

# **Selected Issues in American Contract Law**

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**Consideration**

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## Chapter 2

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# THE BARGAIN THEORY OF CONTRACT

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All but a tiny fraction of the contracts you will see in law practice will be documents containing the promises of two or more parties who have struck a deal. Usually one party will have promised to pay money to the other, and the other will have promised to sell or to work. At the outset these contracts will be "executory"—that is, neither party will yet have performed. In the words of contract law, the "consideration" for each promise is the other's promise. I promise to pay, you promise to work; you promise to pay, I promise to transfer title to my car. Without consideration or some substitute, executory contracts are not enforceable in American law. With luck, you will be able to practice years without ever seeing a contract that lacks consideration, since nearly all commercial contracts and most non-commercial ones contain reciprocal, bargained promises.

Now look at the cases in this chapter. A pathological lot, not so? One deals with the promise to make a gift; another with a promise to pay for a greatly desired but unbargained-for act, the deflection of an ax wielded by an angry spouse. Yet another concerns the enforceability of promises that were relied upon but never responded to with a reciprocal promise. These are sports, the pathological cases of contract law; they are not the cases that you will see often, or, perhaps, at all.

Then why must we deal with this stuff? Is this just law school hazing? Is it law teachers' attempt to maintain the upper hand by forcing the learning of arcane and counterintuitive doctrine? We don't think so. One justification for the study of consideration and the like is to know what promises will be enforced by the courts as contracts. One might regard this chapter as a small venture into legal philosophy. Here we ask what promises should be enforced, and why those and not others. "I will always love you" is a promise but hardly an enforceable contract.

Second, this might be regarded as a small lesson in legal history. Early English law did not enforce bilateral executory promises, but their enforceability is today unquestioned. Nineteenth and twentieth century law has seen the rise of reliance as a basis for the enforcement of

the promise because, the court held, William Story had later established what was, in effect, a trust for the money.]

The order appealed from should be reversed and the judgment of the Special Term affirmed, with costs payable out of the estate. *positively*

### Notes and Discussion

**1. Uncle William's Promise.** William Story promised \$5,000 to his nephew Willie (as he is referred to elsewhere in the opinion) if Willie refrained from doing certain things until age 21. This is, of course, a very large sum of money—in modern terms, perhaps as much as \$100,000. According to the findings of the trial court, Willie first agreed to refrain, and then “in all things fully performed his part of said agreement.” Which did William want: Willie’s promise to behave, or Willie’s actual behavior? If Willie had then smoked or gambled before age 21, would *he* have breached a contract with William? Surely not, true?

When a promise is given in exchange for a future act, the contract is often referred to as a **unilateral contract**. The classic example is the offer of a reward, e.g., for the capture of an escaped criminal; what the reward’s offeror (the promisor) clearly wants in return is not a promise (“I promise to capture the criminal”), but rather an act, the capture itself. Such promises can raise certain problems in formation, which are dealt with briefly in Chapter 3.B; but here no problems seem to have resulted. In an omitted portion of the opinion, the Court quotes a letter from Uncle William stating that Willie had performed to his uncle’s satisfaction.

Most contracts are not unilateral, but rather **bilateral**: the exchange of a promise for a promise, with each promise serving as consideration for the other.

**2. Consideration as Benefit or Detriment.** *signature* The New York Court cites an English case for the proposition that: “A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party [i.e., the promisor], or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other [i.e., the promisee].” This mode of analysis was once common, and is still occasionally found.

*uncle* In arguing to the Court of Appeals, the defendant’s lawyer asserted: “There is no consideration to support the promise to pay the nephew \$5,000. If the nephew was required to do something that would injure him, or something that would benefit the uncle, and did so with the assent of his father, then there would be a consideration for the payment of the \$5,000. Simply failing to play cards or billiards for money, or drink liquor, or use tobacco, would not benefit the uncle; would not, and did not injure the nephew.” (The defendant’s argument is summarized in the trial report.)

On the benefit side of the ledger, the Court believes that “nothing in this record” contradicts the view that Uncle William derived a benefit from his promise. That the Court calls this a benefit “in a legal sense” shows that it is talking about something other than a conventional or direct benefit to the uncle. The Court goes on to say that it is “of no moment whether such

promises that generate no reciprocal promises, and this development probably continues under our noses.

The third justification concerns that tiny percentage of cases where even a commercial contract may be unenforceable for lack of consideration. For example, one of your editors was just presented with a television station's lease of space on a projection tower. The lease, for a large amount of money, was for fifteen years with options to extend the term twice. But the lease had no starting date; it started when the lessee commenced installing its equipment on the tower. More than a year after the lease had been concluded, the lessee had still made no move to install any equipment. Since the lessee made no express promise ever to install its equipment, is the deal lacking in consideration for want of a truly binding promise by the lessee? May the lessor now lease to another without fear of suit by the first lessee?

## A. CONSIDERATION

Restatement 2d § 1 defines a contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." This definition isolates two essential elements of contract in Common Law. First, our legal system focuses primarily on individual promises as the essential building blocks of contract law; it is therefore mainly oriented toward future performance. A different starting point was possible; the Civil Law jurisdictions of Europe, for instance, concentrate on the present agreement between two or more parties as the basis for contractual analysis.<sup>1</sup> Second, in Common Law a promise does not become enforceable simply by virtue of its being made. Rather, law must recognize the promise as resulting in legal duties and remedies.

On what basis is this recognition to occur? Consider two broad possibilities. First, we might adopt the position that all promises ought to be enforced unless there is some good reason for not enforcing them. Such a position accords well with the common moral claim that one who makes a promise has, as a general rule, a duty to carry it out, and that other persons are entitled to trust such promises; fidelity to one's word is a mark of character.<sup>2</sup> A position such as this also has some influence

1. In general, of course, this makes small difference; most enforceable American contracts would also be enforceable as contracts in France or Germany or Japan. But at the margins there are some differences. On the basis of party agreement, Civil Law treats as contracts not only many gratuitous arrangements, but also cash sales (with no immediate promissory element), that we usually do not. On the other hand, we regard offers of rewards as contractual because they are emphatically promissory; Civil Law treats such offers as non-contractual because they lack immedi-

ate agreement between the parties. See Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* 388-399 (trans. Tony Weir, 3rd ed. 1998); Hein Kötz, 1 *European Contract Law* 52-77 (1997).

2. "The obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and in trust. . . . An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance. To renege is to abuse a confidence he was

within American contract law. For instance, courts usually try to avoid interpreting contracts in a way that renders them void.

On the other hand, we might start from the **opposite position**, that no promise ought to be enforced unless there is some **good reason for enforcing it**. This is a more skeptical position, and one that does not wholly jibe with our common moral perceptions. But it is a position that may represent a more realistic assessment of the seriousness with which promises are in fact characteristically made. If it is true that people commonly use the language of promising in order to make promises they may not wish to be bound by, and if it is also true that, by social convention, the recipients of these promises often understand them as undertaken without full commitment—that is, if there is a significant gap between common morality and the actual practice of promising—then judges will need to devise some sort of filter in order to separate serious promises from those that are more lightly given.

In general, Common Law has inclined toward the second and more skeptical of these two positions, with profound consequences for the general shape of our contract law. As we saw in *Lucy v. Zehmer*, intent to contract can stand on its own as one criterion in determining whether a promise is enforceable. But since intent is often difficult to establish under the stress of adversary proceedings, courts have also made use of more immediate interpretative devices.

**Form.** One traditional filter is for a legal system simply to specify a means whereby a promisor can make a promise legally binding: “If you want your promise to count, follow this procedure exactly.” Such prescribed procedures can take almost any form: an oral question-and-answer in solemn words (Roman law), some sort of quasi-public registration (Civil Law countries), and so on. In Common Law, the long-standing procedure was a written statement of the promise to which the promisor affixed a seal before delivering it to the promisee. The contract under seal is an example of a **formal contract**, one that it is legally enforceable not, or not in the first instance, because of its content or because of the circumstances in which it was given, but **chiefly because of way in which it was made**.<sup>3</sup>

A formal contract has numerous advantages. In the famous old case of *Dougherty v. Salt*, 227 N.Y. 200, 125 N.E. 94 (1919), Aunt Tillie wanted to promise a gift of \$3,000 to her orphaned eight-year-old nephew Charley, but the boy’s guardian doubted her commitment. If the two parties had available to them a formal instrument such as a contract

free to invite or not, and which he intentionally did invite.” Charles Fried, *Contract as Promise* 16 (1981) (footnotes omitted). On promissory theories of contract, see Stephen A. Smith, *Contract Theory* 54–78 (2004).

3. A formal contract is distinct from a contract employing a standardized set of terms that one party supplies and the other party adheres to (often called a “form con-

tract”). Such a standard form contract is obviously very frequent in modern law, and we will see many instances of standard form contracts in this Casebook. Standard form contracts are, however, not formal contracts in the sense that they acquire their validity from their form. On formalities in modern contract law, see Zweigert & Kötz, *Introduction*, *supra*, 365–379; Kötz, 1 *European Contract Law*, *supra*, 78–96.

under seal, Aunt Tillie could have ended all doubt by expressing her promise in this form. The formal contract brings with it evidence of her commitment, plus a clear indication that her negotiating with the guardian has ended. The document itself also serves as proof of the content of the promise.

On the other hand, there are some disadvantages. A contract under seal is socially obtrusive; for example, Aunt Tillie might well question why Charley's guardian does not accept her word as good enough. Further, to the extent that the form is "content-neutral," it places a burden on the parties to express the promise exactly—something that may be difficult when the promise is complex. Finally, and perhaps most importantly, a formal contract can be inflexible. What happens, for instance, if Aunt Tillie came to have legitimate reasons for regretting her promise, perhaps because Charley had turned out to be an ungrateful little brat, or because she had suffered severe financial setbacks that made her original promise improvident?<sup>4</sup>

Although the contract under seal survives as an independent basis for enforcing contracts in a few jurisdictions (most notably Massachusetts), in most states it is no longer effective. The UCC, for instance, specifically abolishes it for the sale of goods: § 2-203.

Formal elements do survive, however, in many areas of contract law. A good example is the Statute of Frauds, which requires that some types of contracts cannot be enforced against a promisor unless there is a written memorandum signed by the promisor; see Chapter 3.F. Indeed, the importance of form is today generally increasing. For example, consumer legislation now frequently requires that consumers cannot be bound by some provisions in standard contracts unless they have separately signed or initialed the provisions, in order to indicate that they are specifically aware of these provisions.

**Consideration.** This is the principal device that our law employs in order to determine whether a promise is worthy of legal protection. Restatement 2d § 71 defines the requirement of consideration in the following way:

(1) To constitute consideration, a performance or a return promise must be bargained for. *exchanging*

(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. *give for*

(3) The performance may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation. *promise*

4. In the actual case, Aunt Tillie did not use a contract under seal, but instead signed a promissory note, which (in an opinion by Judge Benjamin Cardozo for the New York Court of Appeals) was held insufficient to bind her estate in the absence of consideration for the promise. *2d NY Cir. 1917, 201 N.Y. 285, 187 N.E. 271*

Restatement (2d Authority) = section 71

(American Law Institute)

Black letter law ← Dist. between Common Law and promissory

consideration - unilateral, bilateral, mutual, joint, joint and several  
several, several

Section 71 defines consideration in terms of a bargain between the promisor and the promisee (or some third party). This is the "bargain theory" of consideration, the dominant modern view. It is premised on the idea that a promise is presumptively serious, and so worthy of legal enforcement, if and only if it is consciously given in return for something that is sought: in short, an exchange. However, Restatement 2d § 79 adds that: "If the requirement of consideration is met, there is no additional requirement of (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or (b) equivalence in the values exchanged; or (c) 'mutuality of obligation.'" Section 79 is largely intended to clear away older conceptions of consideration, some of which can be found in the cases below.

strictly legal  
vs. equity!

### HAMER v. SIDWAY

Court of Appeals of New York, 1891.  
124 N.Y. 538, 27 N.E. 256.

PARKER, J. All concur. The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William E. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that "on the 20th day of March, 1869, \* \* \* William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of \$5,000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement."

plaintiff  
defendant

The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration. A contention, which if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forbore or

consideration, 5 p. 2

suffered by the party to whom the promise is made as consideration for the promise made to him." (Anson's Prin. of Con. 63.) . . .

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him \$5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it, but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.

In *Shadwell v. Shadwell* (9 C. B. [N. S.] 159), an uncle wrote to his nephew as follows:

"My Dear Lancey—I am so glad to hear of your intended marriage with Ellen Nicholl, and as I promised to assist you at starting, I am happy to tell you that I will pay to you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall require.

"Your affectionate uncle,

"CHARLES SHADWELL."

It was held that the promise was binding and made upon good consideration.

In *Lakota v. Newton*, an unreported case in the Superior Court of Worcester, Mass., the complaint averred defendant's promise that "if you (meaning plaintiff) will leave off drinking for a year I will give you \$100," plaintiff's assent thereto, performance of the condition by him, and demanded judgment therefor. Defendant demurred on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled. . . .

The cases cited by the defendant on this question are not in point. . . .

In further consideration of the questions presented, then, it must be deemed established for the purposes of this appeal, that on the 31st day of January, 1875, defendant's testator was indebted to William E. Story, 2d, in the sum of \$5,000 . . .

[Eds.: Although the contractual claim had expired because of the Statute of Limitations, the plaintiff was nonetheless permitted to sue on

performance [by Willie] *actually* proved a benefit to the promisor" (emphasis supplied).

On the detriment side, many would say that Willie did not suffer any personal loss from his abstention from liquor, smoking, swearing, or gambling. Indeed, a staunch Baptist might claim that Willie clearly benefitted by refraining from these things. Look at the opinion again and note how the Court dances around the common meaning of the words that it uses by describing certain benefits as benefits only "in a legal sense."

The Court explains that Willie "had a legal right" to drink and smoke. Presumably his refraining from those acts would not have been consideration if the law had prohibited him from doing such things. Why so? What of a contract to refrain from using heroin, or robbing banks?

*Principle  
vs. bargain  
promise & benefit*

**3. Uncle William's Promise as a Bargain.** In the Second Restatement, the benefit / detriment test is dispensed with, and in its place is put the "bargain." The crucial element in a bargain is exchange. As Comment b to Restatement 2d § 71 puts it, "In the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration. . . . [I]t is not enough that the promise induces the conduct of the promisee or that the conduct of the promisee induces the making of the promise; both elements must be present, or there is no bargain."

*P. 104  
500*

In one sense Uncle William had bargained for Willie's abstention since he offered money in return for this conduct. But the "bargain" was unconventional, since Willie did not promise (at least, not in an effective legal fashion) to do any of the things that his uncle wanted. There need not be actual haggling over the terms in order for a bargain to be present, but it is an unusual bargain where one party promises to make a payment in return for another's act, especially when the act must occur over an extensive period of time, cannot be observed by the other party, and consists in *not* doing something. (Ann Arbor folklore has it that Willie had attended the University of Michigan in the intervening time. It is just possible that he snuck into a billiard parlor or smoked a single cigar during his time there.)

**4. Equivalence of Exchange.** One characteristic of consideration theory, which often seems surprising, is that **modern courts** do not ordinarily use it to police an agreement for fairness. (There are some exceptions, which will be dealt with as they arise.) The Court quotes a treatise holding that it is immaterial whether what is given in consideration "is of *any substantial value to any one*. It is enough that something is promised, done, forbore or suffered by the party to whom the promise is made as consideration for the promise made to him." (Emphasis added.)

What does this mean in the context of *Hamer v. Sidway*? Some might interpret Uncle William's promise as primarily donative (like Aunt Tillie's in *Dougherty v. Salt*), and only hazily conditioned on Willie's future behavior. At issue is the rigor with which courts apply consideration theory in separating serious promises from casual social ones.

**5. Background of the Lawsuit.** The opinion from the General Term of the New York Supreme Court (*Hamer v. Sidway*, 11 N.Y.S. 182; 1890)

gives many additional facts. Uncle William made his promise at his father's golden wedding anniversary in March, 1869. The lower court opinion, after analyzing the surrounding circumstances, concludes that the uncle's promise was "a mere promise to make a gift, . . . that he would give William \$5,000 when he became 21 years of age, if he should prove himself worthy of it by abstaining from certain useless, evil, and expensive habits." The Court goes on to say that Uncle William had then basically fulfilled this promise during his lifetime, and that in any case Willie had formally renounced any additional claim as a result of the promise. Louisa Hamer, who allegedly acquired the claim by assignment, brought suit on the promise in 1887, almost twenty years after it was made and immediately after Uncle William had died, so that his testimony was no longer available. The General Term opinion strongly suggests that Hamer's lawsuit was fraudulent, a phony claim contrived by Willie and Hamer in the aftermath of Uncle William's death. This additional information may suggest to you why courts are often cautious in crediting gift-like promises. Hamer

### Problem 2-1

Fortune Magazine sent a letter addressed to a three-year-old boy. The outside of the envelope stated: "I'll give you this versatile new calculator watch free Just for Opening this Envelope Before Feb. 15, 1985." The boy's mother opened the envelope for him and discovered that defendant's offer was also conditional on subscribing to the magazine. The boy's father and others then brought a class-action suit claiming that they were entitled to the calculator. The defendant responded that: "the mere act of opening the envelope was valueless and therefore did not constitute adequate consideration." Will this argument succeed?

### FIEGE v. BOEHM

Court of Appeals of Maryland, 1956.  
210 Md. 352, 123 A.2d 316.

Delaplaine, J. This suit was brought in the Superior Court of Baltimore City by Hilda Louise Boehm against Louis Gail Fiege to recover for breach of a contract to pay the expenses incident to the birth of his bastard child and to provide for its support upon condition that she would refrain from prosecuting him for bastardy.

Plaintiff alleged in her declaration substantially as follows: (1) that early in 1951 defendant had sexual intercourse with her although she was unmarried, and as a result thereof she became pregnant, and defendant acknowledged that he was responsible for her pregnancy; (2) that on September 29, 1951, she gave birth to a female child; that defendant is the father of the child; and that he acknowledged on many occasions that he is its father; (3) that before the child was born, defendant agreed to pay all her medical and miscellaneous expenses and to compensate her for the loss of her salary caused by the child's birth, and also to pay her ten dollars per week for its support until it reached the age of 21, upon condition that she would not institute bastardy

proceedings against him as long as he made the payments in accordance with the agreement; (4) that she placed the child for adoption on July 13, 1954, and she claimed the following sums: Union Memorial Hospital, \$110; Florence Crittenton Home, \$100; Dr. George Merrill, her physician, \$50; medicines, \$70.35; miscellaneous expenses, \$20.45; loss of earnings for 26 weeks, \$1,105; support of the child, \$1,440; total, \$2,895.80; and (5) that defendant paid her only \$480, and she demanded that he pay her the further sum of \$2,415.80, the balance due under the agreement, but he failed and refused to pay the same.

Defendant demurred to the declaration on the ground that it failed to allege that in September, 1953, plaintiff instituted bastardy proceedings against him in the Criminal Court of Baltimore, but since it had been found from blood tests that he could not have been the father of the child, he was acquitted of bastardy. The Court sustained the demurrer with leave to amend.

Plaintiff then filed an amended declaration, which contained the additional allegation that, after the breach of the agreement by defendant, she filed a charge with the State's Attorney that defendant was the father of her bastard child; and that on October 8, 1953, the Criminal Court found defendant not guilty solely on a physician's testimony that "on the basis of certain blood tests made, the defendant can be excluded as the father of the said child, which testimony is not conclusive upon a jury in a trial court."

Defendant also demurred to the amended declaration, but the Court overruled that demurrer.

Plaintiff, a typist, now over 35 years old, who has been employed by the Government in Washington and Baltimore for over thirteen years, testified in the Court below that she had never been married, but that at about midnight on January 21, 1951, defendant, after taking her to a moving picture theater on York Road and then to a restaurant, had sexual intercourse with her in his automobile. She further testified that he agreed to pay all her medical and hospital expenses, to compensate her for loss of salary caused by the pregnancy and birth, and to pay her ten dollars per week for the support of the child upon condition that she would refrain from instituting bastardy proceedings against him. She further testified that between September 17, 1951, and May, 1953, defendant paid her a total of \$480.

Defendant admitted that he had taken plaintiff to restaurants, had danced with her several times, had taken her to Washington, and had brought her home in the country; but he asserted that he had never had sexual intercourse with her. He also claimed that he did not enter into any agreement with her. He admitted, however, that he had paid her a total of \$480. His father also testified that he stated "that he did not want his mother to know, and if it were just kept quiet, kept principally away from his mother and the public and the courts, that he would take care of it."

Defendant further testified that in May, 1953, he went to see plaintiff's physician to make inquiry about blood tests to show the paternity of the child; and that those tests were made and they indicated that it was not possible that he could have been the child's father. He then stopped making payments. Plaintiff thereupon filed a charge of bastardy with the State's Attorney.

The testimony which was given in the Criminal Court by Dr. Milton Sachs, hematologist at the University Hospital, was read to the jury in the Superior Court. . . . Dr. Sachs reported that Fiege's blood group was Type O, Miss Boehm's was Type B, and the infant's was Type A. He further testified that on the basis of these tests, Fiege could not have been the father of the child, as it is impossible for a mating of Type O and Type B to result in a child of Type A.

Although defendant was acquitted by the Criminal Court, the Superior Court overruled his motion for a directed verdict. In the charge to the jury the Court instructed them that defendant's acquittal in the Criminal Court was not binding upon them. The jury found a verdict in favor of plaintiff for \$2,415.80, the full amount of her claim.

Defendant filed a motion for judgment n.o.v. or a new trial. The Court overruled that motion also, and entered judgment on the verdict of the jury. Defendant appealed from that judgment.

Defendant contends that, even if he did enter into the contract as alleged, it was not enforceable, because plaintiff's forbearance to prosecute was not based on a valid claim, and hence the contract was **without consideration**. He, therefore, asserts that the Court erred in overruling (1) his demurrer to the amended declaration, (2) his motion for a directed verdict, and (3) his motion for judgment n.o.v. or a new trial.

[Eds.: The Court reviews the historical process whereby fathers became liable for support of their illegitimate children, then continues:] However, where statutes are in force to compel the father of a bastard to contribute to its support, the courts have invariably held that a contract by the putative father with the mother of his bastard child to provide for the support of the child upon the agreement of the mother to refrain from invoking the bastardy statute against the father, or to abandon proceedings already commenced, is supported by sufficient consideration. . . .

In Maryland it is now provided by statute that whenever a person is found guilty of bastardy, the court shall issue an order directing such person (1) to pay for the maintenance and support of the child until it reaches the age of eighteen years, such sum as may be agreed upon, if consent proceedings be had, or in the absence of agreement, such sum as the court may fix, with due regard to the circumstances of the accused person; and (2) to give bond to the State of Maryland in such penalty as the court may fix, with good and sufficient securities, conditioned on making the payments required by the court's order, or any amendments thereof. Failure to give such bond shall be punished by commitment to

the jail or the House of Correction until bond is given but not exceeding two years. Code Supp. 1955, art. 12, sec. 8.

Prosecutions for bastardy are treated in Maryland as criminal proceedings, but they are actually civil in purpose. . . . While the prime object of the Maryland Bastardy Act is to protect the public from the burden of maintaining illegitimate children, it is so distinctly in the interest of the mother that she becomes the beneficiary of it. Accordingly a contract by the putative father of an illegitimate child to provide for its support upon condition that bastardy proceedings will not be instituted is a compromise of civil injuries resulting from a criminal act, and not a contract to compound a criminal prosecution, and if it is fair and reasonable, it is in accord with the Bastardy Act and the public policy of the State.

Of course, a contract of a putative father to provide for the support of his illegitimate child must be based, like any other contract, upon sufficient consideration. The early English law made no distinction in regard to the sufficiency of a claim which the claimant promised to forbear to prosecute, as the consideration of a promise, other than the broad distinction between good claims and bad claims. No promise to forbear to prosecute an unfounded claim was sufficient consideration. In the early part of the Nineteenth Century, an advance was made from the criterion of the early authorities when it was held that forbearance to prosecute a suit which had already been instituted was sufficient consideration, without inquiring whether the suit would have been successful or not. *Longridge v. Dorville*, 5 B. & Ald. 117.

In 1867 the Maryland Court of Appeals, in the opinion delivered by Judge Bartol in *Hartle v. Stahl*, 27 Md. 157, 172, held: (1) that forbearance to assert a claim before institution of suit, if not in fact a legal claim, is not of itself sufficient consideration to support a promise; but (2) that a compromise of a doubtful claim or a relinquishment of a pending suit is good consideration for a promise; and (3) that in order to support a compromise, it is sufficient that the parties entering into it thought at the time that there was a bona fide question between them, although it may eventually be found that there was in fact no such question.

We have thus adopted the rule that the surrender of, or forbearance to assert, an invalid claim by one who has not an honest and reasonable belief in its possible validity is not sufficient consideration for a contract. 1 Restatement, Contracts, sec. 76(b). We combine the subjective requisite that the claim be bona fide with the objective requisite that it must have a reasonable basis of support. Accordingly a promise not to prosecute a claim which is not founded in good faith does not of itself give a right of action on an agreement to pay for refraining from so acting, because a release from mere annoyance and unfounded litigation does not furnish valuable consideration.

Professor Williston was not entirely certain whether the test of reasonableness is based upon the intelligence of the claimant himself,

who may be an ignorant person with no knowledge of law and little sense as to facts; but he seemed inclined to favor the view that "the claim forborne must be neither absurd in fact from the standpoint of a reasonable man in the position of the claimant, nor, obviously unfounded in law to one who has an elementary knowledge of legal principles." 1 Williston on Contracts, Rev. Ed., sec. 135. We agree that while stress is placed upon the honesty and good faith of the claimant, forbearance to prosecute a claim is insufficient consideration if the claim forborne is so lacking in foundation as to make its assertion incompatible with honesty and a reasonable degree of intelligence. Thus, if the mother of a bastard knows that there is no foundation, either in law or fact, for a charge against a certain man that he is the father of the child, but that man promises to pay her in order to prevent bastardy proceedings against him, the forbearance to institute proceedings is not sufficient consideration.

On the other hand, forbearance to sue for a lawful claim or demand is sufficient consideration for a promise to pay for the forbearance if the party forbearing had an honest intention to prosecute litigation which is not frivolous, vexatious, or unlawful, and which he believed to be well founded. . . . Thus the promise of a woman who is expecting an illegitimate child that she will not institute bastardy proceedings against a certain man is sufficient consideration for his promise to pay for the child's support, even though it may not be certain whether the man is the father or whether the prosecution would be successful, if she makes the charge in good faith. The fact that a man accused of bastardy is forced to enter into a contract to pay for the support of his bastard child from fear of exposure and the shame that might be cast upon him as a result, as well as a sense of justice to render some compensation for the injury he inflicted upon the mother, does not lessen the merit of the contract, but greatly increases it. . . .

A case in point is *Pflaum v. McClintock*, 130 Pa. 369, 18 A. 734. That was an action to collect a judgment bond which the defendant signed when he was in jail to settle a fornication and bastardy case. The defendant claimed that the bond was conditioned on the support of a child expected to be born, but that he was innocent of the charge, and that in fact the obligee had not given birth to any living child, but died without issue before the judgment was entered. The Supreme Court of Pennsylvania decided that the bond was supported by a good consideration. . . .

In the case at bar there was no proof of fraud or unfairness. Assuming that the hematologists were accurate in their laboratory tests and findings, nevertheless plaintiff gave testimony which indicated that she made the charge of bastardy against defendant in good faith. For these reasons the Court acted properly in overruling the demurrer to the amended declaration and the motion for a directed verdict. . . .

As we have found no reversible error in the rulings and instructions of the trial Court, we will affirm the judgment entered on the verdict of the jury.

*Notes and Discussion*

**1. The Agreement Between Fiege and Boehm.** What did Hilda Boehm give up in return for Louis Fiege's promise to support the daughter?

Suits for bastardy, predicated on the supposed immorality of sexual relations and childbirth out of wedlock, are a dead letter today, but were once much dreaded. "The procedure looked criminal, commencing with the arrest of the defendant and including a preliminary hearing before a justice of the peace. Its chief purpose was not so much the protection of the child as the relief of the parish from the expense of supporting the child." Homer H. Clark, Jr., 1 *The Law of Domestic Relations in the United States* § 5.4 at 317 (Practitioners' 2d ed. 1987).

Boehm might have been blackmailing Fiege in order to force him to make the promise, true? According to Restatement 2d § 175(1), a contract is voidable if a party's "manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative." In a case where the promisee forbears from suing, illustrations 1 and 2 to § 175 distinguish between a promise given simply "to avoid defending the threatened suit," and one given in order to avoid the collapse of a real estate deal with a third party. In the first situation, "[d]efense of the threatened suit is a reasonable alternative [and] the threat does not amount to duress"; in the second, the threatened lawsuit is duress and the contract is voidable. Why wasn't the Court convinced by the argument of Fiege's lawyer?

husband  
was  
not

**2. Forbearance as Consideration.** After Fiege ceased payments, Boehm brought bastardy proceedings against him and also a civil suit on the contract. Fiege won the bastardy proceedings because scientific evidence showed conclusively he could not have been the father. This means that, under the contract, Boehm forbore to bring bastardy proceedings that she was certain to lose, although she may well not have realized this.

In ignoring the fact that Fiege was not the father, the Court relies on First Restatement § 76(b), which says that: "The surrender of, or forbearance to assert an invalid claim or defense" is sufficient consideration only if obtained from one who has "an honest and reasonable belief in its possible validity." In Restatement 2d § 74(1), forbearance of an invalid claim is consideration only if: "(a) the claim or defense is in fact doubtful because of uncertainty as to the facts or the law, or (b) the forbearing or surrendering party believes that the claim or defense may be fairly determined to be valid." To a lawyer's mind, it was probably easier for Boehm to make the case that she believed that her claim "may be fairly determined to be valid" than that she has "an honest and reasonable belief in its possible validity." Or maybe not. What do you think?

In the civil trial, the jury heard evidence that Fiege had been acquitted in the bastardy proceedings, but the judge also told them that this outcome was not binding on them. If it is irrelevant to the outcome of the contract case whether Fiege was actually the father, why was the evidence of the other trial presented to the jury?

**3. Paternity.** Of course, the decision in this case may have been influenced by public policy to insure support for children. One wonders also

whether some of the jurors may have concluded that Fiege ought to pay for the sex that he apparently had with Boehm, even if it didn't result in pregnancy.

**4. Innocent Misrepresentation.** Could Fiege have escaped his contract by alleging that Boehm had misrepresented the truth as to his paternity, even innocently (non-fraudulently)? According to Restatement § 162(2), "A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so." According to § 164(1), the recipient of "either a fraudulent or a material misrepresentation" can seek to void the contract if he justifiably relies on the misrepresentation. Does Fiege qualify? For a recent case discussing this issue, see *Paternity of Cheryl*, 434 Mass. 23, 746 N.E.2d 488 (2001) (a case involving a court order, however); see also *McBride v. Boughton*, 123 Cal.App.4th 379, 20 Cal.Rptr.3d 115 (2004). How does a misrepresentation defense differ from one based on lack of consideration?

If a case like this were to arise today, would a putative father be justified in relying on a pregnant woman's assertion when quick and inexpensive DNA tests of paternity are readily available?

### Problem 2-2

In a job-related accident, Dale Warren Dyer, an at-will employee, lost his right foot. His employer placed him on a paid leave of absence for a year, after which he returned to work as a foreman, the job he had held before the injury. A year later he was laid off. Dyer sues for breach of contract, claiming that he had believed he had a valid claim against his employer for his personal injury, and that he had forborne pursuing this claim because the employer had promised him "lifetime employment." In reply, the employer asserts that this promise, even if it had been made, would be unenforceable for lack of consideration, since the state workers' compensation act states that: "The rights and remedies provided in this chapter ... for an employee on account of injury ... for which benefits under this chapter ... are recoverable, shall be the exclusive and only rights and remedies of such employee ... at common law or otherwise, on account of such injury, against his or her employer." Both parties agree that the employee's injury ... is covered by this statute. Will the employer prevail?

### PETROLEUM REFRACTIONATING CORP. v. KENDRICK OIL CO.

Circuit Court of Appeals, Tenth Circuit, 1933.  
65 F.2d 997.

PHILLIPS, C. J. The Petroleum Corporation brought this action against the Kendrick Company to recover damages for breach of contract. After setting out the jurisdictional facts, the amended petition alleged that on January 15, 1932, the Kendrick Company gave an order to the Petroleum Corporation, the material portions of which read as follows:

deficit -

Legal notes

Intelligence & Wilson

Judges & 29 year parties

50% photos - public life  
w/ (concessions)

1. no consideration (unimpaired)

2. Breach

Judges are not philosophers, but  
practical people

Sec. A

CONSIDERATION

43

"January 15th, 1932.

"To Petroleum Refractionating Company, Tulsa, Oklahoma.

"Ship to Metropolitan Utilities District, Gas Plant, 20th & Center Streets, Omaha, Nebraska. \* \* \* Shipping date, February, March, April and May. Cars—1,500,000 gallons, 10% more or less. Commodity—35-37 straight run gas oil, meeting Metropolitan Utilities District specifications. Price—45 cent barrel. F.O.B.—Pampa, Texas.

"Terms—1-10. \* \* \*

"Seller may cancel any unshipped portion of this order on five days' notice, if for any reason, he should discontinue making this grade of oil. \* \* \*

[Eds.: The amended petition also alleged:] That the Petroleum Corporation accepted such order and delivered thereunder 62,601 gallons of such oil; that on February 16, 1932, the Kendrick Company notified the Petroleum Corporation that it would not accept further deliveries under such order for the reason that the grade of oil being shipped was not of the standard stipulated in the order; that after notice to the Kendrick Company, and on February 21, 1932, the Petroleum Corporation resold the portion of the oil remaining undelivered under such contract at 25 cents a barrel. It sought damages for the difference between the contract price and the resale price of such oil.

The Kendrick Company demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The trial court held that there was no consideration for the promise of the Kendrick Company to purchase, and sustained the demurrer. The Petroleum Corporation elected to stand on its amended petition, and the trial court entered judgment for the Kendrick Company. This is an appeal therefrom.

Counsel for the Petroleum Corporation contend that the promise of the Kendrick Company to purchase was supported by the agreement of the Petroleum Corporation either to sell, which would be a benefit to the Kendrick Company, or, in the alternative, to discontinue making such grade of oil, which would be a detriment to the Petroleum Corporation. On the other hand, counsel for the Kendrick Company contend that whether the Petroleum Corporation should sell and deliver the oil was conditioned only by the will or wish of the Petroleum Corporation.

A benefit to the promisor or a detriment to the promisee is a sufficient consideration for a contract. . . . The detriment need not be real; it need not involve actual loss to the promisee. The word, as used in the definition, means legal detriment as distinguished from detriment in fact. It is the giving up by the promisee of a legal right; the refraining from doing what he has the legal right to do, or the doing of what he has the legal right not to do. . . . And where there is a detriment to the promisee, there need be no benefit to the promisor. . . .

↑ OR ↓

enough  
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5 day notice and receipt

quit 30 days notice (b2u)

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language, open contracting  
not binding; initial by  
obligation arises by contract  
violation consideration

Under the terms of the contract, the Petroleum Corporation agreed either to sell and deliver the oil or to discontinue making the grade of oil contracted for, and to give five days' notice of cancellation of the contract.

Since alternative courses were open to the Petroleum Corporation, the contract was without consideration on its part, if any one of the courses standing alone would have been an insufficient consideration. Restatement, Contracts, § 79; Williston on Contracts, § 104, p. 219; *McManus v. Bark L.R.* 5 Exch. 65.

The question then is, Would a discontinuance by the Petroleum Corporation to manufacture the grade of oil contracted for result in such a detriment to it as would constitute a consideration for the promise of the Kendrick Company to purchase?

The giving up by the seller of the right to sell to others such goods as he should manufacture during a specified period has been held a sufficient consideration for the promise of the buyer to purchase such goods, although the seller was not obligated to manufacture any goods whatever. *Ramey Lumber Co. v. John Schroeder Lumber Co.* (CCA. 7), 237 F. 39; ...

In *City of Marshall v. Kalman*, 153 Minn. 320, 190 N.W. 597, Kalman agreed to purchase all the street improvement certificates which the city should issue during a specified period, at par plus accrued interest. It was urged that the contract was without consideration on the part of the city because it was not obligated to issue any certificates. The Court held that, although the city had not agreed to issue any certificates, it had restricted its freedom to sell to others any certificates which it might issue, and that such restriction was a valid consideration for the promise of Kalman to purchase.

Should the Petroleum Corporation, under the alternative provision of the contract, discontinue to manufacture the grade of oil specified in the contract, it would refrain from doing that which it had the right to do; and it would thereby give up a legal right—the right to continue to make the grade of oil specified.

It follows that, under the principles above stated, the discontinuance by the Petroleum Corporation to manufacture the grade of oil specified in the contract would constitute a detriment to it, and the promise so to do would be a sufficient consideration for the promise of the Kendrick Company to purchase.

The judgment is reversed with instructions to overrule the demurrer.

waiver  
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### Notes and Discussion

1. **Illusory Promises and Mutuality.** Arthur and Betty arrange that Arthur will work for Betty for five years, but Betty reserves the power to terminate their agreement whenever she wishes. Restatement 2d § 77,

Comment a, holds that: "Words of promise which by their terms make performance **entirely optional** with the 'promisor' do not constitute a promise." This means that Betty's promise is not a real one, and so it cannot serve as **consideration** for Arthur's promise. In traditional doctrine, it is irrelevant both that Betty has not exercised her power to terminate and that she does not wish to exercise it; if the other is unwilling, neither Arthur nor Betty can enforce the arrangement.

Kendrick made a version of this argument, but lost. It is a good thing, too; if every contract that had a conditional "out" was rendered unenforceable in this way, modern commerce would be in big trouble.

Note that it is always the person who is not the beneficiary of the condition who claims freedom from a contractual obligation because the *other* party has made an illusory promise. Understand that the party that made the so-called illusory promise does not need the doctrine of mutuality in order to escape from the contract.

**Mutuality**, once treated as an independent requirement for valid contracts, is today usually considered just an aspect of consideration. "If the requirement of consideration is met, there is no additional requirement of ... 'mutuality of obligation.'" Restatement 2d § 79(c). Mutuality applies, of course, only to so-called bilateral contracts, where **parties exchange promises**.

**2. Conditional Contracts.** The contract between the Petroleum Corporation and Kendrick stated that: "Seller [i.e., the Petroleum Corporation] may cancel any unshipped portion of this order on five days' notice, if for any reason, he should discontinue making this grade of oil." On alternative promises, see Restatement 2d § 77.

The Court seems to be saying that if there is **enough pain in the condition**, the promise has not been made illusory by the inclusion of that condition. Here is a place where the doctrine of consideration may actually intrude into commercial contracts, for many commercial contracts are conditional, and when one party is more powerful than the other, the condition may grant to that party a nearly unfettered right to get out of the contract.

**3. Output and Requirements Contracts.** A case that the opinion cites by analogy is *Ramey Lumber*, in which a seller agreed to sell all "such goods as he should manufacture during a specified period" to a buyer. This is called an **output contract**, and the decision held it valid. The opposite situation is a requirements contract, in which a buyer agrees to buy all its requirements from a seller. Would the outcome be different if, for instance, the seller in *Ramey Lumber* had fixed a price for all its sales to the buyer, but had held open the possibility of selling to other buyers as well?

Courts once treated output and requirements contracts as suspect for want of mutuality. Today they are universally accepted. For sale of goods, such contracts are governed by UCC § 2-306(1). Problems associated with the enforcement of these contracts are considered below in Chapter 4.C.

**4. Should the Requirement of Consideration Be Relaxed or Abolished?** Evaluate the following argument: "The consideration doctrine prohibits the enforcement of gift promises not because of a policy against gift-giving but because courts want to encourage parties to be specific about

the content of their exchanges in order to ease the judicial burden of interpretation. Similarly, in the past courts resisted enforcing firm offers and requirements contracts not because they were socially undesirable, but because, like gift exchanges, they were *vague*. But judicial convenience had to give way to commercial exigency. Courts gradually realized—or, at least, came to believe—that parties would prefer the uncertainty of judicial enforcement of vague terms to the certainty of non-enforcement, and over time courts yielded to entreaties to enforce vague contracts. Whether courts will treat gift promises in a similar way remains to be seen. They should only if the social value of enforcement of such promises exceeds the cost of fraud—an empirical question.” Eric A. Posner, *Law and Social Norms* 64 (2000).

And what about the following argument: In the only place where the consideration has a significant bite in commercial transactions, namely promises regarded as illusory because they insufficiently bind one party, the doctrine is dubious. For example, it is clearly worth something to a supplier to be recognized as a potential seller to General Motors or Ford. By submitting its products and having them evaluated by GM or Ford, a supplier may become an authorized seller of a certain part. It might then be willing to enter into a contract to sell “as many gizmos (not to exceed 100,000 a year) as General Motors may wish to buy.” By getting onto GM’s recognized purchase list, the supplier will have accomplished something and may rightly regard itself as in a better economic position than if it had no writing signed by GM at all. If so, the contract should be enforceable, right? What possible argument, economic or otherwise, is there for declining to enforce such a contract? None, says White. (Frier concurs in the outcome.)

### Problem 2-3

Donald agreed with Ivana that, within the United States and for the space of five years, he would have the exclusive right to market the fashionable clothing that she endorsed, and that they would split the profits from any sales. If Ivana then repudiates the agreement, can Donald successfully sue her? What exactly has he promised in return for her promise? This hypothetical is based on the famous old case of *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917), in which Benjamin Cardozo upheld the contract by implying a counter-promise to “use reasonable efforts” in marketing. Such “exclusive dealing” contracts are now governed by UCC § 2-306(2), which speaks of “best efforts.”

### HARRINGTON v. TAYLOR

Supreme Court of North Carolina, 1945.  
225 N.C. 690, 36 S.E.2d 227.

PER CURIAM. The plaintiff in this case sought to recover of the defendant upon a promise made by him under the following peculiar circumstances:

The defendant had assaulted his wife, who took refuge in plaintiff’s house. The next day the defendant gained access to the house and began another assault upon his wife. The defendant’s wife knocked him down

with an axe, and was on the point of cutting his head open or decapitating him while he was laying on the floor, and the plaintiff intervened, caught the axe as it was descending, and the blow intended for defendant fell upon her hand, mutilating it badly, but saving defendant's life.

Subsequently, defendant orally promised to pay the plaintiff her damages; but, after paying a small sum, failed to pay anything more. So, substantially, states the complaint.

The defendant demurred to the complaint as not stating a cause of action, and the demurrer was sustained. Plaintiff appealed.

The question presented is whether there was a consideration recognized by our law as sufficient to support the promise. The Court is of the opinion that however much the defendant should be impelled by common gratitude to alleviate the plaintiff's misfortune, a humanitarian act of this kind, voluntarily performed, is not such consideration as would entitle her to recover at law.

The judgment sustaining the demurrer is: Affirmed.

### Notes and Discussion

**1. Moral Consideration and Past Consideration.** This uncommonly brusque decision hardly seems a straightforward application of the bargain theory of consideration. There are two main circumstances in which a promise, although not bargained for, might seem worthy of enforcement: if the promisor acts from a strong sense of duty toward the promisee (so-called moral consideration); or if the promisor is seeking to recompense the promisee for a benefit previously conferred (so-called past consideration). Lena Harrington could state her claim against Lee Taylor under either theory, but *Webb v. McGowin*, cited below, suggests that moral consideration is the better theory. Note that Taylor promised only to pay for Harrington's damages (medical expenses, lost work, and so on), not an additional reward.

At issue here is whether the bargain theory is underinclusive, in that it excludes enforcement of some promises that should be enforced. What arguments can be given on either side of this matter? Should it matter that promises based on moral or past consideration usually have no direct economic benefits?

**2. Material Benefit.** In 1925, Joe Webb, an employee in an Alabama lumber company, leaped onto a 75-pound block and diverted its fall, thereby preventing the death or serious injury of J. Greeley McGowin; but in the process Webb was crippled for life. In gratitude, McGowin promised, apparently orally, to care for and maintain Webb for the rest of Webb's life. McGowin kept up payments until his death in 1934. The executors of his estate then stopped payment. Alabama appeals courts enforced the promise on that theory that: "a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor." *Webb v. McGowin*, 27 Ala.App. 82, 168 So. 196 (1935), cert. denied 232 Ala. 374, 168 So. 199 (1936). We can't distinguish *Harrington v. Taylor*. Can you?

*Webb v. McGowin* is the leading case for a narrow exception to the rule in *Harrington v. Taylor*. The exception is formalized in Restatement 2d § 86, but is hedged round with conditions: the benefit must have been "received by the promisor from the promisee"; the promise "is binding to the extent necessary to prevent injustice," and may be limited if "its value is disproportionate to the benefit"; and the promise is not binding if the promisor "conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched." These restrictions are quite rigid, and few courts seem to have followed the Restatement.

Statutes in some states make promises of this type enforceable provided that specified requirements are met. N.Y. Gen. Oblig. Law § 5-1105 (Consol. 2004) (promise must be written; consideration must be valid "but for the time when it was given or performed"); Cal. Civ. Code § 1606 (Deering 2004).

For further information relating to *Harrington* and *Webb*, see Richard Danzig and Geoffrey R. Watson, *The Capability Problem in Contract Law* 149-213 (2nd ed. 2004). Lena Harrington's complaint describes her injuries as follows: "[T]he plaintiff's fingers were cut to the bone by the aforesaid blow, and [she] suffered great pain and suffering thereby; ... [her] hand is permanently injured and is practically useless." Further, "the plaintiff has spent considerable sums of money for treatment thereof." Danzig and Watson, at 188. They also reprint the brief of her appeal (pp. 205-208).

**3. Exceptions.** There are a few traditional exceptions to the rule that moral consideration is not enough. Most involve promises renewing obligations that would have been enforceable except for a legal "technicality." For instance, a debtor promises to pay a debt that had been barred by the statute of limitations; this promise is usually enforceable. So too if a minor's promise is voidable for lack of legal capacity, but the promisor then renews the promise upon reaching majority. More controversial is a debtor who has undergone bankruptcy and then promises to pay a pre-bankruptcy creditor; such a promise, if enforceable, arguably defeats the whole purpose of bankruptcy. In the 1978 revision of the Bankruptcy Law, Congress allowed and gave legal enforceability to reaffirmations by bankrupts in certain cases. A moment's thought will reveal that even a bankrupt might rationally wish to make a binding contract with one or more creditors. For example, I might want to kiss off all my creditors except for the one who has a security interest in my automobile. Since bankruptcy does not invalidate perfected security interests, I may be able to keep the car (and so my job) only by reaffirming. See generally § 524(c)-(f) of the Bankruptcy Code.

Another traditional exception, supported by Restatement 2d § 90(2), is promises made to charitable organizations or in the context of property settlements prior to marriage. Although the Restatement is probably right in just making an outright exception on the basis of a public policy favoring charitable organizations and marriage, most courts have tended instead to stretch orthodox concepts of consideration in order to cover particular cases. Judge Cardozo led the way in this respect: *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 159 N.E. 173 (1927) (donation to a college); *De Cicco v. Schweizer*, 221 N.Y. 431, 117 N.E. 807 (1917) (pre-marriage settlement by bride's father on the groom).

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BOARD OF CONTROL OF EASTERN MICHIGAN  
UNIVERSITY v. BURGESS

Court of Appeals of Michigan, 1973.  
45 Mich.App. 183, 206 N.W.2d 256.

BURNS, J. On February 15, 1966, defendant signed a document which purported to grant to plaintiff a 60-day option to purchase defendant's home. That document, which was drafted by plaintiff's agent, acknowledged receipt by defendant of "One and no/100 (\$1.00) Dollar and other valuable consideration." Plaintiff concedes that neither the one dollar nor any other consideration was ever paid or even tendered to defendant. On April 14, 1966, plaintiff delivered to defendant written notice of its intention to exercise the option. On the closing date defendant rejected plaintiff's tender of the purchase price. Thereupon, plaintiff commenced this action for specific performance.

At trial defendant claimed that the purported option was void for want of consideration, [and] that any underlying offer by defendant had been revoked prior to acceptance by plaintiff. . . . The trial judge . . . held that defendant's acknowledgment of receipt of consideration bars any subsequent contention to the contrary. Accordingly, the trial judge entered judgment for plaintiff.

Defendant appeals. She claims that acknowledgment of receipt of consideration does not bar the defense of failure of consideration. . . .

I.

Options for the purchase of land, if based on valid consideration, are contracts which may be specifically enforced. . . . *George v. Schuman*, 202 Mich 241, 250 (1918). Conversely, that which purports to be an option, but which is not based on valid consideration, is not a contract and will not be enforced. *Bailey v. Grover*, 237 Mich. 548 (1927); *George v. Schuman*, *supra*, at 248. One dollar is valid consideration for an option to purchase land, provided the dollar is paid or at least tendered. . . . In the instant case defendant received no consideration for the purported option of February 15, 1966.

A written acknowledgment of receipt of consideration merely creates a rebuttable presumption that consideration has, in fact, passed. Neither the parol evidence rule nor the doctrine of estoppel bars the presentation of evidence to contradict any such acknowledgment. *Hagan v. Moch*, 249 Mich. 511, 517 (1930).

It is our opinion that the document signed by defendant on February 15, 1966, is not an enforceable option, and that defendant is not barred from so asserting.

5. [Eds.: This means that Burgess is not prevented by any standard legal means from presenting evidence that she never

actually received the dollar, despite her signature on the writing.]

valid consideration

valid consideration

The trial court premised its holding to the contrary on *Lawrence v. McCalmont*, 43 U.S. (2 How) 426, 452; 11 L. Ed. 326, 336 (1844). That case is significantly distinguishable from the instant case. Mr. Justice Story held that "[t]he guarantor acknowledged the receipt of one dollar, and is now estopped to deny it." However, in reliance upon the guaranty substantial credit had been extended to the guarantor's sons. The guarantor had received everything she bargained for, save one dollar. . . . In the instant case defendant claims that she never received any of the consideration promised her.

That which purports to be an option for the purchase of land, but which is not based on valid consideration, is a simple offer to sell the same land. *Bailey v. Grover, supra*. An option is a contract collateral to an offer to sell whereby the offer is made irrevocable for a specified period. *George v. Schuman, supra*, at 248. Ordinarily, an offer is revocable at the will of the offeror. Accordingly, a failure of consideration affects only the collateral contract to keep the offer open, not the underlying offer. - looking

A simple offer may be revoked for any reason or for no reason by the offeror at any time prior to its acceptance by the offeree. *Weiden v. Woodruff*, 38 Mich 130, 131-132 (1878). Thus, the question in this case becomes, "Did defendant effectively revoke her offer to sell before plaintiff accepted that offer?" . . .

Defendant testified that within hours of signing the purported option she telephoned plaintiff's agent and informed him that she would not abide by the option unless the purchase price was increased. Defendant also testified that when plaintiff's agent delivered to her on April 14, 1966, plaintiff's notice of its intention to exercise the purported option, she told him that "the option was off."

Plaintiff's agent testified that defendant did not communicate to him any dissatisfaction until sometime in July, 1966.

If defendant is telling the truth, she effectively revoked her offer several weeks before plaintiff accepted that offer, and no contract of sale was created. If plaintiff's agent is telling the truth, defendant's offer was still open when plaintiff accepted that offer, and an enforceable contract was created. The trial judge thought it unnecessary to resolve this particular dispute. In light of our holding the dispute must be resolved.

An appellate court cannot assess the credibility of witnesses. We have neither seen nor heard them testify. . . . Accordingly, we remand this case to the trial court for additional findings of fact based on the record already before the court. . . .

### Notes and Discussion

1. **Nominal Consideration.** If a promise must be supported by bargained-for consideration in order to be binding, can the pretense of a bargain suffice? Despite the general rule against using the requirement of consideration to evaluate fairness of exchange, courts may look suspiciously

on "pseudo-bargains." In *Schnell v. Nell*, 17 Ind. 29 (1861), a widower signed a document promising \$600 to three relatives of his wife, "in consideration of one cent." The Court held: "It is true, that as a general proposition, inadequacy of consideration will not vitiate an agreement. . . . But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value, for money, or, perhaps, for some other thing of indeterminate value." The Court would not have been satisfied with a document that read: "in consideration of an old sweatshirt," would it? What is the underlying issue that the Court is concerned about?

Modern contract law has actually become increasingly disapproving of "pseudo-bargains." The First Restatement seems to permit them; see Illustration 1 to § 84 (in order to make binding A's promise to give property worth \$5,000 to B, A and B agree that A will "sell" the property for \$1; this is sufficient consideration). The Second Restatement apparently reverses this; see Illustration 5 to § 71 (in order to make binding A's promise to give \$1,000 to B, A and B agree that B will "sell" to A a book worth \$1; there is no consideration for A's promise).

**2. Option Contracts.** Burgess signed a writing that purportedly gave EMU 60 days within which to decide whether to purchase her home, in exchange for \$1.00 and "other valuable consideration." Although the writing contained an offer looking forward to the possible conclusion of a sale, in external form it was, as the Court observes, a contract in its own right: an option contract. See Restatement 2d § 25. Options are a very common part of modern life, particularly for real estate, because they make an offer binding for a period of time during which the offeree can decide whether to accept the offer; the offeree can use this time in order to arrange financing, to inspect, and to price out prospective repairs and additions. Supposing that this was a valid option contract, what exactly did Ms. Burgess promise to EMU?

**3. Consideration for Option Contracts.** As the Michigan Court says, a promise that is in form an option requires consideration in order to be binding. This rule is traditional. It makes no difference how absolute the original language of the offer is. For example, in *Hill v. Corbett*, 33 Wash.2d 219, 204 P.2d 845 (1949), an offer was held to be revocable despite language that: "the first parties do hereby grant unto the second parties the option to extend the lease," where there was no consideration for the promise.

On the other hand, relatively small sums have been held to constitute consideration even for large potential deals. A good example is *Keaster v. Bozik*, 191 Mont. 293, 623 P.2d 1376 (1981), in which five dollars (combined with efforts to obtain an FHA loan) was deemed adequate consideration to make binding a one-year option to purchase 899 acres of land for \$200,000.

What does the Michigan Court of Appeals insist on in order to satisfy the requirement of consideration? To what extent does it remain committed to the bargain requirement? To what extent has consideration become, in the context of an option contract, a mere formality? Lon Fuller's classic article on *Consideration and Form*, 41 Colum. L. Rev. 799 (1941), is still very helpful in sorting out the formalistic elements of consideration.

Perhaps the Court could have rescued EMU by implying a promise to pay the dollar to Burgess. Compare *Smith v. Wheeler*, 233 Ga. 166, 210 S.E.2d 702 (1974), where an option to purchase real estate contained a recital that one dollar had been paid as consideration; it was held that "the recital of the one dollar consideration gives rise to an implied promise to pay which can be enforced by the other party," and that failure to pay it did not void the option contract. Few courts have taken this position, however; why?

**4. Reform.** The rule requiring consideration for option contracts has often been criticized. Restatement 2d § 87(1)(a) makes an option binding if it "is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time." Burgess would be bound under this rule, no?

For sale of goods, UCC § 2-205 introduces the concept of a "firm offer," "[a]n offer by a merchant to buy or sell goods in a signed writing"; under certain conditions, it is valid "for a reasonable time" not to exceed three months. The CISG art. 16(2)(a), following European law, goes even further: "an offer cannot be revoked . . . if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable . . ."

Should the concept of a binding "firm offer" (in effect, an option binding without consideration) be extended more widely in Common Law? Think about this in relation to the *Burgess* case.

#### Problem 2-4

"[A] buyer begins her search for a car by taking a new Chevrolet for a test drive. After the test drive, the buyer plans to continue her search by visiting other car dealers. The seller wants to induce the buyer to consider carefully the purchase of the new Chevrolet. Consequently, the seller promises to sell the new Chevrolet to the buyer for a stated price, provided that the buyer accepts within one week. In other words, the seller makes a 'firm' offer and promises to 'keep it open' for one week. The buyer does not want to waste her time by considering the offer carefully and then finding that the seller has reneged. Consequently, the buyer wants the promise to be enforceable. The seller knows that the buyer is more likely to consider the offer carefully if the promise is enforceable, so the seller wants the promise to be enforceable. Thus, the promisor and the promisee want the promise to be enforceable." Robert Cooter and Thomas Ulen, *Law and Economics* 183 (3d. ed. 2000).

Under the bargain theory of consideration, is the seller's offer enforceable if the seller wishes to revoke it early? Should it be? As to this, Cooter and Ulen argue yes: "By enforcing the promise, the court can give both parties what they want. Giving them what they want promotes exchange and encourages cooperation by reducing uncertainty and risk." *Id.* at 185.

**FISHER v. JACKSON**

Supreme Court of Connecticut, 1955.  
142 Conn. 734, 118 A.2d 316.

WYNNE, J. The plaintiff instituted this action to recover damages for the breach of an oral agreement of employment. The defendant has appealed from the judgment rendered upon a plaintiff's verdict. The questions presented are whether the court was in error in denying the defendant's motion to set the verdict aside on the ground that it is not supported on the issue of liability, and in denying the defendant's motion for judgment notwithstanding the verdict.

The substituted complaint alleged that the defendant, through his authorized agent, induced the plaintiff to give up his employment with a firm of bakers, where he was making \$50 per week, and to enter upon employment as a reporter, for \$40 per week, under an oral contract that the employment would be for the life of the plaintiff or until he was physically disabled for work, with a yearly increase in salary of \$5 per week. The defendant's contention is that there was no evidence that the parties had agreed upon such a contract. The defendant's claim is that the job under discussion was a permanent one rather than for a definite term and was terminable at will by either party.

In the absence of a consideration in addition to the rendering of services incident to the employment, an agreement for a permanent employment is no more than an indefinite general hiring, terminable at the will of either party without liability to the other. *Carter v. Bartek*, 142 Conn. 448, 450, 114 A.2d 923, and cases there cited.

The plaintiff was hired by the defendant's managing editor in January, 1944, and went to work as a reporter for the New Haven Register, a newspaper owned by the defendant. He was discharged on or about January 7, 1949. The contact between the parties began with a notice which was put in a trade magazine by the defendant, just prior to the admitted hiring of the plaintiff. That advertisement set forth that a "permanent position" as a reporter awaited an "all-around male newsman with experience on several beats and educational background that [would stand] up in a University city." The plaintiff wrote a letter in response to the advertisement and as a result was interviewed by the defendant's managing editor for about ten minutes and was thereafter hired. Whether or not the plaintiff was an "all-around newsman" with experience on several beats and with an educational background, however nebulous, that would stand up in a university city nowhere appears. The managing editor, who was the only other party to the interview, was deceased at the time of the trial. The plaintiff, in his letter seeking an interview, had written that he was looking for a connection which, "in the event my services are satisfactory, will prove permanent." So it must be quite apparent that the significant thought expressed was in his mind during his brief interview with the defendant's managing editor. It seems clear to us that the negotiations amounted to nothing more than

the hiring of a reporter for a job which was permanent in the sense that it was not a mere temporary place. The hiring was indefinite as to time and terminable by either party at his will.

There is no occasion to discuss at length the claim advanced by the plaintiff that special consideration moved to the defendant because the plaintiff gave up his job with the bakery firm. The plaintiff did no more than give up other activities and interests in order to enter into the service of the defendant. The mere giving up of a job by one who decides to accept a contract for alleged life employment is but an incident necessary on his part to place himself in a position to accept and perform the contract; it is not consideration for a contract of life employment....

The plaintiff argues that he suffered a detriment by giving up his job. To constitute sufficient consideration for a promise, an act or promise not only must be a detriment to the promisee but must be bargained for and given in exchange for the promise ... Restatement, 1 Contracts § 75. In the present case, the plaintiff's giving up of his job at the bakery was not something for which the defendant bargained in exchange for his promise of permanent employment. Nowhere in the plaintiff's testimony does it appear that the defendant's agent even suggested that the plaintiff give up the job he had with the bakery firm, much less that the agent induced him to do so. It would thus appear that there was not even a semblance of a claim that the giving up of the plaintiff's job was consideration for any promise that may have been made by the defendant's agent....

Inasmuch as the contract of employment which was proved would not in any event warrant a judgment in favor of the plaintiff, even though the case were retried, the court should have directed judgment for the defendant notwithstanding the verdict....

There is error, the judgment is set aside and the case is remanded with direction to render judgment for the defendant notwithstanding the verdict.

### *Notes and Discussion*

**1. Employment at Will.** According to the plaintiff's complaint, the defendant offered employment "for the life of the plaintiff or until he was physically disabled for work." The Court interprets this as an offer of "permanent employment," which is then described as "no more than an indefinite general hiring, terminable at the will of either party without liability to the other." This is a legal construction of what it was that the plaintiff was offered. This is not necessarily the most persuasive construction of the word "permanent." Why doesn't it matter what the plaintiff thought he was being offered?

Employment relationships are generally governed, at least in part, by contract law, although they are also heavily impacted by statutory law as well. The traditional position in contract law is that when employment is for

an indefinite term, it is presumed to be a hiring "at will" which may be freely terminated by either party at any time for any reason or even for no reason. The employer's and employee's legal positions are symmetrical in this respect; but this may not correspond to social and economic reality. Employers are significantly advantaged by being able to fire employees without having to explain their reasons for doing so. But only employees who have multiple opportunities (e.g., star athletes) are advantaged by being able to seek work elsewhere at any time for any reason.

Employment at will is a default position, and the parties may bargain away from this position. Fairly few employees have individual written contracts specifying either a term of employment or conditions for discharge, but many more are protected from willful discharge by other means, such as a collective bargaining agreement, civil service protection, or their employers' general workplace policy.

Still, many employment relationships are at will. As we will see in later Chapters, discharge of at-will employees remains a highly contested area of contract law. In recent decades many exceptions to the at-will doctrine have emerged, but *Fisher v. Jackson* was not argued on that basis. On social aspects of the employment relationship in the United States, see especially H. J. Howell, *The Right to Manage* (1982).

**2. Conditions and Consideration.** I promise you that I will treat you to lunch if you meet me at the Chez Paris restaurant at a specified time. You appear on time. Does your appearance constitute **consideration** for my promise of lunch, meaning that you now have a legal claim on me? How, if at all, is a promise of this form different from Uncle William's promise to pay his nephew Willie \$5,000 if the boy grows up straight and true?

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**3. Was There Additional Consideration?** In order to establish that his job was truly for life, the plaintiff in *Fisher v. Jackson* is obliged to demonstrate "a consideration in addition to the rendering of services incident to the employment." Again, this view is traditional. It is not enough that the plaintiff had showed up at his new job and worked there for five years, since this work was paid for by the employer (or so the reasoning goes).

Why was the plaintiff's attorney unsuccessful in showing additional consideration? The Court lays much stress on the record, which gave no sign that the plaintiff's previous position in a bakery had been mentioned during the job interview. The outcome could have been different if this had been mentioned.

The Court could have paid more attention to the plaintiff's 20 percent reduction in pay as he moved from a blue collar to a white collar job. What do you make of the Court's suggestion that the plaintiff was unqualified when he was hired?

### Problem 2-5

Ben Collins was a full professor with tenure at a state university. Another college recruited him by offering him tenure and a specified salary, with specified annual increments for five years. Subsequently, during the

## Chapter 3

## Formation of Contracts - Mutual Assent

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## § 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 §§ 82-94.

## Comment:

a. *Formal contracts.* The types of contracts listed in § 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 § 95, 104(1). Under Uniform Commercial Code § 3-408, a negotiable instrument may be binding without consideration in some cases. Under Uniform Commercial Code § 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 § 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 § 3. See also Comment

b to § 2. Topics 2-5, §§ 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 §§ 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 § 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 §§ 82-94.

assent, if the other party is not negligent. The question whether such a contract is voidable for mistake is dealt with in §§ 151-58. **Illustrations:**

1. A offers to sell B goods shipped from Bombay ex steamer "Peerless". B accepts. There are two steamers of the name "Peerless", sailing from Bombay at materially different times. If both parties intend the same Peerless, there is a contract, and it is immaterial whether they know or have reason to know that two ships are named Peerless.

2. The facts being otherwise as stated in Illustration 1, A means Peerless No. 1 and B means Peerless No. 2. If neither A nor B knows or has reason to know that they mean different ships, or if they both know or if they both have reason to know, there is no contract.

3. The facts being otherwise as stated in Illustration 1, A knows that B means Peerless No. 2 and B does not know that there are two ships named Peerless. There is a contract for the sale of the goods from Peerless No. 2, and it is immaterial whether B has reason to know that A means Peerless No. 1. If A makes the contract with the undisclosed intention of not performing it, it is voidable by B for misrepresentation (see §§ 159-64). Conversely, if B knows that A

means Peerless No. 1 and A does not know that there are two ships named Peerless, there is a contract for the sale of the goods from Peerless No. 1, and it is immaterial whether A has reason to know that B means Peerless No. 2, but the contract may be voidable by A for misrepresentation.

4. The facts being otherwise as stated in Illustration 1, neither party knows that there are two ships Peerless. A has reason to know that B means Peerless No. 2 and B has no reason to know that A means Peerless No. 1. There is a contract for the sale of goods from Peerless No. 2. In the converse case, where B has reason to know and A does not, there is a contract for sale from Peerless No. 1. In either case the question whether the contract is voidable for mistake is governed by the rules stated in §§ 151-58.

5. A says to B, "I offer to sell you my horse for \$ 100." B, knowing that A intends to offer to sell his cow for that price, not his horse, and that the word "horse" is a slip of the tongue, replies, "I accept." The price is a fair one for either the horse or the cow. There is a contract for the sale of the cow and not of the horse. If B makes the contract with the undisclosed intention of not performing it, it is voidable by A for misrepresentation. See §§ 159-64.

## § 21. Intention to Be Legally Bound

Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.

### Comment:

*a. Intent to be legally bound.* Most persons are now aware of the existence of courts and rules of law and of the fact that some promises are binding. The parties to a transaction often have a reasonably accurate understanding of the applicable law, and an intention to affect legal relations. Such facts may be important in interpreting their manifestations of intention and in determining legal consequences, but they are not essential to the formation of a contract. The parties are often quite mistaken about particular rules of law, but such mistakes do not necessarily deprive their acts of legal effect. **Illustrations:**

1. A draws a check for \$ 300 payable to B and delivers it to B in return for an old silver watch worth about \$ 15. Both A and B understand the transaction as a frolic and a banter, but each believes that he would be legally bound if the other dishonestly so asserted. There is no contract.

2. A orally promises to sell B a book in return for B's promise to pay \$ 5. A and B both think such promises are not binding unless in writing. Nevertheless there is a contract, unless one of them intends not to be legally bound and the other knows or has reason to know of that intention.

*b. Agreement not to be legally bound.* Parties to what would otherwise be a bargain and a contract sometimes agree that their legal relations are not to be affected. In the absence of any invalidating cause, such a term is respected by the law like any other term, but such an agreement may present difficult questions of interpretation: it may mean that no bargain has been reached, or that a particular manifestation of intention is not a promise; it may reserve a power to revoke or terminate a promise under certain circumstances but not others. In a written

document prepared by one party it may raise a question of misrepresentation or mistake or overreaching; to avoid such questions it may be read against the party who prepared it.

The parties to such an agreement may intend to deny legal effect to their subsequent acts. But where a bargain has been fully or partly performed on one side, a failure to perform on the other side may result in unjust enrichment, and the term may then be unenforceable as a provision for a penalty or forfeiture. See §§ 185, 229, 356. In other cases the term may be unenforceable as against public policy because it unreasonably limits recourse to the courts or as unconscionably limiting the remedies for breach of contract. See §§ 178-79, 208; Uniform Commercial Code §§ 2-302, 2-719 and Comment 1. **Illustrations:**

3. A, an employer, issues to B, an employee, a "certificate of benefit", promising stated sums

increasing yearly, payable to a named beneficiary if B dies while still in A's employ. The certificate provides that it "constitutes no contract" and "confers no legal right." The quoted language may be read as reserving a power of revocation only until B dies.

4. A and B, two business corporations, have a contract by which B is the exclusive distributor in a certain territory of goods made by A. By a detailed written agreement they agree to continue the distributorship for three years. The writing provides that it is not to be a legal agreement or subject to legal jurisdiction in the law courts. The written agreement may be read and given effect to terminate the prior contract and to prevent any legal duty arising from the making of the agreement or from the acceptance of orders under it; but it does not excuse B from paying for goods delivered under it.

## § 22. Mode of Assent: Offer and Acceptance

(1) The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.

(2) A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.

### Comment:

*a. The usual practice.* Subsection (1) states the usual practice in the making of bargains. One party ordinarily first announces what he will do and what he requires in exchange, and the other then agrees. Where there are more than two parties, the second party to agree may be regarded as accepting the offer made by the first party and as making a similar offer to subsequent parties, and so on. It is theoretically possible for a third person to state a suggested contract to the parties and for them to say simultaneously that they assent. Or two parties may sign separate duplicates of the same agreement, each manifesting assent whether the other signs before or after him. Compare Illustration 5 to § 23.

*b. Assent by course of conduct.* Problems of offer and acceptance are important primarily in cases where advance commitment serves to shift a risk from one party to the other, as in sales of goods which are subject to rapid price fluctuations, in sales of land, and in insurance contracts. Controversies as to whether and when the commitment is made are less likely to be

important even in such cases once performance is well under way. Offer and acceptance become still less important after there have been repeated occasions for performance by one party where the other knows the nature of the performance and has an opportunity for objection to it. See Uniform Commercial Code § 2-208 (1); compare Comment *a* to § 19. In such cases it is unnecessary to determine the moment of making of the contract, or which party made the offer and which the acceptance. Thus, Uniform Commercial Code §§ 2-204 and 2-207(3), relating to contracts for the sale of goods, provide that conduct by both parties which recognizes the existence of a contract is sufficient to establish it although the writings of the parties do not otherwise establish a contract. The principle has also been applied in non-sales contexts.

### Illustration:

1. A, a general contractor preparing a bid on a government construction contract, receives a bid by a proposed subcontractor, B, in a given amount. A names B as a subcontractor in A's bid, but after A receives the government con-

## § 75. Exchange of Promise for Promise

Except as stated in §§ 76 and 77, a promise which is bargained for is consideration if, but only if, the promised performance would be consideration.

### Comment:

*a. The executory exchange.* In modern times the enforcement of bargains is not limited to those partly completed, but is extended to the wholly executory exchange in which promise is exchanged for promise. In such a case the element of unjust enrichment is not present; the element of reliance, if present at all, is less tangible and direct than in the case of the half-completed exchange. The promise is enforced by virtue of the fact of bargain, without more. Since the principle that bargains are binding is widely understood and is reinforced in many situations by custom and convention, the fact of bargain also tends to satisfy the cautionary and channeling functions of form. Compare Comments *b* and *c* to § 72. Evidentiary safeguards, however, are largely left to the Statute of Frauds rather than to the requirement of consideration. See Chapter 5.

*b. Promise and performance.* The principle of this Section is that, in determining whether there is consideration, one's word is as good as one's deed but no better. More detailed rules are stated in §§ 76-78 for cases in which the application of this principle has produced problems. Certain cases which have sometimes been thought to be exceptions to the principle are commented upon below.

*c. Performance of legal duty and settlement of claims.* A promise to perform a legal duty is not consideration for a return promise unless performance would be. Similarly, a promise to surrender a claim or defense or to forbear from asserting it is consideration only if performance would be. Thus a promise of such performance may raise the same questions as the performance would: Is the duty owed to the maker of the return promise? Is the claim or defense known to be invalid? See §§ 73, 74. **Illustrations:**

1. A promises to pay a debt to B, or to perform an existing contractual duty to B, or to perform his duty as a public official. The legal duty is neither doubtful nor the subject of honest dispute, but A would not have fulfilled the duty but for B's return promise. A's promise is not consideration for B's return promise. Compare § 73.

2. A promises B to surrender or to forbear suit upon a claim either against B or against C. A knows the claim is invalid. A's promise is not consideration for a return promise by B. Compare § 74.

*d. "Void" promises.* The value of a promise does not necessarily depend upon the availability of a legal remedy for breach, and bargains are often made in consideration of promises which are voidable or unenforceable. Such a promise may be consideration for a return promise. See § 78. But it is sometimes suggested that a promise is not consideration if it is not binding, or if it is "void." The examples used commonly involve total lack of capacity to contract (see §§ 12, 13), indefinite promises (see §§ 33-34), promises lacking consideration, or promises unenforceable as against public policy (see Chapter 8). Such cases are not exceptions to the rule stated in this Section. In some of them there is no promise within the definition in § 2, in others the return promise would not be binding whether the consideration consisted of a promise or of performance, in some the invalidity of the return promise rests on other policies than those embodied in the requirement of consideration.

### Illustrations:

3. While A's property is under guardianship by reason of an adjudication of mental illness, A makes an agreement with B in which B makes a promise. B's promise is not a contract, whether the consideration consists of a promise by A or performance by A. Compare § 13; Restatement of Restitution § 139.

4. A promises to forbear suit against B in exchange for B's promise to pay a liquidated and undisputed debt to A. A's promise is not binding because B's promise is not consideration under § 73, but A's promise is nevertheless consideration for B's. Moreover, B's promise would be enforceable without consideration under § 82. On either basis, B's promise is conditional on A's forbearance and can be enforced only if the condition is met.

5. A, a married man, and B, an unmarried woman, make mutual promises to marry. B neither knows nor has reason to know that A is married. B's promise is consideration and B may recover damages from A for breach of his promise though B would have a defense to a similar action by A. See § 180.

6. A promises B \$ 100 in return for B's promise to cut timber on land upon which A is a trespasser. B neither knows nor has reason to know that A is not privileged to cut the timber. B's promise is consideration and B may recover damages from A for breach of his promise though B would have a defense to a similar action by A. See Illustration 2 to § 180.

## § 76. Conditional Promise

(1) A conditional promise is not consideration if the promisor knows at the time of making the promise that the condition cannot occur.

(2) A promise conditional on a performance by the promisor is a promise of alternative performances within § 77 unless occurrence of the condition is also promised.

## Comment:

a. "Conditional promise." Conditions and similar events are the subject of Topic 5 of Chapter 9. A promise is "conditional" for the purposes of this Section if an event must occur before a duty of immediate performance of the promise arises, and the "condition" is the event which must occur. See § 224. A condition may be provided for by a term of a promise, either in words or by virtue of other conduct or the circumstances, or it may be supplied by law. See § 5.

b. *Impossible conditions.* Words of conditional promise do not constitute a promise within the definition in § 2 if both promisor and promisee know that the condition cannot occur. If the promisor has such knowledge but the promisee does not, there may be a promise, but the promisee receives only the false appearance of a commitment by the promisor; in such cases the promise is not consideration for a return promise. But if the promisor honestly believes he is making a commitment, the promise may be consideration even though the facts are such that no duty of immediate performance can ever arise. Thus in dealing with promises conditional on past events the law takes the standpoint of the promisor and treats as uncertain that which is uncertain to him. For this purpose, an event is uncertain to a promisor who does not know even though he has reason to know. **Illustrations:**

1. A promises B to pay him \$ 5,000 if B's ship now at sea has already been lost, knowing that the ship has not been lost. A's promise is **illusory** and is not consideration for a return promise.

2. The facts being otherwise as stated in Illustration 1, A makes the promise **not knowing** whether the ship has been lost or not. A's promise is consideration even though A has reason to know that the ship has not been lost.

3. A sells to B a tract of land said to contain 500 acres. Later A and B agree to have the land surveyed; A promises to pay B \$ 16 for each acre of deficiency; B promises to pay A \$ 16 for each acre of excess. A's promise is consideration for B's promise, and B's promise is consideration for A's.

c. *Aleatory promises.* A party may make an aleatory promise, under which his duty to perform is conditional on the occurrence of a fortuitous event. See §§ 225, 226, 239. Such a promise may be consideration for a return promise.

**Illustrations:**

4. A promises to sell and B to buy goods if A's employees do not strike before the time for delivery. The promises are consideration for each other.

5. A promises to convey to B immediately a patent owned by A; B promises to pay A \$ 10,000 when pending litigation is terminated, if the patent is not held invalid. B's promise is consideration for A's promise.

6. A promises B to pay him \$ 5000 if his house burns within a year. This is consideration for a return promise.

**d. Conditions within the promisor's control.**

Words of promise do not constitute a promise if they make performance **entirely optional** with the **purported promisor**. See Comment e to § 2. Such words, often referred to as forming an **illusory promise**, do not constitute consideration for a return promise. See § 77. But a promise may be conditional on an event within the control of the promisor. Such a promise may be consideration if he has also promised that **the condition will occur**. Similarly, even though he does not promise occurrence of the condition, there may be consideration if forbearance from causing the condition to occur would itself have been consideration if it alone had been bargained for. In such a case, there is in effect a promise in the alternative, and the rules stated in § 77 apply.

**Illustrations:**

7. A promises B to pay him \$ 5000 if A enters a competing business within three years. This is consideration for a return promise, since forbearance to compete would be consideration. See § 77.

8. A promises B that, "subject to purchase" of a certain ship, he will charter it to B, and B promises to accept the charter. A's promise is consideration for B's. A's forbearance to buy the ship could have been consideration for a different promise, such as a promise to pay money. See § 77.

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**§ 90. Promise Reasonably Inducing Action or Forbearance**

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

**Comment:**

*a. Relation to other rules.* Obligations and remedies based on reliance are not peculiar to the law of contracts. This Section is often referred to in terms of "promissory estoppel," a phrase suggesting an extension of the doctrine of estoppel. Estoppel prevents a person from showing the truth contrary to a representation of fact made by him after another has relied on the representation. See Restatement, Second, Agency § 8B; Restatement, Second, Torts §§ 872, 894. Reliance is also a significant feature of numerous rules in the law of negligence, deceit and restitution. See, e.g., Restatement, Second, Agency §§ 354, 378; Restatement, Second, Torts §§ 323, 537; Restatement of Restitution § 55. In some cases those rules and this Section overlap; in others they provide analogies useful in determining the extent to which enforcement is necessary to avoid injustice.

It is fairly arguable that the enforcement of informal contracts in the action of assumpsit rested historically on justifiable reliance on a promise. Certainly reliance is one of the main bases for enforcement of the half-completed exchange, and the probability of reliance lends support to the enforcement of the executory exchange. See Comments to §§ 72, 75. This Section thus states a basic principle which often renders inquiry unnecessary as to the precise scope of the policy of enforcing bargains. Sections 87-89 state particular applications of the same principle to promises ancillary to bargains, and it also applies in a wide variety of non-commercial situations. See, e.g., § 94. **Illustration:**

1. A, knowing that B is going to college, promises B that A will give him \$ 5,000 on completion of his course. B goes to college, and borrows and spends more than \$ 5,000 for college expenses. When he has nearly completed his course, A notifies him of an intention to revoke the promise. A's promise is binding and B is entitled to payment on completion of the course without regard to whether his performance was "bargained for" under § 71.

*b. Character of reliance protected.* The principle of this Section is flexible. The promise is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. Satisfaction of the latter requirement may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargain and the prevention of unjust enrichment are relevant. Compare Comment to § 72. The force of particular factors varies in different types of cases; thus reliance need not be of substantial character in charitable subscription cases, but must in case of firm offers and guaranties. Compare Subsection (2) with §§ 87, 88. **Illustrations:**

2. A promises B not to foreclose, for a specified time, a mortgage which A holds on B's land. B thereafter makes improvements on the land. A's promise is binding and may be enforced by denial of foreclosure before the time has elapsed.

3. A sues B in a municipal court for damages for personal injuries caused by B's negligence. After the one year statute of limitation has run, B requests A to discontinue the action and start again in the superior court where the action can be consolidated with other actions against B arising out of the same accident. A does so. B's implied promise that no harm to A will result bars B from asserting the statute of limitations as a defense.

4. A has been employed by B for 40 years. B promises to pay A a pension of \$ 200 per month when A retires. A retires and forbears to work elsewhere for several years while B pays the pension. B's promise is binding.

*c. Reliance by third persons.* If a promise is made to one party for the benefit of another, it is often foreseeable that the beneficiary will rely on the promise. Enforcement of the promise in such

cases rests on the same basis and depends on the same factors as in cases of reliance by the promisee. Justifiable reliance by third persons who are not beneficiaries is less likely, but may sometimes reinforce the claim of the promisee or beneficiary. **Illustrations:**

5. A holds a mortgage on B's land. To enable B to obtain a loan, A promises B in writing to release part of the land from the mortgage upon payment of a stated sum. As A contemplated, C lends money to B on a second mortgage, relying on A's promise. The promise is binding and may be enforced by C.

6. A executes and delivers a promissory note to B, a bank, to give B a false appearance of assets, deceive the banking authorities, and enable the bank to continue to operate. After several years B fails and is taken over by C, a representative of B's creditors. A's note is enforceable by C.

7. A and B, husband and wife, are tenants by the entirety of a tract of land. They make an oral promise to B's niece C to give her the tract. B, C and C's husband expend money in building a house on the tract and C and her husband take possession and live there for several years until B dies. The expenditures by B and by C's husband are treated like those by C in determining whether justice requires enforcement of the promise against A.

*d. Partial enforcement.* A promise binding under this section is a contract, and full-scale enforcement by normal remedies is often appropriate. But the same factors which bear on whether any relief should be granted also bear on the character and extent of the remedy. In particular, relief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee's reliance rather than by the terms of the promise. See §§ 84, 89; compare Restatement, Second, Torts § 549 on damages for fraud. Unless there is unjust enrichment of the promisor, damages should not put the promisee in a better position than performance of the promise would have put him. See §§ 344, 349. In the case of a promise to make a gift it would rarely be proper to award consequential damages which would place a greater burden on the promisor than performance would have imposed. **Illustrations:**

8. A applies to B, a distributor of radios manufactured by C, for a "dealer franchise" to sell C's products. Such franchises are revocable at will. B erroneously informs A that C has ac-

cepted the application and will soon award the franchise, that A can proceed to employ salesmen and solicit orders, and that A will receive an initial delivery of at least 30 radios. A expends \$1,150 in preparing to do business, but does not receive the franchise or any radios. B is liable to A for the \$1,150 but not for the lost profit on 30 radios. Compare Restatement, Second, Agency § 329.

9. The facts being otherwise as stated in Illustration 8, B gives A the erroneous information deliberately and with C's approval and requires A to buy the assets of a deceased former dealer and thus discharge C's "moral obligation" to the widow. C is liable to A not only for A's expenses but also for the lost profit on 30 radios.

10. A, who owns and operates a bakery, desires to go into the grocery business. He approaches B, a franchisor of supermarkets. B states to A that for \$18,000 B will establish A in a store. B also advises A to move to another town and buy a small grocery to gain experience. A does so. Later B advises A to sell the grocery, which A does, taking a capital loss and foregoing expected profits from the summer tourist trade. B also advises A to sell his bakery to raise capital for the supermarket franchise, saying "Everything is ready to go. Get your money together and we are set." A sells the bakery taking a capital loss on this sale as well. Still later, B tells A that considerably more than an \$18,000 investment will be needed, and the negotiations between the parties collapse. At the point of collapse many details of the proposed agreement between the parties are unresolved. The assurances from B to A are promises on which B reasonably should have expected A to rely, and A is entitled to his actual losses on the sales of the bakery and grocery and for his moving and temporary living expenses. Since the proposed agreement was never made, however, A is not entitled to lost profits from the sale of the grocery or to his expectation interest in the proposed franchise from B.

11. A is about to buy a house on a hill. Before buying he obtains a promise from B, who owns adjoining land, that B will not build on a particular portion of his lot, where a building would obstruct the view from the house. A then buys the house in reliance on the promise. B's promise is binding, but will be specifically enforced only so long as A and his successors do not permanently terminate the use of the view.

12. A promises to make a gift of a tract of land to B, his son-in-law. B takes possession and lives on the land for 17 years, making valuable improvements. A then dispossesses B, and

specific performance is denied because the proof of the terms of the promise is not sufficiently clear and definite. B is entitled to a lien on the land for the value of the improvements, not exceeding their cost.

*e. Gratuitous promises to procure insurance.* This Section is to be applied with caution to promises to procure insurance. The appropriate remedy for breach of such a promise makes the promisor an insurer, and thus may result in a liability which is very large in relation to the value of the promised service. Often the promise is properly to be construed merely as a promise to use reasonable efforts to procure the insurance, and reliance by the promisee may be unjustified or may be justified only for a short time. Or it may be doubtful whether he did in fact rely. Such difficulties may be removed if the proof of the promise and the reliance are clear, or if the promise is made with some formality, or if part performance or a commercial setting or a potential benefit to the promisor provide a substitute for formality. **Illustrations:**

13. A, a bank, lends money to B on the security of a mortgage on B's new home. The mortgage requires B to insure the property. At the closing of the transaction A promises to arrange for the required insurance, and in reliance on the promise B fails to insure. Six months later the property, still uninsured, is destroyed by fire. The promise is binding.

14. A sells an airplane to B, retaining title to secure payment of the price. After the closing A promises to keep the airplane covered by insurance until B can obtain insurance. B could obtain insurance in three days but makes no effort to do so, and the airplane is destroyed after six days. A is not subject to liability by virtue of the promise.

*f. Charitable subscriptions, marriage settlements, and other gifts.* One of the functions of the doctrine of consideration is to deny enforcement to a promise to make a gift. Such a promise is ordinarily enforced by virtue of the promisee's reliance only if his conduct is

foreseeable and reasonable and involves a definite and substantial change of position which would not have occurred if the promise had not been made. In some cases, however, other policies reinforce the promisee's claim. Thus the promisor might be unjustly enriched if he could reclaim the subject of the promised gift after the promisee has improved it.

Subsection (2) identifies two other classes of cases in which the promisee's claim is similarly reinforced. American courts have traditionally favored charitable subscriptions and marriage settlements, and have found consideration in many cases where the element of exchange was doubtful or nonexistent. Where recovery is rested on reliance in such cases, a probability of reliance is enough, and no effort is made to sort out mixed motives or to consider whether partial enforcement would be appropriate. **Illustrations:**

15. A promises B \$ 5000, knowing that B desires that sum for the purchase of a parcel of land. Induced thereby, B secures without any payment an option to buy the parcel. A then tells B that he withdraws his promise. A's promise is not binding.

16. A orally promises to give her son B a tract of land to live on. As A intended, B gives up a homestead elsewhere, takes possession of the land, lives there for a year and makes substantial improvements. A's promise is binding.

17. A orally promises to pay B, a university, \$ 100,000 in five annual installments for the purposes of its fund-raising campaign then in progress. The promise is confirmed in writing by A's agent, and two annual installments are paid before A dies. The continuance of the fund-raising campaign by B is sufficient reliance to make the promise binding on A and his estate.

18. A and B are engaged to be married. In anticipation of the marriage A and his father C enter into a formal written agreement by which C promises to leave certain property to A by will. A's subsequent marriage to B is sufficient reliance to make the promise binding on C and his estate.

## § 91. Effect of Promises Enumerated in 82-90 When Conditional

If a promise within the terms of § 82-90 is in terms conditional or performable at a future time the promisor is bound thereby, but performance becomes due only upon the occurrence of the condition or upon the arrival of the specified time.

### Illustration:

1. A owes B a debt of \$ 60, but B's claim is barred by the statute of limitations. A promises in a signed writing to pay B in satisfaction of the claim \$ 5 monthly for a year. The promise is binding but B's only right is to the payment of \$ 5 at the end of each month.

## **Section 2-207 and Form Contracts**