to perform promissory concurrent conditions, because this is necessary to his cause of action. The defendant has the burden of pleading and proving the performance or happening of all conditions subsequent, because they are a matter of defense and terminate a right which the plaintiff would otherwise have,⁶⁵ and for practical reasons, the happening of conditions precedent in insurance cases.⁶⁶

IX.

In order to understand the law of so called impossibility, it is necessary to learn that there must be read into contracts a condition based on a hypothesis of a mutual assumption as to some matter which is either the basis of a contract or the basis of performance of a contract.

In Anglo-American law there really is no such thing as impossibility. The common law permits parties to promise the impossible. It also does not make future impossibility a defence to the performance of a contract. Impossibility as such has no operative effect either to prevent the making of a contract or to discharge a contract.⁶⁷ But where the parties have dealt on a mutual assumption either as to some matter of law or some matter of fact as a basis either for their contract or for their performance, the courts, if this becomes impossible or impracticable, will read into a contract a non-promissory constructive condition, generally subsequent, to discharge either another non-promissory or a promissory condition. This rationale was developed by Justice Blackburn in the Queen's Bench Court in England in 1863 and has become English and American law ever since.⁶⁸

The following are illustrations of some non-promissory

⁶⁴ *McGowin v. Menken*, 223 N. Y. 509, 119 N. E. 877 (1918).

⁶⁵ *Wilmington & R. R. Co. v. Hobeson*, 27 N. C. 391 (1845); *North Western National Life Ins. Co. v. Ward*, 56 Okla. 188, 155 Pac. 524 (1916).

⁶⁶ *Benanti v. Delaware Ins. Co.*, 86 Conn. 15 (1912).

⁶⁷ *Whitman v. Anglum*, 92 Conn. 392, 103 Atl. 114 (1918); *Fargo, et al. v. Wade*, 72 Ore. 477, 142 Pac. 830 (1914); *King v. Braine*, (1597) Owen 60

⁶⁸ *Hawkes v. Kehoe, et al.*, 193 Mass. 419, 79 N. E. 766 (1907); *Taylor v. Caldwell*, (1863) 3 Best and S. 826.

conditions discharged by this kind of a constructive non-promissory condition subsequent. An express non-promissory condition precedent of an architect's certificate is discharged by a constructive non-promissory condition subsequent, of death, or collusion, or spite, where the parties have dealt on a mutual assumption that the architect will continue to live or will not be guilty of collusion or spite.⁶⁹ The express non-promissory condition subsequent of forfeiture for non-payment of insurance premiums on time is discharged or suspended by a constructive non-promissory condition subsequent of war where the parties have dealt on the mutual assumption of peace.⁷⁰

A constructive promissory condition precedent of the lease of a music hall is discharged by a constructive non-promissory condition subsequent of the destruction of the music hall when the parties have dealt on the mutual assumption of its continued existence.⁷¹ A constructive promissory condition precedent of work is discharged by a constructive non-promissory condition subsequent of death because the parties have dealt on the mutual assumption of continuing life.⁷² A duty to give an annual pass is discharged by a constructive non-promissory condition subsequent of a law prohibiting the issuance of passes where the parties have dealt on the mutual assumption that there would be no such law.⁷³ A constructive promissory condition precedent to build a floor in a building is discharged by a constructive non-promissory condition subsequent of the destruction of the building where the parties have dealt on the mutual assumption of the continued existence of the building.⁷⁴

Thus it is seen that the key to understanding the decisions of the courts in all these cases is the mutual assumption which the courts find as a fact for the basis of reading a constructive condition into the contract.

X.

In order to understand the law of assignment, it is again necessary to make use of the law of powers.

⁶⁹ *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 50 S. Ct. 1035 (1885); *Heben v. Dewey*, 191 Mass. 403, 77 N. E. 822 (1906).

⁷⁰ *Cohen v. Ins. Co.*, 50 N. Y. 610 (1872).

⁷¹ *Taylor v. Caldwell*, (1863) 3 Best & S. 826.

⁷² *Yerrington v. Greene, et al.*, 7 R. I. 589 (1863).

⁷³ *Louisville & N. R. Co. v. Crowe*, 156 Ky. 27, 160 S. W. 759 (1913).

⁷⁴ *Carroll v. Bowersock*, 100 Kan. 270, 164 Pac. 143 (1917).

The common law did not permit the assignment or the sale of intangibles with certain exceptions in favor of the crown, executors and administrators, assignees, bankruptcy, bills of exchange and promissory notes and covenants running with the land. This may have been a sad commentary on the common law but nevertheless this was the common law. However, the common law did permit the owner of an intangible right to give to another person whom we will call an assignee a power to collect a debt and to promise not to revoke the power and to allow the assignee to keep the proceeds after collection.⁷⁵ Yet this was not an effective way to get around the rule against assignment, because the common law held that such power was revocable either by the assignor or by bankruptcy and that the assignor could appoint other agents. Because of this ineffectiveness equity took jurisdiction, not at once to permit a sale of or assignment of an intangible, but to specifically enforce the covenant not to revoke a power and to protect the assignee against all who had not reduced the intangible to possession in good faith, but the consequence of this was to make the assignee the equitable owner.⁷⁶ After this the common law adopted the equity rule and modern statutes have required the assignee to sue in his own name. As a consequence, the assignee became at law not only the equitable owner, but probably also the legal owner upon condition of giving notice to the debtor, as against the debtor; and upon condition of exercising his power before any subsequent assignee exercises a power given to him as against subsequent assignees.⁷⁷ Thus, in spite of the early common law, intangibles have become completely assignable, or saleable, unless such assignment is prohibited by contract or by some rule of public policy, or by some rule of personality, but the key to the understanding of all this historical development and present law is the law of powers.

⁷⁵ *Redfield v. Hillhouse*, 1 Root. 63 (1774).

⁷⁶ *Unwin v. Oliver* (1739), cited in Burr. 481.

⁷⁷ *Salem Trust Co. v. Manufacturers' Finance Co., et al.*, 264 U. S. 182, 44 S. Ct. 266 (1924); *Welch v. Mandeville*, 1 Wheat. 233 (1816); *Winch v. Keeley*, (1787) 1 Term. R. 619, 99 Eng. Rep. 1284; *Cook*, *Alienability of Choses in Action* (1916) 29 HARV. L. REV. 816, (1917) 30 HARV. L. REV. 449.

XI.

In order to understand the law of third party beneficiaries it is necessary again to make use of freedom of contract.

The English common law had a difficult time in coming to a decision as to whether rights could be given in a contract to third party beneficiaries. The strict period judges were divided on the question. The period of equity judges permitted this to be done.⁷⁸ But the period of maturity judges came to the decision that this was impossible,⁷⁹ because of a notion which they had as to privity of contract. In the United States the judges in the period of socialization have gradually come to the conclusion that contract rights may be given to third party beneficiaries, whether they are creditor⁸⁰ beneficiaries or donee beneficiaries.⁸¹ The U. S. Courts found a rationale for this position by cutting through the red tape of privity of contract and holding in common sense fashion that the parties to the contract could create these rights in third parties under their freedom of contract. They have the power to create rights and duties, and it makes no difference whether they give such rights to themselves or to third persons.

XII.

In order to understand the effect of the Statute of Frauds it is necessary to adopt the theory of the voidability of contracts for failure to satisfy the Statute of Frauds.

There has been much dispute as to the effect of the Statute of Frauds. Some have taken the position that it simply makes a contract unenforceable by touching the subject of evidence.⁸² Others have taken the view that the Statute effects the remedy and only the remedy.⁸³ The fact that the Statute affects more than evidence is proven by the fact that a memorandum to satisfy the Statute of Frauds must be executed before a suit is instituted.⁸⁴ The fact that the statute affects something besides

⁷⁸ *Dutton v. Poole*, (1677) 2 Levinz 210.

⁷⁹ *Tweedle v. Atkinson*, (1861) 1 Best and S. 393.

⁸⁰ *Lawrence v. Fox*, 20 N. Y. 268 (1859).

⁸¹ *National Bank v. Grand Lodge*, 98 U. S. 123 (1818); *Teaver v Ransom*, 224 N. Y. 233, 120 N. E. 639 (1918).

⁸² *Reuber v. Negles*, 147 La. 374 (1910); *Maddison v. Alderson*, (1883) 8 App. Cas. 467.

⁸³ WILLISTON, *CONTRACTS* (1936) Sec. 527.

⁸⁴ *Lucas v. Ditson*, (1889) 22 Q. B. D. 357.

a remedy is also proven by the fact that even when a case comes within the Statute of Frauds the plaintiff can recover unless the defendant affirmatively pleads the Statute of Frauds. If he does not so plead, it may as well be said that the contract is valid and the plaintiff has both remedial and antecedent rights. What then is the true rationale of the Statute of Frauds? It is submitted that the correct rationale is that the Statute of Frauds gives a defendant the privilege and the power to avoid his contract if it comes within the Statute of Frauds, by so pleading, just as the law gives an infant and parties on whom fraud has been practiced the privilege and power of avoiding their contracts.⁸⁵ Since the statute gives a party the privilege to avoid his contract, he may do so by pleading the Statute of Frauds. However, he may either exercise or waive this privilege. He may waive his privilege by not pleading the Statute of Frauds. He may exercise his privilege, for example, in case of two oral contracts to sell the same land, by executing a conveyance to the second vendee who thus acquires the legal title, through avoidance of the first contract, even though he had notice of the prior oral agreement with the first vendee. If, however, a memorandum is given to the first vendee before giving a conveyance to the second vendee the party waives his privilege of avoiding his contract by the exercise of his power to satisfy the Statute of Frauds by a memorandum.⁸⁶ The key to the understanding of the effect of the Statute, therefore, is that it makes any oral contract within the statute voidable and gives to the party the privilege and power of either avoiding or ratifying the contract.

Now that the author has finished his rationale of the law of contracts and offered it to the public, there may be those who will say that what he has done is to give a rationale of the law as it has been rather than as it is going to be; that what we want are some keys to unlock the secrets of the future not those of the past; that if the judges make law, the thing to do is to study the personality

⁸⁵ *Edwards Mfg. Co. v. Bradford Co.*, 294 Fed. 176 (1923); *First National Bank of Maringo, Iowa v. Blair State Bank, et al.*, 80 Neb. 400, 114 N. W. 409 (1907); *Abraham v. Durward*, 46 N. D. 611, 180 N. W. 783 (1920).

⁸⁶ *Van Cloostere v. Logan*, 149 Ill. 588, 36 N. E. 946 (1894); *Peck v. Williams*, 113 Ind. 256, 15 N. E. 270 (1887).

of the particular judges—their political affiliations, their religious views, economic theories, emotional constitution, health etc.; that if pressure groups (e.g. business) make law, the thing to do is to study them; and that if the parties to contracts make the law, as this article admits so far as concerns substance, the thing to do is to study them.

There is both an empirical science of law (law in action) and a formal science of law (law in discourse). Law is only partly immediate decisions, but in a large sense what any and all judges will decide. Judges make the law. The law in any particular case is what the judge, or judges, will make the law in that case. This law is retrospective, and accurate legal prediction is therefore impossible. Guesses as to decisions can be made on the basis of precedents, statistics, reports of committees, scientific opinions and the personality of the judge. But if one is going to state the law, or rationalize the law, it cannot be done on the basis of anything other than the precedents, and this is the most important factor in making guesses. If any other law were to be taught in our law schools we would have no law schools. At least their curricula would be too short to amount to much, and all principles and rules would always tend to vanish into thin air. As decisions are rendered in specific cases there is gradually built up a body of what is called law—contracts, torts, crimes, property, etc. This law is not the major premise for the decision of new cases, but it is a rationalization of all the old decisions and it will have a major influence upon judges when they come to decide new specific cases. This is the formal science of law. It is just as much law as the empirical science of law; and it is the only law which can be rationalized and taught in law schools. Of course a study of the characteristics and idiosyncrasies of judges, pressure groups and parties to contracts should not be neglected, at least by practitioners, but there are many different judges, pressure groups and parties all of the time and they are constantly changing with the future. By this study help may be gained in guessing what a decision may be in a particular case, but there will be no scientific basis even for this, and generalizations will be impossible. Freedom of contract can be taught but it would be impossible to teach what kind of contracts parties will make. So far as the law is formulated

and rationalized it must be the formal not the empirical science of law.

The empirical science of law studies sociological and psychological phenomena. The formal science of law is propositional, uses formal logic, and deals with certainty. Both grow and change. As defined and taught law must be used in the sense of law in discourse. So defined it is a prediction of what the judges will do, not in the sense of the neo-realists but in the sense of Cardozo and Holmes. It is not a specific decision for a specific case, but it is a hypothetical conclusion. It is not a command by a superior to an inferior, but it is a by-law of the people. It is not a binding precedent, but it will help to make law in a specific case more than anything else. It is not a natural law found by the judges, but a natural law which the judges tend to make. It is a body of hypotheses, theories, doctrines, principles and rules made by executives, legislators, judges, writers and teachers on the basis of past decisions and generalizations and rationalizations from them, and the scheme of social control resulting from putting them all together and applying them to individuals.

In contracts, there are many changes and what he regards as improvements which the writer thinks ought to be made. He, for example, thinks the statute of frauds has outlived its usefulness and should be abolished. He thinks the private seal has become obsolete and that a person's signature should be substituted for it in the formal contract. He thinks that no consideration at all should be required for any promise in writing. But he is not prepared to prophesy that these or any other changes are going to be made by the judges in the law of contracts. Others might desire more freedom of contract and other changes in the law of contracts than the writer would, but they cannot predict that the judges will take their viewpoint. In some branches of the law (e.g., constitutional law) because of general trends in the law and because of the long tenure of judges whose personalities are known it is easier to anticipate and prophesy future changes, but there is no such place for it in contracts. For this reason the writer admits that the keys named herein are not keys to the understanding of the empirical science of law but of the formal science of law.

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