before maturity, or at a place other than where the obligor was legally bound to pay, or to pay in property, regardless of its value, or to effect a composition with creditors by the payment of less than the sum due, has been held to constitute a consideration sufficient in law. The test is whether there is an additional consideration adequate to support an ordinary contract, and consists of something which the debtor was not legally bound to do or give....

And there is authority for the view that, where there is no illegal preference, a payment of part of a debt, "accompanied by an agreement of the debtor to refrain from voluntary bankruptcy," is a sufficient consideration for the creditor's promise to remit the balance of the debt. But the mere fact that the creditor "fears that the debtor will go into bankruptcy, and that the debtor contemplates bankruptcy proceedings," is not enough; that alone does not prove that the creditor requested the debtor to refrain from such proceedings....

The cases to the contrary either create arbitrary exceptions to the rule, or profess to find a consideration in the form of a new undertaking which in essence was not a tangible new obligation or a duty not imposed by the lease, or, in any event, was not the price "bargained for as the exchange for the promise" (see *Coast National Bank v. Bloom,* supra), and therefore do violence to the fundamental principle. They exhibit the modern tendency, especially in the matter of rent reductions, to depart from the strictness of the basic common law rule and give effect to what has been termed a "reasonable" modification of the primary contract....

So tested, the secondary agreement at issue is not supported by a valid consideration; and it therefore created no legal obligation. General economic adversity, however disastrous it may be in its individual consequences, is never a warrant for judicial abrogation of this primary principle of the law of contracts.

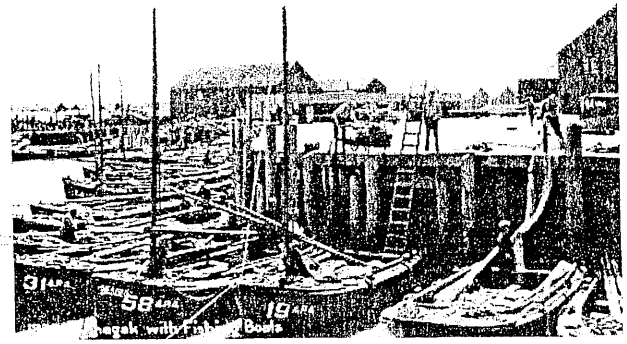
It remains to consider the second contention that, in so far as the agreement has been executed by the payment and acceptance of rent at the reduced rate, the substituted performance stands, regardless of the want of consideration. This is likewise untenable. Ordinarily, the actual performance of that which one is legally bound to do stands on the same footing as his promise to do that which he is legally compellable to do.... Anson on Contracts (Turck Ed.) 234; Williston on Contracts (Rev.Ed.), §§ 130, 130a. This is a corollary of the basic principle. Of course, a different rule prevails where *bona fide* disputes have arisen respecting the relative rights and duties of the parties to a contract, or the debt or demand is unliquidated, or the contract is wholly executory on both sides.... Anson on Contracts (Turck Ed.) 240, 241.

It is settled in this jurisdiction that, as in the case of other contracts, a consideration is essential to the validity of an accord and satisfaction. ... On reason and principle, it could not be otherwise. This is the general rule.... It results that the issue was correctly determined.

Judgment affirmed, with costs.

NOTES

When will a court invoke the strict pre-existing duty rule and when will it permit some flexibility? In *Levine v. Blumenthal* the rule was invoked to protect the lessor-creditor against a modification made in the midst of a depression. In Labriola v. Pollard Group, Inc., 152 Wash.2d 828, 100 P.3d 791 (2004), however, the rule was invoked to protect an at-will employee against a non-competition agreement made with the employer after five years of employment. The court required an "independent" consideration for the modification and found no new benefit for the employee and no further obligations for the employer to provide continued employment or additional training.



Alaska Packers' Association Boats

Alaska Packers' Association v. Domenico

United States Court of Appeals, Ninth Circuit, 1902.
54 C.C.A. 485, 117 Fed. 99.

[On March 26, 1900, appellees entered into a written contract with appellant in San Francisco under which they agreed to sail on a vessel provided by appellant to Pyramid Harbor, Alaska for the 1900 fishing season and then to return. Appellant had a salmon cannery at that location in which they had invested $150,000. They agreed, as sailor and fishermen, to do "regular ship's duty, both up and down, discharging and loading: and to do any other work whatsoever when requested to do so by the captain or agent of the Alaska Packer's Association." For this work, some appellees were to be paid $50 and others $60 for the season and all were to be paid "two cents for each red salmon in the catching of which he took part."

The appellees arrived at Pyramid Harbor in April, 1900 and began to unload the ship and fit up the cannery. On May 19, however, they "stopped work in a body, and demanded of the company's superintendent there in

charge $100 for services in operating the vessel to and from Pyramid Harbor, instead of the sums stipulated for in the contracts; stating that unless they were paid this additional wage they would stop work entirely, and return to San Francisco." The evidence showed that the superintendent stated that he had no authority to modify the contract and was unable to induce the appellees to continue working. Because of the remoteness of the location and the shortness of the season, he was also unable to obtain replacements. On May 22, the superintendent "yielded to their demands" and substituted $100 for the previously agreed seasonal rates in a document that was signed by the appellees before a shipping commissioner who had been brought in for the occasion. After completing the season and returning to San Francisco, the appellees were informed by appellant that they would be paid only the amounts agreed to in March. Some of the appellees sued to enforce the agreed modification and received a judgment in the district court.]

■ ROSS, CIRCUIT JUDGE.

The real questions in the case as brought here are questions of law, and, in the view that we take of the case, it will be necessary to consider but one of those. Assuming that the appellant's superintendent at Pyramid Harbor was authorized to make the alleged contract of May 22d, and that he executed it on behalf of the appellant, was it supported by a sufficient consideration? From the foregoing statement of the case, it will have been seen that the libelants agreed in writing, for certain stated compensation, to render their services to the appellant in remote waters where the season for conducting fishing operations is extremely short, and in which enterprise the appellant had a large amount of money invested; and, after having entered upon the discharge of their contract, and at a time when it was impossible for the appellant to secure other men in their places, the libelants, without any valid cause, absolutely refused to continue the services they were under contract to perform unless the appellant would consent to pay them more money. Consent to such a demand, under such circumstances, if given, was, in our opinion, without consideration, for the reason that it was based solely upon the libelants' agreement to render the exact services, and none other, that they were already under contract to render. The case shows that they willfully and arbitrarily broke that obligation. As a matter of course, they were liable to the appellant in damages, and it is quite probable, as suggested by the court below in its opinion, that they may have been unable to respond in damages. But we are unable to agree with the conclusions there drawn, from these facts, in these words:

"Under such circumstances, it would be strange, indeed, if the law would not permit the defendant to waive the damages caused by the libelants' breach, and enter into the contract sued upon,—a contract mutually beneficial to all the parties thereto, in that it gave to the libelants reasonable compensation for their labor, and enabled the defendant to employ to advantage the large capital it had invested in its canning and fishing plant."

Certainly, it cannot be justly held, upon the record in this case, that there was any voluntary waiver on the part of the appellant of the breach of the original contract. The company itself knew nothing of such breach until the expedition returned to San Francisco, and the testimony is uncontradicted that its superintendent at Pyramid Harbor, who, it is claimed made on its behalf the contract sued on, distinctly informed the libelants that he had no power to alter the original or to make a new contract; and it would, of course, follow that if he had no power to change the original, he would have no authority to waive any rights thereunder. The circumstances of the present case bring it, we think, directly within the sound and just observations of the supreme court of Minnesota in the case of King v. Railway Co., 61 Minn. 482, 63 N.W. 1105:

"No astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. Surely it would be a travesty on justice to hold that the party so making the promise for extra pay was estopped from asserting that the promise was without consideration. A party cannot lay the foundation of an estoppel by his own wrong, where the promise is simply a repetition of a subsisting legal promise. There can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract. The promise cannot be legally enforced, although the other party has completed his contract in reliance upon it."

In Lingenfelder v. Brewing Co., 103 Mo. 578, 15 S.W. 844, the court, in holding void a contract by which the owner of a building agreed to pay its architect an additional sum because of his refusal to otherwise proceed with the contract, said:

"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 anything 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 tender 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 five per cent. on the refrigerator plant as the condition of his complying with his contract already entered into. Nor had he 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

A more complicate solution: modification binding. But the owner may claim damage upon the sailors for the harm they did with the breach of the 1st contract. That harm is equal to the new sums the owner is obliged to pay

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. [Citing a long list of authorities.] But it is 'carrying coals to Newcastle' 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, the 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 results from the views above expressed that the judgment must be reversed, and the cause remanded, with directions to the court below to enter judgment for the respondent, with costs. It is so ordered.

NOTES

(1) Consideration is normally regarded as something which is bargained for and given in exchange for a promise. Was not the bargain requirement satisfied in *Levine*? Why, then, does the court reject the defendants' position? Would the decision have been different were it clearly established that the lessor importuned the lessees to stay on under the new arrangement?

(2) Is there a reasonable basis for distinguishing *Levine* and *Alaska Packers* on consideration theory? Assuming the consideration argument were unavailing in *Alaska Packers*, could you argue persuasively for a similar result predicated on other grounds?

(3) *It's the nets, stupid.* In *Alaska Packers*, the fishermen tried to prove that the nets furnished to them were not serviceable because they permitted the smaller salmon to slip through. The district court concluded that the contention was not proven (a finding affirmed in the full opinion of the Ninth Circuit), reasoning in part that Alaska Packers had every incentive to supply nets adequate to the task. Nevertheless, the district court held that an executory contract could be validly modified by substituting the modifying agreement for the original contract (a novation) and that there was no duress to prevent enforcement. On appeal, the Ninth Circuit rejected the novation theory, holding that new consideration was required to validate the modification. Moreover, the court of appeals appears to conclude that the modification was extracted under duress—by an unlawful threat to breach the contract, leaving the Packers without any viable alternatives and some very uncertain damage remedies. See Restatement (Second) of Contracts § 73 (performance of a legal duty "neither doubtful nor the subject of honest dispute is not consideration").

For an interesting context study of this case that completes the record and develops some alternative stories about what likely occurred, see Debora L. Threedy, *A Fish Story: Alaska Packers' Association v. Domenico*, 2000 Utah L. Rev. 185 (2000). For example, she suggests that the fishermen, because of differences in language and experience, might have misunderstood that the nets were serviceable. While this would not justify a strike, it tends to neutralize the claim of duress. 2000 Utah L. Rev. at 205–07. She also suggests that nets which appear unserviceable to those hoping to catch more fish (the fishermen) would be perfect for the Packers who were concerned about catching too many fish or, perhaps, cutting corners on equipment.

Angel v. Murray

Supreme Court of Rhode Island, 1974.
113 R.I. 482, 322 A.2d 630.

■ ROBERTS, CHIEF JUSTICE. This is a civil action brought by Alfred L. Angel and others against John E. Murray, Jr., Director of Finance of the City of Newport, the city of Newport, and James L. Maher, alleging that Maher had illegally been paid the sum of $20,000 by the Director of Finance and praying that the defendant Maher be ordered to repay the city such sum. The case was heard by a justice of the Superior Court, sitting without a jury, who entered a judgment ordering Maher to repay the sum of $20,000 to the city of Newport. Maher is now before this court prosecuting an appeal.

The record discloses that Maher has provided the city of Newport with a refuse-collection service under a series of five-year contracts beginning in 1946. On March 12, 1964, Maher and the city entered into another such contract for a period of five years commencing on July 1, 1964, and terminating on June 30, 1969. The contract provided, among other things, that Maher would receive $137,000 per year in return for collecting and removing all combustible and noncombustible waste materials generated within the city.

In June of 1967 Maher requested an additional $10,000 per year from the city council because there had been a substantial increase in the cost of collection due to an unexpected and unanticipated increase of 400 new dwelling units. Maher's testimony, which is uncontradicted, indicates the 1964 contract had been predicated on the fact that since 1946 there had been an average increase of 20 to 25 new dwelling units per year. After a public meeting of the city council where Maher explained in detail the reasons for his request and was questioned by members of the city council, the city council agreed to pay him an additional $10,000 for the year ending on June 30, 1968. Maher made a similar request again in June of 1968 for the same reasons, and the city council again agreed to pay an additional $10,000 for the year ending on June 30, 1969.

The trial justice found that each such $10,000 payment was made in violation of law. His decision, as we understand it, is premised on two independent grounds. First, he found that the additional payments were

so, when and why? In confronting these questions, consider first Justice Windeyer's summary of legal developments in England and then the following cases and problems.

> By his readiness to enlarge the scope of assumpsit and indebitatus assumpsit, Mansfield greatly assisted the development of the law of contract, which is the basis of all commercial law. But he failed to gain acceptance for a theory of consideration which, if it had been adopted, would have entirely altered the English law of contract. The established principle of English law today is that a merely gratuitous promise is not legally binding, except it be under seal. To make an enforceable agreement, otherwise than by deed, it is necessary that the promise should be given for some valuable consideration. It is not necessary that the consideration should be adequate, but it must be certain and of some value in the eye of the law. "A valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other". The origin of the doctrine of consideration is not free from doubt. ... Probably it owes something to the notion of *quid pro quo*, an element in the old action of debt which, as we have seen, was superseded by indebitatus assumpsit. Certainly it was chiefly developed as the result of the technicalities of the action of assumpsit in which the plaintiff was required to allege the consideration for the defendant's promise. The canon law too may have made an indirect contribution, for it had, by a singular adaptation of Roman law principles, reached the conclusion that promises were enforceable when supported by *causa*. The meaning of *causa* was not indisputedly defined. "The general meaning on which all were agreed was the necessity of a purpose to be attained. There was *causa*, if the promisor had in view a definite result, either some definite legal act or something more comprehensive, such as peace." The Court of Chancery in the sixteenth century was working out a theory of contract with, as its basis, the canonists' theory of *causa*, which it translated as "consideration". Promises were enforceable if made for a sufficient consideration. A material consideration was not necessary; a good motive, a moral obligation or natural love and affection towards the promisee was enough.
>
> The common law courts never accepted the Chancery Court's doctrine of consideration. The Chancery theory ultimately perished. It was the common law theory of contract and the common law doctrine of valuable consideration which became the accepted principles of English law. Some criterion of the enforceability of agreements was considered necessary as the action of assumpsit developed. The breach of every promise was not to be permitted to give rise to an action of assumpsit. How then could the agreements in respect of which assumpsit would lie be determined? The common lawyers adopted the Roman principle that *ex nudo pacto non oritur actio*. But they understood this maxim in a sense different from that which it bore in Roman law. Roman law had no generalized theory of consideration. For the common law, a *nudum pactum* was a promise not supported by consideration. A mere naked promise could have no assistance from the common law; but if clothed with a consideration, however scanty, it was received with little less respect than the covenant in its sealed vestment.
>
> By the eighteenth century it seemed clearly established that consideration was an essential condition of an action of assumpsit. But the scope of the doctrine was still unsettled. Mansfield cared little for procedural rules, but much for good faith and honest dealing. He was eager to break down some of the barriers between law and equity and to apply equitable principles in the administration of the common law. He confidently asserted that any moral obligation arising from the dictates of good conscience was a sufficient consideration to make a promise actionable. He went even further and denied that consideration was essential to the validity of a contract. In his view consideration had only an evidentiary value. If a promise was supported by consideration, it showed that the parties had intended their engagement to be legally binding. But this might be evidenced in other ways, for example an agreement which was reduced to writing in obedience to the Statute of Frauds or as the result of commercial custom was, in Mansfield's opinion, binding without consideration. "A *nudum pactum*," he said "does not exist in the usage and law of merchants." This doctrine, which he put forward in Pillans v. Van Mierop (3 Burr. 1663), would have made all written agreements enforceable, though they were not under seal. But the traditions of the common law were here too strong even for Mansfield's great prestige. Thirteen years later the House of Lords in Rann v. Hughes (7 T.R. 350), after consulting the judges, overruled his opinion and established the need for consideration in all contracts other than those embodied in a deed. "All contracts", the judges declared, "are by the laws of England distinguished into agreements by specialty and agreements by parol; nor is there any such third class as ... contracts in writing. If they be merely written and not specialties, they are parol and a consideration must be proved."
>
> But, although Mansfield's doctrine that no consideration at all was required to support a written agreement was soon overthrown, his opinion that a merely moral obligation was sufficient to constitute a consideration received general assent throughout the eighteenth century. It was not finally displaced until 1840, when Lord Denman pointed out in Eastwood v. Kenyon (11 Ad. & E. 438) that it would "annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving of promise creates a moral obligation to perform it."

Windeyer, Lectures on Legal History 237–40 (2d ed. rev. 1957).

Mills v. Wyman

Supreme Judicial Court of Massachusetts, 1825.
20 Mass. (3 Pick.) 207.

This was an action of assumpsit brought to recover a compensation for the board, nursing, & c., 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 a 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 preexisting 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 preexisting 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.

* * *

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) Professor Geoffrey R. Watson concluded that the facts stated in *Mills v. Wyman* were "falsely rendered" and that the opinion was "misguided." His

example, he made a mistake in filling out the lottery slip and, but for that mistake, the winnings would have been sizeable. The only commitment given to the principals was the obligation to share the winnings if the ticket was correctly filled out in accordance with the numbers jointly agreed on by the participants. Thus an objective approach was adopted by the court, similar to the approach found in the English case-law, which, on account of its specific characteristics, in particular the doctrine of consideration, provides rather different illustrations.

Queen's Bench Division **1.E.67.**
Simpkins v. *Pays*[159]

AGREEMENT TO SHARE WINNINGS ENFORCEABLE

Competition in Sunday paper

An agreement between a house-owner, her granddaughter and a lodger to enter competitions and share any winnings may be intended to be legally binding.

Facts: Since 1950 the plaintiff had been living as a lodger in the house of the defendant, an elderly woman, in circumstances which had some element of a family circle. Each of the parties used to compete separately in newspaper competitions. From about the beginning of May, 1954, for a period of seven or eight weeks, the plaintiff, the defendant and the defendant's grand-daughter each sent in, each week, a separate entry on one coupon to the fashion competition of a Sunday newspaper. Each of the three contributed one forecast, and the coupon was filled in by the plaintiff but was made out in the defendant's name. The costs of postage and entry were informally shared, being sometimes paid by one and sometimes by another. When the question of sharing winnings first came to be considered between the plaintiff and defendant, the latter said that they would go shares. The grand-daughter was not present on that occasion but the plaintiff and the defendant both knew that she would join in the arrangement. The coupon sent in for 27 June 1954, was successful, the correct forecast being that of the defendant's grand-daughter, and a prize of £750 was paid to the defendant. The defendant refused to pay a third of the prize money to the plaintiff, claiming, among other things, that the arrangement to share the winnings was arrived at in a family association and was not intended to give rise to legal consequences, and that, accordingly, there was no contract.

Held: There was an enforceable contract, because there was a mutuality in the arrangement between the parties, and, therefore, the plaintiff was entitled to payment of a third share of the prize money.

Judgment: SELLERS J: . . . On each of the occasions when the plaintiff made out the coupon . . . she put down the forecasts in the way which I have indicated, and entered in the appropriate place on the coupon "Mrs Pays, 11, Trevor Street, Wrexham", that is to say, the defendant's name and address, as if the coupon had been the defendant's. There were, in fact, three forecasts on each coupon, and I accept the plaintiff's evidence that, when the matter first came to be considered, what was said, when they were going to do it in that way, was: "We will go shares", or words to that effect. Whether that was said by the plaintiff or by the defendant does not really matter. "Shares" was the word used, and I do not think anything very much more specific was said. I think that that was the basis of the arrangement; and it may well be that the plaintiff was right when she said in her evidence, that the defendant said: "You're lucky, May, and if we win we will go shares".

. . .

On the finding of fact that the plaintiff's evidence is right as to what was said about the shares, learned counsel for the defendant not unnaturally said: "Even if that is so, the court cannot enforce this contract unless the arrangement made at the time was one which was intended to give rise to legal consequences". It may well be there are many family associations where some sort of

[159] [1955] 3 All ER 10.

rough and ready statement is made which would not, in a proper estimate of the circumstances, establish a contract which was contemplated to have legal consequences, but I do not so find here. I think that in the present case there was a mutuality in the arrangement between the parties. It was not very formal, but certainly it was, in effect, agreed that every week the forecast should go in in the name of the defendant, and that if there was success, no matter who won, all should share equally. It seems to be the implication from, or the interpretation of, what was said that this was in the nature of a very informal syndicate so that they should all get the benefit of success. It would, also, be wrong, I think, to say from what was arranged that, because the grand-daughter's forecast was the one which was successful of those submitted by the defendant, the plaintiff and the defendant should receive nothing. Although the grand-daughter was not a party before the court and I have not had the benefit of her evidence, on this arrangement she would, in my opinion, be as entitled to a third share as the others, because, although she was not, apparently, present when this bargain was made, both the others knew, at any rate soon after the outset, that she was coming in. It is possible, of course, although the plaintiff is not concerned in this, that the grand-daughter's effort was only to assist the defendant. The grand-daughter may accept that, but it makes no difference to the fact that the plaintiff and the defendant entered into an agreement to share, and, accordingly the plaintiff was entitled to one-third. I so find and give judgment for the amount of £250.

Note

This case clearly raises a problem of interpretation: what was it that the parties had agreed? And there is a further problem, concerning characterization: in what way did the agreement fall to be analysed? The court considered that there had been something cautiously characterized by it as an "arrangement" which the parties had intended to have legal consequences. It even accepted that an "informal syndicate" was involved. The upshot was the same: the plaintiff was entitled to one third of the prize. The decision appears to have been given on the basis of equity—in the general sense of the term—rather than by reference to law.

It is apparent from a comparison of the three judgments that, in cases of this kind involving similar circumstances, the courts have been at something of a loss to find any legal basis for the conclusion reached by them. They have taken the view that it is difficult to determine what the parties really intended in such cases where joint gaming has gone wrong, and have had problems in deciding whether, on the one hand, to order payment of a proportion of the winnings or whether, on the other, to dismiss the claim for payment. The French judgment speaks of the transformation of a moral obligation into an obligation in law, non-performance of which entails a legal sanction, whilst the English and German courts refer to the interests in issue. This is without doubt an area lying at the very fringes of contract law.

We now turn, finally, to a judgment showing the special nature of English law in relation to family arrangements, the effectiveness of which in other European legal systems is open to debate.

faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy." (2 Pomeroy, Equity Jurisprudence 804.) According to the undisputed proof, as shown by the record before us, the plaintiff was a working girl, holding a position in which she earned a salary of $10 per week. Her grandfather, desiring to put her in a position of independence, gave her the note, accompanying it with the remark that his other grandchildren did not work, and that she would not be obliged to work any longer. In effect he suggested that she might abandon her employment and rely in the future upon the bounty which he promised. He, doubtless, desired that she should give up her occupation, but whether he did or not, it is entirely certain that he contemplated such action on her part as a reasonable and probable consequence of his gift. Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration. The petition charges the elements of an equitable estoppel, and the evidence conclusively establishes them. If errors intervened at the trial they could not have been prejudicial. A verdict for the defendant would be unwarranted. The judgment is right and is

Affirmed.

NOTES

(1) How would *Ricketts* be decided under Section 90 of the Restatement (First) or the Restatement (Second)?

(2) Was there "agreement" here? Can there ever be contractual obligation without an agreement?

(3) In *Ricketts v. Scothorn,* there was no consideration for the grandfather's promise. Katie's act of quitting her job was not bargained for and given in exchange for the written promise to pay $2,000 plus interest. The court, however, concluded that grandfather's executor was estopped or precluded from raising the defense of "no consideration." Why? Because grandfather's promise induced reliance by Katie that made it inequitable for the executor later to claim that there was no consideration. As a result, the promise was enforced in full as if there was consideration.

There are two difficulties with this analysis. First the analysis tends to confuse two types of estoppel, "equitable" and "promissory." As one court put it: "Equitable estoppel ... is based upon a representation of existing or past facts, while promissory estoppel requires the existence of a promise.... Equitable estoppel ... is available only as a 'shield' or defense, while promissory estoppel can be used as a 'sword' in a cause of action for damages." Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wash.2d 255, 616 P.2d 644, 646 (1980). Second, the consequence of the confusion is that some courts have treated reliance induced by a promise as a reason to foreclose an attack on the enforceability of the promise and to limit the remedy to the loss suffered in reliance. See, e.g., Wheeler v. White, 398 S.W.2d 93 (Tex.1965). A more

affirmative statement of "promissory" estoppel appears in Section 90 of Restatement (Second):

> (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.

Allegheny College v. National Chautauqua County Bank of Jamestown

Court of Appeals of New York, 1927.
246 N.Y. 369, 159 N.E. 173.

■ CARDOZO, CH.J. The plaintiff, Allegheny College, is an institution of liberal learning at Meadville, Pennsylvania. 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 _____ per cent 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 thirty 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 thirty 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; 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" (Wisc. & Mich. Ry. Co. v. Powers, 191 U.S. 379, 386; McGovern v. City of N.Y., 234 N.Y. 377, 389; Walton Water Co. v. Village of Walton, 238 N.Y. 46, 51; 1 Williston, Contracts, § 139; Langdell, Summary of the Law of Contracts, pp. 82–88). If A promises B to make him a gift, consideration may be lacking, though B has renounced other opportunities for betterment in the faith that the promise will be kept.

The half truths of one generation tend at times to perpetuate themselves in the law as the whole truths 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 (p. 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) and DeCicco v. Schweizer (221 N.Y. 431) 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) and Keuka College v. Ray (167 N.Y. 96) 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 "defences of that character" are "breaches of faith toward the public, and especially toward those engaged in the same enterprise, and an unwarrantable disappointment of the reasonable expectations of those interested." (W.F. Allen, J., in *Barnes v. Perine*, supra, page 24; and cf. Eastern States League v. Vail, 97 Vt. 495, 505, and cases there cited). 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.... More is involved in the receipt of such a fund than a mere acceptance of money to be held to a corporate use.... 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. * * * 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 ever 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). 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.... 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, 22–a; Pettibone v. Moore, 75 Hun, 461, 464). 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 lacks 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 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 Inst. v. French, 16 Gray 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 quo pro* 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, sec. 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, sec. 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, sec. 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 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). * * * 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, CH. J.; KELLOGG, J. dissents in opinion, in which ANDREWS, J., concurs.

Judgment accordingly.

Congregation Kadimah Toras–Moshe v. DeLeo

Supreme Judicial Court of Massachusetts, 1989.
405 Mass. 365, 540 N.E.2d 691.

■ LIACOS, C.J.

Congregation Kadimah Toras–Moshe (Congregation), an Orthodox Jewish synagogue, commenced this action in the Superior Court to compel the administrator of an estate (estate) to fulfil the oral promise of the decedent to give the Congregation $25,000. The Superior Court transferred the case to the Boston Municipal Court, which rendered summary judgment for the estate. The case was then transferred back to the Superior Court, which also rendered summary judgment for the estate and dismissed the Congregation's complaint. We granted the Congregation's application for direct appellate review. We now affirm.

The facts are not contested. The decedent suffered a prolonged illness, throughout which he was visited by the Congregation's spiritual leader, Rabbi Abraham Halbfinger. During four or five of these visits, and in the presence of witnesses, the decedent made an oral promise to give the Congregation $25,000. The Congregation planned to use the $25,000 to transform a storage room in the synagogue into a library named after the decedent. The oral promise was never reduced to writing. The decedent died intestate in September, 1985. He had no children, but was survived by his wife.

The Congregation asserts that the decedent's oral promise is an enforceable contract under our case law, because the promise is allegedly supported either by consideration and bargain, or by reliance.... We disagree.

The Superior Court judge determined that "[t]his was an oral gratuitous pledge, with no indication as to how the money should be used, or what [the Congregation] was required to do if anything in return for this promise." There was no legal benefit to the promisor nor detriment to the promisee, and thus no consideration.... Furthermore, there is no evidence in the record that the Congregation's plans to name a library after the decedent induced him to make or to renew his promise. Contrast *Allegheny College v. National Chautauqua County Bank,* 246 N.Y. 369, 377–379, 159 N.E. 173 (1927) (subscriber's promise became binding when charity implicitly promised to commemorate subscriber).

As to the lack of reliance, the judge stated that the Congregation's "allocation of $25,000 in its budget[,] for the purpose of renovating a storage room, is insufficient to find reliance or an enforceable obligation." We agree. The inclusion of the promised $25,000 in the budget, by itself, merely reduced to writing the Congregation's expectation that it would

tend; and on the account of your situation, and that of your family, I feel like I want you and the children to do well."

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

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

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

NOTES

(1) Does it appear from *Kirksey* that a promise, simply because it is a promise, is presumptively enforceable?

(2) Assuming that the defendant's promise in *Kirksey* was, as characterized by the court, "a mere gratuity," should that, of itself, preclude relief for the plaintiff? Is it a policy of the law to discourage gratuities? Why might a court hesitate, however, to enforce a Kirksey-like promise? For example, what remedy should be given for breach of contract? See James Gordley, *Enforcing Promises*, 83 Cal.L.Rev. 541, 579–582 (1985), who notes that even though the case was decided before the rise of so-called promissory estoppel, Sister Antillico would not be a sympathetic figure if she "herself suspected that the promise might be indeliberate, defeasible for a host of reasons, and not intended to confer a right of action."

(3) The legend of Sister Antillico lives on. For example, Professor Weisbrod speculated on the role of dissent in American case law and the unique function performed by Judge Ormond, who "wrote for the court and was thus majority and dissent, authority and critic at the same time." See Carol Weisbrod, *An Uncertain Trumpet: A Gloss on Kirksey v. Kirksey*, 32 Conn. L. Rev. 1699 (2000). More recently, Professors Casto and Ricks have explored the background and context of the litigation, trying to answer the question why the case occupies such a prominent place in American contract casebooks if not elsewhere. Their conclusion:

> *Kirksey* is like the simple tunes, *Chopsticks* and *Twinkle, Twinkle, Little Star*, that beginning piano students learn. The tunes are delightfully simple and even fun to play. Beginning students learn to control their fingers and can readily see the relationship between notes on the music score and the movements of their fingers. After learning to read and play *Twinkle, Twinkle, Little Star*, the students are ready for more complex pieces. So it is with *Kirksey*. The case's value lies in teaching students to grasp a legal principle and to manipulate the pertinent facts at a quite rudimentary level. After mastering *Kirksey*, the students are ready for more complex pieces.

William R. Casto & Val D. Ricks, "Dear Sister Antillico": The story of Kirksey v. Kirksey, 94 Geo. L. J. 321, 383 (2006).

Hamer v. Sidway

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

Appeal from an order of the general term of the supreme court in the fourth judicial department, reversing a judgment entered on the decision of the court at special term in the county clerk's office of Chemung county on the 1st day of October, 1889. The plaintiff presented a claim to the executor of William E. Story, Sr., for $5,000 and interest from the 6th day of February, 1875. She acquired it through several mesne assignments from William E. Story, 2d. The claim being rejected by the executor, this action was brought. It appears that William E. Story, Sr., was the uncle of William E. Story, 2d; that at the celebration of the golden wedding of Samuel Story and wife, father and mother of William E. Story, Sr., on the 20th day of March, 1869, in the presence of the family and invited guests, he promised his nephew that if he would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until he became 21 years of age, he would pay him the sum of $5,000. The nephew assented thereto, and fully performed the conditions inducing the promise. When the nephew arrived at the age of 21 years, and on the 31st day of January, 1875, he wrote to his uncle, informing him that he had performed his part of the agreement, and had thereby become entitled to the sum of $5,000. The uncle received the letter, and a few days later, on the 6th day of February, he wrote and mailed to his nephew the following letter: "Buffalo, Feb. 6, 1875. W.E. Story, Jr.—Dear Nephew: Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have five thousand dollars, as I promised you. I had the money in the bank the day you was twenty-one years old that I intend for you, and you shall have the money certain. Now, Willie, I do not intend to interfere with this money in any way till I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. The first five thousand dollars that I got together cost me a heap of hard work. You would hardly believe me when I tell you that to obtain this I shoved a jack-plane many a day, butchered three or four years, then came to this city, and, after three months' perseverance, I obtained a situation in a grocery store. I opened this store early, closed late, slept in the fourth story of a building in a room 30 by 40 feet, and not a human

being in the building but myself. All this I done to live as cheap as I could to save something. I don't want you to take up with this kind of fare. I was here in the cholera season of '49 and '52, and the deaths averaged 80 to 125 daily, and plenty of small-pox. I wanted to go home, but Mr. Fisk, the gentleman I was working for, told me, if I left them, after it got healthy he probably would not want me. I stayed. All the money I have saved I know just how I got it. It did not come to me in any mysterious way, and the reason I speak of this is that money got in this way stops longer with a fellow that gets it with hard knocks than it does when he finds it. Willie, you are twenty-one, and you have many a thing to learn yet. This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. I was ten long years getting this together after I was your age. Now, hoping this will be satisfactory, I stop. * * * Truly yours, W.E. Story. P.S. You can consider this money on interest." The nephew received the letter, and thereafter consented that the money should remain with his uncle in accordance with the terms and conditions of the letter. The uncle died on the 29th day of January, 1887, without having paid over to his nephew any portion of the said $5,000 and interest.

■ PARKER, J. The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator, William E. Story, became indebted to his nephew, William E. Story, 2d, on his twenty-first birthday in the sum of $5,000. The trial court found as a fact that "on the 20th day of March, 1869, * * * William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $5,000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement." The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefitted; that which he did was best for him to do, independently of his uncle's promise,—and insists that it follows that, unless the promisor was benefitted, the contract was without consideration,—a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The exchequer chamber in 1875 defined "consideration" as follows: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson, Cont. 63. "In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Pars. Cont. *444. "Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." 2 Kent, Comm. (12th Ed.) *465. Pollock in his work on Contracts, (page 166,) after citing the definition given by the exchequer chamber, already quoted, says: "The second branch of this judicial description is really the most important one. 'Consideration' means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first." Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now, having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but, were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefitted in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been, support the position we have taken. In Shadwell v. Shadwell, 9 C.B. (N.S.) 159, an uncle wrote to his nephew as follows: "My dear Lancey: I am so glad to hear of your intended marriage with Ellen Nicholl, and, as I promised to assist you at starting, I am happy to tell you that I will pay you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall receive or require. Your affectionate uncle, Charles Shadwell." It was held that the promise was binding, and made upon good consideration. * * * In Talbott v. Stemmons, 12 S.W.Rep. 297, (a Kentucky case, not yet officially reported,) the step-grandmother of the plaintiff made with him the following agreement: "I do promise and bind myself to give my grandson Albert R. Talbott $500 at my death if he will never take another chew of tobacco or smoke another cigar during my life, from this date up to my death; and if he breaks this pledge he is to refund double the amount to his mother." The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained, and an appeal taken therefrom to the court of appeals, where the decision of the court below was reversed. In the opinion of the court it is said that "the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money, or contributed to his health; nevertheless, the surrender of that right caused the promise, and, having the right to contract with reference to the subject-matter, the

abandonment of the use was a sufficient consideration to uphold the promise." * * * The order appealed from should be reversed, and the judgment of the special term affirmed, with costs payable out of the estate. All concur.

NOTES

(1) Was there equivalency of exchange in *Hamer*? Did the promisor gain a pecuniary advantage? Did he derive any "benefit" from the transaction at all, or is enforcement predicated solely upon "detriment" to the promisee? In what way was plaintiff's conduct detrimental?

Langer v. Superior Steel Corp.

Superior Court of Pennsylvania, 1932.
105 Pa.Super. 579, 161 A. 571.

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

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

"August 31, 1927.
"Mr. Wm. F. Langer,

"Dear Sir:

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

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

"Cordially yours,

"(Signed) Frank R. Frost,
"President."

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

The issue raised by the affidavit of defense is whether the letter created a gratuitous promise or an enforceable contract. It is frequently a matter of great difficulty to differentiate between promises creating legal obligations and mere gratuitous agreements. Each case depends to a degree upon its peculiar facts and circumstances. Was this promise supported by a sufficient consideration, or was it but a condition attached to a gift? If a contract was created, it was based on a consideration, and must have been the result of an agreement bargained for in exchange for a promise: ... It was held in Presbyterian Board of Foreign Missions v. Smith, 209 Pa. 361, 363, that "a test of good consideration is whether the promisee, at the instance of the promisor, has done, forborne or undertaken to do anything real, or whether he has suffered any detriment or whether in return for the promise he has done something that he was not bound to do or has promised to do some act or has abstained from doing something." Mr. Justice Sadler pointed out in York M. & Alloys Co. v. Cyclops S. Co., 280 Pa. 585, that a good consideration exists if one refrains from doing anything that he has a right to do, "whether there is any actual loss or detriment to him or actual benefit to the promisor or not."

* * *

The plaintiff, in his statement, which must be admitted as true in considering the statutory demurrer filed by defendant, alleges that he refrained from seeking employment with any competitive company, and that he complied with the terms of the agreement. By so doing, has he sustained any detriment? Was his forbearance sufficient to support a good consideration? Professor Williston, in his treatise on Contracts, sec. 112, states: "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.... In case of doubt where the promisee has incurred a detriment on the faith of the promise, courts will naturally be loath to regard the promise as a mere gratuity, and the detriment incurred as merely a condition."

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

The appellee refers to Kirksey v. Kirksey, 8 Ala. 131, which is also cited by Professor Williston in his work on Contracts, sec. 112, note 51, as a leading case on this subject under discussion. The defendant wrote his

[His Lordship went on to hold that there was good consideration for the promise of indemnity despite the fact that the primary consideration was the promise given by the plaintiff to the Laus to perform their contract with FC: a promise to perform, or the performance of, a pre-existing contractual obligation to a third party can be valid consideration.]

Note

The efforts made by the Privy Council to circumvent the "past consideration" rule should be noted. It is certainly the case that the requirement that there be executory or executed consideration may cause arrangements which are otherwise perfectly reasonable to founder. The three conditions of "implied assumpsit" are not in fact always easy to satisfy.[242]

There is another obstacle stemming from another traditional rule: "the consideration must move from the promisee". This is the rule which, until the reforms recently introduced by the Contracts (Rights of Third Parties) Act 1999, precluded contracts in favour of a third party, as will be seen *infra*. It is sufficient to refer to the judgment in *Dunlop Pneumatic Tyre Co Ltd* v. *Selfridge & Co Ltd*.[243]

It is to be noted that the prohibition of such agreements arises out of the combination of two rules: the rule on the origin of consideration and the rule of privity of contract, and the result is the same in both cases.[244]

It seems unlikely that a general reform will be undertaken by legislative action. Yet attention should be drawn to a means which has been found of giving effect to some undertakings unsupported by consideration, which is known as promissory estoppel. We came across this earlier when considering gratuitous contracts.[245]

As is well known, estoppel was developed by equity as a corrective to the rigours of the common law.[246] The subject is attended by some degree of uncertainty and this is not the place to enter into a detailed discussion of it. But it is worth examining the manner in which promissory estoppel intervenes to mitigate the rigours of consideration, by studying the landmark judgment in the *High Trees House* case.

Queen's Bench Division **1.E.106.**

Central London Property Trust Ltd v. *High Trees House Ltd*[247]

PROMISSORY ESTOPPEL

The High Trees case

A landlord's promise to reduce a tenant's rent will be binding without consideration if the tenant has acted on the promise in such a way that it would be inequitable for the landlord to go back on the promise.

Facts: The plaintiff, Central London Property Trust, granted to High Trees House Ltd a ninety-nine year lease on a block of flats at a ground rent of £2,500 a year. The war supervened and the lessor granted a reduction in

[242] See McKendrick, *Contract*, at 103, who states the other exceptions, this time legislative ones.
[243] [1915] AC 847, HL, **7.E.4**, *infra* at 882.
[244] See McKendrick, *Contract*, at 137 ff.
[245] *Supra*, at 17–18.
[246] On the different types of estoppel reference is made to McKendrick, *Contract*, at 108.
[247] [1947] KB 130.

rent of one-half to take account of circumstances. The reduced rent was paid regularly. By 1945 all the flats were again let and the lessor sought to recover ground rent at the full rate from the beginning of the term. It then reduced its claim to the difference with effect from the third quarter of 1945. Denning J (as he then was) allowed this claim.

Judgment: DENNING J. stated the facts and continued: If I were to consider this matter without regard to recent developments in the law, there is no doubt that had the plaintiffs claimed it, they would have been entitled to recover ground rent at the rate of £2,500. a year from the beginning of the term, since the lease under which it was payable was a lease under seal which, according to the old common law, could not be varied by an agreement by parol (whether in writing or not), but only by deed. Equity, however stepped in, and said that if there has been a variation of a deed by a simple contract (which in the case of a lease required to be in writing would have to be evidenced by writing), the courts may give effect to it as is shown in *Berry* v. *Berry* [1929] 2 K. B. 316. That equitable doctrine, however, could hardly apply in the present case because the variation here might be said to have been made without consideration. With regard to estoppel, the representation made in relation to reducing the rent, was not a representation of an existing fact. It was a representation, in effect, as to the future, namely, that payment of the rent would not be enforced at the full rate but only at the reduced rate. Such a representation would not give rise to an estoppel, because, as was said in *Jorden* v. *Money* (1854) 5 H. L. C. 185, a representation as to the future must be embodied as a contract or be nothing.

But what is the position in view of developments in the law in recent years? The law has not been standing still since *Jorden* v. *Money*. There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on. In such cases the courts have said that the promise must be honoured. The cases to which I particularly desire to refer are: *Fenner* v. *Blake* [1900] 1 Q. B. 426, *In re Wickham* (1917) 34 T. L. R. 158, *Re William Porter & Co., Ltd.* [1937] 2 All E. R. 361 and *Buttery* v. *Pickard* [1946] W. N. 25. As I have said they are not cases of estoppel in the strict sense. They are really promises—promises intended to be binding, intended to be acted on, and in fact acted on. *Jorden* v. *Money* can be distinguished, because there the promisor made it clear that she did not intend to be legally bound, whereas in the cases to which I refer the proper inference was that the promisor did intend to be bound. In each case the court held the promise to be binding on the party making it, even though under the old common law it might be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel. The decisions are a natural result of the fusion of law and equity: for the cases of *Hughes* v. *Metropolitan Ry. Co.* (1877) 2 App. Cas. 439, 448, *Birmingham and District Land Co.* v. *London & North Western Ry. Co.* (1888) 40 Ch. D. 268, 286 and *Salisbury (Marquess)* v. *Gilmore* [1942] 2 K. B. 38, 51, afford a sufficient basis for saying that a party would not be allowed in equity to go back on such a promise. In my opinion, the time has now come for the validity of such a promise to be recognised. The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better. That aspect was not considered in *Foakes* v. *Beer* (1884) 9 App. Cas. 605. At this time of day however, when law and equity have been joined together for over seventy years, principles must be reconsidered in the light of their combined effect. It is to be noticed that in the Sixth Interim Report of the Law Revision Committee, pars. 35, 40, it is recommended that such a promise as that to which I have referred, should be enforceable in law even though no consideration for it has been given by the promisee. It seems to me that, to the extent I have mentioned that result has now been achieved by the decisions of the courts.

I am satisfied that a promise such as that to which I have referred is binding and the only question remaining for my consideration is the scope of the promise in the present case. I am satisfied on all the evidence that the promise here was that the ground rent should be reduced to £1,250. a year as a temporary expedient while the block of flats was not fully, or substantially fully let, owing to the conditions prevailing. That means that the reduction in the rent applied throughout the years down to the end of 1944, but early in 1945 it is plain that the flats were fully let, and, indeed the rents received from them (many of them not being affected by the Rent Restrictions Acts), were increased beyond the figure at which it was originally contemplated that they would be let. At all events the rent from them must have been very considerable. I find that the conditions prevailing at the time when the reduction in rent was made, had completely passed away by the early months of 1945. I am satisfied that the promise was understood by all parties only to apply under the conditions prevailing at the time when it was made, namely, when the flats were only partially let, and that it did not extend any further than that. When the flats became fully let, early in 1945, the reduction ceased to apply.

In those circumstances, under the law as I hold it, it seems to me that rent is payable at the full rate for the quarters ending September 29 and December 25, 1945.

If the case had been one of estoppel, it might be said that in any event the estoppel would cease when the conditions to which the representation applied came to an end, or it also might be said that it would only come to an end on notice. In either case it is only a way of ascertaining what is the scope of the representation. I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply. Here it was binding as covering the period down to the early part of 1945, and as from that time full rent is payable.

I therefore give judgment for the plaintiff company for the amount claimed.

Judgment for plaintiffs.

Note

On this judgment, which upheld the reduction of rent under a lease during the war, the equitable doctrine of promissory estoppel was founded. Under that doctrine promises intended to create legal relationships and to be acted upon by the parties must be regarded as valid even if they are unsupported by consideration. We speak here of "reliance on non-bargain promise". The doctrine is used as a shield rather than a sword in the sense that it is applied to a promise to give up an existing contractual right, rather than to the creation of a new right. It will be noted that Denning J was careful to say that "The courts have not gone so far as to give a cause of action for breach of such a promise, but they have refused to allow the party making it to act inconsistently with it". That promissory estoppel cannot be used to make binding a promise to create a new right was confirmed by the Court of Appeal—including Denning LJ, as he had become by then—in *Combe* v. *Combe*.[248] This limit on promissory estoppel seems to be derived from the notion that estoppel does not confer a cause of action, it only helps to complete some other cause of action which would otherwise be incomplete. This restriction on promissory estoppel is not applied in the U.S. under Restatement section 90, nor now in Australia;[249] and it is not impossible that on this point matters might evolve.[250]

[248] [1951] 2 KB 215; BBF3 at 148.
[249] See *Walton Stores (Interstate) Ltd* v. *Maher* (1988) 164 CLR 387, High Court; BBF3 at 153.
[250] See McKendrick, *Contract*, at 118 ff.

Whatever the future may bring, it may be concluded that the doctrine of consideration is an additional feature which is rather burdensome to the validity of contracts; whenever possible the courts endeavour to mitigate its worst effects, in the absence of legislative reform, as has happened in the United States with the UCC.

1.3.3.C. German law: neither cause nor consideration

It is of course unsurprising that consideration, being a product of the Common Law alone, does not exist in German law. What is surprising is that the doctrine of cause, which originated in Roman law, plays no part in German law and the systems of law which have been strongly influenced by German law, such as Swiss law. Netherlands law in which the French doctrine of cause was incorporated in the 1838 Civil Code has abandoned it in the new code.

In German law the notion is not encountered in the BGB.[251]

The first important point to be noted is that German law attaches great importance to the act abstracted from its underlying cause, which includes all acts transferring property, in addition to the abstract acts known under the other systems. It is the doctrine of unjust enrichment (even here German law does not use the term "cause") which is applied in order to restore equilibrium.

In the case of other acts, intention does not need to be supported by a cause. How has it come to this?

The starting point is the same as in French law: the twofold influence of Roman law and Canon law. In the nineteenth century, in his theory on intention, the celebrated Pandectist, Windscheid, gave priority to the subjective argument by affirming that the cause is subsumed within the motive. As a reaction, under the influence of Lenel, the objective cause becomes prevalent: the cause as the economic objective of the contract. The objective desired is revealed by the content of the contract. It in its turn becomes subsumed within intention. The cause does not limit intention but is subject to it. This is affirmed by § 812 BGB in regard to unjust enrichment.

BGB **1.G.107.**

§ 812: A person who, through an act performed by another person or in any other manner acquires something at the expense of the latter without legal justification is bound to return it to him. This liability in restitution is also incurred where the legal justification subsequently disappears or the objective pursued by means of the legal transaction does not materialise.

The objective pursued is determined by the contents of the transaction. Motives not forming part thereof are left out of account. Thus, the doctrine of unjust enrichment deals in German law with matters which would be classified in French law as a failure of cause or a false cause. That may be perceived as an implied application of the objective theory of cause, as expounded by Domat. But the question is hardly touched on by academic writers. As regards the immoral or unlawful cause, German law does not go by the

[251] For comparative bibliography see Rieg, op. cit at 388, and Zweigert and Kötz, (*supra*, note 67).

the interest of the promisee. The assumption made by the law is that any step taken by a reasonably prudent person is dictated by a financial interest (contracts for valuable consideration) or a moral interest (gratuitious acts).

It is to be noted that these academic controversies do little to disturb the serenity of the courts. As regards the distinction between cause and object, denied by the anti-causalists, it is today easy to establish. The object must exist, be determined or determinable and lawful—Articles 1126 to 1130 of the Civil Code. In a synallagmatic contract the link is obvious: an obligation without a predetermined object or having an unlawful object renders the contract null and void in its entirety because the counterpart obligation is unsupported by an underlying cause and therefore null and void. The two concepts are therefore complementary. A contract may be unlawful as a result of its object or its cause. The analysis is more finely balanced than if it is based directly on illegality—e.g. § 138 BGB.[209] The loan of a sum of money will always have a lawful object: the payment of a sum of money. On the other hand, it will have an unlawful cause if, for example, it is intended to facilitate the commission of a crime.

Cass. civ. 1re, 12 July 1989[210] **1.F.93.**

ILLEGAL CAUSE

Hocus pocus

Facts: A professional soothsayer sold to his successor his occult paraphernalia, then contested the validity of the sale.

Judgment: THE COURT . . . —Whereas the cause underlying the buyer's obligations is indeed the transfer of property and delivery up of the items sold, the cause underlying the sales contract is to be found in the essential motive, that is to say the motive which, had it not been present, the buyer would not have committed himself;
—Whereas once they had established that the impelling and determining cause of a contract for the sale of various works on the occult and associated paraphernalia was to enable the buyer to engage in the occupation of soothsayer and fortune teller, which is an offence under Article R.34 of the Criminal Code, the lower courts correctly inferred that a cause of that kind, originating in a criminal offence, is unlawful . . .

Note
The items sold are not in themselves unlawful because what was at the time a criminal offence is the carrying on of the occupation of soothsayer. Yet the cause underlying the contract is the carrying on of the outlawed occupation and the seller knew that the purchaser was intending to carry on that occupation. It is to be noted that the Cour de cassation here distinguishes between the cause supporting the buyer's obligation—transfer and delivery of the items—and the cause underlying the contract—the essential motive.

The articles of the Italian Civil Code (Articles 1343, 1344, and 1345) seem to refer only to the subjective cause. Yet academic writers and the courts both acknowledge the dual

[209] See however Zweigert and Kötz, at 381–2.
[210] JCP 1990. II.21546, annotated by Dagorne-Labbé.

nature of the cause.[211] The objective cause, which is sometimes described as the financial cause, ensures that it is possible to ascertain the reason justifying the transfer of value under the contract.

As for the Quebec Civil Code of 1993, the first draft abolished the cause, at least under that name. It reappeared in the definitive text, alongside the object. It would appear that its reappearance resulted from the realization that certain functions fulfilled by the "*cause*" could no longer be fulfilled. The definition of cause given in Article 1410—the "reason leading each of the parties to enter into the contract"—is consistent with the dual analysis of the cause.

(b) The Classic Applications of the Cause[212]
There must be an objective cause and a contract without a cause or based on an illegal or immoral cause is null and void. In the case of donations it is the intention to make a gift, in synallagmatic contracts it is the performance by the other party of his obligations. In the case of unilateral contracts—in the French sense of the term—the cause varies according to the category of the contract. In a contract for bailment the cause is constituted by deposit of the item which forms the subject-matter of the contract. It will be recalled that French law is also familiar with abstract acts, that is to say acts detached from their cause, though to a lesser degree than German law.[213]

The application of the cause in modern transactions is illustrated by the so-called dates of valuation case.

Cass. com., 6 April 1993[214] **1.F.94.**

ABSENCE OF CAUSE

Delay in crediting accounts

Facts: Under a well-established banking practice, customer remittances are entered only after a certain period whereas payments by the bank are entered in the accounts with a date preceding the date of the transaction. This practice affects the calculation of interest.

Judgment: THE COURT:—Whereas according to the judgment appealed against (Aix-en-Provence, 2nd Civil Chamber, 3 October 1990), the companies Major, Jean Major, Suren and Ambre (the companies) which held current accounts with the Banco Exterior France (the Bank) sued the Bank for recovery of fees charged; as the Bank cross-claimed for an order that the companies should pay to it the amounts debited to their accounts;
—Whereas the companies allege that the lower court erred in holding that the Bank was not wrong to carry out a quarterly capitalisation of interest accrued due in regard to the current accounts opened by the companies, whereas, according to the terms of the appeal, if a current account agreement is a special agreement under Article 1154 of the Civil Code that provision stipulates that the capitalisation of interest can only be in respect of interest accrued due for a whole year; whereas by failing so to hold, the appeal court infringed Article 1154 of the Civil Code.

[211] See G. Alpa and M. Bessone, *Contratti*, Vol. III (Turin: UTET, 1991) at 461 ff.
[212] Excluding the illegal cause, subject to what was said *supra* at 129–30.
[213] See Malaurie and Aynès, para. 493 ff. and *supra* at 128.
[214] JCP 1993.II.22062, annotated by Stoufflet; D. 1993.310, annotated by C. Gavalda.

—Whereas however, the judgment appealed against found that Article 1154 aforesaid does not apply to the capitalisation of interest in the context of a current account. In fact periodic debit entries in respect of interest due are equivalent to payment of such interest which loses its autonomy by becoming merged in the balance due. Thus, the appeal court provided legal justification for its decision and the plea is unfounded;

On the first branch of the first plea:—Under Article 1131 of the Civil Code;
—Whereas the companies claimed that their obligation to pay interest was in part unsupported by any cause, inasmuch as the amounts on which interest was calculated were increased, without justification, by the application of "dates of valuation" to remittances in the form of cheques and cash and to withdrawals;
—Whereas in rejecting that claim, the lower court found that the practice of the Bank, which was condemned by the companies, was justified by the fact that "a remittance for the credit of an account, like a withdrawal debited to an account, takes time to collect or pay out", and that "the value of a cheque can be credited to an account only after collection which cannot be instantaneous";
—Whereas by so holding, although the transactions at issue, other than remittances of cheques for collection, did not involve, even for the purpose of calculating interest, the postponement or bringing forward of the dates on which such amounts were to be credited or debited, the cour d'appel infringed the abovementioned provision.

On those grounds the judgment is set aside and the case referred to the cour d'appel, Lyon.

Note

As is borne out by the reference to Article 1131 of the Civil Code, the Cour de cassation is availing itself of the doctrine of cause in order to hold that amounts of interest received or paid are in part unsupported by any cause. Thus, in the case of the remittance of cheques for collection, postponement of the date from which interest becomes payable is justified by the delay involved in collection. Conversely, there is no such justification in the other cases—cash remittances, telegraphic transfers etc.; in such cases the interest charged is unsupported by any cause.

The Bundesgerichtshof, in its decision of 17 January 1989,[215] provides a similar solution by ordering the deletion of a clause fixing the value date of a current account transaction at 24 hours after the transaction where it involves the remitting of funds or a bank transfer, since, in such circumstances, the deferment of the value debt cannot be regarded as a reimbursement of costs. In order to arrive at that conclusion, the BGH could not have recourse to the concept of a ground inherent in the facts—though not relied on by the parties—, which is not recognized in German law; consequently, it referred to the general conditions contained in the ABGB,[216] even though the clause in question appeared only on a leaflet. It considered that the customers were not given sufficient information and that there was a lack of transparency. It further stated that the fact that the clause was of a customary nature could not operate to save it. The reasons given for the court's decision were therefore of a technical nature and based on a particular form of wording, even though there was also a reference to "*Treu und Glauben*" (the principle of good faith and fair dealing) and, in addition, to the absence of any consideration. This prompts the

[215] NJW 1989.582.
[216] As to which see *supra*, at 23.

question whether it may be possible, in French law, also to invoke, in a similar situation, the rules laid down in the *Code de la Consommation* (Consumer Code) with regard to the unfairness of the clause.

Another example is provided by aleatory contracts, while non-occurence of the risk entails failure of the *cause*.

Cass. civ. 1re, 18 April 1953[217] 1.F.95.

NO REAL BENEFIT

The genealogist

An agreement to do research to discover facts which are already known and readily available is without cause.

Judgment: THE COURT:—Whereas the facts and reasoning of the decision under review, Aix, 17 July 1950, a decision which affirmed the decision of the lower court, indicate that, Doctor M having died on September 8, 1944, B., a genealogist, was asked by the family notary on the day of M's death to perform research in order to discover the heirs of the deceased; as on November 26, 1944, B. entered into a contract with Mrs P., the niece and sole heir of Doctor M., by virtue of which he promised to reveal an inheritance which was to come to her in exchange for a substantial share of that inheritance; as after the contract was signed, he informed her of the inheritance of Doctor M. and of her status as heiress.
—Whereas the appeal objects that the court of appeal declared the contract invalid for absence of cause at the request of Mr and Mrs. P. even though Mrs. P. had been running the risk of ignorance of the existence of the inheritance and of her status as heiress and that without the intervention of the genealogist it would have been impossible to discover the name and address of the said heiress;
—Whereas however the decision, in its own conclusions and those adopted from the lower court decision, and having seen the documents of the case and the results of an inquest, found that the address of Mrs. P. was known to the friends of Doctor M. and of the notary; as the notary had asked B. to do research pointlessly, with too much haste, and without consulting the documents he had at hand and in his files, and as he had given B. enough information to permit B. to find Mrs. P. with nothing left to chance; as B. had not rendered Mrs. P. any service and as he had not run any risk himself; as the existence of the inheritance would have come to the knowlegde of the heiress in the normal course without the intervention of the genealogist; as on these facts the cour d'appel could infer that no secret had been revealed and that the contract of November 26, 1944 was without cause . . . ;

For these reasons, the pourvoi is rejected.

Note

The contract is risky because the genealogist is not certain to find an heir. However, in the present case, the risk did not occur because the notary was in possession of the heir's address. The service rendered was non-existent and the contract was therefore unsupported by any cause. Certainly, the genealogist in that case has an action in tort against the negligent notary.

The case of the unilateral promise to sell subject to a "cancellation charge" affords an illustration of the role played by cause in this type of contract.

[217] D. 1953.403.