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THE FORMATION OF SIMPLE CONTRACTS*

MERTON L. FERSON
PROFESSOR OF LAW AND DEAN OF THE SCHOOL OF LAW
UNIVERSITY OF NORTH CAROLINA

HOW ARE simple contract obligations created? What is their essential basis? They are induced by acts. The essential qualities of the particular acts which are potent to induce such obligations many best be disclosed by the aid of illustrations.

Suppose X offers to trade his horse for Y's cow. X's offer is an act. It may consist of speaking or writing words; or it may consist of making some other kind of signs. The act symbolizes X's will: first, to transfer his horse to Y; and, second, to require as a condition1 that he receive title to the cow. Y, in case he accepts, symbolizes, by suitable act, his will: first, to transfer his cow to X; and, second, to require as a condition that he receive title to the horse. The law recognizes these acts and predicates from them two transfers; one of the horse from X to Y and one of the cow from Y to X.

The analysis would be similar if X, having Y's cow in his possession, offers to buy her for $100 on thirty days credit. X's offer is an act symbolizing his will: first, to come under an obligation binding him to pay $100 in thirty days; and, second, to require as a condition that he presently receive title to the cow. Again, suppose Y accepts. His acceptance cannot be anything other than an act symbolizing his will: first, that title to the cow pass presently to X; and second, that he requires as a condition a claim against X to be paid $100 in thirty days. It should be noted that X's act symbolizing his willingness to come under the obligation is of essentially the same character as his act in the preceding illustration where he


1 "The very existence of a contract may be made by the parties to depend upon a contingency, i.e., the happening of the contingency may be necessary before there can be any contract . . . ." Costigan, The Performance of Contracts, p. 1. This is the sort of conditions referred to above.
signified his willingness to transfer the title to his horse. He has merely used a
different set of words or other signs. The result is different. In this latter case,
X comes under obligation in exchange for receiving the title to the cow; Y
exchanges the title to the cow for a contract right against X. One title is
transferred, and one obligation is created.

Another illustration: suppose X offers to buy Y's cow on credit and for
future delivery of title and possession. X's offer is an act symbolizing his will:
first, to come under an obligation to pay Y a stated amount; and second, to require
as a condition that Y come under an obligation to transfer the title to and pos-
session of the cow at the appointed time. In case Y accepts, he, by suitable act,
symbolizes his will: first, to come under an obligation to transfer title to and
possession of the cow at the appointed time; and second, to require as a condi-
tion that X shall become obliged to pay him the stated price. In this last illus-
ration the acts of the parties are of the same sort as in the preceding illustrations,
but they are directed to, and they accomplish, different results. In this last
illustration each comes under a contract obligation in exchange for the acquisition
of a contract right against the other. No transfer is made; but two obligations
are created. Voluntary transfers and promises are purposely mixed in the above
illustrations. An endeavor will be made herein to show that the operative acts
are of essentially the same character in both.

The offer and acceptance in such cases as those instanced above are com-
monly lumped together and called by such names as "meeting of the minds,"
"mutual consent," and "consensus ad idem." An early conception was to the
effect that there must be a "meeting of the minds" to form a
contract. This
highly figurative expression was supposed to mean an agreement or identity of
mind in the two parties at one and the same moment. Such decisions as Cook v.
Oxley were the result. Naturally enough this unattainable and intangible require-
ment could not last. A pathetic struggle to maintain it and at the same time
reach a sensible result appears in Adams v. Lindsell, where the court indulges
the fiction that the offerors are "considered in law as making, during every instant
of the time their letter was travelling, the same identical offer to the plaintiffs."
"Meeting of the minds" is still in use as a description of the active element in
making a contract; but it is of doubtful import and certainly does not mean that
there must be an identity or synchronizing of mental action. There may be a
long interval between the act of making an offer and the acceptance. The offer
at best, so far as procuring a meeting of the minds is concerned, indicates the
mind of the offeror at the time it is made. His then assertion of his state of
mind, regarded as evidence of what his mind was at the time of acceptance, is
an obvious anachronism. To say that his act fixes his will for a time in the
future is assigning to that act an effect it cannot possibly have.

2 "... the minds of the parties should be brought together at one and the same moment, that notion
is practically the foundation of English law upon the subject of the formation of contracts." Household
Insurance Co. v. Grant, 4 Ex. Div. 216, 220 (1879).
3 3 Term Reports 653 (1790).
4 Barn. & Ald. (Eng.), 681 (1818).
“Mutual assent” is also in use to designate the fundamental basis of contract obligation. This term connotes and has been deemed to mean that the parties consent to the same thing; but they do not. Bearing in mind the above typical illustrations it should be noted in the first place that the parties may not have consented at all. The law does not look beyond their symbolic acts indicative of consent. In the second place, the parties do not even signify consent to the same thing. In the first illustration the essence of what X symbolizes is his will to transfer title to his horse (on condition) and Y signifies his will to transfer title to his cow (on condition). It does not seem accurate to say that these consents are to the same thing. Such an assertion, at best, misplaces the emphasis. The essential thing is that each shall signify consent to the specified subtraction from his own legal position, i.e., shall signify consent to the imposition of his own obligation or the passing of his own title. There is no reason to emphasize or require that X shall signify consent to the transfer of Y's title to him or to Y's coming under an obligation to him, and vice versa.\(^5\)

Even the words “offer and acceptance” are sometimes misleading in their connotation. The offer and acceptance of physical things is markedly different from the offer and acceptance which gives rise to a contract. The word “acceptance” is especially deceptive. Its usual connotation is receiving—taking benefits; at any rate, taking things theretofore existing. The chief idea of acceptance in contract law is the rendition of a burdensome performance or the assumption of a burdensome obligation. The acceptor, in case he becomes an obligor, does not even accept a ready-made burden. He acts in a way that will give rise to the burden he is to come under—i.e., his obligation. The only thing the acceptor accepts in the usual sense of the word is the right, title, or benefit tendered him by the offeror. This phase of his acceptance is almost negligible. The acceptance of advantages could be presumed.\(^6\)

The phrase “offer and acceptance” cannot be understood as a lump conception. The offer and the acceptance is each a distinct act. The offer is and the acceptance may be a symbol of these two things: first, consent to a detrimental change in one’s legal position; and second, a demand or an assumption that certain conditions precede or synchronize with that change. These two aspects were noted in the above illustrations and will now be treated separately in an endeavor to point out what is essential in the formation of a contract.

*The Symbol of Consent to a Subtraction From One's Legal Position.*—It should be noted that X’s act (or Y’s) symbolizing his will to come under the obligation is of the same character as his act symbolizing his will to transfer a title. An act giving rise to an obligation is generally called a promise, but a promise, *qua* act, is not different in character from the act which operates to cause a transfer. The actor merely writes or speaks a different set of words in one case than he does in the other. There is a difference in the results aimed at. There

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\(^5\) "The law supplies or presumes the requisite assent to an act beneficial to the party; or it dispenses with it." Dillon, C. J., in *Allen v. Berryhill*, 27 Ia. 534, 539 (1869).

\(^6\) See note 5.
is a corresponding difference in the results reached. One brings the actor under an obligation; the other divests him of his title. But the acts are of the same sort, and there is a talismanic similarity in the result—each leads to a subtraction from the actor’s legal position. Promises and acts of voluntary transfer fall within a larger class of acts that have been called juristic acts or legal transactions. Juristic acts have long been recognized as essentially different from other acts, but have been so little regarded as a class that the term sounds strange and pretentious. In marked contrast to its pretentious sound, the content of the term “juristic act” is exceedingly simple, it being merely an act symbolizing consent to a subtraction from one’s legal position. By such an act a normal person may surrender or transfer rights and privileges; may subject himself to obligations and powers; and, in general, may progress from dominance or toward servience.

There are limitations upon what the juristic actor may accomplish. His acts will not be given effect, for example, to produce a result deemed prejudicial to the public good. There may also be conditions to comply with even though the result aimed at is permissible. His act must, in some cases, be evidenced in writing, and in the case of forming contract obligations, there must be consideration. The purpose of such requirements, except that of consideration, is obvious. They together are the investiture without which the juristic act is impotent.

It is curious that the juristic act, this prolific cause of change in legal relations, should not have been more attentively isolated and studied. Some characteristics of it may be noted. First, it is a symbolic act; second, it is directed by the actor to the end of producing a change in legal relations; third, its direct effect, if it have any, is generally a subtraction from the legal position of the person in whose behalf it is done. These three characteristics will be briefly noticed.

The juristic act is like other acts in that it is physical, but differs in that it is a symbol of the actor’s subjective mental state. Such acts may vary greatly in their physical aspect; they are appropriate and operative to work a variety of changes other than the formation of contract obligations. But whatever their physical aspect and to whatever purpose directed, they have in common this quality: they symbolize the will of the actor to the change they induce. One may write a promise or speak it; he may by the wink of his eye, the crook of his finger, or any other intelligible sign, symbolize consent to the imposition of an obligation. He may, in like manner, signify his consent to the transfer of property or the appointment of an agent. Such acts, infinite in number, and presenting a great variety of physical aspects, may be noted in the commercial intercourse of a single day. They all, however, bear the hue of symbolism.

The symbolic act will in most instances truly indicate the actor’s subjective state. It may, however, belie that state. If it does, such discrepancy is immaterial. The law cannot deal with the subjective state of a man, but only with his acts. The actor is left to make his own liaison between his subjective state and his act. Most changes in legal relations result from acts; contract obligations
do. It is important, however, to note that the acts which produce contract obligations belong to a distinct class which are operative as symbols of the actor's will. To lose sight of the symbolic character of those acts would leave us searching an unblazed wilderness of acts for those particular ones which lead to and cause contract obligations.

The symbolic act is sometimes ambiguous, and, like other ambiguities, may be open to more than one interpretation. The debtor, for example, sends a check for only a part of the amount his creditor demands and tells his creditor that he may keep and cash the check only on condition that he release the entire claim. When the creditor cashes the check, protesting that he receives it only in part payment, his acts are ambiguous. Cashing the check would signify, under the circumstances, consent to release the claim. His protestation would signify the contrary. American courts have generally resolved this ambiguity in favor of the debtor. English courts, on the other hand, do not regard the creditor's act of cashing the check as conclusive. Suppose, as further illustration, that a shipper receives from the carrier a bill of lading which recites provisions that are burdensome to the shipper. Does his silent receipt and retention of the bill of lading signify consent to those provisions? Most courts hold that it does, but some have reached the opposite conclusion. The differing results spring from different interpretations of the shipper's behavior. One shipper receiving such a bill of lading may actually read it and assent to its provisions, while another does not; but the difficulty of ascertaining in each case whether the shipper has done so leads courts to generalize and treat all who silently receive and retain such a bill of lading alike as having signified or not signified assent. A similar question arises in the law of sales. It is agreed on all hands, where the property sold is specific, that title will pass at a time fixed by the manifested intent of the parties. The behavior of the parties, however, is often ambiguous as to the time they intend title to pass. Courts generalize in the solution of this ambiguity, and we have the familiar rule that, where nothing remains for the seller to do, and the acts of the parties do not point to the contrary, title passes when the agreement is made.

The fact that juristic acts do at times belie the subjective state of the actor, that such acts are sometimes ambiguous, that courts sometimes for practical reasons generalize by assimilating acts of a given kind with seeming disregard of the particular actor's mind, do not disprove the rationale or principle that a man may, by an act symbolic of his consent, subtract from his legal position.

The second peculiarity of the juristic act noted above is that it is apparently directed by the actor to the end of producing its legal result. Legal relations and changes thereof are predicated by law. The majority of such changes, however, are induced by acts of the persons affected, and those brought about by juristic acts are apparently intended.

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1 Fuller v. Kemp, 138 N. Y. 231 (1893).
3 See Elliott on Railroads (3d ed.), par. 2137 for numerous citations.
"Acts are divided by Jurisprudence into those which are 'lawful' and those which are 'unlawful.' The juristic result of the unlawful act is never that aimed at by the doer. In the case of some lawful acts, their operation is independent of the intention of the doer, in the case of others his intention is directed to the juristic result. In the last-mentioned case the act is technically described as 'negotium civile,' 'actus legitimus,' 'Acte juridique,' 'Rechtsgeschäft'; the nearest English equivalent for which terms is probably 'Juristic Act'. . . . A better definition (of a juristic act) is 'a manifestation of the will of a private individual directed to the origin, termination or alteration of rights'.\textsuperscript{10}

"In innumerable cases the law allows a man to acquire or lose his rights by a manifestation or declaration of his will and intent directed to that end . . . An act of the party (juristic act) is any expression of the will or intention of the person concerned, directed to the creation, transfer or extinction of a right, and effective in law for that purpose; such as a contract or a deed of conveyance."\textsuperscript{10a}

"There is a very important class of acts in which the legal result follows mainly, if not entirely, because that particular legal result was itself contemplated and desired as one of the consequences of the act. . . . In all such acts the doer (as the phrase is) expresses his intention; that is, he indicates, or is supposed to indicate, by some means or other, that he desires something. It is probable that before long English lawyers will follow the example of continental lawyers, not only in appropriating a name to acts of this class (and whether they are called acts in the law, or juridical acts, or juristic acts, does not seem to me very material), but also in discussing them generally. If we take the commonest examples of this class, contracts, sales, mortgages, wills, and settlements of property, we shall find that up to a certain point the principles which regulate them are very nearly the same. . . . Brevity and simplicity, therefore, is attained by discussing these principles once for all."\textsuperscript{10b}

It may be repeated, for the sake of contrast that non-juristic acts, whether lawful or unlawful, induce the appropriate penalty or reward whether the actor appeared to contemplate the legal result or not.

The third peculiarity of a juristic act noted above is that its direct effect is generally a subtraction from the legal position of the person in whose behalf it is done. Dean Pound has admirably pointed out that each individual has certain interests which are measurably protected by an array of rights, privileges, powers, and immunities.\textsuperscript{11} A man statically considered is vested with more or less of these protecting rights.\textsuperscript{12} It is rational that the individual with normal capacity be permitted to abrogate such of these rights as he may desire to exchange for others or to give away. The law permits him to do this by voluntary acts which seem to indicate his consent to the abrogation. It is not rational or permissible, except in rare instances, that he should in this manner abrogate the rights of others or take unto himself new rights. Other persons may give him a power to detract from their legal positions, for of course other persons are as free as our supposed man to subject themselves to this liability. There are a few situations in which the law gives one power to detract from the legal position of others without their consent. The defrauded vendor, for example, may rescind, which involves a

\textsuperscript{10} Hollands, Elements of Jurisprudence (1st Am. Ed.), star page 103.

\textsuperscript{10a} Salmond, Jurisprudence (6th ed.), p. 192.

\textsuperscript{10b} Markby, Elements of Law (6th ed.), page 125. See also Pollock, A First Book in Jurisprudence (2d ed.), p. 142.

\textsuperscript{11} 16 International Journal of Ethics 92.

\textsuperscript{12} "Rights" in the broad sense, including privileges, powers, and immunities.
power to divest the vendee of his title.\textsuperscript{13} The carrier has in certain emergencies power to sell the shipper's goods.\textsuperscript{14} These are exceptional situations, and the policy, which accounts for the ability or the actor in each of these cases to bind or divest one who has not signified consent, is a policy of special application. The actor may in such cases derive benefit which seems direct, but he derives the benefit because of a situation which enables him to act in behalf of the person suffering the subtraction.

While the direct effect of a juristic act is generally a subtraction from the legal position of the person in whose behalf it is done, its motive and indirect effect in most instances is to procure an advantage. A man subtracts, for example, from his liberty by acts which bring him under contract obligation, or subtracts from his property rights by acts which divest him of those rights. These are the direct effects of his action. He does this in case of gifts without receiving any advantage in return; but in most instances his purpose and achievement is to get something in exchange that will be of advantage to him.

The term "power" has been variously defined and used. A preponderance of usage would perhaps vindicate the definition of it as the ability of a person, by juristic act, to subtract directly from the legal position of the person in whose behalf the act is performed. The subtraction may be from the legal position of the actor or from the legal position of some principal to whom he stands in relation as an agent. The actor's status as an agent usually depends upon a juristic act of appointment by his principal. He is able, assuming such appointment to have been made, to visit the result of his juristic acts upon the principal, just as one employed to do acts of other sorts is able to visit the consequences of those acts upon his master.\textsuperscript{15}

\textit{Conditions Imposed by the Actor.}—It is possible for one who would, by his symbolic act, transfer property, come under contract obligation, or otherwise alter his legal position, to qualify his act and its effect by specifying a condition. It is elementary that an offeror may impose any conditions he pleases. The conditions here referred to are of the sort Professor Costigan mentions\textsuperscript{16} as "necessary before there can be any contract" and not the sort "which go to performance under existing contracts." Such conditions as the symbolic act requires must come to pass if the act is to be given effect. The condition imposed may be (a) one which does not involve action by the proposed transferee or obligee, e. g., that war be declared; or (b) one that does involve action by the proposed transferee or obligee, e. g., that he shall perform a given piece of work, or make a certain transfer, or come under a certain obligation.\textsuperscript{16a}

\textsuperscript{13} \textit{Thurston v. Blanchard.} 22 Pick (Mass.) 18 (1839).
\textsuperscript{14} \textit{Am. Express Co. v. Smith.} 33 Ohio St. 511 (1877).
\textsuperscript{15} \textit{Supra n. 1.}
\textsuperscript{16} \textit{Sutura n. 1.}
\textsuperscript{16a} Suppose A, whose ball has lodged on the eaves of B's house, has said to B, "If that ball is blown down during the night you may have it." A has thus symbolized his will to pass title to the ball on condition that it is blown down during the night. His act has no immediate legal effect; but if the condition comes to pass A's act, then, will be given its legal effect, and the title to the ball will pass to B.

(b) Suppose A had said to B, "If you will climb up and get that ball, you may have it." A's act, by this supposition, was the same as in the illustration above except that it specified a different condition which
There is also a condition, in case the attempt is to form a contract obligation, that there shall be consideration. This condition is imposed by law. Generally the condition laid down by the actor and the consideration requirement may be satisfied by the same thing. It should be noted, however, that these conditions spring from different sources, and that in some situations one may be satisfied without the other. The offeror, for example, may signify his consent to become bound to pay a reward on condition that a certain act be done. A person who performs the act ignorant of the offer has complied with its conditions, but has given no consideration because his act was not in exchange for the obligation. Again, an officer or other person who is already under duty to perform the acts called for may meet all the conditions of an offer without giving consideration. One knowing of the offer might, on the other hand, perform acts in reliance thereon which would suffice as consideration but which do not fully meet the condition imposed by the offeror. There is no contract unless the condition laid down by the actor and the consideration requirement are both met. If the transaction involved is a transfer of title, the law interposes no consideration requirement; but such conditions as the transferring actor lays down must be complied with to make the act effectual.

Let us resort to illustrations in the further study of conditions imposed by the actor. Suppose X offers to pay Y ten dollars if Y will saw a certain pile of wood. X's offer is a symbolic act, indicating, first, his consent to come under an obligation to pay Y ten dollars, and, second, a condition that Y shall saw the wood. It is well settled that the moment the sawing is completed X becomes bound to pay. He may not be aware that the condition laid down in his offer has been met and thus not aware that he is bound. X might have required as another condition to his becoming bound that Y should notify him when the work was done. The law, however, does not read any such condition into his offer. In case these parties make a bi-lateral contract with reference to sawing the wood the analysis is equally simple. X, as before, performs a symbolic act indicating, first, his willingness to come under an obligation to pay Y, but this time the second aspect of that act is a condition required that Y shall come under obligation to saw the wood. The condition called for in X's offer will come to pass the moment Y, by appropriate act, indicates, first, his will to come under the obligation to saw the wood, and, second, the condition assumed by him that X shall become obligated to pay. The moment that act is done the law predicates the two obligations; synchronously all conditions are satisfied and the symbolic acts given effect.

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must come to pass before A's act will be operative. In this latter illustration, certain action by B, instead of by the wind, is the condition. When that condition comes to pass, A's act, as in the preceding case, will be given its legal effect to pass the title.

(c) Suppose A had said to B, "If you will climb up and get that ball, I will pay you ten cents." In this illustration A's act is not calculated to induce a transfer of title to the ball, but rather to induce an obligation binding A to pay B ten cents. The condition upon which the act is to be given this operative effect, viz., B's climbing up and getting the ball, is the same as in the last preceding illustration. When that condition comes to pass, the law will predicate the obligation, as in the preceding illustrations it would predicate the transfer.

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\(^{27}\) Williston on Contracts, par. 68.
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Suppose the circumstances were such that Y might properly, and did, respond to X's offer by mail. Y's writing and mailing his acceptance is a symbolic act signifying essentially, first, his willingness to come under an obligation to saw, and, second, the condition assumed that he acquire X's obligation to pay. All conditions are satisfied and the signified will of the parties given effect by the creation at the moment this letter is mailed of the two obligations. X becomes bound, as in the unilateral contract illustration, at a moment when he does not know it. He also acquires a contract right against Y at a moment when he does not know it. The law does not read into X's offer here, any more than it does into his offer to enter a unilateral contract, as a condition thereof, that he shall have notice before the contract shall exist. It happens that the act Y does; i. e., that of mailing a letter, will in most instances result in a notice coming to X at some later time, but its aspect as a symbolic act is complete whether it ever culminates in such notice or not. Y is not free to symbolize his assent in any fanciful way he may choose, and the reason mailing a letter is such a peculiarly appropriate act for the purpose is perhaps because it will usually result in notice to the offeror.

It might be argued, if it were an original question, that the offer should be understood, in all cases, to call for notice to the offeror as a condition of acceptance. The question is merely one of interpreting an offer. There is no logical necessity for requiring such notice, and a rule has crystallized to the effect that, in the absence of express requirement, such notice is not necessary.

Let us indulge an illustration where no notice is sent. Suppose X writes to Y offering to buy a chattel on thirty days credit, with a common assumption that in case of acceptance the seller is to ship the article and the buyer is to pay the freight. What happens in case the offeree ships the chattel? The offeree has complied with the conditions of X's offer. By his acts he has symbolized his will that the title should pass. The title does pass and X comes under obligation to pay. It is not a condition precedent to either the passing of Y's title or the inception of X's obligation that X shall have notice of Y's acts.

Suppose X has a melon patch near Y's house. He tells Y that whenever he wants a melon to take it and owe X fifty cents therefor. A few days later Y takes a melon. What legal changes result? X's act signified, first, consent to pass title to a melon, and, second, a condition that Y should come under obligation to pay X fifty cents. Y's act of taking the melon symbolizes, first, Y's will to come under an obligation to pay X fifty cents, and, second, a condition assumed that he have title to the melon. Everything essential to the creation of a unilateral contract comes to pass at the moment Y takes the melon and instantly it exists whether X knows it or not. Y's obligation to pay X is created in exchange for the passing of title from X to Y.

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18 "An acceptance is the distinct act of one party to the contract, as much as the offer is of the other's. The knowledge, by the party making the offer, of the determination of the party receiving it, is not an ingredient of acceptance. It is not compounded of an assent by one party to the terms offered, and a knowledge of that assent by the other." Mactier v. Frith, 6 Wend. (N. Y.) 103, 121 (1830).

The actual decisions bear out the results in these last three illustrations, but
many utterances of courts and text writers are hard to reconcile with such results.
It is said, for example, that "when a contract is made between two parties, there
is a promise by one in consideration of the promise made by the other,"20 and
that "the minds of the two parties must be brought together by mutual com-
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munication."21 The decision in the case where the court uttered the latter quota-
tion was, like most decisions on the point, that a contract was made when the letter
of acceptance was mailed, even though the letter never reached the offeror. The
court squares its decision with the utterance by deeming the post office the common
agent of both parties. There is communication, on this assumption, when the
letter of acceptance is turned over to the agent post office. It should require no
argument, however, to show that the post office is not an agent of both or either
party. It may properly be called an "agency" in the sense that it is a means
employed, but it is not an "agent" in the technical sense, with every one who
uses it a correlative principal. An acceptance deposited in a hollow tree, if that
were by the understanding of the parties a proper receptacle, would, no doubt,
give rise instantly to a contract; yet it would be awkward to deem the hollow
tree an agent. Would it not be simpler and more honest to admit that communi-
cation is not a logical necessity than to insist on it as such and then invent a
fictitious communication to account for the contract?

The word "promise" seems to have contaminated our reasoning on this point.
A "promise" by its very definition is a declaration "to" someone, i. e., a communi-
cation.22 There must, it would seem, be notice to the promisee if a promise as
thus defined is essential to the formation of a contract. A large per cent of our
contract obligations arise, however, according to the decisions, at times when the
obligees have no notice thereof. It seems inevitable that we must revise our
definition of "promise" or else revise our dogma to the effect that a promise is
essential to the formation of a contract-obligation. The word promise contributes
also to a confusion between the physical act which gives rise to a contract and the
resultant obligation itself. While the obligation is purely metaphysical, it is more
than a mere conception to conjure with in legal thinking. It is treated as if it
were a thing. The correlative right is valuable. It is bought and sold; indeed it
is a large subject of commerce.23 The necessity of maintaining a distinction
between the obligation and its causative act must be apparent; yet the word promise
now signifies one and then the other, slipping back and forth like the elusive pea
in a shell game.

One of the most widely accepted definitions in the law is, a contract "is a
promise or set of promises which [promise or set of promises] the law will

20 Tinn v. Hoffman, 29 Law Times (N. S.) 271 (1873).
22 "A promise also ex vi termini imports some communication actual or constructive from the promisor
to the promisee." Williston, Contracts, par. 24. "Promise—A declaration which gives to the person to
whom it is made a right to expect or to claim the performance or forbearance of a specified act; any engage-
ment by one person to another." Webster's New International Dictionary.
23 "Wealth, in a commercial age, is made up largely of promises." Pound, An Introduction to the
Philosophy of Law, p. 236.
enforce." Does "promise" as there used mean the physical act of promising? Probably not. That act is done voluntarily and needs no enforcement. Does it mean the resultant obligation? If it means that, of course the law will enforce it; but if it means that only, it gives us no clue to the origin or nature of the obligation. The definition on that assumption is equivalent to saying that a contract is an obligation which the law will enforce. The definition seems artful only when we allow "promise" to shift meanings before our eyes while we read the definition, first meaning a certain kind of act and then obligation.

Continuing the indictment of the word "promise," it has confused discussions of consideration. Justice Blackburn says in Tinn v. Hoffman, while discussing the formation of contract by correspondence, "When a contract is made between two parties, there is a promise by one, in consideration of the promise made by the other; there are two assenting minds, the parties agreeing in opinion, and one having promised in consideration of the promise of the other—there is an exchange of promises." The context of the opinion indicates that Justice Blackburn was talking about the physical promises, and yet if that were the only thing he had in mind it is hard to see how he finds consideration. The offeror frequently writes the only promise he makes weeks before the acceptance. Even if we concede that his slight physical act is a detriment adequate to be consideration, yet it was not done in reliance upon, or in exchange for, anything. Where is there consideration for it, and how can it be consideration for a promise that has not and may never be made? Weeks later the offeree makes his physical promise by mailing an acceptance. He did not perform this act in exchange for the offeror's act as such. That act has been an accomplished fact for some time. Anyway, a physical act as such needs no consideration. It is the obligation that depends at its inception on consideration.

Physical promises, such as Justice Blackburn probably meant, give rise to a contract consisting of two obligations. Is it each act of promising, or each obligation, in such a contract that requires consideration? Is it the counter promise or the counter obligation that constitutes consideration? These are separate questions. Let us give attention to the former. There are two acts of promising in making a bilateral contract, one by each party. Either one, or both, of these acts certainly may take place regardless of consideration. The act is physical. The law does not give or take away ability to do it. The operation of that act, however, is governed by law, and it is well settled that in the absence of consideration the act cannot operate to induce obligation. The act is possible, but, in the present state of the law, a resultant obligation is not possible without consideration. Let us give attention to the second of the above questions, viz., what constitutes consideration for each obligation in a bilateral contract? The promisee-obligee of a given obligation is required to suffer detriment, and it is for the law to determine

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25 Supra, n. 20, p. 279.
what detriment will suffice. He performs the act of promising to assume a counter obligation. This act itself is perhaps the suffering of a slight detriment. It is an act he was free to omit, but the law does not accept such act as sufficient without ascertaining that the act is operative to enlarge the duties of the actor. It is well settled that a counter-promise to do what one is already bound to do, or which for any reason does not add to the burdens of the counter-promisor, will not suffice. The act of counter-promising, shorn of legal effect, equals zero as consideration. The counter-promise plus a resultant obligation equals adequate consideration. May we not drop the act out of the equation and have as a net result the proposition that the counter obligation is the consideration? It would seem that both of the above questions may be answered by saying that each obligation is consideration for the other in a bilateral contract. Each obligor assumes the burden of his obligation in exchange for his rights, as obligee, against the other party. "Promises" in the sense of contract obligations are thus exchanged for each other. The double significance of the word requires that we guard against the impressions, first, that the act rather than the obligation requires consideration, and, second, that the act rather than the obligation serves as consideration. Two obligations are predicated when the letter of acceptance is mailed. This is a synchronous creation of mutual detriments and mutual rights. Both are created by law, being merely induced by the acts of the parties; the conditions they imposed and the consideration requirements are all met the moment such obligations are predicated. The word "promise," if that be used to describe the operative action, seems to add a requirement of notice to the "promise." We should be chary, however, after our unfortunate experience with the phrases "meeting of minds" and "mutual assent," of allowing a word to become the master of the idea, particularly a word so fickle in its significance as "promise."

A recognition of the true basis of the decisions does not involve, when accounting for bilateral contracts, the circular line of reasoning, deprecated by Professor Williston,\(^2\) to the effect that "if a detriment is necessary to support a promise, and therefore to give rise to an obligation binding upon either party, there can be no detriment without an obligation, and, under the rule of consideration which it is sought to apply, there can be no obligation without a detriment." It is not necessary to predicate the validity of one obligation by itself as a preliminary to validating the other. One would not be good without the other, to be sure, but both may be predicated at the same time. There is an analogous situation in every barter. We do not predicate the passing of one title as a preliminary to passing the other, but when the conditions are ripe the law passes both titles simultaneously. The barter does not involve consideration, of course, but the transfers of the titles are mutually dependent, owing to the apparent will of the parties—even as the inception of the two obligations in a bilateral contract. There is no more difficulty in predicking simultaneous changes in one case than in the other. The consideration requirement is imposed by law, but in most instances is

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\(^2\) Williston on Contracts, par. 103.
satisfied by the identical thing that meets the conditions required by the parties. The only difference is that the law requires an obligee to suffer a detriment, while the actor generally requires the obligee or transferee to suffer a certain specified detriment in exchange for the transfer or obligation he, the actor, submits to. This line of reasoning does not use one obligation as an operative fact from which to predicate the other. It simply uses the acts of the parties, and other operative facts, as a basis for predicating the simultaneous origin of two obligations.

This line of reasoning, it must be conceded, would permit the predication of a contract at the moment the last one of two crossed offers is mailed. Both parties have, at that moment, signified consent to come under their respective obligations on specified conditions, and the predication of a contract would be in accordance with that consent. Pairs of crossed offers contemplating exactly the same obligations between the identical parties are naturally rare. *Tinn v. Hoffman* is often cited to the point that crossed offers do not make a contract. The facts in that case were held, with two judges dissenting, not sufficient to create a contract. There were, however, two grounds for the decision: first, there were only crossed offers instead of an offer and an acceptance, and, second, one offer was to sell 1,200 tons while the crossed offer or counter assent was to buy 800 tons. The two dissenting judges were necessarily of the opinion that the crossed offers would suffice. The other five judges expressed doubt whether crossed offers would make a contract, but took pains to state that a decision of that point was not essential to the result they reached. The correspondence in the case of *James v. Marion Fruit Jar Co.* was held insufficient to create a contract. The result in this case also is based on two reasons: first, the offer and counter-assent crossed in the mails, and, second, the supposed offer was only a quotation and showed "that defendant reserved the right to reject any offer that might be made, if it deemed the specifications unfavorable." While these two cases mildly discredit the efficacy of crossed offers, there seems to be at least as much authority in favor of recognizing them. A letter from the offeror which had not come to the offeree was relied on in *Mactier v. Frith* to prove that the offer existed at the time of the acceptance. In this situation the so-called acceptance is only a crossed offer with reference to the unreceived letter. The case seems, therefore, to be a precedent for making crossed offers operative. Justice Marcy, the author of the opinion, says they are merely using the letter to discover the "intentions" of the offeror, but it is just so that we use any offer. In *Morris Asinof and Sons v. Freudenthal*, it is held that where all of the terms of a contract had been agreed to except the time of payment, there was a valid contract made when the parties each mailed a letter specifying the same time of payment which letters crossed in the mails.
Gibbons v. Proctor,33 and other decisions to the effect that one who offers to pay for given services is bound to one who performs those services, while ignorant of the offer, are, on principle, authority for the efficacy of crossed offers. Those decisions are questionable, however, on the ground that the one who performs the services while ignorant of the offer does not do so in exchange for the obligation, and so gives no consideration.

Legal detriment suffered by the obligee in exchange for the obligation he acquires is consideration. The application of this doctrine calls for discrimination between unilateral and bilateral contracts. The performance of services or the transfer of a title which would be sufficient as detriment to support a unilateral contract may take place without any consideration, and if such performance or transfer takes place without being in exchange, it will not serve as consideration for a promise. The transfer, unlike the performance of services, instead of being made, might, by a suitable symbolic act, be tendered on condition that the actor receive an obligation in return.35 This act is no appreciable detriment in itself. The detriment is suffered, if at all, when the act is given effect to transfer the title. This may be at a much later time, and whenever it occurs it is in exchange for the obligation.

The detriment sustained by either party making a bilateral contract, not only may not, but, cannot, be suffered until and unless it be in exchange for the obligation of the other party. The act of each one tenders, so to speak, the detriment, i.e., the obligation, he is willing to suffer. Neither one suffers that detriment until he does so in exchange for his claim against the other. The prevailing opinion, that one who performs services while ignorant of an existing offer to pay for such services has not thus made a contract,34 is clearly right. It does not, however, militate against crossed offers being effective to make a bilateral contract.

"An acceptance is the distinct act of one party to the contract as much as the offer is of the other . . ..36 The act of the offeror is more definitive and extensive than that of the offeree. It embraces a description of two possible obligations and proposes their reciprocal formation. The offeror has originated, or at least formulated, the idea. His authorship, however, should have little or no significance. The acts of the offeror and offeree are in their essential qualities alike. Each consents to the imposition of his own burden. A third person might describe the two obligations and propose their reciprocal formation. A contract would no doubt be formed if his suggestions were adopted, although neither party thereto was author of the arrangement.38 It happens in the rare instances of crossed offers that both parties are authors of the same idea. Each party consents to his part of the arrangement proposed. Why should there not be a contract? Is there a requirement of exclusive authorship in one party?

33 64 Law Times (N. S.) 594 (1891).
34 Fogg v. Portsmouth Athenæum 44 N. H. 115 (1862); Wheeler v. Klaholt, supra, in 19; Mactier v. Frith, supra, n. 18.
35 Williams v. West Chicago Railway Co., 191 Ill. 610; Broadmax v. Ledbetter. 100 Tex. 375 (1907).
36 Mactier's Adm. v. Frith, 6 Wendell (N. Y.) 103, 121 (1830).
38 The Satanita L. R., (1895) Probate 248.
THE FORMATION OF SIMPLE CONTRACTS

A rule giving effect to the will of the parties, as signified by cross offers, would likely be more convenient than one denying such effect. "In the case of crossed offers, each party has acted and has expressed consent; but in so doing, neither has knowingly exercised a power conferred by the other, and neither has been induced to believe that he has such a power to exercise. Each has done an act conferring a power upon the other, and either one may now exercise that power by a subsequent act and thus create a contract. There is, however, no inevitable necessity in our adoption of the machinery of offer and acceptance. The rules of contract, like all other rules of law, are based upon mere matters of policy, or belief as to policy. In the process of our evolution we find that some or all of us are following a customary rule. When we become conscious of this fact, we try to express the rule in words and to compel others to obey it by legislative command. We may fail in our attempt, either because the custom supposed is not the custom of the powerful, or because we have failed to express it with accuracy, or because new life conditions require new customs. So, therefore, we may decree that two acts expressing consent, as in the case of crossed offers, shall create contractual relations; or that, where an offer has been published, that act empowers others to create contractual relations by doing the acts requested, even though without knowledge of the request. It seems not improbable to the writer that this latter rule will prevail in the future."

Some leading authorities have accounted for contract obligations on the ground that they are the enforcement of promisors to fulfill the expectations their promises have aroused. This explanation seems to base obligations upon the subjective state of the promisee and is therefore open to the same practical objections that have been urged against basing them upon the subjective state of the promisor. A large per cent of contract obligations, moreover, come to exist at a moment before the obligee can possibly have such expectations. The offeror, when a bilateral contract has been made by mail, is a "promisee," yet the obligation in his favor comes into existence at a time when he does not even know the offeree has acted. An explanation is not adequate which does not account for the obligation resting upon the offeree as well as the one resting upon the offeror. There are cases where obligations arise without even a promise in the usual sense, and thus without any expectation on the part of the obligee. An illustration was used

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37 Corbin in 26 Yale L. J. 169, 182. See also note 21 Col. L. R. Rev. 599.
38 "When the law enforces contracts, it does so to prevent disappointment of well founded expectations, which, though they usually arise from expressions truly representing intention, yet may occasionally arise otherwise." Holland, Elements of Jurisprudence (1st Am. Ed.), star page 228.

"The law of contract may be described as the endeavour of the State, a more or less imperfect one by the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average righthandness. Accordingly, the most popular description of a contract that can be given is also the most exact one, namely, that it is a promise or set of promises which the law will enforce." Pollock, Principles of Contract (2d, Am. Ed.), p. 1.

"The individual claims to have performance of advantageous promises secured to him. He claims the satisfaction of expectations created by promises and agreements. Social interest in the security of transactions, as one might call it, requires that we secure the individual interest of the promisee, that is, his claim or demand to be assured in the expectation created, which has become part of his substance." Pound, An Introduction to the Philosophy of Law, p. 256-7.
above where X said to Y, "When you want a melon, take one of mine and owe me fifty cents for it." Suppose Y takes the melon when X knows nothing about it. That would no doubt create an obligation, although Y's act hardly amounts to a promise, and surely creates no expectations at the time it is done. Promises are made on the Board of Trade every day, to deliver grain, which the promisee does not expect to be performed. It is the obligation he expects and gets. Promises are sometimes made by men of such ill repute that the promise itself would not arouse expectation of fulfilment. The obligee, after contracting with such a man, may expect performance, but he bases his expectation on the obligation rather than on the promise. The obligee in any of these cases may, after contracting, expect performance, but doesn't the obligation beget the expectation rather than the expectation beget the obligation?

It has been emphasized above that contracts are predicated upon acts of the obligor, often without the promisee having relied on those acts and sometimes without his even knowing about them. The offeror-actor may, after mailing an offer, mail a revocation. The significance of the former is cancelled by the significance of the latter. Here is the one situation where reliance by the promisee may become important. When the offeree receives the offer it tells him of the offeror's first act. He knows nothing about the second until the revocation arrives. He is warranted, by the information which the offeror has given him, in the deduction, when he mails his acceptance, that he has acquired a contract right against the offeror and has himself come under a duty to the offeror. This assurance may well be the basis of other action by him; so reason, as well as the decisions, spares him from any effect of the uncommunicated revocation. This indulgence to the acceptor is not granted, it seems, if he acquires notice of the offeror's later act by even a casual communication. The large number of cases where the acceptor-promisee is, or would be, protected against the effect of uncommunicated revocation might lead a casual examiner to deem reliance by the promisee essential in all cases to the creation of contract obligations. There are many instances, however, as indicated above, where the obligation comes to exist without such reliance on the part of the promisee.

The suggestion made herein is that simple contract obligations are imposed upon those who symbolize by appropriate acts their will to assume such obligations, provided consideration and the requisite formality is present. Acts appropriate to induce such changes in legal relations are of the character and belong to the class denominated juristic acts. Such an act may be complete and operative to induce a contract obligation, although notice thereof has not been communicated to the "promisee." Acts of the kind referred to are distinguishable from other acts and may be profitably recognized as a class. They account for many changes

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\[40 \text{Dickinson v. Dodds, 2 Ch. Div. 463 (1874). See for a scholarly criticism of this doctrine, Prof. Parks in 19 Mich. L. Rev. 152.}
other than the creation of contract obligations, such as transfers of title and creations of power. The actor may lay down conditions upon which the transfer or other change is to take place. He invariably indicates or assumes such a condition in cases where his act is done by way of inducing a contract obligation. A principle seems to have asserted and established itself in the cases, without being expressly recognized, to the effect that one who symbolizes his will to assume a given obligation is placed under such obligation at the instant his symbolic act is completed and its conditions met.