SCUDDER & ROBICHEAUX

Attorneys at Law

Memorandum

Re: "B" is for Beresford

To: Alex Associate

From: Mary Russell Holmes

John B. Tipton of upstate New York is a man of some wealth, and our client. His first marriage ended badly, and he was estranged from his son Tom and daughter Judy, although later he reconciled with Tom. Tom and Judy do not get along. After an argument over Tom's opposition to abortion, Tom and Judy have not spoken to one another again.

John is now 65 and has asked us for advice. A variety of illnesses have plagued John for the last several years. Both of his parents died in their 67th year. Frankly, John despairs of reaching age 70. He has prepared a letter to Judy. It reads:

> Judy,
>
> Although we have been apart these many years, I still love you with all my heart. I filled with joy at receiving your birthday card after these too many years of silence. This is my promise to you. On your 35th birthday, I want you to have the Chandler books that we read together when you were a child. There is but one condition, I hope and pray that you will reconcile with Tom.
>
> Dad

Judy is now 27 years old. The set of Chandler books is John's most prized possession: all 7 novels of Raymond Chandler, each first editions and signed by the author. The presentation box housing the books is inscribed, “To JB, for giving us such joy as a boy. HG.” The set appraised when John was 60 at $85,000. John wants to send the letter to Judy and the box of books to Tom.

John is not worried that Tom will fail to deliver the box, and if he needs to, he is sure Tom will give him the box back. He is worried about his current wife, Martha, and the children of that marriage. He is certain that they will seek to recover the books after his death. He has written a will that divides his entire estate between Martha and the children of that marriage. He could change that will to give the books to Judy, but he does not want to because he is afraid that Martha will find out. Similarly, he does not want to give the books to Judy now because Judy and his current family have common friends, and he is afraid that Martha will learn that he has given the books to Judy. (He is less concerned that Martha will find out about the letter, although he would be more comfortable if he didn’t have to send it. He has decided to in order to induce Tom and Judy to reconcile.)

We need to advise him whether, if he lets things stand, Judy will be able to get the books after John's death. Would it help to put the letter to Judy under seal?

Memorandum

Re: "B" is for Beresford

To: Alex Associate

From: Perry Paralegal

I didn't spend much time on the question of whether the books are Judy's as a gift, because it seems pretty clear from the first case. The contract question looks harder, so I have attached some explanatory materials along with some cases. I must say, however, that researching the consideration doctrine over Westlaw over the last 5 years or so, I was hard-put to find a case holding there was no consideration for a promise.

On the other thing, I am pretty confident that HG is Helga Greene, who was Chandler's literary agent, fiancée, and heir.

HOFFMANN v. WAUSAU CONCRETE CO.,

58 Wis.2d 472, 207 N.W.2d 80
Supreme Court of Wisconsin, 1973

. . . It is boilerplate law that four elements must be demonstrated to prove a gift:

1. Intention to give on the part of the donor.

2. Delivery, actual or constructive, to the donee.

3. Termination of the donor's dominion over the subject of the right.

4. Dominion in the donee. . . .

HAMER v. SIDWAY

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

Appeal from an order of the general term of the supreme court in the fourth judicial department, reversing a judgment entered on the decision of the court at special term in the county clerk's office of Chemung county on the 1st day of October, 1889. The plaintiff presented a claim to the executor of William E. Story, Sr., for $5,000 and interest from the 6th day of February, 1875. She acquired it through several mesne assignments from William E. Story, 2d. The claim being rejected by the executor, this action was brought. It appears that William E. Story, Sr., was the uncle of William E. Story, 2d; that at the celebration of the golden wedding [anniversary] of Samuel Story and wife, father and mother of William E. Story, Sr., on the 20th day of March, 1869, in the presence of the family and invited guests, he promised his nephew that if he would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until he became 21

years of age, he would pay him the sum of $5,000. The nephew assented thereto, and fully performed the conditions inducing the promise. When the nephew arrived at the age of 21 years, and on the 31st day of January, 1875, he wrote to his uncle, informing him that he had performed his part of the agreement, and had thereby become entitled to the sum of $5,000.

The uncle received the letter, and a few days later, on the 6th day of February, he wrote and mailed to his nephew the following letter:

> Buffalo, Feb. 6, 1875, W. E. Story, Jr.
>
> Dear Nephew: Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have five thousand dollars, as I promised you. I had the money in the bank the day you was twenty-one years old that I intend for you, and you shall have the money certain. Now Willie, I do not intend to interfere with this money in any way till I think you are capable of taking care of it, and the sooner that times 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. . . . 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. . . .
>
> Truly yours, W. E. Story.
>
> P. S. You can consider this money on interest.

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

PARKER, J.

. . . The 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. Cont. 63. "In general waiver of any legal right at the request of another party is a sufficient consideration for a promise." Pars. Cont. *444. "Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." 2 Kent. Comm. (12th Ed.) *465. Pollock in his work on Contracts (page 166), after citing the definition given by the Exchequer Chamber, already quoted, says: "The second branch of this judicial description is really the most important one. 'Consideration' means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first."

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

Order appealed from reversed, and judgment of the special term affirmed.

KIRKSEY v. KIRKSEY

8 Ala. 131
Supreme Court of Alabama, 1845

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

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

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

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

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

ORMOND, J.

The inclination of my mind, is that the loss and inconvenience, which the plaintiff sustained in breaking up, and moving to the defendant's, a distance of sixty miles, is a sufficient consideration

to support the promise, to furnish her with a house, and land to cultivate, until she could raise her family. My brothers, however think, that the promise on the part of the defendant, was a mere gratuity, and that an action will not lie for its breach. The judgment of the Court below must therefore be reversed pursuant to the agreement of the parties.

Restatement [First] of Contracts §75

(1) Consideration for a promise is

(a) an act other than a promise, or

(b) a forbearance, or

(c) the creation, modification or destruction of a legal relation, or

(d) a return promise, bargained for and given in exchange for the promise.

(2) Consideration may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

1 Williston on Contracts §112

If a benevolent man says to a tramp: "If you go around the corner to the clothing shop there, you may purchase an overcoat on my credit," no reasonable person would understand that the short walk was requested as the consideration for the promise, but that in the event of the tramp going to the shop the promisor would make him a gift. Yet the walk to the shop is in its nature capable of being consideration. It is a legal detriment to the tramp to make the walk, and the only reason why the walk is not consideration is because on a reasonable construction it must be held that the walk was not requested as the price of the promise, but was merely a condition of a gratuitous promise. It is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which construction of the promise is more reasonable is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration. On the other hand, if, as in the case of the tramp stated above, the happening of the condition will be not only of no benefit to the promisor but is obviously merely for the purpose of enabling the promisee to receive a gift, the happening of the event on which the promise is conditional, though brought about by the promisee in reliance on the promise, will not properly be construed as consideration. In case of doubt where the promisee has incurred a detriment on the faith of the promise, courts will naturally be loath to regard the promise as a mere gratuity and the detriment incurred as merely a condition. But in some cases it is so clear that a conditional gift was intended that even though the promisee has incurred detriment, the promise has been held unenforceable.

Oliver Wendell Holmes, The Common Law 293-94 (1887)

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.

Charles Pharol, Contract Law Basics

Margee Pub. Company

The seal was a device originally used to identify the maker of a document and to evidence the document's authenticity. English common law has long enforced promises made in sealed documents, even those not supported by consideration, and such is still the rule in England.

Scholars in the United States have been puzzled over why a person cannot, if she chooses, make an enforceable promise to make a gift in the future.

At early common law the seal signified deliberation and authenticity. The seal was typically made by pressing the promisor’s ring to hot wax that had been dripped on a writing containing the promise. One would not accidentally or whimsically poor hot wax on a paper and smash his ring into it. And unless the ring were stolen or counterfeited, a seal indicated the promisor. Over time, the ritual and personification eroded, perhaps due to personalized rings going out of fashion, or a lack of wax, or the stratagems of canny merchants who sought to wring enforceable commitments from the unsuspecting. In any event, Professor Eisenberg, in The Principles of Consideration, 67 Cornell L. Rev. 640 (1982), describes the result:

> [I]n most states by statute or decision a seal may now take the form of a printed device, word, or scrawl, the printed initials "L.S.," [standing for "locus sigilli"—place of the seal] or a printed recital of sealing. Few promisors today have even the vaguest idea of the significance of such words, letters, or signs, if they notice them at all. The Restatement Second itself admits that "the seal has come to seem archaic." Considering this drastic change in circumstances, the rule that the seal renders a promise enforceable has ceased to be tenable under modern conditions. The rule has been changed by statute in about two-thirds of the states, and at least one modern case held even without the benefit of a statute that the rule should no longer be strictly applied. In modern times, most state legislatures have either abolished the distinction between sealed and unsealed promises, abolished the use of a seal in contracts, or otherwise limited the seal's effect. The axiomatic school, however, never rejected the rule that a seal makes a promise enforceable, and that rule is now embodied in §95(1)(a) of the Restatement Second, which provides that "[i]n the absence of statute a promise is binding without consideration if . . . it is in writing and sealed. . . ."

Restatement (Second) of Contracts § 71

Requirement of Exchange; Types of Exchange

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

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

(3) The performance may consist of

(a) an act other than a promise, or

(b) a forbearance, or

(c) the creation, modification, or destruction of a legal relation.

(4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

Commentary to Restatement (Second) of Contracts § 71

a. Other meanings of "consideration." The word "consideration" has often been used with meanings different from that given here. It is often used merely to express the legal conclusion that a promise is enforceable. Historically, its primary meaning may have been that the conditions were met under which an action of assumpsit would lie. It was also used as the equivalent of the quid pro quo required in an action of debt. A seal, it has been said, "imports a consideration," although the law was clear that no element of bargain was necessary to enforcement of a promise under seal. On the other hand, consideration has sometimes been used to refer to almost any reason asserted for enforcing a promise, even though the reason was insufficient. In this sense we find references to promises "in consideration of love and affection," to "illegal consideration," to "past consideration," and to consideration furnished by reliance on a gratuitous promise.

Consideration has also been used to refer to the element of exchange without regard to legal consequences. Consistent with that usage has been the use of the phrase "sufficient consideration" to express the legal conclusion that one requirement for an enforceable bargain is met. Here § 17 states the element of exchange required for a contract enforceable as a bargain as "a consideration. " Thus "consideration" refers to an element of exchange which is sufficient to satisfy the legal requirement; the word "sufficient" would be redundant and is not used.

b. "Bargained for." In the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration. Here, as in the matter of mutual assent, the law is concerned with the external manifestation rather than the undisclosed mental state: it is enough that one party manifests an intention to induce the other's response and to be induced by it and that the other responds in accordance with the inducement. See § 81; compare §§ 19, 20. But it is not enough that the promise induces the conduct of the promisee or that the conduct of the promisee induces the making of the promise; both elements must be present, or there is no bargain. Moreover, a mere pretense of bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal. In such cases there is no

consideration and the promise is enforced, if at all, as a promise binding without consideration under §§ 82-94. . . .