California Law Review

Volume XVII JULY, 1929 Number 5

The Restatement of Contracts and Mutual Assent

THE EDITORS of the CALIFORNIA LAW REVIEW have requested comment on the Official Draft of Chapters one to seven of the Restatement of Contracts. The more this task was examined the greater it appeared. This first article must be confined to mutual assent to keep it within proper bounds. Something about other parts of the Official Draft will appear later.

Any ordinary, reasonable man knows that suggestions which differ from the Restatement, prepared as it has been with elaborate care by a galaxy of the best minds in the country, must overcome a strong presumption in favor of the Restatement's positions. Study of the Restatement compels a very great admiration for the work that has been done. To most of the conclusions reached assent is easy. But one may disagree with some of the results. Casting discretion to the winds, it is proposed in the following pages to discuss these points of difference.

THE OBJECTIVE THEORY

It will probably be admitted by everybody that in the making of most contracts there is actual assent communicated by each party to the other. Professor Williston himself says:[1] "An outward manifestation of assent to the express terms of a contract almost invariably connotes mental assent." It is only in the very exceptional case, therefore, that any doctrine other than that of mutual assent communicated is made necessary by the decisions.

As Professor Williston pointed out in his strong article on Mutual Assent in the Formation of Contracts,[2] no new doctrine for exceptional cases appeared until about 1850 and then chiefly as a misapplication of the principle of estoppel. The substance of the new doctrine which was adopted seems to have been that one who did not actually assent to the contract may be held to it if he carelessly led the other party to reasonably think that there was assent.[3]

[1] 2 WILLISTON, CONTRACTS (1920) § 659. But compare the Comment to § 20 of the Restatement. CONTRACTS RESTATEMENT (O. D. 1928) 38.

[2] (1919) 14 ILLINOIS L. REV. 85.

[3] This was well stated many years ago in an enlightening article by Professor Costigan, *Constructive Contracts* (1907) 19 GREEN BAG 512.

As an original proposition the wisdom of the innovation may well be doubted. It would have simplified our law of contracts if actual meeting of the minds mutually communicated had remained essential. The liability for carelessly misleading the other party into the reasonable belief that there was assent might well have been held to be in tort. With such a liability in tort the danger that one could falsely claim that he did not assent and so escape the contract would be rendered insubstantial. In most cases the triers of the fact would not be misled by his false evidence of non-assent. If they concluded that he truly did not assent then there would be liability in tort unless his mistake was also found to have been non-negligent or to have resulted in no damage. Under the present law the non-consenting party is liable on the contract itself if careless.[4] The chief unfortunate result of this state of the law is that he is bound to the contract though the other party is notified of the mistake before the latter has changed his position or suffered any damage. To hold one for a merely careless use of language which causes no damage whatever to the party to whom the language is addressed is certainly inconsistent with principles generally applied.[5] If D drives down Michigan Avenue, Chicago, in a careless manner but no one is hurt, can any of those who might have been hurt sue D?

But taking the law as settled that one is liable on the contract

[4] Professor Williston would have us believe that he is liable on the contract though not careless. 14 ILLINOIS L. REV. 85 at p. 89. But the telephone cases cited seem much better explained as holding one for the careless errors of his agent. The telegraph cases are discussed later.

[5] Three interesting discussions of the liability for the negligent use of language are: Jeremiah Smith, *Liability for Negligent Language* (1900) 14 HARVARD L. REV. 184; Williston, *Liability for Honest Misrepresentation* (1911) 24 HARVARD L. REV. 415; Francis H. Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty* (1929) 42 HARVARD L. REV. 733. The writer is unable to agree with the contention of Professor Williston's article that there is an irrepressible conflict between the rule of absolute responsibility on a warranty of title which is irrespective of fraud or negligence and the rule in deceit which generally makes liability turn on fraudulent intent or by some authorities on negligence. All non-consensual legal obligations need not have identical bases either as to culpability or damage. An obligation imposed on one who runs a mill may be irrespective of negligence while one imposed on the operator of a motor car may depend on intentional or negligent injury. Obligations imposed in conjunction with a contract of sale may justifiably be made absolute because that will conveniently correspond with the truly contract obligations (contractual obligations being generally absolute), because the warrantor derives a benefit from the sale and because business men soon come to contract on the basis of that responsibility. At the same time the obligation for causing damage by misrepresentation altogether independent of any contract may be made to rest on intent or negligence, thus following the general analogy of torts. That both obligations arise from the use of words is no more conclusive for uniformity in the bases of the obligation than if both obligations arose out of the use of gasoline engines, one in a mill, the other on the highway.

where he carelessly misleads the other party to reasonably believe there was assent, is it wise to state the entire law of mutual assent in terms of these admittedly exceptional cases? Why not say that actual assent communicated is the basis of "mutual assent" except where there is careless misleading which induces a reasonable belief in assent? The writer thinks that this approach to the problems involved is more likely to lead one to just conclusions. He has been brought to this belief largely by the rules which Professor Williston and his advisers have been induced to embody in the Restatement of Contracts.

A. It should first be noticed that in the main the Restatement is in accord with the view herein advocated. In Section 71 three situations are stated where actual intention is said to be material. In Subsection (a) A uses language capable of more than one meaning but non-negligently supposes that his own understanding of it will be its meaning to the other party. The Restatement says that A cannot be held to any other meaning. Quite so. A did not intend to contract on the basis of any other meaning and he was not negligent and so cannot be bound.[6]

In Subsection (b) both parties to the negotiations are negligent and they do not in fact agree. No contract arises. This is perhaps only an application of the doctrine of contributory negligence. A better explanation is that since each party knew or should have known of the ambiguity, neither is reasonably misled by the negligence of the other.

In Subsection (c) one party is negligent in expressing an assent that he does not in fact give but the other knows of the mistake. The latter is not misled and there is no contract.

In the Comment on Section 71 there is further evidence that the reporter and his advisers are following the view herein suggested. "If either party has reason to know that the other will give the words or acts only one of these meanings (where two or more meanings are possible[7]) and in fact the words or acts are so understood, the party conscious of the ambiguity is bound in accordance with that understanding." In other words, a negligent party is bound to an innocent party if the latter, without fault on his part, is misled into supposing that the former assents to the latter's understanding.

In Illustration 1, part (4) to the same section it appears that if neither is negligent there is no contract unless they in fact agree on the terms.

To save a multiplication of proofs, the attention of the reader is merely directed to Sections 51, 55 and 70 (Illustration 1) for further

[6] See 1 WILLISTON, CONTRACTS (1920) § 95.

[7] The contents of the parenthesis are the writer's words.

examples of the substantial adoption by the Restatement of the tests suggested in this article.

It may help to restate the writer's view. Actual assent communicated, other elements being present, suffices to form a contract. If there is no actual meeting of the minds, four cases may arise. Assuming that A is attempting to enforce his understanding of the contract it may be that (1) neither was negligent, (2) both were negligent, (3) A alone was negligent, (4) B alone was negligent. In situation (1) the mistake is due to pure accident and A should not and by law cannot hold B; in situation (2) the same result is reached because though A was negligent B was not misled without fault on his own part; in situation (3) A clearly cannot win as he was solely to blame for the error; in situation (4) alone is A able to enforce the contract.

B. Next we should notice that the Restatement, despite the ability of its draftsmen, was unable to adopt the "objective" view of a contract without serious exceptions. Section 71 has just been discussed. In it three important exceptions are expressly conceded: one is not bound by his "objective" assent (a) where he is non-negligent, (b) where both are negligent, or (c) where his negligence has not misled the other. These are not merely slight variations. On the contrary it is believed that by far the greater number of negotiations which do not result in actual meeting of the minds fall under these exceptions.

Furthermore, in Section 55 is another sizable but unadmitted exception: it includes substantially all unilateral contracts. A offers a reward for the arrest of a criminal. B makes the arrest but without any intention to take the reward. The Restatement and most courts conclude that there is no contract. But objectively the contract seems perfect. The Comment to Section 55 attempts to explain away this exception to the "objective" view by saying that the act of arrest is "an ambiguous expression of intent" and may "have more than one objective meaning": the actor may be accepting by such an act or he may not be accepting: his intent must be determined to ascertain what his act really is. This reasoning seems unsatisfactory. In truth, after you discover his intent you know no more about what his objective act was than you did originally. If the act is to be an acceptance or not according to whether the offeror is justified in inferring acceptance from it at the time of its performance (compare Section 5 of the Restatement) the inference is neither more nor less justified because of undisclosed intent. Section 55 will not square with an "objective" test. But by the view of this paper it is correct. The offeree by his act of arrest did not intend to accept. Did he carelessly mislead the offeror into a belief that he had accepted? Possibly he did. But if

he was careless probably the offeror was equally careless in relying on the ambiguous act as assent. In any event inasmuch as the offeror could not be hurt by such a misleading, since the truth will only relieve him of a supposed liability, the basis of the careless misleading rule is absent and there is no contract. But compare the possible case where the offeree's acts all told indicate that he is not accepting though he makes the arrest. Can he prove that he intended to accept and so bind the offeror? It may well be thought that he cannot. His acts as a whole indicate to the offeror a rejection of the offer. There is little doubt that a rejection may arise through careless misleading[8] and that is the situation here. The implication of Section 55 is that intent is determinative. If this apparent rejection be deemed a rejection by the law, the implication is unjustified.

Section 51 is but a special application of the principles of Section 71 and so contains an exception to the "objective" theory. An offer delayed by the fault of the offeror cannot be accepted after its actual expiration by an offeree who knows or should know that it has expired. The objective offer cannot be taken at its face value. Intent counts when known to the other party or when it should have been known. It is another example of contributory fault.

In Section 25 the same principle again appears. In determining whether a communication is an offer it excludes apparent offers which the party addressed knows or should know were not so intended.

Subsection (1), Clause (b) of Section 72 of the Restatement makes another exception. By this clause an offer proposing silence as acceptance is accepted or not by a silent offeree according to whether he intends to accept. The writer does not believe that this clause either is or should be the law. But it certainly departs widely from an "objective" theory of contracts.

We have seen that the "objective" theory will not square with the law in the case of unilateral contracts, that it is wholly unnecessary to explain most bilateral contracts because actual agreement is present, that of the small number of cases of negotiations for bilateral contracts where no actual agreement results, the majority fail of being contracts because of exceptions to the "objective" theory admitted in the Restatement, and that in the one situation where it coincides with the law (careless conduct by one party leading the other to reasonably believe in the former's assent) there is ground for thinking that the law might well have been otherwise. To state the general theory of mutual

[8] Rejection as the result of a counter-offer or modified acceptance, so far as justifiable, seems to indicate the law. See CONTRACTS RESTATEMENT (O. D. 1928) § 36.

assent on the basis of this exceptional class of cases may easily contribute to further error.

C. In the third place it is believed that a number of the conclusions reached in the Restatement are unjustified by the decisions and unsound in principle and that the fault may in part at least be laid at the door of objectivity.

Section 5 states that a promise must consist of such words or conduct "as justifies the promisee in understanding that the promisor intended to make a promise." On the view of this paper that would be much too liberal. One does not promise whatever the other party may reasonably think he is promising. He does promise when he intentionally or carelessly leads the person addressed to reasonably think that a promise is intended. There must be intention or carelessness on the part of the promisor as well as non-negligent belief by the promisee. Section 5 ignores the former of these two requisites.[9]

A like error seems to be involved in Section 36. Whether a communication is a rejection does not depend wholly on what the offeror is justified in thinking but on what the rejecting party intentionally or carelessly caused him to think. The section reads, "justified in inferring from the words or conduct of the offeree." If this means that the offeror must come to his conclusion solely from the words without using interpretative material as an aid, it is perhaps nearer the view of the cases though still incomplete.

In Section 41 the ordinary rule as to when a revocation is effective is stated, namely, upon receipt by the offeree. In California and the two Dakotas such is not the law: it is effective upon dispatch by the offeror.[10] A sound solution of this conflict may be reached. Obviously the offeror, even before he starts the revocation, has given up his actual intent to contract. To hold him we must find that he has carelessly misled the offeree to think that he is still willing to contract. The offeree will rely upon the offer until he learns of the offeror's change of mind. The offeror then must be diligent to notify the offeree of the change. Since he knows that the offeree may act on the offer at any moment, he should use all reasonably possible haste. A letter would be too slow: a wire is indicated. A number of the cases cited for the prevailing rule can be distinguished on the ground that due haste was not used. Some cannot and seem to be wrong on principle. It is difficult to see any justification for holding one to an offer when he has promptly

[9] Reference may be made to accurate statements in WILLISTON, CONTRACTS (1920) §§ 35, 94, 95, 605; 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2466; (1927) 40 HARVARD L. REV. 645.

[10] 1 WILLISTON, CONTRACTS (1920) § 56.

and properly sent a revocation which fails to reach the offeree by accident or by the wrong of a third party. The offeror in such a case is neither intending to contract nor has he carelessly led the offeree to think that he is so intending.

Section 42 states the rule in *Dickinson v. Dodds* and limits it to sales of property. But the rule is fundamentally sound on the true view of mutual assent and should not be thus limited. As soon as the offeree learns that the offeror has changed his mind, no matter what the source of information, if only it be reliable, he cannot accept. The offeror is no longer minded to contract and though negligent in not notifying the offeree, cannot be held because the offeree is not misled.

In Section 43 the result of *Shuey v. United States*[11] is stated in a rule. Roughly paraphrased, this rule is that offers to the public may be revoked in the manner in which they were made. This does not, in the judgment of the writer, embody the underlying principle. A revocation should be effective from the moment when it would have been communicated but for the fault of the offeree. Therefore, as stated in Section 69, if it is put into the hands of the offeree or into those of his agent or into some place designated for such communications and the offeree intentionally or carelessly fails to get it or to read it, he cannot complain. Further, an offeree must not separate himself from the ordinary channels of communication. He cannot go on a hunting trip to the high Sierras and then set up that he did not receive a letter of revocation. When the offer is made to the world by publication the offeree knows that the only possible channel of communication is through like publication. He must arrange to receive revocations thus sent or be bound by them anyhow. The revocation should take effect at the time when it would have been received but for the offeree's fault. The moment of publication would usually be too early. The exact time for any particular case would be of course a question of fact. For the claimant of the reward in *Shuey v. United States* to go to Italy without any care to keep in touch with American newspapers in which a withdrawal of the reward would necessarily have to appear was substantially equivalent to refraining for days to take your mail from the post office. The *Shuey* case thus becomes illustrative of a general principle and not just an application of a rule of thumb.

In Section 51 by means of one line, "or to the means of transmission adopted by him," the doctrine of *Ayer v. Western Union Telegraph Co.*[12] is approved. Ayer, in that case, plainly did not intend to sell the lath at two dollars a thousand. Neither did he nor his agent carelessly

[11] (1875) 92 U. S. 73.
[12] (1887) 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353.

or otherwise mislead the offeree. An independent contractor, the telegraph company, did all the misleading. For torts committed by an independent contractor one is not liable except for the bringing about of the result contracted for when it is itself a tort. Ayer was therefore not bound by the offeree's acceptance and his recovery against the telegraph company should have been confined to nominal damages. The choosing of a telegraph company to convey an offer certainly cannot be said to be negligence. Surely one must not be penalized for initiating a legitimate business transaction. There seems to be no reason for holding the offeror for the errors of the telegraph company. It is not justified even by the "objective" theory. By Section 20 of the Restatement the acts manifesting assent "must be done with the intent to do those acts." No act of the offeror intentional or otherwise led the offeree to think that he had an offer at two dollars. The offeror is less responsible for the wrong of the telegraph company than a somnambulist would be if he while asleep should write and send such an offer.[13] It was not even the offeror's physical act.

In Section 72, Subsection (1), Clause (b) it is stated that if silence is authorized by the offeror as acceptance the law will consider it sufficient when the offeree in remaining silent intends to accept but not otherwise. It has been pointed out above that this is far from an "objective" standard. But the clause seems wholly wrong because it ignores the requirement that assent must be communicated[14] and because it gives to the offeree too great an opportunity by false or biased testimony to set up or to destroy the contract as his interests may later dictate. The argument for the clause found in the notes to this section (p. 237-8) and based on the analogy to a unilateral contract where the "act" consists of forbearance seems unsatisfactory. True, the forbearance will make a contract or not according to whether it is given with the intent of accepting the offer.[15] There is a superficial resemblance. But the obvious difference is that in unilateral contracts communication of the acceptance is unnecessary, while in bilateral contracts it is necessary. This is not an arbitrary distinction. The act of forbearance given to form a unilateral contract involves normally some actual external change of position. Forbearance to sue, even forbearance to smoke, has an external quality and a reality that mere mental intent to accept does not have. Again, an act is complete without communication but a promise by its nature implies communication. True, the law, wisely

[13] See the Comment to § 20 of the Restatement — CONTRACTS RESTATEMENT (O. D. 1928) § 38.

[14] CONTRACTS RESTATEMENT (O. D. 1928) § 20.

[15] CONTRACTS RESTATEMENT (O. D. 1928) § 55.

or not, has dispensed with receipt of the communication by the promisee in many cases. True, the offeror who seeks a promise as acceptance may perhaps waive even the starting of communication and take instead some designated outward expression of assent. But this clause is novel in making unnecessary any outward evidence of consent. It is better to have something external to evidence mental assent.

IRREVOCABLE OFFERS

In Sections 45, 46 and 47 the view of Professor McGovney[16] that offers may be irrevocable, is adopted. The Restatement makes them irrevocable when given for a consideration or under seal (Section 46), when accompanied by a collateral contract not to revoke (Section 47), and when for a unilateral contract and part of the act is performed or tendered (Section 45). The writer has still to see any adequate authority for this view. It is plain enough that when the offer concerns unique property, such as land or chattels not readily purchasable, a court of equity may well specifically enforce a contract to keep it open on the ordinary ground that damages for breach of the contract would be inadequate. Even then the offer is revocable but eqnity will order specific reparation which includes considering the offer as remade. But when the situation is one outside the limits of specific performance the lack of authority is evidenced by the fact that none of the writers adopting this view have been able to find any real case support for it.[17]

The question is of minor importance because whatever view is taken the rights of the parties will be much the same. Thus take an offer given for consideration or under seal (Section 46). If one considers it revocable he might still believe that the seal or consideration evidenced a promise implied in fact not to revoke. For breach of this promise the same damages would be recoverable as might be had for breach of the contract made by accepting the allegedly irrevocable offer. The only difference would be that one might conclude on all the facts of a particular case that no implied promise was made despite the seal or consideration, with the result that there would be no liability for revoking the offer. Such seems to be the law.[18] The Restatement refuses to recognize this possibility and to that extent is less satisfactory.

When there is an express contract not to revoke (Section 47) the

[16] *Irrevocable Offers* (1914) 27 HARVARD L. REV. 644.

[17] See McGovney, *Irrevocable Offers* (1914) 27 HARVARD L. REV. 644, 650, note 14; 1 WILLISTON, CONTRACTS (1920) § 61, note 91; Corbin, *Offer and Acceptance and Some of the Resulting Legal Relations* (1917) 26 YALE L. J. 169, 185 *et seq.*

[18] Gay v. Ward (1895) 67 Conn. 147, 34 Atl. 1025, 32 L. R. A. 818; Jordan v. Dobbins (1877) 122 Mass. 168.

recovery, whether on this collateral promise or on the contract made by accepting the main offer, seems to be exactly the same. One can think of cases where the two views might lead to opposite results. Consider an offer to buy 100 barrels of flour at eight dollars a barrel with a valid contract to keep it open for ten days. If the seller attempts to accept after the buyer has revoked the offer, can the seller set the flour aside for the buyer and recover the contract price? If the suit is on a contract for the sale of the flour many American courts will allow that remedy.[19] If the suit is on the collateral promise it is certainly arguable that only damages for loss of the sale may be recovered. No authority has been discovered.

When there is an offer for a unilateral contract and the act sought is one requiring time in performance, the Restatement (Section 45) provides that performing or tendering a part of the performance completes the main contract. Of course the performance of the offeror's promise is conditional on full performance of the act by the offeree. The writer prefers Professor McGovney's solution of this problem. He says that in such a case there is an offer implied in fact not to withdraw the main offer after the offeree has started to perform[20] which collateral offer becomes a binding unilateral contract when performance is started. This suggestion has been criticized on the ground that the collateral offer is a pure fiction.[21] But is this so? In many cases of contracts implied in fact there is no conscious mental image of the promise made. A orders a roast from the meat market. He impliedly promises to pay the price therefor. But does he think with every such order, "Now I am binding myself to pay the price?" Probably not. If A promises to pay John ten dollars if he swims a stream, does he not impliedly agree that if John starts on time he will give him a fair chance to finish before withdrawing the offer? Is this implication any more of a fiction than that made effective in the case of the order for meat? Furthermore, this view indicates the reason why an offer to a real estate agent to pay him a commission for selling property may be withdrawn before he obtains a willing and responsible buyer.[22] Due to custom, there is no promise not to revoke such an offer. An offer of a reward for the

[19] 3 WILLISTON, CONTRACTS (1920) § 1365.

[20] McGovney, *Irrevocable Offers* (1914) 27 HARVARD L. REV. 644, 654.

[21] 1 WILLISTON, CONTRACTS (1920) § 60. See also Corbin, *Offer and Acceptance and Some of the Resulting Legal Relations* (1917) 26 YALE L. J. 169, 195.

[22] 2 MECHEM, AGENCY (2d ed. 1914) §§ 2449-2454; *Ibid.* §§ 2445-6 (sale by owner is a revocation); *Ibid.* § 2456 (sale by another agent is a revocation); Brown v. Pforr (1869) 38 Cal. 550; Milligan v. Owen (1904) 123 Iowa 285, 98 N. W. 792; Elliott v. Kazajian (1926) 255 Mass. 459, 152 N. E. 351; Williamson Real Estate Co. v. Sasser (1920) 179 N. C. 497, 103 S. E. 73; Perrow v. Rixey (1916) 119 Va. 192, 89 S. E. 101.

apprehension of a criminal may be withdrawn after some steps have been taken.[23] There again by common understanding there is no implied promise to keep the offer open. True, the law may perhaps be explained on the ground that the steps taken are preparation rather than performance. But if an *exclusive* agency to sell land is given to a realtor there is an implied promise not to revoke and expenditures in attempting to sell are sufficient as consideration to make it binding.[24] The courts have reached results here which cannot be arrived at by applying the rule of Section 45. But they may be justified by considering the fair implication of each situation, custom included. The McGovney view, then, seems much nearer to the law than the hard and fast rule of the Restatement, namely, that in every case part performance or tender makes the contract complete. In the cases where such a collateral promise is fairly implied the remedy on it would be much the same as that on the contract which is made according to the Restatement. Space forbids a discussion of possible differences.

Finally, the making of offers irrevocable as a short cut to specific performance seems unnecessary and unsound. It is unusual to allow specific performance at law. This is more than specific performance; it makes a breach of the contract to keep the offer open impossible. If the above discussion is correct, all the really desirable results which would flow from treating some offers as irrevocable may be obtained without this departure from the general principles of the law.

SOME OTHER CRITICISMS

In connection with Section 5 this illustration (1) is given. "A telephones to his grocer, 'Send me a barrel of flour.' The grocer sends it. A has thereby contracted to pay a reasonable price therefor." This

[23] Biggers v. Owen (1888) 79 Ga. 658, 5 S. E. 193. But see *contra* Cornelson v. Sun Insurance Co. (1852) 7 La. Ann. 345 *semble*. In other sorts of cases the principle of Biggers v. Owen has been applied: Bret v. J. S. (1600) Croke Eliz. 756, 78 Eng. Reprint 987, misapplied; Maddison v. Alderson (1883) 8 App. Cas. 467, 472 *semble*, a misapplication; Alexander Hamilton Institute v. Jones (1924) 234 Ill. App. 444, misapplied; Campbell Co. v. Taylor (1927) 246 Ill. App. 433, 441 *semble*.

[24] Novakovich v. Union Trust Co. (1909) 89 Ark. 412, 117 S. W. 246; Kimmell v. Skelly (1900) 130 Cal. 555, 62 Pac. 1067; Harrison v. Augerson (1904) 115 Ill. App. 226; Singleton v. O'Blenis (1890) 125 Ind. 151, 25 N. E. 154; Braniff v. Baier (1917) 101 Kan. 117, 165 Pac. 816; Goward v. Waters (1868) 98 Mass. 596; Lapham v. Flint (1902) 86 Minn. 376, 90 N. W. 780; Johnson & Moran v. Buchanan (1909) 54 Tex. Civ. App. 328, 116 S. W. 875; Rowan & Co. v. Hull (1904) 55 W. Va. 335, 47 S. E. 92, 104 Am. St. Rep. 998, 2 Ann. Cas. 884. *Contra:* Des Rivieres v. Sullivan (1924) 247 Mass 443, 142 N. E. 111; Stensgaard v. Smith (1890) 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205. See also Robertson v. Wilson (1922) 121 Wash. 358, 209 Pac. 841. See Note (1909) 19 L. R. A. (N. S.) 599.

should not be, and no doubt is not, the law. A in such a case contracts to pay the grocer's regular price.[25] Such is the fair inference from the facts.

Under Section 40 the second illustration states that an offer made in a conversation expires with the conversation unless the offer or the surrounding circumstances indicate the contrary. There appears to be little or no authority for such a statement.[26] Why should a presumption of termination of the offer be made? What is reasonable time for an offer to continue might better be left as a question of fact in each case.

The conclusion in the first illustration under Section 60 may perhaps be questioned. Is an otherwise perfect acceptance ruined by adding "Prompt acknowledgment must be made of the receipt of this letter"? Despite *Poel v. Brunswick-Balke-Callender Co.*,[27] it seems that the acceptance might be sustained. The acceptor may be merely unusually careful about his records or he may not know that the acceptance is binding when mailed and wish to be assured of its receipt. Rigid rules that prevent giving effect to the true meaning of the transaction are to be deprecated.

Both parts of Subsection 2 of Section 72 seem undesirable. The first sentence apparently permits an acceptance by exercising dominion over goods though the offeror required some other form of acceptance—certainly that is erroneous.[28] The second sentence suggests this case. A owns a well and tank. Water from the well fills the tank. B wrongfully takes water from the tank to sprinkle roads. A writes B that if B continues to use the water he (A) will take it as consent to pay fifty dollars a day for it, a grossly excessive price. B continues to take the water, claiming to own it. According to the sentence under discussion, A may elect to treat B's tortious act as an acceptance and recover the fifty dollars a day.[29] Surely B would not be held. Of course the Restatement is adopting the principle of the cases which hold that a check sent in full payment of a disputed claim and cashed by the creditor is conclusively taken to have been accepted as full payment though the

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[25] Peters, Adm. v. Craig (1838) 36 Ky. (6 Dana) 307; Turner v. Mason (1887) 65 Mich. 662, 32 N. W. 846; Kellerman v. Kansas City etc. Ry. Co. (1896) 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; Neidig v. Cole & Pilsbury (1882) 13 Neb. 39, *semble;* Lefurgy v. Stewart (1893) 69 Hun (N. Y.) 614, 23 N. Y. Supp. 537, *semble.* See also Estey Organ Co. v. Lehman (1907) 132 Wis. 144, 111 N. W. 1097, 122 Am. St. Rep. 951, 11 L. R. A. (N. S.) 254.

[26] See Morse v. Bellows (1835) 7 N. H. 549, 565.

[27] (1915) 216 N. Y. 310, 110 N. E. 619.

[28] Bronson v. Herbert (1893) 95 Mich. 478, 55 N. W. 359; Bieber v. Beck (1847) 6 Pa. 198; 1 WILLISTON, CONTRACTS (1920) § 75.

[29] See Wright v. Sonoma County (1909) 156 Cal. 475, 105 Pac. 409, 134 Am. St. Rep. 140.

creditor plainly indicated that he took it only as part payment. It is perforce admitted that the great majority of the cases so hold.[30] But one fails to see the justification either on principle or as a practical solution. The creditor did not assent to the contract of accord nor did he lead the debtor to reasonably or otherwise believe that there had been assent. Professor Williston concedes this. The practical effect of the cases is that a wily debtor can often entrap his creditor into a disadvantageous settlement though the creditor makes it plain that he has no intent to settle. The conduct of the debtor in such cases certainly seems more open to criticism than that of the creditor. The latter having received a part payment from the debtor and being afraid that he may never get that much from him again, keeps it, but refuses assent to the harsh proposal that it be taken in full payment or returned. It is not such a heinous act. But the courts have certainly looked with great disfavor on the creditor while paying slight heed to the unfair tactics of the debtor. The reporter and his advisers might well have chosen the minority view.

In Section 31 it is provided that an offer, in case of doubt, is to be taken as one seeking a bilateral contract. There is certainly scant authority for this.[31] It would appear to be much better to presume that it was indifferently for either a bilateral or unilateral contract. Then either form of acceptance, a promise or an act, would suffice. This solution permits people to make contracts as they will. It probably avoids all necessity for such a departure from the ordinary rules of acceptance as is involved in Section 63. That section provides that when an offer demands a promise it may be accepted by an act if the act is the performance of the promise and is completed by the time the promise should have been made. Professor Goble has criticized Section 63 with much reason.[32] The argument for the presumption advanced in the Restatement is that bilateral contracts protect both parties better and so should be favored. But persons who are *sui juris* may well be allowed to choose what kind of contracts they will make. If an offeror is indifferent as to which kind he gets, the offeree shonld be able to accept the offer in either manner. Illustration 2 under Section 59 violates these principles.

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[30] 3 WILLISTON, CONTRACTS (1920) § 1854.

[31] Two Massachusetts cases express a preference for treating an offer as seeking a bilateral contract: Lennox v. Murphy (1898) 171 Mass. 370, 50 N. E. 644, *semble;* Lascelles v. Clark (1910) 204 Mass. 362, 90 N. E. 875. But see Plumb v. Campbell (1888) 129 Ill. 101, 18 N. E. 790; Ellsworth v. Southern Minn. Ry. Co. (1884) 31 Minn. 543, 18 N. W. 822; Hay v. Fortier (1917) 116 Me. 455, 102 Atl. 294.

[32] Goble, *Is Performance Always as Desirable as a Promise to Perform?* (1928) 22 ILLINOIS L. REV. 789.

It may well be thought that Section 39 would be improved by modifying it so that an acceptance sent while a rejection is en route to the offeror would be binding if received before the offeror has acted on the rejection. Why not make the solution turn on something substantial?

By Section 53 and illustration 2 under Section 23 cross offers do not make a contract. There is little authority and that divided.[33] Why is not intention to contract communicated by each to the other sufficient? Why should offer and acceptance be the only formula?

A counter-offer has generally been thought a rejection of the original offer. Should it not have been left as a question of fact in each case? Surely counter-offers are often made with no notion that they reject the original offers. Section 38 states that a counter-offer will not be a rejection if the offeree expressly states that it is not so intended. Does the reform go far enough? By Section 60, following the cases, a modified acceptance is a counter-offer and so a rejection of the original offer. One who intends to accept but makes a mistake in some possibly minor term thereby rejects. Was there not room for improvement here?

Section 48 states the common holding that death terminates an offer. Professor Williston has said that this should not be the law, that the offer should terminate only on notice of death.[34] The proper solution is not obvious. After death the offeror cannot intend to contract and it is hard to see any careless misleading of the offeree by the offeror. The cases are generally in accord with this result. But should not the offeror's estate be held on the ground that the offeror's act has damaged the offeree and that no excuse can arise out of the inability of the offeror from death to prevent the result? Probably the right answer is "No." To say "Yes" is to impose grave responsibility upon one who has without any fault performed a useful and desirable act — the act of making an offer. Suppose that I non-negligently drive my automobile down the highway and that a sudden paralytic stroke destroys my control. Am I liable to persons injured by the unguided car?

[33] That cross-offers do not make a contract: Tinn v. Hoffman & Co. (1873) 29 L. T. (N. S.) 271, *semble* by five judges; Ratterman v. Campbell (1904) 80 S. W. (Ky.) 1155 (specific performance refused partly on the ground that there was doubt concerning the existence of the contract); James & Sons v. Marion Fruit Jar & Bottle Co. (1897) 69 Mo. App. 207 (one of several grounds stated for the decision); Harris v. Scott (1893) 67 N. H. 437, 32 Atl. 770 (no discussion). *Contra:* Morris Asinof & Sons v. Freudenthal (1921) 195 App. Div. 79, 186 N. Y. Supp. 383, *aff'd.* without opinion (1922) 233 N. Y. 564, 135 N. E. 919. Discussions favoring the view that a contract is formed are found in: Corbin, *Offer and Acceptance and Some of the Resulting Legal Relations* (1917) 26 YALE L. J. 169, 182; Ferson, *The Formation of Simple Contracts* (1924) 9 CORNELL L. Q. 402, 419; (1921) 21 COLUMBIA L. REV. 599.

[34] 1 WILLISTON, CONTRACTS (1920) § 62.

Probably not.[35] By a parity of reasoning death should revoke an offer and the Restatement is more satisfactory than Professor Williston's former opinion.

Section 49 is novel. If "impossibility" would discharge a given contract when made it may well be held to end an offer looking to such a contract and so abort it. But why should this reform be confined to two instances of "impossibility," death of a necessary person and destruction of an essential thing? Section 50, which provides that supervening illegality will end an offer, might well have been limited so as to protect an innocent offeree who accepts an offer wilfully left open by an offeror who has learned of the change of law. Other like limits could be suggested.

Enough has been said to indicate (a) that the law of Mutual Assent might have been stated on a different theory and with an even closer approximation to the existing law, (b) that many of the rules adopted might in reason have been different if we are seeking to let parties of full age contract with each other in any lawful way they choose and if we desire to adjust their rights fairly. The Restatement is nevertheless a splendid attempt to condense much law into small compass and to choose the best. It is in large measure successful. The writer hopes that it will be used by the courts as a great light to guide them on their way. He hopes, however, that it will not be considered oracular. That would hamper the growth of the law and establish permanently some things that should be given further consideration.

Clarke B. Whittier.

STANFORD UNIVERSITY.

35 Slattery v. Haley (1922) 52 Ont. L. Rep. 95; Meyers v. Tri-State Automobile Co. (1913) 121 Minn. 68, 140 N. W. 184, 44 L. R. A. (N. S.) 113, *semble*. One who so acts knowing there is danger of illness is liable: Tift v. State (1915) 17 Ga. App. 663, 88 S. E. 41.