

2-1-1933

The American Law Institute's Restatement of the Law of Contracts with Annotatikons to the Washington Decisions

Committee of Washington State Bar Association on Annotations to the Restatement of the Law by the American Law Institute

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Contracts Commons](#)

Recommended Citation

Committee of Washington State Bar Association on Annotations to the Restatement of the Law by the American Law Institute, *The American Law Institute's Restatement of the Law of Contracts with Annotatikons to the Washington Decisions*, 7 Wash. L. & Rev. 391 (1933).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol7/iss4/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

and that apparent inconsistencies in the cases can usually be accounted for by a distinction in the facts. On the other hand, the chief characteristics of a joint adventure cannot be lost sight of, but must be applied to the particular facts for the purpose of determining the existence of the relationship. Having found the relationship to exist, the chief difficulty has been surmounted, for the legal incidents of such relationship are now well settled.

FREDERICK G. HAMLEY.*

*Of the Seattle Bar.

**The American Law Institute's Restatement of
the Law of Contracts with Annotations to
the Washington Decisions***

Chapter 3

FORMATION OF INFORMAL CONTRACTS**

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)

*The absence of annotations to particular sections of the Restatement indicates that no Washington decisions have been found on the principle therein stated.

**Continued from last issue.

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

ANNOTATION

Washington decisions are in accord with this Section.

Subsection (1), (a) Attendance as a student at Stanford University for four years is sufficient consideration for a promise to pay him \$360 per year for so attending, *Hosbor v. Kautz*, 19 Wash. 258, 53 P 51 (1898) making repairs by one who has permission, but is not under obligation to make them, *Burke & Farrar v. Campbell*, 128 Wash. 646, 224 P 9 (1924) caring for a person during his life is sufficient consideration for a promise to devise land, *Davies v. Cheadle*, 31 Wash. 168, 71 P 728 (1903) completion of a public improvement on which work had been

suspended because the assessment under which it was being made had been declared invalid is sufficient consideration for the agreement of property owners to pay for the improvement, *Gerard v. Seattle*, 73 Wash. 519, 132 P. 227 (1913) continuance in the service of an employer for a fixed period by one employed for an indefinite term and who could have quit at any time is sufficient consideration for the promise of the employer to give a bonus therefor, *Scott v. Duthie & Co.*, 125 Wash. 470, 216 P. 853 (1923).

Subsection (1), (b). Forbearance of a threatened suit to enjoin the erection of a bridge is sufficient consideration for a promise to pay all damages resulting from its erection, where the right to have the work enjoined was disputed and doubtful, even though the promisor may not have been originally liable for resulting damages, *Snohomish River Boom Co. v. Great Northern Ry. Co.*, 57 Wash. 693, 107 P. 848 (1910) forbearance to press suit to foreclose a claimed lien on logs is sufficient consideration for the promise of the purchaser of the logs to pay the logger's claims, even though the lien should, in fact, be unenforceable, *Dybdahl v. Continental Lumber Co.*, 133 Wash. 81, 233 P. 10 (1925) refraining from filing a mechanic's lien against property is sufficient consideration to support the promise of the owner of the property to pay for the work, even though the lien, if filed, could have been successfully contested for non-compliance with statutory requirements as to filing duplicate statements of materials furnished, *Wells & Morris v. Brown*, 67 Wash. 351, 121 P. 828 (1912) forbearance of collection of an account and extension of further credit is sufficient consideration for the guaranty of the account by a third party, *Schoening v. Maple Valley L. Co.*, 61 Wash. 332, 112 P. 381 (1910) waiver of a right of appeal is consideration for the acceptance of less than the full amount of a judgment in satisfaction, *Williams v. Blumenthal*, 27 Wash. 24, 67 P. 393 (1901).

Subsection (1), (c). Surrender by an administrator of a deceased preemptor's right of possession is sufficient consideration for a promise, *Burch v. McDaniel*, 2 W. T. 58, 3 P. 586 (1881) permission by the vendee of machinery to the vendee to take away the machinery without payment in full of the purchase price is consideration for the guaranty of payment thereof by a third party *Washington Iron Co. v. McNaught*, 35 Wash. 10, 76 P. 301 (1904) surrender by a contractor of the right to extra compensation for work done in excess of the requirements of his contract and his agreement to do certain work at less than contract price is sufficient consideration for a promise by the employer to pay more than contract price for work required by the contract, *Wright v. Tacoma*, 87 Wash. 334, 151 P. 337 (1915) surrender by a receiver of partnership property in his possession to one of the partners is sufficient consideration for a bond given by said partner, although the appointment of the receiver was invalid, *Larsen v. Winder* 20 Wash. 419, 55 P. 563 (1898) surrender of possession by one who in good faith has entered upon government land, is sufficient consideration, *Waring v. Loomis*, 35 Wash. 85, 76 P. 510 (1904) execution of a building contract by the building owner is consideration for the promise of the contractor to furnish a bond for the faithful performance of his contract, *Sweeney v. Aetna Indemnity Co.*, 34 Wash. 126, 74 P. 1057 (1904) the purchase of real estate is sufficient consideration for the promise of a real estate agent making the sale to make a resale within nine months or refund the purchase price, *Herkenrath v. Ragley*, 59 Wash. 52, 109 P. 279 (1910) giving an accepted order on a third person for the payment of a debt not due is consideration for an agreement to forbear suit on a due note, *Staver & Walker v. Missmer* 6 Wash. 173, 32 P. 995 (1893) surrender of possession by an agent in possession for heirs of a deceased preemptor, though the entry of the deceased had expired by limitation but had not been cancelled, and the agent's withdrawal of his own pending entry constitute sufficient consideration for a promissory note, *Harris v. Johnson*, 75 Wash. 291, 134 P. 1048 (1913) the debt of a corporation and an extension of time for its payment is sufficient consideration for the personal note of the president of the corporation, *Pitt v. Little*, 58 Wash. 355, 108 P. 941 (1910) *Shrve v. Crabtree*, 149 Wash. 500, *ibid.*, 271

P 239 (1923), 274 P. 712 (1923) indorsement of payment of overdue interest on a note held by a bank is sufficient consideration for the note of the officers of the bank for said interest, *Skagit State Bank v. Moody*, 86 Wash. 286, 150 P 425 (1915) taking by a plaintiff of an assignment of a written contract to do hauling for a defendant is sufficient consideration for defendant's promise to put a road in good condition, *Beeson Bros. v. Chambers*, 155 Wash. 564, 285 P 443 (1930) an engineer who had contracted to accept \$300 in full for preparing plans and specifications for a proposed water system in case the improvement should be financed and executed by others than his employers was not obliged to surrender the plans on abandonment of the project by his employers and, therefore, his surrender of the plans to a third party who financed and executed the work constituted a good consideration for a modification of his original contract to accept \$300, *Sharkey v. Cornell*, 149 Wash. 102, 270 P 293 (1928) the acceptance by a bona fide purchaser of illegally issued corporate stock of a promissory note of the corporation for the amount paid for the stock, due in three months and indorsed by an accommodation indorser is, in effect, a settlement of his cause of action against the corporation and an extension of the time of payment of his demand constituting a sufficient consideration for the accommodation indorsement, *Hobson v. Marsh*, 69 Wash. 326, 124 P 912 (1912) the sale of a crop of wheat by a father to his son is supported by a sufficient consideration where the son assumed the balance due on a land contract and transferred his partnership interest in horses and tools, *Western Investment Co. v. Payne*, 146 Wash. 361, 263 P 188 (1928) extension of further credit to a debtor is sufficient consideration for the promise of a guarantor to pay the past indebtedness and any indebtedness incurred under the extension of credit, *W T. Rawleigh Co. v. Langeland*, 145 Wash. 525, 261 P 93 (1927) a quit claim deed from vendee under a contract to purchase, who were in default and had abandoned the land, is sufficient consideration for a release of their obligation to pay a note given by them in the deal, *National Association of Creditors v. Memish*, 144 Wash. 150, 257 P. 241 (1927) *Seward v. Seward*, 145 Wash. 61, *ibid.*, 258 P 856 (1927) the withdrawal of its application by one of two applicants for a license to operate a stage route and its consent that a sole certificate might issue to the other applicant is sufficient consideration for the promise of the latter to pay the former certain sums of money, even though the license issued to the promisor did not give it the exclusive right of operation on said route, *Inter City Auto Stage Co. v. Bothell Bus Co.*, 139 Wash. 674, 247 P 1040 (1926) transfer of corporate stock to the president of the corporation is sufficient consideration for his agreement to assume and pay all its debts, *Washington Perfection Co. v. Davm*, 138 Wash. 427 244 P 697 (1926) employment by a railroad company, though for no definite time, of a person having a claim against it for personal injuries, is sufficient consideration for the release by him of such claim, *Tyndall v. Northern Pacific Ry. Co.*, 58 Wash. 118, 107 P 1045 (1910) \$150 paid in compromise of an unliquidated claim for damages is sufficient consideration for release of the claim, *Trovik v. Grant Smith & Co.*, 74 Wash. 272, 133 P 454 (1913) the purchase by one partner of his co-partner's interest in a logging contract is sufficient consideration for a modification of the contract, *Skoug v. Latour Creek R. Co.*, 114 Wash. 516, 195 P 216 (1921)

Subsection (1), (d) An agreement by the holder of a note, at the request of the maker thereof, to extend the time of payment for a definite period, is supported by the implied promise of the maker to pay the rate of interest provided for in the note during the period of extension, *Nelson v. Flagg*, 18 Wash. 39, 50 P. 571 (1897) *Stankey v. Godwin*, 158 Wash. 494, *ibid.*, 291 P. 725 (1930) where the law made it necessary to reduce the number of saloons in a city by three, the promise of three saloon keepers not to apply for licenses is sufficient consideration for the promise of the remaining saloon keepers in the city to pay \$500 to each of the three retiring, *Jones v. Maes*, 76 Wash. 517, 136 P 680 (1913) a promise by a mortgagor to convey property to a mortgagee is sufficient consideration to support the promise of the mortgagee to cancel the

mortgage and cancel and return the mortgage note and the contract is specifically enforceable, *Virtue v. Stanley*, 87 Wash. 167, 151 P. 270 (1915)

a bilateral contract containing mutual promises for the exchange of certain properties needs no independent or separate consideration and is specifically enforceable, *Chapman v. Milliken*, 136 Wash. 74, 79, 239 P. 46 (1925)

a writing by which a party agrees to pay the assignee of a lease for the use of the leased premises a fixed sum monthly during the term of the lease in addition to the rent reserved in the lease, which writing is signed by both parties, is a mutual, enforceable contract, *American Savings Bank v. Mafridge*, 60 Wash. 180, 110 P. 1015 (1910)

the promise of trustees of creditors to the father of the debtor to obtain assignments from the creditors to the father of claims against the debtor, to dismiss proceedings in bankruptcy and to permit the debtor to take possession of his property, is sufficient consideration for the note of the father, *Taylor v. Ewing*, 74 Wash. 214, 133 P. 1009 (1913)

the personal note of the president of a corporation given to a bank in settlement of the debt of the corporation is supported by the agreement of the bank to turn over to him the balance of the proceeds of sale of securities of the corporation held by the bank, *Moore v. Kiddall*, 111 Wash. 504, 191 P. 394 (1920)

the promise of the vendor of a lumber mill to the vendee to extend the time of payment of the purchase price two years, or longer if necessary, and to accept payment out of the output of the mill, is supported by the promise of the vendee to enlarge the capacity of the mill and to grant the vendor the exclusive right to handle all of the vendee's products and to receive one dollar per thousand therefor, although the vendee did not promise to cut a certain amount or to operate the mill at a certain rate, *Dent Lumber & Shingle Co. v. Cedarhome Lumber Co.*, 141 Wash. 593, 252 P. 141 (1927)

a contract by which a manufacturer promised to furnish goods to a jobber on credit in consideration of the jobber's promise to sell the manufacturer's goods exclusively, is not lacking in mutuality although the jobber did not agree to purchase any definite quantity, *Federal Iron & Brass Bed Co. v. Hock*, 42 Wash. 668, 85 P. 418 (1906)

the promise of a fish company to transact its business with a certain bank is sufficient consideration for the promise of the bank to extend a credit of \$25,000 to the company, *Merchants Bank of Canada v. Sims*, 122 Wash. 106, 209 P. 1113 (1922).

CONSIDERATION MUST BE BARGAINED FOR

Where lands were conveyed to a corporation expressly as an endowment for educational purposes and it was apparent from the whole tenor of the deed that the land was intended as a gift and that no consideration for the conveyance was requested or expected from the grantee, the assumption by the grantee of an indebtedness upon the land and its incurrence of additional indebtedness in conducting a school upon the land would not constitute consideration to prevent the land from reverting to the grantor upon the abandonment by the grantee of the trust to which the land was devoted, *Jenkins v. Jenkins University*, 17 Wash. 160, 49 P. 247 (1897)

a promise to devise land to the promisor's sister, can not be enforced after the death of the promisor although the sister, in reliance on the promise moved with her family from Massachusetts upon the land in question in Washington and kept house for the promisor until his death, it not appearing that any return for the promise was requested or expected, *Mitchell v. Pirie*, 38 Wash. 691, 80 P. 774 (1905).

Subsection (2).

CONSIDERATION MAY BE GIVEN TO THE PROMISOR OR TO SOME OTHER PERSON

The signing of a building contract by the building owner is sufficient consideration to support the bond of a surety guaranteeing performance of the contract of the building contractor, *Sweeney v. Aetna Indemnity Co.*, 34 Wash. 126, 74 P. 1057 (1904)

a consideration that moves to a principal is sufficient to sustain the promise of the surety, *Pacific National Bank v. Aetna Indemnity Co.*, 33 Wash. 428, 74 P. 590 (1903)

Farmers State Bank v. Gray, 94 Wash. 431, 162 P. 531 (1917).

CONSIDERATION MAY BE GIVEN BY THE PROMISEE OR BY
SOME OTHER PERSON

Where a manufacturing company entered into a contract with the patentee of a motor to manufacture and sell the motor to agents appointed by the patentee and the manufacturer authorized a copy of said contract to be furnished to such agents, there was sufficient consideration for the manufacturer's promise to sell to said agents, *Lloyd v. American Can Co.*, 128 Wash. 298, 222 P. 876 (1926) consideration moving from a building contractor to a guarantor of his building contract supports the guarantor's contract with the building owner, *Sweeney v. Aetna Indemnity Co.*, 34 Wash. 126, 74 P 1057 (1904).

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 large 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.

ANNOTATION

The following cases are in accord with this Section.

Subsection (a). The surrender of a note by one under obligation to do so is not sufficient consideration to support a promise, *Taylor v. Howard*, 70 Wash. 217, 126 P. 423 (1912) payment of part of a liquidated, undisputed claim is not sufficient consideration for the release of the whole claim, *Sanford v. Royal Insurance Co.*, 11 Wash. 653, 40 P 609 (1895) an agreement to extend the time of payment of the amount

due upon a bill of sale and to make a ten per cent reduction thereof in case the same was made at such time is without consideration, *Champagne v. McDonald*, 141 Wash. 617, 251 P. 874 (1927) a promise by an employer to an employee under employment for a fixed term and fixed compensation that a higher wage would be paid if the services of the employee merited the approbation of an officer in charge is without consideration, *Tolmie v. Dean*, 1 W. T. 47 (1858) assignment by a mortgagor of a policy of insurance to the mortgagee is not consideration to support the promise of the mortgagee to pay the mortgagor one-half the proceeds of the policy where the mortgagor was under a contractual duty to make the assignment, *Lewis v. McReavy*, 7 Wash. 294, 34 P. 832 (1893) payment of a liquidated sum due is not sufficient as consideration, *Seattle, Renton & S. Ry. Co. v. Seattle-Tacoma Power Co.*, 63 Wash. 639, 116 P. 289 (1911).

An act of forbearance required by a legal duty which is doubtful or reasonably disputed may be sufficient consideration.

Where part of a building in course of construction fell and the contractor abandoned the work and, while the question whether the owner or the contractor was responsible for the fall was in dispute, a surety for the contractor entered into a new contract with the owner for the completion of the building, the performance of the new contract is a defense to an action for breach of the first contract, *Brodek v. Farnum*, 11 Wash. 565, 570, 40 P. 189, 193 (1895) cancellation of a disputed stock subscription is sufficient consideration to support settlement of all matters of difference between the parties, *Clark v. Waneta Power Co.*, 133 Wash. 1, 233 P. 21 (1925).

The Supreme Court of Washington, however, holds that when a party to a contract refuses to perform it, a new promise by the other party to the contract for its performance, or for a promise of such performance, effects a rescission of the contract, and the performance, or promise of performance of what had been a duty under the original contract constitutes sufficient consideration for such new promise.

A subcontractor commenced performance of his contract to grade a road bed but, finding the compensation agreed upon inadequate, abandoned the work. The principal contractor then promised to pay him a reasonable wage for completing the work. It was held that the new promise to pay a reasonable wage was not without consideration. "Where a party has breached his contract and refused to perform it, it is optional with the adverse party to sue him for damages, or waive the breach, treat the contract as abrogated and enter into a new contract with the delinquent party. It would seem to be elementary that parties competent to contract can abrogate or rescind the contract and enter into a new contract touching the same subject matter to be performed in the same or a different way, upon a different consideration." *Evans v. Oregon & Washington R. Co.*, 58 Wash. 429, 108 P. 1095 (1910) approved in *Smith Sand & Gravel Co. v. Corbin*, 102 Wash. 306, 310; 173 P. 16 (1918)

An agreement between a landlord and a tenant by which a lesser sum than the rent reserved in a written lease was agreed to be paid and accepted in full for rent is supported by a valid consideration where, if the reduction in rent had not been made, the tenant would have been obliged to give up occupancy of the premises. "When a tenant refuses for any cause to pay rentals according to the terms of the contract of lease, the landlord has an option as to the course he will pursue. He may stand on the contract and take the remedies the law applicable to the contract affords him, or he may treat the contract as abrogated and enter into a new contract with the tenant. If he does the latter, the mutual promises made by the one to the other furnish the consideration for the agreement," *Conlan v. Spokane Hardware Co.*, 117 Wash. 378, 201 P. 26 (1921).

Subsection (b). Forbearance to sue upon a note given by the maker to the payee without consideration is not sufficient consideration for a new note, *Nicholson v. Neary*, 77 Wash. 294, 137 P. 492 (1914) a promissory note given for the value of cattle left in the care of the maker and which were stolen without any fault on his part is without consideration, *Cummings v. Wilk*, 150 Wash. 512, 273 P. 527 (1929).

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.

a. This Section in connection with Section 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).

See Annotation to Section 75, (1), (d), *supra*.

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.

ANNOTATION

Washington cases are in accord with the section.

A promise by an executrix to pay a legatee less than the amount of income provided by the will, the estate being adequate, is not consideration for the promise of the legatee to accept the amount so promised, *Stahl v. Schwartz*, 67 Wash. 25, 120 P 856 (1912) the promise of a bank to pay a depositor the amount of his deposit upon condition will not support the promise of the depositor to forfeit the amount of his deposit in case the condition does not occur, *Allen v. Farmers & Merchants Bank*, 76 Wash. 51, 135 P 621 (1913) a promise to pay less than the amount due on a promissory note is not sufficient consideration for a promise to extend the time of payment, *Price v. Mitchell*, 23 Wash. 742, 63 P 514 (1901).

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 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.

ANNOTATION

A contract between a saw mill company and an electric company by which the former agreed to supply all mill waste produced in the operation of its mill to the latter for fuel for its power plant in consideration that the electric company would supply the saw mill with electric power and light, is not void for lack of mutuality because the mill company is privileged to shut down its mill at pleasure, where the contract also provides that in case of the shut down of the mill the electric company should have the use of the saw mill's saws and conveyors for the purpose of supplying necessary fuel, *Sunset Shingle Co. v. Northwest E. & W Works*, 118 Wash. 416, 203 P. 978 (1922) a promise to sell and convey land is supported by a promise to buy and pay for the land although the purchaser may satisfy all obligations by forfeiting \$100 paid on account of the purchase price, *Wright v. Suydam*, 72 Wash. 587, 131 P. 239 (1913).

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

1. 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.

ANNOTATION

1. *Promise void because illegal.*

A promise on behalf of certain officers of a railroad company to locate a line of railroad and a depot upon certain land will not support or render specifically enforceable the promise of the owner of the land made in consideration thereof to convey one-half thereof for the benefit of said officers, *Redd v. Johnson*, 27 Wash. 42, 67 P 381 (1901) a promise to marry by a woman seriously afflicted with pulmonary tuberculosis is inadequate as consideration for a promise to marry her, *Grover v. Zook*, 44 Wash. 489, 87 P 638 (1906).

2. *Promise void for uncertainty.*

An option for the purchase of land at the expiration of one year at a fixed price, given in consideration that the grantees "will, through the Tacoma Ledger, use their best endeavors to advance the value of said lands" and other lands of the grantor in the vicinity thereof, is not founded upon a consideration which can be specifically enforced, owing to its indefiniteness, and, consequently, does not afford sufficient consideration to support an action for specific performance on behalf of the grantees, *Barton v. Spinning*, 8 Wash. 458, 36 P 439 (1894).

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

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.

ANNOTATION

A sale for \$200 of a \$2,000 note secured by a mortgage on real property can not be rescinded for inadequacy of consideration although the vendor at the time of the sale did not have knowledge that a bank had purchased the mortgaged property and assumed payment of the mortgage indebtedness, thereby making the note collectible in full, no deception or fraud having been practiced on the vendor, *Opie v. Pacific Investment Co.*, 26 Wash. 505, 67 P 231 (1901).

"Mere inadequacy of consideration is not enough to avoid a contract entered into between parties of mature judgment, nor can one who claims to have been overreached invite the review of a court of equity unless the inadequacy of consideration is so great that a presumption of fraud follows the recital of the transaction." *Tausick v. Tausick*, 52 Wash. 301, 311, 100 P 757, 761 (1909). Agreement to devise to a son-in-law property worth \$12,000 in consideration of the agreement of the son-in-law to

support for life his father-in-law, who was 83 years of age and who repudiated the contract after receiving only four days' support and died within two years, is specifically enforceable, *Alexander v. Lewes*, 104 Wash. 32, 175 P. 572 (1918) *Howland v. Day*, 125 Wash. 480, 216 P. 864 (1923) *semble*, a guaranty in consideration of further credit to a debtor, to pay a past indebtedness of \$1569.42 and any further indebtedness that might be incurred, renders the guarantor liable for the past indebtedness although new credit was extended to the amount of \$789.80, only, which sum had been fully paid by the debtor, *W. T. Rawleigh Co. v. Langeland*, 145 Wash. 525, 261 P. 93 (1927).

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.

ANNOTATION

"When one consideration is expressed in a deed, any other consideration consistent with it may be averred and proved." Where a bill of sale recites a consideration of \$4,000 in gold coin, proof that the real consideration was two hundred acres of land, \$500 in cash, \$200 in county warrants and a receipted bill for \$100 will not invalidate the bill of sale, *Van Lehn v. Morse*, 16 Wash. 219, 47 P. 435 (1897) though a written contract to release a judgment in excess of \$1,000 recites that it is made in consideration of the payment of \$100 by the judgment debtor, it may be shown that there was additional consideration for the agreement in the debtor's forbearance to appeal from the judgment, *Williams v. Blumenthal*, 27 Wash. 24, 67 P. 393 (1901) where a written contract for the sale of a quarter section of land acknowledged payment of \$2,700 in cash as part of the purchase price, parol evidence is admissible that the true consideration for such past payment was ten acres retained by the grantor and the discharge of certain liens received as in lieu of the \$2,700 and the contract is not thereby invalidated, *Roberts v. Stiltner*, 101 Wash. 397, 172 P. 738 (1918).

Where a bill of sale of logs recited \$300 as the consideration, it may be shown that a part of the consideration was the agreement of the vendee to pay an indebtedness of the vendor to a third party, *Don Yook v. Washington Mill Co.*, 16 Wash. 459, 47 P. 964 (1897) where a guaranty of advances by a bank to a fish company recites that it is in consideration of the bank "dealing" with the fish company, it may be proved by oral testimony, that the real consideration was the oral agreement of the bank to extend credit to the amount of \$25,000, without guaranty, in consideration of the promise of the promoters of the company that the account of the company should be carried with the bank and that its business would be there conducted, which agreement the bank refused to perform until the guaranty was given, *Merchants Bank of Canada v. Sims*, 122 Wash. 106, 116, 209 P. 1113 (1922) parol testimony is admissible to prove the real consideration for a contract reciting that it is given for one dollar and "other considerations" if such testimony is merely to explain how the contract came to be made and the consideration for it and not to contradict the written instrument or its operative effect, *Wright v. Stewart*, 19 Wash. 179, 52 P. 1020 (1898) parol evidence is admissible to show what was the actual consideration for a deed which recites a consideration of \$100, *Warwick v. Hitchings*, 50 Wash. 140, 96 P. 960 (1908).

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 sufficient consideration.

ANNOTATION

The extension of further credit to a debtor will support the promise of a guarantor to pay the debtor's past, as well as future indebtedness, *W T Rawleigh Co. v. Langeland*, 145 Wash. 525, 261 P 93 (1927) the purchase of a butcher business at a fair market price constitutes a sufficient consideration for the conveyance of the business and for the seller's agreement not to engage in such business in the neighborhood for a certain time, *Nelson v. Brassington*, 64 Wash. 180, 116 P 629 (1911)

Johnson v. Schultz, 137 Wash. 584, 243 P 644 (1926) employment of a towing company to do towage supports the agreement of the towing company to do the towage and also to give notice of the loading the cargo to enable the owner to obtain insurance, *Cary-Davis Towing Co. v. Spradley*, 115 Wash. 93, 196 P 655 (1921) *