

Restatement of the Law Second
Contracts 2d
Chapter 3. Formation of Contracts--Mutual Assent
Topic 1. In General

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s 17. REQUIREMENT OF A BARGAIN

(1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.

(2) Whether or not there is a bargain a contract may be formed under special rules applicable to formal contracts or under the rules stated in ss 82-94.

Comment:

a. Formal contracts. The types of contracts listed in s 6 are not necessarily subject to the requirements of manifestation of assent and consideration. Where contracts under seal still have their common-law effect, neither manifestation of assent by the promisee nor consideration is essential. See ss 95, 104(1). Under Uniform Commercial Code s 3-408, a negotiable instrument may be binding without consideration in some cases. Under Uniform Commercial Code ss 5-105, 5-106, neither manifestation of assent by the customer or the beneficiary nor consideration is necessary to the establishment of a letter of credit.

b. Bargains. Contracts of types enumerated in s 6 can be used in many of the transactions essential to civilized life: e.g., sale or lease of land, goods, or intangible property; the rendering of services for hire; the lending of money. But in modern times less formal contracts are far more important. The typical contract is a bargain, and is binding without regard to form. The governing principle in the typical case is that bargains are enforceable unless some other principle conflicts. This chapter and the next deal with the two essential elements of a bargain: agreement and exchange.

c. "Meeting of the minds." The element of agreement is sometimes referred to as a "meeting of the minds." The parties to most contracts give actual as well as apparent assent, but it is clear that a mental reservation of a party to a bargain does not impair the obligation he purports to undertake. The phrase used here, therefore, is "manifestation of mutual assent," as in the definition of "agreement" in s 3. See also Comment b to s 2. Topics 2-5, ss 18-70, explain this requirement.

d. "Sufficient consideration." The element of exchange is embodied in the concept of consideration. In some cases a promise is not binding for want of consideration, despite the presence of an element of exchange. "Consideration" has sometimes been used to refer to the element of exchange, without regard to whether it is sufficient to make an informal promise legally binding; the consideration which satisfies the legal requirement has then been called "sufficient consideration." As the term "consideration" is used here, however, it refers to an element of exchange which is legally sufficient, and the word "sufficient" would therefore be redundant. The requirement of consideration is the subject of ss 71-81.

Illustration:

1. A owes B \$50. In exchange for A's payment of the debt B makes a promise. Under the rule stated in s 73, B's promise is without consideration.

e. Informal contract without bargain. There are numerous atypical cases where informal promises are binding

though not made as part of a bargain. In such cases it is often said that there is consideration by virtue of reliance on the promise or by virtue of some circumstance, such as a "past consideration, " which does not involve the element of exchange. In this Restatement, however, "consideration" is used only to refer to the element of exchange, and contracts not involving that element are described as promises binding without consideration. There is no requirement of agreement for such contracts. They are the subject of ss 82-94.

REPORTER'S NOTE

This Section is based on former s 19(b). See 1 Williston, Contracts ss 2, 2A (3d ed.1957); 1 Corbin, Contracts s 10 (1963).

Comment a. See 1 Williston, Contracts ss 4, 109, 205, 217 (3d ed.1957); 1 Corbin, Contracts s 5 (1963).

Comment c. On the history of the "subjective" or "will" theory, and its eventual displacement, see Horwitz, The Transformation of American Law 1780- 1860, 180-88 (1977); Williston, Mutual Assent in the Formation of Informal Contracts, 14 Ill.L.Rev. 85 (1919); [Ricketts v. Pennsylvania R.R., 153 F.2d 757, 760 \(2d Cir.1946\)](#) (Frank, J., concurring); Gilmore, The Death of Contract (1974). See generally 1 Williston, Contracts ss 21, 22 (3d ed.1957); 1 Corbin, Contracts ss 9, 107 (1963 & Supp.1980). On the origin of the term "meeting of the minds," see Farnsworth, "Meaning" in the Law of Contracts, 76 Yale L.J. 939, 943-44 (1967). The classic statement of the objective view is that of Learned Hand in [Hotchkiss v. National City Bank, 200 F. 287, 293 \(S.D.N.Y.1911\)](#).

Comment d. Compare the somewhat different approaches in 1 Williston, Contracts s 101 (3d ed.1957); and 1 Corbin, Contracts ss 109, 116-17 (1963). Illustration 1 is new.

Comment e. See generally, 1 Williston, Contracts ss 138-204A (3d ed.1957); 1A Corbin ss 171-239 (1963 & Supp.1980).

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