

Promises Supported by Consideration

A. Identifying Consideration

Consideration is one of those law school terms that means something different from its everyday language. In modern cases it is rarely litigated, but it is important to understanding what contracts are and what they aren't.

The Restatement provides the following definition of consideration:

§ 71. Requirement of Exchange

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (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.
- (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.
- (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

Authorities often describe an enforceable agreement between two parties as one demonstrating a “bargained-for exchange.” This occurs when each side promises or performs in exchange for a return promise or performance provided by the other side. Note the emphasis on the exchange and less on a process of bargaining. Pay attention in the future cases to whether consideration requires dickering over terms (as in, “I’ll pay you \$10 for that ball.” “No, I’ll only take \$15.” “How about \$12?” “Fine, it’s a deal!”). Consideration does not require that kind of “bargaining,” as the term is colloquially understood. Rather, it is the exchange of money for the ball that is the emphasis, as opposed to, say, a gift or, as we will see in another module, illusory (empty) or indefinite (uncertain) promises.

As you read these cases, think about what constitutes consideration, and how you would define it in your own words.

A question to think about for the future: For a contract to be formed, courts require both agreement and consideration. If we knew the parties really agreed to the terms of the promise, is consideration also necessary? What does consideration add to the analysis of whether a set of promises should be enforceable?

Dougherty v. Salt

227 N.Y. 200 (N.Y. Court of Appeals 1919)

Appeal from a judgment entered June 20, 1918, upon an order of the Appellate Division of the Supreme Court in the second judicial department, which reversed a judgment in favor of defendant entered upon an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and directing a dismissal of the complaint and reinstated said verdict.

CARDOZO, J.

The plaintiff, a boy of eight years, received from his aunt, the defendant's testatrix, a promissory note for \$3,000 payable at her death or before. Use was made of a printed form, which contains the words "value received." How the note came to be given, was explained by the boy's guardian, who was a witness for his ward. The aunt was visiting her nephew. "When she saw Charley coming in, she said 'Isn't he a nice boy?' I answered her, yes, that he is getting along very nice, and getting along nice in school, and I showed where he had progressed in school, having good reports, and so forth, and she told me that she was going to take care of that child, that she loved him very much. I said, 'I know you do, Tillie, but your taking care of the child will be done probably like your brother and sister done, take it out in talk.' She said: 'I don't intend to take it out in talk, I would like to take care of him now.' I said, 'Well, that is up to you.' She said, 'Why can't I make out a note to him?' I said, 'You can, if you wish to.' She said, 'Would that be right?' And I said, 'I do not know, but I guess it would; I do not know why it would not.' And she said, 'Well, will you make out a note for me?' I said, 'Yes, if you wish me to' and she said, 'Well, I wish you would.'" A blank was then produced, filled out, and signed. The aunt handed the note to her nephew with these words, "You have always done for me, and I have signed this note for you. Now, do not lose it. Some day it will be valuable."

The trial judge submitted to the jury the question whether there was any consideration for the promised payment. Afterwards, he set aside the verdict in favor of the plaintiff, and dismissed

the complaint. The Appellate Division, by a divided court, reversed the judgment of dismissal, and reinstated the verdict on the ground that the note was sufficient evidence of consideration.

We reach a different conclusion. The inference of consideration to be drawn from the form of the note has been so overcome and rebutted as to leave no question for a jury. This is not a case where witnesses summoned by the defendant and friendly to the defendant's cause, supply the testimony in disproof of value (*Strickland v. Henry*, 175 N. Y. 372). This is a case where the testimony in disproof of value comes from the plaintiff's own witness, speaking at the plaintiff's instance. The transaction thus revealed admits of one interpretation, and one only. The note was the voluntary and unenforcible promise of an executory gift (*Harris v. Clark*, 3 N. Y. 93; *Holmes v. Roper*, 141 N. Y. 64, 66). This child of eight was not a creditor, nor dealt with as one. The aunt was not paying a debt. She was conferring a bounty (*Fink v. Cox*, 18 Johns. 145). The promise was neither offered nor accepted with any other purpose. "Nothing is consideration that is not regarded as such by both parties" (*Philpot v. Gruninger*, 14 Wall. 570, 577; *Fire Ins. Assn. v. Wickham*, 141 U. S. 564, 579; *Wisconsin & M. Ry. Co. v. Powers*, 191 U. S. 379, 386; *DeCicco v. Schweiser*, 221 N. Y. 431, 438). A note so given is not made for "value received," however its maker may have labeled it. The formula of the printed blank becomes, in the light of the conceded facts, a mere erroneous conclusion, which cannot overcome the inconsistent conclusion of the law (*Blanshan v. Russell*, 32 App. Div. 103; *affd.*, on opinion below, 161 N. Y. 629; *Kramer v. Kramer*, 181 N. Y. 477; *Bruyn v. Russell*, 52 Hun, 17). The plaintiff, through his own witness, has explained the genesis of the promise, and consideration has been disproved (*Neg. Instr. Law*, see. 54; *Consol. Laws*, chap. 43).

We hold, therefore, that the verdict of the jury was contrary to law, and that the trial judge was right in setting it aside.

Hamer v. Sidway

27 N.E. 256 (N.Y. Court of Appeals 1891)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made July 1, 1890, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granted a new trial.

This action was brought upon an alleged contract.

The plaintiff presented a claim to the executor of William E. Story, Sr., for \$5,000 and interest from the 6th day of February, 1875. She acquired it through several mesne assignments from William E. Story, 2d. The claim being rejected by the executor, this action was brought. It appears that William E. Story, Sr., was the uncle of William E. Story, 2d; that at the celebration

of the golden wedding of Samuel Story and wife, father and mother of William E. Story, Sr., on the 20th day of March, 1869, in the presence of the family and invited guests he promised his nephew that if he would refrain from drinking, using tobacco, swearing and playing cards or billiards for money until he became twenty-one years of age he would pay him a sum of \$5,000. The nephew assented thereto and fully performed the conditions inducing the promise. When the nephew arrived at the age of twenty-one years and on the 31st day of January, 1875, he wrote to his uncle informing him that he had performed his part of the agreement and had thereby become entitled to the sum of \$5,000. The uncle received the letter and a few days later and on the sixth of February, he wrote and mailed to his nephew the following letter:

‘BUFFALO, Feb. 6, 1875.

‘W. E. STORY, Jr.:

‘DEAR NEPHEW—Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have five thousand dollars as I promised you. I had the money in the bank the day you was 21 years old that I intend for you, and you shall have the money certain. Now, Willie I do not intend to interfere with this money in any way till I think you are capable of taking care of it and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. The first five thousand dollars that I got together cost me a heap of hard work. You would hardly believe me when I tell you that to obtain this I shoved a jackplane many a day, butchered three or four years, then came to this city, and after three months’ perseverance I obtained a situation in a grocery store. I opened this store early, closed late, slept in the fourth story of the building in a room 30 by 40 feet and not a human being in the building but myself. All this I done to live as cheap as I could to save something. I don’t want you to take up with this kind of fare. I was here in the cholera season ’49 and ’52 and the deaths averaged 80 to 125 daily and plenty of small-pox. I wanted to go home, but Mr. Fisk, the gentleman I was working for, told me if I left then, after it got healthy he probably would not want me. I stayed. All the money I have saved I know just how I got it. It did not come to me in any mysterious way, and the reason I speak of this is that money got in this way stops longer with a fellow that gets it with hard knocks than it does when he finds it. Willie, you are 21 and you have many a thing to learn yet. This

money you have earned much easier than I did besides acquiring good habits at the same time and you are quite welcome to the money; hope you will make good use of it. I was ten long years getting this together after I was your age. Now, hoping this will be satisfactory, I stop. One thing more. Twenty-one years ago I bought you 15 sheep. These sheep were put out to double every four years. I kept track of them the first eight years; I have not heard much about them since. Your father and grandfather promised me that they would look after them till you were of age. Have they done so? I hope they have. By this time you have between five and six hundred sheep, worth a nice little income this spring. Willie, I have said much more than I expected to; hope you can make out what I have written. To-day is the seventeenth day that I have not been out of my room, and have had the doctor as many days. Am a little better to-day; think I will get out next week. You need not mention to father, as he always worries about small matters.

Truly Yours,

‘W. E. STORY.

‘P. S.—You can consider this money on interest.’

The nephew received the letter and thereafter consented that the money should remain with his uncle in accordance with the terms and conditions of the letters. The uncle died on the 29th day of January, 1887, without having paid over to his nephew any portion of the said \$5,000 and interest.

PARKER, J.

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.’

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

'In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise.' (Parsons on Contracts, 444.)

Pollock, in his work on contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, says: 'The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first.'

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 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, and if this action were founded on that contract it would be barred by the Statute of Limitations which has been pleaded, but on that date the nephew wrote to his uncle as follows:

‘DEAR UNCLE—I am now 21 years old to-day, and I am now my own boss, and I believe, according to agreement, that there is due me \$5,000. I have lived up to the contract to the letter in every sense of the word.’

A few days later, and on February sixth, the uncle replied, and so far as it is material to this controversy, the reply is as follows:

‘DEAR NEPHEW—Your letter of the 31st ult. came to hand all right saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have \$5,000 as I promised you. I had the money in the bank the day you was 21 years old that I intended for you, and you shall have the money certain. Now, Willie, I don’t intend to interfere with this money in any way until I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. * * * This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. * * * W. E. STORY.

‘P. S.—You can consider this money on interest.’

The trial court found as a fact that ‘said letter was received by said William E. Story, 2d, who thereafter consented that said money should remain with the said William E. Story in accordance with the terms and conditions of said letter.’ And further, ‘That afterwards, on the first day of March, 1877, with the knowledge and consent of his said uncle, he duly sold, transferred and assigned all his right, title and interest in and to said sum of \$5,000 to his wife Libbie H. Story, who thereafter duly sold, transferred and assigned the same to the plaintiff in this action.’

We must now consider the effect of the letter, and the nephew’s assent thereto. Were the relations of the parties thereafter that of debtor and creditor simply, or that of trustee and cestui que trust? If the former, then this action is not maintainable, because barred by lapse of time. If the latter, the result must be otherwise. No particular expressions are necessary to create a trust. Any language clearly showing the settler’s intention is sufficient if the property and disposition of it are definitely stated. (Lewin on Trusts, 55.)

A person in the legal possession of money or property acknowledging a trust with the assent of the cestui que trust, becomes from that time a trustee if the acknowledgment be founded on a valuable consideration. His antecedent relation to the subject, whatever it may have been, no longer controls. 2 Story’s Eq. § 972. If before a declaration of trust a party be a mere debtor, a subsequent agreement recognizing the fund as already in his hands and stipulating for its investment on the creditor’s account will have the effect to create a trust. *Day v. Roth*, 18 N. Y. 448 (1858).

It is essential that the letter interpreted in the light of surrounding circumstances must show an intention on the part of the uncle to become a trustee before he will be held to have become such; but in an effort to ascertain the construction which should be given to it, we are also to observe the rule that the language of the promisor is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. *White v. Hoyt*, 73 N. Y. 505, 511 (1878). At the time the uncle wrote the letter he was indebted to his nephew in the sum of \$5,000, and payment had been requested. The uncle recognizing the indebtedness, wrote the nephew that he would keep the money until he deemed him capable of taking care of it. He did not say ‘I will pay you at some other time,’ or use language that would indicate that the relation of debtor and creditor would continue. On the contrary, his language indicated that he had set apart the money the nephew had ‘earned’ for him so that when he should be capable of taking care of it he should receive it with interest. He said: ‘I had the money in the bank the day you were 21 years old that I intended for you and you shall have the money certain. ‘That he had set apart the money is further evidenced by the next sentence: ‘Now, Willie, I don’t intend to interfere with this money in any way until I think you are capable of taking care of

it.‘ Certainly, the uncle must have intended that his nephew should understand that the promise not ‘to interfere with this money‘ referred to the money in the bank which he declared was not only there when the nephew became 21 years old, but was intended for him. True, he did not use the word ‘trust,‘ or state that the money was deposited in the name of William E. Story, 2d, or in his own name in trust for him, but the language used must have been intended to assure the nephew that his money had been set apart for him, to be kept without interference until he should be capable of taking care of it, for the uncle said in substance and in effect: ‘This money you have earned much easier than I did * * * you are quite welcome to. I had it in the bank the day you were 21 years old and don’t intend to interfere with it in any way until I think you are capable of taking care of it and the sooner that time comes the better it will please me.’ In this declaration there is not lacking a single element necessary for the creation of a valid trust, and to that declaration the nephew assented.

The learned judge who wrote the opinion of the General Term, seems to have taken the view that the trust was executed during the life-time of defendant’s testator by payment to the nephew, but as it does not appear from the order that the judgment was reversed on the facts, we must assume the facts to be as found by the trial court, and those facts support its judgment.

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

All concur.

Order reversed and judgment of Special Term affirmed.

Notes and Questions

1. Was the decedent, William Story, Sr., serious about his promise when he made it? What facts lead you to your answer?
2. Why did the court in *Hamer v. Sidway* enforce the promise?
3. How does the promise in *Hamer* differ from the promise in *Dougherty*? What does that difference tell you about what makes a promise enforceable at law?
4. This case describes an apparent contract dispute between an uncle, William Story, and his nephew, young Willie Story. Who is Louisa Hamer? Who is Franklin Sidway?

5. Read the text of Restatement (Second) of Contracts §§ 71, 79, 81, as well as the comments and illustrations that follow them. Do these provisions of the Restatement provide further clarity about what makes a contract enforceable, and how to distinguish enforceable from unenforceable promises?
6. Read the following excerpt, from Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–801 (1941).

The Evidentiary Function.—The most obvious function of a legal formality is, to use Austin’s words, that of providing “evidence of the existence and purport of the contract, in case of controversy.” The need for evidentiary security may be satisfied in a variety of ways: by requiring a writing, or attestation, or the certification of a notary. It may even be satisfied, to some extent, by such a device as the Roman stipulatio, which compelled an oral spelling out of the promise in a manner sufficiently ceremonious to impress its terms on participants and possible bystanders.

The Cautionary Function. A formality may also perform a cautionary or deterrent function by acting as a check against inconsiderate action. The seal in its original form fulfilled this purpose remarkably well. The affixing and impressing of a wax wafer-symbol in the popular mind of legalism and weightiness—was an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future. To a less extent any requirement of a writing, of course, serves the same purpose, as do requirements of attestation, notarization, etc.

The Channeling Function. Though most discussions of the purposes served by formalities go no further than the analysis just presented, this analysis stops short of recognizing one of the most important functions of form. That a legal formality may perform a function not yet described can be shown by the seal. The seal not only insures a satisfactory memorial of the promise and induces deliberation in the making of it. It serves also to mark or signalize the enforceable promise; it furnishes a simple and external test of enforceability. This function of form Ihering described as “the facilitation of judicial diagnosis,” and he employed the analogy of coinage in explaining it.

Form is for a legal transaction what the stamp is for a coin. Just as the stamp of the coin relieves us from the necessity of testing the metallic content and weight-in short, the value of the coin (a test which we could not avoid if uncoined metal were offered to us in payment), in the same way legal formalities relieve the judge of an inquiry whether a legal transaction was intended, and-in case different forms are fixed for different legal transactions which was intended!

Does Fuller's explanation of the roles fulfilled by consideration in contract law help you distinguish enforceable from unenforceable promises?

Military College Co. v. Brooks

107 N.J.L. 28, 147 A. 488 (N.J. Supreme Court 1929)

PARKER, Judge

The litigation arises out of the placing of defendant's son at the military school conducted by the plaintiff 1926-27 at a fee of \$1,375 for the year, payable one-half at entrance, and the balance six months thereafter. The first half was paid, and the counterclaim relates to failure of consideration for that payment, in that the young man was summarily, and, as claimed, wrongfully, dismissed before the expiration of the first semester, payment for which should, as set up in the counterclaim, be reduced proportionately. After the dismissal, and when the second half of the annual fee would come due in ordinary course, plaintiff made demand on defendant for it, though his son had not been taken back, and payment was refused, whereupon there was correspondence in which defendant disclaimed liability, and plaintiff threatened suit. The personal interview leading up to the original note of which the note in suit is a renewal, is thus set forth in defendant's own affidavit used on the motion for summary judgment:

'That after March 14, 1927, I went to Pennsylvania Military College, at Chester, Pa., to again discuss their bill. They insisted on payment of the balance due at once or would bring a suit against me. That at this time I had financial difficulties and rather than have a law suit which I thought would greatly injure my credit I gave them a note for \$900.00 which was the balance they claimed to be due for tuition and certain miscellaneous military paraphernalia and gave to me a statement which I have which is dated March 22, 1927, and which is ready to be produced at my trial. I renewed this note later which renewal note for \$927.00 is the one upon which the plaintiff is bringing suit in this case.'

Defendant does not seem to deny that the contract was for the full school year. If his son was rightfully dismissed, it is at least arguable that the full year's fee would be nevertheless payable. Defendant claimed the dismissal was wrongful, and plaintiff that it was rightful; and this raised a legitimate dispute of fact and perhaps of law also as to defendant's liability. In this situation, defendant being so situated financially that a lawsuit, whatever its result, would in his judgment be disastrous to him, elected to buy his peace for the time being by giving the first note, which postponed any such suit till the maturity of that note, not to mention that by a renewal or renewals it was further postponed till February 18, 1928, or nearly a year. This, under our decisions, was adequate consideration to support the note.... In *Grandin v. Grandin*, 49 N. J. Law, 508, 9 A. 756, 759, 60 Am. Rep. 642, it is held that 'the compromise of a disputed claim made bona fide is a good consideration for a promise, whether the claim be in suit, or litigation has not been actually commenced, even though it should ultimately appear that the claim was wholly unfounded; the detriment to the party consenting to a compromise arising from the alteration in his position forms the real consideration which gives validity to the promise. The only elements necessary to a valid agreement of compromise are the reality of the claim made, and the bona fides of the compromise. * * * The court will not inquire into the adequacy or inadequacy of the consideration of a compromise fairly and deliberately made.' ... In *Phillips v. Pullen*, 50 N. J. Law, 439, 14 A. 222, in the Court of Errors and Appeals, an action for crim. con. was pending and settled by an agreement to pay a stipulated sum in satisfaction of all damages. In a suit on the agreement, the legality of the consideration was upheld, the court remarking, page 444, of 50 N. J. Law, 14 A. 224: 'By the agreement of settlement, Pullen obtained a substantial advantage. * * *' It was added, on page 445, 446, of 50 N. J. Law, 14 A. 222, that, if the suit was mere blackmail, the agreement would not be enforceable, but nothing short of fraud would affect its validity at law. There is no suggestion of any fraud or blackmail in the present case; it is simply the common case of suit on a claim presumably honestly made, even if actually groundless, and honestly disputed, being put off for the benefit of the debtor by a positive agreement to pay at the deferred date. Such an agreement has a lawful consideration, and will be enforced....

The judgment under review will therefore be affirmed.

Notes and Questions

1. What was Brooks' benefit of the bargain? What was the benefit of the bargain for Military College?

2. Restatement (Second) of Contracts, § 74, describes when forbearing the right to sue can constitute consideration:

§ 74. Settlement of Claims

(1) Forbearance to assert or the surrender of a claim or defense which proves to be invalid is not consideration unless

(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.

(2) The execution of a written instrument surrendering a claim or defense by one who is under no duty to execute it is consideration if the execution of the written instrument is bargained for even though he is not asserting the claim or defense and believes that no valid claim or defense exists.

Illustrations:

1. A, a shipowner, has a legal duty to provide maintenance and care for B, a seaman. B honestly but unreasonably claims that adequate care is not available in a free public hospital and that he is entitled to treatment by a private physician. B's forbearance to press this claim is consideration for A's promise to be responsible for the consequences of any improper treatment in the public hospital.

2. A, knowing that he has no legal basis for complaint, frequently complains to B, his father, that B has made more gifts to B's other children than to A. B promises that if A will cease complaining, B will forgive a debt owed by A to B. A's forbearance to assert his claim of discrimination is not consideration for B's promise.

B. Consideration and Conditional Gifts

Kirksey v. Kirksey

8 Ala. 131 (Alabama Supreme Court 1845)

Assumpsit by the defendant, against the plaintiff in error. The question is presented in this Court, upon a case agreed, which shows the following facts:

The plaintiff was the wife of defendant's brother, but had for some time been a widow, and had several children. In 1840, the plaintiff resided on public land, under a contract of lease, she had held over, and was comfortably settled, and would have attempted to secure the land she lived on. The defendant resided in Talladega county, some sixty, or seventy miles off. On the 10th October, 1840, he wrote to her the following letter:

“Dear sister Antillico – Much to my mortification, I heard, that brother Henry was dead, and one of his children. I know that your situation is one of grief, and difficulty. You had a bad chance before, but a great deal worse now. I should like to come and see you, but cannot with convenience at present. * * * I do not know whether you have a preference on the place you live on, or not. If you had, I would advise you to obtain your preference, and sell the land and quit the country, as I understand it is very unhealthy, and I know society is very bad. If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend; and on the account of your situation, and that of your family, I feel like I want you and the children to do well.”

Within a month or two after the receipt of this letter, the plaintiff abandoned her possession, without disposing of it, and removed with her family, to the residence of the defendant, who put her in comfortable houses, and gave her land to cultivate for two years, at the end of which time he notified her to remove, and put her in a house, not comfortable, in the woods, which he afterwards required her to leave.

A verdict being found for the plaintiff, for two hundred dollars, the above facts were agreed, and if they will sustain the action, the judgment is to be affirmed, otherwise it is to be reversed.

ORMOND, J. (dissenting)*

The inclination of my mind, is, that the loss and inconvenience, which the plaintiff sustained in breaking up, and moving to the defendant's, a distance of sixty miles, is a sufficient consideration to support the promise, to furnish her with a house, and land to cultivate, until she could raise her family. My brothers, however, think that the promise on the part of the defendant, was a mere gratuity, and that an action will not lie for its breach. The judgment of the Court below must therefore be reversed, pursuant to the agreement of the parties.

Notes and Questions

1. This case is surprisingly short, but it has cut a wide swath across contract law over the last two centuries. How did the court interpret the words, "If you will come down and see me, I will let you have a place to raise your family"? Did the court view this as an offer for a mutual exchange or as a condition attached to a gratuitous promise?
2. What elements—such as the wording, context, or indications of intent—make the statement seem more like a gift or more like a proposal for a bargain? If you were representing Isaac Kirksey, what aspects or portions of the letter would you emphasize? How would your approach differ if you were representing Angelico Kirksey?

Professor Samuel Williston famously used the following hypothetical to distinguish contractual consideration from a conditional gift:

1 Samuel Williston, *The Law of Contracts* § 112 (1922)

If a benevolent man says to a tramp: "If you go around the corner to the clothing shop there, you may purchase an overcoat on my credit," no reasonable person would understand that the short walk was requested as consideration for the promise, but that in the event of the tramp going to the shop the promisor would make him a gift. Yet the walk to the shop is in its nature capable of being consideration. It is a legal detriment to the tramp to make the walk, and the only reason why the walk is not consideration is because on a reasonable construction it must

* The only opinion comes from Justice Ormond, who disagrees with his fellow justices. The reporter does not style his observations as a dissent, but we find it more accurate to style it as such. Eds.

be held that the walk was not requested as the price of the promise, but was merely a condition of a gratuitous promise.

It is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which construction of the promise is more reasonable is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration. On the other hand, if, as in the case of the tramp stated above, the happening of the condition will be not only of no benefit to the promisor but is obviously merely for the purpose of enabling the promisee to receive a gift, the happening of the event on which the promise is conditional, though brought about by the promisee in reliance on the promise, will not properly be construed as consideration. In case of doubt where the promisee has incurred a detriment on the faith of the promise, courts will naturally be loath to regard the promise as a mere gratuity and the detriment incurred as merely a condition. But in some cases it is so clear that a conditional promise was intended even though the promisee has incurred a detriment, the promise has been held unenforceable.

Notes and Questions

1. What do you make of Professor Williston's tramp hypothetical? Evidence suggests Williston's hypo was inspired by *Kirksey*. Is the hypo a good analogy to *Kirksey*? If so, why? If not, why not?
2. Modifying Williston's tramp hypothetical, should the following promise be enforceable? Halverson is hosting a party at a restaurant with a street-facing entrance. She expects celebrities to attend and has hired a photographer to document the event. Wooley is an unhoused person who often camps out in front of the restaurant entrance. Halverson would prefer not to have Wooley appear in the photographs. She tells Wooley, "If you go around the corner to the clothing shop there, you may purchase an overcoat on my credit."
3. A father tells his daughter, "If you meet me at Macy's tomorrow at noon, I will buy you anything you like at the store, up to \$100." Under what circumstances would this promise be enforceable? What circumstances might render it unenforceable?

Langer v. Superior Steel Corp.

105 Pa.Super. 579 (Superior Court of Pennsylvania 1932)

BALDRIGE, J.

This is an action of assumpsit to recover damages for breach of a contract. The court below sustained questions of law raised by defendant, and entered judgment in its favor.

The plaintiff alleges that he is entitled to recover certain monthly payments provided for in the following letter:

August 31, 1927.

Mr. Wm. F. Langer,

Dear Sir:

As you are retiring from active duty with this company, as superintendent of the annealing department, on August 31st, we hope that it will give you some pleasure to receive this official letter of commendation for your long and faithful service with the Superior Steel Corporation.

The Directors have decided that you will receive a pension of \$100 per month as long as you live and preserve your present attitude of loyalty to the company and its officers and are not employed in any competitive occupation. We sincerely hope that you will live long to enjoy it and that this and the other evidences of the esteem in which you are held by your fellow employees and which you will today receive with this letter, will please you as much as it does us to bestow them.

Cordially yours,

(Signed) Frank R. Frost, President.

The defendant paid the sum of \$100 a month for approximately four years when the plaintiff was notified that the company no longer intended to continue the payments.

The issue raised by the affidavit of defense is whether the letter created a gratuitous promise or an enforceable contract. It is frequently a matter of great difficulty to differentiate between promises creating legal obligations and mere gratuitous agreements. Each case depends to a degree upon its peculiar facts and circumstances. Was this promise supported by a sufficient consideration, or was it but a condition attached to a gift? If a contract was created, it was

based on a consideration, and must have been the result of an agreement bargained for in exchange for a promise ... It was held... that “a test of good consideration is whether the promisee, at the instance of the promisor, has done, forborne or undertaken to do anything real, or whether he has suffered any detriment or whether in return for the promise he has done something that he was not bound to do or has promised to do some act or has abstained from doing something.” ... good consideration exists if one refrains from doing anything that he has a right to do, “whether there is any actual loss or detriment to him or actual benefit to the promisor or not.”

* * *

The plaintiff, in his statement, which must be admitted as true in considering the statutory demurrer filed by defendant, alleges that he refrained from seeking employment with any competitive company, and that he complied with the terms of the agreement. By so doing, has he sustained any detriment? Was his forbearance sufficient to support a good consideration?...

It is reasonable to conclude that it is to the advantage of the defendant if the plaintiff, who had been employed for a long period of time as its superintendent in the annealing department, and who, undoubtedly, had knowledge of the methods used by the employer, is not employed by a competitive company; otherwise, such a stipulation would have been unnecessary. That must have been the inducing reason for inserting that provision. There is nothing appearing of record, except the condition imposed by the defendant, that would have prevented this man of skill and experience from seeking employment elsewhere. By receiving the monthly payments, he impliedly accepted the conditions imposed and was thus restrained from doing that which he had a right to do. This was a sufficient consideration to support a contract.

The appellee refers to *Kirksey v. Kirksey* ... In that case ... there was no benefit to be derived by the promisor, as in the case at bar, and therefore a good consideration was lacking...

Judgment is reversed, and the defendant is hereby given permission to file an affidavit of defense to the merits of the plaintiff's claim.

Notes and Questions

1. Compare the promises in *Hamer*, *Kirksey*, and *Langer*. Can you explain what makes the promises in *Hamer* and *Langer* enforceable but not the promise in *Kirksey*? What do those differences tell you about what makes a promise enforceable at law?

2. For a general perspective on the distinction between enforceable contracts and gifts, see E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576 (1969). In this article, the author quotes the following excerpt from Adam Smith's *The Wealth of Nations*:

[M]an has almost constant occasion for the help of his brethren, and it is vain for him to expect it from their benevolences only. He will be more likely to prevail if he can interest their self-love in his favour, and shew them that it is for their own advantage to do for him what he requires of them. Whoever offers to another a bargain of any kind, proposes to do this. Give me that which I want, and you shall have this which you want, is the meaning of every such offer; and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages. Nobody but a beggar chooses to depend chiefly upon the benevolence of his fellow citizens.

