William & Mary Law Review

Volume 10 (1968-1969)
Issue 1

Article 12

October 1968

The Peppercorn Theory and the Restatement of Contracts

Edmund Polubinski Jr.

THE PEPPERCORN THEORY AND THE RESTATEMENT OF CONTRACTS

INTRODUCTION

Not all promises should be enforced. Social promises or gratuities, for example, are not and should not be given legal redress. To have redress there must be a legal obligation. This obligation is often said to arise from the consideration.[1]

There is a variety of opinon as to what will constitute an adequate consideration. While "it is an elementary principle that the law will not enter into an inquiry as to the adequacy of consideration," [2] there is authority for the position that a consideration so small that it negates any notion of a bargain will be treated as an "absurdity" [3] or as a "joke" [4] unable to support the obligation.

One writer has ventured:

> [W]hile the simulated commercial transaction has worked successfully in France nothing is more notorious in Anglo-American Law . . . subject in various jurisdictions to conflicting rules diversely applied by individual judges in a fashion so uncertain as to approach the whimsical.[5]

With authority in such conflict, it was expected that the Restatement of Contracts[6] would clarify the issue by adopting and adhering to one of the two divergent views. However, the Restatement has at different times deemed it appropriate to recognize both of these positions.

Restatement First ventured:

> 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

1. *E.g.*, WHITNEY, CONTRACTS, § 43 (1953) "Offer and acceptance alone . . . do not create the legal obligation; they merely lay the foundation for it. The legal obligation arises out of the consideration. . . . *Id.* at 101. *See generally* CORBIN, CONTRACTS, § 110 (1963).

2. Westlake v. Adams, 5 C.B. (N.S.) 248 (1858).

3. White v. Bluett, 23 L.J. Ex. 36 (1834).

4. Fisher v. Union Trust Co., 132 Mich. 611, 101 N.W. 852 (1904).

5. Mason, *The Utility of Consideration—A Comparative View*, 41 COLUM. L. REV. 825, 831 (1941).

6. RESTATEMENT OF CONTRACTS (1937) is hereinafter cited as RESTATEMENT (FIRST). The RESTATEMENT SECOND OF CONTRACTS (Tentative draft) will be hereinafter called RESTATEMENT (SECOND).

> 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.[7]

Restatement Second reversed this position:

> A desires to make a binding promise to give $1000 to his son B. Being advised that a gratuitous promise is not binding, A offers to buy from B a $1 book. B accepted the offer knowing that the purchase is a mere pretense. There is no consideration for A's promise to pay $1000.[8]

The justification for this change is that a mere pretense of a bargain will not constitute consideration—there must be a true bargain.[9] It is apparent that the Restatement Second has chosen to strengthen the bargain concept of consideration which it recognizes.[10] In eliminating the possibility of exceptions to this bargain concept, the Restatement has greatly reduced the complexities which customarily surround the labyrinthine doctrine of consideration. The merits of the decision will occupy the remainder of this discussion.

Nominal Consideration

The doctrine of nominal consideration is torn between two conflicting theories. The earliest cases dealing with nominal consideration aligned themselves with the theory that:

> . . . when a thing is to be done by the plaintiff be it ever so small, this is sufficient consideration to ground an action.[11]

As the consideration concept developed, some courts abandoned this theory when the consideration became so small that it negated any

7. Restatement (First) § 84, illustration 1.
8. Restatement (Second) § 75, illustration 5.
9. Restatement (Second) § 75, comment b.
10. Restatement (First) § 75,—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.
11. Sturlyn v. Albany, Cro. Eliz. I 67, 78 Eng. Rep. 327 (1587). *See* Mandel v. Liebman, 303 N.Y. 88, 100 N.E.2d 149 (1951).
This concept seems well grounded in Anglo American thought, and finds much support during the *laissez-faire* era of our history. Hobbes had said: "The value of all things contracted for is measured by the appetite of the contractors. . . ." Hobbes, Leviathan, pt 1 ch. 15 (1651).

idea that a "price" had been paid for the promise. These courts felt that a nominal consideration could not result from a bargain and therefore adopted a theory which apparently negated the peppercorn concept.[12] Accordingly, it was held that a nominal consideration could not be used to support a promise for a larger sum.[13] It was obviously felt that a court could inquire into adequacy of consideration if the promise and the consideration were in the same medium, i.e., $1 paid in hand for a promise of $5000.[14] Also, a recited but never paid consideration would not support a promise[15]—except possibly in Pennsylvania.[16] Nominal consideration thus existed in a twilight zone on the fringes of two conflicting theories.

Litigation concerning nominal consideration has fallen into the following general areas:

Purchase Options

An irrevocable option must be supported by a consideration.[17] Thus, to entitle the offeree to specific performance on the option, the option must be mutual.[18] Consequently, a valuable consideration separate and distinct from the purchase price must move from the offeree to the offeror.[19] Although most courts have accepted nominal consideration as the separate consideration,[20] a clear minority have held that nominal consideration did not alone constitute a proper consideration essential to a suit for specific performance.[21]

The majority of courts accepted the theory that it was not in the court's province to determine adequacy of the consideration. Un-

12. *E.g.*, Fischer v. Union Trust Co., 158 Mich. 612, 101 N.W. (1904).

13. *E.g.*, Schnell v. Nell, 17 Ind. 29 (1861).

14. *In re* Greene 45 F.2d 428 (S.D.N.Y. 1931).

15. Van Knuth v. Ryan, 107 Neb. 351, 186 N.W. 81 (1921); Stigler v. Jaep, 83 Miss. 351, 35 So. 948 (1903); *but see* Seiforth v. Grover, 217 Ill. 483, 75 N.E. 522 (1905).

16. *See* Real Estate Co. of Pittsburgh v. Rudolph 301 Pa. 502, 153 A. 438 (1930); see Comment, 79 U. OF PA. L. REV. 1139, 1141 (1931).

17. Wresten v. Bowles, 82 Cal. 84, 22 P. 1136 (1889), Pollock v. Brookover, 60 W. Va. 75, 53 S.E. 795, 6 L.R.A. (N.S.) 405; RESTATEMENT (FIRST) § 46.

18. Ide v. Leister, 10 Mont. 5, 24 P. 694, 24 Am. St. Rep. 17 (1890), Morrison v. Johnson, 148 Minn. 343, 181 N.W. 945 (1921).

19. *E.g.*, Murphy v. Reed, 125 Ky. 585, 101 S.W. 964 (1907).

20. Ross v. Parks, 93 Ala. 153, 8 So. 368 (1890); Smith v. Bangham 156 Cal. 359, 104 P. 689, (1909); Cuyer v. Warren, 175 Ill. 328, 51 N.E. 580 (1898); Mier v. Haddin, 148 Mich. 488 (1907); Morrison v. Johnson, 148 Minn. 343, 181 N.W. 945 (1941).

21. Rude v. Levy, 96 Colo. 56, 43 P. 482 (1908); Murphy v. Reed, 125 Ky. 575, 101 S.W. 964 (1907).

fortunately, some of these courts have not recognized the nominal consideration doctrine standing by itself, but have grounded their reasoning upon the justification that there is no adequate standard to determine the value of an option. In effect, they attempted to prove that they were not capable of determining the adequacy of consideration.[22] Restatement Second also accepts nominal consideration with short-term options, as it is rationalized that the option is "an appropriate preliminary step of a socially useful transaction. . . ." [23]

Contracts of Guaranty

From the time that a contract of guaranty supported by 2s.6d. was upheld in *Dutchman v. Tooth*,[24] courts have generally accepted nominal consideration in this situation.[25] Relying on *Dutchman v. Tooth*,[26] Mr. Justice Story in *Lawrence v. McCalmont*[27] held that:

> . . . a valuable consideration, however small, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract. . . .[28]

As in the case of purchase options, the justification has been that courts are unable to deal with the inadequacy of consideration.[29]

Recognizing the great weight of authority, the Restatement Second has accepted nominal consideration as valid in contracts of guaranty.[30]

Deeds and Conveyances

After the Statute of Uses,[31] the bargain and sale deed became more

22. *E.g.*, Marsh v. Lott, 8 Cal. App. 384, 97 P. 163 (1908). In this case an option for the purchase of land valued at $100,000 dollars was given for a consideration of 25 cents. The court upheld the nominal consideration. The court however did not merely profess its incompetence to deal with adequacy of consideration but said: "From the very nature of the case no standard exists whereby to determine the adequate value of an option to purchase specific real estate . . . ," and attempted to justify this upon the facts of the case. The consideration, however, was obviously nominal and this court perhaps tried to prove too much.

23. RESTATEMENT (SECOND) § 89 B, comment b.

24. 5 Bing. N.C. 577, 132 Eng. Rep. 1222 (S.C. 7 Scott 710) (1839).

25. Davis v. Wells, 104 U.S. (14 Otto.) 167, 411 (8th Cir. 1919); Brooks v. Haigh, 10 Ad. & E. 309, 323 Eng. Rep. 124, 128 (1840).

26. 5 Bing. N.C. 577 132 Eng. Rep. 1222 (1839).

27. 43 U.S. (2 How.) 425 (1844).

28. *Id.* at 452.

29. *Id.*

30. RESTATEMENT (SECOND) § 89 C, comment b.

31. 27 Hen. VIII c. 10 (1536).

prevalent. This method of conveyancing required a valuable consideration.[32] When the deed recited a nominal consideration most courts held the deed binding between the parties.[33] In many cases, however, this deed would be void as to creditors of the grantor if the deed was part of a scheme to defraud them.[34] An Alabama court sensibly shifted the burden of proof to the grantee to show a deed free from fraud, when conveyed for a nominal consideration. Other courts, however, did not agree and held that a nominal consideration was a "joke" or a "mere nominal" consideration.[35]

With respect to bona fide purchasers of real property under the recording acts, many statutes required such a party to purchase for a "valuable consideration." [36] Many courts have declared that a nominal consideration is a "valuable consideration." [37] Others have held that a nominal consideration is an infirmity which should put a purchaser upon inquiry,[38] and that a nominal consideration was not a valuable consideration within the acts.[39]

The diversity of viewpoint expressed in these cases reveals that there is some divergence in the courts' approach to consideration as a legal concept. It therefore becomes necessary to examine the nature of the concept itself.

The Basis of the Concept of Consideration

Although the origins of consideration are obscure,[40] its essence is found in the following two theories. On the one hand, consideration has been depicted as the price requested for the promise.[41] Conversely, it has been cast as a form similar in effect to a writing or a seal.[42] The

32. *See* Houston v. Blackman, 66 Ala. 559 (1880).

33. Houston v. Blackman, 66 Ala. 559 (1880); Belden v. Seymour, 8 Conn. 304 (1828); Meeker v. Meeker, 16 Conn. 383 (1844); Grout v. Townsend, 2 Hill. 554 (N.Y. 1842).

34. Houston v. Blackman, 66 Ala. 559 (1880).

35. Fischer v. Union Trust, 138 Mich. 612, 101 N.W. 852 (1904).

36. *E.g.*, Laws of Delaware (1937), c. 190 ". . . said deed shall not avail against a subsequent fair creditor, mortgagee or purchaser for a valuable consideration. . . ."

37. Strong v. Whybark, 204 Mo. 341, 102 S.W. 968 (1907).

38. Ehrig v. Adams, 67 Okla. 157, 169 P. 645 (1918).

39. Mackay v. Gabell, 117 F. 873 (C.C.S.D. Cal. 1902); Ten Eyck v. Witbeck, 133 N.Y. 40, 31 N.E. 994 (1892).

40. 1 Corbin, Contracts § 109 (1963).

41. *See* Philpot v. Grunninger, 81 U.S. (14 Wall.) 570 (1872).

42. *See* Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941).

peppercorn concept therefore adopts a different meaning when viewed in the light of each theory.

Consideration as Form

In *Pillans v. Van Mierop*,[43] Lord Mansfield contended that consideration was "merely for the sake of evidence" and was intended to remove the hazards of perjured or mistaken testimony. It was also maintained that consideration insured proper deliberation.[44] Speaking of that case, Professor Fuller has contended that these facets of consideration "touch the form rather than the content", and the objections would be removed if the making of the promise was "attended by some formality or ceremony." [45]

The purposes of consideration within this theory are evidentiary, cautionary, and channeling.[46] It can easily be seen that nominal consideration fulfills these functions well.[47]

Consideration as Substance

Adherents of this theory generally regard consideration as either the price paid for the promise,[48] the detriment or benefit,[49] or the exchange bargained for.[50] The Restatement has adopted the latter definition.[51]

At first glance, nominal consideration has no place in the scheme. The rationale is that there is no bargain for a promise supported by a peppercorn.[52]

If the transaction based upon nominal consideration is closely examined however, one can see an element of bargain enter. This "bargain" is merely the added detriment that the promisee must forbear as a "price" for the promise, and is analogous to the added detriment

43. 3 Burr. 1663, 97 Eng. Rep. 1035 (1765).

44. *Id.* at *opinion of* Wilmont, J.

45. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

46. The evidentiary function is obviously to show the "existence and purport" of the contract. The cautionary function acts "as a check against inconsiderate action. The channeling function serves as a "simple and external test of enforceability" for ". . . the facilitating of judicial diagnosis." *Id.* at 800.

47. *Id.*

48. *E.g.*, Philpot v. Grunninger, 81 U.S. (14 Wall.) 570 (1872).

49. *E.g.*, Currie v. Mesa, 10 Exch. 162 (1875).

50. RESTATEMENT (SECOND) § 75.

51. *Id.*

52. RESTATEMENT (SECOND) § 75, comment b ". . . a mere pretense of a bargain does not suffice, as where there is a fake recital of consideration or where a purported consideration is merely nominal."

incurred by the partial payment of a liquidated debt if payment is at a different time, place, or in a different manner.[53] Of course, it is difficult to rationalize this theory with the Restatement's definition of bargain.[54] When that strictly defined concept is closely applied, a partial payment of a liquid debt at a different time, place, or in a different manner would not be recognized as a valid consideration.[55] Accordingly, the strictly applied bargain theory also excludes all past and moral considerations, although such consideration is valid in several jurisdictions.[56] Even the Restatement devotes considerable space to exceptions to the bargain theory.[57]

These exceptions prompted Professor Corbin to contend that a strict bargain theory is not in accord with the "prevailing usage of courts" being "markedly narrower" than general usage.[58] He suggested that the function of the courts, when determining if consideration exists, is not to apply deductively a formula, but instead to determine if a sound social policy exists to enforce the promise. "When the court finds such a reason, it cheerfully calls it a sufficient consideration." [59]

With this more realistic theory as the base, exceptions to the more rigid discipline can be entertained. Consequently, courts could apply the fashionable bargain theory, and when the social policy dictates, make exceptions.

Nominal Substitutes for Consideration

In light of these theories, one must examine the case for nominal consideration to determine both its values to society and whether these positive values outweigh its obvious fictitiousness and the erosion of a symmetrical test for consideration. Investigating the most notorious example of nominal consideration—the gift disguised as a business transaction—it is obvious that the device is used to eliminate the necessity of

53. It would appear that Professor Williston suggests something on this order by contending that a nominal consideration may be upheld if it *is* bargained for "or at least is a requested detriment." Williston, Contracts § 115 (1931).

54. "Consideration and the promise bearing a reciprocal relation of motive or inducement—with consideration inducing the promise and the promise inducing the consideration." Restatement (Second) § 75, definition b.

55. *E.g., In re* Gillens Estate, 28 Ill. App. 436, 6 N.E.2d 257 (1937).

56. *See* Corbin, *Recent Developments in Contracts*, 50 Harv. L. Rev. 449, 453 (1937).

57. Restatement Contracts (First)—*Informal Contracts without Assent or Consideration*, §§ 85-94.

58. Corbin, *supra* note 56.

59. *Id.*

delivery; a requisite needed to make the gift binding.[60] Reasons for this delivery as advanced by Professor Mechem are:

1. Delivery makes the donor acutely aware of his action.
2. A delivery is unequivocal.
3. A delivery provides excellent evidence of the transfer.[61]

It would appear that these functions of delivery are analogous to the cautionary, channeling, and evidentiary functions of the form theory of consideration.[62] Logically, a writing "formalized" by the addition of a nominal consideration could perform as a very able equivalent for delivery.

The virtual abolition of the seal furnishes another reason for acceptance of nominal consideration. The seal had either created a conclusive presumption that the promise was supported by consideration[63] or perhaps more accurately, the seal waived the necessity of consideration.[64] Today this effect of the seal has been abolished in most states.[65] Generally the reasons for its abolition are not because of the seal's ability to enforce a promise without consideration, but because of its cumbersomeness, because its effects were generally unknown to laymen, and because the fraudulent placing of the seal was difficult to detect and to prove. Also, there was the question of what constituted a seal, and the fact that its contemporary forms no longer exhibited added dignity or more deliberation.[66] The experience after the seal's abolition has not been an altogether happy one, since it left a legal system without a reliable method whereby a promise could be made binding without consideration.[67]

---

60. *E.g.*, Irons v. Smallpiece 2 B. & Ald. 551, 106 Eng. Rep. 467 (1819).

61. Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341, 348 (1926).

62. *See* Fuller, *Consideration and Form* 41 COLUM. L. REV. 799 (1941).

63. 3 HOLDSWORTH, HISTORY OF THE ENGLISH LAW (3d ed 1923).

64. *Id.* HOLMES, THE COMMON LAW 134 (1881).

65. The distinctions between sealed and unsealed instruments are removed in the following states: Alaska, Arizona, Arkansas, California, Colorado, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wyoming.

66. *See* Hays, *Formal Contracts and Consideration: A Legislative Program*, 41 COLUM. L. REV. 848, 850 (1941); HANDBOOK, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, p. 195 (1925); Crane, *The Magic of the Private Seal*, 15 COLUM. L. REV. 24 (1915).

67. *See* WILLISTON, CONTRACTS § 219 (1931).

New York's experience is typical. *Cochran* v. *Taylor*,[68] decided shortly after a limitation in the seal's effectiveness,[69] involved a sealed option supported by a consideration of one dollar. The New York Court of Appeals, stating that the nominal consideration would support the obligation, ruled that because of the seal's presence, parol evidence was inadmissible to show that the consideration had not been in fact paid.[70] The rationale was that:

> A progressive court had become convinced that the area of enforceability required extention and that some mode of enforcement of gratuitous promises is an essential device in a mature system of law. . . . The Court provided an immediate solution in the creation of a necessary device.[71]

Other attempts have been made to rectify this void caused by the abolition of the seal. Promissory estoppel was designed as a supplement to consideration.[72] While a detailed study of the doctrine is beyond the scope of this discussion, it may be said that promissory estoppel is not a completely suitable substitute for a formality. The matter of invoking this device is subtle and complex when compared to a seal; for example, the promisee at his peril must answer these questions if the doctrine is to be invoked: (1) Is this action a forbearance the kind the promisor might reasonably expect? (2) Was there a "substantial reliance"? and finally (3) Is the situation one where injustice can be avoided only by an enforcement of the promise? This three-pronged test is hardly a simple and definite procedure by which to determine enforceability.[73] Moreover, the doctrine of promissory estoppel was not meant to be the only device available to enforce promises without consideration. In fact, such champions of promissory estoppel as Professor Williston also advocated adoption of the Uniform Written Obligations Act,[74] which was designed to enforce gratuitous promises if the parties evidenced in writing their intention to be bound.[75] It met with limited success,[76]

68. 273 N.Y. 172, 7 N.E.2d 87 (1937).

69. N.Y. LAWS § 342 (1935).

70. *Id.*

71. Lloyd, *Consideration and the Seal*, 46 COLUM. L. REV. 13 (1946).

72. *See* RESTATEMENT CONTRACTS § 90.

73. Lloyd, *Consideration and the Seal*, 46 COLUM. L. REV. 1 (1946).

74. *See* 14 A.B.A.J. 554 (1928); WILLISTON, CONTRACTS § 219 (1931).

75. Sec. 1. "A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration,

perhaps because of its novelty.[77] Nominal consideration, it may be ventured, has none of the unnaturalness of this Act, as its roots lie deep in our judicial system. Courts have used the theory that they are not to inquire into adequacy of consideration. When this theory is applied to a nominal consideration, the court is not logically professing its incompetence to prescribe market prices, or "bargain" for the parties, but is recognizing consideration as a form. To recognize nominal consideration therefore, the court merely has to apply the ancient doctrine.

Analogies can be drawn to the Roman Law.[78] The Civil Law as well as the Common Law does not enforce a gratuitous promise.[79] Yet in the Civil Law, when the parties show an intent to be bound by making a public record (*vestimentum*),[80] the "gratuitous" promise may be enforced.[81] It should be noted that this "recording" serves the cautionary, channeling and evidentiary purposes of form.

Nominal consideration is not, however, without its drawbacks. The foremost drawback is its capricious treatment by various courts.[82] Its effectiveness as a formal device therefore is correspondingly limited. Its effectiveness, however, is greater than by any other device, enjoying in some jurisdictions not only approval but also the advocacy of the courts.[83] If the American Law Institute adopted this doctrine for the pragmatic advantages it offers, it would serve to stabilize this particular area of the law in the face of capricious court handling and recognition.

A second major objection is the possibility of economic coercion. Professor Oliphant, speaking of the Uniform Written Obligations Act, leveled a criticism which has been used against nominal consideration[84]

if the writing also contains an additional express statement in any form of language, that the signer intends to be bound."

76. WILLISTON CONTRACTS § 219.

77. *Id.*

78. One must be careful not to draw the comparison too closely because the bases of the systems—*causa* and consideration are alien. *See generally,* Mason, *The Utility of Consideration—A Comparative View,* 41 COLUM. L. REV. 799 (1941). One can merely draw the conclusion that most mature legal systems employ a device to make a promise binding by the request of the parties.

79. *See e.g.,* Rawleigh Co. v. Toms, 153 So. 595 (La. App. 1934). *See* N.Y. LAW REVISION COMMISSION 2ND ANNUAL REPORT (1937).

80. *See generally* Mason, *The Utility of Consideration—A Comparative View,* 41 COLUM. L. REV. 799 (1941).

81. *Id.*

82. *Id.* at 831.

83. ". . . [I]t is a simpler, and a usual and sound, conveyancing practice to recite at least a nominal consideration so that a stated consideration will appear on the face of the deed. . . ." Brown v. Weare, 348 Mo. 135 152 S.W. 2d 649, 653 (1941).

84. Oliphant, *Legislatures and the Commissioners on Uniform State Laws: Letters on Uniform State Laws,* 14 A.B.A.J. 348 (1928).

when he stated that there was a "marked disparity present in the consummation of numerous contractual arrangements. . . ." thus opening the door to economic coercion.[85] Professor Williston replied that the Act (or nominal consideration) had no bearing upon this evil; that the Act merely allowed the enforceability of a promise without consideration. "[I]f the agreement is invalid without the passage of the Act it will fare no better if the act is passed." [86]

Conclusion

It would appear that Restatement Second is on firm ground rejecting nominal consideration from the standpoint of the symmetry of the doctrine of consideration. However, when one considers other factors such as the unavailability of any formality in our system, the need for symmetry becomes less intense. Even if one accepts the now fashionable bargain theory, it is evident that there is a need for a formality. If nominal consideration is used, the formality may be had without resort to radical innovation by simply recognizing the doctrine that "it is none of the court's concern how adequate the consideration is."

In this way the court would indeed sanction a fiction and would also close its eyes to the fact that there is no bargain, or at least no bargain as defined by Restatement Second. The court, however, would recognize that it is serving other important functions and goals of the law of contracts, because

> 1. The efficient administration of the law of contracts requires that the courts shall not be required to prescribe prices.
> 2. The test of enforceability should be certain and not clouded by such terms as "fair" and "reasonable."
> 3. Persons of sound mind should be free to contract imprudently as well as prudently.[87]

Should not one be allowed to make a promise binding without resorting to a bargain? Should not the court give effect to his will when he has taken the trouble to phrase his contract in the form of a binding promise?

The writer believes that the answer should be in the affirmative.

Edmund Polubinski, Jr.

85. *Id.*
86. *Reply of* Prof. Williston 14 A.B.A.J. 554 (1928).
87. Patterson, *An Apology for Consideration* 58 Colum. L. Rev. 929 (1958).