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The American Law Institute's Restatement of the Law of Contracts with Annotations to the Washington Decisions

Committee of Washington State Bar Association on Annotations to the Restatement of the Law by the American Law Institute

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THE AMERICAN LAW INSTITUTE'S RESTATEMENT OF THE LAW OF CONTRACTS WITH ANNOTATIONS TO THE WASHINGTON DECISIONS

TO THE BENCH AND BAR OF THE STATE OF WASHINGTON

The Committee of the Washington Bar Association appointed to procure the preparation of the Washington Annotations to the Restatement of the Law by the American Law Institute welcomes this opportunity to say an introductory word about the American Law Institute and the Washington Annotations to the Restatement.

In 1923 a group of specially invited judges, practicing lawyers and law teachers met in Washington, D. C., to consider the report of a committee on the defects in the law. This committee was headed by Elihu Root. It had long been recognized that the confusion and complexity resulting from the multitude of new decisions rendered annually was making it well-nigh impossible to make adequate or satisfactory search for the law and it was recognized that a remedy must be attempted. The meeting resulted in the formation of the American Law Institute, which immediately undertook the monumental task of restating the fundamental principles of the common law. Recognizing the significance of this undertaking, the Carnegie Foundation made a grant of $1,075,000 to further the work of the Institute.

Since its inception the preparation of the Restatement has gone forward under the guidance of the finest legal scholars in America. Many of the leaders of bench, bar and law school faculties alike are giving generously of their time and effort. The work is being done with the utmost care and it is expected that by its inherent excellence it will command the respect of the Courts.

The restatement of the various branches of the law is in the hands of specialists in their particular field. The Restatement of the Law of Contracts, done under the guidance of Professor Samuel Williston of Harvard Law School, will soon be published in final form. The Restatements of the Law of Agency and of the Conflict

of Laws are rapidly nearing completion. In addition work is steadily progressing on the restatement of other subjects.

As the preparation of the restatement progressed, it became apparent that its usefulness to the lawyer and judge alike would be greatly enhanced if there was some means of readily ascertaining whether or not the particular statement of the law found in the Restatement has ever been considered in the reported decisions of the Courts of his own state, or whether there is a statute which alters or affects that rule in his particular jurisdiction. The various State Bar Associations were appealed to and the result was the appointment of Cooperating Committees to prepare the Annotations to the Restatement. Such committee was appointed in the State of Washington early in the year 1931 by the President of the Washington State Bar Association.

It is the function of the Annotators to take the restatement of each branch of the law as it is prepared by the Institute, subject it to critical analysis in the light of Washington decisions and statutes and annotate it in such fashion that when the restatement is ready and the annotations are laid beside it it will be possible to say whether a certain proposition therein contained does or does not coincide with the laws of the State of Washington on that subject, and if it does not, what the cases or statutes are which modify that law in its application to our state.

The committee realized at the very outset that the respect which would be accorded the Annotations by the Bench and Bar of the State of Washington would depend largely upon the ability and reputation of the Annotators and the care with which the work was done. It was also realized that no funds were available for compensating those who would undertake this most time consuming task. In view of these facts one can readily sense the satisfaction of this committee when it was informed by Dean Shepherd both that the University of Washington Law School faculty was willing to undertake the preparation of the Annotations and that the Washington Law Review was willing to publish the annotations in its issues.

Our immediate goal is the completion of the Annotations to the Restatement of the Law of Contracts. Professor Lantz and Dean Shepherd have been engaged in their preparation for some time and in this issue is printed the annotations prepared by Professor Lantz to the first sections of this restatement. The annotations to the remainder of Contracts will appear in subsequent issues. Professor Ayer is at this time engaged in annotating the Restatement to the Law of Agency

This committee feels that the Bench and Bar of the State of Washington are deeply indebted to the Dean and Faculty of the University of Washington Law School.

COMMITTEE OF WASHINGTON STATE BAR ASSOCIATION ON ANNOTATIONS TO THE RESTATEMENT OF THE LAW BY THE AMERICAN LAW INSTITUTE

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The American Law Institute's Restatement of the Law of Contracts with Annotations to the Washington Decisions*

Chapter 1

MEANING OF TERMS

Section 1. CONTRACT DEFINED.

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

Comment

a. A contract may consist of a single promise by one person to another, or of 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. It is essential, however, for the formation of a single contract that all the promises shall form part of a set. In other words they must be parts of a single transaction.

b. It is not practicable in a definition of contract to state all the operative facts that are necessary or sufficient, or to state all the legal relations that are created by such facts. These will appear with greater fullness in the succeeding Chapters and Sections.

* The absence of annotations to particular sections of the statement indicates that no Washington decisions have been found on the principle therein stated. The sections dealing with the definition of terms, obviously require no annotations.

c. It has been pointed out 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 if not itself such an act is the evidence of such acts,

3. The legal relations resulting from the operative acts.

As the term is used in the Restatement of this Subject, "contract" includes not only the act of making a promise or promises but the intangible duties which arise. Similarly "promise," under the definition in Section 2, includes not merely the act of speaking, but the continuous duty, whether moral or legal, which a promisor assumes when he makes a promise. The separation is not made in ordinary legal speech, and is not made in the Restatement of this Subject, between the physical act of speaking words of promise and the intangible duties which thereupon arise.

d. Not all the operative acts which are essential to create contractual relations between the parties are included in the definition. It does not attempt to state what acts are essential. When an act is done as the consideration for a unilateral contract (see Section 12) and is essential to make the promise obligatory the act is not a part of the promise, and hence is not part of the contract as contract is here defined. Similarly, delivery is necessary to make a sealed promise binding, but delivery is not part of the contract.

e. The term contract is generic. As commonly used, and as here defined, it includes varieties described as void, voidable, unenforceable, formal, informal, express, implied, unilateral, bilateral. In these varieties neither the operative acts of the parties nor the resulting relations are identical.

Section 2. PROMISE DEFINED.

(1) A promise is an undertaking, however expressed, either that something shall happen, or that something shall not happen, in the future.

(2) Words which in terms promise the happening or failure to happen of something not within human control, or the existence or non-existence of a present or past state of facts, are to be interpreted as 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 existence or non-existence of the asserted state of facts.

Comment

a. Just as "contract" as used in this Restatement means not

simply the act of promising, but duties arising therefrom, so "promise" means both physical manifestations by words or acts of assurance and the moral duty to make good the assurance by performance. If by virtue of other operative facts the promise is legally binding, the promise is a contract. The word promise, though in ordinary use, frequently bears different shades of meaning. 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 or refrain from doing something or that he will cause something to come to pass. 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 existence and validity of the undertaking is dealt with in the same way as if the warrantor could cause the fact to be as he asserted, though the meaning of words in terms promising the existence of present or past facts must be interpreted as stated in Subsection (2). 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.

b. An apparent promise which according to its terms makes performance optional with the promisor whatever may happen, or whatever course of conduct in other respects he may pursue, is in fact no promise. Such an expression is often called an illusory promise.

c. A promise must be distinguished from a statement of intention or of opinion and from a mere prophecy As an unsealed promise is binding only if sufficient consideration is given for it, except as is stated in Sections 85-94, and statements of intention or of opinion or sounding merely in prophecy are not ordinarily given for consideration, the distinction is not usually difficult. The problem is, however, frequently presented in determining whether the words of a seller of goods amount to a warranty.

Section 3. AGREEMENT DEFINED.

An agreement is an expression of mutual assent by two or more persons.

Comment:

a. Agreement has a wider meaning than contract, bargain or promise. The word contains no implication that legal consequences are or are not produced. It applies to transactions executed on one or both sides, and also to those that are wholly executory

Section 4. BARGAIN DEFINED.

A bargain is an agreement of two or more persons to exchange promises or performances.

Comment.

a. Bargain has a narrower meaning than agreement, since it is applicable only to a particular class of agreements. It has a broader meaning than contract, because it includes not only transactions of which a promise forms a part, but also completely executed transactions such as exchanges of goods (barters) or of services, or sales where goods have been transferred and the price paid for them. It also includes transactions where one party makes a promise and the other gives something in exchange which is insufficient consideration.

Section 5. HOW A PROMISE MAY BE MADE.

Except as stated in Section 72 (2), a promise in a contract must be stated in such words either oral or written, or must be inferred wholly or partly from such conduct, as justifies the promisee in understanding that the promisor intended to make a promise.

Comment.

a. Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Implied contracts must be distinguished from quasi-contracts, which also have often been called implied contracts or contracts implied in law. Quasi-contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice. 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

Section 6. CONTRACTS CLASSIFIED.

Contracts are classified as formal or informal; as unilateral or bilateral.

Section 7. FORMAL CONTRACT.

Formal contracts are

(a) Contracts under seal,

(b) Recognizances,

(c) Negotiable instruments.

Comment.

a. Other contracts which by statute are required to be in writing or in some prescribed form are not classed as formal contracts. The classification is made for convenience of reference and desig-

nation. Contracts here classified as formal, in many cases, at least, have some characteristics analogous to those of contracts classified as informal. Promissory notes and bills of exchange, especially, are often called informal contracts for this reason. In many states also the effect of seals has been abolished by statute, thereby doing away with Class (a).

Section 8. CONTRACTS UNDER SEAL.

A contract under seal is a contract expressed in a writing which is sealed and delivered by the promisor.

Comment.

a. The rules governing the formation of sealed contracts are stated in Sections 95-110. Where peculiar incidents are attached to such contracts after their formation, attention is called to these incidents in appropriate connections.

Section 9. RECOGNIZANCES.

A recognizance is an acknowledgement in court by the recognizor that he is bound to make a certain payment unless a specified condition is performed.

Comment:

a. Recognizances are in use chiefly to secure (1) the attendance in court at a future day of the recognizor, or (2) the prosecution of an action, or (3) the payment of bail.

Section 10. NEGOTIABLE INSTRUMENTS.

Negotiable instruments are such bills of exchange, promissory notes, and bonds as are payable to bearer, or to the order of a specified person. By statutes, in many States, bills of lading and warehouse receipts, also, if running to bearer or to the order of a specified person, are negotiable.

Comment.

a. The foregoing Section is inserted for completeness of enumeration. The instruments referred to are to be treated of in a Restatement especially devoted thereto. Certificates of shares of stock are also made negotiable by statute in some States, but such certificates do not usually contain promises.

Section 11. INFORMAL CONTRACTS.

Informal contracts are all others than those enumerated as formal contracts in Section 7.

Comment:

a. Under this definition a written contract is an informal contract unless it falls within one of the classes enumerated in Section 7. As stated in the Comment to that Section, the classification of contracts as formal and informal is for convenience of reference

and designation. Many contracts classified as informal have some requisites of form.

b. By the English Statute of Frauds, enacted in 1677, a number of contracts were made unenforceable unless evidenced by a writing. A great part of this statute has been re-enacted in all of the United States, and other contracts besides those enumerated in the English statute have frequently been subjected to the same formal requirement. Rules applicable to such statutes are stated in Chapter 8.

c. 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 a written promise, like a sealed contract at common law, shall be binding without consideration.

Informal contracts as that term is used in the Restatement of this Subject are often called simple contracts.

Section 12. UNILATERAL AND BILATERAL CONTRACTS.

A unilateral contract is one in which no promisor receives a promise as consideration for his promise. A bilateral contract is one in which there are mutual promises between two parties to the contract; each party being both a promisor and a promisee.

Comment:

a. In a unilateral contract the exchange for the promise is something other than a promise, in a bilateral contract promises are exchanged for one another.

b. There must always be at least two parties to a contract, whether unilateral or bilateral, and there must usually be an expression of assent by each. In many cases, however, a promise becomes a contract even though no return promise is made by the promisee. In such cases the legal duty is unilateral, resting on the promisor alone. The correlative legal right is also unilateral, being possessed by the promisee alone. The statement often made that unless both parties are bound neither is bound is quite erroneous, as a universal statement.

c. A unilateral contract is in a very real sense, as its name implies, a one-sided contract. There are two parties to the contract, it is true, and an expression of assent on the part of each is usually necessary to its formation, but one of 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 contractual promises on both sides, the contract is properly called bilateral.

d. Contracts are possible where there are more than two parties, but 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.

e. Contracts are also possible under Section 75 (2) where A promises B in consideration of B's promise to C, or in consideration of C's promise to A. The promises in such cases are not mutual, and therefore, do not fall within the definition of bilateral contract. In view of possible differences in legal treatment they may properly be kept separate.

Section 13. VOIDABLE CONTRACTS.

A voidable contract is one where one or more parties thereto have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract; or by ratification of the contract to make it valid and enforceable.

Comment:

a. Typical instances of voidable contracts are those where one or both parties are infants; or where the contract was induced by fraud, mistake, or duress, or where breach of a warranty or of another promise justifies the injured party in rescinding a bargain or avoiding its legal effect. Usually the power to avoid is confined to one party to the contract, but where, for instance, both parties are infants, or where both parties enter into the contract under such a mutual mistake as affords grounds for rescission by a court of equity, the contract may be voidable by either one of the parties.

b. The consequence of avoidance in some cases is to entitle the party who avoids the contract to be restored to a position as good as that which he occupied immediately before the formation of the contract, in other cases to leave the situation of the parties in the same condition as at the time of the avoidance.

c. In many cases it is a condition qualifying a power of avoidance that the original situation of the parties can be and shall be restored at least substantially, but this is not necessarily the case. An infant, for instance, in many jurisdictions is allowed to avoid his contract without this qualification, so that when the infant exercises his power the parties frequently are left in a very different situation from that which existed when the contract was made.

d. In some contracts included under the designation of voidable contracts, it is unnecessary for one who wishes to avoid them to take promptly the position of an actor. No manifestation of in-

tention is necessary until an action is brought against him. He may, however, by ratifying the transaction make the contract enforceable.

e. Where both parties have a power of avoidance the propriety of calling the transaction 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 Moreover, ratification by either party may terminate his power of avoidance.

Special Note: A promise or set of promises for breach of which the law neither gives a remedy nor otherwise recognizes a duty of performance by the promisor, is often called a void contract, but this is a contradiction in terms in view of the definition of contract in Section 1.

In Jenk's 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 only under this artificial nomenclature could an agreement by which the parties intended to create such an obligation but which did not accomplish their intention, properly be called a void contract.

Section 14. UNENFORCEABLE CONTRACTS.

An unenforceable contract is one which the law does not enforce by legal proceedings, but recognizes in some indirect or collateral way as creating a duty of performance, though there has been no ratification.

Comment.

a. Both voidable and unenforceable contracts, as they have been classified in the Restatement of this Subject, frequently involve a power on the part of one or the other of the parties to create the full contractual rights and duties of an ordinary contract. If this were their only effect they might be classified together, but in the transactions classified as unenforceable some legal consequences, other than the creation of a power of ratification, follow without further action by either party

Chapter 2

FORMATION OF CONTRACTS—GENERAL PRINCIPLES

Section 15. PARTIES REQUIRED.

There must be at least two parties in a contract, but may be any greater number.

Comment:

a. It is not possible under existing law 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 a matter of substantive law for him by his own individual will or expressions to contract with himself. 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 on one side of a bargain, and either alone or with others a party to the other side. The question is also distinct whether a contract is necessarily discharged where one party becomes both obligor and obligee and there are no other parties to the contract.

b. 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 to any number of persons in return for acts or return promises, and all may be part of the same transaction.

Section 16. JOINT, SEVERAL, JOINT AND SEVERAL PROMISORS AND PROMISEES.

Where there are more promisors than one in a contract, some or all of them may promise jointly as a unit, or some or all of them may each promise severally, or some or all of them may promise jointly and severally. Where there are more promisees than one 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, or to some or all of them jointly and severally.

Comment:

a. Procedure in English and American courts in actions at law, when there has been no statutory change fusing legal and equitable procedure, permits 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 may consist of more than one person, but all the persons joined as plaintiffs must assert a common right, and all the persons joined as defendants must be charged with a common duty.

b. As matter of substantive law, however, an indefinite number of persons may contract with one another; each one of the persons or groups of the persons promising either one or any number of the

others, whether dealing with them individually or jointly as a unit. If all the promises are entered into as part of a single transaction, they form part of one contract.

c. In equity there has never been the requirement that the parties to a suit must consist of 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 under the code procedure, now enacted in most of the United States, the same thing is true.

Section 17 WHEN A PERSON MAY BE BOTH PROMISOR AND PROMISEE.

A contract may be formed between two or more persons acting as a unit and one or more but fewer than all of these persons, acting either singly or with other persons.

Comment:

a. This section is applicable to both unilateral and bilateral contracts, and like the other sections in this chapter is applicable both to formal and to informal contracts.

b. The rule 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.

Section 18. NECESSITY FOR CONTRACTUAL CAPACITY.

No one can be bound by contract who has not legal capacity to incur at least voidable contractual obligations. Contractual incapacity may be total or may be only partial.

Comment:

a. Capacity, as here used, means legal power. The legal powers possessed by natural or artificial persons can be set forth only when the various classes are separately considered.

b. 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.

Chapter 3
FORMATION OF INFORMAL CONTRACTS

TOPIC A. GENERAL REQUIREMENTS

TOPIC B. MANIFESTATION OF ASSENT

TOPIC C. CONSIDERATION AND ITS SUFFICIENCY

TOPIC D. INFORMAL CONTRACTS WITHOUT ASSENT OR CONSIDERATION

TOPIC A. GENERAL REQUIREMENTS

Section 19. REQUIREMENTS OF THE LAW FOR FORMATION OF AN INFORMAL CONTRACT.

The requirements of the law for the formation of an informal contract are:

(a) A promisor and a promisee each of whom has legal capacity to act as such in the proposed contract;

(b) A manifestation of assent by the parties who form the contract to the terms thereof, and by every promisor to the consideration for his promise, except as otherwise stated in Sections 85 to 94;

(c) A sufficient consideration except as otherwise stated in Sections 85 to 94;

(d) The transaction, though satisfying the foregoing requirements, must be one that is not void by statute or by special rules of the common law.

Comment:

a. The explanation of the requirements of Clause (a) belongs in the Restatement of the law of Persons, the explanation of the requirements of Clause (d) is given in a later chapter of the Restatement of Contracts, the explanation of the requirements of Clauses (b) and (c) is given in the following sections of this chapter.

TOPIC B. MANIFESTATION OF ASSENT

Section 20. MANIFESTATION OF MUTUAL ASSENT NECESSARY.

A manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts; but, except as qualified by Sections 55, 71 and 72, neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.

Comment:

a. Mutual assent to the formation of informal contracts is operative only to the extent that it is manifested. Moreover, if the manifestation is at variance with the mental intent, subject to the slight exception stated in Section 71, it is the expression which is controlling. Not mutual assent but a manifestation indicating such assent is what the law requires. Nor is it essential that the parties are conscious of the legal relations which their words or acts give rise to. It is essential, however, that the acts manifesting assent shall be done intentionally That is, there must be a conscious will to do those acts, but it is not material what induces the will. Even insane persons may so act, but a somnambulist could not.

Section 21. ACTS AS MANIFESTATION OF ASSENT.

The manifestation of mutual assent may consist wholly or partly of acts, other than written or spoken words.

Comment:

a. Words are not the only medium of expression. Conduct may often convey as clearly as words a promise or an assent to a proposed promise, and where no particular requirement of form is made by the law a condition of the validity or enforceability of a contract, there is no distinction in the effect of a promise whether it is expressed (1) in writing, (2) orally, (3) in acts, or (4) partly in one of these ways and partly in others.

ANNOTATION

Where a teacher was re-elected by a board of education for the ensuing year, and upon being notified thereof by the secretary of the board, expressed to him gratitude that she was "to have the same work," and during vacation consulted with the principal at his request in regard to the proposed work, her acceptance of the appointment was sufficiently shown: *MacKenzie v. State*, 32 W 657, 73 P. 889 (1903), Where L offered in writing to supply S with specific materials for a building for $312 and to furnish extras at market price, and S wrote in reply, "I have decided to accept your bid, but I do this work with the understanding this includes all material to finish said building," and L, without objecting to this conditional acceptance of his bid, proceeded to furnish the materials, he must be held to have assented to S's terms and to have contracted to furnish all necessary materials for the total price of $312: *Gittell v. Saulsberry*, 40 W. 550, 82 P. 909 (1905). Defendant wrote plaintiff, offering to assume payment of $800 for the printing of a catalogue "on condition that there will be no additional charges beyond —the price of $800." Plaintiff replied by letter, "We beg to accept your proposition with the understanding that we are to have $800 for the catalogue—and no changes to be made in your copy or corrections except at your expense.—We believe there will be no changes necessary, but, in case there are, we will expect $1.25 per hour for composition changes." Without deciding whether the acceptance was conditional, but doubting that it was, the court held, that the parties, having treated the corre-

spondence as an existing contract, a contract was formed: *General Lith. & P Co. v. Washington Rubber Co.*, 55 W 461, 104 P 650 (1909). A signed appointment of an agent for the management of property and collection of rents, accepted and acted upon by the appointee, though not signed by him, constitutes a binding contract: *Amherst Inv. Co. v. Meacham*, 69 W 284, 124 P 682 (1912). A writing, signed by defendant, by which he undertakes to secure a patent of certain lands for plaintiff, in consideration of $500 received of plaintiff and of $500 more to be paid when patent is obtained, delivered to and accepted by plaintiff, is binding though not signed by him: *Hunter v. Byron*, 92 W 469, 159 P. 703 (1916).

A memorandum, signed by plaintiff, stating, "I sell to D 6,000 bushels Blue Stem wheat, basis No. one grade—at $1.03½ per bushel—delivery—on or before Sept. 30, 1916," upon which D wrote "Confirmed" and signed it, is a contract binding on both parties, D, by his said acts, having bound himself to purchase the wheat upon the terms stated: *Dement Bros. v. Coon*, 104 W 603, 177 P 354 (1919). The payee's acceptance and endorsement of a check which stated, "to invest Wenatchee Orchard Co. until called for 10 per cent guaranteed," together with evidence of the circumstances under which the check was given, are sufficient to show a binding obligation upon the payee to repay the money on demand with 10 per cent interest: *Griffin v. Lear* 123 W 191, 212 P. 271 (1923). A written agreement for the furnishing of moving picture films which provides that it shall not become binding until accepted in writing by an officer of the producer and written notice of acceptance sent to the exhibitor within 25 days, is effective and complete as a contract where it was accepted in writing by an officer of the producer within the time limited and thereafter partly performed by the delivery and acceptance of films although the record contained no evidence of the sending of notice of its final approval: *Educational Film Exchange v. Praggastis*, 144 W. 289, 257 P 845 (1927). A written contract for the exchange of properties, containing a provision for the payment of a commission to certain brokers for services to be rendered by them in consummating the exchange, which was accepted and acted upon by the brokers, though not signed by them, became their contract as effectively as if they had signed it: *Miskey v. Mazey*, 150 W 676, 274 P. 698 (1929).

Section 22. Offer and Acceptance.

The manifestation of mutual assent almost invariably takes the form of an offer or proposal by one party accepted by the other party or parties.

Comment:

a. This rule is rather one of necessity than of law In the nature of the case one party must ordinarily first announce what he will do before there can be any manifestation of mutual 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 rare, and the decision of it so clear that it is practically negligible.

Section 23. NECESSITY OF COMMUNICATION OF AN OFFER.

Except as qualified by Section 70, it is essential to the existence of an offer that it be a proposal by the offeror to the offeree, and that it becomes known to the offeree. It is not essential that the manifestation shall accurately convey the thought in the offeror's mind.

Comment:

a. Two manifestations of willingness to make the same bargain do not constitute a contract unless one is made with reference to the other. 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.

Section 24. OFFER DEFINED.

An offer is a promise which is in its terms conditional upon an act, forbearance or return promise being given in exchange for the promise or its performance. An offer is also a contract, commonly called an option, if the requisites of a formal or an informal contract exist, or if the rule stated in Section 47 is applicable.

Comment:

a. In an offer for a unilateral contract the offeror's promise is conditional upon an act other than a promise being given except in cases covered by Section 57. In an offer for a bilateral contract the offeror's promise is always conditional upon a return promise being given. The return promise may be in the form of assent to the proposal in the offer. In order that a promise shall amount to an offer, performance of the condition in the promise must appear by its terms to be the price or exchange for the promise of its performance. The promise must not be merely performable on a certain contingency

b. All offers are promises of the kind stated in this section and all promises of this kind are offers if there has been no prior offer of the same tenor to the promisor. But if there has already been such an offer to enter into a bilateral contract, an acceptance thereof, like the offer itself, will be a promise of the kind stated in the Section.

Special Note: The word "option" is often used for a continuing offer although it is revocable for lack of consideration, but more commonly the word is used to denote an offer which is irrevocable and therefore a contract.

Special Note: An offer necessarily looks to the future. It is an expression by the offeror of his agreement that something over

which he at least assumes to have control shall be done or happen or shall not be done or happen 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 2. In such a case as that in Illustration 1,[c] 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 become owner of the chattel if he accepts 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. 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.

Moreover, 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, and even if in terms revocable at any moment, it is still a promise, operative until revoked.

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.

Section 25. WHEN A MANIFESTATION OF INTENTION IS NOT AN OFFER.

If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, he has not made an offer.

[c] A says to B, "This book is yours if you promise to pay me $5 for it." A's offer is a promise in terms conditional on receiving a promise of $5 from B.

Comment:

a. It is often difficult to draw an exact line between offers and negotiations preliminary thereto. It is 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 negotiation must be considered, as well as the customs of business, and indeed all surrounding circumstances.

ANNOTATION

A letter proposing a sale of corporate stock, within the Statute of Frauds, which shows upon its face that there had been prior oral negotiations and contains matters of detail necessarily unintelligible to the receiver of the letter, were he not aided by the previous negotiations; which indicates that there were liens on the corporate property which would have to be dealt with before a sale could be consummated; and mentions the granting of an option after the termination of an existing option to other parties, yet does not state the terms or conditions of the option to be granted, but recites that "final agreement can be arranged for and the deal concluded on the day following expiration of the existing option," does not constitute a binding offer which can be converted into a contract by acceptance: *Coleman v. St. Paul & Tacoma Lumber Co.*, 110 W. 259, 188 P. 532 (1920). A letter from the vice-president of a corporation to a dissatisfied stockholder, containing explanations which he manifestly hoped would satisfy the stockholder, and in which he expressed a willingness to buy back the stock, without specifying the terms of the agreement, and containing no words of present promise, is not an agreement to buy the stock but only an offer to make an agreement: *Richardson v. Hunter*, 88 W 375, 153 P. 325 (1915).

Section 26. CONTRACT MAY EXIST THOUGH WRITTEN MEMORIAL IS CONTEMPLATED.

Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but other facts may show that the manifestations are merely preliminary expressions as stated in Section 25.

Comment:

a. Parties who plan to make a final written instrument as the expression of their contract, necessarily discuss the proposed terms of the contract before they enter into it, and often before the final writing is made, agree upon all the terms which they plan to incorporate therein. This they may do orally or by exchange of several writings. It is possible thus to make a contract to execute subse-

quently a final writing which shall contain certain provisions. If parties have definitely agreed that they will do so, and that the final writing shall contain these 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 anyway that legal obligations between the parties shall be deferred until the writing is made, the preliminary negotiations and agreements do not constitute a contract.

b. The matter may be put in this way If the parties indicate that the expected document is to be a mere "memorial" of operative facts already existing, its non-existence does not prevent those facts from having their normal legal operation. What that operation is must be determined largely by oral testimony, or by preliminary or only partially complete writings. If the parties indicate that the expected document is to be the exclusive operative consummation of the negotiation, their preceding communications will not be operative as offer or acceptance. This also must be shown largely by oral testimony.

c. If the written document is prepared and executed, the legal relations of the parties are then largely determined by that document, because of the so-called "Parol Evidence Rule," even though there was a binding informal contract previously made (see Section 233).

ANNOTATION

A contract for the sale of a crop of hops may be consummated by letters and telegrams, although the negotiating parties may have intended that a more formal contract should be subsequently executed, where the correspondence discloses that the subject matter and terms have been agreed upon and that the parties intended to enter into a contract prior to the execution of the formal writing: *Loewi v. Long*, 76 W 480, 136 P. 673 (1913). A contract is consummated by a written offer to sell two cars dried apples at a price and on terms stated, and its due acceptance by the offeree by telegram; with confirmation by letter, notwithstanding that the offerer, in a letter to the offeree, acknowledging the telegraphic acceptance, added, "If you will let us have regular rail contract duly filled in, we will sign same on receipt," which was not done: *Washington Dehydrated Food Co. v. Triton Co.*, 151 W. 613, 276 P. 562 (1929). Where parties, by oral negotiation for the logging of certain land, came to an agreement as to the work to be done, the time when it should be begun, the place of delivery and the price, but left details as to payment to be arranged later, with the understanding that a written contract should be executed in which the details were to be stated, which was never done, no contract was consummated: *McDonnell v. Coeur d'Alene Lumber Co.*, 56 W 495 106 P 135 (1910). A written

bid to do the carpenter work on a certain building for a specified sum in accordance with plans, but which did not specify when the work should be commenced or completed, nor the character of the work or time of payment, and which contained the statement, "Formal contract to follow," though the person to whom it was addressed wrote "Accepted" thereon and signed his name thereto, does not constitute a contract, the bidder not having forwarded, for execution, a formal contract embodying the essential details of the work: *Stanton v. Dennis*, 64 W 85, 116 P. 650 (1911). Defendant who was intending to bid upon some construction work for a city, agreed with plaintiff that if he would furnish an estimate of the cost of one certain section of the work, Section 8, defendant would use this estimate in making his bid for the whole work and that if the contract were awarded to him he would sublet Section 8 to plaintiff at the figures furnished. Plaintiff made and submitted an estimate of the cost of Section 8, but as it was in excess of the limit fixed by the city, was not used by defendant as a basis for his bid for the whole work. The general contract was awarded to defendant. It was customary for subcontractors to furnish estimates upon portions of the work to a general contractor prior to the bidding upon general contract. Held that no contract was made between plaintiff and defendant, their negotiations indicating merely a purpose to enter into a subcontract, which should be reduced to writing when the terms were later agreed upon: *Meacham v. Pederson*, 70 W. 479, 127 P 114 (1912). Where the original draft of a contract for the sale of box shooks was reduced to writing, signed by the buyer and forwarded to the seller who made certain changes therein, signed and forwarded it to the buyer, who, though accepting the changes, made other changes and insisted upon a contract without interlineations or erasures, and, after further changes were made and assented to, it was further agreed that a writing, containing the terms upon which the parties had then agreed, should be signed by the presidents of the respective parties, which was never done, no contract was ever completed: *Epsom Packing Co. v. Lamb-Davis Lumber Co.*, 112 W. 75, 191 P. 833 (1920). Agreement as to the terms of a contract for the sale of a moving picture business reached through correspondence between the parties does not constitute a completed contract where the parties contemplated the execution of a formal written instrument: *Jammie v. Robinson*, 114 W. 275, 195 P 6 (1921). Where, in response to plaintiff's order for 150,000 box shooks to conform to specifications and at prices previously furnished and quoted by defendant, defendant replied, "today we are sending contracts—and as soon as these are returned to us signed—we will be ready to go ahead on deliveries," but contracts were never sent or signed, no contract was consummated: *Pennington & Co. v. Hedlund Box & S. Co.*, 116 W 292, 199 P. 235 (1921). Although a call for bids for the construction of a building requires the posting of certified checks by bidders for 5 per cent of the amount bid, and does not reserve the right to reject all bids, the owner not having agreed to accept the lowest bid is not bound to do so, especially when the call requires the "successful bidder" to enter into a contract with the owner within five days after the work is awarded to him, or forfeit the amount of his check: *Bromley v. McHugh*, 122 W 361, 210 P. 809 (1922).

*To be continued.