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RATIONALE OF AGREEMENT

By Hugh Evander Willis*

In Anglo-American law, there are four types, or species, of contracts: (a) promises under seal; (b) promises for moral consideration; (c) promises injuriously relied upon; and, (d) promises in the form of agreement and for bargain consideration. The one common characteristic of all these species of contracts is a promise. A promise is fundamental to them all. Otherwise, each species of contract differs from the others. They all require something more than a promise, but each one requires something different from the others. The contract under seal requires, in addition to a promise, a writing, a seal, and a delivery, although the seal has almost become obsolete. The contract based on moral consideration requires, in addition to a promise, the antecedent facts either of a prior legal obligation or the receipt of pecuniary benefits. The contract created by injurious reliance requires, in addition to a promise, the subsequent facts of reasonable and justifiable reliance on the promise by the promisee to his injury. The consensual contract requires not only a promise, but a promise in the form of agreement and contemporaneous bargain consideration. Each of these species of contracts is distinct from the others, and each one should be so studied and treated; nothing but confusion can result from any attempt to run all of these into one specific mold.

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2 Willis, Rationale of Past Consideration and Moral Consideration, 19 Iowa L. Rev. 395 (1934).
3 The American Law Institute's Restatement of the Law of Contracts simplifies the law as to promises for moral consideration and promises injuriously relied on by stating that they are informal contracts without assent or consideration. Sections 85–93.
4 Willis, Rationale of Past Consideration and Moral Consideration, 19 Iowa L. Rev. 395 (1934).
5 Restatement of Contracts, Section 90.
6 An illustration of this confusion is found in the Sales Act and the Negotiable Instruments Act. Under the Sales Act does a contract
This article is concerned only with the fourth type of contract, the consensual type, and only with the agreement requirement of that species of contract. It will undertake to formulate a statement of the rules of case law on agreement if there are such rules, and it will discuss the subject from the standpoint of the formal not the empirical science of law.

Agreement, according to this Anglo-American case law, is a manifestation, or expression, of mutual assent (an objective meeting of the minds) of two or more persons, by means of an offer and of an acceptance.

In Anglo-American law it should be noted, in the first place, "agreement" means an objective rather than a subjective agreement, that is, an expression of mutual assent instead of an actual meeting of the minds. The views of the parties as to the law of agreement or as to the effect of their own acts are ordinarily irrelevant. This is why a mistake of either one or both of the parties to an agreement is ordinarily of no operative effect, why insane persons may make voidable contracts, and why the parol evidence rule prevents the variance of an integration by any prior contemporaneous oral or written agreements. Yet there are many exceptions to the objective theory of agreement where the subjective theory is followed. (1) Where the mistakes of parties to an agreement are due to an ambiguity, each party is entitled to show what his own mental intent was. (2) Where an integration is at material variance with a prior identical intention of the parties, it will be reformed so as to

to sell (or a sale) include instances of the transfer of the title to goods by a promise under seal, or by a promise for a prior legal obligation or prior pecuniary benefits, or by a promise injuriously relied on, or even by a promise for an act in a unilateral agreement?

Under the Negotiable Instruments Act, does value, which seems to be a requisite for a negotiable instrument though it is not named in the list of requisites, include injurious reliance on a promise and prior pecuniary benefits, when it states that value may consist of "an antecedent debt" and "any consideration sufficient to support a simple contract"?

See Llewellyn, Rule of Law in Case Law of Contracts, 47 Yale L. J. 1243 (1938).

*Restatement of Contracts, Sections 3, 19, 20; Williston on Contracts, Sections 21, 22, 34, 1536.

*Restatement of Contracts, Sections 71, 503.


Restatement of Contracts, Section 237; Williston on Contracts, Section 1536.

Restatement of Contracts, Section 71.
conform to such actual intent. Where there is an offer to
the public of a promise for an act, the performance of the act by
anyone must be with the intent of accepting the offer.4

(3) Where there is an offer to
the public of a promise for an act, the performance of the act by
anyone must be with the intent of accepting the offer.4

(4) Where an offer is delayed, the period of its continuance will
not be extended if the offeree has knowledge of such delay
though it is due to the fault of the offeror.5

(5) If a promisee
has knowledge that the promissor does not intend his offer to be
an offer until some further act, the offer will not be considered
an offer.6

(6) Whether or not silence will amount to
acceptance of an offer authorizing acceptance in such way will
depend upon the intent of the offeree.7

(7) Where an offeree
has knowledge that the offeror no longer desires to contract with
him, he cannot create a contract by acceptance even though the
offeror has not expressly revoked his offer.8

The rule making death terminate an offer without any
express notice thereof to the offeree has sometimes been thought
to be another illustration where Anglo-American law has adopted
the subjective theory of agreement. Where the termination of
an offer by death is rationalized on the ground that the offer is
terminated because there can be no mutual assent with a dead
man, or on the theory that the offeror is constantly repeating
his offer, this position is well-taken.9 But this is not the best
rationale of the termination of offers by death. The best ration-
ale is that death has this operative effect either because of a
condition in the offer,10 or because death is notice of itself.11

Under the last rationale, of course, the objective theory is
adopted, and termination of offers by death is no exception to
the objective theory.

Some have contended that there are so many exceptions to

13 Restatement of Contracts, Section 504.
14 Restatement of Contracts, Section 55. Cases opposed to this
exception and adhering to the objective theory in such case, like
Williams v. Carwardine (1833), 4 Barn. & Adol. 621; and Dawkins v.
Sappington (1866), 26 Ind. 199, are contra both to the weight of author-
ity on this point and to the law of offer and acceptance.
15 Restatement of Contracts, Section 51.
16 Restatement of Contracts, Section 25.
17 Restatement of Contracts, Section 72.
18 Restatement of Contracts, Section 42.
20 Parks, Indirect Revocation and Termination by Death of Offers,
21 Ferson, Does Death of Offeror Nullify His Offer? 10 Minn. L.
Rev. 373 (1926).
the objective theory that the exceptions have made the rule;\textsuperscript{22} others have contended that whatever Anglo-American law may have done, the subjective theory is better than the objective theory and should be adopted and followed.\textsuperscript{23} However, it must be taken as established that in Anglo-American law the objective theory of agreement has been generally adopted, and that the Restatement of the Law of Contracts is therefore correct in the position which it has taken.

Anglo-American law, it should be noted in the second place, requires that this agreement be created by means of an offer and of an acceptance.\textsuperscript{24} The Restatement of the Law of Contracts does not take this position and says that, "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."\textsuperscript{25} The Restatement has no other authority for its proposition than a hypothetical where a third person states a suggested contract to two parties and they simultaneously assent. This hypothetical is no authority for the proposition for which it was given, because in the case of this hypothetical, it is perfectly possible to find that each one of the parties makes an offer through the third person, and each one accepts the offer of the other thus made.\textsuperscript{26}

If Anglo-American law does not require the creation of an agreement by offer and acceptance but only an expression of mutual assent, then cross-offers would create an agreement. It is a rule of case law that cross-offers do not create a legal agreement.\textsuperscript{27} Yet cross-offers do create an objective agreement.

\textsuperscript{22}Whittier, The Restatement of Contracts and Mutual Assent, 17 Calif. L. Rev. 441 (1929).
\textsuperscript{24}The Reporter on Contracts for the Institute practically admitted the truth of this statement when, in a letter to the writer of December 12, 1927, he wrote: "I am willing to accept your analysis of my hypothetical case, namely, that C makes an offer for A which A ratifies and which B accepts when they simultaneously express assent, if you will add that C makes an offer for B which B ratifies and which A accepts when they simultaneously assent."
\textsuperscript{25}Tinn v. Hoffman & Co., 29 L. T. (N. S.) 271; Rotterman v. Campbell (1904), 26 K.L.R. 173, 80 S. W. 1155; James & Son v. Marion Fruit
Since it is the law that in such case, because of lack of offer and acceptance, there is not the kind of objective agreement required by Anglo-American law, it follows that Anglo-American law requires that objective agreement be created by means of offer and acceptance. This position is further supported by all the cases requiring the receipt by the offeree of the offer of the offeror and an intent by the offeree to accept in the case of a promise for an act (a subjective thing) before there can be either acceptance or agreement. Evidently these cases regard offer and acceptance as more fundamental than objective agreement. It is inconsistent to say that there is no agreement in the foregoing cases without offer and acceptance, but that there is an agreement in the hypothetical case without offer and acceptance; and there is no authority for the saying.

It may be that this is not the best kind of law. It may be that our law would be better if only mutual assent, or objective agreement, were required instead of objective agreement created by offer and acceptance. It may even be that subjective agreement would be better than objective agreement. But what we are trying to do is not to state what the law ought to be or is going to be some time in the future (although we doubt if it will ever adopt the subjective theory or dispense with offer and acceptance); but what Anglo-American case law at the present time is, and it seems very clear that, at the present time, Anglo-American law requires that objective agreement be created by means of offer and acceptance. To this extent the proposition in the Restatement of the Law of Contracts seems to be inaccurate.

The offer required by agreement is a conditional promise by the offeror giving the offeree the power to create an agreement either by performing an act (a unilateral agreement), or by making a promise (a bilateral agreement), as called for by the offer, within the time, in the manner, and at the place

Co. (1897), 69 Mo. App. 207; Harrison v. Scott (1893), 67 N. H. 347, 32 Atl. 770. Mr. Williston and the American Law Institute have also taken this position.

28 Fitch v. Snedaker (1868), 38 N. Y. 248; Williams v. West Chi. St. Ry. (1901), 191 Ill. 610. Restatement of Contracts, Section 23. Mr. Williston disagrees with the case of Williams v. Carwardine (1833), 4 Barn. & Adolp. 621, yet he should agree with it if offer and acceptance are not necessary for agreement.
RATIONALE OF AGREEMENT

authorized by the offeror either expressly or by implication of law.\textsuperscript{29}

The above requirements for an offer explain why offers in jest, invitations for offers, and other inoperative preliminary negotiations do not have operative effect; and also why it is necessary to have a communication of offer before it will have operative effect. A person cannot be considered to have a power unless he is aware that he has been empowered.\textsuperscript{30} Yet, because the offeror does not by his offer ordinarily give the offeree a right but only a power, it follows that the power given the offeree is revocable; that is, the offer may be revoked. But the communication of the offeror’s revocation is just as necessary as the communication of his offer, because a power, once given, will continue in the person to whom it is given for the time designated or for a reasonable time implied unless it is meanwhile revoked. Revocation by death is not an exception to this rule where it is rationalized as a condition in the offer or as giving notice by operation of law. If the agency explanation for acceptance where the subjective theory of the meeting of the minds has been followed were true, a revocation would take effect when given to a common agent, but since this is not the rule of case law, herein is found another argument against the subjective theory.

While offers are ordinarily revocable for the reason above given, it is possible to make them irrevocable. This may be done by a collateral contract, or by putting the offer under seal, or having bargain consideration given for the offer, or, in the case of an offer of a promise for an act, by injurious reliance on the conditional promise in the offer so as either to create a contract to keep the offer open or to destroy the power of revocation of the offeror.\textsuperscript{31} It has been contended that there can be no such

\textsuperscript{29}Corbin, Offer and Acceptance and Some of the Resulting Legal Relations, 26 Yale L. J. 169, 181 (1917); Willis, Introduction to Anglo-American Law, 37. The Restatement of Contracts, Section 24, defines an offer in the terms of a conditional promise, but does not include the idea that the offer must give the offeree a power. However, that that is true is recognized by the Restatement of Contracts, Section 28.

\textsuperscript{30}Restatement of Contracts, Section 23. Corbin, Offer and Acceptance and Some of the Resulting Legal Relations, 26 Yale L. J. 169, 182 (1917).

\textsuperscript{31}McGovney, Irrevocable Offers, 27 Harv. L. Rev. 644 (1914); Corbin, Offer and Acceptance and Some of the Resulting Legal Relations, 26 Yale L. J. 182 (1917); Corbin, Recent Developments in the Law of Contracts, 50 Harv. L. Rev. 449 (1937).
thing as an irrevocable power, evidently on the subjective argument. It is admitted by those who contend for this position that, in the case of options, an offeror may be guilty of a legal wrong, yet that he has the power to destroy both an offer and a contract. The answer to this objection is that society has created the law of powers. Where society has created, it can take away, or refuse to take away, and the law seems to be settled that powers may be irrevocable as is proven by the remedy of specific performance.

An offer may be terminated by the offeree as well as the offeror through a rejection or a counter-offer, except in the case of irrevocable offers, evidently on the theory not that the offeree has a power of termination of an offer, but that unless the offeror has otherwise provided in his offer, the law should protect the offeror from the consequences of the act of the offeree. Since the offeror has the power to fashion the power of the offeree, if he desires he may prescribe the time during which his offer will continue, but if he does not so prescribe, the time will be prescribed by the law as a reasonable length of time, though, of course, the offeror may meanwhile revoke his offer if it has not become an irrevocable offer. An offer will last this length of time, not on the theory that the offeror is continuously repeating his offer, as contended by those who champion the subjective theory, but because the offeree has been given a power for this length of time.

An acceptance is an exercise by the offeree of the power given to him by the offeror to create an agreement either by performing an act, in the case of an offer of a unilateral agreement, or by making a promise, in the case of an offer of a bilateral agreement, at the time, in the manner, and at the place designated, either expressly or by implication of law. Because the offeree in acceptance is only exercising a power given him is why he must have knowledge of the offer, and in the case of unilateral agreements, must intend to accept the offer, and why in the case of an offer of a promise for a

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3 Restatement of Contracts, Sections 36, 37.
2 American Law Institute Restatement, Section 40.
4 Corbin, Offer and Acceptance and Some of the Resulting Legal Relations, 26 Yale L. J. 169, 199 (1917); Willis, Introduction to Anglo-American Law, 37; Eliason v. Henshaw (1819), 4 Wheat. 225. Cf., Restatement of Contracts, Section 52.
5 Restatement of Contracts, Section 53.
6 Restatement of Contracts, Section 55.
promise the offeree cannot accept by doing another act, and vice versa. The power of acceptance of the offeree is given to him by the offeror. This means that the offeror is supreme over the power of the offeree. He may give the offeree any power he desires so long as he does not authorize the offeree to do something illegal. He may give the offeree a power to accept only by performing an act, or a power to accept only by making a promise. He may give him a power that will last only a certain length of time. He may give him a power which may be exercised only in a specified manner. He may give him a power which must be exercised at a particular place. Notice or communication of the acceptance to the offeror is not necessary as a matter of law, but the offeror may make communication a part of the power given to the offeree. In the case of an offer of a promise for a guarantee, unless the offeror otherwise provides, there is a condition subsequent implied by law that notice must be given within a reasonable length of time if the offeree knows the offeror has no adequate means of acquiring knowledge. While the legal consequences of acceptance are a matter of law, and while the offeree is free to exercise or not exercise his power, the nature of the power which the offeree possesses is determined entirely by the offeror. He may provide that the offeree may manifest his acceptance of a bilateral proposition by shooting off a gun, or hoisting a flag, or doing any other act the offeror specifies. He may give the offeree the power to accept even by silence. Of course, he cannot impose a duty upon the offeree to accept by silence, since the offeree has an immunity against such power of the offeror with certain exceptions, but he may give the offeree the power to accept by silence if he wishes. Whatever the power given to the offeree if he exercises it as authorized, he thereby creates an agreement, but an attempt to exercise a power not given or an attempt to exercise a power in an unauthorized way is inoperative to create an agreement.

The reason why an acceptance by mail takes effect on dis-

77 White v. Corlies (1871), 46 N. Y. 467; Eliason v. Henshaw (1819), 4 Wheat. 225.
78 Willis, Rationale of the Law of Contracts, 11 Ind. L. J. 227, 245; Corbin, Offer and Acceptance and Some of the Resulting Legal Relations, 26 Yale L. J. 168, 201 (1917).
79 Lennox v. Murphy (1898), 171 Mass. 370.
80 Restatement of Contracts, Section 72.
patch is because the offeror has given the offeree the power to accept in this way, either because of an express statement to that effect, or because business usage is read into the situation.\textsuperscript{41} A rejection does not take effect when it is dispatched,\textsuperscript{42} because the offeree is not exercising a power given to him by the offeror. Champions of the subjective theory have tried to rationalize acceptance on the theory of a delivery of the acceptance to a common agent of both parties. If this were a correct rationale, rejection should also take effect when it is given to this common agent. An acceptance pursuant to a power given, sent while a rejection is \textit{en route} to the offeror, consequently will take effect in spite of this fact unless the offeror has acted on the rejection before receipt of the acceptance.\textsuperscript{43} An attempted acceptance after the receipt of a revocation amounts to nothing, because the offeree has lost his power, but an acceptance before the receipt of such a revocation is complete though the offeree succeeds in getting his letter back from the post office.

A part performance of the act called for by an offer of a promise for an act to create a unilateral agreement, is not an acceptance of the offer, because it is not an exercise of the power given to the offeree by the offeror, but only a beginning of the exercise of the power. This act of part performance might be said to amount to injurious reliance on the conditional promise in the offer of the offeror, so as to make a contract not to withdraw the offer;\textsuperscript{44} or, better, it might be said to operate as a matter of law to destroy the power of revocation of the offeror so as practically to make the power of acceptance of the offeree irrevocable.\textsuperscript{45} The Restatement of the Law of Contracts takes the position that in such case there is a contract though the duty of the immediate performance of it is conditional on the full consideration being given or tendered within the time stated in the

\textsuperscript{41} Restatement of Contracts, Sections 64, 67.

\textsuperscript{42} Restatement of Contracts, Section 39.

\textsuperscript{43} The Restatement of Contracts, Section 39, overstates the operative effect of the dispatch of a rejection. Such rejection should not be said to limit the acceptance to a counter offer unless received by the offeror before the rejection, but to protect the offeror if he acts on the rejection before he knows of the acceptance, because the court will then balance his right against the right of the offeree.

\textsuperscript{44} Willis, Restatement of the Law of Contracts, 7 Ind. L. J. 429, 432 (1932).

\textsuperscript{45} Corbin, Offer and Acceptance and Some of the Resulting Legal Relations, 26 Yale L. J. 169, 193 (1917).
offer, or within a reasonable time.\footnote{Restatement of Contracts, Section 45.} The position of the Restatement is not sound, because it is impossible rationally to say that the future contract contemplated by the exercise of his power by the offeree is completed before he has exercised that power. The position of the Restatement also runs into another difficulty. If part performance creates a unilateral contract, then if the offeror should prevent the offeree from completing the rest of his act, there would be breach by prevention and the situation would be governed by the rule against the enhancement of damages. For these reasons, the correct rationale of part performance in the case of an offer of a promise for an act is not that such part performance makes a contract for such a promise, but only that the part performance destroys the power of the offeror to revoke his offer, so that, as a consequence, the offeree is absolutely free if he so desires, to make a contract by completing the entire act.

The best rationale of the law of offer and acceptance was first given by Professor Corbin. This rationale was championed by the writer and others before the American Law Institute,\footnote{Proceedings American Law Institute, 173, 183, 190, 193, 195, 204.} and it had the approval of many (perhaps a majority) of the leading law teachers, judges, and other lawyers. In the opinion of the writer, the Restatement of Contracts would have been stronger if this rationale had been definitely and clearly adopted. Instead of doing so, the Restatement adopted the old orthodox rationalization. Thus, for example, it did not define an offer in the terms of the creation of a power,\footnote{Restatement of Contracts, Section 24.} though it elsewhere had to admit that this was the correct rationale,\footnote{Restatement of Contracts, Section 28.} and it did not define an acceptance in the terms of an exercise of power,\footnote{Restatement of Contracts, Section 26.} though other sections of the Restatement show that the Restatement admits that this is the correct rationale.\footnote{Restatement of Contracts, Section 40, 41.}

In general, the writer approves of the Anglo-American law upon the subject of offer and acceptance and objective agreement. If reform of our law of contracts is needed, and he thinks it is needed, he would accomplish this reform not by changing the present law of objective agreement created by offer and acceptance, but by changing the law as to contracts under seal. He would advocate, in the case of contracts under seal, the drop-
ping of the seal, because it has become a mere form and tech-
nicality. If that were done, it would leave as one form of con-
tracts a promise in writing, signed and delivered. This would
be a desirable kind of contract and would accomplish all that
Lord Mansfield tried to accomplish through the law of moral
consideration.

It is with the correct statement and rationale of agreement
rather than with the law of agreement with which the writer is
concerned. It may be objected: What difference does the
rationale make? It is true that in most cases, but not all, the
same result will be obtained whatever recognized rationale or
statement is used. But a correct rationale and statement make
it easier to understand the law and an incorrect rationale and
statement are just as much a mistake as are incorrect holdings.
Correct rationale and statement are important not only to law-
yers, but to laymen, and especially to those laymen who are
beginning law students and anxious to obtain a scientific master-
ful knowledge of the law and legal administration.