Rationale of the Law of Contracts

Hugh Evander Willis

Indiana University School of Law

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RATIONAL OF THE LAW OF CONTRACTS

By HUGH EVANDER WILLIS

The law of contracts includes all the social control applied to promises. It, of course, includes, first, social control applied to promises in the form of contracts. This is the most important part of the law of contracts, but it is broader than and includes more than contracts. It also includes, second, social control applied to promises made with a view to contracts but before any contracts arise, third, social control applied to promises made to discharge contracts, fourth, social control applied to promises which are not allowed to become contracts, and, fifth, social control applied to promises in the form of contracts which are allowed to be avoided. In the case of contracts the social control involves rights. In the case of promises preliminary to contracts, the social control relates to privileges and power. In the social control applied to promises made to discharge contracts the social control relates to rights. In the case of the avoidance of promises in contracts the social control relates to privileges and powers. In the case of promises not allowed to become contracts the social control relates to a situation where there are no powers, privileges or rights (other than public). Where rights are involved the social control may result in specific performance, or restitution, or damages for breach. Where privileges and powers are involved the social control may result either in a judicial finding of a contract or in a decree rescinding a contract as the case may be. Where there are no rights (except public), powers or privileges the social control may consist either in non-action or in an independent criminal proceeding.

*Professor of Law, Indiana University School of Law.

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A contract is a legal obligation created by the law because of a promise or a set of promises.\(^1\) A contract is a right-duty relation. In contracts social control is applied to promises which create such a right-duty relation.

Contracts, then, in the first place are a law of promises. Mr Williston almost alone among the text writers on contracts is entitled to credit for seeing this truth.\(^2\) Most text writers on contracts have defined a contract as an agreement, or as an agreement plus promises under seal and of record.\(^3\) The reason for their doing this was probably because Blackstone defined a contract as "an agreement, upon sufficient consideration, to do or not to do a particular thing." Decisions of the courts have perpetuated the confusion of the text writers.\(^4\) A definition of a contract in terms of an agreement is inaccurate because it does not include three main kinds of contracts promises under seal, promises for moral consideration, and promises injuriously relied on. Those definitions which include promises under seal are a little better, but even they do not include promises for moral consideration and promises injuriously relied on. If the text

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\(^2\) Williston on Contracts, sec. 1, Restatement of the Law of Contracts, sec. 1. See also Harriman on Contracts, sec. 2. Bishop uses the term "promise," but his use of the term is incoherent.

\(^3\) Addison on Contracts, sec. 1, Anson on Contracts, sec. 9; Andrews, American Law, p. 706, Bishop on Contracts, sec. 22; Chitty on Contracts (11th ed.), pp. 5, 11, Clark on Contracts, sec. 2; Elliott on Contracts, sec. 1, Hare on Contracts, p. 118, Helm on Contracts, p. 6, Lawson on Contracts, sec. 6, Leake on Contracts, p. 6, Metcalf on Contracts, p. 1, Morawetz on Contracts, p. 5, Paige on the Law of Contracts, sec. 49; Parsons on Contracts (7th ed.), p. 6, Pollock, Principles of Contracts (9th ed.), p. 9; Salmond and Winfield on Contracts, p. 1, Smith on Contracts, p. 40; Storey on Contracts, p. 1, Horton on Contracts, sec. 1. The writer of this article made the same mistake when he wrote his textbook on contracts twenty-five years ago. Willis on Contracts, sec. 5.

\(^4\) II Blackstone Comm. 442. See also: II Kent's Comm. 449.

\(^5\) 1 Words and Phrases 1513, 2 Words and Phrases 980; 3 Words and Phrases 428, 4 Words and Phrases 541.
writers and judges had used either the historical, or the analytical, or the philosophical method they would have discovered that Blackstone's definition was inaccurate. Historically, promises under seal, promises for moral consideration, and promises injuriously relied on were perfectly good contracts at the time Blackstone wrote his Commentaries and have been ever since. A comparison and analysis of the cases would have shown this situation. Philosophical considerations would have shown the necessity for all of these kinds of contracts. Hence, in spite of the fact that almost all the text writers and almost all of the judges have failed to define a contract in the terms of a promise, the fact remains that the only way a contract can be accurately defined is in such terms. Text writers and judges simply have been wrong. Mr. Williston is right.

A promise is an undertaking that something will, or will not, happen in the future. If there is no promise, there cannot be a contract of any kind. If there is a promise, there may be a contract if it is accompanied by certain other operative facts. A contract requires more, but never less, than a promise. Announcements, invitations for offers, statements of opinion, prophecies, offers in known jest and promises on condition of writing are not promises, because there is no undertaking that anything will, or will not, happen. Where there is such an undertaking, the first essential for a contract exists.

Contracts, in the second place, are a law of rights. Contracts are not promises or sets of promises. They are legal relations. It is true there must be a promise or set of promises before there can be a contract, but this does not make the promise or set of promises the contract. The contract is what we actually have after the law gives operative effect to the promise or set of promises. To define a contract as a promise or set of promises would be like defining a house as a tree or a set of trees. In this respect Mr. Williston is just as wrong as he was right with respect to the necessity of a promise. Most of the text writers heretofore cited have

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6 7 Ind. L. J. 429; 3 Proc. Am. Law Inst. 172-175.
been fairly accurate on this point, but special reference should be made to Anson Pollock and Salmond.\textsuperscript{7}

The problem, therefore, of determining when there is a contract is the problem of determining to what promises the law attaches legal obligation. In other words, it is the problem of finding out those promises which create a right-duty relation.

The law does not make contracts out of all promises. There is a social interest in being able to rely upon any promise that any person may make. Our social order would be a better social order if people could always rely upon every statement that others might make. Human beings would be happier if all of them always told the truth. Under these circumstances it may be wondered why the law has not made contracts out of all promises. The reason why it has not is probably a reason of public policy. Some promises are not of enough importance to make it worth while to make contracts out of them. The legal enforcement of all promises is expensive. No more expense should be incurred for the enforcement of promises than the needs of our social order make imperative. There is a social interest in personal liberty; and personal liberty, even the personal liberty to lie, ought not to be delimited unless the social interests of other people are thereby injured enough so as to warrant the delimitation of personal liberty. Self-control is also a matter in which there is a social interest. If social control was applied to all promises there would be very little opportunity left for self-control. So far as it is possible the making and performance of promises should, therefore, be left to personal liberty.

Yet, some promises are of such great importance that social control must be applied to them. Not all promises can be left to self-control. Wealth in a commercial age is largely made up of promises. An important part of everyone's substance consists of advantages promised by others. There is a demand of society that some promises, at least, be kept. Hence, our Anglo-American law, much as all systems of law have done, has compromised between enforcing all promises.

\textsuperscript{7}Pollock, Principles of Contracts (9th ed.), Salmond & Winfield on Contracts, p. 1, Anson on Contracts, sec. 3, Willis on Contracts, sec. 5.
and enforcing no promises, and as a result we have special classes of promises to which this form of social control is applied and which are contracts. Our problem, therefore simmers down to a problem of determining these different classes of promises.

What social control ought to be applied to promises is hard to determine. Why we have the particular kinds of social control characteristic of Anglo-American law is even harder to explain. The political theory that that government is best which governs the least, traceable to the government by barons, is a satisfactory explanation of freedom of contract, but when contracts are enforced by law so that people are denied the freedom to break them, the argument for freedom is more or less nullified. Now, of course, we even control the freedom to make contracts. The economic theory of *laissez faire* also may be a rationalization of freedom of contract, but it is not a rationalization of the social control applied to contracts; and economics have shown that freedom of contract is not the best way to achieve the greatest common good, because contracts too frequently favor one side. Undoubtedly, there is a religious explanation for a good deal of our contract law—Calvanism has been the faith of the commercial classes. Men are instinctively repelled by the breaking of a contract, and consequently contracts come to have a sanctity. Of course, if this were the basis for the law of contracts, probably all promises should be enforced, but we only enforce a few classes of promises. Metaphysically, contract law might be justified on the basis of free will and the adoption of the individual as the unit. Undoubtedly, the will of the parties is inherently worthy of respect. But the trouble with the metaphysical explanation is that there are too many contracting parties, like employees, passengers, and parties in fiduciary relation to other parties, who do not have free will, and the law does not really enforce the will of the parties, but general security and even things which the parties did not foresee. Injurious reliance on promises is not a sufficient explanation, because only a few injurious reliances on promises are actionable. Most promises are actionable for other reasons. The enforcement of promises because of an ex-
change of equivalents is not required by modern law, with such minor exceptions as to make the explanation negligible. Formalism has something to do with the rationalization of contract law, but it is not a general explanation. The distribution of risks is certainly a partial explanation of the law of contracts. Yet the parties contemplate performance, not breach of contract, and the law sometimes grants specific performance of them. It must be admitted, however, that adjudications do distribute gains and losses. Perhaps all that can be said is that the roots of contract law are many. There is no one explanation. The function of the Law of Contracts is to standardize transactions, to make the path of enterprise secure, to distribute gains and losses, and to continue to enforce promises because they have been enforced in the past.

One class of promises, and historically the oldest of the promises made contracts, is promises under seal. This form of contracts was created in connection with the action of covenant. At first this action was an action for breach of every kind of promise enforced, oral or written, real or personal, but by the close of the reign of Edward I it would lie only on a promise in writing under seal and delivered. This kind of contracts has continued up to the present time, and no further requirements are required even today for this form of contracts.\(^8\) The requirement of the seal has changed. At first it had to be an impression on wax,\(^9\) but now any scroll or device will satisfy the requirements of a seal.\(^{10}\) At first delivery had to be actual surrender, and in the United States today there must be some putting of the document out of possession with apparent intent,\(^{11}\) but in England apparently intent alone is enough.\(^{12}\) But even today a promise under seal to be a contract does not require consideration,\(^{13}\) or acceptance unless the promise under seal requires a return promise.\(^{14}\)

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\(^8\) 3 Street, Foundations of Legal Liability, 114-126, 23 Publications of the Selden Society, 43, 47.
\(^9\) Warren v. Lynch (1810), 5 Johns. 239.
\(^12\) Xenos v. Wickham (1867), L. R. 2 H. L. 296.
\(^13\) Restatement of Am. Law Inst., sec. 110.
\(^14\) Restatement of Am. Law Inst., sec. 105.
Promises in writing, under seal and delivered are a very small class of promises, and if this was all the contract law we had, the subject of contracts would be a very small subject. However, this kind of contracts is not only the oldest and simplest form of contracts which we have, but it is one for which very good philosophical as well as historical reasons can be found. The reasons for making promises under seal contracts were because of their analogy to early religious sanctions, when an oath was used, and because of the fact that there is abundant evidence for proof of the promise.

Another class of promises made contracts is the promises given for moral consideration. This kind of contracts grew up out of the common law action of general assumpsit. It had its chief development in the period of equity, and Lord Mansfield did more than any one else to put it into the category of contracts, but it is having some new growth in the twentieth century. This class of promises also is a very small class. Even under Lord Mansfield, and those who were his disciples, only a few promises were enforced for moral consideration although Lord Mansfield alone would probably have enforced all promises intended as a business transaction, at least if in writing. The typical cases of promises enforced for moral consideration are promises to pay a debt discharged by the statute of limitations, a promise to pay a debt discharged in bankruptcy, and a promise of a surety to pay a debt in spite of his discharge. In all of these cases, except the surety, the promisor has received pecuniary benefits for which he has never paid. This creates sufficient moral obligation so that the law holds a person liable on his subsequent promise to pay even though he has technically been discharged by a statute of limitations, or by a discharge in bankruptcy, or some other rule of law. For this reason a strong minority of the cases will make any promise to pay for prior pecuniary benefits a contract. These cases take the position that there

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17 Earle v. Oliver (1848), 2 Exch. 71 Zavelo v. Reeves (1913), 227 U. S. 625.
18 Hurlburt v. Bradley (1920), 94 Conn. 495, 109 Atl. 171.
is just as much moral obligation to pay for pecuniary benefits received where there was no prior legal obligation as there is where there was a prior legal obligation.\textsuperscript{10} Recovery is allowed on such a promise even where there has been illegality if the thing is merely \textit{malum prohibitum}.\textsuperscript{20} Yet, even where promises to pay for any prior pecuniary benefits are erected into contracts the class of contracts identified with moral consideration is very small, probably much smaller than the small class of promises under seal.

A third class of promises made contracts is that of promises injuriously relied on. This kind of promises was first made contracts because of the action of special assumpsit. The action of special assumpsit was regarded at first as a tort action, and the root of liability was damage done by deceitful artifice. But the action was gradually extended to an undertaking to do something followed by malfeasance, then to an undertaking to do something followed by misfeasance, and finally to an undertaking to do something followed by nonfeasance. When the action was extended thus far it really became a contract action, and promises were enforced because of injurious reliance thereon. This kind of contract law might have become very extensive, except that it was adequate only for promises followed by acts and not for promises given for promises—that is, bilateral agreements. Hence, to meet the need of a contract law for this kind of promises the courts imported from equity and from the action of debt the bargain theory of consideration, and, after doing so, began to rationalize promises injuriously relied upon as promises paid for by an act so as to bring unilateral situations within the bargain theory.\textsuperscript{21} After this occurred there was very little new development of the contracts created by prom-


\textsuperscript{20} Barnes v. Hedley (1809), 2 Taunt. 184, Brewster v. Banta (1901), 66 N. J. L. 367, 49 Atl. 718.

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ises injuriously relied on. However, these forms of promises were not wholly eliminated. The promises of this sort which continued to be enforced were gratuitous promises to convey land, injuriously relied upon by the promisee entering upon the land and making improvements,22 gratuitous promises of a license, acted upon so that the licensee has seriously changed his position;23 charitable subscriptions, injuriously relied and acted upon;24 gratuitous promises of other gifts, reasonably relied and acted upon to one's injury;25 gratuitous undertakings of bailees, reasonably relied upon;26 and promises of waiver, justifiedly relied upon.27 This kind of contracts also bids fair to have some new development in modern times. The American Law Institute, for example, has a provision that: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." But even if this class of contracts should have some new development it also will probably never become a very large class. The basis for liability in this case is called the injurious reliance. It really is not very different from the moral consideration class of contracts. In the one case the promisor has received pecuniary benefits for which he ought to be held liable, certainly if he makes a promise and sometimes in quasi contracts without a promise, while, in the other case, the promisor has caused the promisee to sustain an injury because of his promise, but he ought to be held liable in one case as much as in the other. It should be noted that in both of these classes of contracts only two things are required for the

22 Ames, Cases on Equity, 306-309.
24 Presbyterian Church of Albany v. Cooper (1889), 112 N. Y. 517, Young Men's Christian Ass'n v. Estill (1913), 140 Ga. 291, 78 S. E. 1075.
27 Underwood Typewriter Co. v. Century Realty Co. (1909), 220 Mo. 522, 119 S. W 400; Butt v. Butt (1883), 91 Ind. 305.
A fourth kind of promises which are made contracts is promises of record. A contract of record is one resulting from acknowledgment in court by a recognizer that he is bound to make a certain payment unless a specified condition is performed. The reason why promises of this sort are made contracts is much like the reason why promises under seal are made contracts. They are probably the smallest class of contracts.

The fifth and last class of promises which have been made contracts is promises in the form of objective agreement, produced by offer and acceptance, and supported by the bargain theory of consideration. Both of these requirements have a common origin, but they differ from each other. They go back to the action of special assumpsit. The promise injuriously relied upon was given a twist so that the act following the promise was required to be in exchange for a promise, and the act was made to include a promise as well as actual acts of performance. This was done to make a contract law for bilateral agreements, but after this was done there was made a new contract law for both oral and written promises and for promises in the form of both unilateral and bilateral agreements. Historically, the explanation for the bargain theory of consideration is found in the law of consideration developed by the equity courts and in the requirement of a quid pro quo by the old common law action of debt. Philosophically the reason why the bargain theory of consideration has bulked so large in Anglo-American history from the seventeenth century on has undoubtedly been the fact that the business man and his scheme of values have dominated our economic life. The business man has thought that any promise for which a price has been paid should be regarded

28 Restatement of Am. Law Inst., sec. 9.
20 Freeman v. Freeman (1615), 2 Bulst. 269.
30 Thomas v. Thomas (1842), 2 Q. B. 351.
as a contract and enforced, and he has felt that no other promise should be enforced, but he has not been able to destroy the other kinds of contracts which we have already considered. The reason why this new form of contracts should also require an objective meeting of the minds brought about by offer and acceptance is more difficult of explanation. Undoubtedly there was at first the idea that there was some special reason for enforcing promises when both parties to the relation actually agreed upon the subject matter of the promises, and there probably was implicit in this assumption a notion of a meeting of the minds of the parties. But any subjective theory of agreement which may at first have obtained has now very generally been rejected for an objective theory of agreement.

The act or promise which under this new law of contracts had to be given in exchange for a promise seems, at first, to answer the requirements of both the objective agreement and the bargain theory of consideration, but this is not the case. The bargain theory of consideration limits and narrows the new law of contracts in that in order to be enough for the bargain theory of consideration it required the act or promise which might be enough for the objective agreement to be either some legal right, power, privilege or immunity. The giving or the promise to give of either a right, or a power, or a privilege, or an immunity is sufficient consideration, but unless one of these things is given or promised to be given there is no consideration. An infant’s promise and the promises of those upon whom fraud, duress, or undue influence have been practiced are not exceptions to this rule. Each

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33 Payne v. Cave (1789), 3 T. R. 148; Adams v. Lindsell (1818), 1 Barn. & Ald. 681, Mactier v. Frith (1830), 6 Wend. 103.
36 White v. McMath and Johnson (1913), 127 Tenn. 713, 156 S. W 470.
38 7 Ind. L. J. 434.
of these parties, in order to make a voidable contract, must promise to give up a right, power, privilege or immunity. If he does so there is sufficient consideration for his contract. The fact that he may avoid the contract for infancy, or fraud, or duress, or undue influence does not touch the matter of consideration and the making of a contract, but is an independent power given to him by the law to void a contract after it has once been made.\textsuperscript{40} Pre-existing legal duty cases and forbearance to sue cases also are not exceptions to this rule because in such cases, according to the majority viewpoint, where a person does not have a privilege to sue another person,\textsuperscript{41} or a privilege to rescind or to offer a rescission of an existing contract,\textsuperscript{42} there is no consideration. Of course, a person has the physical power to institute a malicious prosecution or to breach a contract, but a promise to give up such a power will not create a contract because of illegality, and it may be said that the illegality affects the consideration so that there is not sufficient consideration. The requirement of a legal right, power, privilege or immunity by the bargain theory of consideration has finally developed until it has become a mere technical requirement; and no real price is paid for a promise, except where that phase of the bargain theory called the equivalent theory prevails in the exchange of sums of money.\textsuperscript{43}

What we have said would be a sufficient rationale of promises which are contracts were it not for the statute of frauds. The statute of frauds, originally enacted in England in 1677 and re-enacted in the United States by the different states of the Union, places a further limitation upon contracts. By this statute, really enacted to protect the social interests against perjury, certain promises are not allowed to become contracts unless they are accompanied by further operative facts. In the case of the promise of an executor to answer

\textsuperscript{40} Willis, Rationale of Past Consideration and Moral Consideration, 19 Iowa L. Rev. 395, 396.

\textsuperscript{41} Wade v. Simeon (1846), 2 C. B. 548, Willis, Consideration in the Anglo-American Law of Contracts, 8 Ind. L. J. 93, 114.

\textsuperscript{42} De Cicco v. Schweizer (1917), 221 N. Y. 431, 117 N. E. 807, Willis, Consideration in the Anglo-American Law of Contracts, 8 Ind. L. J. 93, 154, 170.

\textsuperscript{43} Schnell v. Nell, (1861), 17 Ind. 29.
damages out of his own estate, or the promise of any person to answer for the debt, default, or miscarriage of another; or a promise or agreement in consideration of marriage, or a promise (contract) for the sale of land, or a promise (agreement) not to be performed within one year from the making thereof, before the promise can become a contract, the promise, or agreement, or some memorandum thereof must be in writing, signed by the party to be charged. And in the case of a promise (contract) for the sale of goods for the price of ten pounds (or some other price varying from $30.00 to $500.00) before the promise can become a contract, the promise (or bargain) or some memorandum thereof must be in writing, signed by the parties to be charged, or there must be a receipt and acceptance of the goods or part of them, or something in earnest to bind the bargain, or part payment.

There is no doubt that the statute of frauds applies to promises in the form of agreement so that if there is an agreement which relates to any one of the kinds of promises covered by the statute of frauds there must be not only an objective meeting of the minds and the bargain theory of consideration, but there must be a satisfaction of the statute of frauds before the law will regard the promise or promises as contracts.\textsuperscript{44} Does the statute of frauds apply to the other kinds of promises which are made contracts? It does not apply to promises under seal.\textsuperscript{45} The promise under seal has to be in writing anyway, but if the courts had taken the position that the statute of frauds applied thereto, they might have also required consideration, since the courts have interpreted the memorandum required by the statute of frauds to be a memorandum setting forth the consideration and all of the other essentials of a bilateral contract. This the courts


have not done. The statute of frauds also must be held not to apply to promises for moral consideration, promies injuriously relied upon, and promises of record. In spite of the fact that the statute of frauds generally uses the word “promise,” the occasional use of the word “agreement” and the word “contract” perhaps tend to show that the drafters of the statute had in mind only promises in the form of agreement. The moral obligation of the defendant in such cases also gives the courts an excuse to ignore the statute of frauds. At any rate this seems to be the construction which the courts have put upon the statute.

The law makes contracts of each of the five kinds of promises above considered. The one common fact in all of these contracts is a promise, but each one of these contracts requires more than a promise. In the case of promises under seal, before the law will make the promises contracts, there must also be a seal and writing and delivery. In the case of promises for moral consideration there must be the fact either of a moral obligation which was once a precedent debt, or prior pecuniary benefits. In the case of promises injuriously relied upon there must be the fact of injurious reliance. In the case of promises in the form of agreement there must be the further facts of an objective expression of assent by means of offer and acceptance, the bargain theory of consideration, and satisfaction of the statute of frauds. If all of these operative facts exist, the law will make contracts of each one of the kinds of promises which we have named.

Before the law will allow promises to become contracts, that is, apply social control instead of allow personal liberty, it also requires competency on the part of promisors though not of promisees. A corporation, for example, cannot make

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46 In promises for moral consideration the courts have never suggested the applicability of the statute of frauds and probably no promises will ever be made for the statute to apply to anyway.

47 If part performance is sufficient to take a contract to sell land, and performance by one party is sufficient to take a contract not performable in one year, out of the statute, injurious reliance should have the same effect if the statute otherwise would apply.

48 The statute of frauds should not apply to promises of record for the same reason it does not to promises under seal.
a contract unless it has been authorized so to do in its charter. Most courts hold void an infant's power of attorney and all his other attempted contracts if he is under guardianship. All attempted contracts of a person non compos mentis are void after he has been adjudged incompetent. At the common law, the attempted contracts of a married woman were void. All other parties generally are competent to make promises which the law will make contracts. Promises which the law will make contracts may be made by one person alone, or by two or more jointly, or jointly and severally, and they may be made to one person, or to two or more jointly, or jointly and severally. This is true as to all of the different classes of contracts which are recognized by the common law. The law will make contracts out of such promises whether they are under seal, for moral consideration, injuriously relied upon, or in the form of agreement, or of record. The only importance of such promises is in the matter of such questions as suit and survivorship. Promises also will be made contracts by the law even though they are made for the benefit of third party beneficiaries instead of for the benefit of the promisees. These promises also may be under seal or in the form of agreement. Whether or not promises for moral consideration and promises injuriously relied upon may be made for the benefit of third persons is unimportant, because promises of this sort are not made. Where promises are made for the benefit of third party beneficiaries the law, if the other conditions precedent to contracts exist, creates contracts both for the promisees and the third party beneficiaries. Promises which have been made contracts by the law are capable of assignment, so far as contract rights are concerned, either by another promise which the law will make a contract or by a gift. This is a modern development of the law. At first the common law found very great difficulty in

41 Trueblood v. Trueblood (1856), 8 Ind. 195.
42 Wait v. Maxwell (1827), 5 Pick. 217.
43 Jackson v. Vanderheyden (1819), 17 Johns. 167.
44 Restatement of Am. Law Inst., sec. 111.
45 Restatement of Am. Law Inst., sec. 134.
46 Restatement of Am. Law Inst., sec. 135, 136.
permitting any one other than a party to a contract to acquire the right thereunder, but this difficulty was finally overcome through the use of the device of a power of attorney, although the development had to be worked out by the courts of equity. 56 A person may make, through an agent as well as by himself, promises which the law will treat as contracts.57

The social control which the law will apply to promises will depend very much upon whether the promise is an independent promise or a dependent promise. If the promise is independent the possibility of a requirement of performance is more imminent than where the promise is dependent. A dependent promise may depend upon the happening of some casual act or event, or upon the performance of another promise. In the first case, the act or event is a casual condition. In the second case, the promise is a promissory condition. If the condition is one which must occur before the obligation of a promise arises it is called a condition precedent. If it must occur at the same time as the obligation of a promise it is called a concurrent condition. If it must occur after the obligation of a promise it is called a subsequent condition. The law of conditions is a law of performance. In all such cases the law recognizes the promise or promises as a contract. The condition simply affects the performance of the contract.58 The social control is exerted either to postpone the duty of immediate performance until the happening of a condition, or to discharge the duty of performance upon the happening of a condition, or to regulate the order of the performances.

We have now considered all of the promises which the law will make contracts. There are some other promises which the law will enforce for example, gratuitous declarations of trust,59 promises of accommodation endorsers of bills and notes,60 and stipulations of attorneys.61 However, these

56 Mowse v. Edney (160), Rolle's Abr. 20 pl. 12; Redfield v. Hillhouse (1764), 1 Root. 63, Legh v. Legh. (1799), 1 Bos. & Pul. 447
57 Willis on Contracts, sec. 122, 126.
58 Restatement of Am. Law Inst., sec. 250 et seq., 7 Ind. L. J. 435.
59 Perry, Trusts, 96.
60 Uniform Negotiable Instruments Act, sec. 29.
61 Restatement of Am. Law Inst., sec. 94.
promises are not as yet contracts, but are enforced for other reasons, though perhaps they should be absorbed by contracts. The only promises which the law will at present enforce as contracts are the five different classes of contracts which we have heretofore discussed. If promises conform to the patterns of these different kinds of contracts the law will apply social control to them. Otherwise, it will apply no social control for their enforcement. Any other social control which it may apply to them will have to be the kind of social control which we are going to consider hereafter.

II.

The law also applies some social control to promises which are not as yet contracts, but which are made with a view to contracts. These kinds of promises do not occur in the case of promises given for moral consideration, or promises injuriously relied upon, or promises of record, or promises under seal, unless in the last case the promises are what are called option contracts. In the case of an option the promisee has a right as well as a privilege and power. But these kinds of promises always occur in the case of agreement. The only way whereby the law will permit parties to create an agreement is by means of offer and acceptance. In the case of a unilateral agreement the offer consists of a conditional promise for an act. In the case of a bilateral agreement the offer consists of a conditional promise for a promise. In both cases the offeree is thereby given a privilege and power of acceptance. In the case of a unilateral agreement he may exercise his power by doing the act required by the offer. In the case of a bilateral agreement he may exercise his power by making the promise called for by the offer in the manner, at the place, and within the time designated by the offer, expressly or impliedly Unless the offer is in the form of an option, either under seal or for consideration, the offeror also has a power of revocation of his offer. In the cases now under consideration the law will not apply social control to make

62 McMillan v. Ames (1885), 33 Minn. 257, 22 N. W 612.
either the offeree or the offeror exercise his power, or outside of option cases to restrain either from exercising his power; that is, the law will not exercise any social control to compel performance. This seems to indicate that the law exercises no social control whatever. Yet, this is not true because the law does recognize the existence of the powers to which we have just referred. It will recognize them as sufficient consideration for other promises, and if they are exercised, the law will give operative effect to them either as destroying another power or as creating a new right. The law also will permit a person to waive a privilege or power by a mere statement to that effect. For these reasons it must be agreed that the law does exercise social control over these preliminary promises in that it makes them create privileges and powers even though it does not make them create rights.

III.

The law applies social control to promises to discharge contracts, but for the law to exercise this social control the same operative facts are required which are required for the making of a contract. If the promise to discharge is a promise under seal it is called a release and must have all the essentials of a promise under seal. If the promise is in the form of a novation, either simple or compound, this promise must have consideration and probably the bargain theory of consideration and agreement. If the promise is a promise

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64 Will's, Rationale of Past Consideration and Moral Consideration, 19 Iowa L. Rev. 104.

Illustration of waivers of privileges and powers are often found in the law of offer and acceptance, the law of agency and the law of insurance. Some of the best illustrations are found in the law of insurance. Madden v. Interstate Business Men's Ass'n. (1917), 139 Minn. 6, 165 N. W 482. De Francisco v. Zurich Gen. Ac. & Lia. Ins. Co. (1926), 105 Conn. 162, 134 Atl. 789.

65 Willis, Introduction to Anglo-American Law, 45.


of rescission, or a promise of a substituted contract, or a promise of an accord, the same thing is true.

IV

The fourth kind of social control applied to promises is the social control applied to prevent promises from becoming contracts. To most promises probably the law applies no social control whatever but leaves their making and performance to the personal liberty and sense of morality of individuals. To the five different kinds of promises heretofore discussed the law applies the social control characteristic of contracts. There is another list of promises to which the law applies social control, not to enforce their performance, but rather to prevent their performance. Where the law applies social control to hold people to their promises it does so in order to protect the social interest in promised advantages and in the security of transactions. Where it applies social control to keep people from performing their promises it does so in order to protect a great variety of other social interests.

The problem in such cases is to determine when the law should apply social control to prevent the formation of contracts. Before it will do this it must come to the conclusion that the object to be accomplished by the contracts is unsocial. Who determines this conclusion? The makers of the law representing the people, either the legislatures if they so declare and the courts hold that their action is constitutional, or the courts, where legislatures do not expressly declare. Many old cases were decided arbitrarily and accidentally without the needed judicial balancing of the interest in freedom of contracts and in legal transactions against the many other important social interests of the day. Distinctions between malum in se and malum prohibitum are inadequate expressions of this fundamental truth. Juggling with "statutory interest," and "collateral illegality" only confuses the courts and pre-

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60 Restatement of Am. Law Inst., sec. 406.
70 Bandman v. Finn (1906), 185 N. Y. 508, 78 N. E. 175.
71 Good v. Cheesman (1831), 2 Barn. & Adol. 328.
vents their approaching the subject from the true standpoint.\textsuperscript{72} The true distinction is, which in any given case is more important, promised advantages and the security of transactions on the one hand, or other social interests (like general security of the person, domestic relations, substance, or social institutions, or general morals, or the conservation of social resources, or general progress) on the other hand. If the first, the law will apply the social control called contracts, if the second, some other social control.

It will be impossible to enumerate all of the promises upon which the law puts a ban. There are hundreds of crimes and a great many torts. A promise though under seal or for consideration, whose purpose is the commission of a legal wrong of any one of these sorts, is one which is so illegal that the law will not permit it to be enforced.\textsuperscript{73} All that will be attempted in this place is an enumeration of a few of the most striking and frequent instances of promises to do illegal things. One class of promises of this sort is found in promises in restraint of trade. If a promise is not ancillary it will always be declared illegal, and even if it is ancillary the law will balance the social interest in freedom of contract, general security, and protection of business on the one hand, and the social interest in livelihood and in social resources and general progress on the other hand. If the promise is necessary for the protection of a business it will probably be upheld,\textsuperscript{74} but if it is not necessary for the protection of a business it will probably not be upheld.\textsuperscript{75} Other promises which are illegal are those in the form of wagers,\textsuperscript{76} lotteries and gambling transactions. The social interest protected by the refusal to make contracts out of these promises is a social interest in good morals. Usurious promises also are illegal because of the social interest in economic progress.\textsuperscript{77} Promises made or to be performed on Sunday, except for mutual prom-

\textsuperscript{72} Gilhorn, Contracts and Public Policy, 35 Col. L. Rev. 679.
\textsuperscript{73} Restatement of Am. Law Inst., sec. 512, sections 571-579.
\textsuperscript{74} Nordenfelt v. Maxim Nordenfelt etc. Co. (1894), L. R. App. Cas. 535.
\textsuperscript{75} Herreshoff v. Boutineau (1890), 17 R. I. 3.
\textsuperscript{76} Collamer v. Day (1829), 2 Vt. 144.
\textsuperscript{77} Restatement of Am. Law Inst., sec. 526.
ises to marry and those involving works of necessity and charity, are generally made illegal by statute in order to protect the social interest in religious institutions. In the same way, promises which tend to obstruct the administration of justice because of involving maintenance, champerty, or barratry, compounding a crime, or paying a witness contingent compensation, or paying for the suppression of evidence, or paying for the prosecution of fictitious litigation, or unreasonably limiting the tribunal to which resort may be had, are all illegal. Promises of this sort are found in promises to influence the members of a legislative body otherwise than by presenting facts and arguments to them (lobbying), promises to induce a public official to make a certain appointment, promises to procure a pardon, promises to procure the location of a railroad or other public facilities in a manner opposed to public interest, promises to increase or diminish compensation of a public official fixed by law, promises of a public board to employ one of its members for compensation. The social interest protected in this case is also the social interest in political institutions. Promises in restraint of marriage, or for marriage brokerage, or for separation and divorce, or to change the essential incidents of marriage, or to marry another person when one is already

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70 Restatement of Am. Law Inst., sec. 541.
80 Hutley v. Hutley (1873), L. R. 8 Q. B. 112.
81 Ellis v. Frawley (1917), 165 Wis. 381, 161 N. W 364.
82 Williams v. Baily (1866), L. R. 2 Eq. 731.
83 Restatement of Am. Law Inst., sec. 552.
84 Restatement of Am. Law Inst., sec. 554.
85 Restatement of Am. Law Inst., sec. 556.
86 Restatement of Am Law Inst., sec. 558.
87 Trist v. Child (1874), 21 Wall. 441.
88 Meguire v. Corwine (1879), 101 U. S. 108.
89 Restatement of Am. Law Inst., sec. 561.
90 Restatement of Am. Law Inst., sec. 564.
91 Restatement of Am. Law Inst., sec. 565.
92 Restatement of Am. Law Inst., sec. 566.
94 Duval v. Wellman (1891), 124 N. Y. 156, 26 N. E. 343.
95 Stratton v. Wilson (1916), 170 Ky. 61, 185 S. W 522.
96 Restatement of Am. Law Inst., sec. 587.
married, are illegal. The social interest protected by this form of social control is the social interest in domestic institutions.

Promises of the above sorts and hundreds of other promises like them are illegal, either on common law grounds or statutory grounds. In such cases the law will not allow them to become contracts. No one will be permitted to sue in the courts to recover damages for their breach. Ordinarily, the law will do nothing whatever about them. It will not help a person to obtain performance from another nor a person who has rendered performance to get it back. It, however, in any proceeding which involves such promises, will declare them illegal and void. Sometimes, also, it will punish criminally those who have made such promises.

In the case of illegality the law says it will leave the parties where it finds them. In truth it does not do this. For example, it gives title or possession to one party in case of the delivery of a chattel sold on Sunday, and then refuses to do anything for the other party. A few decisions make the bargains void and place the parties in statu quo. Professor Cook makes a convincing argument for the position of the minority.

This fourth kind of social control is applied to all promises. It makes no difference whether the promises are supported by bargain consideration, or moral consideration, or injurious reliance, or are promises under seal or of record. If any of these promises are illegal, the law will not allow them to become contracts. The illustrations heretofore given and those usually found in the textbooks and reports involve promises in the form of agreement. However, it is settled that the same social control is applied to promises under seal and on principle it should apply to promises for moral consideration, promises injuriously relied on, and promises of record. A promise, as for example, to murder another

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97 Restatement of Am. Law Inst., sec. 588.
99 Cook, Rescission of Bargains Made on Sunday, 13 N. C. L. Rev. 165.
100 Page on Contracts, sec. 1057.
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man, is just as illegal if for moral consideration or injuriously relied upon as it would be if for bargain consideration. However, such kind of promises as a matter of fact are not made and it is almost impossible to think of their being made.

V

The last class of promises to which social control is applied is those promises which are voidable. This class of promises includes promises made by infants and promises procured by fraud, duress or undue influence. In such cases the law will apply the first form of social control, which we have discussed, to make the promises contracts. In addition, it will apply a new form of social control, to allow the infant or the party upon whom fraud, duress or undue influence has been practiced to avoid the contract. It does this by giving such person a power of avoidance and permitting him to exercise this power either by ex parte help or by a suit at law for the rescission of the contract.101 This social control, like that applied to promises whose object is illegal, is not applied because of the social interest in promised advantages or the social interest in the security of transactions, but because of other social interests. In the case of infants it is the social interest in human resources, in the case of fraud it is the social interest in morals and substance, and in the case of duress and undue influence it is the social interest in the freedom of the will. In protecting these social interests social control does not go as far as it does in the case of illegality so as to prevent the promises from becoming contracts. It allows them to become contracts. But after they have become contracts it protects these social interests by giving a power of avoidance to the party of whom advantage has been taken and liability in tort for deceit. The other party is held to his promise because of the social interest in promised advantages. The party allowed to avoid will be held to his promise for the same reason if he does not elect to use his power. But the social interests referred to are

101 Restatement of Am. Law Inst., sec. 431, 19 Iowa L. Rev. 396.
important enough so that the law protects them by giving the injured party a power of avoidance if he chooses to use it.

The power of avoidance for the causes enumerated applies in principle to all the classes of contracts. It makes no difference what the class of contract, if it was made by an infant, or was procured by fraud, duress, or undue influence, it may be avoided. This is true whether the contract is a promise under seal, or a promise for moral consideration, or a promise injuriously relied on, or a promise in the form of agreement, or a promise of record. A promise to pay a debt barred by the statute of limitations or a discharge in bankruptcy made because of duress, or fraud or undue influence should be voidable just as much as a promise in the form of agreement procured by such means. An infant should be allowed to disaffirm one such promise as much as another. The same reasons for avoidance of one kind of promises apply to the avoidance of all.

103 Hopkins v. Beard (1856), 6 Calif. 664.
104 Brown v. Pierce (1868), 7 Wall. 205.
105 Peterson v. Budge (1909), 35 Utah 596, 102 Pac. 211.
107 It should be noted that mere promisees in contracts under seal, contracts for moral consideration, and contracts created by injurious reliance do not have any power or privilege of avoidance of the contracts; these legal capacities are given only to promisors in such cases. Of course infants, for example, like any other promisees have a power of disclaimer. Restatement of Am. Law Inst., sec. 104.

SPECIAL NOTE

The writer believes that the subject of contracts should be taught according to the rationale set forth in this article, and in his classes at Indiana University he follows this policy. Promises under seal are studied first. Then promises for moral consideration are taken up. After that, promises injuriously relied on are considered. Finally, promises in the form of objective agreement, produced by offer and acceptance and requiring the bargain theory of consideration, are thoroughly studied. In this way the different types of contracts are not only studied in their historical order but so separately that the principles of one are not confused with those of another. The student, for example, does not get the idea that contracts under seal require consideration or that the seal imports consideration; nor the idea that there has to be offer and acceptance in contracts founded on moral consideration or on injurious reliance; nor the idea of privileges and powers preliminary to contracts outside of promises in the form of objective agreement and options under seal.
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After finishing these fundamental and distinctive types of contracts, the statute of frauds is considered, and the question of its application to all these types of contracts is studied. With this problem out of the way, third party beneficiaries, assignees and joint parties are considered, and their relation to each type of contract determined. Following these topics performance, discharge and illegality follow in order. The power of avoidance for infancy, fraud, duress and undue influence is studied for the most part in other courses.

Of course there is no case book built just on this plan, although the writer devoutly wishes there was, but he has been able to use the regular case books by rearranging their material.