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## Mutual Assent in Simple Contracts

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## NOTES

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### MUTUAL ASSENT IN SIMPLE CONTRACTS.

That mutual assent is necessary for the formation of simple contracts all agree, but whether this assent is the actual mental assent of the parties or their assent as expressed either by their words or acts is a question on which there seems to be considerable dispute. In a learned and helpful article by Mr. Samuel Williston, the author takes great pains to demonstrate that the test is objective rather than subjective, and that the phrase so commonly used during the early part of the nineteenth century, namely, the "meeting-of-minds," is a misleading and an inaccurate description of the necessary element of mutual assent.<sup>1</sup>

It will be attempted in this note to set forth Mr. Williston's ideas and arguments on this subject as simply and as clearly as possible.

During the latter part of the eighteenth century and the early part of the nineteenth century the authorities were of opinion that the intent of the parties, rather than their expressed intent, was material, and that the words or acts, by means of which the state of their minds was shown, were the necessary evidence to prove the intent. But, at the present time, the courts of law, in this country especially, have abandoned this theory and hold that the contractual liability is determined by the overt acts of the parties. This modern view is very clearly set forth in the case of *Hotchkiss v. National City Bank*, 200 Fed. 287, 293. In the opinion Justice Hand says:

"A contract has, strictly speaking, nothing to do with the personal or individual intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were

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1. "Wigmore Celebration Legal Essays," p. 525.

proved by twenty bishops that either party when he used the words intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake or something else of the sort.”

It may be contended that the results reached in the modern cases can be attained as well under the old theory of the “meeting-of-minds” as under the modern theory. This, however, would only be possible if we held the acts of the parties to be not merely presumptions of the intent, but conclusive presumptions. And, as Mr. Williston points out, it would be highly “undesirable to state the law in terms of conclusive presumptions.”

Others might contend that this result could be reached by employing the doctrine of estoppel. They would hold that a person who had, by his acts or words, deceived the other party in respect to his actual intent would be estopped from showing that actual intent. The trouble with this theory is that the doctrine of estoppel applies only where the party to whom the representation has been made has acted upon it to his detriment. The fact that in many cases this element is wanting conclusively demonstrates that the subjective test cannot be upheld on this theory.

The soundness of the objective theory and the falsity of the subjective theory is further brought out by the parol-evidence rule. Generally speaking, this rule excludes oral testimony to vary the terms of a writing. As Mr. Wigmore points out, this kind of evidence is not excluded because of the character of the proof, but because the facts to be proved by it are held to be immaterial. “The parol-evidence rule is in truth no rule of evidence, but of substantive law.”<sup>2</sup>

Mr. Williston enumerates numerous modern cases in which it would be impossible to attain the results reached other than employing the objective test. He mentions contracts

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2. “Greenleaf on Evidence” (Wigmore’s), 16th Ed., Vol. 1, see note, p. 404.

made through interpreters who misinterpret, through telephone operators who fail to repeat messages accurately, those in which a message is inaccurately transmitted by the telegraph company, and those where a person, after learning the price of an article in a store, takes the article, but declines to pay the price demanded. It can be seen at a glance that the contracts in these cases can be established only by means of the objective test.

It is admitted that there are some courts that would deny that some or perhaps all of the instances cited above are cases of contracts, but there is one instance universally accepted by all courts, and which can be explained by the objective test alone. This is where an offer is to be accepted by mail; after mailing the offer, the offerer, changing his mind, sends a revocation, but the offeree mails his acceptance before the notice of revocation reaches him. All courts will agree that this is the case of a valid and binding contract, and their conclusion can be reached only by the objective test.

It is true that in some cases, such as the famous "Peerless case,"<sup>3</sup> we find the court seeking the intent of the parties. But here the expressed intent is ambiguous and, as Mr. Holmes points out, the actual intent of the parties is sought for no other reason than to explain the true meaning of the external acts. He says:

"The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals and judge the parties by their conduct. . . . The true ground of the decision was not that each party meant a different thing from the other, as is implied by the explanation which has been mentioned, but that each said a different thing. The plaintiff offered one thing; the defendant expressed his assent to another."<sup>4</sup>

The cases where a reward is offered for the doing of an act, such as the return of a lost article, the arrest and conviction of a criminal, etc., would seem at first sight to deny the validity of the objective test. For, by the weight of au-

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3. *Raffles v. Wichelhaus*, 2 H. & C. 906.

4. Holmes, "The Common Law," p. 309.

thority, it is held in such cases that there is no contract unless the party doing the act does it with the intention of earning the reward. It would therefore seem that the intent of the parties is the controlling factor. But, upon a closer examination of these cases and the facts involved, it will be seen that they are not in conflict with the objective theory. The act itself in all these cases implies neither acceptance nor refusal of the offer. For example: A, having lost his watch, offers a reward to the person who shall find and return it. B finds the watch and returns it to A. Like all other individuals, B is presumed to be honest until proven otherwise and, therefore, we have no more right to presume that he returned the watch in order to get the reward than that, in ignorance of the reward, having found A's watch, he returned it to him just as any honest person would do. Wherefore we see that the act itself does not carry with it the presumption of assent on the part of B. The act is ambiguous, and in all such cases it becomes necessary for the court to examine the intent of the parties in order to determine the true nature of the act.

In spite of the fact that the great majority of courts of law at the present time recognize and apply the objective test and have long since discarded the theory of the "meeting-of-minds," courts of equity, to some extent at least, and especially in England, persist in resting their decrees for rescission and reformation of contracts on account of mistake on the ground that the minds of the parties never met. In so doing, they necessarily assume that the mental assent is the controlling factor. In this connection Mr. Williston says:

"Such a theory, however, is unnecessary to support the jurisdiction of the court, and indeed cannot be consistently carried out without violating actual law and good sense. There is no reason why a court of equity should not set aside a contract which the parties have made whenever it is just to do so. Equity unquestionably exercises this jurisdiction when a contract is procured by fraud, and its jurisdiction to rescind a contract for mistake is entirely analogous. And when parties have intended to make a certain contract or

conveyance and have failed to do so, it is not necessary to assert that their intention of itself created a contract or conveyance in order to justify a court in imposing on the parties the consequences of an act which they intended, but did not do. . . . If attention is fixed not so much on what courts of equity have said as on what they have done, it is clear that they, like courts of law, have adopted an objective standpoint."<sup>5</sup>

It may be contended by some that this discussion is but a quibble over the *minutiae* of form, and that as long as all courts today reach the same conclusions in cases of simple contracts, it really matters not what words or expressions they use in so doing. But is this a sound contention? We think not. In the law, more so than in any other subject, is it of vital importance to avoid the careless and "slipshod" use of language. Uncertainty and ambiguity of expression should not be countenanced. If we mean black, let us say black, and not white, pink, green, or even dark brown. If the expressed intent of the parties to a contract is the determining factor, let us say so in as many words, and not be satisfied with an expression such as the "meeting-of-minds," which means an entirely different thing.

But it is not only a question of expression. Some courts and writers still insist that mental assent is the necessary element. Yet in these very courts we find that the parties are held to the necessary implications of what they said or did, irrespective of what they thought. And if the words or acts of the parties are in all courts the basis for determining their contractual liability, then it follows that the expression of intent, and not the intent, is the controlling factor. This being the case, does it not necessarily follow that the expression of assent, and not the mental assent, is the necessary element? It is difficult to see how this can be denied.

E. A. SHEPLEY.

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5. "Wigmore Celebration Legal Essays," p. 532, 533.