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RIGID LEGAL THEORIES, WITH CONTRACTUAL ILLUSTRATIONS

Introduction

Theories, in the field of the lawyer's profession, are mental tools. They help him to carve the prophecy which he gives in the form of paid advice, and he must know how to wield them or shield against them in the conflict of trial. Therefore the reader must not skitter away from the word "theories," if the law is his field. An intelligent workman must not only know all of his tools, but he must know their strength and their weakness, their sharpness and their dullness, their limits of fitness and unfitness. Changing the simile, every scrap of information about legal theories is grist for the lawyer's mill. Try to wade through the introduction and we will bring you down to present problems.

Now it happens that a theory, when once evolved and voiced as a product of past experience or empirical foresight, is very prone to go a little crazy. Having been born of a particular set of thoughts and experiences, the theory gets a delusion of grandeur and tries to cover everything within apparent reach. Over two thousand years ago, a "law-of-nature" theory was developed in China, taking shape under the leadership of Lao-tze, Mencius and Mih and culminating under Chuangtze. The theory was based upon the observation that primitive people in a state of nature were free of many worries and complexities which were present in the current civilization. This theory then decided that a prehistoric state of nature was a state of bliss, and hence developed a mania for the utter abolition of all current law and customs. A similar theory, similarly puffed into an idol, has appeared periodically in most legal systems. The dreamy Rousseau, frustrated and abashed by social complexities, discovered it anew just prior to the French Revolution, and a clumsy attempt to put it to work was made in the abortive communistic experiment of the subsequent revolutionists.

When some early common law theories were crystalizing, there was a broad concept of the sanctity and permanency of titles to property. In accord with this concept there was a theory that a thief or a finder of personal property other than money, having no title, could not be the means of creating a valid title in his innocent transferee. Instruments of mercantile credit, such as promissory notes, were deemed similar to or a species of personal property, and hence within the theory. Now it happened that merchants found that their greatest convenience was not suited by this application of the theory. By custom among them, a note in a certain form and payable or indorsed in blank or to bearer was deemed quasi-money, and a thief or a finder thereof was deemed able to pass a perfect title to a bona fide purchaser for value, cutting off the rights of the loser. For centuries the rigid and all-reaching common law theory stood adamant against the custom of merchants and the needs of a newly developed commercial world. Finally, under the influence of a new broad theory or method of general approach known as philosophical jurisprudence, the barriers of crystalized conceptualism were battered down by a series of judicial decisions, and the law merchant entered the common law.

During the 1800's, the Anglo-American legal system again saw a general domination of the desire for stability, crystalization and absolute legal concepts and rules. Whether a theory was one of broad approach or one in the form of a rule dealing with a special type of fact problem, there was a general desire of judges, lawyers, legislators and legal thinkers to have it cast in absolute and immutable form. Some sought to find the concepts and rules unfolded in history, some sought to create them by the sheer mental exercise of philosophy, and some sought to discover them by analysis, but all agreed that when they were found or created they should stand as the firmly fixed *lares* and *penates* of our legal hearth. The opinionated Jeremy Bentham declared that judges should apply the law as they found it laid down,

without personal reflection or discretion, and he offered to draw a perfect perpetual constitution and code of laws for any nation on the face of the earth. The constitution of South Carolina was the only practical product of the offer. This dominant juristic attitude has been called the Jurisprudence of Conceptions.

One of the favorite forms of this outlook of the 1800's was the evidentiary rule. As corollaries to general rules, there were evolved various rules devoted to various fact situations which might bring the general rule into issue; and each special rule declared that whenever its kind of fact appeared it should *always* and automatically prove that the general rule was (or was not) fulfilled.

The "Quotation" Rule

For example, there had been worked out our modern general rule that for a communication to be tagged as an "offer" it must manifest a proposition *final* in form, not merely tentative, to which the communicator is willing to be bound, without a further chance to reconsider or dicker, the moment the other party assents. In connection with that proposition, it was observed that when a communication takes the form of a letter or telegram listing prices in the words "we quote you," it was normally intended and understood to manifest a tentative or negotiating state of mind. From this observation, there was precipitated a sort of evidentiary rule that the words "we quote you" or their equivalent *always*, as a matter of law, are intended to manifest a negotiating state of mind, and the receiver of those words is not justified in being misled into believing anything else. By this rule, the words have a constant and automatic legal implication, regardless of context or surrounding circumstances.¹

¹ See: *Johnston Bros. v. Rogers Bros.*, 30 Ont. 150 (1899); *Boyer & Co. v. Duke*, 2 Ir. Rep. 617 (1905); *Little v. Hanbury*, 14 B. C. R. 18 (1908); *Harvey v. Facey* [1893] A. C. 552; *Knight v. Cooley*, 34 Iowa 218 (1872); *Smith v. Gowdy*, 8 Allen (Mass.) 566 (1864); *Nebraska Seed Co. v. Harsh*, 98 Neb. 89 (1915); *Courteen Seed Co. v. Abraham*, 129 Ore. 427 (1929).

In some of the cases last cited, the word "quote" was not used, the court indicating that the evidentiary rule applies to any communication which in fact is a quotation. The jurisprudence of conceptions, whose products are still very much with us, is a ready mark for the bloating expansion of theories. It is perfectly obvious that the conceptual proposition about quotations is capable of a *reductio ad absurdum*. Suppose *A.* should write to *B.*: "I want the price at which you will sell me barrels of X-flour in carload lots, and any quotation you give me is understood to be an offer which, upon my acceptance, will immediately create a binding contract." If *B.* sends back a quotation, no court could hold otherwise than that *B.* had manifested an offering state of mind. In trying to avoid judicial caprice and discretion, some courts stated the evidentiary rule of quotations in a form too absolute for any of them if actually put to the test.

It seems a proper limit to state that a communication carrying a quotation may or may not manifest an offering state of mind, and it is a question of fact, aided by the context and surrounding circumstances, as to what reasonable belief on the part of the receiver of the communication is justified. The decision in *Harvey v. Facey*² has been subjected to the criticism that the quotation of price was not the first communication, but was sent in response to a telegram which seemed to give plain notice that an offer, a manifestation of a final state of mind, was desired.³

There is a Massachusetts case, also, in which there appears to be a complete disregard of the fact that a quotation was made in response to an inquiry and not as the initial move.⁴ The plaintiff wired, "How much corn will you sell, and price." The defendant wired in reply, "1,000 cases, \$1.15, open one week." Then the plaintiff wired, "Sold corn," and requested delivery. The court held that this did

² *Op. cit. supra* note 1.

³ See: 45 Can. L. J. (N. S.) 617; 1 CAN. BAR REV. 392, 398, 403, 713.

⁴ *Lincoln v. Erie Preserving Co.*, 132 Mass. 129 (1882).

not complete a contract because the defendant's wire was a quotation and so, automatically, not an offer. It is submitted that the words "will you sell," in the plaintiff's first wire, put the defendant upon notice that he was expected to make an offer, and that unless he made the contrary plain his reply would be taken to manifest a final state of mind. The reply certainly looked final, and the words "open one week" do not make sense unless attached to an offer; a set lifetime has no meaning or value in a proposition which is tentative and negotiatory.

Some courts have seen that the evidentiary rule as to "we quote" is improper and unfair in its form as an absolute concept; they have declined to let the process of thinking on and evaluating fact problems be replaced by mathematical molds into which facts *volens nolens* must be crammed. For example, in *Fairmount Glass Works v. Cruden-Martin Co.*⁵ the court said:

"But each case must turn largely upon the language there used. In this case we think there was more than a quotation of prices, although appellant's letter uses the word 'quote' in stating the prices given. The true meaning of the correspondence must be determined by reading it as a whole."⁶

The "Counter-Offer" Rule

Another example of rule-worship leading to an over-sweeping rigidity appears in some decisions concerning the effect of a counter-offer as a rejection.

A basic proposition in the common law prescribed that a rejection by an offeree kills the offer, even though its natural span of life (a time set or a reasonable time) has not yet run; thereafter there is nothing left to which an acceptance may attach. This starting point was fair enough; it was based upon the observation that an offeror who receives a rejection is entitled to believe that the offer is dead and he may go ahead with his plans free of any duty of revo-

⁵ 106 Ky. 659, 51 S. W. 196 (1899).

⁶ See, also, *Texas Co. v. American Trade Co.*, 272 Fed. 670 (1921).

cation. But after a time, chiefly in the 1800's, this theory was expanded to include the proposition that a counter-offer is always an implied rejection.⁷ Another expansion followed in the form of a rule that a conditional or modified acceptance is equivalent to a counter-offer, and hence is an implied rejection. These rules contain a fundamental wisdom, but the fault lies in the habit, established under the dominance of the jurisprudence of conceptions, of stating them in a rigidly absolute and unqualified form, with the accent so strongly on the rule as to tend to subordinate the details of a particular fact problem.

Now it seems plain that an offeree may desire to hang onto the offer while he sends out an inquiry as to possible different terms, and may make this clear so that the offeror is not justified in being led into a belief that the offer has been killed.⁸ It is likely that most courts would agree on this limit, or explanation, for the general "counter-offer" rule. The danger, however, lies in the habit of stating the bald rule that a counter-offer is an automatic rejection. Such a statement is likely to prevent a searching of the mind for limitations or shadings. The human mind disgorges its contents only when prodded by stimuli. If a stimulus is partial and fragmentary, it will bring forth only parts and fragments of the possible memories of law and observation of facts. The commonest sin of legal thinking, by students or lawyers, is omission, produced by an inherent and eager tendency to leap at prompt and final conclusions on the first body of observed materials.

Therefore it would seem much safer, protecting the legal thinker against his own unwise tendency, *always* to state the rule of implied rejection somewhat in this fashion: "An offeree may reject the offer or he may hold it while he makes an inquiry; a counter-offer or a conditional accept-

⁷ See the leading case of *Hyde v. Wrench*, 3 Beav. 334 (1840).

⁸ The leading case on this proposition is *Stevenson v. McLean*, 5 Q. B. D. 346 (1880).

ance may imply a rejection, but not if it makes reasonably clear an intention of the offeree to hold onto the offer.”⁹ The advantage of this form is that it puts both possibilities immediately before the reciter of the rule, and causes him to go through a fairly complete and two-sided process of perception and memory before he attempts a conclusion. In this paper we have space for only a few sample situations, but the reader can rest assured that they are typical of hundreds of problems covering all divisions of the legal field. It is hoped that one plain lesson may be deduced; learn your rules and use them in a form which states the alternatives. Learn legal propositions in groupings, wherever possible, so that two or more rules pertinent to an issue join in prodding and broadening the perceptions and help to point out the full problem of fact in connection with the rules which are aids to thinking.

Promises Without Consideration

Probably the most familiar and yet timely example of the difficulty flowing from an overly rigid concept or theory is found in the rule that an unsealed promise must be supported by consideration. This broad proposition was crystallized into its details by the formation of two fundamental tests. First, the purported consideration must fulfill an “intent element”; it must be that which the manifested intent of the promisor wanted as the price of the promise, and it must have been given by one who then and there knew of and intended thereby to purchase the promise. Second, the purported consideration must fulfill a “detriment-benefit element”; it must be something which the giver legally did not have to give and which the receiver had no legal right to insist upon. This statement is brief, but it

⁹ See the RESTATEMENT OF CONTRACTS, section 38, which says: “A counter-offer by the offeree, relating to the same matter as the original offer, is a rejection of the original offer, unless the offeree at the same time states in express terms that he is still keeping the original offer under advisement.”

summarizes a concept which the juristic attitude dominant in the 1800's took to be fairly absolute, rigid and self-sufficient.

But this concept was scarcely formulated before it began to run into difficulties. Fact situations arose wherein certain courts felt that, in spite of total or partial failure of compliance with the set rule of consideration, the promisor in fairness ought to be held to his promise and the promisee *ex aequo et bono* ought to recover. As early as 1849, the Supreme Judicial Court of Massachusetts voiced a yearning for the irrevocability, in some circumstances, of a promise to keep an offer open for a set time.¹⁰ The court said:

"Highly respectable authors regard it as inconsistent with the plain principles of equity, that a person, who has been induced to rely on such an engagement, should have no remedy in case of disappointment. But whether wisely and equitably or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached."

The court might yearn, but the rising tide of the jurisprudence of conceptions was too strong to permit any admission of possible change.

More recently, there have been two types of attempts to break through the old concept and to make irrevocable an offer whose acceptance takes considerable time when a substantial start on the acceptance causes the offeree to undergo a substantial change of position. One view attempts by *fiction* to find compliance with the old rules; a collateral option contract may be found,¹¹ or there is an implied immediate promissory acceptance of which the further acts of the offeree are deemed mere performance. A second view sets out a frank noncompliance with the rules of consideration and a frank new rule that certain offers, admittedly un-

¹⁰ The Boston & Maine R. R. v. Bartlett, 3 Cush. 224 (1849).

¹¹ See the famous Wilshire case, 135 Cal. 654, 67 Pac. 1086 (1902), and various discussions thereof.

sealed and lacking consideration, are irrevocable because of the demands of justice and fair dealing.¹²

Closely parallel to the situation of "irrevocable" offers, we find a group of cases concerning promises which are final in form, not merely tentative offers, and yet are unsealed and fail to comply strictly with one or the other of the two classic tests of valid consideration.¹³ The charitable subscription cases have produced the largest variety of judicial struggles hereon,¹⁴ and the two fundamental attitudes of stability and flexibility of rules are quite plainly voiced by the majority and dissenting opinions in *The Alleghany College* case.¹⁵ Mr. Chief Justice Cardozo, speaking for the majority, pointed out that most of the arguments by which courts have purported to find classic consideration for a charitable subscription are fictitious, and he voiced the very frank belief that the rigid elements which form the classic rule or test are breaking down to admit the legal validity of a promise which has caused the promisee to rely on it and substantially change his position. In opposition, Mr. Justice Kellogg, writing for the minority and conservatively respectful of the classic rigid rule, said:

"I can see no ground for the suggestion that the ancient rule which makes consideration necessary to the formation of every contract is in danger of effacement through any decisions of this court. To me that is a cause for gratulation rather than regret."

Obviously, the dissent does not understand the majority suggestion, for Mr. Chief Justice Cardozo had no desire for the "effacement" of the classic rule,—in fact, he actually used the classic rule and declared it fulfilled by the facts of the case before him. The Chief Justice merely desired to

¹² See Professor McGovney's article, "Irrevocable Offers," in 27 HARV. L. REV. 644.

¹³ Most readers probably remember being introduced to this problem by the cases of *Kirksey v. Kirksey*, 8 Ala. 131 (1845), and *Devecmon v. Shaw*, 69 Md. 199, 14 Atl. 464 (1888).

¹⁴ See these subscription cases classified in 18 CAL. L. REV. 314, in an article by C. H. Matthews.

¹⁵ *Alleghany College v. National Chatauqua Bank*, 246 N. Y. 369, 159 N. E. 173 (1927).

soften and take the rigidity out of the rule in order to allow justice to a misled promisee in a limited group of instances, to make an "exception" as he plainly stated.

It has been noted that some people persist in misunderstanding both Justice Cardozo and Dean Pound. Those steeped in the tradition of the jurisprudence of conceptions, trained in the property-based writings of Professor Gray, think that Cardozo and his ilk are dangerously revolutionary. Those who have leaped into the unleashed Non-Euclidean torrent of Jerome Frank *et al.*, and become a bit drunk on the waters thereof, insist that Dean Pound is a stodgy conservative who hides a Benthamite heart beneath his coat of sociological jurisprudence. These two groups of critics prove our present thesis that theories are inherently prone to go a little crazy. Those who have found a need for flexibility and change get to the point where they want to throw the anchors overboard and trust the legal ship to the unfettered winds of "modern" thinking. Those who see a need for safeguards and stability are likely to set all anchors firmly and let the legal ship become barnacled and decayed. Of course, the truth of the matter is that both Cardozo and Pound are rarely keen men who understand full well the constant legal conflict of the desire for stability and the need for change. The reason why they irritate the "ultras" is that they have been able to keep their balance.

We might go on with further illustrations of judicial alleviation of the classic rules of consideration. It is not our purpose, however, to pile up cases. The exceptions to the detriment element, in its aspect of the "doing what you are bound to do" doctrine, have been laid out in casebooks and texts, and should be studied; they give some excellent illustrations of both the jurisprudence of conceptions and a variety of judicial devices for dodging the rigidity of those conceptions.

Conclusion

Our main purpose is to indicate that theories and ideas, whether on the side of stability or of flexibility, are tainted with the human tendency toward absolutism and superlatives. They like to cover everything in sight, and are susceptible to a delusion of grandeur. Just as we find a common desire to put a tag on the "greatest" or the "worst" President, the "finest" or the "most untasty" culinary dish, or the "greatest" All-American full-back, so we also find a tendency to the superlative in legal or governmental theories and ideas.

Finally, an appreciation of our thesis has a practical value to the lawyer, apart from his own mental balance. This writer has had two recent successes with it, by way of proof. In one case he deprecated the over-worship of flexibility, and pointed out the value of a basic stability which protects judges and lawyers against their own hunches and caprice, in order to secure the sustaining of a demurrer. In the other case he was able, in an argument on the merits, to weaken the broad statements in a line of cases by showing that they were born in the very midst of the jurisprudence of conceptions, and to secure a recognition of limits and variants to the former sweeping proposition.

Jurisprudence, and an appreciation of the thoughts and tendencies which have shaped it, are not dead stuff to be relegated to queer old book-scholars. They are alive, practical, useful tools for the practitioner. They give meaning and depth to propositions found in decisions, statutes and texts. The brief illustrations here given from case law can be found duplicated in every branch or subject. It is for those who look for and see them to give to past and present authorities their richest and keenest use before the courts.

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