NOTE ON EDITING

In presenting the materials in this book the editors have used the following conventions.

*Cases.* Descriptions and restatements of the facts of a case, and any insertion within an opinion, if prepared by the editors, are enclosed in brackets. Some opinions are abridged and presented with adjustments in format and style. Statutory references in an opinion are as stated by the court.

*Citations.* The Restatement, Second, of Contracts (1980) is referred to simply as “Restatement,” except when it is compared with the initial Restatement of Contracts (1932) or compared with another Restatement. References to the initial Restatement of Contracts carry a designation such as “original” or “first.” The Uniform Commercial Code is often referred to as “UCC,” or “the Code.” All references to Article 1 of the UCC are to the 2001 Revised Text. The United Nations Convention on Contracts for the International Sale of Goods, sometimes referred to as the Vienna Convention, is cited as “CISG.” The Restatement, Articles 1 and 2 of the UCC, the CISG, and other useful sources are found in *Selections for Contracts (Selections)*, which accompanies this text.

In general, parallel citations to cases in materials reproduced, including opinions, have been deleted unless they carry information (e.g., a page reference). A citation to a decision does not include, normally, an indication of subsequent case history having no effect on the merit or authority of the decision cited, or of an opinion associated with it (e.g., “certiorari denied”).

*Notes and Problems.* When a question or problem is accompanied by a reference to a case, the reference is intended only to support a line of thought, or suggest an analogy, and not to supply “the answer.”

*Footnotes.* A lettered footnote within an opinion or other quoted text indicates that the note was inserted by the editors; a numbered footnote indicates a footnote in the original text. When a footnote in an opinion or other reproduced text has been omitted, the footnotes retained have been renumbered in sequence.

*Pronouns and Gender.* To avoid occasional awkwardness or confusion in distinguishing one party from another, we have, when useful characterized promisors as women and promisees as men, and used pronouns accordingly.
CHAPTER 1

BASES FOR ENFORCING PROMISES

SECTION 1. ENFORCEABLE PROMISES: AN INTRODUCTION

Most people have an informal sense of contracts. Almost everyone of consenting age has entered into a contract, often with little hesitation or ceremony. Consider, for example, the arrangement you have with your cell phone company or the agreement established when you accepted the offer of admission from your law school. You are no doubt already familiar with such common-sense notions of contracts. The aim of this book is to provide more formal content to those general understandings. We are interested in what “contract” means as a matter of law.

The Restatement of Contracts, Second, defines contract as “a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” Restatement § 1. Not all promises are legally binding; the law does not provide a remedy for every broken promise. There may, of course, be moral or social sanctions for breaking a promise, but our primary inquiry here concerns the distinctive contributions of law. How does the law determine which promises to enforce?

We take up that question with two cases that focus on the promise itself. The first considers whether a binding (or enforceable) promise was created by a doctor’s assertion that he would make a young man’s injured hand “one hundred percent perfect.” The second case queries whether an enforceable promise should be found in the printed materials of a boat manufacturer stating that its boats could attain a “maximum speed of 30 miles per hour.” These cases begin our consideration of why some promises are found to be legally enforceable and others not. The section concludes with a brief introduction to theories of why some promises should be legally enforceable. In Section 2 we turn to the issue of how the law enforces promises, by taking an initial look at remedies for breach.

Beyond the “why” and “how” of promissory enforcement, these opening materials also serve as an introduction to the question of “where” the law of promissory obligation is to be found: the basic sources and authorities that govern most contractual relationships. We have already mentioned the influential Restatement of Contracts, a comprehensive statement of general common law contract principles first promulgated by the American Law Institute (ALI) in 1932. The Restatement, Second, appeared in 1979. In this book, unless otherwise indicated, a reference to the “Restatement” refers to the Restatement, Second. While not enacted law itself, the Restatement has been aptly described by a former ALI director as “common law persuasive authority” with a high degree of persuasion.” Herbert Goodrich, Restatement and Codification, in DAVID DUDLEY FIELD: CENTENARY ESSAYS 241, 244-45 (Alison Reppy ed., 1949). For more on the history of the Restatements, see the Selections for Contracts.
Beyond the persuasive force of the Restatement, statutes are a distinctive and direct source of authority, particularly Article 2 of the Uniform Commercial Code, which as we shall see in our second case, applies in cases involving the sale of goods. We will highlight various other sources of contract law as we encounter them in the cases that follow. Of course, the primary sources relied on in most casebooks, including this one, are cases—the judicial opinions that constitute the common law. We begin our study of promises with an old chestnut from the American common law of contracts, Hawkins v. McGee.

Hawkins v. McGee

New Hampshire Supreme Court, 1929.
84 N.H. 114, 146 A. 641.

Branch, J. The operation in question consisted in the removal of a considerable quantity of scar tissue from the palm of the plaintiff's right hand and the grafting of skin taken from the plaintiff's chest in place thereof. The scar tissue was the result of a severe burn caused by contact with an electric wire, which the plaintiff received about nine years before the time of the transactions here involved. There was evidence to the effect that before the operation was performed the plaintiff and his father went to the defendant's office, and that the defendant, in answer to the question, "How long will the boy be in the hospital?" replied, "Three or four days, not over four; then the boy can go home and it will be just a few days when he will go back to work with a good hand." Clearly this and other testimony to the same effect would not justify a finding that the doctor contracted to complete the hospital treatment in three or four days or that the plaintiff would be able to go back to work within a few days thereafter. The above statements could only be construed as expressions of opinion or predictions as to the probable duration of the treatment and plaintiff's resulting disability, and the fact that these estimates were exceeded would impose no contractual liability upon the defendant. The only substantial basis for the plaintiff's claim is the testimony that the defendant also said before the operation was decided upon, "I will guarantee to make the hand a hundred per cent perfect hand or a hundred per cent good hand." The plaintiff was present when these words were alleged to have been spoken, and, if they are to be taken at their face value, it seems obvious that proof of their utterance would establish the giving of a warranty in accordance with his contention.

The defendant argues, however, that, even if these words were uttered by him, no reasonable man would understand that they were used with the intention of entering "into any contractual relation whatever," and that they could reasonably be understood only "as his expression in strong language that he believed and expected that as a result of the operation he would give the plaintiff a very good hand." It may be conceded, as the defendant contends, that, before the question of the making of a contract should be submitted to a jury, there is a preliminary question of law for the trial court to pass upon, i.e. "whether the words could possibly have the meaning imputed to them by the party who founds his case upon a certain interpretation," but it cannot be held that the trial court decided this question erroneously in the present case. It is unnecessary to determine at this time whether the argument of the defendant, based upon "common knowledge of the uncertainty which attends all surgical operations," and the improbability that a surgeon would ever contract to make a damaged part of the human body "one hundred per cent perfect," would, in the ab-
sence of countervailing considerations, be regarded as conclusive, for there were other factors in the present case which tended to support the contention of the plaintiff. There was evidence that the defendant repeatedly solicited from the plaintiff's father the opportunity to perform this operation, and the theory was advanced by plaintiff's counsel in cross-examination of defendant that he sought an opportunity to "experiment on skin grafting," in which he had had little previous experience. If the jury accepted this part of plaintiff's contention, there would be a reasonable basis for the further conclusion that, if defendant spoke the words attributed to him, he did so with the intention that they should be accepted at their face value, as an inducement for the granting of consent to the operation by the plaintiff and his father, and there was ample evidence that they were so accepted by them. The question of the making of the alleged contract was properly submitted to the jury.

[The Court then discussed the proper measure of damages and, finding that the trial court's charge to the jury was erroneous (the trial court had instructed that the jury could consider the "(1) pain and suffering due to the operation; and (2) positive ill effects of the operation upon the plaintiff's hand"), it ordered a new trial on the calculation of damages. We take up the question of damages in such a case—what it means for the law to give a remedy—in Section 2.]

NOTES

(1) One Hundred Percent. Although Dr. McGee made a number of statements to the boy's father regarding the outcome of treatment, it does not appear that he actually used the word "promise." What then makes a statement a promise? Consider the role of language, its context, and the nature of the transaction in Hawkins. See Restatement §§ 2 and 4. What result if, before performing reconstructive knee surgery, a surgeon tells the patient that "the operation could give you a knee that was stronger than before" and that the patient would, "if committed, play basketball again"? See Anglin v. Kleeman, 665 A.2d 747 (N.H. 1995).

(2) Policy Considerations. In a well-known case involving plastic surgery gone wrong, the court observed that "[i]t is not hard to see why the courts should be unenthusiastic or skeptical about contract theory [in such a case]." Sullivan v. O'Connor, 296 N.E.2d 183 (Mass. 1973). (The Sullivan case is presented on p. 15 below.) Is judicial skepticism about recovery in contract specially warranted in a medical setting? Why?

Might an aggrieved plaintiff try other theories of recovery? What factors contribute to a decision to bring one type of claim rather than another? The availability of certain kinds of damages available in tort, for example, but not in contract? The application of the relevant statute of limitations?

The questions highlight structural limitations of the traditional law school curriculum. Although first year courses are sometimes taught as though they had little substantive relation to one another, the connections among them are many. Contracts for the sale of property, for example, require an underlying understanding of what counts as property and is therefore subject to transfer. Land obviously qualifies, but what about leaseholds, or ideas, or embryos? These questions are sometimes resolved in the context of a contract action, as we will see in connection with commercial surrogacy at p. 613 below. More often, however, contract law proceeds against the background of existing rules of
property, civil procedure, torts, and so on. We will from time to time point out the significance of these other foundational areas for the contract issue at hand, and urge you to keep an eye on the connections between contract law and your other subjects throughout this course.

(3) Statutory Override. Common-law rulings by courts sometimes give way to contrary judgments by legislatures. Consider the following example. In 1971, the Michigan Supreme Court affirmed a judgment for damages for breach of contract against a surgeon who, according to his patient’s testimony, had said before a stomach operation, “After this operation, you can throw your pillow away” and “Once you have an operation it takes care of all your troubles.” Guilmet v. Campbell, 188 N.W.2d 601 (Mich. 1971). Three years later, the Michigan legislature enacted a statute providing that an “agreement, promise, contract, or warranty of cure relating to medical care or treatment” is void unless evidenced by a signed writing. Mich.Comp.L. Ann. 566.132(1)(g). How might this statute have come about?

We note the interplay between courts, legislatures, and other law-making bodies such as regulatory agencies at various points throughout this book. As you read, think about the strengths and advantages of each with regard to making or reforming contract law. Keep in mind such factors as institutional competence, legitimacy, and the practical necessities of law-making.

Bayliner Marine Corp. v. Crow
Supreme Court of Virginia, 1999.
257 Va. 121, 599 S.E.2d 499.

■ KEENAN, JUSTICE. In this appeal, the dispositive issue is whether there was sufficient evidence to support the trial court’s ruling that the manufacturer of a sport fishing boat breached an express warranty and implied warranties of merchantability and fitness for a particular purpose.

In the summer of 1989, John R. Crow was invited by John Atherton, then a sales representative for Tidewater Yacht Agency, Inc. (Tidewater), to ride on a new model sport fishing boat known as a 3486 Trophy Convertible, manufactured by Bayliner Marine Corporation (Bayliner). During an excursion lasting about 20 minutes, Crow piloted the boat for a short period of time but was not able to determine its speed because there was no equipment on board for such testing.

When Crow asked Atherton about the maximum speed of the boat, Atherton explained that he had no personal experience with the boat or information from other customers concerning the boat’s performance. Therefore, Atherton consulted two documents described as “prop matrixes,” which were included by Bayliner in its dealer’s manual.

Atherton gave Crow copies of the “prop matrixes,” which listed the boat models offered by Bayliner and stated the recommended propeller sizes, gear ratios, and engine sizes for each model. The “prop matrixes” also listed the maximum speed for each model. The 3486 Trophy Convertible was listed as having a maximum speed of 30 miles per hour when equipped with a size “20x20” or “20x19” propeller. The boat Crow purchased did not have either size propeller but, instead, had a size “20x17” propeller.

At the bottom of one of the “prop matrixes” was the following disclaimer: “This data is intended for comparative purposes only, and is available without reference to weather conditions or other variables. All testing was
done at or near sea level, with full fuel and water tanks, and approximately 600 lb. passenger and gear weight."

Ahterton also showed Crow a Bayliner brochure describing the 1989 boat models, including the 3486 Trophy Convertible. The brochure included a picture of that model fully rigged for offshore fishing accompanied by the statement that this model "delivers the kind of performance you need to get to the prime offshore fishing grounds."

In August 1989, Crow entered into a written contract for the purchase of the 3486 Trophy Convertible in which he had ridden. The purchase price was $120,000, exclusive of taxes. The purchase price included various equipment to be installed by Tidewater including a generator, a cockpit cover, a "Bimini top," a winch, a spotlight, radar, a navigation system, an icemaker, fishing outriggers, an automatic pilot system, extra fuel gauges, a second radio, and air conditioning and heating units. The total weight of the added equipment was about 2,000 pounds. Crow did not test drive the boat after the additional equipment was installed or at any other time prior to taking delivery.

When Crow took delivery of the boat in September 1989, he piloted it onto the Elizabeth River. He noticed that the boat's speed measuring equipment, which was installed in accordance with the contract terms, indicated that the boat's maximum speed was 13 miles per hour. Crow immediately returned to Tidewater and reported the problem.

During the next 12 to 14 months, while Crow retained ownership and possession of the boat, Tidewater made numerous repairs and adjustments to the boat in an attempt to increase its speed capability. Despite these efforts, the boat consistently achieved a maximum speed of only 17 miles per hour, except for one period following an engine modification when it temporarily reached a speed of about 24 miles per hour. In July 1990, a representative from Bayliner wrote Crow a letter stating that the performance representations made at the time of purchase were incorrect, and that 23 to 25 miles per hour was the maximum speed the boat could achieve.

In 1992, Crow filed a motion for judgment against Tidewater, Bayliner, and Brunswick Corporation, the manufacturer of the boat's diesel engines. Crow alleged, among other things, that Bayliner breached express warranties, and implied warranties of merchantability and fitness for a particular purpose.

At a bench trial in 1994, Crow, Ahterton, and Gordon W. Shelton, III, Tidewater's owner, testified that speed is a critical quality in boats used for offshore sport fishing in the Tidewater area of Virginia because of the distance between the coast and the offshore fishing grounds. According to these witnesses, a typical offshore fishing site in that area is 90 miles from the coast. Therefore, the speed at which the boat can travel to and from fishing sites has a major impact on the amount of time left in a day for fishing.

Crow testified that because of the boat's slow speed, he could not use the boat for offshore fishing, that he had no other use for it, and that he would not have purchased the boat if he had known that its maximum speed was 23 to 25 miles per hour. . . .

The trial court entered judgment in favor of Crow against Bayliner on the counts of breach of express warranty and breach of implied warranties of merchantability and fitness for a particular purpose. . . . On appeal, we review the evidence in the light most favorable to Crow, the prevailing party at trial.
Crow argues that the “prop matrixes” he received created an express warranty by Bayliner that the boat he purchased was capable of a maximum speed of 30 miles per hour. We disagree.

Code § 8.2–313 provides, in relevant part:

Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made a part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

The issue whether a particular affirmation of fact made by the seller constitutes an express warranty is generally a question of fact. See id., Official Comment 3; Daughtrey v. Ashe, 243 Va. 73, 78, 413 S.E.2d 336, 339 (1992). In Daughtrey, we examined whether a jeweler’s statement on an appraisal form constituted an express warranty. We held that the jeweler’s description of the particular diamonds being purchased as “v.v.s. quality” constituted an express warranty that the diamonds were, in fact, of that grade. Id. at 77, 413 S.E.2d at 338.

Unlike the representation in Daughtrey, however, the statements in the “prop matrixes” provided by Bayliner did not relate to the particular boat purchased by Crow, or to one having substantially similar characteristics. By their plain terms, the figures stated in the “prop matrixes” referred to a boat with different sized propellers that carried equipment weighing substantially less than the equipment on Crow’s boat. Therefore, we conclude that the statements contained in the “prop matrixes” did not constitute an express warranty by Bayliner about the performance capabilities of the particular boat purchased by Crow.

Crow also contends that Bayliner made an express warranty regarding the boat’s maximum speed in the statement in Bayliner’s sales brochure that this model boat “delivers the kind of performance you need to get to the prime offshore fishing grounds.” While the general rule is that a description of the goods that forms a basis of the bargain constitutes an express warranty, Code § 8.2–313(2) directs that “a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.”

The statement made by Bayliner in its sales brochure is merely a commendation of the boat’s performance and does not describe a specific characteristic or feature of the boat. The statement simply expressed the manufacturer’s opinion concerning the quality of the boat’s performance and did not create an express warranty that the boat was capable of attaining a speed of 30 miles per hour. Therefore, we conclude that the evidence does not support the trial court’s finding that Bayliner breached an express warranty made to Crow.

[The Court also found that Bayliner had not violated the “implied warranty of merchantability” provided in UCC § 2–314. Discussion of implied warranties is left to Chapter 5.]

Reversed and final judgment.
NOTES

(1) **Express Warranties.** According to Crow, what promise had Atherton broken? By what means had the supposed promise been made? Why should an express warranty result even if the seller did not intend to make one? What if Atherton had told Crow during their negotiations that “in my opinion this boat will go 30 miles per hour no trouble”? See UCC § 2-313(2).

(2) **Implied Warranties.** Suppose that another purchaser contracted with a boat manufacturer for the sale of a speed boat and that as in the principal case, the contract was silent with regard to the boat’s speed. Assuming that there had been no brochure or any discussion of speed between the parties prior to the sale, would any promise have been broken if when the purchaser revved the engine of his new boat, it was able to achieve a maximum speed of only two miles per hour? See UCC § 2-314 (2). Which of the provisions of that subsection might apply? How do implied warranties alter the force or applicability of the familiar saying *caveat emptor*? We discuss implied warranties, including disclaimers of warranties, in greater detail in Chapter 6.

(3) **UCC Primer.** Article 2 of the Uniform Commercial Code (UCC or “the Code”) is the primary source of law for transactions involving the sale of goods in the United States. The Code itself is the product of the American Law Institute and the National Conference of Commissioners on Uniform State Laws (NCCUSL). Versions of the Code have been enacted across the country by state legislatures, and by Congress for the District of Columbia. Article 2 is fundamental to the study of contract law, and cases exploring its structure and how it differs from the common law appear throughout this book. For now, however, a few basics are in order.

Transactions covered by Article 2 include not only sales between merchants but also those between merchants and consumers, as in Bayliner. As we shall see, in a number of areas Article 2 provides special rules for merchants, who are assumed to be more sophisticated and more familiar with commercial practices than are consumers. Determining whether a party is a merchant is therefore an important preliminary question. Article 2 defines merchant to include not only “a person who deals in goods of the kind” but also one who “by his occupation holds himself out as having knowledge or skill peculiar to the goods involved in the transaction.” UCC § 2–104(1). Comment 2 to that section lists special Article 2 merchant provisions which treat merchants differently from nonmerchants; we return to the significance of a party’s status as a merchant at various points.

A second basic matter concerns the definition of “goods.” The starting point is UCC § 2–105(1). What are “things . . . which are movable”? Is land “goods”? Is a 10-ton printing press “goods”? What if in the case above, Crow had custom-ordered his boat so that at the time of the contract the boat had not been built? See UCC § 2–105(2). The application of Article 2 is often called into question in contracts that involve both goods and services. Article 2 does not apply, for example, to a contract to paint the exterior of a house, even though a small amount of paint (goods) will be transferred, because the goods component of the contract is incidental. But what about other kinds of “hybrid contracts” such as contracts involving the sale of goods and the provision of services, or contracts involving the sale of goods and the sale of property other than goods, such as real estate? Should Article 2 apply to a contract that includes both the sale and installation of an appliance such as a washing machine? What about a
catering contract in which the customer is paying both for food and for food preparation? We look more closely at the problem of hybrid contracts in Chapter 8.

Finally, it is important to keep in mind that the Code does not wholly supplant the common law. UCC § 1–103(b) states that "[u]nless displaced by the particular provisions of [the Code], the principles of law and equity . . . supplement its provisions." UCC § 1–103(b) provides a lengthy list of principles of law and equity that may supplement the Code, including such principles as capacity to contract, duress, and mistake. For a helpful discussion of the concept of supplementation, see Comment 2 to UCC § 1–103.

THEORIES OF CONTRACT ENFORCEMENT

The law of contract is the law of enforceable promises. But why should law enforce promises? In a well known article from the last century, legal philosopher Morris Cohen suggested that "[t]he simplest answer is that of the intuitionists, namely, that promises are sacred per se, that there is something inherently despicable about not keeping a promise, and that a properly organized society should not tolerate this." At the same time, Cohen thought it very doubtful that

"many of us would want to live in an entirely rigid world in which one would be obliged to keep all one's promises instead of the present more viable system, in which a vaguely fair proportion is sufficient. Many of us indeed would shudder at the idea of being bound by every promise, no matter how foolish, without any chance of letting increased wisdom undo past foolishness. Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience." Morris Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 571–74, 580–583 (1932).

Few would argue with the notion that promises carry moral force. So evident, it is almost tautological. Yet, when the force of law is brought to bear on promises, commonsense notions become more complicated and more contested. "Nowhere," declared Oliver Wendell Holmes, "is the confusion between legal and moral ideas more manifest than in the law of contract." The Path of the Law, 10 Harv. L. Rev. 457 (1897).

Conceding that law is justified in enforcing some, but not all, promises, the pertinent question then becomes, what distinguishes the promises that law will enforce from those it will not? To address this question, a number of theoretical arguments have been proposed, some more compelling than others. Pursuing these lines of argument in any detail would take us well beyond the scope of this casebook: our primary focus is contract doctrine—the basic rules and practices that comprise contract law. However, as we shall see, theoretical perspectives on promises can usefully inform the application of doctrine. For example, as the court observed in Mills v. Wyman, p. 52 below, "[g]eneral rules of law established for the protection and security of honest and fair-minded men, who may incon siderately make promis-

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* Oliver Wendell Holmes, Jr. (1841–1935) practiced law in Boston, served briefly as professor of law at Harvard, and then for twenty years as justice and later chief justice of the Supreme Judicial Court of Massachusetts. In 1902 President Theodore Roosevelt appointed him to the Supreme Court of the United States, where the quality of his dissenting opinions won him the title of the "Great Dissenter." He resigned because of his great age in 1932. His most famous work is The Common Law (1881), based on a series of lectures.
es without any equivalent, will sometimes screen men of a different character from engagements which they are bound in foro conscientiae to perform."

Every theoretical argument justifying promissory liability emphasizes certain underlying values served by contract doctrine. Take, for instance, two competing theories that ground legal enforcement in the promisor's autonomy or will. The "contract as promise" thesis holds that law is justified in enforcing a promise when an individual "intentionally invoke[s] a convention whose function is to give grounds—moral grounds—for another to expect the promised performance." See, Charles Fried, Contract as Promise, at p. 16. Morality alone, however, won't tell us which promises are or ought to be legally enforceable, since all promises carry some moral force. The competing "consent theory" grounds enforcement less in a general moral duty to keep one's promises than in consensual undertakings that reveal an "intention to create a legally enforceable obligation." See Randy E. Barnett, A Consent Theory of Contract, 86 Colum. L. Rev. 269, 300 (1986).

Both "contract as promise" and the "consent theory" look to the promisor's will—in making a promise or voluntarily taking on a legal duty—in locating the basis for judicial enforcement. A third theoretical basis of promissory obligation flips the focus from the promisor's will to the promisee's reliance. When a promisee reasonably relies on a promise to his detriment, law may and in many cases does enforce the promise, even against the promisor's will, in order to protect the promisee. Reliance theories are most clearly implicated in the various estoppel doctrines that enforce promises where the promise has triggered reasonable, foreseeable and justifiable detrimental action by the promisee.

Still other rival theoretical arguments for legal enforceability focus less on the interests of the parties, whether promisors or promisees, and more on broader criteria such as economic efficiency, predictability, fairness, social justice and distribution to justify legal enforcement of doctrine. For example, as Morris Cohen observed, "[t]here can be no doubt that from an empirical or historical point of view, the ability to rely on the promises of others adds to the confidence necessary to social intercourse and enterprise." Whether or not these broader criteria undergird the whole of contract law, there is no doubt that aspects of each are reflected in the various doctrines we will study. As you read the cases going forward, be alert to the competing normative values that justify the legal enforcement of promises. Predictability, for instance, is a central motivating feature of the consideration doctrine, the topic of Section 3, and fairness, social justice and distribution run through doctrine of unconscionability discussed in Chapter 6. Theories of economic efficiency have been most effective, and perhaps also most controversial, in the doctrines involving contract remedies, the topic to which we now turn.

SECTION 2. REMEDYING BREACH

We all know what it means to keep a promise. Simply put, it means doing what was promised. But what does it mean to enforce a promise that has not been kept? Restatement § 1 defines a contract in terms of both a legal duty to perform a promise and the provision of a remedy if performance does not occur. How does the law determine the appropriate remedy? Although the answer is taken up in detail in Chapter 7, some consider-

(3) Bargaining in the Shadow of Law. In considering “the work of law,” Llewellyn referred to cases in which legal intervention is “not consciously contemplated as a possibility.” But what is the work of law when legal action is contemplated or has already been commenced by one of the parties? Does law matter when parties decide to settle a dispute outside the courtroom? In an important 1979 article, Professors Robert Mnookin and Lewis Kornhauser suggested disputing parties often bargain with one another against the knowledge, or “in the shadow,” of what the law is likely to do if they do not agree. See Mnooking and Korhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950 (1979). In this way, the background legal rule—say, that fault will not be penalized—provide parties with certain bargaining chips, or “endowments,” and that these endowments, among other factors, enhance a party’s negotiating power. The concept of bargaining in the shadow of law provides another example of a behavioral or socio-legal approach, as law hovers over the process of dispute settlement.

SECTION 3. CONSIDERATION AS A BASIS FOR ENFORCEMENT

(A) FUNDAMENTALS OF CONSIDERATION

Departing from the premise that not all promises are legally enforceable, we quickly arrive at the basic question of how to determine which ones are. To address this question, we must begin with an historical perspective. Enforceability under early English law was closely tied to the common law actions of covenant, debt, and assumpsit and, even today, no adequate answer to our basic question can ignore this aspect of legal history.

The first of these actions, covenant, was used to enforce contracts made under seal. Once a written promise was sealed and delivered, the action of covenant was available to enforce it, and it made no difference whether the promisor had bargained for or received anything in exchange for the promise, or whether the promisee had in any way changed position in reliance on it. In medieval England, the seal was a piece of wax affixed to the document and bearing an impression identifying the person who had executed it. At first its use was confined to the nobility, but later it spread to commoners. With the growth of literacy and the use of the personal signature as a means of authentication, the requirement of formality was so eroded that a seal could consist of any written or printed symbol intended to serve as a seal. The word “Seal” and the letters “L.S.” (locus sigilli) were commonly used for this purpose.

Three functions performed by such legal formalities as the seal have been described by Professor Lon Fuller.\footnote{Lon L. Fuller (1902–1978) had a long teaching career at Oregon, Illinois, Duke, Columbia, and, for the last three decades of his life, at Harvard, where he taught contracts and jurisprudence. In philosophical works he presented alternatives to positivist attitudes toward law, sometimes using partly-fanciful cases in imaginary and contrasting opinions. See, e.g., Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616 (1949). His article, with one of his students, William Perdue, on the reliance interest in contracts prompted an extensive reexamination of the subject. It is cited on p. 15 above.} The first is “evidentiary,” that is, providing trustworthy evidence of the existence and terms of the contract in
the event of controversy. The second function is "cautionary," that is, bringing home to the parties the significance of their acts—inducing "the circumspective frame of mind appropriate in one pledging his future." The third function of seal, or of any other form, is "channeling," or marking the promise as one intended to be legal and therefore to be resolved within the system of laws. Using the seal as the example, Fuller explained: "The seal not only insures a satisfactory memorial of the promise and induces deliberations in the making of it. It serves also to mark or signalize the enforceable promise; it furnishes a simple and external test of enforceability." See Lon L. Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 800–801 (1941); Lon L. Fuller, Anatomy of the Law 36–37 (1968). Of course, the ability of the seal to perform these functions and its distinctive effect on the enforceability of promises have declined as its legal status has changed. The seal has been abolished in roughly half of the states and seriously curtailed in the rest. The enactment of the Uniform Commercial Code dealt another significant blow to the seal with its announcement that "every effect of the seal which relates to 'sealed instruments' as such is wiped out insofar as contracts for sale are concerned." Comment 1 to UCC §2–203. Where the seal still retains some effect, it is often limited to raising a rebuttable presumption of consideration or making applicable a longer period of limitations.

What supplanted the seal as the primary criterion of the enforceability of a promise was the circumstance that the promise was, or was not, given in exchange for something. This development is reflected in the second of the three common law actions, debt, which was used to enforce some types of unsealed promises to pay a definite sum of money. These included a promise to repay money that had been loaned and a promise to pay for goods that had been delivered or for work that had been done. Since these were situations in which the contemplated exchange was completed on one side, they appealed to the primitive notion that the promisor (or debtor) had something belonging to the promisee (or creditor) that the former ought to surrender. The proprietary element present in this notion is reflected in the popular expression that a depositor who is owed money by a bank "has money in the bank." What the promisee had given the promisor was sometimes called the "quid pro quo" and, as the underlying principles of contract law developed, the promisor's obligation in debt was considered to rest upon receipt of a benefit from the promisee.

The third and ultimately the most important common-law action, assumpsit, grew out of cases in which the promisee sought to recover damages for physical injury to person or property on the basis of a consensual undertaking. In one such case a ferryman who undertook to carry the plaintiff's horse across a river was held liable when he overloaded the boat and the horse drowned. In another a carpenter who undertook to build a house for the plaintiff was held liable when he did so unskillfully. The underlying theme of these decisions was that of misfeasance—the promisor, having undertaken (assumpsit) to do something, had done it in a manner inconsistent with that undertaking to the detriment of the promisee. The decisions did not go so far as to impose liability for nonfeasance—where the promisor had done nothing in pursuance of the undertaking—for example, where the carpenter in the case just put had failed to build the house at all. It was not until the latter half of the fifteenth century that the common-law courts began to make this extension. When they did, they imposed a requirement, analogous to that in the misfeasance cases, that the promisee must have incurred a detriment in reliance on the promise—as where the
owner had changed position by selling an old house in reliance on the carpenter's promise to build a new one.

Finally, by the end of the sixteenth century, the courts made a second major extension of the action of assumpsit and held that a party that had given only a promise in exchange for the other's promise had incurred a detriment by having its freedom of action fettered, since it was bound in turn by its own promise. By this circular argument, the common-law courts began to enforce exchanges of promises. Here is the opinion in what is said to be the earliest case recognizing that a promise, not even partly performed, could be consideration for a return promise:

Note, that a promise against a promise will maintain an action upon the case, as in consideration that you do give me £10 on such a day, I promise to give you £10 such a day after.


Eventually the action of assumpsit was allowed to supplant that of debt for the enforcement of promises. By the beginning of the seventeenth century, the common-law courts had succeeded in developing the action of assumpsit as a general basis for the enforcement of promises. By that time, the term "consideration" had come to be used as a word of art to express the sum of the conditions necessary for such an action to lie. It was therefore a tautology that a promise, if not under seal, was enforceable only where there was "consideration," for this was to say no more than that it was enforceable only where the action of assumpsit would lie. Bound up in the concept of consideration were several elements. Most important, from the _quid pro quo_ of debt came the idea that there must have been an exchange arrived at by way of bargain. To the extent that debt inspired the concept of consideration, there was the notion that there must be a _benefit_ to the promisor. To the extent that assumpsit inspired it, there was the notion that there must be a _detriment_ to the promisee.

The cases that follow refine our understanding of the doctrine of consideration and of its development into this century. Consideration is now a fundamental feature of a contractual relationship, "the glue that binds the parties to a contract together." In re Owen, 303 S.E.2d 351 (N.C.App. 1983). The concept of benefit and detriment have receded but the centrality of a bargained-for exchange between the parties remains, lending at least some support to the claim of the English legal historian, F.W. Maitland, that "[t]he forms of action we have buried, but they still rule us from their graves." Frederic W. Maitland, _The Forms of Action at Common Law_ 2 (1936 ed.). For a thorough treatment of this historical background, see A.W. Brian Simpson, _A History of the Common Law of Contract_ (1975). See also Patrick S. Atiyah, _The Rise and Fall of Freedom of Contract_ (1979); Farnsworth, The Past of Promise: An Historical Introduction to Contract, 69 Colum. L. Rev. 576 (1969). To be sure, the criterion of consideration as the _sine qua non_ for promissory enforcement has, like the seal, been partially supplanted in its turn, by other criteria of enforceability, such as reliance. These too are developed in the following sections in this chapter. For now, however, our focus is on consideration: its logic, its vocabulary, and its development. Before doing so, a brief word on the categories or types of cases in which our investigation proceeds.
TYPICAL CATEGORIES OF AGREEMENTS

Throughout the nineteenth century, text-writers on contract law devoted considerable attention to specific types of agreements, such as contracts with common carriers and innkeepers, and for pawns and pledges, that were on the periphery of general contract law. When, in 1920, Samuel Williston launched the first edition of his magisterial contracts treatise, he announced that he sought to “treat the subject of contracts as a whole, and to show the wide range of application of its principles.” This conception of a body of contract law generally applicable to agreements of all sorts was confirmed in 1932, when the ALI promulgated its original Restatement of Contracts, for which Williston served as Reporter. Half a century later, a federal court of appeals affirmed this view. In response to a party’s plea to limit an earlier holding involving the sale of software in the case of ProCD v. Zeidenberg, p. 227 below, the judge responded, “Where’s the sense in that? ProCD is about the law of contracts, not the law of software.” Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997). Consistent with this conception, this book seeks to show how contract principles apply to a wide variety of transactions.

At the same time, many transactions fall into recognizable categories with distinctive rules and practices. These distinctive features derive from historical practice or common business sense; others reflect larger policy concerns. We note five such categories here: contracts for sales of goods, real estate transactions, construction contracts, employment agreements, and family contracts. When a case involving one of these categories appears, it is preceded by a description of some of the common features of the category. As other types of agreements appear throughout the book—franchise and distributorship contracts, publishing contracts, government contracts, consumer contracts, and so on—you may detect and organize distinctive features of these categories as well.

And now to the first of our five typical categories: family contracts.

FAMILY CONTRACTS

The agreement in the following venerable case—an uncle’s promise to a nephew made during a family celebration—is typical of agreements between relatives and others in close personal relationships. Unlike most commercial agreements, family agreements are frequently informal and oral, lacking in detail, and may not be preceded by significant bargaining. Whatever their importance within a particular family, family agreements are rarely of great moment to the economy, although in certain historical periods the accumulation and protection of family capital was often secured by keeping it “in the family” through elaborate contractual formalities.

Yet family agreements may involve matters long understood to be outside the proper scope of judicial intervention. An initial question is therefore whether a promise made between family members is enforceable at all,

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h Samuel Williston (1861–1938) joined the faculty of the Harvard Law School in 1890, after practicing law for a short period in Boston, and taught there until his retirement in 1938. His principal fields were contracts and sales. His multi-volume work, A Treatise on the Law of Contracts, was first published in 1920 and became one of the most widely used legal treatises in the United States. He was the Reporter for the Restatement of Contracts and the draftsman of several uniform laws, including the Uniform Sales Act.
a question that explains the presence of a number of such cases in this chapter.

The traditional answer has been: No. Goods or services given or pledged by one family member to another were assumed to be motivated by altruism or by domestic obligation (not always the same thing), and were decidedly not bargains motivated by gain. Policy concerns, such as family privacy and domestic harmony, further explained judicial reluctance to find a bargain between intimates. As an English court explained in denying a wife recovery on her husband’s promise of a stated monthly allowance, “it would be the worst possible example to hold that agreements such as this resulted in legal obligations which could be enforced in the Courts,” for “each house is a domain into which the King’s writ does not run and to which his officers do not seek to be admitted.” Balfour v. Balfour, [1919] 2 K.B. 571, 579 (C.A.). An American court justified a similar decision by declaring that to enforce such a promise would “open an endless field for controversy and bickering.” Graham v. Graham, 33 F.Supp. 936 (E.D.Mich.1940).

In recent years, the differences between family agreements and commercial ones have narrowed as contractual relationships among relatives and other intimates have found greater legal acceptance. Sophisticated contracts, now often drafted by lawyers, are used to order matters once considered wholly unsuited for private agreement or public enforcement. Parties, married and unmarried, now arrange aspects of their relationships from start to finish through pre-nuptial agreements, cohabitation contracts, mid-marriage agreements and divorce and property settlements. People increasingly contract with one another for the purpose of creating and ordering vertical relationships—that is, between parents and children. For example, contract has come to play a role in parental acquisition of children, whether through surrogacy contracts, open adoption agreements, or the sale of genetic material. We explore such agreements in later chapters, but begin here with a relatively straightforward promise from uncle to nephew.

**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. 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, and 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 21 years old that I intend for you, and you shall have the money certain. Now, Willie, I do not intend to interfere with this money in any way till I think you are capable of taking care of it and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. The first five thousand dollars that I got together cost me a heap of hard work... It did not come to me in any mysterious way, and the reason I speak of this is that money got in this way stops longer with a fellow that gets it with hard knocks than it does when he finds it. Willie, you are 21 and you have many a thing to learn yet. This money you have earned much easier than I did besides acquiring good habits at the same time and you are quite welcome to the money; hope you will make good use of it. I was ten long years getting this together after I was your age. Now, hoping this will be satisfactory, I stop...

Truly Yours,
"W.E. STORY.

"P.S.—You can consider this money on interest."

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

- PARKER, J. The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William S. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that "on the 20th day of March, 1869, ... William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $5000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration, a contention which, if well founded, would seem to leave open for controversy in many cases whether that
which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to 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's Prin. of Con. 63.

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

"Any damage, or suspension or forbearance of a right, will be sufficient to sustain a promise." Kent, Vol. 2, 465, 12th Ed.: 1

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 $5000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it, but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.

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

"My Dear Lancey—I am so glad to hear of your intended marriage with Ellen Nicholl, and as I promised to assist you at starting, I am happy to tell you that I will pay you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister

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1 James Kent (1763–1847) began practice after three years as an apprentice and was active in Federalist politics. Hamilton introduced him to the writings of European authors on the civil law, which were to influence his later work. In 1793, largely through his Federalist connections, he was made Professor of Law in Columbia College. He attracted few students, and soon resigned to become a judge on the New York Supreme Court, then the highest court in the state. In 1814 he became Chancellor. Upon his retirement in 1823, he lectured again at Columbia for three years. Out of these lectures grew the "Commentaries on American Law," in four volumes, which became one of the most important American law books of the century. (It is the source of the quotation above.) Kent lived to prepare six editions; subsequent ones were revised by others. For his work on the Court of Chancery, he has been called the creator of equity in the United States.
shall amount to 600 guineas, of which your own admission will be the only evidence that I shall require.

"Your affectionate uncle,
CHARLES SHADWELL."

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

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

In Talbott v. Stemmons, 89 Ky. 222, 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." Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in Lindell v. Rokes, 60 Mo. 249. The cases cited by the defendant on this question are not in point....

[In an omitted part of the opinion the court held that the action was not barred by the statute of limitations because under the uncle's letter he held the money in trust and not merely as a debtor.] Order reversed and judgment of special term affirmed.

NOTES

(1) Benefit, Detriment, and Bargain. What was the consideration for the uncle's promise to pay $5,000? How did the court's definition of detriment differ from that urged by the defendant? What role do benefit and detriment play under Restatement §§ 71 and 79? Was there consideration for the uncle's promise under those sections? What if the uncle had promised his nephew $5,000 in exchange for the young man's promise to forego illegal substances?

How clear is it that there was consideration for promise of the affectionate uncle in Shadwell v. Shadwell ("My dear Lancey . . ."), cited by the court as being "precisely on point."

(2) Holmes and the "Bargain Theory" of Consideration. Oliver Wendell Holmes, Jr., an early advocate of the "bargain theory" of consideration later
espoused in the Restatement, spoke of "reciprocal conventional inducement": "It is said that consideration must not be confounded with motive. It is true that it must not be confounded with what may be the prevailing or chief motive in actual fact. A man may promise to paint a picture for five hundred dollars, while his chief motive may be a desire for fame. A consideration may be given and accepted, in fact, solely for the purpose of making a promise binding. But, nevertheless, it is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise." Holmes, The Common Law 293–94 (1881).

Holmes reaffirmed this when he went on the bench: "[T]he 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." Holmes, J., in Wisconsin & Michigan Railway Co. v. Powers, 191 U.S. 379 (1903). Compare Restatement § 71(2) with § 81(1).

(3) "Sufficiency" of Consideration. The term "sufficient consideration" appears at several points in Hamer v. Sidway. The original Restatement ("the Restatement"), embodied a concept of the "sufficiency" of consideration. Although consideration did not have to be "adequate," it had to be "sufficient." See the Restatement, §§ 76–81. The Restatement Second abandoned this concept. Under its terminology the question is simply whether there is "consideration," with no qualifying adjective. See Restatement § 79. In declining to assess whether a particular lease provision was inadequate, one court relied on the "time-honored principle" that an informed decision by a party "that what it is receiving is worth what it is giving may not later be second-guessed by that party, nor may the party ask a court to engage in such post-hoc revisionism." GLS Development v. Wal-Mart Stores, 944 F.Supp. 1384 (N.D.Ill. 1996). Whether or not consideration can ever be so paltry as to suggest impermissible overreaching by one of the parties is taken up in Chapter 4.

(4) The Peppercorn. Under the bargain theory of consideration, can a gratuitous promise be made enforceable by a mere token payment, arranged by the parties for the sole purpose of satisfying the requirement of consideration? Holmes concluded that since courts would not in general "inquire into the amount of such consideration . . . consideration is as much a form as a seal." Krell v. Codman, 28 N.E. 578 (Mass. 1891). The term "peppercorn" is often used to describe consideration that is of trifling value.

Will such a device be given effect? There is some authority, most of it old, that it will be. E.g., Thomas v. Thomas, 2 Q.B. 851, 114 Eng.Rep. 330 (1842). Illustration 1 to the Restatement § 84 states:

A wishes to make a binding promise to his son B to convey to B Blackacre, which is worth $5,000. Being advised that a gratuitous promise is not binding, A writes to B an offer to sell Blackacre for $1. B accepts. B's promise to pay $1 is sufficient consideration.

In contrast, the Restatement Second, takes the opposite view. Illustration 5 to § 71 states:
A desires to make a binding promise to give $1,000 to his son B. Being advised that a gratuitous promise is not binding, A offers to buy from B for $1,000 a book worth less than $1. B accepts the offer knowing that the purchase of the book is a mere pretense. There is no consideration for A’s promise to pay $1,000.

Why should promisors not be able to bind themselves through the pro forma use of consideration? Why might parties want to bind themselves legally in the absence of a bargain? Ought the law differentiate between a peppercorn inserted for the purpose of tying the promisor to the mast, and cases in which the consideration is intended as a sham from a promisory point of view? See Meyer v. South Dakota Dept. of Social Services, 581 N.W.2d 151 (S.D. 1998), in which the owner of a ranch sought to reduce his estate for purposes of Medicaid eligibility through a series of “gift/lendback” transactions with his adult children. The owner wrote checks to his children who endorsed the checks and gave them back to the owner, who deposited them into his account uncashed. The owner then gave the children a mortgage on the ranch to secure the “loans” they had made him. The court quoted Williston: “nothing can be treated as consideration that is not intended as such by the parties.” 3 Williston on Contracts § 7.2 (4th ed. 1992).

(5) Promise for Performance or Promise for Promise? In the principal case, the uncle promised to pay his nephew in exchange for his nephew’s refraining from various vices, and not for his nephew’s promise to refrain. See Restatement § 71(1). Why might the uncle have sought actual performance rather than his nephew’s promise? Distinctions between contracts in which the promise is exchanged for performance and those in which two promises are exchanged are discussed at p. 71 below and again in Chapter 2 in connection with contract formation. Agreements in which only one party makes a promise are often called unilateral contracts; agreements in which each party makes a promise to the other are often called bilateral. Bilateral contracts are much more common and economically significant than unilateral contracts. Why might this be?

(6) Hamer Lives. In Dahl v. HEM Pharmaceuticals, 7 F.3d 1399, 1404 (9th Cir. 1993), a drug company promised a year’s free supply of an experimental drug to subjects who participated in a one-year clinical trial to test the drug’s efficacy. Dahl participated for the full year, at which time HEM refused to supply the drug any further, claiming its promise to do so was unsupported by consideration. On appeal, the court said: “Somehow the category of unilateral contracts appears to have escaped HEM’s notice. The deal was, ‘if you submit to our experiment, we will give you a year’s supply of Ampligen at no charge.’ This form of agreement resembles that in the case taught in the first year of law school, Hamer v. Sidway . . .”

**Problem**

Discounting Retirement. Thomas Hurley has worked as general superintendent for Marine Contractors for eight years, during which Marine has made annual payments into an Employee Retirement Plan and Trust Fund, a legally-separate entity whose sole trustee is also the president of Marine. Hurley now plans to leave Marine, and is entitled under the terms of the trust to payment of his vested share after a five-year waiting period. Marine wants Hurley to make a binding promise to Marine not to compete with it after he leaves its employ. In return, Marine’s president, as trustee, is willing to have the trust
pay Hurley his vested share immediately. Will payment by the trust to Hurley be consideration for Hurley's promise to Marine? Does the answer depend on whether you are looking for a benefit, a detriment, or a bargain? See Marine Contractors Co., Inc. v. Hurley, 310 N.E.2d 915 (Mass. 1974).

**GRATUITOUS PROMISES**

Suppose that the uncle in *Hamer* had given his nephew $5,000 in cash at the golden wedding anniversary and had told him that it was a gift that he could keep on condition that he refrain from drinking, smoking, swearing, and gambling until he was twenty-one. Surely the nephew, having met the condition, could have kept the money if the uncle’s executor had attempted to get it back.

If the law recognizes gratuitous transfers, with or without strings attached, why should it not recognize gratuitous promises? Why did the court have to find that there was consideration? What explains the reluctance to create a regime of enforceable gift promises? We have already seen the suggestion that social cooperation might best be achieved by a system of “free enterprise.” Is it the fact that gratuitous promises serve no useful economic function? Do gift promises raise dangers as to proof? See Richard A. Posner, Gratuitous Promises in Economics and Law, 6 J. Legal Stud. (1977).

What sorts of rules or legal mechanisms would you suggest if it were thought desirable to enable promisors to make enforceable gratuitous promises? To what extent should those rules take account of such factors as the promisor’s motives, the social utility of the promise, the formality with which it was made and the availability of alternate means of making gifts?

**NOTES**

1. *Sweetheart Stadium*? In the 1990s, a group of taxpayers in Washington State sought to enjoin a bond ordinance enacted to raise money for a new stadium for the Seattle Mariners, a baseball team. The taxpayers argued that the consideration received by the city under the terms of the stadium lease between the city and the team was so “grossly inadequate” as to make the lease a gift, one prohibited under the state constitution, which forbids gifts of public monies to private organizations. The taxpayers pointed to such provisions as profit-sharing (with little expectation of profit), nominal rent, and easy-out terms for the team.

   Noting that “courts do not inquire into the adequacy of consideration,” the Washington Supreme Court found consideration in the Mariners’ obligations to play home games, maintain the stadium, and share profits. It affirmed the trial court’s declaratory order validating the bonds. King County v. Taxpayers of King County, 949 P.2d 1260 (Wash.1997).

   Is the traditional rule regarding consideration appropriate in the context of a constitutional challenge? A dissent in the stadium case argued that it is not:

   If a public official may transfer $100 of the taxpayer property for a $5 return to the taxpayer, they are $95 poorer. The return is inadequate regardless of the legal sufficiency of the consideration. The purpose of
the [constitutional] provision is to avoid transactions which plunder the public purse to the benefit of private corporate wealth.

_Id._ at 1278. The dissenting justices would have required a trial on the question of the adequacy of the return. The Arizona Supreme Court agreed. In 2010, the Court held that although “courts do not ordinarily examine the proportionality of consideration between parties contracting at arm’s length, leaving such issues to the marketplace,” a different test applies when the adequacy of consideration is challenged under the Gift Clause of the state constitution. Turken v. Gordon, 224 P.3d 158 (Ariz, 2010). In that case, the City of Phoenix had agreed to pay a private developer an extraordinary price of over $97,000,000 for the use of parking spaces over a specified period of time. Applying the new test prospectively, the Court held that the Gift Clause “prohibits subsidies to private entities, and paying far more than the fair market value . . . would plainly be a subsidy.” _Id._ at 166.

(2) _Changing One’s Mind._ One argument against enforcing gratuitous promises is that enforcement leaves no room for a promisor’s regret or for changed circumstances. But might not some reasons for changing one’s mind be anticipated and accommodated? French and German laws, for example, permit the revocation of _gifts_ by means of implied conditions in cases where the donor is subsequently impoverished (German law), or cases of “donee ingratitude” (French law). See John P. Dawson, _Gifts and Promises_ (1980) at 53, 140–141; see also Richard Hyland, _Gifts: A Study in Comparative Law_ (2009). Professor Larry Garvin notes that we need not go so “far afield to see revocation for ingratitude at work.” Louisiana, a civil law jurisdiction, provides for revocation of an inter vivos gift where the donee “has attempted to take the life of the donor” or “has been guilty. . . . of cruel treatment, crimes, or grievous injury.” Farnsworth on Contracts: 2013–2 Cumulative Supplement § 2.18a, n.21 (Larry T. Garvin ed., 2012).

Consider also an Israeli rule that permits revocation of a gift _promise_, even after reliance by the promisee, “if the retraction is warranted by disgraceful conduct towards the [promisor or the promisor’s family],” 22 Laws of State of Israel 113. Is it significant in these latter cases that the promisee appears to have had some responsibility for the promisor’s regret? For a thorough investigation of the subject, see E. Allan Farnsworth, _Changing One’s Mind: The Law of Regretted Decisions_ (2000).

**SETTLEMENT AGREEMENTS**

Despite the well-known, perhaps well-deserved reputation for litigiousness in the U.S., only a tiny percentage of civil cases actually go to trial. See John H. Langbein, _The Disappearance of Civil Trial in the United States_, 122 Yale L.J. 522 (2012). Most parties settle their cases, and for a variety of reasons: risk aversion, trial costs, privacy. When a plaintiff gives up a valid claim in exchange for something, consideration is no obstacle to the settlement. But what if the plaintiff’s claim turns out to be invalid? Has the defendant in such a case given up something for nothing?
PROBLEM

In 1985, the Prentis family entered into an endowment contract, or gift agreement, with Wayne State University ("WSU") under which the Prentis's family foundation would give $1,500,000 to WSU and WSU would name its cancer center the Meyer L. Prentis Comprehensive Cancer Center. The payments were completed in 1990. In 1995, the Karmanos family offered WSU a significant gift on the condition that the center be renamed the Barbara Ann Karmanos Cancer Institute. The center accepted. The Prentis family sued for breach of contract. Should they prevail?

In answering, consider the following language. In paragraph 1 of the agreement, the foundation agreed to contribute the money. In paragraph 2, WSU stated as follows:

In recognition of the significant and long-standing commitment of and leadership and support by the Prentis Foundation in the fields of cancer education, detection and research and the generous financial contributions made over many years by the Prentis Foundation in furtherance thereof; and in further recognition of and appreciation to the Prentis Foundation for the fund it is hereby creating, [WSU and the other parties] do hereby agree that Center shall be renamed and henceforth be known as the Meyer L. Prentis Comprehensive Cancer Center of Metropolitan Detroit.


MORAL OBLIGATION

Mills v. Wyman
Supreme Judicial Court of Massachusetts, 1825.
3 Pick. 207, 20 Mass. 207.

[Levi Wyman, age 25, fell ill on his return from a sea voyage and, being poor and in distress, was cared for by Daniel Mills for about two weeks. A few days later, after all Mills's expenses had been incurred, Seth Wyman, Levi's father, wrote Mills promising to pay those expenses. When Seth Wyman decided not to pay, Mills sued him. From a direction of nonsuit, Mills appealed.]

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 . . .

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 . . .

[There seems to be no case in which it was nakedly decided, that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

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. *The Case Against "Moral Obligation."* Mills v. Wyman accurately reflects the traditional common law view that a promise made in recognition of a "moral obligation" arising out of a benefit previously received is not enforceable. A benefit conferred before a promise is made can hardly be said to have been given in "exchange" for the promise. Williston noted further that "it is essential that the classes of promises which are [enforceable by law] shall be clearly defined. The test of moral consideration must vary with the opinion of every individual. Indeed, as has been said, since there is a moral obligation to perform every promise, it would seem that if morality was to be the guide, every promise would be enforced and if the existence of a past moral obligation is to be the test, every promise which repeats or restates a prior gratuitous promise would be binding." 1 Williston, *Treatise on the Law of Contracts* § 148 (1st ed. 1920).

2. *Immoral without Obligation?* Suppose the letter from Seth Wyman to Daniel Mills had read as follows:

I received a line from you relating to my Son Levi's sickness and requesting me to come up and see him, but as the going is very bad I cannot come up at the present, but I wish you to take all possible care of him and if you cannot have him at your house I wish you to remove him to some convenient place and if he cannot satisfy you for it I will.

(3) **Recognized Exceptions.** As the court acknowledged in *Mills*, in certain exceptional situations the common law does enforce certain promises made in recognition of what could be viewed as a “moral obligation.” These include a promise to pay a debt no longer legally enforceable because the statutory period of limitations has run, and a promise by an adult reaffirming a promise made when the promisor was a minor and that could have been avoided on that ground. A promise to pay a debt that has been discharged in bankruptcy constitutes a third exception. See Restatement §§ 82 and 83. What appears to explain these exceptions? (The enforceability of a promise to pay a debt unenforceable because of the promisor’s discharge in bankruptcy is now subject to additional requirements under the Bankruptcy Code. 11 U.S.C. § 524(c)-(d) (2006).)

**Webb v. McGowin**

*Court of Appeals of Alabama, 1935.*

27 Ala. App. 82, 168 So. 196.

Action by Joe Webb against N. Floyd McGowin and Joseph F. McGowin, as executors of the estate of J. Greeley McGowin, deceased. From a judgment of nonsuit, plaintiff appeals.

- **BRICKEN, PRESIDING JUDGE.** This action is in assumpsit. The complaint as originally filed was amended. The demurrers to the complaint as amended were sustained, and because of this adverse ruling by the court the plaintiff took a nonsuit, and the assignment of errors on this appeal are predicated upon said action or ruling of the court.

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

"On the 3d day of August, 1925, appellant while in the employ of the W.T. Smith Lumber Company, a corporation, and acting within the scope of his employment, was engaged in clearing the upper floor of Mill No. 2 of the company. While so engaged he was in the act of dropping a pine block from the upper floor of the mill to the ground below; this being the usual and ordinary way of clearing the floor, and it being the duty of the plaintiff in the course of his employment to so drop it. The block weighed about 75 pounds.

"As appellant was in the act of dropping the block to the ground below, he was on the edge of the upper floor of the mill. As he started to turn the block loose so that it would drop to the ground, he saw J. Greeley McGowin, testator of the defendants, on the ground below and directly under where the block would have fallen had appellant turned it loose. Had he turned it loose it would have struck McGowin with such force as to have caused him serious bodily harm or death. Appellant could have remained safely on the upper floor of the mill by turning the block loose and allowing it to drop, but had he done this the block would have fallen on McGowin and caused him serious injuries or death. The only safe and reasonable way to prevent this was for appellant to hold to the block and divert its direction in falling from the place where McGowin was standing and the only safe way to di-
vert it so as to prevent its coming into contact with McGowin was for appellant to fall with it to the ground below. Appellant did this, and by holding to the block and falling with it to the ground below, he diverted the course of its fall in such way that McGowin was not injured. In thus preventing the injuries to McGowin appellant himself received serious bodily injuries, resulting in his right leg being broken, the heel of his right foot torn off and his right arm broken. He was badly crippled for life and rendered unable to do physical or mental labor.

"On September 1, 1925, in consideration of appellant having prevented him from sustaining death or serious bodily harm and in consideration of the injuries appellant had received, McGowin agreed with him to care for and maintain him for the remainder of appellant's life at the rate of $15 every two weeks from the time he sustained his injuries to and during the remainder of appellant's life; it being agreed that McGowin would pay this sum to appellant for his maintenance. Under the agreement McGowin paid or caused to be paid to appellant the sum so agreed on up until McGowin's death on January 1, 1934. After his death the payments were continued to and including January 27, 1934, at which time they were discontinued. Thereupon plaintiff brought suit to recover the unpaid installments accruing up to the time of the bringing of the suit.

"The material averments of the different counts of the original complaint and the amended complaint are predicated upon the foregoing statement of facts." . . .

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

1. The averments of the complaint show that appellant saved McGowin from death or grievous bodily harm. This was a material benefit to him of infinitely more value than any financial aid he could have received. Receiving this benefit, McGowin became morally bound to compensate appellant for the services rendered. Recognizing his moral obligation, he expressly agreed to pay appellant as alleged in the complaint and complied with this agreement up to the time of his death; a period of more than 8 years.

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

Where the promisee cares for, improves, and preserves the property of the promisor, though done without his request, it is sufficient consideration for the promisor's subsequent agreement to pay for the service, because of the material benefit received. . . .

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

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

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

2. It is well settled that a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor. [Cases cited.]

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

3. Some authorities hold that, for a moral obligation to support a subsequent promise to pay, there must have existed a prior legal or equitable obligation, which for some reason had become unenforceable, but for which the promisor was still morally bound. This rule, however, is subject to qualification in those cases where the promisor having received a material benefit from the promisee, is morally bound to compensate him for the services rendered and in consideration of this obligation promises to pay. In such cases the subsequent promise to pay is an affirmation or ratification of the services rendered carrying with it the presumption that a previous request for the service was made....

4. The averments of the complaint show that in saving McGowin from death or grievous bodily harm, appellant was crippled for life. This was part of the consideration of the contract declared on. McGowin was benefited. Appellant was injured. Benefit to the promisor or injury to the promisee is a sufficient legal consideration for the promisor’s agreement to pay....

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

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

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

[Part of the short opinion of the Supreme Court of Alabama, denying certiorari, is set out next.]

Foster, Justice . . . The opinion of the Court of Appeals here under consideration recognizes and applies the distinction between a supposed moral obligation of the promisor, based upon some refined sense of ethical duty, without material benefit to him, and one in which such a benefit did in fact occur. We agree with that court that if the benefit be material and substantial, and was to the person of the promisor rather than to his estate, it is within the class of material benefits which he has the privilege of recognizing and compensating either by an executed payment or an executory promise to pay. The cases are cited in that opinion. The reason is emphasized when the compensation is not only for the benefits which the promisor received, but also for the injuries either to the property or person of the promissee by reason of the service rendered.

Writ denied.

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

Per Curiam.

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

The defendant had assaulted his wife, who took refuge in plaintiff's house. The next day the defendant gained access to the house and began another assault upon his wife. The defendant's wife knocked him down with an axe, and was on the point of cutting his head open or decapitating him while he was laying on the floor, and the plaintiff intervened, caught the axe as it was descending, and the blow intended for defendant fell upon her hand, mutilating it badly, but saving defendant's life.

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

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

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

The judgment sustaining the demurrer is

Affirmed.
NOTES

(1) The Case for "Moral Obligation." "Courts have frequently enforced promises on the simple ground that the promisor was only promising to do what he ought to have done anyway. These cases have either been condemned as wanton departures from legal principle, or reluctantly accepted as involving the kind of compromise logic must inevitably make at times with sentiment. I believe that these decisions are capable of rational defense. When we say the defendant was morally obligated to do the thing he promised, we in effect assert the existence of a substantive ground for enforcing the promise. . . . The court's conviction that the promisor ought to do the thing, plus the promisor's own admission of his obligation, may tilt the scales in favor of enforcement where neither standing alone would be sufficient. If it be argued that moral consideration threatens certainty, the solution would seem to lie, not in rejecting the doctrine, but in taming it by continuing the process of judicial exclusion and inclusion already begun in the cases involving infants' contracts, barred debts, and discharged bankrupts." Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 821–822 (1941).

(2) Reconciling Webb and Harrington. These two cases are less than ten years apart. What factors might explain the difference in outcome?

(3) Reform by Statute. New York law does not recognize "moral obligation" as an equivalent of consideration, but a New York statute enacted in 1941 and now found in General Obligations Law § 5–1105 provides: "A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed."

How would the New York statute have affected the preceding cases? Would the common recital "for value received" satisfy the New York statute? Would you favor the adoption of that statute by other states? What about the adoption of a statute enacting Restatement § 86?

(C) THE REQUIREMENT OF BARGAIN

Kirksey v. Kirksey
Supreme Court of Alabama, 1845.
8 Ala. 131.

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

"Dear Sister Antillico,—Much to my mortification, I heard that brother Henry was dead, and one of his children. I know that your situation is one of grief and difficulty. You had a bad chance before, but a great deal worse now. I should like to come and see you, but cannot with convenience at pre-