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FICTION VS. REALITY, IN RE CONTRACTS: A SURVEY

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Introduction

The history and philosophy of the law of contracts has more than academic interest. In some areas there are conflicts and uncertainties that stem from the history, nature and basis of contracts.

Primitive men were familiar with the idea of possession which later developed into the idea of ownership. And a person having possession or ownership has long been able to transfer whatever he had to another.[1]

But the idea of obligation was a later development in the advance of civilization.[2] Obligations, as we know them at present, would have been incredible to primitive men. Do we fully realize even now the nature of an obligation? It has no tangible existence. It is only a figment of the mind. And yet, it is a powerful means of controlling what the obligor shall do. The obligation can be owned, bought and sold, and inherited. Its owner can be taxed because he has it. Such ideas are pabulum for men who are advanced in civilization and acumen. Even now a bank depositor is likely to say that he has money in the bank. He may, if he is a layman, really think he has money in the bank. In truth he has nothing in the bank. He has a claim against the bank. When the bank received his money it expressly or impliedly undertook to make repayment. The bank thus created and incurred obligation. That obligation is what the depositor has. The nature of an obligation itself, and the manner of its creation, were both beyond the ken of primitive men.

How did obligations come to be invented? And how did they get into the fold of the common law? The growth of the obligation idea and its recognition by the common law came about in connection with two forms of action — debt and trespass on the case.[3] The advance that was made in connection with the action of debt was made by assimilating the creation of obligation with the transfer of property — a natural

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1. 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 56, 57 (2d ed. 1923); 2 *id.* at 155.

2. 2 *id.* at 184 *et seq.*

3. "So great is the ascendency of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms." MAINE, EARLY LAW AND CUSTOM 389 (1901).

and rational approach. The advance that was made in connection with trespass on the case was made by branding a promisor as a deceiver and then holding him liable for his tort — an artificial and irrational approach.

The action of debt introduces what is substantially an obligation, even though in theory it was in form a proprietary action. "To all appearance our ancestors could not conceive credit under any other form."[4] The action was extensively used in cases where goods had been sold on credit. It was conceived in such cases that the seller acquired a proprietary right in the price just as a buyer did in the goods that were sold and delivered to him. The seller's theoretical ownership rested on the idea that the buyer had invested him with title to a certain amount of money. It was not necessary that the buyer should have any money on hand. But the buyer was thought of as keeping the seller out of his own property. Under modern analysis, how can the debt be anything but an obligation? The plaintiff, if successful, was given a judgment for his debt and damages for the detention thereof.[5]

Whether a person going into debt transfers a sum of money, as lawyers in the fifteenth century would have said, or incurs an obligation, as lawyers in the twentieth century would say, he does it by the same kind of an act. The transfer is effected, or the obligation incurred, by the enactment of his will. And that is the rational basis of all legal transactions.

In the light of hindsight it appears that the action of debt came near to establishing the law of contracts on a firm and rational basis. But, alas! the action itself was doomed. Other forms of action were more advantageous to plaintiffs.[6] Debt fell into disuse. And with it fell the advances that had been made therein toward the establishment of contracts on a rational basis.

It was destined that the action of trespass on the case should be the main entrance through which contracts would come into the fold of the common law. Ever since contracts came in through that gate there have been two contesting ideas as to why simple contracts are enforced. One of these bases the enforcement of contracts on a fiction; the other, on a candid view of the facts.

Whence Came the Fiction? What Is It?

What fiction is involved? And how did it come to be used? The

4. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 205 (2d ed. 1923).

5. MARTIN, CIVIL PROCEDURE AT COMMON LAW 41 (1905). "The ancient distinction between the judgments in debt and assumpsit when money was recovered was expressly abolished by the Common Law Procedure Act of 1852. Thus it may be said that debt, as finally settled, is in substance an action to obtain redress for the breach of a personal obligation to pay a certain sum of money." *Id.* at 37.

6. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 53 (1888).

fiction is that the making of a promise followed by its nonperformance is a deceit. And the fiction was invented to meet a supposed necessity that the facts of a case must make out a deceit in order that the plaintiff could recover on a broken promise.

Let us first suppose a case of genuine deceit arising in the early part of the fifteenth century. Assume that Skinner, a crafty person, coveted Cornwall's horse, Pompey. Cornwall was reluctant to part with Pompey unless he should receive the price immediately in exchange for the horse. But Skinner, pursuing an evil design that he would never pay for the horse, said, "Mr. Cornwall, let me have Pompey now and I promise to pay you, come next January first." Skinner thus used a promise to accomplish his wicked purpose—to wheedle Cornwall into giving up the horse.

Suppose further that, when January first came around, Cornwall demanded payment but found that Skinner had shed his sincere manner. He utterly refused to pay and defied the demand of Cornwall. These facts, added together, make out a case of deceit. Skinner has cheated Cornwall out of a horse. An action of trespass on the case on the promises would be available to Cornwall.

Next suppose that, at about the same period, an honest man bought a horse and gave in exchange his solemn promise to pay for it. He fully intended, for all that appears, to perform his promise. But when the promise fell due it was not performed. Such facts do not make out that any real deceit was practiced on the seller, although the buyer made a promise and later omitted to perform it. What could the seller do? He could sue in debt. But that form of action, wherein the buyer could wage his law, was unsatisfactory. The rising sense of justice demanded that the plaintiff should have a more effective remedy. Some ingenuity was required. A loose interpretation of what the judges and lawyers of the period did is this: They put their heads together and said, "Let's pretend that everyone who breaks a promise that was made in the procurement of something has committed a deceit." Accordingly, the making and breaking of a promise was deemed a deceit, however honestly the defendant may have acted.[7] The plaintiff's statement of his case included such language as this: "Yet the said C. D., not regarding his said promise, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the plaintiff," etc.,[8] omitted to perform. This fiction, that the promisor had committed a deceit, was, perhaps, necessary in order that the plaintiff might sue in trespass on the case. But that fiction, with its corollaries, has per-

7. 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 429 *et seq.* (3d ed. 1923); Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888), reprinted in SELECTED READINGS ON THE LAW OF CONTRACTS 33 (1931), 3 SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 259 (1909).

8. Ames, *supra* note 7, at 16.

sisted long after forms of action have gone into the limbo. And it has hindered the establishment of contracts on a rational basis.

Legal Transactions: Based on Consent of Parties Bound

Through the centuries there have been legal transactions. They are the essence of commerce and are the means whereby every normal adult can bargain away what he has for what he wants. Legal transactions are the genus of which simple contracts should be deemed a species. Let us notice their forms and the philosophy that is implicit in their long and extensive use. Mention will be made of some familiar kinds of legal transactions, ancient and modern. It will be seen that, while they vary in form, their vital element is constant.

Livery of seisin was an ancient ceremony whereby the feoffor voluntarily transferred his ownership of real property to another.[9] The execution and delivery of a sealed instrument is a voluntary formality, that has been in use for centuries, whereby the party who executes the instrument conveys a title or assumes an obligation.[10] Bills of exchange, in ancient[11] as well as modern use, bind the persons who voluntarily sign and issue them. Declarations voluntarily made by the owner of property that he holds the property in trust for another are binding on him. Wills that were voluntarily made, in due form, are given effect to transfer property that belonged to the testator. Gifts of chattels voluntarily made and accompanied by delivery are binding on the donor. Such transactions have increased in modern times to an incredible volume. They include transactions both large and small, both unilateral and bilateral. They include, for instance, the purchase and sale of a newspaper for a few cents; the purchase and sale of a locomotive or a diamond or a skyscraper for a million dollars; a service contract to have one's shoes shined for a quarter; the creation of a complicated trust arrangement, by will or inter vivos; and, the taking on of special duties as a carrier, bailee, or innkeeper.

Some typical legal transactions have been called to mind in the preceding paragraph. What is their underlying philosophy? An admirable statement of that philosophy is made by Professor Fuller in the following words:

> "*Private Autonomy.* — Among the basic conceptions of contract law the most pervasive and indispensable is the principle of private autonomy.

9. 2 BL. COMM. *315.

10. *Id.* at *297 *et seq.* The ancient Hebrews used another form. "Now this was the custom in former times in Israel concerning redeeming and exchanging: to confirm a transaction, the one drew off his sandal and gave it to the other, and this was the manner of attesting in Israel." *Ruth*, IV, 7 (Revised Standard Version 1952).

11. BRANNAN, NEGOTIABLE INSTRUMENTS LAW 4 (7th ed., Beutel, 1948); BRITTON, BILLS AND NOTES 2 (1943); Bosanquet, *The Law Merchant and Transferable Debentures*, 15 L.Q. REV. 130, 138 (1899).

> This principle simply means that the law views private individuals as possessing a power to effect, within certain limits, changes in their legal relations. The man who conveys property to another is exercising this power; so is the man who enters a contract. When a court enforces a promise it is merely arming with legal sanction a rule or *lex* previously established by the party himself. This power of the individual to effect changes in his legal relations with others is comparable to the power of a legislature."[12]

Professor Fuller adds in a footnote, "What I have called 'the principle of private autonomy' is more commonly assumed than discussed in the Anglo-American literature."

The idea basic in all legal transactions is that a normal person can, by his enacted will, divest himself of rights, privileges, and other legal advantages.[13] He can, if he wants to, derogate from his legal position. Stated in more familiar terms, persons have for centuries transferred their property and bound themselves in obligations by their acts of consent.

Double Background

Simple contracts came into the common law against this double background. On one hand such contracts had to be twisted into deceits for procedural reasons. On the other hand a variety of legal transactions gave every normal adult person power to divest himself of property or to bind himself in obligations by suitable voluntary acts. The purpose of the following survey is to look at the development of simple contracts and to note particularly whether, in their maturity, they quadrate with the fiction that each one is a deceit or with the idea that in each one the promisor has voluntarily assumed an obligation.

Suit on a broken promise would, in some cases, lead to the same result whether the promisor is deemed to have cheated the promisee, or to have bound himself by his solemn consent to render a given performance which he failed to render. But the corollaries are different when a defendant is being pursued as a deceiver from what they are when he is being pursued on an obligation that he created and failed to perform.

A promise that is used as a device to wheedle and cheat the promisee out of something is different in character from a promise that is made by the way of consenting to be bound in an obligation. The fact that the act of promising *can* be used as a cheating device does not mean that it *cannot,* under any circumstances, be a juristic act — *i.e.,* a con-

12. Fuller, *Consideration and Form,* 41 COL. L. REV. 799, 806 (1941).
13. HOLLAND, ELEMENTS OF JURISPRUDENCE 117 (13th ed. 1924); MARBLEY, ELEMENTS OF LAW 125 (6th ed. 1905); POLLOCK, A FIRST BOOK IN JURISPRUDENCE 142 (2d ed. 1896); SALMOND, JURISPRUDENCE 481 (9th ed., Parker, 1937).

senting to be bound. Consider the common transaction of a customer borrowing one hundred dollars at a bank. The customer executes and delivers a promise that he will repay the amount. Must that be deemed part of a nefarious plot to get one hundred dollars from the bank and never pay it back? Even if lawyers and judges in the fifteenth century would have looked at the customer's promise as the first step in a deceit, in order to satisfy a form of action, must we cling to that view of it? Suppose the borrower executed a mortgage to secure the loan. The mortgage would be a conveyance. There never was any doubt that a voluntary conveyance in due form is effective, and for the simple reason that the grantor consented that it should divest him of his title. The act of executing the promissory note and the act of executing the mortgage are alike in character. Each one is a consenting to a subtraction from the customer's legal position. The note puts him under obligation. The mortgage divests him of property.

Suppose that the seller of a machine undertakes to keep it in repair for a year. He would probably do it like this: He would sign and deliver a writing which recites substantially as follows: First, "I convey the ownership of the machine," Second, "I promise (undertake) to keep it in repair for one year." He would, in such a case, not merely make the conveyance and the undertaking by similar acts. He would do the two things by an identical act. It would seem that the conveyance and the undertaking are both effective and for the same reason — the seller-promisor enacted his will that it should be so. The point being emphasized is that promises are frequently a form of juristic acts, and, like other juristic acts, are effective according to their tenor.

It is not asserted here that every promise is a consenting to be bound. But in modern business "I promise" is generally synonymous with "I consent to be bound" and with "I undertake." "I promise" is common language in the making of contracts. Fiction says: a "promise" is only a cheating device. Common sense and business usage say: a "promise" in context may be a consenting to be bound. These are opposing ideas. Fiction had its way at the outset. Promises were then treated as cheating devices. The trend has been toward recognizing promises, in suitable context, as juristic acts. The fiction idea hung on with amazing tenacity in some groups of cases, to be noted later, such as the cases that have to do with contracts for a third party, mailed acceptances, and crossed offers. These groups of cases will illustrate how slow and labored was the transition from holding promisors because they were knaves, to holding them because they consented to be bound. But the transition is almost complete.

Consideration

The most striking reminder that simple contracts were, at first,

taken to be deceits is the doctrine of consideration. The two elements that were necessary to make out a plaintiff's claim for deceit were: first, a deceitful promise made by the defendant, and, second, a resulting loss to the plaintiff. He must have been led to give up something. Both the promise and the loss to the plaintiff were necessary to make out a true case of trespass on the case on the promises. And even a fictitious deceit could not be conceived unless the plaintiff gave up something in response to the promise.[14] He could not possibly have been cheated if he gave up nothing. There had to be this loss to the plaintiff and it came to be called consideration.

It may seem at first blush that the doctrine of consideration, still a vital requirement in the making of simple contracts, proves that simple contracts are still enforced only because they are a form of deceit. The doctrine of consideration has, however, been so modified that it is now more consistent with the idea that a simple contract is a form of legal transaction that it is with the idea that it is a form of deceit. One such modification is this: The consideration given may be sufficient even though it has no value. Promises to pay large sums of money made in exchange for worthless pieces of paper have been held to be binding.[15] In such cases the deceit basis for recovery breaks down. The plaintiff has been cheated out of practically nothing. A second modification of the doctrine is this: consideration may be sufficient to support a promise even though it was given by someone other than the plaintiff. That is so in most American jurisdictions,[16] although it may not be so in England. In such cases the plaintiff cannot possibly have been cheated by the promisor. He has suffered no loss and cannot make out a case of deceit, either real or fictitious. The defendant seems to be held for the simple reason that his promise was a consenting to be bound. In other words, it rests on the same basis as other legal transactions. The consideration requirement, as it now exists, has nothing to do with making out a deceit. It has come to be regarded by some writers as "in effect a formality, like an oath, the affixing of a seal, or a stipulation in court."[17]

14. "Finally, the consideration must move from the plaintiff to-day, because only he who had incurred detriment upon the faith of the defendant's promise, could maintain the action on the case for deceit in the time of Henry VII." Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 16 (1888).

15. Judy v. Louderman, 48 Ohio St. 562, 29 N.E. 181 (1891); Haigh v. Brooks, 10 A. & E. 309, 113 Eng. Rep. 119 (K.B. 1839). "A cent or a pepper corn, in legal estimation, would constitute a valuable consideration." Whitney v. Stearns, 16 Me. (4 Shepley) 394, 397 (1839).

16. "It matters not from whom the consideration moves. . . ." RESTATEMENT, CONTRACTS § 75, comment *e* (1932). See also Farley v. Cleveland, 4 Cow. 432 (N.Y. 1825), *aff'd*, 9 Cow. 639 (N.Y. 1827); 1 CORBIN, CONTRACTS § 124 (1950).

17. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 582 (1933). And said Holmes, J., "[C]onsideration is as much a form as a seal." Krell v. Codman, 154 Mass. 454, 28 N.E. 578 (1891). Consideration is, however, more than a form of consenting to be bound. It is rather a circumstance that is indispensable to the validity of a simple contract.

Privity

Courts have frequently taken it for granted that there must be "privity" between the parties in order to create a contract obligation. But the courts have not told us what the word "privity" means. Its meaning must be made out from the context in which the word is used.

"A sort of mystery," says Professor Corbin, "accompanies many of our words. . . ." He then indicates that "privity" is such a word.[18] The mystery deepens when we note that the word "privity" is used in two distinct connections and that it has meanings that are necessarily different in the respective connections. In one connection it has to do with the ownership of property. In the other connection it has to do with an operative fact in the making of a contract.

In the field of property, the word "privity" has a well settled meaning. It is this: "Mutual or successive relationship to the same rights of property. . . . Thus, the executor is in privity with the testator, the heir with the ancestor, the assignee with the assignor, the donee with the donor, and the lessee with the lessor."[19]

"Privity" as an operative fact in the making of a contract obligation is altogether different from privity of estate — as described in the preceding paragraph. When regard is had for such authority as is available, the mysterious word, "privity," stands for a very simple fact. It is this: communication by the promisor to the promisee. And so, if privity should be required in order to create an obligation by promising, it would be needful that the promisor should do two things — enact his consent to be bound, and get notice of his act to the potential obligee.

Professor Corbin defines and illustrates "privity" as a factual experience as follows:

> " 'Privity' may, however, be defined in terms of factual experience. Thus where B has promised A to render a performance beneficial to C, we may say that A is in privity with B because A was in B's presence, or because A was named or described by B, or because B pointed at A and directed his promissory words to A. Likewise we may say that C was not in privity because he was not physically present, he was not named by B, and B's words and fingers were not directed at him. Such facts as these may or may not be regarded as a good reason for denying any legal remedy to C against B; they have not been discussed by the courts except as they are involved in the mysterious and undefined term privity. In the light of modern development, it must be supposed that the absence of privity is not a sufficient reason for denying a remedy, inasmuch as C has been given one in thousands of cases without reference to privity. The mystery of privity remains; but it is no longer of much interest because court action is not much influenced by it."[20]

18. 4 CORBIN, CONTRACTS 28 (1951).
19. BLACK, LAW DICTIONARY 1361 (4th ed. 1951).
20. 4 CORBIN, CONTRACTS 29 (1951).

That privity means simply communication by the promisor to the promisee can be made out from the context in a good many cases. Note, for instance, the case of *Marston v. Bigelow*,[21] where Morton, C.J., says, "In the case at bar there was no offer to prove a promise to the defendant . . . there was no privity of contract between the plaintiff's intestate and the defendant." Note, too, the dissenting opinion of Comstock, J., in *Lawrence v. Fox*.[22] He says, "In general, there must be privity of contract. The party who sues upon a promise must be the promisee. . . ." The foregoing quotations are not accurate statements of the law. They are put in to indicate what "privity" means.

Should privity be required in the making of a contract? If so, why? That forces the question: Why is recovery allowed when one breaks a simple contract? What is the theoretical basis for such a recovery? Two possible bases for recovery on a simple contract have been noted. One is a fiction to the effect that the plaintiff has been cheated by the promisor. The other is that the promisor enacted his consent that he should be bound in an obligation and thus created an obligation. If the plaintiff hopes to recover on the fiction that he has been cheated, it is an essential part of his case to show that the promise came to him and moved him to give up something. Privity is a *sine qua non* if the plaintiff must make out a case of trespass on the case as he had to do in the fifteenth century. But this is another day. Forms of action have been abandoned. Courts no longer require that a plaintiff must make out trespass on the case in order to recover on a broken contract.

When the making of contract obligations are assimilated with other legal transactions the need for privity disappears. The vital factor in all such transactions is that the transferor, obligor or other person who gave up legal advantage shall have consented to be bound according to the terms of the transaction. Privity is not generally required in the making of legal transactions. Property can be transferred to a person who has not been notified of the transfer.[23] Declarations of trust are effective without notice to the beneficiary.[24] The appointment of an agent can be effective before communication of the appointment has come to the appointee.[25] An obligation can be created by deed without communication to the obligee.[26]

Analogies drawn from other kinds of legal transactions indicate that privity should not be necessary in the making of simple contracts.

21. 150 Mass. 45, 53 (1889).
22. 20 N.Y. 268 (1859).
23. Moore v. Trott, 162 Cal. 268, 122 Pac. 462 (1912); Port Huron Machinery Co. v. Wohlers, 207 Iowa 826, 221 N.W. 843 (1928); Wheat v. Cross, 31 Md. 99 (1869); *In re* Tardibone's Estate, 196 Misc. 738, 94 N.Y.S.2d 724 (Surr. Ct. 1949); Taylor v. Sanford, 108 Tex. 340, 193 S.W. 661 (1917).
24. *In re* Prudence Co., 24 F. Supp. 666 (E.D.N.Y. 1938); *Ex parte* Pye, 18 Ves. 140, 34 Eng. Rep. 271 (Ch. 1811).
25. Ruggles v. American Cent. Ins. Co., 114 N.Y. 415, 21 N.E. 1000 (1889).
26. Butler and Baker's Case, 3 Co. Rep. 25a, 26b, 76 Eng. Rep. 684, 689 (K.B. 1591).

Some groups of cases will be discussed in later paragraphs where the privity requirement persisted for a long time and hindered a rational advancement of the law. It will appear, however, that, even in these instances, the privity requirement no longer exists in American courts, except that there is modern authority to the effect that "crossed offers" do not make a contract.

Measure of Damages

A shift from what may be called the deceit theory of contracts to what may be called the juristic act theory is apparent in a change of the rule for assessing damages when recovery is had because the defendant made a promise which he did not perform. Suppose that Cornwall delivered his horse Pompey to Skinner in exchange for Skinner's promise to pay Cornwall one hundred dollars on the following January first. Suppose further that the value of Pompey was fifty dollars. In case Skinner did not perform his promise and Cornwall gets judgment against him for damages, what should be the amount of that judgment? That depends on the theoretical basis of Cornwall's recovery. If Skinner is held on the deceit theory, he has cheated Cornwall out of a fifty dollars horse and the judgment should be for fifty dollars. But if Skinner's promise was a juristic act and as such created an obligation to pay one hundred dollars, that is the basis for assessing damages. Cornwall is one hundred dollars worse off when Skinner omits to pay one hundred dollars and that should be the amount of the judgment. Courts have long assessed damages according to the juristic act theory. "Damages," says Dean Ames, "were soon assessed, not upon the theory of reimbusement for the loss of the thing given for the promise, but upon the principle of compensation for the failure to obtain the thing promised."[27]

The shift of simple contracts from the fictional basis that they were deceits to a juristic act basis is implicit in another point made by Dean Ames. "Again," says he,[28] "the liability for a tort ended with the life of a wrong-doer. But after the struggle of a century, it was finally decided that the personal representatives of a deceased person were as fully liable for his assumpsits as for his covenants."

Contracts for a Third Party

The opposition of the deceit theory of contracts to the juristic act theory is implicit in the long struggle that occurred before contracts made for the benefit of third parties were upheld. As noted above, the consideration requirement and the privity requirement are both corollaries of the deceit theory. On the deceit theory a plaintiff must satis-

27. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 15 (1888).
28. See note 27 *supra*.

fy both of these requirements. He cannot have been deceived and cheated if he gave nothing by reason of the promise. And that is so, *a fortiori,* if the promise did not even come to him.

But if the plaintiff's case is bottomed on the defendant's undertaking, as a legal transaction, the plaintiff does not claim to have been cheated. He depends on the defendant's juristic act of consenting that he should be bound unto the plaintiff. Questions about privity and as to who suffered the consideration are beside the point.

Suits by third party beneficiaries, therefore, test the theory that underlies simple contracts. Does the plaintiff, suing on a simple contract, recover on the fictional deceit basis that would have supported him in the fifteenth century? Or does he recover on the simple and rational basis that supports a plaintiff suing on a legal transaction in our day? In a suit brought by a third party beneficiary, the result reached under the deceit theory of contracts would be exactly opposite to the result that would be reached under the juristic act theory. The deceit theory would lead to no recovery. The juristic act theory would lead to recovery.

Courts in both England and America have shown a desire to uphold third party beneficiaries.[29] But they have been baffled, to an extent, by the ancient requirements that a plaintiff, in order to recover on a broken promise, must show that the promise came to him and that it induced him to give up something. The English courts balk particularly at the idea of allowing a plaintiff who gave no consideration to recover.[30] And even now such a plaintiff cannot, in England, have a clean cut recovery on his contract. He is in some instances given rights under the guise that a trust has been created in his favor.[31]

The American courts have been troubled particularly by the privity requirement. They held in many early cases that the third party beneficiary could not recover. But with the passing of time a trend set in that was favorable to the third party. He can now recover in almost all American jurisdictions. The varied and complicated reasoning that was used by American courts in attempting to square their decisions with the privity requirement has plagued generations of law students.

An adequate exposition of the cases whereby it came about that a third party beneficiary can recover would be out of place in this

29. "My Lords, I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce." Lord Dunedin, in Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd., [1915] A.C. 847, 855. See also 4 CORBIN, CONTRACTS § 772 (1951).

30. Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd., [1915] A.C. 847; Tweddle v. Atkinson, 1 B. & S. 393, 121 Eng. Rep. 762 (K.B. 1861); Bourne v. Mason, 1 Vent. 6, 86 Eng. Rep. 5 (K.B. 1669).

31. Corbin, *Contracts for the Benefit of Third Persons,* 46 L.Q. REV. 12 (1930).

little survey. The significant fact is: he can now recover, even though he was not privy to the transaction and gave no consideration for his right.

In the making of other legal transactions it is not necessary that the designated transferee or obligee shall be privy in order to acquire rights. And it has come to be so when a contract has been made for a third party. Consideration is necessary to support a contract made for a third party, as it is in all simple contracts, but it need not be furnished by the plaintiff. The net result is a complete victory for the idea that a simple contract is a legal transaction. The obligor is held because he consented to be bound, and he is held according to the tenor of that consent.

Liability of Undisclosed Principals

Another group of cases that test the fictional deceit theory of contracts against the juristic act theory are the cases of third parties against undisclosed principals. Here again the third party is not privy —*i.e.*, the principal's undertaking is not communicated to the third party. The third party is not even aware that a principal exists when he deals with the agent. The third person cannot, under the circumstances, establish a case of deceit against the principal. But, under the juristic act theory, the third party has a perfect case. The authorization given by the undisclosed principal to his agent amounts to this: The principal offered (consented) to become bound to a third person if the agent should make such a deal. Our premise is that the agent made the deal. The condition imposed by the principal (offeror) is thus met. The principal has created an obligation against himself by his own juristic act.

The decisions are unanimous in holding that a third person can recover against a principal who was undisclosed when the third person dealt with the agent. A good many scholars, including some notable ones,[32] have called this an "anomalous" doctrine. Why do they say it is "anomalous"? Their objection seems to be the same as the one urged against "third party beneficiaries"—*viz.*, no privity; *ergo*, no deceit; *ergo*, no recovery. But the prevailing view brushes aside the ancient requirement of real or fictional deceit. The right of a third party on a contract that names him as obligee or on a contract with the agent of an undisclosed principal seems to rest squarely on the idea that the defendant undertook the obligation and should be bound by it.

Bargains Made by Correspondence

The question of whether a promise (undertaking) must be communicated to the promisee, in order to be binding, frequently comes

32. HUFFCUT, AGENCY § 120 (2d ed. 1901); Ames, *Undisclosed Principal—His Rights and Liabilities*, 18 YALE L.J. 443, 445, 447 (1909); Pollock, 3 L.Q. REV. 358, 359 (1887).

up in connection with bargains being made by correspondence. The question comes up — but less frequently — as to whether notice of a property transfer must come to the transferee in order to be effective.

Let us start from base. It has been emphasized that the vital factor in every legal transaction is the enacted will of the party or parties who are to be bound. Each party must consent to suffer his own burden or loss according to the terms of the transaction. The burden may be a new obligation on his shoulders. The loss may be a divestment of his property. For centuries normal persons have been able to modify their legal positions by the making of legal transactions. This ability, Professor Fuller aptly calls private autonomy.[33] Keeping these fundamental ideas in mind, let us consider bargains made by correspondence.

It is commonly said that a bargain is made by a "meeting of the minds." The phrase is not at all descriptive of the way bargains are made, particularly when they are made by correspondence. Let us study how bilateral bargains (exchanges or contracts) are really made by correspondence. The typical process is this: one party makes an offer and the other party, at a later time, and in a different place, accepts by mailing a letter. The offer is a juristic act — a consenting to be bound — *e.g.*, to an obligation or a transfer of property. The acceptance is the same.[34] Each party consents to suffer his own burden or loss. Assuming that the offer was to make a bilateral contract, each party has incurred an obligation. And, since the case of *Adams v. Lindsell*,[35] it is elementary that the two obligations came to exist at the moment the offeree accepted by mailing his letter. Now why did those respective obligations come to exist? Is it because the respective promisors deceived the promisees, or is it because the promisors undertook (consented) to be bound?

It is possible, by a stretch of imagination, to say that the offeree was deceived. The promise of the offeror came to the offeree and could have moved him. But no stretch of the imagination can make out that the offeror was deceived. He is bound before he knows of the acceptance — *viz.*, at the moment the latter was mailed. Communication of the acceptance to the offeror-promisee is not essential. One simple explanation accounts for both obligations — the respective obligors consented to take on their obligations.

Let us think of "crossed offers."[36] A preliminary thought is this: In the making of a bargain each party's consent is conditioned on his getting this or that from the other party. In *Adams v. Lindsell*, for

33. See note 12 *supra*.
34. Except in the rare cases where the acceptance called for was a non-juristic act — *e.g.*, sawing a pile of wood.
35. 1 B. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818).
36. It is assumed that the reader has studied contracts and is familiar with facts that make out a case of "crossed offers."

instance, the offeror was willing to shoulder an obligation that he should transfer wool to the offeree if the offeree would shoulder an obligation to pay. And the offeree was willing to shoulder an obligation to pay on condition that the offeror was bound to sell. The emphasis is that each party consented, by a suitable juristic act, to shoulder his own obligation — but on a condition.

Now for the question of whether crossed offers make a contract. The answer seems to depend on the basic and recurring question: why are recoveries allowed on simple contracts? In the crossed offer cases, neither party has been deceived. Neither one can recover if he has to satisfy the form of trespass on the case. But every element is present in a crossed offer case to make out a legal transaction. Each mailing is a juristic act. It is a consenting to be bound on condition that the addressee shall undertake a counter obligation. When the later mailing occurs the respective consents have been given, and the conditions of each one have been met. At that juncture, neither party knows that the other party has undertaken to be bound. He is, in that respect, like a "third party beneficiary," a third party who deals with the agent of an undisclosed principal and an offeror who does not know that his offer has been accepted. In these cases just mentioned, as in legal transactions generally, it has come to be the law that the obligee does not have notice of the undertaking in his favor in order that it shall be effective.

There is not much judicial authority as to whether or not crossed offers make a contract. The few decisions that have been rendered are almost evenly divided on the question.[37]

The opposition to the idea that crossed offers should make a contract seems to come from a failure to recognize two things: First, an offer and acceptance are merely the mechanics of making a contract. The basic question is whether each party undertook to be bound. Second, the terms "offer" and "acceptance" have technical meanings, when applied to contract making, that are altogether different from their popular and dictionary meanings. The failure to recognize these two things begets the sophistry: How can an offer be accepted before it is received![38]

Summary

The fiction that a promisor is liable because he cheated the promisee

37. Crossed offers do make a contract: Ruggles v. American Cent. Ins. Co., 114 N.Y. 415, 21 N.E. 1000 (1889); Mactier's Administrators v. Frith, 6 Wend. 103, 21 Am. Dec. 262 (N.Y. 1830); Morris Asinof & Sons v. Freudenthal, 195 App. Div. 79, 186 N.Y. Supp. 383 (1st Dep't 1921); The Satanita, [1895] P. 248 *semble.*

Crossed offers do not make a contract: James v. Marion Fruit Jar Co., 69 Mo. App. 207 (1897); Tinn v. Hoffmann, 29 L.T. 271 (Ex. Ch. 1873).

38. For a more adequate discussion of this point see FERSON, THE BASIS OF CONTRACTS c. IV (1949).

was used as a procedural expedient in the early history of simple contracts. The persistence of that fiction has mystified several chapters in the law of contracts. For instance, the labor and vacillation of the courts in dealing with: contracts made for the benefit of third parties; the liability of undisclosed principals; the mailed-acceptance cases; and, the "crossed offer" cases seem to stem from the aforesaid fiction. In the long run the fiction has given way to candor on almost all points. The time has come when we can say with some assurance that simple contracts are like conveyances and other legal transactions in that they are based on the enacted wills of the persons who are bound.

This survey may seem uncalled for. That is, it may already be taken for granted that: simple contracts are legal transactions; that they rest on the enacted wills of the persons who are bound; and, that the need for privity has passed out. The excuse for reviewing these familiar problems is that it may broaden a student's understanding to view the problems together and realize that the several problems are basically alike. They all derive from the perennial conflict between the fictional and the candid explanation of simple contracts.