

CONTRACTS: A LAW OF RIGHTS, POWERS, PRIVILEGES AND IMMUNITIES

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What is the correct rationale of the law of contracts? Is the Anglo-American law of contracts a body of rights, powers, privileges and immunities?¹ Can this terminology advanced by Hohfeld be satisfactorily employed to rationalize the law of contracts?

The law of contracts is that specific part of the general law which applies social control to freedom of contract. Social control delimits freedom; it does not make it. Yet, in contract law, so far as the making of contracts and the terms of contracts are concerned, freedom is the general rule. The parties are free to make or not to make a contract, and, if they decide to make a contract, to determine all of their rights and duties and some powers, privileges and immunities under the contract, and all other matters of substance. They may measure bargain consideration, insert conditions modifying their duties of immediate performance, promise the impossible, and even choose between different kinds of contracts. In the struggle between freedom of contract and social control, freedom of contract finally won the privilege of assigning contract rights, of creating rights in third party beneficiaries, and of making joint and joint and several contracts. This is democracy with a vengeance, because the legal relations found in contracts are created, not by a majority of the people or by their legislative or judicial representatives, but by the parties to the contracts themselves.

In Anglo-American law, the social control applied to contracts may relate (1) to limitations of the power to make contracts; (2) to requiring contracts or their substance; (3) to prescribing the formalities of contracts; (4) to granting the privilege of the avoidance of contracts for the protection of interests other than those in promised advantages; and (5) to furnishing remedies (legal and equitable) and legal redress

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1. For the hypothesis that rights, powers, privileges and immunities are fundamental legal concepts which rationalize all branches of the law, see Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). As used in the following discussion a legal right means the legal capacity to enforce action or forbearance (performance) by another. Its correlative is duty. A legal privilege is the legal capacity to do as one pleases in a certain matter. Its correlative is inability (no right). A legal power is the legal capacity to change or create new legal capacities or liabilities for others. Its correlative is liability (no immunity). A legal immunity is the legal capacity to be free from the legal power or control of another. Its correlative is disability (no power).

for the breach of contracts. There are some contracts which the law will not permit the parties to make and which it declares illegal, because their subject-matter would be against public policy. There are a very few contracts, such as compulsory automobile insurance contracts, which the parties are required to make, and there are some contracts where specific terms, as in the case of minimum wage and hour provisions and standard uniform acts, must be inserted because required by law. There are also cases where, though the parties have made a contract, the law, in order to protect social interests other than that in promised advantages, will give one of the parties the power to avoid his contract. Illustrations of this sort of social control are found where one of the parties is an infant or *non compos mentis*, or where fraud, duress, or undue influence has been exercised upon one of the parties to a contract. In all of the above instances, social control affects the freedom of the parties as to matters of substance, but only to a limited extent, so that even here the role of the parties bulks larger than does that of society.

When considering the formalities of contracts, however, the rule is very different. Here, freedom of contract disappears, and everything is fixed and determined by law. It is true that the law gives the parties a choice between four different types of contracts: the seal, the moral consideration, the injurious reliance, and the bargain consideration types (although in practical experience there is a choice only between the first and the last); but the parties must obey the essentials prescribed for whichever type of contract they choose or their efforts will be in vain.² Thus, the essentials for a contract under seal are a promise, a writing, a seal and delivery;³ for a contract for moral consideration, a promise and either a prior legal obligation⁴ or a receipt of prior pecuniary benefits;⁵ for a contract based on injurious reliance, a promise and a definite and

2. Willis, *Key to Understanding the Law of Contracts*, 34 Ky. L.J. 171-6 (1945). The Restatement of the American Law Institute, Sections 85-110, recognizes these different types of contracts, but treats the topics of promise for moral consideration and injurious reliance under the heading Informal Contracts without Assent or Consideration, and states that consideration is not requisite for the formation of such contracts. It will be shown that the Restatement's conclusion is erroneous.

3. *Crowley v. Lewis*, 239 N.Y. 264, 146 N.E. 374 (1925); *Moore v. Trott*, 162 Cal. 268, 122 Pac. 462 (1912); *Warren v. Lynch*, 5 Johns. 239 (N.Y. 1800).

4. *Niblack v. Goodman*, 67 Ind. 174 (1879); *Earle v. Oliver*, 2 Ex. 71, 154 Eng. Rep. 410 (1848); *Eastwood v. Kenyon*, 11 A. & E. 438, 113 Eng. Rep. 482 (Q.B. 1840).

5. *Park Falls State Bank v. Fordyce*, 206 Wis. 628, 238 N.W. 516 (1931); *Holland v. Martinson*, 119 Kan. 43, 237 Pac. 902 (1925); *Bagaeff v. Prokopik*, 220 Mich. 265, 180 N.W. 427 (1920); *Edson v. Poppe*, 24 S.D. 466, 124 N.W. 441 (1910); *Muir v. Kane*, 55 Wash. 131, 104 Pac. 153 (1909); *Mohr v. Rickgauer*, 82 Neb. 398, 117 N.W. 950 (1908); *Ferguson v. Harris* 39 S.C. 323, 17 S.E. 782 (1893); *Gray v. Hamil*, 82 Ga. 375, 10 S.E. 205 (1889); *Landis v. Royer*, 50 Pa. 95 (1868); *Boothe v. Fitzpatrick*, 36 Vt. 681 (1864); *Wilson v. Edwards*, 24 N.H. 517 (1852); *Bentley v. Morse*, 14 Johns. 468 (N.Y. 1817).

substantial reliance;⁶ and for the bargain contract, an offer and acceptance, bargain consideration, and frequently something to satisfy a Statute of Frauds.⁷ These are the formalities prescribed by the law for the making of contracts, and the parties cannot make a contract in any other way. Thus freedom of contract is not permitted to touch formalities. What has been said with reference to the formalities for the making of contracts also applies to the unmaking, or discharge, of contracts, and to the legal redress for breach of contracts.

The law's limitations on the power to make contracts, requiring contracts or their substance, granting the privilege of avoidance of contracts and furnishing remedies and legal redress, though all forms of social control and therefore a part of the law of contracts, offer little difficulty for rationale because, being so firmly established, are all well accepted. They are all for the protection of sufficient social interests and involve simple rights, powers and privileges.

The rationale does become difficult, however, when considering the formalities. Here the law is more complex and the problems more numerous; for this reason there is no general agreement as to the proper rationale. The chief problems relate to offer and acceptance, bargain consideration, conditions, and the Statute of Frauds.

OFFER AND ACCEPTANCE

Should a contract be defined in terms of agreement, or in terms of rights, powers, privileges and immunities? When social control, in the guise of formalities, is applied to freedom of contract, does it require an agreement as an operative fact, or a promise or set of promises, and in one type of contract offer an acceptance?

In Anglo-American law an agreement is not required for any kind of a contract, and a contract should not be defined as an agreement. The operative facts required for the creation of a contract are either a promise and a seal, a promise and moral consideration, a promise and injurious reliance, or a promise, offer and acceptance and bargain consideration. A contract should be defined as the legal relation, or relations, created by the promises of the parties, the remedies and legal redress provided by law (on subjects permitted by law), and the formalities prescribed by law.

6. AMES, *CASES ON EQUITY*, 306-309 (1904); *Basick Mfg. Co. v. Riley*, 9 F.2d 138 (Pa. 1925); *Siegel v. Spear*, 234 N.Y. 479, 138 N.E. 413 (1923); *Underwood Type-writer Co. v. Realty Co.*, 220 Mo. 522, 119 S.W. 400 (1909); *Devecmon v. Shaw*, 69 Md. 199, 15 Atl. 464 (1889); *Presbyterian Church of Albany v. Cooper*, 112 N.Y. 517, 20 N.E. 352 (1889).

7. *Tinn v. Hoffman & Co.*, 29 L.T. 271 (1873); *Gurfein v. Werbelovsky*, 97 Conn. 703, 118 Atl. 32 (1922).

The chief relations in a contract are right-duty-in-personam (or legal obligation) relations. A contract can, therefore, be defined as a legal obligation.

Offer and acceptance are required by the law only in bargain contracts. A promise—an undertaking by the promisor to do or not to do something, or that something will or will not be done in the future—is required for all kinds of contracts. It requires relinquishment of a privilege. An offer is a conditional promise by the offeror to the offeree, which gives the offeree the power to make a contract by an act (unilateral contract) or by a promise (bilateral contract), within the time, in the manner, and at the place authorized by the offeror either expressly or by implication of law. An acceptance is the exercise of the power to make a contract vested in the offeree by the offeror. Offer and acceptance are therefore rationalized by the law of powers. If the offeree exercises his power prior to legal revocation thereof, there is a contract even though there is no agreement, or mutual assent, or meeting of the minds.

Blackstone was responsible for introducing the concept of agreement into Anglo-American contract law;⁸ the source of his misconception remains a mystery. It certainly did not come from the action of special assumpsit, which was the origin of both bargain consideration and the consideration of injurious reliance. Following Blackstone, English and United States judges for a time tried to rationalize their decisions by using the agreement theory; and they were fairly successful so long as the parties to contracts dealt with each other face to face; but when they began to deal at a distance and to use the instrumentalities of the mail, telegraph, etc., and the possibility of mistakes increased, the judges were confronted with the alternatives of either declaring that there was no contract or making new contract law. For the sake of justice and a better law they chose to make new contract law—the law of offer and acceptance, as a substitute for agreement. Before doing so an attempt was made to find an agreement, in the case of mistakes, by resorting to the device of a common agent, but the fallacy of this scheme soon became apparent. First, to say that either party could by unilateral action make his agent the agent of the other, was fallacious. Secondly, it was a contradiction to find a common agency only for purposes of acceptance but not for purposes of revocation or rejection. When these defects became obvious, there was nothing left but to use the concepts of promise and offer and acceptance for the rationalization of these decisions.⁹

8. Blackstone defined a contract as "an agreement, upon sufficient consideration, to do or not to do a particular thing." 2 BL. COMM. *422.

9. The writer presented his views on the definition of a contract, and on offer and acceptance, before the members of the American Law Institute in a meeting in Wash-

Yet all the text writers on contracts, with the exception of Professor Williston, continued to define a contract as Blackstone had done, *i.e.*, as an agreement, and to rationalize the law of contracts in terms of agreement.¹⁰ The result was to give to the Anglo-American world a text law different from the case law. Mr. Williston realized that there was no agreement required in the contract under seal, the contract for moral consideration, or the contract created by injurious reliance, and that in the bargain contract, actual (subjective) agreement was not required. He therefore defined a contract as "a promise or set of promises" but he still considered the bargain contract as requiring an "objective agreement."¹¹ His definition, instead of defining a contract in terms of what it is, defines it in terms of how it is created. Moreover, he names only one operative fact necessary for its creation. This so-called "objective agreement" is in fact, of course, no agreement at all. It is simply another name for offer and acceptance. The Restatement of the American Law Institute has essentially followed the position of Mr. Williston as to bargain contracts: the result is not a restatement of Anglo-American law as it is found in the decisions of the courts; it is essentially a slavish following of the concept introduced by Blackstone. Although the American Law Institute professes to follow a policy of not reforming the law, its effort in the field of contracts culminated in a substitution of textbook law for that developed by the courts. To make matters worse, the change is detrimental to a proper understanding of this most basic field of the law. Some day, perhaps, we shall have a restatement of the Restatement.

There is abundant proof that the rationale advanced above is correct. Never has "agreement" been required in three kinds of contracts: those under seal, for moral consideration, and those based on injurious reliance. These contracts have had a long and honored history from the time of the Normans down to the present, in both England and the United States, and they were all recognized in the time of Blackstone. In the light of these facts it is singular, to say the least, that Blackstone

ington which was called to consider the final draft of this part of the Restatement. 3 PROCEEDINGS A.L.I. 173, 183, 190, 193, 195, 204 (1925); 7 PROCEEDINGS A.L.I. 205, 207, 269-72, 276, 279, 292 (1928-29). He won to his side some of the ablest members of the institute and an overwhelming majority of the total membership. Instead of voting on the question, the Institute referred it to the Council. Mr. Mathews, a prominent attorney of Boston and a member of the Council, volunteered to guarantee that the Council would substitute all of the ideas and phraseology of the writer for that of Mr. Williston; but Mr. Mathews' death within a short time thereafter terminated his guarantee. The Council then compromised. It adopted the definition of offer desired by Mr. Williston and the definition of acceptance desired by the writer.

10. This has been done by Addison, Anson, Bishop, Black, Chapman, Chipman, Chitty, Clark, Elliott, Fry, Hare, Harriman, Harris, Helm, Lawson, Leake, Lee, Metcalf, Morawetz, Page, Parsons, Pollock, Salmond, Story, Street, and Wharton.

11. WILLISTON, CONTRACTS, §§ 22-23 (1936).

defined a contract as an agreement. Whether he made this mistake out of ignorance or out of an attempt to reform the law, his definition undoubtedly made it difficult for these different types of contracts to compete with the developing bargain contract. Other text writers copied Blackstone's definition; judges in the nineteenth century tried to substitute a law of agreement for all other types of contract; and in the United States even legislators joined in the battle, but all of their efforts failed to destroy these well established contracts. They succeeded in changing the nature of the requirement of a seal¹² and the nature of the requirement of delivery in the contract under seal,¹³ but it remains a valid type of contract. Lord Mansfield's doctrine of moral consideration was so vigorously attacked that it was restricted to prior legal obligations. In the twentieth century, however, it has been extended to also include prior pecuniary benefits, and it remains an important type of contract.¹⁴ The consideration of injurious reliance was hardy enough to withstand the attack levied against gratuitous promises to convey land, gratuitous promises of a license, charitable subscriptions, other gratuitous promises of gifts, gratuitous undertakings of bailees, and promises of waiver. As a result, the contract based on injurious reliance has continued to thrive.¹⁵ Hence today, as much as in Blackstone's day, it is error to define a contract as an agreement, when there are three types of contracts which do not require this element. Mr. Williston, in eliminating the term in his definition of a contract, has done a better job than other text writers.

If agreement was ever required by the bargain contract, it is not so required today. In bargain contract cases there may be three typical situations: (1) where there is an agreement but no offer and acceptance, (2) where there is both an agreement and an offer and acceptance, and (3) where there is an offer and acceptance but no agreement.

Where there are both an agreement and offer and acceptance, it would be impossible to say that the rationale is either one or the other, because there would be a contract no matter what a court might say about the rationale. Where there is an agreement but no offer and acceptance, Mr. Williston contended that there was a contract. If there are any cases which so hold, it would have to be admitted that the rationale might be agreement; but neither the writer nor Mr. Williston has found such a

12. *Hawkberry v. Metz*, 91 W. Va. 637, 114 S.E. 240 (1922).

13. *Herman v. Jorgenson*, 263 N.Y. 348, 189 N.E. 449 (1934).

14. Willis, *Rationale of Past Consideration and Moral Consideration*, 19 IOWA L. REV. 395 (1934).

15. Comment, 48 YALE L.J. 1036 (1939).

case.¹⁶ Furthermore, the cross-offer cases hold that there is no contract in case of an agreement without offer and acceptance. In these cases there may be a perfect agreement, mutual assent and meeting of the minds of the parties upon the same thing in the same sense. Yet, in the cross-offer case of *Tinn v. Hoffman*,¹⁷ the court held that there was no contract because there was no acceptance. This authority for the proposition that an agreement alone will not make a contract has continued to be the accepted doctrine. Mr. Williston, himself, concedes that cross-offers do not make a contract.

Where there is an offer and acceptance but no agreement, there is a contract. The authority for this proposition derives from those cases where, through a mistake or the carelessness of the offeror or his agent, a bid or offer sent by mail or telegraph is not what the offeror intended, so that, when the offeree accepts the bid or offer, there is no agreement, or meeting of the minds. In such cases there is an offer and acceptance, and the giving of the power to make a contract and an exercise of the power; it is the law that there is a contract.¹⁸ The only possible rationale is found in the law of offer and acceptance, which must be rationalized by the law of powers. There are no facts to support any other rationale.

Thus, Mr. Williston and the Restatement were wrong in rationalizing a bargain contract as an agreement; the other text writers were wrong in defining a contract as an agreement. Mr. Williston likewise erred in defining a contract as a promise or set of promises. Contracts is a law of rights, powers, privileges and immunities, and should be defined and rationalized by the use of these terms. Instead of agreement Anglo-American law requires offer and acceptance created by the use of powers.

BARGAIN CONSIDERATION

Must the formal consideration which is required for the making of a contract always be bargain consideration? Is bargain consideration always a legal right, power, privilege or immunity; or may it also sometimes be any act or promise?

Consideration in Anglo-American law is not confined to bargain consideration. There have been and still are three kinds of consideration; (1) the moral consideration of the antecedent facts (rights) of either a

16. However, at one time, Mr. Williston thought he had found a hypothetical situation, in which there was an agreement but no offer and acceptance, namely, where a third person stated the promises for two other parties who answered "yes" when they were asked if they agreed to them. But later, Mr. Williston admitted to the writer that in such a case there were two offers and two acceptances.

17. 29 L.T. 271 (1873).

18. *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 Atl. 495 (1887); *Steinmeyer v. Schroepfel*, 229 Ill. 9, 80 N.E. 564 (1907).

prior legal obligation or a receipt of prior pecuniary benefits,¹⁹ (2) the consideration of the subsequent fact (privilege) of injurious reliance (that is, reasonable and justifiable reliance and action thereon), gratuitous promises to convey land, gratuitous promises of a license, charitable subscriptions, gratuitous promises of other gifts, gratuitous promises of bailees, or promises of waiver,²⁰ and (3) the bargain consideration of the contemporaneous fact of a legal right, power, privilege, or immunity bargained for and given or promised in exchange for a promise. In the case of exchange of sums of money the consideration on one side must be equivalent to that on the other.²¹ Moral consideration involves benefit to the promisor, while injurious reliance and bargain consideration involve detriment to the promisee.

Most text writers have defined consideration as benefit to the promisor or detriment to the promisee,²² and, while consideration may sometimes be benefit and sometimes detriment, this definition is highly inaccurate in that it gives the impression that consideration must always be either benefit to the promisor or detriment to the promisee regardless of the type of contract involved. If this way of defining consideration is to be followed, the definition should state when benefit is required and when detriment is adequate. But even this would not be a satisfactory definition without a description of the benefit and the detriment, since detriment in bargain consideration cases is very different from detriment in the injurious reliance cases. It follows that this method of defining consideration results in nothing but confusion and complications. A few text writers have defined consideration exclusively as detriment to the promisee.²³ In addition to all the evils mentioned above, this definition is absolutely inaccurate insofar as it concerns moral consideration. Other text writers have defined consideration as bargain detriment.²⁴ This definition is inaccurate either in wholly ignoring moral consideration and injurious reliance or in giving them a false definition. There is also a dispute among the writers as to what is bargain detriment. Therefore no attempt should be made to give one definition which includes all kinds of consideration; but moral consideration, the consideration of injurious reliance, and bargain consideration should each be defined separately.

19. Willis, *Rationale of Past Consideration and Moral Consideration*, 19 IOWA L. REV. 395 (1934).

20. Comment, 48 YALE L.J. 1036 (1939).

21. Willis, *Consideration in the Anglo-American Law of Contracts*, 8 IND. L.J. 93, 153 (1932); Willis, *Rationale of Bargain Consideration*, 27 GEO. L.J. 414 (1939).

22. The following are texts of this sort: Addison, Anson, Chitty, Hare, Page, Parsons, Salmond, Story, Wharton.

23. The following are texts of this sort: Elliott, Lawson, Leake.

24. The following are texts of this sort: Pollock, Williston.

Yet, the Restatement of the American Law Institute has chosen to define consideration in terms of only one kind; and has attempted to dispose of the problems of moral consideration and injurious reliance consideration by abolishing them. The Restatement states that these contracts may be created without assent or consideration,²⁵ and then proceeds to name as such contracts the factual situations which have historically been held to create moral consideration and injurious reliance. It would almost seem that the Restatement was trying to stultify itself. Why is there to be liability in the future on promises given for these considerations? Not because of moral consideration or injurious reliance, although that is why the promises are enforceable and have always been enforced, but because of the fiat of the Restatement. After this fiat, one must not ask why the promises are enforceable. How can the legal world ultimately do anything but repudiate a so-called Restatement of this sort?

Bargain consideration consists of a legal right, power, privilege, or immunity (other than a power to do an illegal act), bargained for and given or promised in exchange for a promise. In bilateral contracts, the doctrine of mutuality of consideration (based on a mutual assumption) applies, and unless both parties furnish sufficient consideration, neither party is bound. Bargain consideration may be given to the promisor or some other person, or by the promisee or some other person. When the consideration is actually given, one half of the contract is executed and it is then called unilateral; when the consideration is only promised, the contract is executory and it is called bilateral: however, the consideration is required to be the same in both cases. The consideration, also, must be the same whether the contract is voidable or valid, or relates to preexisting legal duties and forbearance to sue, on the one hand, or other kinds of contracts, on the other. It is a form of detriment to the promisee.

There are three lines of authority for all of the foregoing statements. In the first place, any legal right, power, privilege, or immunity is always sufficient for any bargain consideration;²⁶ there are no cases which have held otherwise. Indeed, all sorts of property rights, privileges (like the privilege of drinking intoxicating liquors) and powers (like the power of acceptance), have been held sufficient for bargain consideration. Secondly, the forbearance to sue and the pre-existing duty cases have

25. RESTATEMENT, CONTRACTS § 85 (1932).

26. *Cox v. A.P. Green Fire Brick Co.*, 230 Mo. App. 774, 75 S.W.2d 621 (1934); *Briggs v. Miller*, 176 Wis. 321, 186 N.W. 163 (1922); *Orr v. Orr*, 181 Ill. App. 148 (1913); *White v. McMath & Johnson*, 127 Tenn. 713, 156 S.W. 470 (1913); *Hamer v. Sidway*, 124 N.Y. 538, 27 N.E. 256 (1891).

held that nothing other than a legal right, power, privilege, or immunity will be sufficient bargain consideration,²⁷ and an attempt to rationalize these cases in any other way is a false rationalization. Forbearance to sue or a promise not to sue on a doubtful claim which is reasonable and honestly asserted is sufficient bargain consideration because of the privilege to sue; but if any one of the elements are lacking in these situations there would be no consideration because there would be no privilege to sue—indeed it would be malicious prosecution to do so.²⁸ In the case of a promise by a third person to two parties under mutual contractual obligations, in return for their performance of that obligation, there is sufficient bargain consideration because of the parties relinquishment of their privilege to rescind.²⁹ Thirdly, there are no cases, when properly rationalized, which hold that any thing other than a legal right, power, privilege, or immunity will be sufficient bargain consideration. Instead the cases hold that where these elements are lacking, the resulting illusory promise will not be sufficient.³⁰

Yet, the late Dean Ames took the position that there were two theories of bargain consideration, (he said "consideration," but of course he meant bargain consideration). One theory, found in forbearance to sue and pre-existing duty cases, required a legal right, power, privilege or immunity; the other theory, found by him in doubtful claims cases and third party promise cases, in infant's and other voidable contracts, and in conditional promises, compromises and power to cancel cases, did not require a legal right, power, privilege or immunity, but only some act or some promise (that is, any act or promise). The Restatement ostensibly adopts the "any act or promise" theory of bargain consideration (it too says only "consideration");³¹ but in Sections 76 and 78 it excludes, in forbearance to sue and pre-existing duty cases, any act or promise other than a legal right, power, privilege or immunity, so that it is a reasonable conclusion that the Restatement follows the rationale of Dean Ames.

Dean Ames championed his theory of any act or promise in the different kinds of cases enumerated, because, he said, the consideration-giver did not give or promise to give a legal right, power, privilege or immunity, but only gave or promised to do so if he chose.³² However, the consideration-giver made no such condition or statement. Had he

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

28. *Cook et al. v. Wright*, 1 Best & S. 559, 121 Eng. Rep. 822 (Q.B. 1861).

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

30. *Great Northern Ry. v. Witham*, L.R. 9 C.P. 16 (1873).

31. RESTATEMENT, CONTRACTS § 75 (1932).

32. Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515; 13 *id.* 29 (1899).

done so, his act or promise would have been made illusory and void. There would be no promise and no contract. In the case of voidable contracts, infants and persons on whom fraud, duress, or undue influence has been practiced have been given the power to avoid their contracts for the protection of social interests other than that in promised advantages. This power of avoidance has no relation to bargain consideration or the making of contracts. This is also true in the case of conditional contracts; something other than consideration is involved. For example, if an infant promised to do something *if he chose to*, such a promise would concededly be illusory. Similarly, if an infant promised to forbear to sue an adult on a claim that was doubtful or that he did not reasonably and honestly believe in, there would be no consideration for the adult's promise because the infant did not promise to give up a privilege. In other words, to furnish bargain consideration the infant must promise to do, or must do, just what an adult would be required to promise or do; and a limited power of avoidance, whether given to a person (infant or adult) by contract or by law, has nothing whatever to do with bargain consideration. In the case of *Gurfein v. Werbelovsky*,³³ an adult reserved a power of avoidance but the court had no difficulty in finding bargain consideration in the sense of a legal right, power, privilege, or immunity. It was therefore held that the adult's promise was not illusory. Thus the choice is really between an illusory promise and the promise of a legal right, power, privilege or immunity. There is no third alternative of "any act or promise," such as is found in the Restatement.

Equally fallacious is the suggestion that, in the case of a promise by a third party to a person already under legal duty, the bargain consideration consists of benefit to the promisor, because in such cases there can always be found detriment to the promisee.³⁴ For the suggestion to be valid there would have to be actual benefit to the promisor and not mere detriment to the promisee. In fact there are many cases of bargain consideration where there has been detriment to the promisee without benefit to the promisor, and no cases of benefit to the promisor without detriment to the promisee.³⁵ The detriment in all cases has, of course, been a legal right, power, privilege or immunity, given or promised.

CONDITIONS

Text writers have habitually classified conditions in contracts as express and constructive on the one hand, and precedent, concurrent

33. 97 Conn. 703, 118 Atl. 32 (1922).

34. Morgan, *Benefit to the Promisor as Consideration for a Second Promise for the Same Act*, 1 MINN. L. REV. 383 (1917).

35. *McDevitt v. Stokes*, 174 Ky. 515, 192 S.W. 681 (1917).

and subsequent on the other; and the Restatement has followed this usual practice.³⁶ But these two classifications offer little assistance in the rationale of the law of conditions. Express and constructive conditions relate to the methods whereby conditions are created: express by the parties; and constructive, by the law. Their significance is found in the difference in operative effect given them by the courts in situations involving part performance and substantial performance, time-of-the-essence, and personal satisfaction. Here the courts are more liberal in the case of constructive, than in the case of express, conditions. Precedent, concurrent, and subsequent conditions are so called because of their relation to the immediate performance of some duty. Their chief significance lies in the determination of the burden of pleading and proof: the plaintiff has the burden of pleading and proving conditions precedent, express and constructive; the defendant has the burden of pleading and proving conditions subsequent, express and constructive (and for practical reasons a few conditions precedent); and the plaintiff has the burden of pleading and proving a readiness and willingness to perform concurrent conditions. The most important problems involving conditions, such as assignment, waiver, impossibility, and breach, are not brought out by these classifications. For this reason there is a need for a third classification of conditions as promissory and non-promissory. The writer proposed such a classification in a previous article.³⁷

A non-promissory condition is a fact, other than a promise, which either suspends a duty of immediate performance, or a second condition, until it occurs, or extinguishes such duty or other condition upon its occurrence. A promissory condition is both a promise and a condition in a bilateral contract; its performance either suspends or extinguishes a duty of immediate performance, and in addition its breach gives rise to a secondary obligation.³⁸ A non-promissory condition precedent creates a privilege, but if subsequent, a power. A promissory condition creates both a privilege (or power) and a right. Since privileges and powers are not capable of assignment³⁹ while rights are,⁴⁰ it follows

36. Sections 250-253.

37. Willis, *Promissory and Non-promissory Conditions*, 16 IND. L.J. 349 (1941).

38. An illustration of a non-promissory condition is found where there is a promise of a buyer to pay a certain sum of money for a suit of clothes, provided he is personally satisfied with the suit after it has been made, in consideration for a tailor's promise to make such a suit. *Brown v. Foster*, 113 Mass. 136 (1873). However, if the tailor should promise to make the suit to the personal satisfaction of the buyer in consideration for the buyer's promise to pay a certain sum for it, the personal satisfaction of the buyer would be a promissory condition. *Kendall v. West*, 196 Ill. 221, 63 N.E. 683 (1902).

39. *Marston v. Carter*, 12 N.H. 159 (1841).

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

that non-promissory conditions cannot be assigned but promissory conditions may be.⁴¹ Similarly, since privileges and powers may be waived,⁴² but rights may not,⁴³ it follows that non-promissory conditions may be waived,⁴⁴ while promissory conditions may not.⁴⁵ The common law permits the parties to promise the impossible, so that impossibility will neither prevent the parties from making a contract nor operate to discharge a contract;⁴⁶ but where the parties have mutually assumed some matter of law or fact as a basis either for their contract or for its performance, the courts will read into the contract a non-promissory constructive condition, which is generally subsequent to another non-promissory condition or to a promissory condition, to discharge the contract in case of impracticability of performance.⁴⁷ Since a breach of contract is a legal wrong arising from a violation of duty, there can, of course, be no breach of a privilege or power found in a promissory or a non-promissory condition, but there can be a breach of the duty created by a promissory condition, whether express or constructive, or whether precedent, concurrent, or subsequent.

Since the Restatement has not classified conditions as promissory and non-promissory, it gives no discussion to rights, powers, privileges and immunities, or to promissory and non-promissory conditions as such, and even goes so far, in Sections 260 and 261, as to declare that a promissory condition is not a condition, although in the sections on constructive conditions, where the performance of one promise is dependent upon the performance of another promise, practically all of its illustrations are promissory conditions. Of course, the express and constructive aspects and the precedent, concurrent, and subsequent factors are discussed, but the promissory and non-promissory aspects, as such, are ignored. As a consequence, the Restatement contains almost no discussion of the topic of waiver,⁴⁸ and its discussion of assignment wholly omits any discussion of the question of the assignment of promis-

41. *Homer v. Shaw*, 212 Mass. 113, 98 N.E. 697 (1912).

42. *Patton v. United States*, 281 U.S. 276 (1930); *Wittwer v. Hurwitz*, 216 N.Y. 259, 110 N.E. 433 (1915).

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

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

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

46. *Whitman v. Anglum*, 92 Conn. 392, 103 Atl. 114 (1918); *King v. Braine*, Owen 60, 74 Eng. Rep. 899 (1597).

47. *Hawkes v. Kehoe et al.*, 193 Mass. 419, 79 N.E. 766 (1907); *Taylor v. Caldwell*, 3 Best & S. 826, 122 Eng. Rep. 309 (Q.B. 1863).

48. There is such a topic as waiver. Mr. Ewart, in his book *WAIVER DISTRIBUTED*, has demonstrated that there can be no waiver of rights, but that what is spoken of as waiver is either estoppel, or election, or discharge; but for some reason he wholly omitted any reference to the question of waiver of privileges, powers and immunities. There is abundant authority that these can be waived.

sory and non-promissory conditions. Although the Restatement recognizes the promise part of a promissory condition and therefore discusses breach in that connection, it does not explain why there can be no breach of a non-promissory condition, and, of course, it does not discuss the possibility of waiver of the condition part of a promissory condition.⁴⁹ Logically, according to its own position, the Restatement can treat of the express and constructive aspects and the precedent, concurrent, and subsequent aspects of non-promissory conditions, but it should not treat promissory conditions at all—even in their express, constructive, precedent, concurrent and subsequent aspects—for they are stated not to be conditions but only promises. Because of its silence, this kind of a restatement fails to restate the common law. It might almost be said that there is no restatement of the law of conditions. Perhaps someday this deficiency will be met.

STATUTE OF FRAUDS

Is the rationale that the Statute of Frauds has the operative effect of making voidable any non-conforming contract which comes within its terms defensible? The fact that the Statute affects more than evidence, as claimed by some,⁵⁰ is proved by the fact that a memorandum which is designed to satisfy it must be executed prior to the institution of the suit.⁵¹ The fact that the Statute affects more than the remedy, as claimed by others,⁵² is proved by the fact that, even when a contract comes within its terms, the plaintiff may nevertheless recover unless the defendant affirmatively pleads the Statute. In reality, the Statute gives the defendant the privilege and power of invoking its protection, so that he may thereby avoid liability if his contract is within its purview and the requirements have not been met.⁵³ However, the defendant may waive his privilege by not pleading the Statute; in addition, he may exercise his power to satisfy the Statute by executing a memorandum of the contract.⁵⁴ These are the same privileges and powers which are given by the law to an infant, or to a person upon whom fraud, duress, or undue influence has been practiced. The Statute of Frauds is, therefore, another illustration of how freedom of the parties as to the determination of matters of substance in contracts is delimited by social control for the protection of the social interest against fraud and perjury. The Statute's

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

50. *Reuber v. Negles*, 147 Iowa 734, 126 N.W. 966 (1910).

51. *Lucas v. Ditson*, L.R. 22 Q.B.D. 357 (1889).

52. *WILLISTON, CONTRACTS* § 527 (1936).

53. *Edwards Mfg. Co. v. Bradford Co.*, 294 Fed. 176 (2d Cir. 1923).

54. *Van Cloostere v. Logan*, 149 Ill. 588, 36 N.E. 946 (1894).

correct rationale is found in the law of rights, powers, privileges and immunities. The Restatement does not clearly state what rationale as to the effect of the Statute of Frauds it adopts, but the best assumption is that it adopts the rationale that the Statute affects only the remedy. Hence, if the writer is correct, this is another situation in which the Restatement has not correctly restated the Anglo-American law.

IRREVOCABLE POWERS AS RIGHTS

One more problem to be considered is whether an irrevocable power is a right. This involves only the nature of rights, powers, privileges and immunities themselves. An irrevocable power may be created by a contract, as in the case of an offer under seal. The offeree in such a case has both a right and an irrevocable power. An irrevocable power may also be created without a contract as in the case of the part performance of an act for which a promise has been given. Is this irrevocable power a right as contended by the Restatement,⁵⁵ or only an irrevocable power? In the case of the posed hypothetical, five different answers have been given: (1) the part performance amounts to nothing—the power does not become irrevocable and the offeror retains his power of revocation;⁵⁶ (2) the part performance changes the unilateral contract offered into a bilateral contract;⁵⁷ (3) part performance amounts to acceptance and creates a unilateral contract;⁵⁸ (4) part performance operates as injurious reliance on the promise in the offer so as to create an option contract to keep the offer open;⁵⁹ and (5) part performance destroys the offeror's power of revocation and thereby gives the offeree an immunity against revocation and an irrevocable power of acceptance, but there will be no contract until the offeree completes the remainder of the act.⁶⁰ The writer takes the position that the first three answers are either too unjust or too illogical to be accepted, and that the fifth is better than the fourth.

The following is the writer's argument for adopting the fifth rationale:

(1) the offeror has given the offeree the power to create a contract by the performance of a designated act. There can be no contract until this power has been exercised, and the power has not been exercised by the exercise of a part of it;

55. RESTATEMENT, CONTRACTS § 45 (1932).

56. *Stensgard v. Smith*, 43 Minn. 11, 44 N.W. 669 (1890).

57. *Braniff et al. v. Blair et al.*, 101 Kan. 117, 165 Pac. 816 (1917).

58. *Brackenbury et al. v. Hodgkin et al.*, 116 Me. 399, 102 Atl. 106 (1917).

59. *McGovney, Irrevocable Offers*, 27 HARV. L. REV. 644 (1914).

60. *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 Pac. 1086 (1902).

(2) if the offeree has only a power he may waive it, but if he has a right it may not be waived. In the above hypothetical, would anyone suppose the offeree may not waive his power of acceptance, even after his partial performance?

(3) if the offeree has only a power (though it is irrevocable) he has nothing which he can assign, but if he has a right it may be assigned. It is believed that in the case under discussion, the offeree would not be permitted to assign to another his power of acceptance;

(4) if the offeree has a right, the offeror has a duty which he may violate by breach of contract. After the offeror has broken his contract, the law would forbid the offeree to enhance his damages, and thus it would be impossible for him to perform the rest of the act which the Restatement and Mr. Williston make a condition to the liability of the breacher;

(5) suppose an offeror makes an offer of reward of \$1000 for the finding and return to him in good condition of an automobile which has been stolen. A hundred different people immediately begin to perform some of the acts required for the finding and return of the automobile. Would anyone suppose that 100 different contracts had been made? If the offeror should repudiate his offer, would he be liable for the breach of 100 contracts?

Enough has been said, it is believed, to show that the best rationale of the hypothetical given is that there will be no contract until the performance of the entire act designated by the promise in the offer, and that until that time the offeree has, not a right, but only a power (though it is irrevocable). An irrevocable power in itself is not a right.

This survey of the law of contracts is sufficient to show that the fundamental concepts of rights, power, privileges and immunities must be employed in any correct and effective rationale of both the fundamental essentials of contracts and of the entire subject of contracts. This conclusion is a complete vindication, as to contracts, of Mr. Hohfeld's hypothesis that rights, powers, privileges and immunities are fundamental concepts running through all of the law. It also demonstrates that the Restatement of the Law of Contracts would have been a better restatement had the American Law Institute used the terms rights, powers, privileges and immunities in restating the Anglo-American law of contracts, as it did in restating the Anglo-American law of real property.⁶¹

61. See also Roman Civil Law of Louisiana. This law has been sadly neglected by the Anglo-American legal world ever since the time of Lord Mansfield. But a proper use of the Roman law involves a correct rationale, not only of Anglo-American law, but also of Roman law.