III. THE ILLUSORY PROMISE

WOOD v. LUCY, LADY DUFF-GORDON
Court of Appeals of New York, 1917
222 N.Y. 88, 118 N.E. 214

CARDOZO, J. The defendant styles herself "a creator of fashions." Her favor helps a sale. Manufacturers of dresses, millinery, and like articles are glad to pay for a certificate of her approval. The things which she designs, fabrics, parasols, and what not, have a new value in the public mind when issued in her name. She employed the plaintiff to help her to turn this vogue into money. He was to have the exclusive right, subject always to her approval, to place her indorsements on the designs of others. He was also to have the exclusive right to place her own designs on sale, or to license others to market them. In return she was to have one-half of "all profits and revenues" derived from any contracts he might make. The exclusive right was to last at least one year from April 1, 1915, and thereafter from year to year unless terminated by notice of 90 days. The plaintiff says that he kept the contract on his part, and that the defendant broke it. She placed her indorsement on fabrics, dresses, and millinery without his knowledge, and withheld the profits. He sues her for the damages, and the case comes here on demurrer.

The agreement of employment is signed by both parties. It has a wealth of recitals. The defendant insists, however, that it lacks the elements of a contract. She says that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed (Scott, J., in McCall Co. v. Wright, 133 App. Div. 62, 117 N.Y. Supp. 775; Moran v. Standard Oil Co., 211 N.Y. 187, 198, 105 N.E. 217). If that is so, there is a contract.

The implication of a promise here finds support in many circumstances. The defendant gave an exclusive privilege. She was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff. The acceptance of the exclusive agency was an assumption of its duties. Phoenix Hermetic Co. v. Filtrine Mfg. Co., 164 App. Div. 424, 150 N.Y. Supp. 193; W. G. Taylor Co. v. Bannerman, 120 Wis. 189, 97 N.W. 918; Mueller v. Mineral Spring Co., 88 Mich. 390, 50 N.W. 319. We are not to suppose that one party was to be placed at the mercy of the other. . . . Many other terms of the agreement point the same way. We are told at the outset by way of recital that: "The said Otis F. Wood possesses a business organization adapted to the

placing of such indorsements as the said Lucy, Lady Duff-Gordon, has approved."

The implication is that the plaintiff's business organization will be used for the purpose for which it is adapted. But the terms of the defendant's compensation are even more significant. Her sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the plaintiff's efforts. Unless he gave his efforts, she could never get anything. Without an implied promise, the transaction cannot have such business "efficacy, as both parties must have intended that at all events it should have." Bowen, L.J., in the Moorcock, 14 P.D. 64, 68. But the contract does not stop there. The plaintiff goes on to promise that he will account monthly for all moneys received by him, and that he will take out all such patents and copyrights and trade-marks as may in his judgment be necessary to protect the rights and articles affected by the agreement. It is true, of course, as the Appellate Division has said, that if he was under no duty to try to market designs or to place certificates of indorsement, his promise to account for profits or take out copyrights would be valueless. But in determining the intention of the parties the promise has a value. It helps to enforce the conclusion that the plaintiff had some duties. His promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly was a promise to use reasonable efforts to bring profits and revenues into existence. For this conclusion the authorities are ample. . . .

The judgment of the Appellate Division should be reversed, and the order of the Special Term affirmed, with costs in the Appellate Division and in this court.

CUDDEBACK, MCLAUGHLIN, and ANDREWS, JJ., concur. HISCOCK, C.J., and CHASE and CRANER, JJ., dissent.

Order reversed, etc.

NOTE

Had Cardozo decided the other way, Karl Llewellyn suggested that the facts might have been stated very differently. Llewellyn, A Lecture on Appellate Advocacy, 29 U. Chi. L. Rev. 627, 637-638 (1962):

> The plaintiff in this action rests his case upon his own carefully prepared form agreement, which has as its first essence his own omission of any expression whatsoever of any obligation of any kind on the part of this same plaintiff. We thus have the familiar situation of a venture in which one party, here the defendant, has an asset, with what is, in advance, of purely speculative value. The other party, the present plaintiff, who drew the agreement, is a marketer eager for profit, but chary of risk. The legal question presented is whether the plaintiff, while carefully avoiding all risk in the event of failure, can nevertheless claim full profit in the event that the market may prove favorable in its response. The law of consideration joins with the principles of business decency in giving the answer. And the answer is no.

SYLVAN CREST SAND & GRAVEL CO. v. UNITED STATES
United States Court of Appeals, Second Circuit, 1945
150 F.2d 642

SWAN, Circuit Judge. This is an action for damages for breach of four alleged contracts under each of which the plaintiff was to deliver trap rock to an airport project "as required" and in accordance with delivery instructions to be given by the defendant. The breach alleged was the defendant's refusal to request or accept delivery within a reasonable time after the date of the contracts, thereby depriving the plaintiff of profits it would have made in the amount of $10,000. The action was commenced in the District Court, federal jurisdiction resting on 28 U.S.C.A. §41(20). Upon the pleadings, consisting of complaint, answer and reply, the defendant moved to dismiss the action for failure of the complaint to state a claim or, in the alternative, to grant summary judgment for the defendant on the ground that no genuine issue exists as to any material fact. The contracts in suit were introduced as exhibits at the hearing on the motion. Summary judgment for the defendant was granted on the theory that the defendant's reservation of an unrestricted power of cancellation caused the alleged contracts to be wholly illusory as binding obligations. The plaintiff has appealed.

The plaintiff owned and operated a trap rock quarry in Trumbull, Conn. Through the Treasury Department, acting by its State Procurement Office in Connecticut, the United States invited bids on trap rock needed for the Mollison Airport, Bridgeport, Conn. The plaintiff submitted four bids for different sized screenings of trap rock and each bid was accepted by the Assistant State Procurement Officer on June 29, 1937. The four documents are substantially alike and it will suffice to describe one of them. It is a printed government form, with the blank spaces filled in in typewriting, consisting of a single sheet bearing the heading:

Invitation, Bid, and Acceptance
(Short Form Contract)

Below the heading, under the subheadings, follow in order the "Invitation," the "Bid," and the "Acceptance by the Government." The Invitation, signed by a State Procurement Officer, states that "Sealed bids in triplicate, subject to the conditions on the reverse hereof, will be received at this office ... for furnishing supplies ... for delivery at WP 2752—Mollison Airport, Bridgeport, Ct." Then come typed provisions which, so far as material, are as follows:

> Item No. 1. ½" Trap Rock to pass the following screening test ... approx. 4,000 tons, unit price $2.00 amount $8,000. To be delivered to project as required. Delivery to start immediately. Communicate with W. J. Scott, Supt. W.P.A. Branch Office, 147 Canon Street, Bridgeport, Ct., for definite delivery instructions. Cancellation by the Procurement Division may be effected at any time.

The Ct tries to interpret this statement ↘

The Bid, signed by the plaintiff, provides that

> In compliance with the above invitation for bids, and subject to all of the conditions thereof, the undersigned offers, and agrees, if this bid be accepted ... to furnish any or all of the items upon which prices are quoted, at the prices set opposite each item, delivered at the point(s) as specified. ...

The Acceptance, besides its date and the signature of an Assistant State Procurement Officer, contains only the words "Accepted as to items numbered 1." The printing on the reverse side of the sheet under the heading "Conditions" and "Instructions to Contracting Officers" clearly indicates that the parties supposed they were entering into an enforceable contract. For example, Condition 3 states that "in case of default of the contractor" the government may procure the articles from other sources and hold the contractor liable for any excess in cost; and Condition 4 provides that "if the contractor refuses or fails to make deliveries ... within the time specified ... the Government may by written notice terminate the right of the contractor to proceed with deliveries. ..." The Instructions to Contracting Officers also presupposes the making of a valid contract; No. 2 reads:

> Although this form meets the requirements of a formal contract (R.S. 3744), if the execution of a formal contract with bond is contemplated, U.S. Standard Forms 31 and 32 should be used.

No one can read the document as a whole without concluding that the parties intended a contract to result from the Bid and the Government's Acceptance. If the United States did not so intend, it certainly set a skillful trap for unwary bidders. No such purpose should be attributed to the government. See United States v. Purcell Envelope Co., 249 U.S. 313, 318. In construing the document the presumption should be indulged that both parties were acting in good faith.

Although the Acceptance contains no promissory words, it is conceded that a promise by the defendant to pay the stated price for rock delivered is to be implied. Since no precise time for delivery was specified, the implication is that delivery within a reasonable time was contemplated. Allegheny Valley Brick Co. v. C. W. Raymond, Co., 2 Cir., 219 F. 477, 480; Frankfurt-Barnett v. William Prym Co., 2 Cir., 237 F. 21, 25. This is corroborated by the express provision that the rock was "to be delivered to the project as required. Delivery to start immediately." There is also to be implied a promise to give delivery instructions; nothing in the language of the contracts indicates that performance by the plaintiff was to be conditional upon the exercise of the defendant's discretion in giving such instructions. A more reasonable interpretation is that the defendant was placed under an obligation to give instructions for delivery from time to time when trap rock was required at the project. Such were the duties of the defendant, unless the cancellation clause precludes such a construction of the document.

Beyond question the plaintiff made a promise to deliver rock at a stated price; and if the United States were suing for its breach the question would be whether the "acceptance" by the United States operated as a sufficient consideration to make the plaintiff's promise binding. Since the United States is the defendant the question is whether it made any promise that has been broken. Its "acceptance" should be interpreted as a reasonable business man would have understood it. Surely it would not have been understood thus: "We accept your offer and bind you to your promise to deliver, but we do not promise either to take the rock or pay the price." The reservation of a power to effect cancellation at any time meant something different from this. We believe that the reasonable interpretation of the document is as follows: "We accept your offer to deliver within a reasonable time, and we promise to take the rock and pay the price unless we give you notice of cancellation within a reasonable time." Only on such an interpretation is the United States justified in expecting the plaintiff to prepare for performance and to remain ready and willing to deliver. Even so, the bidder is taking a great risk and the United States has an advantage. It is not "good faith" for the United States to insist upon more than this. It is certain that the United States intended to bind the bidder to a "contract," and that the bidder thought that the "acceptance" of his bid made a "contract." A reasonable interpretation of the language used gives effect to their mutual intention. Consequently we cannot accept the contention that the defendant's power of cancellation was unrestricted and could be exercised merely by failure to give delivery orders. The words "cancellation may be effected at any time" imply affirmative action, namely, the giving of notice of intent to cancel. The defendant itself so construed the clause by giving notice of cancellation on July 11, 1939, as alleged in its answer. While the phrase "at any time" should be liberally construed, it means much less than "forever." If taken literally, it would mean that after the defendant had given instructions for delivery and the plaintiff had tendered delivery in accordance therewith, or even after delivery had actually been made, the defendant could refuse to accept and when sued for the price give notice of cancellation of the contract. Such an interpretation would be not only unjust and unreasonable, but would make nugatory the entire contract, contrary to the intention of the parties, if it be assumed that the United States was acting in good faith in accepting the plaintiff's bid. The words should be so construed as to support the contract and not render illusory the promises of both parties. This can be accomplished by interpolating the word "reasonable," as is often done with respect to indefinite time clauses. See Starkweather v. Gleason, 221 Mass. 552, 109 N.E. 635. Hence the agreement obligated the defendant to give delivery instructions or notice of cancellation within a reasonable time after the date of its "acceptance." This constituted consideration for the plaintiff's promise to deliver in accordance with delivery instructions, and made the agreement a valid contract.

It must be conceded that the cases dealing with agreements in which one party has reserved to himself an option to cancel are not entirely harmonious. Where the option is completely unrestricted some courts say that the party having the option has promised nothing and the contract is

void for lack of mutuality. Miami Coca-Cola Bottling Co. v. Orange Crush Co., 5 Cir., 296 F. 693; Oakland Motor Car Co. v. Indiana Automobile Co., 7 Cir., 201 F. 499. These cases have been criticized by competent text writers and the latter case cited by this court "with distinct lack of warmth," as Judge Clark noted in Bushwick-Decatur Motors v. Ford Motor Co., 2 Cir., 116 F.2d 675, 678. But where, as in the case at bar, the option to cancel "does not wholly defeat consideration," the agreement is not *nudum pactum*. Corbin, The Effect of Options on Consideration, 34 Yale L.J. 571, 585; see Hunt v. Stimson, 6 Cir., 23 F.2d 447; Gurfein v. Werbelovsky, 97 Conn. 703, 118 A. 32. A promise is not made illusory by the fact that the promissor has an option between two alternatives, if each alternative would be sufficient consideration if it alone were bargained for. ALI Contracts, §79. As we have construed the agreement the United States promised by implication to take and pay for the trap rock or give notice of cancellation within a reasonable time. The alternative of giving notice was not difficult of performance, but it was a sufficient consideration to support the contract.

The judgment is reversed and the cause remanded for trial.

QUESTION

The Uniform Commercial Code speaks to this issue. Read §2-309(3) and consider how it would have affected the previous case had it been the law at the time of the decision.

Problem 44

Archibald Craven made the following proposal to Mary Lennox. "I promise to sell you my car for $1,000 if you want to buy it, but I reserve the right to cancel this deal by giving you notice before midnight Friday." To this Mary replied, "That's fine with me." Does this conversation create a contract?

McMICHAEL v. PRICE
Supreme Court of Oklahoma, 1936
177 Okla. 186, 58 P.2d 549

OSBORN, Vice Chief Justice. This action was instituted in the district court of Tulsa county by Harley T. Price, doing business as Sooner Sand Company, hereinafter referred to as plaintiff, against W. M. McMichael, hereinafter referred to as defendant, as an action to recover damages for the breach of a contract. The cause was tried to a jury and a verdict returned in favor of plaintiff for $7,512.51. The trial court ordered a remittitur of

$2,500, which was duly filed. Thereafter the trial court rendered judgment upon the verdict for $5,012.51, from which judgment defendant has appealed.

The pertinent provisions of the contract, which is the basis of this action, are as follows:

> This Contract and Agreement entered into on this 25th day of February, 1929, by and between Harley T. Price, doing business as the Sooner Sand Company, party of the first part, and W. M. McMichael, party of the second part, Witnesseth:
>
> Whereas, the party of the first part is engaged in the business of selling and shipping sand from Tulsa, Oklahoma, to various points in the United States; and,
>
> Whereas, the party of the second part is the owner of a plot of ground hereinafter described as follows, to-wit:
>
> Lot 11, Section 11, Township 19 North,
>
> Range 12 East, Tulsa County, and,
>
> Whereas, the party of the second part has agreed to build a switch connecting with the Frisco Railway and having its terminal in or at said plot of ground above described; and,
>
> Whereas, the party of the first part is desirous of buying and the party of the second part is desirous of selling various grades and qualities of sand as hereinafter set forth;
>
> Now, therefore, in consideration of the mutual promises herein contained, the said second party agrees to furnish all of the sand of various grades and qualities which the first party can sell for shipment to various and sundry points outside of the City of Tulsa, Oklahoma, and to load all of said sand in suitable railway cars on said aforesaid switch for delivery to said Frisco Railway Company as initial carrier. Said second party agrees to furnish the quantity and quality of sand at all and various times as the first party may designate by written or oral order, and agrees to furnish and load same within a reasonable time after said verbal or written order is received.
>
> In consideration of the mutual promises herein contained, first party agrees to purchase and accept from second party all of the sand of various grades and quality which the said first party can sell, for shipment to various and sundry points outside of the City of Tulsa, Oklahoma, provided that the sand so agreed to be furnished and loaded by the said second party shall at least be equal to in quality and comparable with the sand of various grades sold by other sand companies in the City of Tulsa, Oklahoma, or vicinity. First party agrees to pay and the second party agrees to accept as payment and compensation for said sand so furnished and loaded, a sum per ton which represents sixty percent (60 percent) of the current market price per ton of concrete sand at the place of destination of said shipment. It is agreed that statements are to be rendered by second party to first party every thirty days; the account is payable monthly by first party with a discount to be allowed by second party of four cents per ton for payment within ten days after shipment of any quantity of sand. . . .
>
> This contract and agreement shall cover a period of ten years from the date hereof, and shall be binding and effective during said period, and shall extend to the heirs, executors, administrators and assigns of both parties hereto.
>
> Dated this 25th day of February, 1929.

Sooner Sand Company,
By *Harley T. Price,*
Party of the first part

W. M. McMichael,
By *J. O. McMichael,*
Party of the second part

Plaintiff alleged the execution of the above contract, and further alleged that defendant at various and sundry times, beginning about five months after the execution of the contract, failed, neglected, and refused to furnish all of the sand which plaintiff had sold for shipment to various points outside of the city of Tulsa; that on or about November 15, 1929, defendant expressly repudiated and renounced the contract and stated to plaintiff that he would no longer consider himself bound thereby and would not further comply therewith. Plaintiff alleged various items of damages in the nature of loss of profits arising by reason of the alleged repudiation and breach of the contract by defendant. It will not be necessary to set out the various items of damage claimed.

Defendant admitted the execution of the contract and alleged his full performance thereof from March, 1929, to November, 1929, and further alleged that plaintiff breached the terms of the contract by failing and refusing to pay for the sand shipped each month as required by the contract; that he advised plaintiff that he would cease making further shipments unless plaintiff paid the accounts monthly as provided in the agreement; that in November, 1929, at a time when the sum of $2,143.32 was due and owing by plaintiff to defendant, defendant refused to make further shipments of sand until said account was paid; that plaintiff has been in default on the contract since April, 1929. For counterclaim against plaintiff, defendant alleged the indebtedness of $2,143.32, and prayed for judgment against plaintiff in said amount.

By way of reply to defendant's answer and counterclaim, plaintiff denied the correctness of the accounts sued on in the counterclaim and alleged that defendant only furnished to plaintiff one statement which was on the date of November 10, 1929, which statement was incorrect, false, and fraudulent. In this connection plaintiff claims that in order to make settlements with defendant he was forced to go to the office of defendant and examine the books; that at no time did the books of defendant reflect the correct balance due and owing; that plaintiff from time to time made payments on the account and was assured by defendant from time to time that the books would be adjusted and they would determine the exact amount due and owing to defendant. Plaintiff insists that he was able and willing at all times to make full and complete settlement with defendant whenever the exact amount of the indebtedness could be determined.

Defendant contends that the contract between the parties was a mere revocable offer and is not a valid and binding contract of purchase and sale for want of mutuality. The general rule is that in construing a contract where the consideration on the one side is an offer or an agreement to sell, and on the other side an offer or agreement to buy, the obligation of the parties to sell and buy must be mutual, to render the contract binding on

either party, or, as it is sometimes stated, if one of the parties, not having suffered any previous detriment, can escape future liability under the contract, that party may be said to have a "free way out" and the contract lacks mutuality. Consolidated Pipe Line Co. v. British American Oil Co., 163 Okl. 171, 21 P.2d 762. Attention is directed to the specific language used in the contract binding the defendant to "furnish all of the sand of various grades and qualities which the first party can sell" and whereby plaintiff is bound "to purchase and accept from second party all of the sand of various grades and qualities which the said first party (plaintiff) can sell." It is urged that plaintiff had no established business and was not bound to sell any sand whatever and might escape all liability under the terms of the contract by a mere failure or refusal to sell sand. In this connection it is to be noted that the contract recites that plaintiff is "engaged in the business of selling and shipping sand from Tulsa, Oklahoma, to various points." The parties based their contract on this agreed predicate.

A number of the applicable authorities were discussed by this court in the case of Baker v. Murray Tool & Supply Co., 137 Okl. 288, 279 P. 340, 344, where the court was called upon to determine the force and effect of a contract somewhat similar to the contract involved herein. We quote from the body of the opinion:

> In the case of Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N.E. 774, 31 L.R.A. 529, the court, in sustaining the validity of a contract of sale by mining company to a dealer in coal of his requirements, said:
>
> 1. A contract wherein defendant agreed to buy of plaintiff all its "requirements" of coal for the season at a specified price is not void for uncertainty, in that the actual amount of the requirement was not stated, it being, manifestly, the amount of coal defendant needed and used in its business during the season.
>
> 2. Where defendant agreed to buy its "requirements" of coal of plaintiff, the contract is mutual, as such provision required defendant to buy all its coal from plaintiff, and was one on which plaintiff could maintain an action for breach, should defendant purchase coal elsewhere.

If the word "requirements," as here used, is so interpreted as to mean that appellee was only to furnish such coal as appellant should require it to furnish, then it might be said that appellant was not bound to require any coal unless he chose, and that therefore there was a want of mutuality in the contract. But the rule is that, where the terms of a contract are susceptible of two significations, that will be adopted which gives some operation to the contract, rather than that which renders it inoperative. . . . A contract should be construed in such a way as to make the obligation imposed by its terms mutually binding upon the parties, unless such construction is wholly negatived by the language used. . . . It cannot be said that appellant was not bound by the contract. It had no right to purchase coal elsewhere for use in its business, unless, in case of a decline in the price, appellee should conclude to release it from further liability. . . .

It is said in the syllabus of Texas Co. v. Pensacola Maritime Corporation (C.C.A.) 279 F. 19, 24 A.L.R. 1336:

> A contract for the sale of plaintiff's requirements of oil for resale to ships does not lack mutuality, even though the plaintiff had as yet no established business for the sale of fuel oil for ships, and especially where plaintiff did

have an established business in the sale of coal as a fuel for ships, since plaintiff's agreement to buy its oil only from defendant was a detriment to it sufficient to support the contract. . . .

Crane v. C. Crane & Co., 105 F. 869, 45 C.C.A. 96, cited by the appellee in support of the position of the District Court, involved material points of difference from the case made by the complaint under examination. The contract examined in that case left the plaintiff at liberty to buy the lumber he desired elsewhere if the prices of such lumber were more favorable to him, and it did not appear from the complaint that the vendor had knowledge of the purchaser's requirements. These points of distinction are well brought out in Grand Prairie Gravel Co. v. Wills Co. (Tex. Civ. App.) 188 S.W. 689.

At the time the contract involved herein was executed, plaintiff was not the owner of an established sand business. The evidence shows, however, that he was an experienced salesman of sand, which fact was well known to defendant, and that it was anticipated by both parties that on account of the experience, acquaintances, and connections of plaintiff, he would be able to sell a substantial amount of sand to the mutual profit of the contracting parties. The record discloses that for the nine months immediately following the execution of the contract plaintiff's average net profit per month was $516.88.

By the terms of the contract the price to be paid for sand was definitely fixed. Plaintiff was bound by a solemn covenant of the contract to purchase all the sand he was able to sell from defendant and for a breach of such covenant could have been made to respond in damages. The argument of defendant that the plaintiff could escape liability under the contract by going out of the sand business is without force in view of our determination, in line with the authorities hereinabove cited, that it was the intent of the parties to enter into a contract which would be mutually binding. . . .

Defendant contends that even though the contract is valid and enforceable, plaintiff failed to make out a case under his own theory. Under the specification defendant argues that the evidence shows that plaintiff, and not defendant, breached the contract by failure to make monthly payments as provided by the contract and by his failure to keep his accounts with defendant settled in full. In this connection the court gave a special instruction to the jury upon the issue of waiver and instructed the jury in detail upon the issues of fact involved by the pleadings and evidence regarding plaintiff's claim that defendant did not keep a correct account of the indebtedness and did not furnish correct statements of the accounts so that plaintiff at no time was able to determine from said books the correct status of his account. The evidence on this point is conflicting, but the finding of the jury under said special instruction is supported by ample competent evidence and will not be disturbed. . . .

The judgment is affirmed.

In a bilateral contract it is often said that there must be *mutuality of obligation:* Both parties must be bound or neither is bound. Apply this rule to the following Problem.

Problem 45

Read UCC §2-306 and its Official Comment and use it to decide if there is a valid contract in the following situations:

(a) Portia agreed to buy and the Antonio Casket Company agreed to sell her all the caskets that the company produced the next year.

(b) Portia agreed with the Antonio Casket Company to buy from it all the caskets that she would need the next year, and they agreed to sell her that amount.

(c) Portia agreed to buy and the Antonio Casket Company agreed to sell her all the caskets she wished to order during the coming year. If she does place an order, is there a contract?

CORBIN ON CONTRACTS §156

A promise to buy of another person or company all of some commodity or service that the promisor may thereafter need or require in his business is not an illusory promise; and such a promise is a sufficient consideration for a return promise. It is true that the amount to be delivered or paid for cannot be determined at the time the contract is made; but the terms of the promise give a sufficiently definite objective standard to enable a court to determine the amount when the time comes for enforcement. It is not a promise to buy all that the buyer wishes or may thereafter choose to order; the amount is not left to the will of the promisor himself.

The word "require" is not here used in the sense of request or order; instead, it is the equivalent of need or use. The promisor's duty is conditional upon the existence of an objective need for the commodity or service, and the promisor may have a high degree of control over the happening of this condition; but this does not render the promise illusory and empty of content. It states a limitation upon the promisor's future liberty of action; he no longer has an unlimited option.

It makes no difference how great or small this limitation is — at least, until it approaches near to the vanishing point.

Corbin's basic test here — whether the promise states a limitation upon the promisor's future liberty of action — is useful in determining whether any promise is illusory. Use it and the other ideas just quoted to resolve the following matters.

Problem 46

(a) Ralph Rackstraw was contemplating purchasing a yacht named *Pinafore* and hiring it out to others for pleasure cruises. He signed a contract with Josephine Corcoran in which he promised to charter the

yacht to her *if* he decided to purchase it. Is there a contract *prior* to his purchase? See Corbin §160 and Restatement (Second) of Contracts §77 (reprinted below). This problem is based on Scott v. Moragues Lumber Co., 202 Ala. 312, 80 So. 394 (1918).

(b) Wanting to make a binding gift, and being aware of the doctrine of consideration, Uncle Scrooge signed an agreement promising to give his nephew Donald $10,000 a year for ten years in return for which Donald promised never to become a professor of law. Donald has no legal training, has no interest in law, and is in fact a sand dealer. Valid contract?

RESTATEMENT (SECOND) OF CONTRACTS

§77. Illusory and Alternative Promises

A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless

(a) each of the alternative performances would have been consideration if it alone had been bargained for; or
(b) one of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternative which would not have been consideration.

IV. PAST CONSIDERATION

HAYES v. PLANTATIONS STEEL CO.
Supreme Court of Rhode Island, 1982
438 A.2d 1091

Shea, J. The defendant employer, Plantations Steel Company (Plantations), appeals from a Superior Court judgment for the plaintiff employee, Edward J. Hayes (Hayes). The trial justice, sitting without a jury, found that Plantations was obligated to Hayes on the basis of an implied-in-fact contract to pay him a yearly pension of $5,000. The award covered three years in which payment had not been made. The trial justice ruled, also, that Hayes had made a sufficient showing of detrimental reliance upon Plantations's promise to pay to give rise to its obligation based on the theory of promissory estoppel. The trial justice, however, found in part for Plantations in ruling that the payments to Hayes were not governed by

the Employee Retirement Income Security Act, 29 U.S.C.A. §§1001-1461 (West 1975), and consequently he was not entitled to attorney's fees under §1132(g) of that act. Both parties have appealed.

We reverse the findings of the trial justice regarding Plantations's contractual obligation to pay Hayes a pension. Consequently we need not deal with the cross-appeal concerning the award of attorney's fees under the federal statute.

Plantations is a closely held Rhode Island corporation engaged in the manufacture of steel reinforcing rods for use in concrete construction. The company was founded by Hugo R. Mainelli, Sr., and Alexander A. DiMartino. A dispute between their two families in 1976 and 1977 left the DiMartinos in full control of the corporation. Hayes was an employee of the corporation from 1947 until his retirement in 1972 at age of sixty-five. He began with Plantations as an "estimator and draftsman" and ended his career as general manager, a position of considerable responsibility. Starting in January 1973 and continuing until January 1976, Hayes received the annual sum of $5,000 from Plantations. Hayes instituted this action in December 1977, after the then company management refused to make any further payments.

Hayes testified that in January 1972 he announced his intention to retire the following July, after twenty-five years of continuous service. He decided to retire because he had worked continuously for fifty-one years. He stated, however, that he would not have retired had he not expected to receive a pension. After he stopped working for Plantations, he sought no other employment.

Approximately one week before his actual retirement Hayes spoke with Hugo R. Mainelli, Jr., who was then an officer and a stockholder of Plantations. This conversation was the first and only one concerning payments of a pension to Hayes during retirement. Mainelli said that the company "would take care" of him. There was no mention of a sum of money or a percentage of salary that Hayes would receive. There was no formal authorization for payments by Plantations's shareholders and/or board of directors. Indeed, there was never any formal provision for a pension plan for any employee other than for unionized employees, who benefit from an arrangement through their union. The plaintiff was not a union member.

Mr. Mainelli, Jr., testified that his father, Hugo R. Mainelli, Sr., had authorized the first payment "as a token of appreciation for the many years of [Hayes's] service." Furthermore, "it was implied that that check would continue on an annual basis." Mainelli also testified that it was his "personal intention" that the payments would continue for "as long as I was around."

Mainelli testified that after Hayes's retirement, he would visit the premises each year to say hello and renew old acquaintances. During the course of his visits, Hayes would thank Mainelli for the previous check and ask how long it would continue so that he could plan an orderly retirement.

The payments were discontinued after 1976. At that time a succession of several poor business years plus the stockholders' dispute, resulting in the takeover by the DiMartino family, contributed to the decision to stop the payments.

The trial justice ruled that Plantations owed Hayes his annual sum of $5,000 for the years 1977 through 1979. The ruling implied that barring bankruptcy or the cessation of business for any other reason, Hayes had a right to expect continued annual payments.

The trial justice found that Hugo Mainelli, Jr.'s statement that Hayes would be taken care of after his retirement was a promise. Although no sum of money was mentioned in 1972, the four annual payments of $5,000 established that otherwise unspecified term of the contract. The trial justice also found that Hayes supplied consideration for the promise by voluntarily retiring, because he was under no obligation to do so. From the words and conduct of the parties and from the surrounding circumstances, the trial justice concluded that there existed an implied contract obligating the company to pay a pension to Hayes for life. The trial justice made a further finding that even if Hayes had not truly bargained for a pension by voluntarily retiring, he had nevertheless incurred the detriment of foregoing other employment in reliance upon the company's promise. He specifically held that Hayes's retirement was in response to the promise and held also that Hayes refrained from seeking other employment in further reliance thereon.

The findings of fact of a trial justice sitting without a jury are entitled to great weight when reviewed by this court. His findings will not be disturbed unless it can be shown that they are clearly wrong or that the trial justice misconceived or overlooked material evidence. Lisi v. Marra, R.I., 424 A.2d 1052 (1981); Raheb v. Lemenski, 115 R.I. 576, 350 A.2d 397 (1976). After careful review of the record, however, we conclude that the trial justice's findings and conclusions must be reversed.

Assuming for the purpose of this discussion that Plantations in legal effect made a promise to Hayes, we must ask whether Hayes did supply the required consideration that would make the promise binding? And, if Hayes did not supply consideration, was his alleged reliance sufficiently induced by the promise to estop defendant from denying its obligation to him? We answer both questions in the negative.

We turn first to the problem of consideration. The facts at bar do not present the case of an express contract. As the trial justice stated, the existence of a contract in this case must be determined from all the circumstances of the parties' conduct and words. Although words were expressed initially in the remark that Hayes "would be taken care of," any contract in this case would be more in the nature of an implied contract. Certainly the statement of Hugo Mainelli, Jr., standing alone is not an expression of a direct and definite promise to pay Hayes a pension. Though we are analyzing an implied contract, nevertheless we must address the question of consideration.

Contracts implied in fact require the element of consideration to support them as is required in express contracts. The only difference between the two is the manner in which the parties manifest their assent. J. Koury Steel Erectors, Inc. v. San-Vel Concrete Corp., R.I., 387 A.2d 694 (1978); Bailey v. West, 105 R.I. 61, 249 A.2d 414 (1969). In this jurisdiction, consideration consists either in some right, interest, or benefit accruing to one party or some forbearance, detriment, or responsibility given, suffered,

or undertaken by the other. See Dockery v. Greenfield, 86 R.I. 464, 136 A.2d 682 (1957); Darcey v. Darcey, 29 R.I. 384, 71 A. 595 (1909). Valid consideration furthermore must be bargained for. It must induce the return act or promise. To be valid, therefore, the purported consideration must not have been delivered before a promise is executed, that is, given without reference to the promise. Plowman v. Indian Refining Co., 20 F. Supp. 1 (E.D. Ill. 1937). Consideration is therefore a test of the enforceability of executory promises, Angel v. Murray, 113 R.I. 482, 322 A.2d 630 (1974), and has no legal effect when rendered in the past and apart from an alleged exchange in the present. Zanturjian v. Boornazian, 25 R.I. 151, 55 A. 199 (1903).

In the case before us, Plantations's promise to pay Hayes a pension is quite clearly not supported by any consideration supplied by Hayes. Hayes had announced his intent to retire well in advance of any promise, and therefore the intention to retire was arrived at without regard to any promise by Plantations. Although Hayes may have had in mind the receipt of a pension when he first informed Plantations, his expectation was not based on any statement made to him or on any conduct of the company officer relative to him in January 1972. In deciding to retire, Hayes acted on his own initiative. Hayes's long years of dedicated service also is legally insufficient because his service too was rendered without being induced by Plantations's promise. See Plowman v. Indian Refining Co., supra.

Clearly then this is not a case in which Plantations's promise was meant to induce Hayes to refrain from retiring when he could have chosen to do so in return for further service. 1 Williston on Contracts, §130B (3d ed., Jaeger 1957). Nor was the promise made to encourage long service from the start of his employment. Weesner v. Electric Power Board of Chattanooga, 48 Tenn. App. 178, 344 S.W.2d 766 (1961). Instead, the testimony establishes that Plantations's promise was intended "as a token of appreciation for [Hayes's] many years of service." As such it was in the nature of a gratuity paid to Hayes for as long as the company chose. In Spickelmier Industries, Inc. v. Passander, 172 Ind. App. 49, 359 N.E.2d 563 (1977), an employer's promise to an employee to pay him a year-end bonus was unenforceable because it was made after the employee had performed his contractual responsibilities for that year.

The plaintiff's most relevant citations are still inapposite to the present case. Bredemann v. Vaughan Mfg. Co., 40 Ill. App. 2d 232, 188 N.E.2d 746 (1963), presents similar yet distinguishable facts. There, the appellate court reversed a summary judgment granted to the defendant employer, stating that a genuine issue of material fact existed regarding whether the plaintiff's retirement was in consideration of her employer's promise to pay her a lifetime pension. As in the present case, the employer made the promise one week prior to the employee's retirement, and in almost the same words. However, *Bredemann* is distinguishable because the court characterized that promise as a concrete offer to pay *if she would retire immediately.* In fact, the defendant wanted her to retire. Id. 188 N.E.2d at 749. On the contrary, Plantations in this case did not actively seek Hayes's retirement. DiMartino, one of Plantations's founders, testified that he did not want Hayes to retire. Unlike *Bredemann,* here Hayes announced his unsolicited intent to retire.

This is the test

Retirement Plan was not induced by the promise made by the company to pay pension, so it's not a detriment

gift

If this company made a promise early on when he 1st started work, then it could be a good consideration. If the pension promise induces the employee to work, then good consideration.

Hayes also argues that the work he performed during the week between the promise and the date of his retirement constituted sufficient consideration to support the promise. He relies on Ulmann v. Sunset-McKee Co., 221 F.2d 128 (9th Cir. 1955), in which the court ruled that work performed during the one-week period of the employee's notice of impending retirement constituted consideration for the employer's offer of a pension that the employee had solicited some months previously. But there the court stated that its prime reason for upholding the agreement was that sufficient consideration existed in the employee's consent not to compete with his employer. These circumstances do not appear in our case. Hayes left his employment because he no longer desired to work. He was not contemplating other job offers or considering going into competition with Plantations. Although Plantations did not want Hayes to leave, it did not try to deter him, nor did it seek to prevent Hayes from engaging in other activity.

Hayes argues in the alternative that even if Plantations's promise was not the product of an exchange, its duty is grounded properly in the theory of promissory estoppel. This court adopted the theory of promissory estoppel in East Providence Credit Union v. Geremia, 103 R.I. 597, 601, 239 A.2d 725, 727 (1968) (quoting 1 Restatement Contracts §90 at 110 (1932)) stating:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of its promise.

In *East Providence Credit Union* this court said that the doctrine of promissory estoppel is invoked "as a substitute for a consideration, rendering a gratuitous promise enforceable as a contract." Id. To restate the matter differently, "the acts of reliance by the promisee to his detriment [provide] a substitute for consideration." Id.

Hayes urges that in the absence of a bargained-for promise the facts require application of the doctrine of promissory estoppel. He stresses that he retired voluntarily while expecting to receive a pension. He would not have otherwise retired. Nor did he seek other employment.

We disagree with this contention largely for the reasons already stated. One of the essential elements of the doctrine of promissory estoppel is that the promise must *induce* the promisee's action or forbearance. The particular act in this regard is plaintiff's decision whether or not to retire. As we stated earlier, the record indicates that he made the decision on his own initiative. In other words, the conversation between Hayes and Mainelli which occurred a week before Hayes left his employment cannot be said to have induced his decision to leave. He had reached that decision long before.

An example taken from the restatement provides a meaningful contrast:

> 2. A promises B to pay him an annuity during B's life. B *thereupon* resigns profitable employment, as A *expected* that he might. B receives the annuity for some years, in the meantime becoming disqualified from again obtaining good employment. A's promise is binding.

(Emphasis added.) 1 Restatement Contracts §90 at 111 (1932).

In Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. App. 1959), the plaintiff-employee had worked for her employer for nearly forty years. The defendant corporation's board of directors resolved, in view of her long years of service, to obligate itself to pay "retirement privileges" to her. The resolution did not require the plaintiff to retire. Instead, the decision whether and when to retire remained entirely her own. The board then informed her of its resolution. The plaintiff worked for eighteen months more before retiring. She sued the corporation when it reduced her monthly checks seven years later. The court held that a pension contract existed between the parties. Although continued employment was not a consideration to her receipt of retirement benefits, the court found sufficient reliance on the part of the plaintiff to support her claim. The court based its decision upon the above restatement example, that is, the defendant informed the plaintiff of its plan, and the plaintiff in reliance thereon, retired. *Feinberg* presents factors that also appear in the case at bar. There, the plaintiff had worked many years and desired to retire; she would not have left had she not been able to rely on a pension; and once retired, she sought no other employment.

However, the important distinction between *Feinberg* and the case before us is that in *Feinberg* the employer's decision definitely shaped the thinking of the plaintiff. In this case the promise did not. It is not reasonable to infer from the facts that Hugo R. Mainelli, Jr., expected retirement to result from his conversation with Hayes. Hayes had given notice of his intention seven months previously. Here there was thus no inducement to retire which would satisfy the demands of §90 of the restatement. Nor can it be said that Hayes's refraining from other employment was "action or forbearance of a definite and substantial character." The underlying assumption of Hayes's initial decision to retire was that upon leaving the defendant's employ, he would no longer work. It is impossible to say that he changed his position any more so because of what Mainelli had told him in light of his own initial decision. These circumstances do not lead to a conclusion that injustice can be avoided only by enforcement of Plantations's promise. Hayes received $20,000 over the course of four years. He inquired each year about whether he could expect a check for the following year. Obviously, there was no absolute certainty on his part that the pension would continue. Furthermore, in the face of his uncertainty, the mere fact that payment for several years did occur is insufficient by itself to meet the requirements of reliance under the doctrine of promissory estoppel.

promissory estoppel

For the foregoing reasons, the defendant's appeal is sustained and the judgment of the Superior Court is reversed. The papers of the case are remanded to the Superior Court.

NOTE

Some pensions are enforceable under statute. See Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified in various sections of 26, 29 U.S.C.).

MILLS v. WYMAN
Supreme Judicial Court of Massachusetts, 1825
3 Pick. 207

This was an action of assumpsit brought to recover a compensation for the board, nursing, etc. of Levi Wyman, son of the defendant, from the 5th to the 20th of February 1821. The plaintiff then lived at Hartford, in Connecticut; the defendant, at Shrewsbury, in this county. Levi Wyman, at the time when the services were rendered, was about 25 years of age, and had long ceased to be a member of his father's family. He was on his return from a voyage at sea, and being suddenly taken sick at Hartford, and being poor and in distress, was relieved by the plaintiff in the manner and to the extent above stated. On the 24th of February, after all the expenses had been incurred, the defendant wrote a letter to the plaintiff, promising to pay him such expenses. There was no consideration for this promise, except what grew out of the relation which subsisted between Levi Wyman and the defendant, and Howe J., before whom the cause was tried in the Court of Common Pleas, thinking this not sufficient to support the action, directed a nonsuit. To this direction the plaintiff filed exceptions.

PARKER C.J. General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in *foro conscientiae* to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put

for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a quid pro quo; and according to the principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises therefore have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the interior forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells, to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the statute of limitations or bankruptcy, the principle is preserved by

looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value: though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application to cases where at some time or other a good or valuable consideration has existed. A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessaries, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation; and it seems to follow, that a promise founded upon such a debt has no legally binding force. . . .

For the foregoing reasons we are all of opinion that the nonsuit directed by the Court of Common Pleas was right, and that judgment be entered thereon for costs for the defendant.

NOTES

1. For an article arguing that this case is wrong on both the facts (the son apparently lived for a number of years, for example) and the law, see Geoffrey R. Watson, In the Tribunal of Conscience: *Mills v. Wyman* Reconsidered, 71 Tulane L. Rev. 1749 (1997).

2. The Utah Supreme Court in Manwill v. Oyler, 11 Utah 2d 433, 361 P.2d 177, 178 (1961), had this to say about the doctrine of moral consideration:

> The difficulty we see with the doctrine is that if a mere moral, as distinguished from a legal, obligation were recognized as valid consideration for a contract, that would practically erode to the vanishing point the necessity for finding a consideration. This is so, first because in nearly all circumstances where a promise is made there is some moral aspect of the situation which provides the motivation for making the promise even if it is to make an outright gift. And second, if we are dealing with the moral concepts, the making of a promise itself creates a moral obligation to perform it. It seems obvious that if a contract to be legally enforceable need be anything other than a naked promise, something more than mere moral consideration is necessary. The principle that in order for a contract to be valid and binding, each party must be bound to give some legal consideration to the other by conferring a benefit upon him or suffering a legal detriment at his request is firmly implanted in the roots of our law.

Note, however, that *Mills* states a number of exceptions to the general rule against the use of the moral obligation doctrine as a substitute for traditional consideration. These exceptions are still generally applicable. For example, it is still true if after default (or prospective default) on a contract

the obligor promises not to plead the statute of limitations or to pay a debt voidable because of the statute the promise is enforceable if voluntarily made. For that matter the mere acknowledgment of the debt or the part payment of principal or interest may be found to be an enforceable implied promise to pay the obligation. See Restatement (Second) of Contracts §82 (reprinted below). All states except Kentucky, Maryland, New Hampshire, Pennsylvania, Rhode Island, and Tennessee provide by statute that such a promise or acknowledgment must be in writing to be enforceable.

3. *Mills* also recognizes the historical exception for promises to pay debts discharged in bankruptcy. The use of this exception has typically required the showing of an express promise of *reaffirmation,* which many states required to be in writing. This bankruptcy exception has now been changed by federal law. The Bankruptcy Code of 1978, at 11 U.S.C. §524(c) and (d), allows a bankrupt 60 days to rescind a promise to pay a discharged debt and, unless the debt is secured by real property, authorizes the bankruptcy court to disallow any consumer agreements not in the best interests of the consumer. Typically, bankruptcy serves to discharge the bankrupt's obligations. However, the bankrupt cannot receive such a discharge again for six years. When would it ever be in the consumer's best interest to agree to pay a debt dischargable in bankruptcy?

4. *Mills* also recognizes the still generally accepted special treatment of promises to pay an obligation otherwise voidable because of infancy. Upon reaching majority, if a person voluntarily and with knowledge of the facts promises to pay an obligation that was voidable because that person was a minor when the contract was made, the new promise is enforceable. It is generally assumed that this special treatment applies to promises to perform all or part of any antecedent contract previously voidable because of such defects as fraud, mistake, duress, or undue influence. See Restatement (Second) of Contracts §85. Another rationale that is often used for enforcing such promises is that the obligor has "affirmed" the original promise made during infancy.

Problem 47

Alexander Selkirk was shipwrecked for a ten-year period on a deserted island. When he returned to civilization, one of his creditors, Daniel Defoe, to whom he owed $5,000, hunted him up and asked him for payment. The statute of limitations had recently run on the debt.

(a) If Selkirk makes no promise to pay the time-barred debt, must he do so? What policies are at work here?

(b) If he makes a written promise to pay the debt, what consideration does Defoe give for the new promise?

(c) If Selkirk makes a written promise to pay Defoe, but states that he will pay no more than $1,000, does he owe any amount?

(d) When Defoe made his payment demand, Selkirk said nothing, but the next day he sent a check to Defoe for $100. Must he now pay the remaining debt?

RESTATEMENT (SECOND) OF CONTRACTS

§82. Promise to Pay Indebtedness; Effect on the Statute of Limitations

(1) A promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations.

(2) The following facts operate as such a promise unless other facts indicate a different intention:

(a) A voluntary acknowledgment to the obligee, admitting the present existence of the antecedent indebtedness; or
(b) A voluntary transfer of money, a negotiable instrument, or other thing by the obligor to the obligee, made as interest on or part payment of or collateral security for the antecedent indebtedness; or
(c) A statement to the obligee that the statute of limitations will not be pleaded as a defense.

Problem 48

When his car broke down the night before he had to drive 40 miles to the big game, Coach Pigskin of Football University was frantic. He phoned his next-door neighbor, Al Garage, who owned a repair shop and who always performed the coach's repair work, and asked Al if he could do an emergency repair, "for a friend in need who must get to the football game." Al agreed to try to help, and after working on the car for four hours, he put it in running condition. Coach Pigskin's team won the game, and when he returned home he told Al that he would pay him $200 for his work the night before. The two friends had never discussed payment at the time of the repair, though Al had always charged the coach for previous repair work. Al agreed to the $200 figure, and they shook hands on the deal. Later Coach Pigskin decided the work was worth only $100, and he refused to pay more. If Al sues, what amount, if any, can he recover?

WEBB v. McGOWIN
Court of Appeals of Alabama, 1935
27 Ala. App. 82, 168 So. 196

Bricken, Presiding Judge. This action is in assumpsit. The complaint as originally filed was amended. The demurrers to the complaint as amended were sustained, and because of this adverse ruling by the court

the plaintiff took a nonsuit, and the assignment of errors on this appeal are predicated upon said action or ruling of the court.

A fair statement of the case presenting the questions for decision is set out in appellant's brief, which we adopt.

> On the 3d day of August, 1925, appellant while in the employ of the W. T. Smith Lumber Company, a corporation, and acting within the scope of his employment, was engaged in clearing the upper floor of mill No. 2 of the company. While so engaged he was in the act of dropping a pine block from the upper floor of the mill to the ground below; this being the usual and ordinary way of clearing the floor, and it being the duty of the plaintiff in the course of his employment to so drop it. The block weighed about 75 pounds.
>
> As appellant was in the act of dropping the block to the ground below, he was on the edge of the upper floor of the mill. As he started to turn the block loose so that it would drop to the ground, he saw J. Greeley McGowin, testator of the defendants, on the ground below and directly under where the block would have fallen had appellant turned it loose. Had he turned it loose it would have struck McGowin with such force as to have caused him serious bodily harm or death. Appellant could have remained safely on the upper floor of the mill by turning the block loose and allowing it to drop, but had he done this the block would have fallen on McGowin and caused him serious injuries or death. The only safe and reasonable way to prevent this was for appellant to hold to the block and divert its direction in falling from the place where McGowin was standing and the only safe way to divert it so as to prevent its coming into contact with McGowin was for appellant to fall with it to the ground below. Appellant did this, and by holding to the block and falling with it to the ground below, he diverted the course of its fall in such way that McGowin was not injured. In thus preventing the injuries to McGowin appellant himself received serious bodily injuries, resulting in his right leg being broken, the heel of his right foot torn off and his right arm broken. He was badly crippled for life and rendered unable to do physical or mental labor.
>
> On September 1, 1925, in consideration of appellant having prevented him from sustaining death or serious bodily harm and in consideration of the injuries appellant had received, McGowin agreed with him to care for and maintain him for the remainder of appellant's life at the rate of $15 every two weeks from the time he sustained his injuries to and during the remainder of appellant's life; it being agreed that McGowin would pay this sum to appellant for his maintenance. Under the agreement McGowin paid or caused to be paid to appellant the sum so agreed on up until McGowin's death on January 1, 1934. After his death the payments were continued to and including January 27, 1934, at which time they were discontinued. Thereupon plaintiff brought suit to recover the unpaid installments accruing up to the time of the bringing of the suit.
>
> The material averments of the different counts of the original complaint and the amended complaint are predicated upon the foregoing statement of facts.

In other words, the complaint as amended averred in substance: (1) That on August 3, 1925, appellant saved J. Greeley McGowin, appellee's testator, from death or grievous bodily harm; (2) that in doing so appellant sustained bodily injury crippling him for life; (3) that in consideration

of the services rendered and the injuries received by appellant, McGowin agreed to care for him the remainder of appellant's life, the amount to be paid being $15 every two weeks; (4) that McGowin complied with this agreement until he died on January 1, 1934, and the payments were kept up to January 27, 1934, after which they were discontinued.

The action was for the unpaid installments accruing after January 27, 1934, to the time of the suit.

The principal grounds of demurrer to the original and amended complaint are: (1) It states no cause of action; (2) its averments show the contract was without consideration; (3) it fails to allege that McGowin had, at or before the services were rendered, agreed to pay appellant for them; (4) the contract declared on is void under the Statute of Frauds.

1. The averments of the complaint show that appellant saved McGowin from death or grievous bodily harm. This was a material benefit to him of infinitely more value than any financial aid he could have received. Receiving this benefit, McGowin became morally bound to compensate appellant for the services rendered. Recognizing his moral obligation, he expressly agreed to pay appellant as alleged in the complaint and complied with this agreement up to the time of his death; a period of more than eight years.

Had McGowin been accidentally poisoned and a physician, without his knowledge or request, had administered an antidote, thus saving his life, a subsequent promise by McGowin to pay the physician would have been valid. Likewise, McGowin's agreement as disclosed by the complaint to compensate appellant for saving him from death or grievous bodily injury is valid and enforceable.

Where the promisee cares for, improves, and preserves the property of the promisor, though done without his request, it is sufficient consideration for the promisor's subsequent agreement to pay for the service, because of the material benefit received. Pittsburg Vitrified Paving & Building Brick Co. v. Cerebus Oil Co., 79 Kan. 603, 100 P. 631; Edson v. Poppe, 24 S.D. 466, 124 N.W. 441, 26 L.R.A. (N.S.) 534; Drake v. Bell, 26 Misc. 237, 55 N.Y.S. 945.

In Boothe v. Fitzpatrick, 36 Vt. 681, the court held that a promise by defendant to pay for the past keeping of a bull which had escaped from defendant's premises and been cared for by plaintiff was valid, although there was no previous request, because the subsequent promise obviated that objection; it being equivalent to a previous request. On the same principle, had the promisee saved the promisor's life or his body from grievous harm, his subsequent promise to pay for the services rendered would have been valid. Such service would have been far more material than caring for his bull. Any holding that saving a man from death or grievous bodily harm is not a material benefit sufficient to uphold a subsequent promise to pay for the service, necessarily rests on the assumption that saving life and preservation of the body from harm have only a sentimental value. The converse of this is true. Life and preservation of the body have material, pecuniary values, measurable in dollars and cents. Because of this, physicians practice their profession charging for services rendered in saving life and curing the body of its ills, and surgeons perform operations. The same

is true as to the law of negligence, authorizing the assessment of damages in personal injury cases based upon the extent of the injuries, earnings, and life expectancies of those injured.

In the business of life insurance, the value of a man's life is measured in dollars and cents according to his expectancy, the soundness of his body, and his ability to pay premiums. The same is true as to health and accident insurance.

It follows that if, as alleged in the complaint, appellant saved J. Greeley McGowin from death or grievous bodily harm, and McGowin subsequently agreed to pay him for the service rendered, it became a valid and enforceable contract.

2. It is well settled 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. . . . In the case of State ex rel. Bayer v. Funk, supra, the court held that a moral obligation is a sufficient consideration to support an executory promise where the promisor has received an actual pecuniary or material benefit for which he subsequently expressly promised to pay.

The case at bar is clearly distinguishable from that class of cases where the consideration is a mere moral obligation or conscientious duty unconnected with receipt by promisor of benefits of a material or pecuniary nature. Park Falls State Bank v. Fordyce, supra. Here the promisor received a material benefit constituting a valid consideration for his promise.

3. Some authorities hold that, for a moral obligation to support a subsequent promise to pay, there must have existed a prior legal or equitable obligation, which for some reason had become unenforceable, but for which the promisor was still morally bound. This rule, however, is subject to qualification in those cases where the promisor, having received a material benefit from the promisee, is morally bound to compensate him for the services rendered and in consideration of this obligation promises to pay. In such cases the subsequent promise to pay is an affirmance or ratification of the services rendered carrying with it the presumption that a previous request for the service was made. McMorris v. Herndon, 2 Bailey (S.C.) 56, 21 Am. Dec. 515; Chadwick v. Knox, 31 N.H. 226, 64 Am. Dec. 329; Kenan v. Holloway, 16 Ala. 53, 50 Am. Dec. 162; Ross v. Pearson, 21 Ala. 473.

Under the decisions above cited, McGowin's express promise to pay appellant for the services rendered was an affirmance or ratification of what appellant had done raising the presumption that the services had been rendered at McGowin's request.

4. The averments of the complaint show that in saving McGowin from death or grievous bodily harm, appellant was crippled for life. This was part of the consideration of the contract declared on. McGowin was benefited. Appellant was injured. Benefit to the promisor or injury to the promisee is a sufficient legal consideration for the promisor's agreement to pay. Fisher v. Bartlett, 8 Greenl. (Me.) 122, 22 Am. Dec. 225; State ex rel. Bayer v. Funk, supra.

5. Under the averments of the complaint the services rendered by appellant were not gratuitous. The agreement of McGowin to pay and the acceptance of payment by appellant conclusively shows the contrary. . . .

From what has been said, we are of the opinion that the court below erred in the ruling complained of; that is to say, in sustaining the demurrer, and for this error the case is reversed and remanded.

Reversed and remanded.

SAMFORD, J. (concurring). The questions involved in this case are not free from doubt, and perhaps the strict letter of the rule, as stated by judges, though not always in accord, would bar a recovery by plaintiff, but following the principle announced by Chief Justice Marshall in Hoffman v. Porter, Fed. Cas. No. 6,577, 2 Brock. 156, 159, where he says, "I do not think that law ought to be separated from justice, where it is at most doubtful," I concur in the conclusions reached by the court.

[The Supreme Court of Alabama denied certiorari in this case, writing a short opinion in which it expressly approved the decision of the lower appellate court, 232 Ala. 374, 168 So. 199 (1936).]

NOTES AND QUESTIONS

1. Is this case distinguishable from Mills v. Wyman?

2. Would the case have been decided differently if McGowin had made no promise at all and had never made any payments?

> Courts have frequently enforced promises on the simple ground that the promisor was only promising to do what he ought to have done anyway. These cases have either been condemned as wanton departures from legal principle, or reluctantly accepted as involving the kind of compromise logic must inevitably make at times with sentiment. I believe that these decisions are capable of rational defense. When we say the defendant was morally obligated to do the thing he promised, we in effect assert the existence of a substantive ground for enforcing the promise. . . . The court's conviction that the promisor ought to do the thing, plus the promisor's own admission of his obligation, may tilt the scales in favor of enforcement where neither standing alone would be sufficient. If it be argued that moral consideration threatens certainty, the solution would seem to lie, not in rejecting the doctrine, but in taming it by continuing the process of judicial exclusion and inclusion already begun in the cases involving infants' contracts, barred debts, and discharged bankrupts.

Lon Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 821-822 (1941).

Problem 49

When his parents died, Oliver, age 9, was taken into the home of his aunt, Mrs. Corney, who cared for him until he reached the age of majority. Twenty years later, Mrs. Corney appealed to him for financial aid, and he signed a contract obligating himself to pay her $50 a week for the rest of

her life "in return for her many acts of kindness to me." By a twist of fate, the next day he met the love of his life and ran off with her. Two years later Mrs. Corney died, and her executor brought suit against him for all of the missed weekly payments. Must he pay?

RESTATEMENT (SECOND) OF CONTRACTS

§86. PROMISE FOR BENEFIT RECEIVED

(1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.

(2) A promise is not binding under Subsection (1)

(a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or

(b) to the extent that its value is disproportionate to the benefit.

Problem 50

Decide *Hayes, Mills,* and *Webb* as if the Restatement provision above expressed the law of the jurisdiction.

V. THE PREEXISTING DUTY RULE

A. The Basic Concept

HARRIS v. WATSON
King's Bench, 1791
Peake 72, 170 Eng. Rep. 94

In this case the declaration stated, that the Plaintiff being a seaman on board the ship Alexander, of which the Defendant was master and commander, and which was bound on a voyage to Lisbon: whilst the ship was on her voyage, the Defendant, in consideration that the plaintiff would perform some extra work, in navigating the ship, promised to pay him five guineas over and above his common wages. There were other counts for work and labour, etc.

The Plaintiff proved that the ship being in danger, the Defendant, to induce the seamen to exert themselves, made the promise stated in the first count.

Lord KENYON. If this action was to be supported, it would materially affect the navigation of this kingdom. It has been long since determined, that when the freight is lost, the wages are also lost. This rule was founded on a principle of policy, for if sailors were in all events to have their wages, and in time of danger entitled to insist on an extra charge on such a promise as this, they would in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to make.

The plaintiff was nonsuited.

STILK v. MYRICK
Court of Common Pleas, 1809
6 Esp. 129, 170 Eng. Rep. 1168

This was an action for seaman's wages, on a voyage from London to the Baltic and back.

By the ship's articles, executed before the commencement of the voyage, the plaintiff was to be paid at the rate of 5 pounds a month; and the principal question in the cause was, whether he was entitled to a higher rate of wages. In the course of the voyage two of the seamen deserted, and the captain, having in vain attempted to supply their places at Cronstadt, there entered into an agreement with the rest of the crew, that they should have the wages of the two who had deserted equally divided among them if he could not procure two other hands at Gottenburgh. This was found impossible, and the ship was worked back to London by the plaintiff and eight more of the original crew, with whom the agreement had been made at Cronstadt.

Lord ELLENBOROUGH. I think Harris v. Watson (Peake, 72) was rightly decided; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say, the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compelled to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death, and those who

remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of 5 pounds a month.

Verdict accordingly.

LINGENFELDER v. WAINWRIGHT BREWERY CO.

Supreme Court of Missouri, 1891
103 Mo. 578, 15 S.W. 844

[Plaintiff was the executor of the estate of Edmund Jungenfeld, who was employed by the defendant brewery as an architect. During the performance of a contract to design new brewery buildings, Jungenfeld discovered that defendant had awarded a separate contract for a refrigeration plant to one of his competitors. Angry, Jungenfeld threatened to quit, but agreed to continue when defendant promised him an extra payment of 5 percent of the refrigeration plant's cost. When Jungenfeld finished the brewery building, defendant refused to pay anything more than the original contract amount. The trial court, refusing to adopt the portion of a report on this point prepared by a referee to whom the case was assigned, held for the plaintiff on the issue presented here.]

GANTT, P.J. (after stating the facts). . . . Was there any consideration for the promise of Wainwright to pay Jungenfeld the 5 percent on the refrigerator plant? If there was not, plaintiffs cannot recover the $3,449.75, the amount of that commission. The report of the referee and the evidence upon which it is based alike show that Jungenfeld's claim to this extra compensation is based upon Wainwright's promise to pay him this sum to induce him, Jungenfeld, to complete his original contract under its original terms. It is urged upon us by respondents that this was a new contract. New in what? Jungenfeld was bound by his contract to design and supervise this building. Under the new promise he was not to do any more or anything different. What benefit was to accrue to Wainwright? He was to receive the same service from Jungenfeld under the new, that Jungenfeld was bound to render under the original, contract. What loss, trouble, or inconvenience could result to Jungenfeld that he had not already assumed? No amount of metaphysical reasoning can change the plain fact that Jungenfeld took advantage of Wainwright's necessities, and extorted the promise of 5 percent of the refrigeration plant as the condition of his complying with his contract already entered into. Nor was there even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part. Jungenfeld himself put it upon the simple proposition that "if he, as an architect, put up the brewery, and another company put up the refrigerating machinery, it would be a detriment to the Empire Refrigerating Company," of which Jungenfeld was president. To permit

plaintiff to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts that they may profit by their own wrong. "That a promise to pay a man for doing that which he is already under contract to do is without consideration" is conceded by respondents. The rule has been so long imbedded in the common law and decisions of the highest courts of the various states that nothing but the most cogent reasons ought to shake it. . . . But "it is carrying coals to New Castle" to add authorities on a proposition so universally accepted, and so inherently just and right in itself.

The learned counsel for respondents do not controvert the general proposition. Their contention is, and the circuit court agreed with them, that when Jungenfeld declined to go further on his contract, that defendant then had the right to sue for damages, and, not having elected to sue Jungenfeld, but having acceded to his demand for the additional compensation, defendant cannot now be heard to say his promise is without consideration. While it is true Jungenfeld became liable in damages for the obvious breach of his contract we do not think it follows that defendant is estopped from showing its promise was made without consideration. It is true that as eminent a jurist as Judge Cooley, in Goebel v. Linn, 47 Mich. 489, 11 N.W. Rep. 284, held that an ice company which had agreed to furnish a brewery with all the ice they might need for their business from November 8, 1879, until January 1, 1881, at $1.75 per ton, and afterwards, in May, 1880, declined to deliver any more ice unless the brewery would give it $3 per ton, could recover on a promissory note given for the increased price. Profound as is our respect for the distinguished judge who delivered that opinion, we are still of the opinion that his decision is not in accord with the almost universally accepted doctrine, and is not convincing, and certainly so much of the opinion as held that the payment by a debtor of a part of his debt then due would constitute a defense to a suit for the remainder is not the law of this state, nor, do we think, of any other where the common law prevails. The case of Bishop v. Busse, 69 Ill. 403, is readily distinguishable from the case at bar. The price of brick increased very considerably, and the owner changed the plan of the building, so as to require nearly double the number. Owing to the increased price and change in the plans the contractor notified the party for whom he was building that he could not complete the house at the original prices, and thereupon a new arrangement was made and it is expressly upheld by the court on the ground that the change, in the buildings was such a modification as necessitated a new contract. Nothing we have said is intended as denying parties the right to modify their contracts, or make new contracts, upon new or different considerations, and binding themselves thereby. What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and although by taking advantage of the necessities of his adversary he obtains a promise for more, the law will regard it as *nudum pactum,* and will not lend its process to aid in the wrong. So holding, we reverse the judgment of the circuit court of St. Louis to the extent that it allows the plaintiffs below (respondents here) the sum $3,449.75, the amount of commission at 5 per cent on the refrigerator plant. . . .

Jugenfeld - no consideration to Wainwright
- can't ask for more when doing what originally agreed to

Problem 51

When Tony was murdered, Maria offered a $5,000 reward for the arrest of his killer. Officer Krupke of the New York police force tracked down the killer while Krupke was taking a day off from work. Maria refused to pay Krupke the reward. Is the preexisting duty rule involved in this? What policy considerations affect the result? See N.Y. Penal Law §§200.30 and 200.35, making it a crime to offer or accept a gratuity for the performance of a public servant's official duties. There is a similar federal statute: 18 U.S.C.A. §201(f) and (g).

Problem 52

The Gilberts School of Law hired Professor Chalk to teach Contracts for an agreed salary of $60,000 for the first year. The day after Chalk agreed to this new employment, he received an offer to join the faculty of the Nutshell Law School at a yearly salary of $65,000. He phoned the dean of the Gilberts School of Law and said, "Will you advise me as a friendly matter what to do?" The dean, worried, replied, "I don't want to lose you. Let's agree to forget the first contract, and I'll see that you are paid $65,000 for next year." Chalk did join the Gilberts faculty, but the school paid him only $60,000. Is he entitled to the extra $5,000? See Schwartzreich v. Bauman-Basch, Inc., 231 N.Y. 196, 131 N.E. 887 (1921); Corbin §186. Is it possible to characterize the extra amount as a *gift*? See Watkins & Sons, Inc. v. Carrig, 91 N.H. 459, 21 A.2d 591 (1941).

Problem 53

Abby Brewster had wanted to have a cellar under her house for a long time. She hired the Teddy Construction Company to do the excavation for $1,500. Shortly after the work began, it was discovered that the house was built over swampland, and the cellar could be dug only with almost superhuman effort and great expense. Teddy wanted to quit, but Abby insisted on the cellar, promising to pay any additional cost. Teddy finally did complete the cellar, but Abby refused to pay anything more than $1,500. Must she? If it is clear from the usage of trade that in this situation the contractor bears the risk of soil problems, how is this result squared with the preexisting duty rule? See Corbin §§183 and 184. If this were a sale of goods instead of a construction agreement, is the answer easier? See UCC §2-209(1) and its Official Comment 2.

Problem 54

The U.S. Army contracted with Treads, Inc., to supply a special type of tread for a new tank the army was developing. When the tanks were in

production and it was too late for the army to procure the treading elsewhere, Treads suddenly announced that it was doubling the price — take it or leave it. The army complained but finally gave in "under protest." After Treads had completely performed, must the army pay the doubled amount? See UCC §§2-209(1) and its Official Comment 2, 1-203, and 1-207 [in jurisdictions adopting the new version of Article 1, these last two citations are §§1-304 and 1-308]. Compare Austin Instrument, Inc. v. Loral Corp., 29 N.Y.2d 124, 324 N.Y.S.2d 22, 272 N.E.2d 533 (1971), and United States v. Bethlehem Steel Corp., 315 U.S. 289 (1942), with Ruble Forest Products, Inc. v. Lancer Mobile Homes, Inc., 269 Or. 315, 524 P.2d 1204 (1974). The seminal article on point is Dawson, Economic Duress: An Essay in Perspective, 45 Mich. L. Rev. 253 (1947).

Problem 55

The owner of the sailboat *Indefatigable* hired Horatio Hornblower to sail her in the America's Cup Race and agreed to pay Hornblower $50,000 if he won. The *Indefatigable* had been built by the Forester Marine Works, which stood to gain a great deal of business if the boat won the race, so the president of Forester contracted to pay Hornblower an extra $10,000 if he won. The *Indefatigable* did prove to be the victor, and Hornblower collected his $50,000 from her owner. Must Forester Marine Works pay up, or is the preexisting duty rule a bar? Compare McDivitt v. Stokes, 174 Ky. 515, 192 S.W. 681 (1917), with Corbin §§176-179.

B. Past Due Monetary Debts

Problem 56

Thomas Pettifog, an attorney, did a lot of debt collection work for clients. On behalf of a client, Pettifog phoned a debtor, I. M. Pecunious, and asked her what she was going to do about the past due amount of $1,000 that she owed Pettifog's client. She replied that she was short of funds. When Pettifog threatened suit, she asked him if he would accept an immediate payment of $750 and forget the rest. He agreed to do so. When her check for that amount arrived, he cashed it and then, secure in his knowledge of the preexisting duty rule, he filed suit against her for the extra $250. Will the suit succeed?

In Pinnel's Case, 5 Coke's Rep. 117a, 77 Eng. Rep. 237 (Com. Pl. 1602), Lord Coke said in dictum that "payment of a less sum on the day [due] in satisfaction of a greater, cannot be satisfaction of the whole," but he added that "the gift of a horse, hawk, or robe, etc., in satisfaction is good." In 1884 in the famous case of Foakes v. Beer, L.R. 9 A.C. 605, the House of Lords (Great Britain's highest court) cited to Pinnel's Case when

holding that there was no consideration for a modification agreement in which a creditor agrees to accept as satisfaction a lesser amount than that admittedly due. Does the "Rule of Foakes v. Beer" follow logically from the preexisting duty rule? Is it good policy?

In Pinnel's Case, Lord Coke himself had provided the way out of the partial payment puzzle—simply substitute a nonfungible item (for example, a hawk) for the amount due and, since the law will not inquire into the adequacy of the consideration, a valid modification agreement arises. In a modern context an additional promise to do something additional, or in substitution, such as paying a debt earlier than due would be sufficient consideration. It is a favorite legal maxim that "the law favors a compromise." Further, note again that the decision in *Foakes* only serves to keep a new agreement unenforceable if the obligation is admittedly due. That is, if there is either a good faith dispute about whether there is any debt owed or the amount of debt owed, an agreement to pay less than requested by the creditor is supported by consideration.

An *accord* is the agreement to accept a substitued or different performance, and a *satisfaction* is the satisfaction of the new agreement.

Problem 57

In the last Problem, would your answer change if I. M. Pecunious (a) truly believed that she only owed $750 or (b) she did not believe she owed any money to Pettifog's client because Pettifog's client was rude to I. M. Pecunious when she purchased goods on credit from him?

Problem 58

Attorney Pettifog phoned the debtor, I. M. Pecunious, and demanded that she pay his client the $1,000 she owed. She replied that she had decided to file for bankruptcy and Pettifog's client should submit his claim to the bankruptcy court. Knowing that the chance of getting any payment out of a bankruptcy court is slim, Pettifog said, "Look, why don't you forget about filing a bankruptcy petition and send me $750 as a full satisfaction of the debt?" She agreed to do so. Is this a valid accord and satisfaction or may Pettifog still collect the extra $250? If Pecunious violates this agreement and files her bankruptcy petition anyway, may Pettifog's client file a claim for $1,000 or only $750?

CLARK v. ELZA
Court of Appeals of Maryland, 1979
286 Md. 208, 406 A.2d 922

ELDRIDGE, J. This case presents the question of whether an executory oral agreement to settle a pending law suit may be raised as a defense to

prevent a plaintiff from pursuing his original cause of action. It also presents the threshold issue of whether a trial court's refusal to enforce such a settlement agreement, where enforcement was sought in the underlying legal action, may be immediately appealed. We answer these questions in the affirmative.

As a result of injuries sustained in an automobile accident, the plaintiffs, Floyd L. Elza and his wife Myrtle E. Elza, filed suit in the Circuit Court for Baltimore County. They alleged that the defendants, Swannie B. Clark and Linda Sue Woodward, were legally responsible for their injuries. After the case was scheduled for trial, settlement negotiations ensued between the parties. A figure of $9,500.00 was verbally agreed upon; the trial judge was notified; and the case was removed from the trial calendar. The defendants forwarded a release and an order of satisfaction to the plaintiff's attorney, and later sent a settlement draft to the plaintiffs' attorney. Thereafter, these papers were returned unexecuted with the statement that the $9,500.00 settlement was no longer adequate. The reason given for this change of mind was that on the day after the oral agreement, Mr. Elza had visited a new physician who informed him that his injuries were more extensive than he originally believed.

The plaintiffs then advised the court that they were no longer willing to go through with the settlement. In response, the defendants filed in the tort action a "Motion to Enforce Settlement." At a hearing on the motion the plaintiffs argued that the settlement agreement was not binding on them because it was merely an executory accord, and could only be enforced upon satisfaction. The court observed that if the agreement were a substituted contract, as opposed to an executory accord, then it would be binding. Finding that the intention of the parties was to create an executory accord, the trial judge denied the motion of the defendants to enforce the settlement. The effect of this ruling was that trial upon the original tort action could proceed, notwithstanding the supposed settlement.

The defendants then took an appeal to the Court of Special Appeals, and the plaintiffs moved to dismiss the appeal. The Court of Special Appeals, in an unreported opinion, dismissed the appeal as premature because the trial court had not yet rendered a final judgment in the tort case. The court reasoned:

> Here, the order . . . denying appellants' motion to enforce settlement did not deny appellees the means of further prosecuting their claims nor did it deny appellants the right to defend against those claims. In short, it did not settle and conclude the rights of the parties involved in the action and, thus, constituted an interlocutory order which is not appealable at this time.

The defendants petitioned this Court for a writ of certiorari, challenging the ruling that the case was not appealable and arguing that the purported settlement was effective. We granted the petition with respect to both issues.

[The court first concluded that the case was appealable.]

As previously mentioned, the trial court refused to enforce the settlement agreement on the ground that it was an "executory accord" and not

a "substitute contract." An executory accord is defined in 6 Corbin on Contracts §1268, p.71 (1962) as follows:

> The term "accord executory" is and always has been used to mean an agreement for the future discharge of an existing claim by a substituted performance. In order for an agreement to fall within this definition, it is the promised performance that is to discharge the existing claim, and not the promise to render such performance. Conversely, all agreements for a future discharge by a substituted performance are accords executory. It makes no difference whether or not the existing claim is liquidated or unliquidated, undisputed or disputed, except as these facts bear upon the sufficiency of the consideration for some promise in the new agreement. It makes no difference whether or not a suit has already been brought to enforce the original claim; or whether that claim arised out of an alleged tort or contract or quasi-contract.

See also J. Calamari and J. Perillo, The Law of Contracts §21-4 (2d ed. 1977); II Restatement of Contracts §417 (1932). See generally Gold, Executory Accords, 21 Boston U. L. Rev. 465 (1941); Comment, Executory Accord, Accord and Satisfaction, and Novation—The Distinctions, 26 Baylor L. Rev. 185 (1974). On the other hand, where the parties intend the new agreement itself to constitute a substitute for the prior claim, then this substituted contract immediately discharges the original claim. Under this latter type of arrangement, since the original claim is fully extinguished at the time the agreement is made, recovery may only be had upon the substituted contract. 6 Corbin, supra, pp. 74-75; Calamari and Perillo, supra, §21-5.

It is often extremely difficult to determine the factual question of whether the parties to a compromise agreement intended to create an executory accord or a substitute contract. However, unless the evidence demonstrates that the new agreement was designed to be a substitute for the original cause of action, it is presumed that the parties each intended to surrender their old rights and liabilities only upon performance of the new agreement. In other words, unless there is clear evidence to the contrary, an agreement to discharge a pre-existing claim will be regarded as an executory accord. Porter v. Berwyn Fuel & Feed, 244 Md. 629, 639, 224 A.2d 662 (1966); 15 Williston on Contracts §1847 (3d ed. Jaeger 1972).

In light of the above-discussed principles, we agree with the trial court that the settlement agreement in this case was an executory accord and not a substitute contract. This conclusion is supported by the fact that a "release" was to be executed upon performance of the settlement contract. If a substitute contract were intended, the underlying tort cause of action would have been released when the agreement was made, notwithstanding the fact that performance had not yet been rendered. Holding in abeyance the release of the tort claim until the settlement agreement was performed would be inconsistent with the principle that a substitute contract serves to replace the initial claim. See Warner v. Rossignol, 513 F.2d 678, 682 (1st Cir. 1975). Furthermore, to the extent that there is any doubt, under this Court's decision in Porter v. Berwyn Fuel & Feed, supra, 244 Md. at 639, 224 A.2d 662, such doubt is resolved in favor of finding an executory accord.

After concluding that the oral settlement agreement was an executory accord, the circuit court permitted the plaintiffs to proceed to trial on their original cause of action. In so ruling, we believe that the circuit court erred as to the effect of an unexecuted accord.

It is true that several cases set forth the principle, adopted by the court below, that an executory accord is unenforceable and is no defense against a suit on the prior claim. See the discussion in 6 Corbin on Contracts §§1271-1275 (1962). See also Addison v. Sommers, 404 F. Supp. 715 (D. Md. 1975). Nevertheless the modern view, and in our judgment the better view, is summarized by 6 Corbin, supra, §1274, p.104, as follows:

> An accord executory does not in itself operate as a discharge of the previous claim, for the reason that it is not so intended or agreed. In nearly every case, however, the parties intend that the duty created by the previous transaction shall be suspended during the period fixed for performance of the accord. As long as the debtor has committed no breach of the accord, therefore, the creditor should be allowed to maintain no action for the enforcement of the prior claim. His right of action should be held to be suspended as the parties intended.

This is also the position adopted by the Restatement of Contracts, Vol. II, §417 (1932):

> **§417. An Accord; Its Effect When Performed and When Broken**
>
> Except as stated in §§142, 143 with reference to contracts for the benefit of third persons and as stated in §418, the following rules are applicable to a contract to accept in the future a stated performance in satisfaction of an existing contractual duty, or a duty to make compensation:
>
> (a) Such a contract does not discharge the duty, but suspends the right to enforce it as long as there has been neither a breach of the contract nor a justification for the creditor in changing his position because of its prospective non-performance.
>
> (b) If such a contract is performed, the previously existing duty is discharged.
>
> (c) If the debtor breaks such a contract the creditor has alternative rights. He can enforce either the original duty or the subsequent contract.
>
> (d) If the creditor breaks such a contract, the debtor's original duty is not discharged. The debtor acquires a right of action for damages for the breach, and if specific enforcement of that contract is practicable, he acquires an alternative right to the specific enforcement thereof. If the contract is enforced specifically, his original duty is discharged.
>
> Comment . . .
>
> b. The rules governing the validity and effect of accord and satisfaction are applicable as well where the pre-existing duty arises from a tort as where it is based on contract.

Thus, an executory accord does not discharge the underlying claim until it is performed. Until there is a breach of the accord or a justifiable change of position based upon prospective nonperformance, the original cause of action is suspended. As long as the "debtor" (i.e., the defendant in a tort case) neither breaches the accord nor provides a reasonable basis for

concluding that he will not perform, the "creditor" (i.e., the plaintiff) has no right to enforce the underlying cause of action.

These principles have been applied to enforce executory accords under circumstances similar to those in the instant case. In Warner v. Rossignol, supra, 513 F.2d 678, a tort plaintiff in a bifurcated trial obtained a finding that the defendant was liable for the plaintiff's injuries. Prior to the jury trial on the issue of damages, the parties arrived at an oral settlement agreement; the court was notified; and the case removed from the trial calendar. After an initial delay in payment, the defendant tendered his check, which was refused by the plaintiff. The plaintiff then moved for a jury trial on the damages question and, in response, the defendant filed a "motion to enforce the settlement." The trial court denied the plaintiff's motion, and granted that of the defendant. On appeal the plaintiff argued that the settlement was unenforceable because it was an unconsummated accord. The United States Court of Appeals rejected this contention, characterizing it as "plainly wrong." Similarly, the court refused to accept the defendant's argument that the agreement was a "substitute contract" and not an executory accord. However, it went on to uphold the enforceability of the accord, declaring (513 F.2d at 683):

> We hold, therefore, that while the agreement to compromise was binding and enforceable against a defaulting party—barring plaintiff from proceeding with his original action in breach of the agreement—plaintiff did not entirely relinquish his original cause upon entering into the agreement of compromise. The tort action would only be conclusively terminated when the $6,000 was paid against delivery of the releases and dismissal stipulation; until then it remained in abeyance and if defendant repudiated the settlement or committed a material breach of its terms, plaintiff could elect either to sue for $6,000 or to rescind and press forward upon the original cause.

Although the precise question here presented does not appear to have been discussed by this Court in any prior opinion, nevertheless our decisions seem to reflect the position of the above-cited cases, the Restatement, and Corbin. See, e.g., Chicora Fer. Co. v. Dunan, 91 Md. 144, 46 A. 347 (1900). Moreover, it is logical to hold that executory accords are enforceable. An executory accord is simply a type of bilateral contract. As long as the basic requirements to form a contract are present, there is no reason to treat such a settlement agreement differently than other contracts which are binding. This is consistent with the public policy dictating that courts should "look with favor upon the compromise or settlement of law suits in the interest of efficient and economical administration of justice and the lessening of friction and acrimony." Chertkof v. Harry C. Weiskittel Co., 251 Md. 544, 550, 248 A.2d 373, 377 (1968), cert. denied, 394 U.S. 974, 89 S. Ct. 1467, 22 L. Ed. 2d 754 (1969).

In sum, the circuit court should not have permitted the plaintiffs to proceed with the underlying tort action in violation of their settlement agreement.

Judgment of the court of special appeals reversed and case remanded to that court with directions to reverse the judgment of the circuit court

for Baltimore County and remand the case for further proceedings not inconsistent with this opinion. Respondents to pay costs.

Problem 59

When attorney Pettifog finally contacted I. M. Pecunious, a debtor, he asked her when she was going to pay the $1,000 she owed his client; she replied that she did not owe that amount. She insisted that all she owed was $750. She mailed Pettifog a check for $750 and marked both on the check and on the accompanying letter that the check was tendered as "payment in full" of the debt owed to Pettifog's client. What results in the following circumstances?

(a) Pettifog's client cashes the check. Compare Hudson v. Yonkers Fruit Co., 258 N.Y. 168, 179 N.E. 373 (1932), with Kellogg v. Iowa State Traveling Men's Assn., 239 Iowa 196, 29 N.W.2d 559 (1947).

(b) Pettifog's client holds onto the check, not cashing it or replying in any way. See Hoffman v. Ralston Purina Co., 86 Wis. 2d 445, 273 N.W.2d 214 (1979).

(c) Pecunious is lying. She owes $1,000 and knows it all too well. Pettifog's client cashes the check and sues her for the other $250. See Hayden v. Coddington, 169 Pa. Super. 174, 82 A.2d 285 (1951).

The 1990 revision of Article 3 of the UCC addressed this problem of the "payment-in-full" check for the first time (the courts had reached varying results). Read §3-311 and its Official Comment and then tackle the following Problem.

Problem 60

Robert Startup picked out a beautiful Persian rug for his living room when he visited the carpet department of Merchandise World, agreeing to pay $5,500 for it. He charged it on his Merchandise World credit card. When the rug was delivered, he was annoyed to discover that it was badly wrinkled, apparently because it had been rolled up and stored in the delivery truck under much heavier items. He immediately complained to Merchandise World, but got no satisfactory resolution of the problem, so he had the rug professionally cleaned, which cost him $150. When he received his credit card bill from Merchandise World, he sent back a check for $5,350, along with a cover letter explaining what had happened, stating in the letter that the check was tendered as "payment in full" for the rug. The check was routinely cashed by the credit card department.

(a) The next month Merchandise World sent him a bill for $150. Must he pay it? See UCC §3-311(b). What should Merchandise World have done when it received the check?

(b) Is it too late for Merchandise World to do anything to avoid the accord and satisfaction? See UCC §3-311(c)(2).

(c) You are the attorney for Merchandise World. Alice Mayberry, the head of the credit card department, wants a realistic chance to avoid the accidental settlement of these disputes. She asks: Is there any way for checks like these to be sent to her office for her personal consideration? See UCC §3-311(c)(1).

(d) Alice also asks if, when she gets such checks, she can just scratch off the "payment in full" language on the check, write "cashed under protest, all rights reserved," and avoid settling the dispute. See UCC §1-207 [§1-308 in the new version of Article1].

VI. PROMISSORY ESTOPPEL

This section focuses on the historical development and modern application of the broader reliance concept recognized at §90 of the Restatement (Second). *Promissory estoppel* and the more general term *reliance* are often used interchangeably by the courts. Corbin, in §204 of his treatise, argued for the use of the latter term, but promissory estoppel (frequently condemned as something of a misnomer) has proved a durable label for the theory protecting unbargained-for reliance. Section 90 of the Restatement (Second) and its predecessor under the first Restatement (same section number) have probably generated more analysis by the courts than any other Restatement provision.

A. *Historical Development*

ALLEGHENY COLLEGE v.
NATIONAL CHAUTAUQUA COUNTY BANK
New York Court of Appeals, 1927
246 N.Y. 369, 159 N.E. 173

CARDOZO, C.J. The plaintiff, Allegheny College, is an institution of liberal learning at Meadville, Pa. In June, 1921, a "drive" was in progress to secure for it an additional endowment of $1,250,000. An appeal to contribute to this fund was made to Mary Yates Johnston, of Jamestown, New York. In response thereto, she signed and delivered on June 15, 1921, the following writing:

Estate Pledge, Allegheny College Second Century Endowment.

Jamestown, N.Y., June 15, 1921

In consideration of my interest in Christian education, and in consideration of others subscribing, I hereby subscribe and will pay to the order of the treasurer of Allegheny College, Meadville, Pennsylvania, the sum of five thousand dollars; $5,000.

This obligation shall become due thirty days after my death, and I hereby instruct my executor, or administrator, to pay the same out of my estate. This pledge shall bear interest at the rate of ____ percent per annum, payable annually, from _____ till paid. The proceeds of this obligation shall be added to the Endowment of said Institution, or expended in accordance with instructions on reverse side of this pledge.

Name: *Mary Yates Johnston,*
Address: 306 East 6th Street, Jamestown, N.Y.
Dayton E. McClain, Witness,
T. R. Courtis, Witness,
To authentic signature

On the reverse side of the writing is the following indorsement:

In loving memory this gift shall be known as the Mary Yates Johnston memorial fund, the proceeds from which shall be used to educate students preparing for the ministry, either in the United States or in the Foreign Field.

This pledge shall be valid only on the condition that the provisions of my will, now extant, shall be first met.

Mary Yates Johnston

The subscription was not payable by its terms until 30 days after the death of the promisor. The sum of $1,000 was paid, however, upon account in December, 1923, while the promisor was alive. The college set the money aside to be held as a scholarship fund for the benefit of students preparing for the ministry. Later, in July, 1924, the promisor gave notice to the college that she repudiated the promise. Upon the expiration of 30 days following her death, this action was brought against the executor of her will to recover the unpaid balance.

The law of charitable subscriptions has been a prolific source of controversy in this state and elsewhere. We have held that a promise of that order is unenforceable like any other if made without consideration. . . . On the other hand, though professing to apply to such subscriptions the general law of contract, we have found consideration present where the general law of contract, at least as then declared, would have said that it was absent. . . .

A classic form of statement identifies consideration with detriment to the promisee sustained by virtue of the promise. Hamer v. Sidway, 124 N.Y. 538, 27 N.E. 256, 12 L.R.A. 463, 21 Am. St. Rep. 693; Anson, Contracts (Corbin's ed.) p.116; 8 Holdsworth, History of English Law 10. So compendious a formula is little more than a half truth. There is need of many a supplementary gloss before the outline can be so filled in as to depict the classic doctrine. "The promise and the consideration must purport to be the motive each for the other, in whole or at least in part.

It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting." . . .

The half truths of one generation tend at times to perpetuate themselves in the law as the whole truth of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten. The doctrine of consideration has not escaped the common lot. As far back as 1881, Judge Holmes in his lectures on the Common Law (page 292), separated the detriment, which is merely a consequence of the promise from the detriment, which is in truth the motive or inducement, and yet added that the courts "have gone far in obliterating this distinction." The tendency toward effacement has not lessened with the years. On the contrary, there has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in what is styled "a promissory estoppel." Williston, Contracts, §§139, 116. Whether the exception has made its way in this state to such an extent as to permit us to say that the general law of consideration has been modified accordingly, we do not now attempt to say. Cases such as Siegel v. Spear & Co., 234 N.Y. 479, 138 N.E. 414, 26 A.L.R. 1205, and De Cicco v. Schweizer, 221 N.Y. 431, 117 N.E. 807, L.R.A. 1918E, 1004, Ann. Cas. 1918C, 816, may be signposts on the road. Certain, at least, it is that we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions. So long as those decisions stand, the question is not merely whether the enforcement of a charitable subscription can be squared with the doctrine of consideration in all its ancient rigor. The question may also be whether it can be squared with the doctrine of consideration as qualified by the doctrine of promissory estoppel.

We have said that the cases in this state have recognized this exception, if exception it is thought to be. Thus, in Barnes v. Perine, 12 N.Y. 18, the subscription was made without request, express or implied, that the church do anything on the faith of it. Later, the church did incur expense to the knowledge of the promisor, and in the reasonable belief that the promise would be kept. We held the promise binding, though consideration there was none except upon the theory of a promissory estoppel. In Presbyterian Society v. Beach, 74 N.Y. 72, a situation substantially the same became the basis for a like ruling. So in Roberts v. Cobb, 103 N.Y. 600, 9 N.E. 500, and Keuka College v. Ray, 167 N.Y. 96, 60 N.E. 325, the moulds of consideration as fixed by the old doctrine were subjected to a like expansion. Very likely, conceptions of public policy have shaped, more or less subconsciously, the rulings thus made. Judges have been affected by the thought that "defenses of that character" are "breaches of faith towards the public, and especially towards those engaged in the same enterprise, and an unwarrantable disappointment of the reasonable expectations of those interested." . . . The result speaks for itself irrespective of the motive. Decisions which have stood so long, and which are supported by so many considerations of public policy and reason, will not be overruled to save the symmetry of a concept which itself came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure. 8 Holdsworth, History of English Law, 7 et seq.

The concept survives as one of the distinctive features of our legal system. We have no thought to suggest that it is obsolete or on the way to be abandoned. As in the case of other concepts, however, the pressure of exceptions has led to irregularities of form.

It is in this background of precedent that we are to view the problem now before us. The background helps to an understanding of the implications inherent in subscription and acceptance. This is so though we may find in the end that without recourse to the innovation of promissory estoppel the transaction can be fitted within the mould of consideration as established by tradition.

The promisor wished to have a memorial to perpetuate her name. She imposed a condition that the "gift" should "be known as the Mary Yates Johnston Memorial Fund." The moment that the college accepted $1,000 as a payment on account, there was an assumption of a duty to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly in the spirit of its creation. The college could not accept the money and hold itself free thereafter from personal responsibility to give effect to the condition. . . . The purpose of the founder would be unfairly thwarted or at least inadequately served if the college failed to communicate to the world, or in any event to applicants for the scholarship, the title of the memorial. By implication it undertook, when it accepted a portion of the "gift," that in its circulars of information and in other customary ways when making announcement of this scholarship, it would couple with the announcement the name of the donor. The donor was not at liberty to gain the benefit of such an undertaking upon the payment of a part and disappoint the expectation that there would be payment of the residue. If the college had stated after receiving $1,000 upon account of the subscription, that it would apply the money to the prescribed use, but that in its circulars of information and when responding to prospective applicants it would deal with the fund as an anonymous donation, there is little doubt that the subscriber would have been at liberty to treat this statement as the repudiation of a duty impliedly assumed, a repudiation justifying a refusal to make payments in the future. Obligation in such circumstances is correlative and mutual. A case much in point is New Jersey Hospital v. Wright, 95 N.J. Law, 462, 464, 113 A. 144, where a subscription for the maintenance of a bed in a hospital was held to be enforceable by virtue of an implied promise by the hospital that the bed should be maintained in the name of the subscriber. Cf. Board of Foreign Missions v. Smith, 209 Pa. 361, 58 A. 689. A parallel situation might arise upon the endowment of a chair or a fellowship in a university by the aid of annual payments with the condition that it should commemorate the name of the founder or that of a member of his family. The university would fail to live up to the fair meaning of its promise if it were to publish in its circulars of information and elsewhere the existence of a chair or a fellowship in the prescribed subject, and omit the benefactor's name. A duty to act in ways beneficial to the promisor and beyond the application of the fund to the mere uses of the trust would be cast upon the promisee by the acceptance of the money. We do not need to measure the extent either of benefit to the promisor or of detriment to the promisee implicit in this duty. "If a person chooses to make an extravagant promise for

an inadequate consideration, it is his own affair." 8 Holdsworth, History of English Law, p.17. It was long ago said that "when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action." Sturlyn v. Albany, 1587, Cro. Eliz. 67, quoted by Holdsworth, supra; cf. Walton Water Co. v. Village of Walton, 238 N.Y. 46, 51, 143 N.E. 786. The longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good.

We think the duty assumed by the plaintiff to perpetuate the name of the founder of the memorial is sufficient in itself to give validity to the subscription within the rules that define consideration for a promise of that order. When the promisee subjected itself to such a duty at the implied request of the promisor, the result was the creation of a bilateral agreement. Williston, Contracts, §§60a, 68, 90, 370; Brown v. Knapp, supra; Grossman v. Schenker, supra; Williams College v. Danforth, 12 Pick. (Mass.) 541, 544; Ladies Collegiate Institute v. French, 16 Gray (Mass.) 196, 200. There was a promise on the one side and on the other a return promise, made, it is true, by implication, but expressing an obligation that had been exacted as a condition of the payment. A bilateral agreement may exist though one of the mutual promises be a promise "implied in fact," an inference from conduct as opposed to an inference from words. Williston, Contracts, §§90, 22a; Pettibone v. Moore, 75 Hun. 461, 27 N.Y.S. 455. We think the fair inference to be drawn from the acceptance of a payment on account of the subscription is a promise by the college to do what may be necessary on its part to make the scholarship effective. The plan conceived by the subscriber will be mutilated and distorted unless the sum to be accepted is adequate to the end in view. Moreover, the time to affix her name to the memorial will not arrive until the entire fund has been collected. The college may thus thwart the purpose of the payment on account if at liberty to reject a tender of the residue. It is no answer to say that a duty would then arise to make restitution of the money. If such a duty may be imposed, the only reason for its existence must be that there is then a failure of "consideration." To say that there is a failure of consideration is to concede that a consideration has been promised, since otherwise it could not fail. No doubt there are times and situations in which limitations laid upon a promisee in connection with the use of what is paid by a subscriber lack the quality of a consideration, and are to be classed merely as conditions. Williston, Contracts, §112; Page, Contracts, §523. "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." Williston, supra, §112. Such must be the meaning of this transaction unless we are prepared to hold that the college may keep the payment on account, and thereafter nullify the scholarship which is to preserve the memory of the subscriber. The fair implication to be gathered from the whole transaction is assent to the condition and the assumption of a duty to go forward with performance. . . .

The subscriber does not say: I hand you $1,000, and you may make up your mind later, after my death, whether you will undertake to commemorate my name. What she says in effect is this: I hand you $1,000, and if you are unwilling to commemorate me, the time to speak is now.

The conclusion thus reached makes it needless to consider whether, aside from the feature of a memorial, a promissory estoppel may result from the assumption of a duty to apply the fund, so far as already paid, to special purposes not mandatory under the provisions of the college charter (the support and education of students preparing for the ministry) — an assumption induced by the belief that other payments sufficient in amount to make the scholarship effective would be added to the fund thereafter upon the death of the subscriber. Ladies Collegiate Institute v. French, 16 Gray (Mass.) 196; Barnes v. Perine, 12 N.Y. 18, and cases there cited.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and judgment ordered for the plaintiff as prayed for in the complaint, with costs in all courts.

KELLOGG, J. (dissenting). The Chief Judge finds in the expression, "In loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund," an offer on the part of Mary Yates Johnston to contract with Allegheny College. The expression makes no such appeal to me. Allegheny College was not requested to perform any act through which the sum offered might bear the title by which the offeror states that it shall be known. The sum offered was termed a "gift" by the offeror. Consequently, I can see no reason why we should strain ourselves to make it, not a gift, but a trade. Moreover, since the donor specified that the gift was made, "In consideration of my interest in Christian education, and in consideration of others subscribing," considerations not adequate in law, I can see no excuse for asserting that it was otherwise made in consideration of an act or promise on the part of the donee, constituting a sufficient quid pro quo to convert the gift into a contract obligation. To me the words used merely expressed an expectation or wish on the part of the donor and failed to exact the return of an adequate consideration. But if an offer indeed was present, then clearly it was an offer to enter into a unilateral contract. The offeror was to be bound provided the offeree performed such acts as might be necessary to make the gift offered become known under the proposed name. This is evidently the thought of the Chief Judge, for he says: "She imposed a condition that the 'gift' should be known as the Mary Yates Johnston Memorial Fund." In other words, she proposed to exchange her offer of a donation in return for acts to be performed. Even so, there was never any acceptance of the offer, and therefore no contract, for the acts requested have never been performed. The gift has never been made known as demanded. Indeed, the requested acts, under the very terms of the assumed offer, could never have been performed at a time to convert the offer into a promise. This is so for the reason that the donation was not to take effect until after the death of the donor, and by her death her offer was withdrawn. Williston on Contracts, §62. Clearly, although a promise of the college to make the gift known, as requested, may be implied, that

promise was not the acceptance of an offer which gave rise to a contract. The donor stipulated for acts, not promises.

> In order to make a bargain it is necessary that the acceptor shall give in return for the offer or the promise exactly the consideration which the offeror requests. If an act is requested, that very act and no other must be given. If a promise is requested, that promise must be made absolutely and unqualifiedly. Williston on Contracts, §73.
>
> It does not follow that an offer becomes a promise because it is accepted; it may be, and frequently is, conditional, and then it does not become a promise until the conditions are satisfied; and in case of offers for a consideration, the performance of the consideration is always deemed a condition. Langdell, Summary of the Law of Contracts, §4.

It seems clear to me that there was here no offer, no acceptance of an offer, and no contract. Neither do I agree with the Chief Judge that this court "found consideration present where the general law of contract, at least as then declared, would have said that it was absent" in the cases of Barnes v. Perine, 12 N.Y. 18, Presbyterian Society v. Beach, 74 N.Y. 72, and Keuka College v. Ray, 167 N.Y. 96, 60 N.E. 325. In the *Keuka College* Case an offer to contract, in consideration of the performance of certain acts by the offeree, was converted into a promise by the actual performance of those acts. This form of contract has been known to the law from time immemorial (Langdell, §46), and for at least a century longer than the other type, a bilateral contract (Williston, §13). It may be that the basis of the decisions in Barnes v. Perine and Presbyterian Society v. Beach, supra, was the same as in the *Keuka College* Case. See Presbyterian Church of Albany v. Cooper, 112 N.Y. 517, 20 N.E. 352, 3 L.R.A. 468, 8 Am. St. Rep. 767. However, even if the basis of the decisions be a so-called "promissory estoppel," nevertheless they initiated no new doctrine. A so-called "promissory estoppel," although not so termed, was held sufficient by Lord Mansfield and his fellow judges as far back as the year 1765. Pillans v. Van Mierop, 3 Burr. 1663. Such a doctrine may be an anomaly; it is not a novelty. Therefore I can see no ground for the suggestion that the ancient rule which makes consideration necessary to the formation of every contract is in danger of effacement through any decisions of this court. To me that is a cause for gratulation rather than regret. However, the discussion may be beside the mark, for I do not understand that the holding about to be made in this case is other than a holding that consideration was given to convert the offer into a promise. With that result I cannot agree and, accordingly, must dissent.

POUND, CRANE, LEHMAN, and O'BRIEN, JJ., concur with CARDOZO, C.J.

KELLOGG, J., dissents in opinion, in which ANDREWS, J., concurs.

Judgment accordingly.

QUESTIONS

1. Was Justice Cardozo's discussion of estoppel necessary to his decision?

2. If the case had been decided solely on promissory estoppel grounds, how would it have come out?

3. For a line-by-line analysis of this case, see Alfred S. Konefsky, How to Read, Or at Least Not Misread, Cardozo in the *Allegheny College* Case, 36 Buff. L. Rev. 645 (1987).

B. Basic Applications

RESTATEMENT OF CONTRACTS

§90. Promise Reasonably Inducing Definite and Substantial Reliance

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

RESTATEMENT (SECOND) OF CONTRACTS

§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.

There are minor variances in these two sections, and we will discuss those below. First, note their similarity. There is little substantive difference in their scope. There is no language in either section that limits coverage to donative promises although nearly all pre-Restatement cases were so limited. In fact, most cases concerning §90 have not involved donative promises but promises in a bargaining context. The three major limitations on the scope of the section under the Restatement (Second) are the same under the original Restatement: (1) The promisor must reasonably expect that his or her promise will induce action or forbearance; (2) the promise must in fact induce such action or forbearance; and (3) injustice can be avoided only by the enforcement of the promise.

Note the language of subsection (2) of Section 90 of the Restatement (Second) of Contracts. Why do you suppose there is this difference for promissory estoppel in charitable subscription cases? Does *Allegheny* give you any hint?

Problem 61

When Earnest was about to turn 40, he became very depressed. To cheer him up, his rich Aunt Augusta told him that she was going to give him $1,000 for each year of his life as a birthday gift. Overjoyed, Earnest lived it up in the month before his birthday. He spent his savings on a new car, a wild day at the races, and a hot air balloon. When his Aunt Augusta learned this, she became disgusted at his profligacy and for his birthday she sent him a simple birthday card. He calls your office for advice. Does he have an action against her?

He relied on the gift promise & made some financial expenses, trusting that this would fall through. HOWEVER, Aunts promise is not one that that promisor expects to induce anything except cheering up. His reaction is not justifiable.

Problem 62

Valentine and Proteus, two friends, pooled their money and decided to buy a $75,000 yacht. On the day it was delivered, they painted the name *Silvia* on the bow, and Valentine promised Proteus that he would procure insurance for the craft on the next day. One week later a hurricane destroyed the yacht, and Valentine felt sick when he revealed to Proteus that he had forgotten to apply for the insurance. "It's O.K.," Proteus replied, "just replace the boat." When Valentine declined to do so, Proteus sued. Is promissory estoppel applicable here? Is there traditional consideration for Valentine's promise? Compare Rayden Engr. Corp. v. Church, 337 Mass. 652, 151 N.E.2d 57 (1958) (promise by insurance agent); Graddon v. Knight, 138 Cal. App. 2d 577, 292 P.2d 632 (1956) (promise by mortgagee-bank); Spiegel v. Metropolitan Life Ins. Co., 6 N.Y.2d 91, 160 N.E.2d 40 (1959) (promise by insurance agent); East Providence Credit Union v. Geremia, 103 R.I. 597, 239 A.2d 725 (1968) (dictum; credit union), with Northern Commercial Co. v. United Airmotive, 101 F. Supp. 169 (D. Alaska 1951); Nichols v. Acers Co., 415 S.W.2d 683 (Tex. Civ. App. 1967); Dillow v. Phalen, 106 Ohio App. 106, 153 N.E.2d 687 (1957). Comment e to Restatement (Second) §90 urges caution in applying the doctrine in such cases.

No bec. he is not relying by Valentine's promise.

No bec. no bargain for exchange

Problem 63

Aunt Augusta promised her nephew Earnest the sum of $5,000 if he studied hard in law school and made the law review. Earnest had always been an indifferent student who made modestly impressive grades by force of talent rather than application to his lessons. Taking her at her word, Earnest concentrated on his courses, finished his first year at the top of his class, and eventually became the editor in chief of the law review. By this time Aunt Augusta was repulsed by the snob he had become, and she refused to make the $5,000 payment, saying it was clearly a gift promise on which she had changed her mind. The day he was sworn into the bar, Earnest filed suit against her pro se. How does this come out? Does it differ from Hamer v. Sidway, supra section IA, at all?

1) She made a promise and reasonably expect to induce the nephew to study hard & review. Not studying is a legal right, so there was detriment on his side. His response is also justifiable

2) Injustice element here is missing though, $5000 would be a generalized expectation of gain - not a loss of hope expense

UNIVERSAL COMPUTER SYSTEMS v. MEDICAL SERVICES ASSOCIATION OF PENNSYLVANIA

United States Court of Appeals, Third Circuit, 1980
628 F.2d 820

ROSENN, Circuit Judge. This is a diversity action in which we are asked to consider questions of agency and promissory estoppel under Pennsylvania law. Specifically, we are asked to consider whether a principal is bound under a theory of promissory estoppel when an employee promised to pick up a bid from a potential bidder. We hold that the employee possessed apparent authority to make a binding promise on which the promisee relied to its detriment and accordingly reinstate the verdict of the jury awarding damages for the breach of that promise.

I

In July of 1975, Medical Services Association of Pennsylvania (Blue Shield) located in Camp Hill, Pennsylvania, solicited bids for the lease of a computer. Pursuant to the bid solicitation, Universal Computer Systems, Inc. (Universal) of Westport, Connecticut, prepared a bid proposal. In order to be considered, the terms of the solicitation required that it be received by Blue Shield at Harrisburg, Pennsylvania, no later than 12:00 Noon on August 18, 1975.

Joel Gebert, an employee of Blue Shield, served as liaison between Blue Shield and prospective bidders on this contract. Shortly before the date of the bidding deadline, most probably on Friday, August 15, Warren Roy Wilson, President of Universal, telephoned Gebert and informed him that Universal could furnish a computer which would meet the required specifications. Being reluctant to entrust the bid to a conventional courier source, Wilson informed Gebert that he expected to transmit the bid via Allegheny Airlines to Harrisburg, Pennsylvania, and asked Gebert if he could arrange to have someone pick up the proposal at the Harrisburg airport on Monday morning. Gebert assured Wilson that the proposal would be picked up at the airport and delivered to Blue Shield in time to meet the bidding deadline.

On the appointed day, Wilson dispatched the bid proposal from La Guardia Airport in New York by Allegheny Airlines PDQ Service on August 18, 1975, at approximately 8:30 A.M. Wilson called Gebert again to give him the necessary information so that the bid could be picked up at Harrisburg as Gebert had agreed and timely delivered to Blue Shield. Gebert, however, informed Wilson that he had changed his mind and could not pick up the proposal. Wilson then unsuccessfully attempted to make other arrangements with Allegheny to have the proposal picked up by courier or other agents and timely delivered to Blue Shield.

Allegheny originally refused to allow anyone to pick up the proposal other than a direct employee of either plaintiff or Blue Shield. Wilson was

finally able to contact the supervisors of the airline manager who instructed the manager to release the package to a courier. The bid proposal, however, was released too late to meet the noon deadline. Consequently, Blue Shield rejected the bid as untimely and returned it unopened.

Thereafter, Universal filed a complaint in the United States District Court for the Middle District of Pennsylvania seeking damages for the alleged breach of Blue Shield's promise. The case was tried before a jury which returned a verdict in the amount of $13,000 against Blue Shield. Thereafter Blue Shield filed a motion for judgment non obstante veredicto (n.o.v.) and a motion for a new trial. The district court granted the motion for judgment n.o.v. but denied the motion for a new trial. Universal appealed from the court's entry of judgment n.o.v. and Blue Shield cross-appeals from the denial of its motion for a new trial.

Proc History

II

In this diversity action brought in a Pennsylvania forum, Pennsylvania law applies as the place where the promise was made and where it was to be performed. See Craftmark Homes, Inc. v. Nanticoke Construction Co., 526 F.2d 790, 792 n.2 (3d Cir. 1975). The district court's order entering judgment n.o.v. rests on two findings. The first is that Gebert, whom Universal alleged made the promise to pick up the bid proposal, lacked actual and apparent authority to make that promise and thereby bind Blue Shield. The second is whether Wilson's reliance upon Gebert's promise was justified.

Promise is not binding if Gebert lacks authority

It is undisputed that Gebert lacked *actual* authority to make the promise. The issue, however, is whether he possessed *apparent* authority under Pennsylvania law to make such a promise. Under the decisional law of Pennsylvania, "apparent authority" is the power to bind a principal in the absence of actual authorization from the principal, but under circumstances in which the principal leads persons with whom his agent deals to believe that the agent has authority. Revere Press, Inc. v. Blumberg, 431 Pa. 370, 375, 246 A.2d 407, 410 (1968). The test for determining whether an agent possesses apparent authority is whether "a man of ordinary prudence, diligence and discretion would have a right to believe and would actually believe that the agent possessed the authority he purported to exercise." Apex Financial Corp. v. Decker, 245 Pa. Super. 439, 369 A.2d 483, 485-486 (1976). Nevertheless, a principal is not bound by the unauthorized act of his agent if the third person had notice of the agent's lack of authority. Schenker v. Indemnity Insurance Co., 340 Pa. 81, 87, 16 A.2d 304, 306 (1940).

2) under fed reg. he could not make the promise no sale

The district court stated that Gebert "received all calls from prospective bidders and was the sole contact pursuant to the request for bids." Nevertheless, the court found that Universal should have been aware that Gebert lacked the authority to promise to pick up the bid at the airport and, therefore, Blue Shield was not bound by Gebert's promise. The court based its holding on three findings. First, it found that the bidding process was covered by the federal procurement regulations. Second, the court

found that those regulations prohibited Blue Shield from showing a preference for any bidder by receiving a bid at a time or place other than that specified in the Invitation for Bids. Finally, the court found that Universal should have known that the procurement regulations applied to the bidding process and that those regulations prohibited the act which Gebert allegedly promised to perform. Accordingly, our discussion of the agency issue focuses upon the district court's conclusions about the relevance of the federal regulations.

The first two points do not require extended discussion because we believe that the district court erred in holding, as a matter of law, that Universal should have known the federal regulations were applicable. The invitation for bids apparently contained only two indications that federal procurement regulations might be applicable. There was, however, apparently no mention of the regulation at issue here, 41 C.F.R. §1-2.301(a), which the district court construed as forbidding the accommodation Gebert allegedly promised. The first mention of federal regulations occurs at page 2 of the Invitation for Bids and states: "specifications are presented in a 'Brand Name or Equal' modes for optional equipment, as described in Federal Procurement Regulations, Section 1-1.307-4 and 1-1.307-5 through 1-1.307-9." The second reference to federal regulations evidently appears at page 10 of the Invitation for Bids. Both parties apparently agree that the invitation did not mention the federal regulation at issue here, nor did it give any notice that federal procurement regulations were generally applicable.

In addition, Blue Shield argues that the Invitation for Bids contained a notice that the successful bidder had to be approved by the Secretary of the United States Department of Health, Education, and Welfare (HEW). Even so, that would nonetheless be insufficient to support the holding of the district court. By its ruling, the court concluded that as a matter of law a reasonable man should have been aware that the bidding procedure was governed by the federal procurement regulations. We disagree.

The references to the federal procurement regulations in the Invitation for Bids are not to the relevant regulation involving the issue before us, 41 C.F.R. §1-2.301(a) (1979), supra, and the references give no notice whatever that the bid procedures are covered by the federal procurement regulations. In addition, there is no indication that the Invitation for Bids contained a copy of the relevant federal regulations. Finally, although the invitation contained a notice that the successful bidder had to be approved by HEW, we do not believe that requirement provided a sufficient basis to conclude as a matter of law that a reasonable person should have been aware that the bidding procedures were governed by the Federal procurement regulations. Thus, the district court erred in concluding that Gebert lacked apparent authority to make the promise. Therefore, the jury could conclude, as it appears to have done, that Wilson reasonably was unaware of the applicability of the federal regulations and that they possibly interdicted Gebert's promised action.

For essentially the same reasons, we believe that the district court erred in ruling that Gebert's promise should not be enforced on principles of promissory estoppel. To create liability on the basis of promissory