

4-1932

## Restatement of the Law of Contracts of the American Law Institute

Hugh E. Willis  
*Indiana University School of Law*

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### Recommended Citation

Willis, Hugh E. (1932) "Restatement of the Law of Contracts of the American Law Institute," *Indiana Law Journal*: Vol. 7 : Iss. 7 , Article 2.

Available at: <https://www.repository.law.indiana.edu/ilj/vol7/iss7/2>

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## COMMENTS

### RESTATEMENT OF THE LAW OF CONTRACTS OF THE AMERICAN LAW INSTITUTE

On the whole, the writer of this comment is full of admiration for the work of the American Law Institute, and especially for its Restatement of the Law of Contracts. But there are a few definitions and theories found in this restatement with which he cannot agree, and he desires to state his position so that it may be a matter of record. He has already made these points before the meetings of the American Law Institute and in so doing has discovered that a large number, if not a majority, of members of the American Law Institute and its council support his position.<sup>1</sup> Yet, apparently, no changes are going to be made in the text of the restatement, and for these reasons, the writer thinks he should make this last expression of his position.

#### I

For one thing, he thinks that a contract and specific terms in the law of contracts should be defined in the terms of the fundamental legal concepts. He takes this position (1) because the restatement of the law of property and other restatements of the American Law Institute have defined their terms in this way, and from the standpoint of style and uniformity it is desirable to pursue the same plan in all of the restatements; (2) because the restatement of the law of contracts itself thus defines a *quasi* contract and an acceptance; and the law of torts, of crimes, of trusts, of bailments and of public callings are customarily stated in this way, and the law of contracts should be restated in the same way, not only for the sake of uniformity, but for the sake of comparison; and (3) because any other definition would be inaccurate.

It is not accurate to define a contract as a promise or set of promises. It is true that you never have a contract unless there is a promise. This is an operative fact which must exist before there is ever a contract, but there are other operative facts which also must exist before there is a contract. In a contract under seal, for example, there must be the fact of sealing and

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<sup>1</sup> 3 Proc. Am. Law Inst. 173, 183, 190, 193, 195, 204; 7 Proc. Am. Law Inst. 205, 207, 269-272, 276, 279, 292.

the fact of delivery, and in an informal contract there must be offer and acceptance, consideration, sometimes writing, and always freedom from illegality. If a contract is to be defined in the terms of the operative facts which are necessary for its creation, then all of these operative facts should be named, but for the reasons named above it is better to define a contract not in the terms of the operative facts necessary to its creation, but in the terms of the legal relations resulting from such operative facts, as is generally done elsewhere in the law. To define a contract as a promise or set of promises is like defining a house as a tree or set of trees.

The legal relation which exists in a contract is a right-duty relation, and a contract, therefore, should be defined either as a right in *personam* or as a legal obligation.

The legal relation created by an offer, on the other hand, is not a right-duty relation, but a power-liability relation. The promisee who receives an offer from the promisor does not have a right unless the offer itself is a contract, but merely a power, the power to create an agreement by acceptance. An offer, therefore, should be defined as a conditional promise which gives such power.

Consequently, he would suggest amendments to Section 1<sup>2</sup> and Section 24,<sup>3</sup> so as to make them read as follows:

#### SECTION 1. CONTRACT DEFINED

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

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<sup>2</sup> "Section 1. Contract Defined.

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

<sup>3</sup> "Section 24. Offer Defined.

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

## SECTION 24. OFFER DEFINED

An offer is a conditional promise which gives to the offeree the power by acceptance to create an agreement. An offer is also a contract, commonly called an option, if the requisites of a formal or an informal contract exist or if the rule stated in Section 47 is applicable.

## II

The American Law Institute's definition of agreement and its statement as to the necessity of offer and acceptance are also, in the judgment of the writer, inaccurate. An agreement can arise only as the result of an offer and acceptance. An objective meeting of the minds, while required by the law of contracts, is not in itself enough. That objective meeting of the minds, or expression of mutual assent, must be brought to pass by means of offer and acceptance. If this were not so, cross-offers would create an agreement, because there is a complete expression of mutual assent and an objective meeting of the minds in such case; but cross-offers are not enough to create an agreement.<sup>4</sup> The hypothetical suggested in the comment under Section 22 of the American Law Institute's restatement is not one where there is not an offer and acceptance, but one where there are probably two offers and two acceptances. Even the reporter for this restatement admits that this is true. The writer does not believe any illustration can be given of a case where an agreement can be found without an offer and acceptance.

Consequently, he suggests that Section 3<sup>5</sup> and Section 22<sup>6</sup> be amended, so as to read as follows:

## SECTION 3. AGREEMENT DEFINED

An agreement is an expression of mutual assent by two or more persons by means of an offer and acceptance.

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<sup>4</sup> *Tinn v. Hoffman*, 29 Law Tr. (N. S.) 271 (1873).

<sup>5</sup> "Section 3. Agreement Defined.

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

<sup>6</sup> "Section 22. Offer and Acceptance.

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

## SECTION 22. OFFER AND ACCEPTANCE

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

## III

The American Law Institute's statement of the law when there has been part performance after an offer for a unilateral contract is inaccurate. The American Law Institute states that after such part performance the offeror is bound by a contract the duty of immediate performance of which is conditional upon the giving or tender of the full consideration. It is true that after part performance there is a contract, but it is not *the* contract which the statement involves. After part performance, the offer becomes irrevocable,<sup>7</sup> and, therefore, a contract to keep the offer open; but the contract, which will result after the exercise of the power given to the offeree, has not been made yet and cannot be made until the offeree has performed the entire act called for by the offer. If he decides not to go on any further with the performance there never will be a contract. However, he has an irrevocable power to complete the contract, so that if he so desires he may fully exercise the power. The only other way that a contract could be procured would be on the theory of promissory estoppel under Section 90, but Section 90 could hardly give the offeree after part performance a right to full performance by the offeror, and therefore the promissory estoppel theory should be applied only so far as to create an irrevocable offer or option.

Consequently, the writer suggests that Section 45<sup>8</sup> be phrased, so as to read as follows:

SECTION 45. REVOCATION OF OFFER FOR UNILATERAL CONTRACT;  
EFFECT OF PART PERFORMANCE OR TENDER.

If an offer for a unilateral contract is made, and part of the performance requested in the offer is given or tendered by the

<sup>7</sup> *Los Angeles Traction Company v. Wilshire*, 135 Cal. 654 (1902); *Half Co. v. Waugh*, 183 S. W. 839 (1916); *Zwolaneck v. Baker Manufacturing Company*, 150 Wis. 517 (1912); *A. B. Dick Company v. Fuller*, 213 Fed. 98 (1914).

<sup>8</sup> "Section 45. Revocation of Offer for Unilateral Contract; Effect of Part Performance or Tender.

"If an offer for a unilateral contract is made, and part of the considera-

offeree in response thereto, the offeror's power of revocation is thereby destroyed, but there is no acceptance or other contract than that to keep the offer open, unless and until the offeree completes the requested performance within the time stated in the offer, or, if no time was there stated, within a reasonable time.

#### IV.

While the American Law Institute has done an admirable piece of work in restating the law of consideration, yet it has not cleared up a difficulty which has always existed between forbearance to sue cases and pre-existing legal duty cases on the one hand, and voidable contract cases and conditional contract cases, on the other hand. (1) It has made exceptions of an act or a promise which would amount to malicious prosecution, or which would be only the giving up of the power to break a contract. The reason for these exceptions is, of course, the fact of illegality. The law will not permit the refraining or the promise to refrain from doing an illegal thing to be consideration. Why, then, should only two kinds of illegality be singled out? The refraining or the promise to refrain from committing a murder would be consideration no more than the two cases which have been singled out. (2) A promise is correctly defined in Section 2 so as to exclude an illusory promise. An illusory promise is the same thing as no promise at all. It is neither the acceptance of an offer for a bilateral contract nor consideration therefor. If an infant's promise, other voidable promises, and conditional promises are rationalized as illusory promises, that is, promises to perform if a person chooses to perform, or if he does not choose not to perform, they also would be illusory promises and would have no further operative effect than any other illusory promise. For this reason, all of these voidable and conditional contracts will have to be rationalized as contracts where the promisee has either given up or promised to give up some legal right, power, privilege, or immunity; and where the power of avoidance in voidable contracts relates to performance rather than the formation of the contract. This is exactly what must

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tion requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time."

be the consideration in pre-existing legal duty cases and forbearance to sue cases.<sup>9</sup>

Consequently, the writer would suggest the following substitute section for the American Law Institutes definition of consideration:<sup>10</sup>

#### SECTION 75. CONSIDERATION DEFINED.

(1) Consideration is an act or a promise including or involving some legal right, power, privilege, or immunity, other than the power to do an illegal act, bargained for and given in exchange for a promise.

(2) Consideration may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

Or, Section 75 could be allowed to stand as it now reads, when Section 76<sup>11</sup> would have to be re-phrased so as to read as follows:

#### SECTION 76. WHAT ACTS OR FORBEARANCES ARE SUFFICIENT CONSIDERATION

Any act is sufficient consideration which includes or involves some legal right, power, privilege, or immunity (1) other than

<sup>9</sup> Willis, *Consideration in Anglo-American Law*, to be published soon in the *Indiana Law Journal*.

<sup>10</sup> "Section 75. Definition of Consideration.

"(1) Consideration for a promise is

"(a) an act other than a promise, or

"(b) a forbearance, or

"(c) the creation, modification or destruction of a legal relation, or

"(d) a return promise, bargained for and given in exchange for the promise.

"(2) Consideration may be given to the promisor or to some other person. It may be given by the promisee or by some other person."

<sup>11</sup> "Section 76. What Acts or Forbearances Are Sufficient Consideration.

"Any consideration that is not a promise is sufficient to satisfy the requirement of Section 19 (c), except the following:

"(a) An act or forbearance required by a legal duty that is neither doubtful nor the subject of honest and reasonable dispute if the duty is owed either to the promisor or to the public, or, if imposed by the law of torts or crimes, is owed to any person;

"(b) The surrender of, or forbearance to assert an invalid claim or defense by one who has not an honest and reasonable belief in its possible validity;

"(c) The transfer of money or fungible goods as consideration for a promise to transfer at the same time and place a larger amount of money or goods of the same kind and quality."

the power to do an illegal act; (2) or the transfer of money or fungible goods as consideration for a promise to transfer at the same time and place a larger amount of money or goods of the same kind and quality.

## V.

A contract integration may be an integration of a promise as well as an integration of an agreement. A contract under seal, of course, is an illustration of an integration of a promise. Yet Chapter 9 of the restatement discusses only integration of agreement.

Consequently, the writer suggests that Section 224<sup>12</sup> (227) be amended to read as follows:

### SECTION 224 (227)

A contract is integrated where the party or parties thereto adopt a writing or writings as the final and complete expression of his promise or their agreement. An integration is the writing or writings so adopted.

## VI

In its classification of conditions, the American Law Institute has classified conditions as express or constructive, and as precedent, concurrent or subsequent, but it has not classified conditions as casual (fortuitous) or promissory. The classification of conditions as casual or promissory is fully as important as the other classifications. This is proven by the fact that the American Law Institute itself uses these concepts in Sections 246 (249), 253 (256), 256 (259), 261 (264), 288 (291), and Section 301 (304).

Consequently, the writer proposes the addition of new sections defining these two conditions as follows:

### SECTION —. CASUAL CONDITION DEFINED.

A casual condition is a condition which merely suspends a duty of immediate performance until it exists or extinguishes such duty upon its existence.

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<sup>12</sup> "Section 224. An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted."

## SECTION —. PROMISSORY CONDITION DEFINED.

A promissory condition is a condition which is both a casual condition and a promise, so that it both suspends or extinguishes a duty of immediate performance of a primary obligation and in addition, if broken, gives rise to a secondary obligation.

Then the title for Section 253<sup>13</sup> (256) should be changed by substituting the title "Casual and Promissory Conditions," and the title for Section 256<sup>14</sup> (259) should be changed so as to substitute the words "Casual and Promissory Conditions Interpreted," and Section 288<sup>15</sup> should be re-phrased so as to read as follows:

SECTION 288. EXCUSE OF CONDITION, EVENT NO LONGER A  
CONDITION

If a condition in a contract is excused, the promisor whose performance depends thereon becomes subject to a duty to perform without the existence or occurrence of the condition, but if such condition is a promissory condition damages will be recoverable for breach thereof, and the damages recoverable for breach of the conditional duty are not always the same as they would have been if the condition existed or occurred.

HUGH E. WILLIS.

Indiana University School of Law.

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<sup>13</sup> "Section 253. Non-Existence of Condition Distinguished from Breach of Promise."

<sup>14</sup> "Section 256. Words of Promise Distinguished from Words of Condition."

<sup>15</sup> "Section 288. Excuse of Condition Means Event Is No Longer a Condition."

"If a condition in a contract is excused, the promisor becomes subject to a duty to perform without the existence or occurrence of the condition, but the damages recoverable for breach of the duty are not always the same as they would have been if the condition existed or occurred."