Washington University Law Review

Volume 17 | Issue 1

January 1931

Restatement of the Law of Contracts of the American Law Institute, Sections 75-84, with Missouri Annotations

Tyrrell Williams
Washington University School of Law

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview

 Part of the Contracts Commons

Recommended Citation

Tyrrell Williams, *Restatement of the Law of Contracts of the American Law Institute, Sections 75-84, with Missouri Annotations*, 17 ST. LOUIS L. REV. 001 (1931).
Available at: https://openscholarship.wustl.edu/law_lawreview/vol17/iss1/3

This Article is brought to you for free and open access by Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

ST. LOUIS
LAW REVIEW

Vol. XVII DECEMBER, 1931 No. 1

RESTATEMENT OF THE LAW OF CONTRACTS OF THE AMERICAN LAW INSTITUTE, SECTIONS 75-84,* WITH MISSOURI ANNOTATIONS†

BY TYRRELL WILLIAMS

TOPIC C. *Consideration and Its Sufficiency*

Section 75. DEFINITION OF CONSIDERATION.

(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.

Comment:

a. The law generally imposes no duty on one who makes an informal promise unless the promise is supported by sufficient consideration (see Section 19).

b. This Restatement distinguishes the two questions: whether there is consideration for a promise, and whether that consideration is sufficient. This Section defines consideration in effect as

* Copyright, 1928, The American Law Institute.
† Copyright, 1931, by Washington University. Previous sections of the Restatement, similarly annotated, will be found in the ST. LOUIS LAW REVIEW for December, 1930, February, 1931, and June, 1931.

Washington University Open Scholarship

the price bargained for and paid for a promise, and in connection with Section 19 states the principle that, subject to certain exceptions, an informal promise is not binding unless an agreed price has been paid for it. Consideration must actually be bargained for as the exchange for the promise. A statement that a consideration has been bargained for does not conclusively prove the fact. Recital of a payment not in fact made, but stated to have been made as consideration, the statement being inserted merely to make a transaction look like a bargain when in fact it was not a bargain, does not suffice. The existence or non-existence of a bargain where something has been parted with by the promisee or received by the promisor depends upon the manifested intention of the parties.

c. Furthermore, although a price has been agreed upon and paid for a promise, the promise is not binding unless the law deems the price sufficient. The following Sections state when an agreed price or consideration for a promise is sufficient to make the promise binding and when such a price or consideration is insufficient. The fact that the promisee relies on the promise to his injury, or the promisor gains some advantage therefrom, does not establish consideration without the element of bargain or agreed exchange; but some informal promises are enforceable without the element of bargain. These fall and are placed in the category of contracts which are binding without assent or consideration (see Topic D, Sections 85-94).

d. In unilateral contracts the consideration is something other than a promise. It may be a specified act or forbearance, or any one of several specified acts or forbearances of which the offeree is given the choice, or such conduct as will produce a specified result. The offeror may also offer or request as consideration the creation, modification or destruction of a purely intangible legal relation. Not infrequently the consideration bargained for is an act with the added requirement that a certain legal result shall be produced. In bilateral contracts the consideration is a return promise. What amounts to a promise is defined in Section 2. Consideration may consist partly of promises and partly of other acts or forbearances. Though a promise is itself an act, it is in this connection distinguished from all other acts.

e. It matters not from whom the consideration moves or to

https://openscholarship.wustl.edu/law_lawreview/vol17/iss1/3

whom it goes. If it is bargained for as the exchange for the promise, the promise is not gratuitous.

Illustrations of Subsection (1):

1. *A* requests *B* to give him a book, promising *B* $10 in exchange therefor; or *B* offers the book in exchange for *A*'s promise to pay $10. In either case, if the book is given and received, there is consideration for *A*'s promise.

2. *A* promises *B* $500 when *B* goes to college. If the promise is not made as an agreed exchange for *B*'s going to college but is reasonably to be understood as a gratuity, payable on the stated contingency, *B*'s going to college is not consideration for *A*'s promise.

3. *A* says to *B*, the owner of a garage, "I will pay you $100 if you will make my car run properly." The production of this result is the requested consideration.

4. *A* has *B*'s horse in his possession. *B* writes to A, "If you will promise me $500 for the horse, he is yours." *A* promptly replies making the requested promise. The property in the horse at once passes to *A*. The change in ownership is consideration for *A*'s promise.

Illustrations of Subsection (2):

5. *A* promises *B* to guarantee payment of a bill of goods if *B* sells the goods to *C*. Selling the goods to *C* is consideration for *A*'s promise.

6. *A* makes a promissory note payable to *B* in return for payment by *B* to *C*. The payment is consideration for the note.

7. *A*, at *C*'s request and in exchange for $1 paid by *C*, promises *B* to give him a book. The payment is consideration for *A*'s promise.

8. *A* promises *B* to pay *B* $1, in exchange for *C*'s promise to *A* to give *A* a book. The promises are consideration for one another.

Annotation:

This Section is in general accord with Missouri law. A definition of consideration often approved by Missouri courts is "a benefit to the party promising or to a third person at his request, or an inconvenience, loss or injury, or the risk of it, to the party promised." *Strode v. St. Louis Transit Co.* (1906) 197 Mo. 616, 95 S. W. 851; *Greene v. Higham* (1901) 161 Mo. 333, 61 S. W. 798. For a comprehensive description of consideration in both unilateral and bilateral contracts, see *German v. Gilbert* (1900) 83 Mo. App. 411. *Allen West Commission Co. v. Richter* (1921) 286 Mo. 691, 228 S. W. 827, is authority for

Washington University Open Scholarship

the Restatement's assertion that the alleged consideration is not binding consideration unless it is "bargained for and given in exchange for the promise." To the same effect: *Glasscock v. Glasscock* (1877) 66 Mo. 627.

Subdivision (1), Clause (a) is illustrated by *Powell v. Railroad* (1914) 225 Mo. 420, 164 S. W. 628, issuing a pass; *Underwood Typewriter v. Century Building Co.* (1909) 220 Mo. 522, 119 S. W. 400, act of obtaining a satisfactory tenant; *Stone v. Pennock* (1888) 31 Mo. App. 544, performing services as nurse.

Subdivision (1), Clause (b) is illustrated by *Brandenburger v. Puller* (1916) 266 Mo. 534, 181 S. W. 1141, refraining from the contest of a will; *Bridges v. Stephens* (1896) 132 Mo. 524, 34 S. W. 555, forbearing to sue held consideration for oral promise not to plead statute of limitations; *Rinehart v. Bills* (1884) 82 Mo. 534, compromise case, the court saying "the compromise of a doubtful claim asserted in good faith furnishes a valuable consideration to support a promise"; *Lindell v. Rokes* (1875) 60 Mo. 249, forbearing to use intoxicating liquors for eight months; *Hughes v. Foltz* (1910) 142 Mo. App. 513, 127 S. W. 112, withdrawing claim to purchase certain property; *Hill v. Railroad Co.* (1899) 82 Mo. App. 188, delaying legal proceedings for loss of a cow.

Subdivision (1), Clause (c) is illustrated by *Scriba v. Neely* (1908) 130 Mo. App. 258, 109 S. W. 845, giving up a contract right; *Gunnell v. Emerson* (1898) 73 Mo. App. 291, abandoning equitable right to redeem mortgaged chattels; *Lancaster v. Elliot* (1893) 55 Mo. App. 249, release of right to recover interest on judgment.

Subdivision (1), Clause (d) is illustrated by *Green v. Whaley* (1917) 271 Mo. 636, 197 S. W. 355, contract between joint owners of property as to final disposition thereof, the court saying "the promise of one was a sufficient consideration for the promise of the other"; *Moss v. Green* (1867) 41 Mo. 389, mutual promises to pay money upon happening of fortuitous events; *Maccalum Printing Co. v. Graphite Compendius Co.* (1910) 150 Mo. App. 383, 130 S. W. 836, bilateral contract for commercial printing; *Young v. Ruhwedel* (1906) 119 Mo. App. 231, 96 S. W. 228, contract of owner to sell supported by promise of plaintiff to act as agent.

Subdivision (2). In *Scars v. Krekel* (Mo. App. 1916) 184 S. W. 911, the consideration was the purchase of land from a third party after defendant promised plaintiff to pay taxes on the land. In *Crow v. Abernathy* (1913) 171 Mo. App. 227, 156 S. W. 494, the consideration was given by promisee to a third person and supported a valid sale of lumber from promisor. In *Webster v. Switzer* (1884) 15 Mo. App. 346, the consideration

https://openscholarship.wustl.edu/law_lawreview/vol17/iss1/3

was given by promisee to a trust estate at request of trustee and promisor who was held liable individually.

Section 76. WHAT ACTS OR FORBEARANCES ARE SUFFICIENT CONSIDERATION.

Any consideration that is not a promise is sufficient to satisfy the requirement of Section 19 (c), except the following:

(a) An act or forbearance required by a legal duty that is neither doubtful nor the subject of honest and reasonable dispute if the duty is owed either to the promisor or to the public, or, if imposed by the law of torts or crimes, is owed to any person;

(b) The surrender of, or forbearance to assert, an invalid claim or defense by one who has not an honest and reasonable belief in its possible validity;

(c) The transfer of money or fungible goods as consideration for a promise to transfer at the same time and place a larger amount of money or goods of the same kind and quality.

Comment:

a. Section 75 defines consideration. The present Section states what consideration is legally sufficient to support a unilateral contract. Legal sufficiency does not depend upon the comparative economic value of the consideration and of what is promised in return (see Section 81).

b. The satisfaction of the requirement of the sufficiency of consideration, which is stated in Section 19 (c) as a requisite for the formation of an informal contract, is but one of the requisites enumerated in that Section. It is, however, with that requisite alone that the present Topic (Sections 75-84) deals. The effect of illegality of the consideration will be stated in a later portion of the Restatement of this Subject.

c. The duty referred to in this Section is confined to a duty for which any remedy ordinarily allowed by the law for that kind of duty is still available. One who may at will avoid a legal relation or refrain from any performance without legal consequences, or against whom all remedies appropriate to the enforcement of his duty have become barred, is not under a duty within the meaning of the Section.

Illustrations:

1. In a State where the law permits a husband and wife to contract with one another, and to sue upon a contract so

Washington University Open Scholarship

made, *A*'s wife, *B*, leaves him without just cause. *A* promises to pay *B* $1000 if she will return. Induced thereby, *B* returns. Her return is not sufficient consideration.

2. *A*, an infant, promises *B* to pay *B* $50 for a set of books which *A* does not need. *B* delivers the books. *A* becomes of age and threatens to rescind the bargain, as the law permits him to do. *B* promises *A* that if *A* will pay the $50 as originally agreed, *B* will give *A* another book. *A* induced thereby pays the $50. The payment is sufficient consideration.

3. *A* sells goods to *B* who becomes indebted therefor in the sum of $100. The Statute of Limitations bars any remedy of *A* to recover the debt. *A* promises *B* that if *B* will pay the debt, *A* will give *B* a specified book. *B* pays the debt. The payment is sufficient consideration.

4. *A* owes *B* a debt which is unliquidated, or of which either the existence or amount is honestly and reasonably disputed. A payment of any amount by *A* is sufficient consideration for *B*'s agreement to accept it in full satisfaction.

5. *A* owes *B* a liquidated and undisputed debt of $100. *B* has also another claim against *A*, the existence or amount of which is honestly and reasonably disputed by *A*. *A* pays *B* $100 in return for *B*'s agreement to accept the payment in full satisfaction of both claims. There is not sufficient consideration for *B*'s agreement, since *A* has paid only what he was under a duty to pay.

6. *A* owes *B* a liquidated sum. Any payment by *A* at an earlier time, or in a different medium from that required by the duty, is sufficient consideration for *B*'s promise to accept it in full satisfaction if the difference in performance is part of what is requested and given in exchange for the promise.

7. *A* owes *B* a matured liquidated debt bearing interest. Mutual promises to extend the debt for a year are binding, though the rate of interest is below that which the law allows on overdue debts for which no interest has been contracted. *A* might have paid the debt and altogether prevented *B* from acquiring a right to interest.

8. *A* enters into a contract with *B* to build a house, according to certain plans, for ten thousand dollars, which *B* agrees to pay. When the work is half done *A* finds that he will lose money by performing the contract, and informs *B* that the work will stop unless *B* promises to pay two thousand dollars additional for its completion. *B* makes the promise and *A* thereupon completes the building. There is no sufficient consideration for *B*'s promise to pay the additional sum. If unforeseen difficulties justifying *A* in rescinding

https://openscholarship.wustl.edu/law_lawreview/vol17/iss1/3

the contract exist, there is sufficient consideration for a promise of additional payment.

Annotation:

This section relates to unilateral contracts, and seems to be in accord with Missouri law. The general rule is in favor of sufficient consideration. See annotation under Section 75. Three important exceptions to the general rule are stated in the subdivisions of this section.

The exception of *Subdivision (a)* is illustrated by *Lingenfelder v. Wainwright Brewery Co.* (1891) 103 Mo. 578, 15 S. W. 844 (leading case), where plaintiff, an engaged architect, by refusing to continue performance, exacted an additional promise from defendant; held no sufficient consideration. A certain separation agreement between husband and wife held invalid. *In re Estate of Wood* (1921) 288 Mo. 588, 232 S. W. 671. Part payment of money due is no consideration for postponing payment of residue. *Price v. Cannon* (1834) 3 Mo. 453. It is the legal duty of police to make arrests. *Kick v. Merry* (1856) 23 Mo. 72, and *Thornton v. Mo. Pac. Ry. Co.* (1890) 42 Mo. App. 58. Two alleged contracts relating to reorganization of a corporation; held no consideration for promise in second contract because of first contract. *Brown v. Irving* (Mo. App. 1925) 269 S. W. 686. Promise by landlord inducing tenant not to break lease is without consideration. *Hunter Land & Development Co. v. Watson* (Mo. App. 1922) 236 S. W. 670. Executor became attorney for estate; no consideration for promise of beneficiary to pay for services. *Orr v. Sanford* (1898) 74 Mo. App. 187. Promisee was railroad company having right of way in public street; held no consideration for promise of contractor to pay for extra support of tracks during sewer construction. *Kansas City, St. J. & C. B. Ry. Co. v. Morley* (1891) 45 Mo. App. 304.

Subdivision (b). In *Long v. Towl* (1868) 42 Mo. 545, the alleged consideration, dismissal of suits palpably unjust, was held to be insufficient. In the following cases the consideration although challenged was held to be sufficient. *Mullanphy v. Riley* (1847) 10 Mo. 489, withholding claim against estate in probate; *Livingston v. Dugan* (1854) 20 Mo. 102, payment for medical attention to slave of doubtful ownership as between plaintiff and defendant; *Valle v. Picton* (1884) 16 Mo. App. 178, contract between wife's husband and father in settlement of doubtful claim; *Harms v. Fidelity & Casualty Co. of N. Y.* (1913) 172 Mo. App. 241, 157 S. W. 1046, insurance case involving settlement of disputed claim.

The principle of *Subdivision (c)* is stated in *Wetmore v. Crouch* (1899) 150 Mo. 671, 51 S. W. 738, as follows: "A transaction which consists only in the payment of a smaller sum than

Washington University Open Scholarship

is unquestionably due, and which has no other element of accord in it, is not a satisfaction of the debt even though accepted as such at the time." A part payment of a judgment debt is not a discharge even if so intended. *Winter v. K. C. Cable Ry. Co.* (1901) 160 Mo. 159, 61 S. W. 606. The principle of the subdivision was pointed out but facts indicated valid compromises in the following cases: *Pollman & Bros. Coal & Sprinkling Co. v. City of St. Louis* (1898) 145 Mo. 651, 47 S. W. 563; *Chamberlain v. Smith* (1905) 110 Mo. App. 657, 85 S. W. 645.

Section 77. A PROMISE IS GENERALLY SUFFICIENT CONSIDERATION.

Except as qualified by Sections 78, 79 and 80, any promise whether absolute or conditional is a sufficient consideration.

Comment:

a. This Section in connection with Sections 78, 79 and 80 states what consideration is sufficient in a bilateral contract.

b. Where promises are exchanged, one or both of them may be conditional, and though the condition of a promise may never happen, and in that event the promisor will not violate his promise if he does nothing, this alone does not prevent the promise from being sufficient consideration. Such conditional promises as are insufficient consideration are defined in Sections 78 and 79.

Within the definition of consideration in Section 75, taken in connection with Section 77, a promise by *A* to *B* is sufficient consideration for a promise by *B* to *C* (see Illustration 8 under Section 75).

Annotation:

This section relates to bilateral contracts, and is not inconsistent with Missouri law. *Anderson v. Gaines* (1900) 156 Mo. 664, 57 S. W. 726, was a suit in equity to set aside a deed to land given in consideration of a promise by an insolvent defendant to support plaintiff; held that the promise was a sufficient consideration in the absence of fraud. *Maccalum Printing Co. v. Graphite Compendius Co.* (1910) 150 Mo. App. 383, 130 S. W. 836, involved a binding bilateral contract to print one catalogue and also subsequent ones "if the price of plaintiff was no higher than that of other responsible firms." See also *German v. Gilbert* (1900) 83 Mo. App. 411, a conditional promise to bid at a mortgage sale held a sufficient consideration.

https://openscholarship.wustl.edu/law_lawreview/vol17/iss1/3

Section 78. A PROMISE IS INSUFFICIENT CONSIDERATION IF ITS PERFORMANCE WOULD OBVIOUSLY BE INSUFFICIENT.

A promise is insufficient consideration if the promisor knows or has reason to know at the time of making the promise that it can be performed by some act or forbearance which would be insufficient consideration for a unilateral contract.

Comment:

a. The rule stated in this Section is applicable, though but for the return promise the promisor would not have done what he has promised, or though for lack of money or for other reason he is unable to do so.

Illustrations:

1. *A*'s promise to pay a debt to *B*, his promise to perform an existing contractual duty to *B*, his promise to perform his official duty, his promise to refrain from committing a tort against *B* or against a third person (*A* having no honest and reasonable doubt as to the facts on which his duty depends), are all insufficient considerations for a promise by *B*, though but for *B*'s promise *A* would not have fulfilled his previous duty.

2. *A* promises *B* to surrender or to forbear suit upon an invalid claim either against *B* or against *C*, which *A* does not honestly and reasonably believe has possible validity. In either case *A*'s promise is insufficient consideration for a promise by *B*.

Annotation:

This section is in accord with Missouri law. See cases cited in annotation under Section 76. See also *Smith v. Sickenger* (Mo. App. 1918) 202 S. W. 262, where the lessor of a farm, rent to be paid out of crops, by a promise to do what was right, induced the lessee to replant after a flood; the promise was an insufficient consideration.

Section 79. A PROMISE IN THE ALTERNATIVE AS CONSIDERATION.

A promise or apparent promise which reserves by its terms to the promisor the privilege of alternative courses of conduct is insufficient consideration if any of these courses of conduct would be insufficient consideration if it alone were bargained for.

Comment:

a. This Section is applicable to two classes of promises. In

Washington University Open Scholarship

one class the promisor undertakes to give any one of several performances, each of which is in a greater or less degree an object of desire to the promisee. In the other class of cases one performance only is an object of such desire, but another course of conduct by the terms of the promise is permissible to the promisor in case he deems it for his advantage to adopt that course. In both cases the promise is sufficient consideration if it cannot be kept without some action or forbearance which would be sufficient consideration if it alone were bargained for.

b. Under the definition of "promise" in Section 2, words that state an undertaking to do something if the "promisor" so desires are apparently a promise, but not a promise in fact.

Illustrations:

1. *A* promises *B* to act as *B*'s agent for three years on certain terms, and *B* agrees that *A* may so act, but reserves the power to cancel the agreement at any time. *B*'s agreement is insufficient consideration, since it involves nothing that can properly be called a promise. Otherwise, if *B* reserves the power to cancel on thirty days' notice.

2. *A* promises to sell *B* a certain quantity of goods which *A* has on hand, unless *A* should decide not to sell the goods to anyone. This promise is sufficient consideration for a return promise. Though *A* may refuse to sell to *B*, he cannot then keep his promise except by not selling to anyone. This itself would be sufficient consideration if it were bargained for.

3. *A* offers to deliver to *B* at $2 a bushel as many bushels of wheat, not exceeding 5000, as *B* may choose to order within the next thirty days. *B* accepts, agreeing to buy at that price as much as he shall order of *A* within the specified time. *B*'s acceptance involves no promise by him, and is not sufficient consideration.

4. *A* offers to deliver to *B* at $2 a bushel as many bushels of wheat, not exceeding 5000, as *B* may choose to order within the next thirty days, if *B* will promise to order at least 1000 bushels within that time. *B* accepts. There is a contract. *B*'s promise reserves only a limited option and cannot be performed without doing something which would be sufficient consideration if it alone were bargained for.

5. *A* promises either to give *B* a book or to pay a liquidated, undisputed and matured debt which *A* owes to *B*. *A*'s promise is insufficient consideration for a return promise by *B*.

https://openscholarship.wustl.edu/law_lawreview/vol17/iss1/3

Annotation:

This section is in accord with Missouri law, but attention should be paid to principles rather than terminology. See annotation under Section 30 for occasional use in Missouri of word *unilateral* as indicating insufficiency of promise as consideration. See also annotation under Section 32 for discussion of contracts to supply *needs or wishes.*

A promise to pay for cream if delivered is not a contract in the absence of a definite promise to deliver cream. *Halloway v. Mountain Grove Creamery Co.* (1921) 286 Mo. 489, 228 S. W. 451. A certain promise to cut railroad ties was held too vague and uncertain to support a bilateral contract. *Hudson v. Browning* (1915) 264 Mo. 58, 174 S. W. 393. For comment on this case see 9 UNIV. OF MO. LAW BULLETIN 38. A freight contract is not supported by a sufficient consideration in the absence of a definite promise to ship. *Steffen v. Mississippi River & B. T. Ry. Co.* (1900) 156 Mo. 322, 56 S. W. 1125. To the same general effect: *Barnes v. Bragg* (Mo. App. 1917) 198 S. W. 73, and *Campbell v. American Handle Co.* (1906) 117 Mo. App. 19, 94 S. W. 815.

Section 80. A PROMISE WHICH IS NOT BINDING IS GENERALLY INSUFFICIENT CONSIDERATION.

Except as stated in Section 84 (e), a promise which is neither binding nor capable of becoming binding by acceptance of its terms is insufficient consideration, unless its invalidity is caused by illegality due solely to facts that the promisor neither knows nor has reason to know.

Comment:

a. The ultimate basis of the legal requirement of sufficient consideration for promises is the belief not only that something should be given in exchange for a promise in order to make it binding, but that what is given should have value, although the test of value for determining the sufficiency of consideration does not completely correspond with value in fact, either as measured by the opinion of mankind or by the opinion of the parties to the transaction.

b. A promise which is neither binding nor, like the promise in an offer, capable of becoming binding by acceptance of its terms, is regarded by the law as of no value. Therefore, a promise in a bilateral agreement which falls within this category is insufficient consideration for a return promise, and the whole

Washington University Open Scholarship

agreement is inoperative. One of the promises may have such a defect and bring about this result:

i. because of total incapacity to contract on the part of the promisor, or

ii. because of such illegality or prohibition of the law as makes a promise entirely inoperative, or

iii. because the promise itself is not supported by sufficient consideration.

Illustrations:

1. In a State where the promise of a married woman to become surety for her husband is void, *A*, a married woman, makes a bilateral agreement with *B*, her only promise being to become surety for her husband. There is no contract.

2. In a State where the promise of a lunatic under guardianship is void, *A*, such a lunatic, makes a bilateral agreement with *B*. There is no contract.

3. In a State where the Statute of Frauds makes an oral promise to sell land void, not merely unenforceable, *A* promises orally to sell Blackacre to *B*, and *B* promises to pay $5000 for it. There is no contract.

4. *A* promises *B* a book in return for *B*'s promise to pay *A* a liquidated debt *B* owes him. *B*'s promise is insufficient consideration for *A*'s, and therefore *A*'s promise is not binding. In consequence, *B*'s promise also is without sufficient consideration.

5. *A*, a married man, and *B*, an unmarried woman, make mutual promises to marry. *B* neither knows nor has reason to know that *A* is married. *B*'s promise is sufficient consideration and *B* may recover damages from *A* for breach of his promise though *B* would have a defence to a similar action by *A*.

6. *A* promises *B* $100 in return for *B*'s promise to cut timber on Blackacre, upon which *A* is a trespasser. *B* neither knows nor has reason to know that *A* has no right to have the timber cut. *B*'s promise is sufficient consideration and *B* may recover damages from *A* for breach of his promise though *B* would have a defence to a similar action by *A*.

Annotation:

This section relates to bilateral contracts and is not inconsistent with Missouri law. An agreement for a prize fight in violation of statute is not a contract. *Reisler v. Dempsey* (1921) 207 Mo. App. 182, 232 S. W. 229. Promise to "compromise" a "claim" that has no merit and is not doubtful is not binding.

https://openscholarship.wustl.edu/law_lawreview/vol17/iss1/3

McCrary v. Thompson (1907) 123 Mo. App. 596, 100 S. W. 535. Promisor incapacitated by drunkenness and so known to promisee, is not bound. *Longhead v. Combs and Bro. Commission Co.* (1896) 64 Mo. App. 559.

Section 81. ADEQUACY OF VALUE OF CONSIDERATION IS IMMATERIAL.

Except as this rule is qualified by Sections 76, 78, 79 and 80, gain or advantage to the promisor or loss or disadvantage to the promisee, or the relative values of a promise and the consideration for it, do not affect the sufficiency of consideration.

Comment:

a. Although, as stated in the Comment to Section 80, some conception of value forms the basis of the legal requirement of sufficient consideration, it is a general rule, subject to the qualifications referred to in this Section, that whatever consideration a promisor assents to as the price of his promise, is legally sufficient consideration. But the fact that the value of what is stated as consideration is insignificant as compared with the value of what is promised in exchange is evidence, and under some circumstances may amount to convincing evidence, that the transaction is not a bargain but rather a promise to make a gift, and that it is, therefore, not a promise for sufficient consideration.

Illustrations:

1. *A*, from motives of pity for animal suffering, promises *B* $10 for a broken-legged horse which *B* had thought worthless and would have gladly given $10 to have *A* remove. The transfer of the horse to *A* is a sufficient consideration for *A*'s promise.

2. *A* believes a letter in *B*'s possession will enable him to establish a claim against *C*. *A* offers *B* $1000 for the letter. *B* accepts and gives *A* the letter, which proves insufficient to establish the claim. The letter is sufficient consideration for *A*'s promise.

Annotation:

This section is in accord with Missouri law. "It is not necessary that the consideration should be adequate in point of value. Although small or even nominal, in the absence of fraud, it is enough to support a contract entered into upon the faith of it." *Strong v. Whybark* (1907) 204 Mo. 341, 102 S. W. 968. The principle is illustrated by *Williams v. Jensen* (1882) 75 Mo. 681,

Washington University Open Scholarship

decided before the present married woman's statute was passed. A married woman without a separate estate was induced to sign a note. The obtaining of this signature was a consideration for a promise, the court saying: "It may have been an inconvenience for Stonebreaker to secure the signature of his wife and this much appearing the law will shut its eyes to the inequality between the consideration and the promise." Other cases in support of the principle are: *Campbell v. McLaughlin* (Mo. 1918) 205 S. W. 18; *Bean v. Valle* (1829) 2 Mo. 126; *Forbs v. St. Louis I. M. & S. Ry. Co.* (1904) 107 Mo. App. 661, 82 S. W. 562.

Smallness of consideration is not of itself evidence of fraud, but is a circumstance to be weighed with others in determining the question of fraud. *Chouteau v. Nuckolls* (1855) 20 Mo. 442.

As to the distinction between inadequacy of consideration and total failure of consideration, see *Lindsay v. Sonora Gold Min. & Mill. Co.* (Mo. 1917) 196 S. W. 764, and *Brown v. Weldon & Lankford* (1887) 27 Mo. App. 251.

Section 82. A RECITAL OF CONSIDERATION IS NOT CONCLUSIVE PROOF.

A recital in a written agreement that a stated consideration other than a promise has been given as consideration is not conclusive proof of the fact.

Comment:

a. The parol evidence rule does not prevent denial of the truth of statements of fact contained in a written agreement, except statements that the promises contained in the agreement have been made. The rule forbids (see Section 238) proof that a promise stated in a written agreement was not made in those terms.

Illustrations:

1. A writing is signed by *A* and accepted by *B*, which reads: "In consideration of one dollar to me in hand paid by *B*, the receipt of which is hereby acknowledged, I guarantee that the thousand dollars advanced yesterday to *C* by *B*, shall be duly repaid." *A* may show that a dollar was neither paid nor expected to be paid by *B*, and that his promise is, therefore, not binding; but if the dollar was paid it is sufficient consideration since the parties have manifested an intention to make a bargain. *B* may prove, if the facts warrant it, that some sufficient consideration, other than that recited (as, for example, forbearance) was bargained for and given.

https://openscholarship.wustl.edu/law_lawreview/vol17/iss1/3

2. A written agreement made by *A* and *B* states that in consideration of *A*'s promise not to use intoxicating liquor, *B* promises to pay him $5000. Neither *A* nor *B* may introduce evidence to show that he never made the promise stated in the writing as made by him.

Annotation:

This section is in accord with Missouri decisions. *McDaniel v. United Rys. Co.* (1912) 165 Mo. App. 678, 148 S. W. 464, involved the construction of an alleged release of a personal injury claim. It was held that the consideration clause was a "mere recital of facts" and not "contractual"; therefore parol evidence was admissible. The case makes plain the distinction between the Restatement's Illustration 1 (mere recital of fact) and Illustration 2 (contractual). The same distinction is recognized in *Neville v. Hughes* (1904) 104 Mo. App. 455, 79 S. W. 735, a suit on an alleged breach of warranty, where it was held that the consideration clause was "contractual"; therefore parol evidence was not admissible. To the same effect is *General Accident & L. Insurance Co. v. Owen Bldg. Co.* (1917) 195 Mo. App. 371, 192 S. W. 145, where the consideration being a promise, parol evidence was inadmissible. See also *Poplin v. Brown* (1918) 200 Mo. App. 255, 205 S. W. 411, a replevin suit, where parol evidence was admitted to show real character of a bill of sale.

In *Moore v. Ringo* (1884) 82 Mo. 468, the court said: "Where a consideration has been inserted in an executory contract which is shown to be nominal or unreal, the real consideration may be shown for the purpose of supporting the contract."

Section 83. ONE CONSIDERATION MAY SUPPORT A NUMBER OF PROMISES.

Consideration is sufficient for as many promises as are bargained for and given in exchange for it if it would be sufficient:

(a) for each one of them if that alone were bargained for, or

(b) for at least one of them, and its insufficiency as consideration for any of the others is due solely to the fact that it is itself a promise for which the return promise would not be a sufficient consideration.

Illustrations:

1. *A* pays *B* or promises *B* to pay him $5, not then owed by *A*, in consideration of which *B* promises *A* to give him a book and also promises to surrender a letter. Both of *B*'s promises are supported by sufficient consideration.

Washington University Open Scholarship

2. *A* pays *B* or promises *B* to pay him $50 not then owed by *A*, in exchange for the following promises: a promise by *C* to dig a well for *D*, a promise by *E* to discharge *F* from a debt of $100 owing by *F* to *E*. All the promises are supported by sufficient consideration.

3. *A* promises to pay *B* $1000 in exchange for *B*'s promises to complete a building *B* is then under an existing duty to *A* to complete, and to do other specified work. Though *A*'s promise would be insufficient consideration for *B*'s promise to complete the building if that promise were the only one made by *B*, since both parties to a bilateral agreement must be bound or neither is bound, *B*'s additional promise removes the obstacle and both *B*'s promises are supported by sufficient consideration.

Annotation:

This section is in accord with Missouri law.

Subdivision (a). Tebeau v. Ridge (1914) 261 Mo. 547, 170 S. W. 871, lease of land containing option to purchase, rent reserved being only consideration. See also *Luthy v. Woods* (1878) 6 Mo. App. 67.

Subdivision (b). A lawful promise to pay for services, made by corporate defendant based upon a lawful consideration, is not invalid because the defendant made at the same time an unlawful promise, to purchase its own stock, based upon the same consideration. *Sexton v. North Mo. Cent. Ry. Co.* (Mo. App. 1917) 194 S. W. 1082. See also *Presbury v. Fisher* (1853) 18 Mo. 50.

Section 84. APPLICATION OF RULES TO A NUMBER OF SPECIAL CASES.

Consideration is not insufficient because of the fact

(a) that obtaining it was not the motive or a material cause inducing the promisor to make the promise, or

(b) that part of it does not fulfill the requirements of sufficiency, or

(c) that the party giving the consideration is then bound by a duty owed to the promisor or to the public, or by any duty imposed by the law of torts or crimes, to render some performance similar to that given or promised, if the act or forbearance given or promised as consideration differs in any way from what was previously due, or

(d) that the party giving the consideration is then bound by a contractual or quasi-contractual duty to a third person to perform the act or forbearance given or promised as consideration, or

https://openscholarship.wustl.edu/law_lawreview/vol17/iss1/3

(e) that it is a promise, and a special privilege not expressly reserved in the promise but given by the law, makes the promise or the whole agreement unenforceable or voidable, or

(f) that it is a promise, performance of which is conditional on either a future or past event, if when the promise is made there is any possibility, or there would seem to a reasonable man in the position of the promisor to be any possibility, that the promise can be performed only by some act or forbearance which would be sufficient consideration.

Comment:

a. The various circumstances set out in the Subsections of this Section are specifically stated for the purpose of amplifying general rules stated in previous Sections with reference to questions which have most frequently raised controversy.

Comment on Clause (a):

b. As it is the intent of the parties as manifested to one another which determines whether consideration is given in exchange for a promise, it follows that if such an intent is manifested, the motive or the cause is immaterial.

Illustration of Clause (a):

1. *A* wishes to make a binding promise to his son *B*, to convey to *B*, Blackacre, which is worth $5000. 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.

Comment on Clause (b):

c. If something capable of operating as consideration is given, it matters not that other things also given as consideration are in themselves insufficient or that the exchange which the promisor undertakes to give in return is disproportionately great; but if part of the consideration is illegal the whole agreement may thereby become invalid.

d. Compositions with creditors fall within this Clause. The consideration for which each of the assenting creditors bargains may be any or all of the following: 1. part payment of the sum due him; 2. the promise of each other creditor to forego a portion of his claim; 3. forbearance (or promise thereof) by the debtor to pay the assenting creditors more than equal proportions;

Washington University Open Scholarship

4. the action of the debtor in securing the assent of the other creditors; 5. the part payment made to the other creditors. Of these, number 1 is not a sufficient consideration; but each of the other four is sufficient. Numbers 4 and 5 are seldom bargained for in fact; but numbers 2 and 3 are practically always bargained for, by reasonable implication if not in express terms. Still other considerations may be agreed upon in any case.

Illustrations of Clause (b):

2. *A* promises *B* a book if *B* will pay *A* $5 which *B* owes *A*, and $1 in addition. *B* pays *A* $6. *A*'s promise is binding, although *B*'s payment of the $5 which he owes is not of itself sufficient consideration.

3. *A* makes a composition with *B*, *C* and *D*, three of his creditors, whereby each of them, in consideration of a payment of forty cents on the dollar and of *A*'s promise to treat all assenting creditors equally, and in further consideration of similar promises by the other two of the creditors, promises to accept the said payment as full satisfaction. The 1st two of the expressed considerations are sufficient and the composition is valid. It is immaterial whether *A* has creditors who do not assent, unless *B*, *C* and *D* make their agreements subject to the condition or on the expressed assumption that these creditors likewise enter into the composition.

Illustration of Clause (c):

4. *A*, a public official, performs acts requested in an offer of reward and some of these acts are beyond the scope of his official duty. He has given sufficient consideration.

Illustration of Clause (d):

5. *A* owes *B* $10. *C* promises that he will give *A* a book in return for *A*'s payment of the debt or in return for *A*'s promise to pay it. The payment or promise of payment is sufficient consideration.

Comment on Clause (e):

e. Though an unconditional reservation by a promisor of the privilege of avoiding performance or cancelling his agreement precludes a promise or apparent promise from being sufficient consideration, an equally extensive privilege given by the law without such a reservation has no such effect.

Illustrations of Clause (e):

6. *A* makes a promise in consideration of a return promise by *B*. Though the contract is voidable by *A* because of

https://openscholarship.wustl.edu/law_lawreview/vol17/iss1/3

his own infancy, or because of *B*'s fraud, *A*'s promise is not, because of that insufficient consideration for *B*'s promise.

7. *A* makes a promise in consideration of a return promise by *B*. Though *A*'s promise is unenforceable (but not void; see Section 80, Illustration 3) under the Statute of Frauds, it is not on that account insufficient for *B*'s promise.

8. *A* makes a bilateral agreement with the United States Government. The promise of the Government though unenforceable is not, because of that, insufficient for *A*'s promise.

Comment on Clause (f):

f. In dealing with promises contingent on past events the law takes the standpoint of the promisor. If he honestly, and reasonably from the facts within his knowledge, believes that his promise does not by its terms permit him to avoid a breach thereof without some performance which might furnish sufficient consideration, it is immaterial that the facts are such that there is no such possibility. His honest and reasonable belief that he will be unable to fulfill a previous legal duty, however, does not make a promise by him which is contingent on the nonfulfilment, a sufficient consideration, if it remains legally permissible to the promisor to discharge his duty by performing the previous duty.

Illustrations of Clause (f):

9. *A* promises *B* to pay him $5000 if his house burns within a year. This is sufficient consideration for a return promise.

10. *A* promises *B* to pay him $5000 if *A* enters a competing business within three years. This is a sufficient consideration for a return promise.

11. *A* promises *B* to pay him $5000 if *B*'s ship now at sea has already been lost, the fact being, though unknown to the promisor, that the ship has not been lost. This is sufficient consideration for a return promise, since it reasonably seems to the promisor that keeping his promise may involve payment of $5000.

12. *A* owes *B*, on September 1, an overdue debt of $10,000. On that day, in return for a promise by *B*, *A* promises *B* to deliver to *B*, on October 1, a Ford car, unless *A* shall previously pay the debt. *A*'s promise is insufficient consideration, since after making the promise he can avoid breach of it by paying his debt.

Washington University Open Scholarship

Annotation:

This section is in accord with Missouri law, except clause (d), which is not inconsistent with Missouri law.

(a) The clause is illustrated by *Stone v. Pennock* (1888) 31 Mo. App. 544; even if plaintiff would have rendered services without compensation named in contract, this fact cannot prevent plaintiff from recovering.

(b) The principle is illustrated by composition agreements. *Mullin v. Martin* (1886) 23 Mo. App. 537. If several considerations are recited and one or more are frivolous but not illegal, considerations may be severed. *Drummond Realty & Inv. Co. v. Thompson Trust Co.* (Mo. 1915) 178 S. W. 479. In a certain alleged contract relating to divorce part of the consideration was illegal and the entire agreement became invalid. *Beardsley v. Bass* (1921) 287 Mo. 393, 229 S. W. 1092. But severable legal agreements may be enforced though coupled with illegal agreements. *Schibi v. Miller* (Mo. App. 1925) 268 S. W. 434.

(c) A public officer may accept a reward for services outside the scope of his duties, such as arresting criminals in other states. *Smith v. Vernon County* (1905) 188 Mo. 501, 87 S. W. 949; *Davis v. Millsap* (1911) 159 Mo. App. 167, 140 S. W. 751. In *Weber Implement & Auto. Co. v. Goswell* (Mo. App. 1927) 299 S. W. 152, the promisees, responsible for the price of a mortgaged and lost automobile, did more than their legal duty in finding the automobile. The principle of this clause frequently is applied to substituted contracts. *Mt. Vernon Car Mfg. Co. v. Hirsch Rolling Mill Co.* (1920) 285 Mo. 669, 227 S. W. 67; *Davis v. Culmer* (1927) 221 Mo. App. 1037, 295 S. W. 803; *Latham v. Douglass* (Mo. App. 1918) 206 S. W. 392; *Scriba v. Neely* (1908) 130 Mo. App. 258, 109 S. W. 845. The principle was recognized but was not applied because of facts in *State ex rel. v. Cox* (Mo. 1923) 251 S. W. 374, and *Wilt v. Hammond* (1914) 179 Mo. App. 406, 165 S. W. 362.

(d) As above stated, this clause is not inconsistent with Missouri law, but no direct authority has been found for or against the principle. In *Hoffman v. St. Louis Refrigerator & Cold Storage Co.* (1906) 120 Mo. App. 661, 97 S. W. 619, the court said: "We refrain from passing on the question of whether a promise to do what the promisor is already under a legal obligation to do by virtue of a prior contract between him and a third party, is a good consideration for an undertaking by the promisee to compensate him for doing the thing agreed—whether or not under those circumstances, an action will lie on the promisee's obligation. This is a question on which the authorities are in conflict." See also *Lindsly & Son v. Kansas City Viaduct & T. Ry. Co.* (1911) 152 Mo. App. 221, 133 S. W. 389.

https://openscholarship.wustl.edu/law_lawreview/vol17/iss1/3

(e) The principle frequently is illustrated by cases involving the Statute of Frauds. "The person making a parol contract to convey lands, may or may not insist on the protection of the statute of frauds. If he will confess the agreement, and not insist on the statute, its performance will be enforced against him." *McGowen v. West* (1842) 7 Mo. 569. Other Statute of Frauds cases are: *St. Louis K. & N. Ry. Co.* (1894) 121 Mo. 169, 25 S. W. 192; *Aultman and Co. v. Booth* (1888) 95 Mo. 383, 8 S. W. 742; *Cash v. Wysocki* (Mo. App. 1921) 229 S. W. 428; *Shannon v. Mastin* (Mo. App. 1908) 108 S. W. 1116. The principle is also illustrated by those infancy contracts which are voidable. *Baker v. Kennett* (1873) 54 Mo. 82; *Kerr v. Bell* (1869) 44 Mo. 120; *Gerkey v. Hampe* (Mo. App. 1925) 274 S. W. 510. See R. S. Mo. (1929) sec. 2971.

(f) The principle is illustrated by facts in *Myers v. Hay* (1832) 3 Mo. 98, sale of animal with warranty and promise to pay liquidated damages in case of breach. See also *Wills v. Forester* (1910) 140 Mo. App. 321, 124 S. W. 1090, promise not to go into business and to pay liquidated damages if promise broken; *Harrington v. Neville* (1900) 83 Mo. App. 589, sale of newspaper with condition subsequent involving promise.

Washington University Open Scholarship