THE LAW OF CONTRACTS.

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One frequently hears the terms "agreement" and "contract" used as convertible terms; but this is not strictly correct. If I ask a man to dinner, and he accepts my invitation, that is clearly an "agreement" on his part, but it certainly is not a "contract." There is no legal obligation upon him to carry out his agreement; he is bound by a merely social obligation. We may, therefore, define a contract as being "an agreement enforcable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others." In order to constitute an agreement enforceable at law:—

1. There must be a distinct communication by one side to the other of their intention, i.e., there must be *offer* and *acceptance*.

2. There must be certain evidence, required by law, that the parties intend to affect their *legal* relations, i.e., there must be *form* or *consideration*.

3. The parties must be capable of making a valid contract.

4. The consent expressed by the offer and acceptance must be genuine.

5. The objects of the contrct must be legal. Learned writers on the law of contract require books of large size to explain, even briefly, the details of that law. I, therefore, find great difficulty in approaching such a large subject when the time allotted to me is so brief. But a rough general outline of the subject may be best obtained by considering a little more fully each of the topics I have just mentioned. Now, in the first place, every contract springs from the acceptance of an offer. Thus, if we see a finally concluded contract whereby A. agrees to sell a horse to B. for £5, that necessarily implies a moment at which A. says, "Will you give me £5 for my horse?" And B. says, "I will." Upon saying those mystic words the contract is concluded for richer, for poorer, for better, for worse, until the lawyers do their part. It is not necessary that either the offer or the acceptance should be in actual words—either may be indicated by conduct. Thus, if I offer X £5 to do a certain piece of work and X thereupon does it, I am bound by contract to pay

him the £5—his conduct is an acceptance of my offer. So, if A sends goods to my house and I use them, though never a word has passed betwen us, I am bound by contract to pay him the value of the goods—the offer and the acceptance are both in such a case made by conduct.

But an offer is not made until it is communicated to the offeree. This, at first sight appears a truism, but on closer examination it will be seen to be the principle upon which many questions are decided. One case which illustrates this principle is Henderson v. Stevenson (L.R. 2 H.L., Sc, App. 470): the plaintiff bought from the defendant company a ticket by steamer from Dublin to Whitehaven. On the face of the ticket were these words only, "Dublin to Whitehaven"; on the back was an intimation that the company incurred no liability for loss of passenger's luggage. The vessel was wrecked and the luggage lost. The plaintiff claimed that the company ought to pay for the luggage—true it was that he had since learnt that there were conditions on the back of the ticket, but the only offer communicated to him was the one he had seen on the face of his ticket, and that was the only offer that he had accepted. The House of Lords upheld the plaintiff's contention, but companies have since then become more cautious, and now generally refer to the conditions on the back of the ticket by printing on the face of it, "See back." It then becomes a question to be decided by the jury whether the ticket amounted to a reasonable notice that it was issued subject to the conditions printed on it. I remember one case of this nature in which a clerk of the defendant company stated in the witness box that he always told passengers, when they bought a ticket, that it was issued subject to the conditions printed on the back of it. No doubt, in this particular instance, that statement was quite true; but if many other clerks in a similar position gave such evidence, one would expect them to occupy the third place in that classification of witnesses by the late Montague Williams, Q.C., in which he divided them into:

1. Liars.
2. D—— liars.
3. Experts.

In the same way, an aceptance must be communicated by words or conduct—as a judge (Brian C. J.) said in the reign of Edward IV.: "It is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man." Thus in the case of Felthouse v. Brindley (11 C.B.N.S. 869) Felthouse offered to buy his nephew's horse for £30, adding "If I hear no more about him I shall consider the horse is mine at £30." The nephew made no answer to this letter, but he told Brindley, an auctioneer, to keep the horse out of a sale of his farm stock, as it was sold to his uncle Felthouse. Brindley sold the horse by mistake and the uncle sued him for its value. But it was held th the horse had never become the uncle's—the nephew had never communicated to him an acceptance of his offer.

But it is not always necessary that the acceptance should be verbal or by direct communication with the offeror; acceptance is communicated when it is made in the manner *prescribed* or *indicated* by the offeror. Contracts made by post form a very good illustration of this rule. Thus, in *Adams v. Lindsell* (1 B. and Hld. 681) Lindsell offered to sell wool to Adams by letter dated 2nd September, "receiving your answer in due course of post"—i.e., he indicated the manner in which the offer could be accepted. He misdirected his letter, so that Adams did not receive it until the 5th. Adam's posted a letter of acceptance on the evening of the 5th, but Lindsell had meantime sold the wool to others. Adams sued for breach of contract, and it was argued that there was no contract between the parties till the letter of acceptance was actually received. But the Court scouted this argument and held that the contract was made when the acceptance was communicated in the manner prescribed by the offeror—i.e., was put in the post. It follows, that in such a case the contract would have been effectually made, even though the letter of acceptance was lost or delayed in the post; the offeror chooses the post office as his agent and is bound by his choice.

An offer, of course, creates no legal rights until it is accepted; but it may lapse or be revoked. Thus, if either party dies before acceptance of the offer, it lapses—the offeror cannot be bound to a dead offeree's representative, nor can an offeree hold a dead offeror's representatives to the offer.

Sometimes parties fix a time within which an offer is to remain open—e.g., "This offer to be left open till 6 p.m. on Tuesday, 15th June"; this leaves it open to the offeror to revoke, or the offeree to accept, the offer at any time up to the time named. A promise to keep an offer open for a certain time only becomes binding, if the party making the offer is to get some benefit by keeping it open—in other words if there is a valid contract to keep it open for a specified time. And even if there is no revocation of the offer, the offer may lapse by the efflux of a reasonable time. Thus in Ramsgate Hotel Co. v. Montefiore (L.R., 1 Exch. 109), the defendant by letter dated 28th June offered to buy certain shares from the company; no answer was made till 23rd November, when he was informed that the shares were allotted to him. He refused to accept, and it was held that the offer had lapsed by reason of the delay of the company in notifying their acceptance. But revocation of an offer, as distinct from lapse, must be communicated. Thus A makes me an offer—within a reasonable time, he revokes his offer but does not tell me that he has revoked it; the offer is still open to me, and may be accepted within a resonable time or within the time fixed in the offer; a mere mental revocation of an offer is no revocation at all.

An offer need not be made to an ascertained person, but to make a contract it must be accepted by an ascertained person. This principle received a very neat illustration in the case of Carlill v. Carbolic Smoke Ball Co. [L.R. (1893) 10 B. 268]: the company

offered by advertisement—i.e., not to any ascertained person, but to everybody—to pay £100 to anyone who caught cold after using the ball for three weeks according to directions, and stated that they had deposited £1000 with a bank to show their sincerity in the matter. This simple faith in the efficacy of their remedy led the plaintiff to try it: she took it for three weeks and in accordance with the direction—and then caught cold. She thereupon sued the company on the contract formed by her acceptance (by conduct) of the company's offer and obtained a verdict. No doubt the remedy thus applied had a much more beneficial effect on her cold. The company tried to get out of their contract by saying that the offer was a mere puff or advertisement, and not intended seriously; but the Court gravely pointed out to them their published announcement that they had deposited £1000 with a bank to prove the sincerity of their offer.

I propose to mention only one other point of this branch of my subject, but it is a point that is of the utmost importance, and one that is very often lost sight of by business people. The rule of law is that an acceptance must be absolute and identical with the terms of the offer. It is quite obvious that if I offer to sell property for £100 and a would-be buyer writes back saying he will give me £95, that no contract is made—the acceptance is not identical with the terms of the offer; in fact, the alleged acceptance is really a new offer. But, though a simple case like this shows that the rule mentioned is merely common sense, neglect to give a careful consideration to business letters frequently results in parties, who fancy they have a binding contract, finding themselves with no contract at all. Only this year (6 S.R. 10 Z), the Sydney Harbour Trust Commissioners brought an action on a contract for a lease against Warburton, and attempted to prove their contract by putting in evidence their offer and a letter from Warburton in these words, "I am willing to accept a lease on the terms named and to comply with your conditions re stacking coal against the fence. I will expect to get preference on expiration of lease. The drainage of stables will also be included in the specification, also water for horses laid on, and a small W.C." The Harbour Commissioners' offer did not contain any reference to the matters mentioned in Warburton's letter, and it was, therefore, held that there never had been any acceptance of the Commissioners' offer and, consequently, there was no contract. Sir William Owen, in his judgment on this part of the case, said: " . . . in the final letter written by the defendant (Warburton) accepting some of the terms of the lease proposed in the letters from the plaintiffs he imposed certain additional terms, and there is no evidence to show that these additional terms were ever accepted by the plaintiffs. It is therefore quite clear to my mind . . . that the matter rested simply on negotiation and no more."

It is, therefore, not useless reiteration for me to again point out that an acceptance of an offer must be absolute, and identical with the terms of the offer.

I come now to another of the essential elements to a valid contract—that is the subject of Form and Consideration. Contracts are divisable into two great classes—Formal Contracts and Simple Contracts. Formal contracts are those which depend for their validity on their form, and include Contracts of Record and Contracts under Seal. A judgment of the Court is the commonest example of a Contract of Record—that is the highest form of contract known to the law. It is not necessary to deal with it here, as to enable a contract to reach that stage is a matter which is more the concern of my profession than of yours. The other kind of Formal Contract is the Contract under Seal—i.e., a deed. A deed is made binding between parties by being signed, sealed and delivered. The party executing a deed signs his name, places his finger on the seal intended for him, and utters the words, "I deliver this as my act and deed." Thus he at once identifies himself with the seal and indicates his intention to *deliver*, i.e., to give operation to, the deed. A deed may be delivered subject to a condition—e.g., that it is not to become operative until a certain event happens: until that event happens it is called an *escrow*, but on the happening of the condition it immediately becomes operative. A contract under seal has certain characteristics which distinguish it from a Simple Contract.

(1) Where a man enters into a solemn engagement by deed as to certain facts, then all statements in the deed, if express and clear, are conclusive against the parties to the deed in any litigation arising upon it. He is not allowed to disprove facts, the truth of which he has asseverated in a deed.

(2) A right of action arising out of simple contract is barred by the Statutes of Limitations if it is not exercised within six years; but if the action arises out of a contract under seal, the period of limitation is 20 years.

(3) No consideration is required to support a contract under seal; a mere promise for which the promisor obtains no consideration either present or future is not enforceable if made verbally or in writing, but it is enforceable if under seal. "A seal imports consideration."

Some contracts are not binding unless they are made under seal—some cases are specially fixed by statute, e.g., transfer of a ship, leases intended to take advantage of the Leases Facilitation Act, and some few other cases. Common law (i.e., as distinguished from Statute law) requires a deed in two cases—(1) Contracts for which there is no consideration, and (2) a corporation aggregate (e.g., municipality) can only be bound by contracts under the Corporate seal. Thus, if a municipality wishes to make a contract to carry out important works, such contract is not enforceable by either party to it, unless it is under seal; but the exigencies of business are such that if the contracts of corporations are of trifling importance or of daily necessary recurrence, they may be

made verbally or in writing without seal. However, all important contracts with such badies must be under seal. I must here point out that a company registered under the Corporation Act is a corporation; but the Companies Act specially provides that contracts made by and with such a body may be verbally entered into in the same form as in the case of individuals. I now come to the other great class of contracts—Simple Contracts, i.e., contracts which depend for their validity upon the presence of consideration. Of these, the law requires that some should be in writing, while others are quite good if they are merely verbal; but all alike require consideration to support them. Consileration is really a *quid pro quo*—it may consist in some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. If one remembers that the law of contract requires that one should not take a benefit from another without giving something for it in return, one gets a very good idea of what consideration is. It need not be adequate to the promise, but must be of some value in the eye of the law. The following case will illustrate this rule:—B owned two boilers, and at the request of F allowed him to weigh them on the terms that they were restored in as good condition as they were lent. F. took the boilers to pieces in order to weigh them and returned them in this state, and for breach of his promise B sued him. It was argued that B suffered no detriment, nor did F get any benefit by permission to weigh the boilers and that there was no consideration for the promise to restore them in good condition. But the defendant was held liable—"The consideration is that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit; at any rate there is a detriment to the plaintiff from his parting with the possession for ever so short a time."

One other important rule to notice on the subject of consideration is that it must be present or future, it must not be past. Thus, if I verbally promise to give X £5 if he will pull me out of the water into which I have fallen, X, on pulling me out, has a contractual right to the £5; but if, after I am pulled out, I promise to pay X £5 in consideration of his having pulled me out—that is a past consideration, and is not sufficient to support a contract. There is one exception to this rule—that if the past consideration was moved by a previous request, it will support a contract. Thus, in the case put, if X had pulled me out of the water at my request and I had then promsied him the £5 for having done so, a good contractt would be formed—the consideration (i.e., the pulling out of the water) was moved at my request. All Simple Contracts require consideration to support them; but, further, some Simple Contracts are not enforceable unless they are in writing and signed by the party chargeable therewith or his agent duly authorised thereto. The requirement of writing is imposed by Statutes, the