

10-1-1987

## How to Read, Or at Least Not Misread, Cardozo in the *Allegheny College Case*

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### Recommended Citation

Alfred S. Konefsky, *How to Read, Or at Least Not Misread, Cardozo in the Allegheny College Case*, 36 Buff. L. Rev. 645 (1987).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol36/iss3/4>

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# How To Read, Or at Least Not Misread, Cardozo in the *Allegheny College* Case

ALFRED S. KONEFSKY\*

Cardozo was a truly innovative judge of a type which had long since gone out of fashion. In his opinions, however, he was accustomed to hide his light under a bushel. The more innovative the decision to which he had persuaded his brethren on the court, the more his opinion strained to prove that no novelty—not the slightest departure from prior law—was involved. Since Cardozo was one of the best case lawyers who ever lived, the proof was invariably marshalled with a masterly elegance. It is not until the reader gets to the occasional angry dissent that he realizes that Cardozo had been turning the law of New York upside down. During his twenty years Cardozo succeeded to an extraordinary degree in freeing up—and, of course, unsettling—the law of New York. It is true that he went about doing this in such an elliptical, convoluted, at times incomprehensible, fashion that the less gifted lower court New York judges were frequently at a loss to understand what they were being told.

Grant Gilmore<sup>1</sup>

## I. INTRODUCTION

NO judicial opinion of Benjamin Nathan Cardozo better illustrates Grant Gilmore's observation than the *Allegheny College* case.<sup>2</sup> It is, at the very least, an example of the "elliptical, convoluted," and "at times" also the "incomprehensible."<sup>3</sup> We might also add that it is frustrating, elusive, and occasionally impenetrable. In this essay, I offer hope. I think I understand, in the face of confusion, what Cardozo set out to accomplish in the eleven paragraphs of *Allegheny College*. Perhaps I too have been misled. In any event, I will demonstrate what I think Cardozo

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\* Professor, Law School, State University of New York at Buffalo. I would like to thank (1) a decade or so of law students at Buffalo, who sat through a form of this lecture, helped to hone it, and endured it, (2) Dianne Avery, David Engel, Jack Hyman, and Jack Schlegel, who read and commented on it, and may or may not have saved me from my errors, (3) Frank Herdman and Susan Weber of the *Buffalo Law Review*, who actually encouraged writing this article and worked hard on making it intelligible, and (4) Joyce Farrell, who helped make this both legible and presentable.

1. G. GILMORE, *THE AGES OF AMERICAN LAW* 75 (1977).

2. *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 159 N.E. 173 (1927), cited in G. GILMORE, *supra* note 1, at 135 n.18.

3. G. GILMORE, *supra* note 1, at 75.

had in mind by organizing and writing the opinion in the manner he did. And I am going to demonstrate his thought process by a somewhat novel and untraditional technique—reading the opinion and offering my commentary on it, line by line, paragraph by paragraph.<sup>4</sup> (For those who would prefer to read the complete opinion, either before, during, or after this exercise, the opinion has been added to the end of the essay as Appendix I.)

### A. *Understanding Cardozo*

Why am I engaging in this quaint exercise in textual exegesis?<sup>5</sup> The answer is simple—my Contracts students made me do it. Quite a few years ago, I began to notice that, in addition to “the less gifted lower court New York judges,” first-year law students, perhaps only a month or two into the formal study of the legal process, had barely a clue as to what was going on in the *Allegheny College* opinion. This should not have struck anyone as unusual, for as I will show shortly, some very distinguished legal scholars have grappled with the opinion without appreciably better results. Since confusion was epidemic, one day I decided not to tease out the mysteries of the case, but rather to read the opinion carefully along with the students in order to help them understand its meaning and purpose. Since Cardozo “was accustomed to hide his light under a bushel,” I saw no reason to use the socratic method to hide the ball as well as “the light.” Not surprisingly, the textual explication turned into a lecture. Many students, presumably those who were not bored, said they found it helpful. I offer it here in that spirit.

I am not certain what the relevance of the case is today. Why should we study a sixty-year-old charitable subscription case, in which an elderly woman, Mary Yates Johnston, pledged to a college a sum of money due thirty days after her death, paid part of it during her lifetime, and then changed her mind and cancelled the rest of the pledge, thereby bringing down an action for the unpaid funds on her estate? Should we care how Cardozo applied consideration doctrine to determine whether or not the pledge was enforceable? Doctrinally the case is a dead end in

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4. We usually demand this only of students in their first year of law school, and we tell them they need to read a case many times before they will really understand it. For Cardozo decisions, it may take many years.

5. You will notice my analysis proceeds untouched by, and without a single nod in the direction of, any modern debate on the subject of original texts and interpretivism. Will the law review make me provide citations to this phenomenon? For a reasoned response, see *Aside, Don't Cry Over Filled Milk: The Neglected Footnote Three to Carolene Products* (footnotes omitted), 136 U. PA. L. REV. 1553, 1558 (1988) (“Citation is the highest form of legal discourse.”).

the late twentieth century. Few are the occasions when these disputes are likely to find their way into litigation, and even when litigated, section 90(2) of the Second Restatement<sup>6</sup> puts the problem to rest. Charitable subscriptions are accepted as enforceable without requiring that the facts fit within the parameters of promissory estoppel (or consideration for that matter).<sup>7</sup> Courts, I suppose, are free to disagree, but few will. So, the case now rarely appears in Contracts casebooks, and when not reprinted, it is rarely cited. Most books just ignore it.

Why then teach or study it? One reason appears to be that *Allegheny College* helps introduce promissory estoppel historically, to show how it began to find its way over time into a handful of discrete doctrinal areas which were originally donative rather than commercial, such as family transactions and charitable subscriptions.<sup>8</sup> The case can also be treated as an exercise, or a moment in the history of consideration doctrine in which the traditional doctrine was expanded or reexamined. Cardozo seemed to be moving along this doctrinal front as I will try to show below. Through the first paragraphs of the opinion, Cardozo sounds critical of innovations in consideration doctrine. But his critique serves merely to emphasize the malleability of the doctrine. Similarly, references to promissory estoppel are illustrations of that flexibility. Having deployed an historical argument establishing that consideration is not as rigid a concept as it first appeared, Cardozo then proceeds to use traditional doctrinal language to arrive at a conclusion which further expands consideration.

That leads to a second reason. Clearly, it is important to examine the judicial process and to see how particularly gifted judges have dealt with complicated doctrinal issues. Much has been said about the craft of Cardozo's judging.<sup>9</sup> But Cardozo presents a problem. What exactly is his

6. RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (1979) reads: "A charitable subscription or a marriage settlement is binding under subsection (1) without proof that the promise induced action or forbearance." For charitable subscription purposes, the requirement that the promise induced action is unnecessary. Section 90(2) was added to the second Restatement. Obviously § 90(1) requires that a promise "which the promisor should reasonably expect to induce action or forbearance . . . does induce such action or forbearance." See also comment f and its illustrations.

7. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

8. See, e.g., C. KNAPP & N. CRYSTAL, PROBLEMS IN CONTRACT LAW 133-63 (2d ed. 1987).

9. For example, Soia Mentschikoff and Irwin Stotzky devoted about two hundred fifty pages of *The Theory and Craft of American Law* to tracing a sequence of New York contract opinions on the subject of indefiniteness, many of which Cardozo either participated in or authored. See S. MENTSCHIKOFF & I. STOTZKY, THE THEORY AND CRAFT OF AMERICAN LAW 295-554 (1981). Part of the point of their exercise was to expose the student "to the use of precedents by the skilled judge, Benjamin Cardozo." *Id.* at xvii. Cardozo saw the problem this way:

The work of deciding cases goes on every day in hundreds of courts throughout the land.

craft supposed to illuminate about the legal process, if "he was accustomed to hide his light under the bushel"? I assume we are not applauding stealth, guile rather than craft, though the two can be conflated. Arthur Corbin, consistent with Gilmore's insight, once said of Cardozo that when he was "through, the law is not exactly as it was before; but there has been no sudden shift or revolutionary change."<sup>10</sup> Is craft inconsistent with doctrinal manipulation, or is it a craft of its own? Maybe the craft is in moving things along within the framework of the system so that hardly anyone notices or complains. I suppose that is an art form, and art, needless to say, ought to be studied. To that end, however, it might be useful to pin down precisely what Cardozo was up to in *Allegheny College*. In doing that work, and, for purposes of this essay, I am not interested in whether Cardozo was a social engineer, antiformalist, rationalist, humanist, moralist, Thomist, relativist, liberal, closet or proto-realist (actually, I prefer to think of some of the legal realists and their progeny as regal legalists), or whatever. (By the way, though he seems to have rejected formalism, he was not above occasionally and silently using it to serve his own purposes.)<sup>11</sup> I am pretty sure he was not a crit.

There is a third reason too. Maybe because I am at heart a social historian of law (with a soft spot for legal doctrine, and particularly consideration doctrine), I just find studying the case fun.

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Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth. Let some intelligent layman ask him to explain: he will not go very far before taking refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the craft. Such an excuse may cover with a semblance of respectability an otherwise ignominious retreat.

B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 9 (1921). See also Hamilton, *Cardozo The Craftsman*, 6 U. CHI. L. REV. 1 (1938). For a critical view, see (Anon. Y.) Mous, *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625 (1943).

10. Corbin, *Mr. Justice Cardozo and The Law of Contracts*, 39 COLUM. L. REV. 56, 57 (1939), 52 HARV. L. REV. 408, 409 (1939), 48 YALE L.J. 426, 427 (1939) (citations to this article will list page numbers to each of these law reviews in the order shown here).

11. See *infra* text accompanying note 60 (Cardozo's arrayal of the principle of the adequacy of consideration doctrine). For Cardozo's rejection of formalism, see *Wood v. Lucy, Lady-Duff Gordon*, 222 N.Y. 88, 91, 118 N.E. 214, 214 (1917) ("The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal . . ."); *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 242-43, 129 N.E. 889, 891 (1921) ("Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred.").

### B. *Misreading Cardozo*

The conceptual problem facing a judge deciding charitable subscription cases like *Allegheny College* in the mid-1920s was whether or not consideration was present to support enforcement of the promise. Most commentators have found, for better or worse, that Cardozo did manage to fit this particular charitable subscription case within a somewhat "convoluted" consideration formula, and therefore enforced the promise. Two examples will suffice. In the most recent edition of their contracts casebook, Farnsworth and Young observe that "[i]t is also sometimes possible to enforce such a promise by finding that the charity has done or has promised to do something in exchange for the subscriber's promise."<sup>12</sup> This "ground" of enforcement, they say, is found in the *Allegheny College* case.<sup>13</sup> Grant Gilmore concluded that "Cardozo's opinion . . . was essentially a demonstration of why the broad New York consideration theory made promissory estoppel an unnecessary and undesirable refinement."<sup>14</sup> There it is—promissory estoppel—the phrase sometimes referred to as the "dictum" in the case.<sup>15</sup>

A number of times in the course of the opinion Cardozo invoked the phrase promissory estoppel, thereby leading to a certain confusion as to how exactly it was being used. The doctrinal question is whether or not he was applying promissory estoppel, rather than consideration theory, to enforce the promise. I will have more to say about that question when I work my way through the opinion. But I think the answer is very clear—Cardozo, having twice raised the issue of promissory estoppel, dismissed it as a ground of decision.<sup>16</sup> Consideration doctrine, albeit expansively and flexibly applied, solved the enforceability problem for Cardozo.

But that leaves us with a problem: how could an eminence such as Arthur Corbin (not a first-year law student) have misread Cardozo so thoroughly in the following manner?

The promise when first made was a promise of a gift for a specified purpose and was not then binding. It was held that it became binding, in accordance with the promissory estoppel doctrine, when the College received the part payment. Such receipt raised the implication of a promise to

12. E. FARNSWORTH & W. YOUNG, *CONTRACTS* 98 (4th ed. 1988).

13. *Id.*

14. G. GILMORE, *THE DEATH OF CONTRACT* 129 n.145 (1974).

15. E. FARNSWORTH & W. YOUNG, *supra* note 12, at 99; see also Note, *Contract: Consideration in Charitable Subscriptions*, 13 CORNELL L.Q. 270, 272 (1928).

16. See 246 N.Y. at 373-75, 159 N.E. at 174-75; see also *infra* text accompanying notes 53-54, 69.

use the fund as Mary had directed. It was by reason of this receipt and implied promise that Mary became bound to pay the balance of her subscription. Thus the revocable promise of the subscriber was turned into an enforceable bilateral contract by applying the supposed doctrine of promissory estoppel.<sup>17</sup>

Assuming Farnsworth and Young, Gilmore, and others were correct (as I think I will show they were), what was Corbin talking about? Is it simply a flat misreading by Corbin, from which we should all take comfort as a sign of the fallibility of great persons? Maybe. It is peculiar that no one even quotes Corbin's interpretation of *Allegheny College*. (It seems a little like a deep, dark family secret—or at least, a minor eccentricity protected by the small circle of people who might have both known and thought about the case, and were also aware Corbin had something to say about it. Grant Gilmore, who had lots to say about everything, never mentioned a word about Corbin's reading of the case, even though he often relied on Corbin, including his unrecorded conversations with him.<sup>18</sup> Gilmore could keep a secret.) What could Corbin have meant? Or better put: What was Corbin up to? A number of readings are possible (and I do not mean to be exhaustive).

First, Corbin really did not understand the opinion, and he actually misread it. This has a certain surface plausibility and appeal—great men with feet of clay, or at least asleep at the switch. But Corbin had such a terrific command of doctrine and the subtle sense of the manipulation of legal rules that it is hard to believe he made a first-year law student's mistake about the holding of a case.

Second, maybe Corbin preferred to think, for whatever reason, that Cardozo was actually using promissory estoppel, even though Cardozo did not wish to inform anyone that he was actually using it. In effect, Corbin said, regardless of what you call it, Cardozo, or what you say you actually did, my discerning eye perceives what you really did. You cannot fool me, which is a good thing, because I approve of what you did, even though you did not want to reveal your meaning. So now I have brought it all out in the open.

Third, perhaps Corbin was pretending the case meant precisely what he thought it should mean, regardless of what Cardozo actually intended. In other words, Corbin did it deliberately. Why? Because Corbin had an agenda which he advocated very seriously and very openly: the liberation of contract doctrine from the iron rule of formalism. At the

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17. Corbin, *supra* note 10, at 65, 417, 435.

18. G. GILMORE, *supra* note 14, at 128 n.135.

beginning of the opinion, as we shall see, Cardozo wrestled with the difficult and controversial problem of just what was an appropriate definition of consideration in New York. Cardozo had two routes to choose from: one basically symbolized by the late nineteenth century New York case of *Hamer v. Sidway*,<sup>19</sup> an open and generous elaboration of what might constitute consideration, and the other, the so-called bargain theory, which was more tightly controlled, particularly in the hands of Holmes and Williston.<sup>20</sup> Cardozo appeared to pay great deference in *Allegheny College* to the latter, referring to it at various times as the "classic doctrine" in all its "ancient rigor." This annoyed Corbin to no end, and this is what he had to say about it:

The present writer has no criticism of the court's decision in this case; . . . . But he knows of no "classic doctrine," except as one is quoted in the opinion from the works of Mr. Justice Holmes; and that one is "classic" only because the man who composed and repeated it is Holmes. The present writer knows of no doctrine of consideration that ever was stated and applied with "ancient rigor." Instead, the doctrine is one that was totally unknown in early English law, one that started from nothing and was constructed case by case as reasons for enforcing informal promises were found. The instant decision marks one more step in that evolutionary process—in the development of a doctrine that is modern rather than "classic" and that has always been characterized by flexibility rather than by "rigor."<sup>21</sup>

Corbin was not averse on any occasion to pushing his program. A decade earlier he had tried to move consideration doctrine along employing a Cardozo opinion as a springboard.<sup>22</sup> Perhaps by converting Cardozo's consideration opinion into an endorsement of promissory estoppel, Corbin was simply continuing his attack on the elements of the formal or "classic" system, even if he had to misstate slightly what was going on. The lesson was clear: nothing was safe from his reorganizing and reforming zeal. And he preferred that the assaults not be as subtle as Cardozo was suggesting—Corbin's style was more straightforward.

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19. 124 N.Y. 538, 27 N.E. 256 (1891). For a summary of the facts in this case, see *infra* text accompanying note 34-35.

20. See *infra* text accompanying notes 38-43.

21. Corbin, *supra* note 10, at 66, 418, 436. This paragraph reminds one of a similar argument made by Grant Gilmore at various points in his *THE DEATH OF CONTRACT*. G. GILMORE, *supra* note 14, at 18-21, 62-65.

22. Corbin, *Does A Pre-existing Duty Defeat Consideration? Recent Noteworthy Decisions*, 27 *YALE L.J.* 362 (1918), relying on *DeCicco v. Schweizer*, 221 N.Y. 431, 117 N.E. 807 (1917) (consideration found in agreement by father to pay daughter a certain sum annually in return for daughter's marriage to fiance, where formal writing recited that the engagement and marriage were consideration of the promise to pay).



Fourth, for some of the reasons just suggested, Corbin thought the "supposed," as he put it, doctrine of promissory estoppel was "real."<sup>23</sup> In other words, promissory estoppel, for Corbin, was in reality just part of consideration, another element of it. And promissory estoppel was a particularly good fit within Corbin's system of thought, because it paid little or no homage (except as an exception) to the formal requirements of consideration he rejected. Therefore, recognizing promissory estoppel as a basis for the holding of the opinion expanded the meaning of consideration more in accord with Corbin's overall purposes, and ought to be heralded as an advance—"one more step in that evolutionary process."<sup>24</sup>

Fifth, Corbin may have thought there was a sound doctrinal reason for analyzing the opinion as he did. Corbin's argument might have stressed the following: within the parameters of the opinion there is no functional difference between the manipulation of consideration doctrine—finding an implied request by Mary Johnston that the college do something leading toward an exchange of sorts, or an implied duty of the college to act in response to her implied request—and promissory estoppel—emphasizing that once Mary made a partial payment, and the college became bound to use the money as she impliedly requested, a bilateral contract was formed out of the curious combination of "receipt and implied promise." Was Mary estopped from changing her mind because the college relied on her implied promise and down payment in agreeing to respond to her by assuming an implied duty?<sup>25</sup> The problem, of course, is that the web of promissory estoppel is at least as tenuous as the web of consideration. Promissory estoppel would only guide Cardozo's incursion into the realm of conventional wisdom—flexible consideration rather than rigorous consideration.

I am sure that I, as well as others, could propose other possible explanations for Corbin's misreading. Indeed, I may have missed some obvious ones. But I will stop here with only a final thought. If Corbin either misstated the holding, or at the very least, could not come up with a clear and convincing explanation of his reading of the case, what conclusion are we to draw? Has Cardozo failed us? Is the confusion his and not ours? Or is this just a difficult and troubling area of law that evades quick and sure-handed treatment? Before we get on with reading the opinion, I have one more example of grappling with Cardozo in *Allegheny College*.

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23. Corbin, *supra* note 10, at 65, 417, 435.

24. *Id.* at 66, 418, 436.

25. *See* Note, *supra* note 15, at 273.

C. *[The] Oscillating Cardozo*

If Corbin could not correctly figure out Cardozo's legal argumentation, perhaps an excuse does lie in its manner of presentation. Maybe Corbin had trouble isolating the argument because Cardozo constantly changed his mind, or at the very least shifted back and forth, from one doctrinal premise to another. So thought Leon Lipson, in a wonderfully literate article, which employed the following evocative image:

When we look at the oscillation of argument in the opinion, we are reminded rather of another image, one that was suggested a hundred years before the Allegheny College Case by that odd and engaging logician, Richard Whately, sometime later to be Archbishop of Dublin. Judge Cardozo goes from consideration to promissory estoppel to consideration to duty-&-obligation to promise to consideration to promissory estoppel to victory for Allegheny College. Whenever his argument emphasizing consideration runs thin, he moves on to promissory estoppel; whenever his hints in favor of promissory estoppel approach the edge of becoming a committed ground of decision, he veers off in the direction of the doctrine of consideration. Arguments that oscillate in this way, repeatedly promoting each other by the alternation, call to mind Whately's simile of "the optical illusion effected by that ingenious and philosophical toy called the Thaumatrope: in which two objects are painted on opposite sides of a card—for instance, a man and a horse, [or]—a bird and a cage"; the card is fitted into a frame with a handle, and the two objects are, "by a sort of rapid whirl [of the handle], presented to the mind as combined in one picture—the man *on* the horse's back, the bird *in* the cage."

Now what were the objects painted on the opposite sides of Judge Cardozo's Thaumatrope? His trouble was that on the consideration side he had a solid rule but shaky facts; on the promissory-estoppel side he had a shaky rule but (potentially) solid facts. He twirled the Thaumatrope in order to give the impression that he had solid facts fitting a solid rule. Some lawyers think that what emerges instead is a picture of a bird on the horse's back.<sup>26</sup>

Lipson's clever interpolation could carry us a long way to understanding Cardozo's technique in *Allegheny College*. Except for one problem—I think Lipson was wrong, and he, like Corbin, has also misread the opinion, though in a far more interesting way than Corbin did. My reading of the case finds something different—no oscillating or wavering, though I can understand how one could be easily misled. Rather, I find it a relatively straightforward lesson in the shadow world of New York consideration doctrine. The opinion is actually quite logically organized

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26. Lipson, *The Allegheny College Case*, 23 YALE L. REP. 8, 11 (1977), quoted in C. KNAPP & N. CRYSTAL, *supra* note 8, at 152; F. KESSLER, G. GILMORE & A. KRONMAN, *CONTRACTS* 509-10 (3d ed. 1986).

and streamlined. It is also a rather elementary lesson in the historical evolution of consideration doctrine. In short, Cardozo sought to demonstrate that (a) despite the closed, tight theory of formal consideration theory, (b) various alterations, expansions, and changes have occurred in that strict domain, and promissory estoppel is simply a very good historical example of how formal consideration theory has declined and that, (c) since New York law contains an expansive consideration theory, particularly in charitable subscription cases, (d) we do not need to resort to promissory estoppel—we can simply rely on its presence as justification for the general program of expanding consideration doctrine. The opinion suggests that promissory estoppel is a primary historical signpost demonstrating that the project of making consideration flexible has legitimacy, otherwise promissory estoppel would not have made its way this far. Therefore, (e) the last half of the opinion is devoted to showing how the facts of this case fit into the New York version of the expanded “mould” of consideration—the actual search for consideration—though even in Cardozo’s hands, it is a formidable task. The opinion may appear to waver, if you do not comprehend the logic and structure. Otherwise, I think it simply unfolds.

All of this is not to deny that Professor Lipson was on to something. He was correct in observing that this is a weak factual case on the consideration side, and a weak rule case on the promissory estoppel side. Cardozo knew this before he started writing, and so he sought to reason from strength, from the established legal rule of consideration. As those who so mightily labored before him, Cardozo could make almost anything fit into consideration if he were forced to. He did not waver or blink. If we understand how he set his stage, we can see through his legerdemain with New York consideration doctrine. The difficulty is that it appears to be pure magic because factually it is a difficult case. But *in theory*, Cardozo knew exactly what he was doing. Or at least, unless I have misread the case, I think I understand what he was doing. But you can now read on, and read with me, and judge for yourself, though I ought to warn you that, every once in a while, Cardozo gets under my skin, and I may momentarily lapse into cynicism or sarcasm, though I quickly recover and reclaim the high road. Anyway read on, if you wish, in the tale of a promise in search of a theory.<sup>27</sup>

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27. The *Allegheny College* decision appears in italics throughout the text. In two instances where Cardozo’s long paragraphs might have led to problems with typography and continuity, the paragraphs have been broken to maintain the flow in the analysis. The broken paragraphs appear as independent paragraphs in the text. Excerpts from the opinion addressed directly in the text appear

## II. OPINION

*CARDOZO, Ch. J. The plaintiff, Allegheny College, is an institution of liberal learning at Meadville, Pennsylvania. In June 1921, a "drive" was in progress to secure for it an additional endowment of \$1,250,000. An appeal to contribute to this fund was made to Mary Yates Johnston of Jamestown, New York. In response thereto, she signed and delivered on June 15, 1921, the following writing:*

*"Estate Pledge,*

*"Allegheny College Second Century Endowment  
"JAMESTOWN, N. Y., June 15, 1921.*

*"In consideration of my interest in Christian Education, and in consideration of others subscribing, I hereby subscribe and will pay to the order of the Treasurer of Allegheny College, Meadville, Pennsylvania, the sum of Five Thousand Dollars; \$5,000.*

*"This obligation shall become due thirty days after my death, and I hereby instruct my Executor, or Administrator, to pay the same out of my estate. This pledge shall bear interest at the rate of . . . per cent per annum, payable annually, from . . . till paid. The proceeds of this obligation shall be added to the Endowment of said Institution, or expended in accordance with instructions on reverse side of this pledge.*

*"Name MARY YATES JOHNSTON,*

*"Address 306 East 6th Street,*

*"Jamestown, N. Y.*

*"DAYTON E. McCLAIN Witness*

*"T.R. COURTIS Witness*

*"to authentic signature."*

*On the reverse side of the writing is the following indorsement: "In loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund, the proceeds from which shall be used to educate students preparing for the Ministry, either in the United States or in the Foreign Field.*

*"This pledge shall be valid only on the condition that the provisions of my Will, now extant, shall be first met.*

*"MARY YATES JOHNSTON."*

*The subscription was not payable by its terms until thirty days after the death of the promisor. The sum of \$1,000 was paid, however, upon account in December, 1923, while the promisor was alive. The college set*

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in boldface following the italicized paragraphs. Citations not discussed in this essay have been omitted. Such omissions are not indicated in the text. A complete version of the opinion including all citations is reproduced in Appendix I, which follows this essay.

*the money aside to be held as a scholarship fund for the benefit of students preparing for the ministry. Later, in July, 1924, the promisor gave notice to the college that she repudiated the promise. Upon the expiration of thirty days following her death, this action was brought against the executor of her will to recover the unpaid balance.*

The two introductory paragraphs presenting the facts are written in Cardozo's characteristically facile manner. I do not mean this necessarily as a criticism. He had a gift for summarizing and delivering the most complex of factual situations in the most elegant and sparse fashion. I suppose it was part of his craft, though sometimes one senses something is missing. Like most good lawyers, he tried to load the facts to meet his view of what he needed to accomplish—a subtle form of judicial advocacy. Every once in a while, a different view of the facts emerges in a dissent. The best example I can think of is Judge McLaughlin's recasting in dissent of Cardozo's factual recitation in *Jacob & Youngs, Inc. v. Kent*.<sup>28</sup>

The facts of *Allegheny College* seem disarmingly simple. Most of the summary is taken up by the reproduction of the pledge card. Mary Yates Johnston signed the pledge card as part of a fund drive at Allegheny College. She pledged five thousand dollars, due thirty days after her death. The pledge read that she was subscribing “[i]n consideration of my interest in Christian Education, and in consideration of others subscribing . . . .” On the back of the pledge read an indorsement, establishing the purposes of the fund and stipulating that “[i]n loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund.” (We will see shortly what Cardozo makes of that statement legally.) During her lifetime, Mary Johnston paid one thousand dollars of the pledged amount. The college placed the money in the fund. Mary then decided she no longer wished to continue the pledge, and so notified the college. Cardozo says “she repudiated the promise.” When she died, the college sought to collect “the unpaid balance” from her estate. The facts appear to be simple and straightforward.

But a number of items ought to attract our attention. First, though

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28. In *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921), a contractor sued a homeowner to recover the unpaid balance on a residence built for the defendant. The homeowner had withheld payment because the contractor had substituted another brand of pipe for that specified in the contract. Cardozo's opinion admitted that some of the pipe was not the brand specified, but stressed the pipe was not inferior; therefore, he treated the substitution as insignificant. *Id.* at 241, 129 N.E. at 889. McLaughlin's dissent, however, stressed that a significant amount of the pipe installed was not of the type specified, regardless of whether or not it was of the same quality. *Id.* at 245-47, 129 N.E. at 892.

it may not be relevant legally in Cardozo's hands, why did Mary Johnston change her mind, and should we care? In the mid-1970s, Richard Danzig pursued the question, and in his unpublished contracts materials, in a little essay entitled, "Some Observations on Allegheny College v. National Chautauqua Bank," explained what he found.<sup>29</sup> A surviving friend of Mary Yates Johnston provided Danzig with the following account:

Mary Yates Johnston was an elderly lady who was hard of hearing, lame and had difficulty in getting about. She was a dear, religious person, and being very honorable assumed other people were also. She thought, as I recall her, the Ministers and religious schools were Special.

Some time after the drawing of her will in which she left a legacy to the College, she decided by the payment of a lower sum to cancel or wipe out that clause of her will. I don't recall whether her minister or a representative of the college handled the negotiations. I do recall that I stopped at her home one day. (She had previously talked with me a number of times about the matter.) She had me close all the doors to the room where she was sitting and told me that the arrangements were all made to close out that item or bequest as set forth in her will. She made it very clear to me that she was giving them a lesser amount than that mentioned in the will in consideration of that legacy being cancelled.

She was so honorable herself and felt others were too, I guess. At any rate I know that she understood from the college that the legacy to the college was cancelled upon payment of a lesser sum. I had discussed it frequently with her in her life time. I have had no confidence in the college since. For as soon as Mrs. Johnston died they called her settlement an advance payment and proceeded to collect the balance of the legacy. I have never had any regard for the college since that time. Of course she should have had her attorney draw up the proper receipt and release.<sup>30</sup>

Why did she cancel the pledge? According to Danzig, "Surviving contemporaries have suggested that Mary Yates Johnston sought to withdraw her promise to Allegheny College because she was concerned about her capacity to both pay the college and to leave enough to her daughter so that her daughter could in turn aid her impoverished cousins, the Yates."<sup>31</sup> Apparently she "revised her will to eliminate"<sup>32</sup> all charitable bequests, not just the one to Allegheny College. What differ-

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29. R. Danzig, *An Introduction to the Role of Law in the Realm of Private Agreement* 520 (Aug. 1976) (unpublished manuscript) [hereinafter R. Danzig, Introduction]. This was a short essay that did not find its way into R. DANZIG, *THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES* (1978).

30. R. Danzig, Introduction, *supra* note 29, at 523-24.

31. *Id.* at 526-27. My survey of the record and the briefs on appeal (a generally overlooked source in doctrinal writing, as if judges either routinely ignore or do not respond significantly to what is submitted to them) has revealed no factual evidence about what caused Mary Yates Johnston

ence does that information make if an enforceable promise is an enforceable promise?<sup>33</sup> Probably little difference, except for one problem in tone

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to repudiate her pledge. There is an allusion to family matters in the conclusion of the college's brief that seems, to coin a phrase, less than charitable.

Whether the attempted revocation was made by the importunities of residuary legatees who are undoubtedly responsible for the refusal of the executor to voluntarily settle the claim we cannot say.

How much more proper, however, it is that Allegheny College, which has incurred responsibilities and performed labors in reliance upon receiving this gift, should now be paid the sum called for by the subscription than that residuary legatees whose rights might have been cut off at any time by the whim of defendant's testatrix should receive something for which they have done nothing to obtain it.

Appellant's Brief at 50. This is consistent with the earnest tone of the brief, which observed elsewhere that the subscriber is

obviously morally obligated. When, however, time rolls on and he [sic] has a change of heart, then and only then does he begin to hunt around for some way of getting out of his obligation, just as men are wont to avoid debts for property purchased upon such grounds as they may be able to conceive to avoid their obligations.

*Id.* at 24-25

32. *Id.* at 527.

33. But should the change of mind matter if it reflects a change of circumstances?

If it does amount to a promise, it may be, and when made gratuitously commonly would be, a promise importing some kind of obligation, but an obligation which both the promisor and the promisee would have great difficulty in defining. If I (without more) state that I will do a certain thing, I do not conceive that I warrant that I shall do that thing in any event: making that promise in the utmost good faith, I am understood by honest men to reserve to myself some discretion; and my nonperformance would in certain circumstances not be regarded by honest men as a breach of faith even if those circumstances did not amount to an excuse in law. For example, a drastic and unexpected change of circumstances (even though not amounting to an excuse in law) would in good faith be held to excuse me. Supposing I write a letter to my son-in-law stating that I propose to make him an allowance of £1,000 per annum for five years, should I be conceived as bound in good faith to continue the allowance if my daughter and he separated as a result of mutual dissensions? I believe that good faith would in the circumstances admit the unexpressed exception—namely, "You and my daughter continue living in amity", and there would be quite a number of other such admissible exceptions. Yet very probably if I covenanted to pay such sum without *expressing* the exception, I should not according to our present rules of construction be permitted in law to allege such an exception. Again, good faith would have its grave doubts whether I was bound to the extent of £1,000 per annum even if the only change in the circumstances was that my own income happened unexpectedly to fall from £15,000 to £1,500. Good faith would undoubtedly recognize some obligation in me in those changed circumstances, but not an absolute one to pay £1,000; and I believe it would regard the payment of £500 as a very honourable performance under the circumstances. In law, of course, if I had covenanted to pay and was not actually insolvent, the change in my income would be a matter of entire indifference, unless I had *expressed* the sum as a fraction of my income.

The point is that a statement respecting my future conduct . . . is by common sense and good faith when made informally and gratuitously very definitely separated from [another] possible meaning of such a statement. For . . . the statement may mean (though that is exceedingly improbable when it is made gratuitously and informally, without express words added) that I not only promise but am willing to bind myself to

or affect. The opinion is organized to make it appear as if the college is the injured party, because it is deprived of its important pledge. What if it turned out that in reality Mary Johnston was the aggrieved party, simply trying to protect her family through an intelligent evaluation and management of her assets? Or a Mary Johnston just interested in caring for her family and sharing with them her good fortune? What if the college was raiding the Johnston/Yates family treasury? Should we continue to enforce the promise? Maybe not. Cardozo says not a word about this. Perhaps he had no reason to know. This case might look different if it had been presented as the elderly widow who, having made a conscious, rational choice, is pursued ruthlessly by the grasping and invulnerable college, and is driven for protection into the capable, warm, and open arms of Cardozo.

A final curiosity in these two paragraphs—three times in his recitation of the pledge cards, Cardozo allows to go unremarked a series of phrases that might explain why the pledge was made: “[i]n consideration of my interest in Christian Education;” “in consideration of others subscribing;” and “[i]n loving memory.” Cardozo usually never missed, or let go, a fact that was crucial to his argument. But there is not a word here highlighting the phrases. Are they of no significance legally? Probably not, if Cardozo did not venture to use them. None of them, under the circumstances in the case, seem to qualify as consideration. At best, they might be evidence of her motive in pledging. But at this moment in the opinion, his silence is eloquent testimony to the difficulty of the task he is embarking on. Maybe it is just a case of prudent and silent question begging. Why should charitable subscriptions be enforced if we have any doubts that “the general law of contract” might be less than enthusiastic about providing a safe harbor?

*The law of charitable subscriptions has been a prolific source of controversy in this State and elsewhere. We have held that a promise of that order is unenforcible like any other if made without consideration. On the other hand, though professing to apply to such subscriptions the general law of contract, we have found consideration present where the general law of contract, at least as then declared, would have said that it was absent*

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that construction of my *actual* words of promise which may be put upon them not by good faith, but by the technical rules of a Court of law. In my opinion, unless express words or a legal formality are added, the . . . meaning is not the meaning attached to a gratuitous promise either by the most honest promisor, or by the least honest promisee, or by any reasonable and disinterested bystander.

Hamson, *The Reform of Consideration*, 54 L.Q. REV. 233, 244-45 (1938).



(*Barnes v. Perine*, 12 N. Y. 18; *Presb. Soc. v. Beach*, 74 N. Y. 72; *Keuka College v. Ray*, 167 N. Y. 96; cf. *Williston, Contracts*, § 116).

The law of charitable subscriptions has been a prolific source of controversy in this State and elsewhere. We have held that a promise of that order is unenforcible like any other if made without consideration. At the outset, Cardozo tells us that courts in New York ("and elsewhere") have traditionally tried to fit charitable subscription cases into standard consideration doctrine to see whether or not these cases pass muster. A charitable subscription is like any other promise; it is not worthy of any special treatment. Nevertheless, we have been forewarned. Why else would we be focusing on this problem at all, if it were not for the fact this category of cases "has been a prolific source of controversy"?

On the other hand, though professing to apply to such subscriptions the general law of contract, we have found consideration present where the general law of contract, at least as then declared, would have said that it was absent. What does that mean? Does that mean that we have enlarged the theory of consideration, in order to fit this type of promise within it? Have we been put on notice that the doctrine of consideration, particularly as applied to charitable subscriptions, has been manipulated before in New York? He says we found consideration where the general law of contract, "at least as then declared would have said it was absent." Is that about to occur again in this case?

*A classic form of statement identifies consideration with detriment to the promisee sustained by virtue of the promise (Hamer v. Sidway, 124 N. Y. 538; Anson, Contracts [Corbin's ed.], p. 116; 8 Holdsworth, History of English Law, 10). So compendious a formula is little more than a half truth. There is need of many a supplementary gloss before the outline can be so filled in as to depict the classic doctrine. "The promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting" (Wisc. & Mich. Ry. Co. v. Powers, 191 U. S. 379, 386; 1 Williston, Contracts, § 139; Langdell, Summary of the Law of Contracts, pp. 82-88). If A promises B to make him a gift, consideration may be lacking, though B has renounced other opportunities for betterment in the faith that the promise will be kept.*

A classic form of statement identifies consideration with detriment to the promisee sustained by virtue of the promise. The citation for this proposition is the 1891 New York case of *Hamer v. Sidway*, also supported by Corbin's Edition of Anson and the English legal historian

Holdsworth. We all remember the saga of Uncle Willie. In *Hamer*, an uncle "promised his nephew that if he would refrain from drinking, using tobacco, swearing and playing cards or billiards for money until he became twenty-one years of age he would pay him a sum of \$5,000. The nephew assented thereto and fully performed the conditions inducing the promise."<sup>34</sup> The legal question was simply whether or not the promise was supported by consideration, and was therefore enforceable. The New York Court of Appeals adopted a definition of consideration stressing legal detriment; in *Hamer* it was the legal "right he abandoned [drinking, smoking, swearing, card and billiard playing—sometimes referred to by modern law students in classroom discussion as generally having fun] for a period of years upon the strength of the promise . . ."<sup>35</sup> *Hamer* seems to stand for two propositions at least. First, a simple detriment to the promisee itself will suffice for establishing consideration. Second, almost any type or degree of detriment will do—a broad or loose definition of what detriment is will also suffice. After *Hamer*, New York was a loose or "expansive" consideration jurisdiction, particularly guided by Cardozo.<sup>36</sup> In other words, if you are not careful, you might just "find consideration anywhere."<sup>37</sup> But as of yet, we have only an inkling that there might be another way to think about the problem. So we start with "a classic form of statement."

Then comes one of a series of famous Cardozo sentences. **So compendious a formula is little more than a half truth.** What is little more than a half truth? That detriment to the promisee sustained by virtue of the promise is good consideration. There is need of many a supplementary gloss before the outline can be so filled in as to depict the classic doctrine. What Cardozo now seems to be saying is that New York, having followed *Hamer v. Sidway*, did not fully adopt the classic doctrine, that *Hamer v. Sidway* was only a partial statement of the classic doctrine. The implication is that the "outline" of the full, complete version of consideration doctrine is only partially "filled in" by *Hamer*. This is our first doctrinal clue that things will get complicated.

**"The promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise**

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34. *Hamer v. Sidway*, 124 N.Y. 538, 540, 27 N.E. 256, 256 (1891).

35. *Id.* at 546, 27 N.E. at 257. *But see* E. FARNSWORTH, CONTRACTS § 2.4, at 44-46 (1982) (analyzing *Hamer* in terms of bargain and exchange).

36. G. GILMORE, *supra* note 14, at 62.

37. *Id.*

if the other half is wanting." Now look where the quotation comes from—an opinion by Holmes. And in support, Cardozo uses Williston and Langdell. He cites Holmes's bargain theory—"reciprocal conventional inducement"—as the fuller, more complete classic formulation of consideration doctrine, as the true consideration doctrine, the doctrine by which it appears that we must measure all cases.<sup>38</sup> The point seems to be that if the detriment, as posited in *Hamer v. Sidway*, is the consequence of the promise, but does not induce the making of the promise, then there can be no consideration under standard consideration theory. There has to be reciprocity—the mutual inducement that Holmes talks about. Now, just to get ahead for a moment, it is clear that in a promissory estoppel example, estoppel would involve for the most part a non-induced, non-bargained promise. That is, the detriment is only a consequence of the promise, and the detriment has not been bargained for. But notice the disingenuousness, self-consciousness, playfulness, maliciousness or craftsman-like quality (depending on your point of view) with which Cardozo trots out the old conventional descriptions of what consideration is—setting it up almost as a straw man. I am a believer in the old faith, he seems to be saying—far be it from me to challenge it. Since it is Cardozo speaking, one ought immediately to be suspicious. Cardozo's citation of Holmes, Williston, and Langdell as gospel is what Professor Lipson refers to as "the ironic deference that he pays (on the way to subversion) to the textbook learning on the doctrine of consideration . . . ."<sup>39</sup> If A promises B to make him a gift, consideration may be lacking, though B has renounced other opportunities for betterment in the faith that the promise will be kept. This is a simple illustration of how situations of donative intent do not fit within the bargain principle. The detriment may be the consequence of the promise (foregoing other opportunities), but the detriment was not induced and there has been no bargain. Now we go back to half truths.

*The half truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten. The doctrine of consideration has not escaped the common lot. As far back as 1881, Judge HOLMES in his lectures on the Common Law (p. 292), separated the detriment which is merely a consequence of the promise from the detriment which is in truth the motive or inducement, and yet added that the courts "have gone far in obliterating this distinc-*

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38. *Id.* at 19-21.

39. Lipson, *supra* note 26, at 11.

tion." *The tendency toward effacement has not lessened with the years. On the contrary, there has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in what is styled "a promissory estoppel" (Williston, Contracts, §§ 139, 116). Whether the exception has made its way in this State to such an extent as to permit us to say that the general law of consideration has been modified accordingly, we do not now attempt to say. Cases such as Siegel v. Spear & Co. (234 N. Y. 479) and DeCicco v. Schweizer (221 N. Y. 431) may be signposts on the road. Certain, at least, it is that we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions. So long as those decisions stand, the question is not merely whether the enforcement of a charitable subscription can be squared with the doctrine of consideration in all its ancient rigor. The question may also be whether it can be squared with the doctrine of consideration as qualified by the doctrine of promissory estoppel.*

The half truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten. Cardozo continues by embracing the classic formulation of Holmes's criticism of the way in which standard, strict consideration theory has been eroded over time.<sup>40</sup> It is a little strange that it should come out of Cardozo's mouth. What he is saying, basically, is that we now have in New York, through *Hamer v. Sidway*, a half truth theory. We have a pure detriment theory without any talk about a bargain.

The doctrine of consideration has not escaped the common lot. As far back as 1881, Judge HOLMES in his lectures on the Common Law (p. 292) separated the detriment, which is merely a consequence of the promise, i.e., sometimes called detrimental reliance, perhaps as in a promissory estoppel case, from the detriment which is in truth the motive or inducement, i.e., a bargain theory, and yet added that the courts "have gone far in obliterating this distinction." The tendency toward effacement has not lessened with the years. We have moved away, particularly in New York, from the strict Holmesian conception.<sup>41</sup> Is it a good thing or a bad thing that "effacement" has occurred? Is this a deliberate Cardozo strategy—not taking a position of approval or disapproval on "ef-

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40. O. HOLMES, *THE COMMON LAW* 227-30 (Howe ed. 1963).

41. This, of course, leaves unanswered the question of where Holmes got his notion from. For critical views, see G. GILMORE, *supra* note 14, at 20-21 and Corbin, *supra* note 10, at 66, 418, 436.

facement," or on the original doctrine effaced, just digging away like an archaeologist or perhaps an historian, simply making a neutral observation on the fate of things? Cardozo seems to be saying, I am an agnostic myself on these matters. I am just reporting what I find. Here are the strands of doctrinal disputation as I see them. To make an informed judgment, we must know what we have to work with, and what the historical development looked like. Besides, if we are going to change things, it is helpful to establish a tradition of "effacement." In addition, Cardozo's seeming insistence on full-blown bargain consideration theory as the starting point for his analysis seems a bit disingenuous for someone who "delighted in weaving gossamer spider webs of consideration."<sup>42</sup> Thus, Cardozo appears to embrace a traditional conception of consideration founded on Holmes's bargain theory. As we will see, Cardozo's application of the strict bargain theory will largely undermine its rigor. **On the contrary, there has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in what is styled "a promissory estoppel."** (Williston, *Contracts*, §§ 139, 116.) Not only have we moved toward effacement, not only has the rigor of the old theory declined, but we now have something which is a substitute. We have in Holmes's terms obliterated the distinctions. Promissory estoppel is an *example* of effacement. But look who Cardozo cites for this proposition. He cites Williston for the notion that inroads have been made into the standard doctrine, or that at least there is evidence that the old doctrine is in the process of being altered. This is irony with a vengeance. At the very least, it is an example of Gilmore's insight that "[t]he more innovative the decision . . . the more his opinion strained to prove that no novelty . . . was involved."<sup>43</sup> The more you disturb the landscape, the harder you work to make it appear unscathed.

Whether the exception has made its way in this State to such an extent as to permit us to say that the general law of consideration has been modified accordingly, we do not now attempt to say. Far be it from me, says Cardozo, to hazard a guess. I am just sticking with the old doctrine. Cases such as *Siegel*<sup>44</sup> and *DeCicco*<sup>45</sup> may be sign-posts on the road. What Cardozo does not tell us is that he was the author of one of those sign-posts. As cogently summarized by Gilmore, Cardozo found in

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42. G. GILMORE, *supra* note 14, at 62.

43. G. GILMORE, *supra* note 1, at 75.

44. *Siegel v. Spear & Co.*, 234 N.Y. 479, 138 N.E. 14 (1923) (where bailee voluntarily undertook to procure insurance for the bailor's benefit, the promise was part of the entire transaction, obligating bailee to obtain the insurance as well as take care of the goods).

45. 221 N.Y. 431, 117 N.E. 807 (1917).

*DeCicco* that “[t]here was consideration for a father’s promise to pay his engaged daughter an annuity after marriage in the fact that the engaged couple, instead of breaking off the engagement, had in fact married.”<sup>46</sup> In other words, Cardozo cites himself as authority for the proposition that sign-posts along the road exist, indicating that an “exception” to the “ordinary requirements” of consideration doctrine has been made. He will not venture a guess as to whether the Holmesian doctrine has been “modified accordingly” in New York, though if we read carefully it is clear Cardozo has had something to do with just a mere suggestion of change in the air. Just a hint.

Certain, at least, it is that we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions. Here it is, a return to the calm shore of certainty. Promissory estoppel is a substitute for consideration, at least in charitable subscription cases in New York. Normally that would put us on notice that the next thing to look for is whether *Allegheny College* is a promissory estoppel case because it is a charitable subscription case. Does Cardozo’s statement shift the inquiry? If Cardozo is “certain,” why does he not conclude that he has found the rule he was looking for, that all that discussion about consideration up until now has been sort of interesting, but now he can finally get down to work? So long as those decisions stand, the question is not merely whether the enforcement of a charitable subscription can be squared with the doctrine of consideration in all its ancient rigor. We do not have to go through those doctrinal handstands. We do not have to try to figure out whether or not there is consideration in this case. We can take care of it with promissory estoppel—a legitimate substitute for consideration.

The question may also be whether it can be squared with the doctrine of consideration as qualified by the doctrine of promissory estoppel. That is an interesting theoretical line. Suddenly, the real doctrinal question: if we accept the notion that promissory estoppel qualifies rigorous consideration theory, do charitable subscription cases fit into the newly found flexible framework of formal consideration? At this point, we ought to pause and look back at what Cardozo has accomplished in one short paragraph—how he has subtly shifted the terrain. There are two theories at stake: a full-blown rigorous bargain theory, and a half-truth New York version of it. The half-truth is an example of the effacement of the rigorous theory. Is Cardozo going to stand for that in New York? Is

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46. G. GILMORE, *supra* note 14, at 62.

he going to take advantage of the half-truth theory? Or is he going to restore New York to the pristine purity of rigorous theory? Is he criticizing New York's effacement or is he supporting it? It's hard to say. Perhaps he is merging the categories. On the one hand he says to the classical bargain theorists, you can have your strict requirements, but I know the real story is in how you fulfill the requirements. Sure I believe in consideration, but the game is in what you call it, what satisfies the concept of consideration. Keep your theory. I'll expand it within conventional definitions. It might even turn out to be an additional effacement. So now, Cardozo turns to an examination of the New York charitable subscription cases themselves to discern more accurately how they have actually been treated.

*We have said that the cases in this State have recognized this exception, if exception it is thought to be. Thus, in Barnes v. Perine (12 N. Y. 18) the subscription was made without request, express or implied, that the church do anything on the faith of it. Later, the church did incur expense to the knowledge of the promisor, and in the reasonable belief that the promise would be kept. We held the promise binding, though consideration there was none except upon the theory of a promissory estoppel. In Presbyterian Society v. Beach (74 N. Y. 72) a situation substantially the same became the basis for a like ruling. So in Roberts v. Cobb (103 N. Y. 600) and Keuka College v. Ray (167 N. Y. 96) the moulds of consideration as fixed by the old doctrine were subjected to a like expansion. Very likely, conceptions of public policy have shaped, more or less subconsciously, the rulings thus made. Judges have been affected by the thought that "defences of that character" are "breaches of faith toward the public, and especially toward those engaged in the same enterprise, and an unwarrantable disappointment of the reasonable expectations of those interested" (W. F. ALLEN J., in Barnes v. Perine, supra, page 24). The result speaks for itself irrespective of the motive. Decisions which have stood so long, and which are supported by so many considerations of public policy and reason, will not be overruled to save the symmetry of a concept which itself came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure (8 Holdsworth, History of English Law, et seq.). The concept survives as one of the distinctive features of our legal system. We have no thought to suggest that it is obsolete or on the way to be abandoned. As in the case of other concepts, however, the pressure of exceptions has led to irregularities of form.*

**We have said that the cases in this State have recognized this exception, if exception it is thought to be. Remember, also, that the exception**

is a reference to the middle of the preceding paragraph. The exception, "what is styled 'a promissory estoppel,'" is an "exception to [the] ordinary requirements" of consideration. It is sometimes also called "a substitute for consideration." Notice the grudging reluctance to term promissory estoppel an exception—"if exception it is thought to be." Perhaps the argument will demonstrate that promissory estoppel will become another historical example of the expansion of consideration theory, rather than simply an exception to it. (Gilmore suggested that consideration doctrine, in Cardozo's hands, was "so broadened as to have become meaningless.")<sup>47</sup> And finally, we are to analyze this exception to the consideration doctrine by looking at charitable subscription cases. We will no longer ask whether enforcement of the cases "can be squared with the doctrine of consideration in all its ancient rigor," but whether they "can be squared with . . . consideration" as qualified by promissory estoppel. There is a certain surface confusion here. But let us plunge on.

Thus, in *Barnes v. Perine*, he tells us, the subscription was made without request . . . that the church do anything on the faith of it. Later, the church did incur expense to the knowledge of the promisor, and in the reasonable belief that the promise would be kept. Hardly a promising scenario for conventional consideration enforcement. Nevertheless, [w]e held the promise binding, though consideration there was none except upon the theory of promissory estoppel.<sup>48</sup> In *Presbyterian Society v. Beach*, it was substantially the same, and so in the last two cases, *Roberts* and *Keuka College*,<sup>49</sup> the moulds of consideration as fixed by the doctrine were subjected to a like expansion. Cardozo says we did not use rigorous consideration doctrine; we used consideration doctrine as expanded by promissory estoppel, and so enlarged the scope of the traditional doctrinal scheme.

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47. *Id.*

48. For a different reading of these cases than Cardozo's assertion that promissory estoppel applied, see Snyder, *Promissory Estoppel in New York*, 15 BROOKLYN L. REV. 27, 34-44 (1948).

49. In *Barnes v. Perine*, 12 N.Y. 18 (1854), the defendant was liable for the amount he pledged toward a fund for the construction of a new church building, where the fund induced church elders to demolish their old building. Similarly, *Presbyterian Soc'y v. Beach*, 74 N.Y. 72 (1878) held that defendant's knowledge that his subscription was to be used for a specified purpose and that plaintiff was fulfilling that purpose constituted sufficient consideration to enforce payment. *Roberts v. Comb*, 103 N.Y. 600 (1886) held that a promise to contribute to the discharge of a church's mortgage was enforceable where the church agreed to raise a specified amount from other subscribers in consideration for the defendant's promise. Lastly, *Keuka College v. Ray*, 167 N.Y. 96 (1901) held that the defendant's subscription was enforceable where the plaintiff performed services at the invitation or request of the subscriber.



Then, somewhat out of the blue, Cardozo offers a public policy explanation for this "expansion" of consideration doctrine. Very likely, conceptions of public policy, have shaped more or less subconsciously, the rulings thus made. What does that mean? Why do we need a public policy justification at this point in the argument? And, what is the public policy? He does not tell us precisely what the public policy is. He provides a clue however, in the next sentence: Cardozo, quoting from the *Barnes* opinion, observes that judges have been affected by the thought that "defences of that character" are "breaches of faith towards the public, and especially towards those engaged in the same enterprise, and an unwarrantable disappointment of the reasonable expectations of those interested." When donors have decided to withdraw promised gifts, they have sometimes used consideration doctrine as a legal defense, arguing that their promises were not enforceable because of lack of consideration. As a result, the expectations of the charitable institutions may have occasionally been disappointed.

Cardozo implicitly seems to be saying that we want to encourage donations to schools and colleges, and we want to promote private, philanthropic giving as a matter of public policy. What motivates the holdings in the charitable subscriptions cases is the desire to make it possible for schools and churches to reap the harvest. We do not want to allow donors to change their minds and expose such institutions to financial uncertainties in planning and relying on gifts.<sup>50</sup> In other words, Cardozo suggests, one of the reasons we loosened up the rigorous consideration doctrine in this instance in New York was because of an important "public policy." The real world has intruded into the thicket of formal doctrine. Progress has reared its head. In any event, Cardozo has identified a policy factor that may help explain why the New York courts have relaxed the rigorous consideration theory. However, the result speaks for itself irrespective of the motive. That is, for whatever reason, we must face the unassailable evidence that at least in this class of cases an exception has been allowed into the otherwise tight fortress of consideration.

**Decisions which have stood so long and which are supported by so many considerations of public policy and reason, that is decisions which enforce charitable subscriptions, will not be overruled to save the symme-**

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50. Occasionally the argument is made that the social policy may be self-defeating since it may provide a disincentive for people to make charitable contributions: "The frequent argument that the societal interest in eleemosynary activities explains the distinctive legal treatment of charitable promises is not convincing. The social benefit from promise-making would be similarly impaired if enforcement led to restraints on future charitable promises." Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 *YALE L.J.* 1261, 1307 (1980).

try of a concept—the concept being consideration doctrine—which itself came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure. In another subtle critique of the standard doctrine, Cardozo tells us that consideration is not all that it is cracked up to be, it might even be an historical anomaly! Cardozo has demonstrated that all these charitable subscription decisions, based on sound public policy, create a completely defensible “exception” to consideration theory. Therefore, we will not allow this concept of consideration (whose birth, heritage, and legitimacy he now challenges, only shortly after having reassured us about the integrity of the formal doctrine) to prevail simply to preserve the symmetry of the consideration “concept.” Rather, we will expand the doctrine and bend it a little; in fact, by the end of this opinion we will turn it into a pretzel.

The concept, again the concept of consideration, survives as one of the distinctive features of our legal system. Now he is about to rehabilitate consideration just after he has damaged it. First he tells us consideration may be an historical accident, then he tells us it is a distinctive feature of our law. It is possible he is being consistent. We have many distinctive accidents in our legal system. We have no thought to suggest that it is obsolete or on the way to be abandoned. The whole purpose of the previous paragraph was to show the way in which standard consideration has been undermined. Or at least, it showed that consideration is on the way to being recast, if not formally abandoned.<sup>51</sup> But, Cardozo says, we do not even want to suggest such an idea—the thought has not occurred to us. Cardozo, at his most subversive, at the last moment, calms our fears: **As in the case of other concepts, however, the pressure of exceptions has led to irregularities of form.** This is something any good lawyer would understand. The concept becomes distorted once we determine that it cannot fit all the problems and all the situations. Exceptions begin to develop, for after all, the common law is expanding and evolving. Now our new consideration theory will incorporate charitable subscriptions even though it offends conventional consideration doctrine, as I suppose it also offends judges who believe in it.<sup>52</sup>

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51. For a while, New York actually flirted with the idea of doing away with the consideration requirement. In 1937, a statute intending to abolish the doctrine of consideration passed the New York legislature but was vetoed by Governor Lehman “upon urgent representations from bench, bar, and business organizations that the great commercial fabric of the Empire State was unprepared for so radical a change without opportunity for study and discussion.” Thompson, *Some Current Economic and Political Impacts in the Law of Contracts*, 26 CORNELL L.Q. 4, 7 & n.14 (1940).

52. See, e.g., *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 379-82, 159 N.E. 173, 177-78 (1927) (Kellogg, J., dissenting); see also G. GILMORE, *supra* note 1, at 75.

*It is in this background of precedent that we are to view the problem now before us. The background helps to an understanding of the implications inherent in subscription and acceptance. This is so though we may find in the end that without recourse to the innovation of promissory estoppel the transaction can be fitted within the mould of consideration as established by tradition.*

Finally, he tells us what he is going to do. Even though promissory estoppel has been recognized as an exception to consideration doctrine for purposes of enforcing charitable subscriptions in New York, he is not going to use it. Promissory estoppel might be very helpful, but he can get by with standard consideration doctrine. In effect, he says, I can show you that if you adopt a theory more or less like the one in *Hamer v. Sidway*, I can make the charitable subscription cases fit within the traditional "mould." I don't need promissory estoppel. Watch me. Now at this point, and up until this point, he has been accused of going from "consideration to promissory estoppel to consideration . . . to promissory estoppel . . ." <sup>53</sup> In other words, he oscillates and wavers. I think that is a misreading. As his emphasis at the beginning of this paragraph suggests, to this point Cardozo seems primarily concerned with presenting "[t]he background of precedent," so that we will understand that, at least in his hands, consideration doctrine is a more open and flexible concept than is usually appreciated. What he has attempted to demonstrate is the manner in which consideration doctrine has evolved historically. That is all he is trying to do—provide us with a rather elementary history lesson. Cardozo, in effect, argues that the established traditional definition of consideration has been modified over time. The landmarks have shifted, and the signs of the road have been altered somewhat. Cardozo is not using promissory estoppel at this point to try to prove that promissory estoppel ought to be applied in this particular charitable subscription case. Instead, he is using promissory estoppel to show us that there is evidence that traditional consideration doctrine is not as tight as it once was. An historical argument is being developed. Cardozo is trying to convince us that the doctrine has responded to some pressure for change, that it has been infused with notions that perhaps it originally did not contain, that it has been eroded over time. As an historical matter, promissory estoppel is only evidence of that erosion—a stage in the historical advance, an example of doctrinal accommodation. And as he prepares the foundation, Cardozo is also lending legitimacy to the task that he is

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53. Lipson, *supra* note 26, at 11.

about to undertake. He is going to show by his manipulation of the consideration doctrine that almost anything can fit into it, making it essentially, by Grant Gilmore's calculation, "meaningless."<sup>54</sup> In establishing the groundwork for the task he is about to embark on, Cardozo reminds us of the secure pattern of the evolutionary character of legal doctrine. So now that we know the historical nature of the doctrinal inroads, we can proceed to an evaluation of what consideration doctrine can actually do for us today. We have accounted for the wavering doctrine. We will now set sail in search of consideration.

*The promisor wished to have a memorial to perpetuate her name. She imposed a condition that the "gift" should "be known as the Mary Yates Johnston Memorial Fund." The moment that the college accepted \$1,000 as a payment on account, there was an assumption of a duty to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly in the spirit of its creation. The college could not accept the money, and hold itself free thereafter from personal responsibility to give effect to the condition (1 Williston, Contracts, §§ 90, 370). More is involved in the receipt of such a fund than a mere acceptance of money to be held to a corporate use. The purpose of the founder would be unfairly thwarted or at least inadequately served if the college failed to communicate to the world, or in any event to applicants for the scholarship, the title of the memorial. By implication it undertook, when it accepted a portion of the "gift," that in its circulars of information and in other customary ways, when making announcement of this scholarship, it would couple with the announcement the name of the donor. The donor was not at liberty to gain the benefit of such an undertaking upon the payment of a part and disappoint the expectation that there would be payment of the residue. If the college had stated after receiving \$1,000 upon account of the subscription that it would apply the money to the prescribed use, but that in its circulars of information and when responding to prospective applicants it would deal with the fund as an anonymous donation, there is little doubt that the subscriber would have been at liberty to treat this statement as the repudiation of a duty impliedly assumed, a repudiation justifying a refusal to make payments in the future.*

The promisor wished to have a memorial to perpetuate her name. She imposed a condition, that's the first trouble sign, that the "gift" should "be known as the Mary Yates Johnston Memorial Fund." She imposed a condition. What follows legally from imposing a condition to

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54. G. GILMORE, *supra* note 14, at 62.

a "gift"? The classification seems ambiguous, perhaps contradictory. Notice Cardozo put "gift" in quotation marks (perhaps quoting the reverse side of the pledge card), apparently as a signal that he is unwilling to accept its legal connotation. If it is a "gift," or a "condition" to a "gift," we have a long way to go even if we intend to fit the transaction into the ever expanding "mould" of consideration. Promises to make gifts tend not to be enforceable promises, even if we wish to cast acceptance of the "condition" as a promise itself to abide by the condition. **The moment that the college accepted \$1,000 as a payment on account, there was an assumption of a duty to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly in the spirit of its creation.** The one-sentence condition that the fund be named in memory of Mary Yates Johnston has been converted into a possible series of unnamed duties. When the college accepts the money, it accepts the condition, and the condition seems to have been instantaneously and magically transformed into a duty. Cardozo now moves to foreclose the possibility that the implied condition in the pledge is a pure expression of gratuitous intent. In other words, in place of a gratuitous condition for receiving the gift, Cardozo finds a duty to be performed by the college.<sup>55</sup>

What is Cardozo up to? He is trying to take this case out of the realm of gratuitous intent and place it into the mechanics of bargain. Cardozo is looking either for an implied promise or duty to abide by the "condition" (a kind of exchange), or some sort of detriment. It appears that he is trying to figure out a way to find consideration, but how do we find consideration? Perhaps as in *Hamer*, either in detriment to the promisee or benefit to the promisor. Apparently, he is setting up the likelihood that this condition is, once accepted, actually a duty, and therefore can be implied as a promise to carry out the duty. Or perhaps the duty may in short order amount to a detriment sufficient for us to say a legal consideration is present. **The college could not accept the money, and hold itself free thereafter from personal responsibility to give effect to the condition.** Again he cites Williston (along with some New York cases) for the proposition. But the statement is fraught with moral overtones. Once the college takes the money, it accepts some sort of "responsibility." Whether the responsibility is moral or legal or both is not clear. But the college is bound in some sense. **More is involved in the receipt of such a fund than a mere acceptance of money to be held to a corporate use.** A "mere acceptance" underestimates the responsibility—what ex-

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55. See E. FARNSWORTH, *supra* note 35, § 2.9, at 61-62.

actly the responsibility is again is not clear, though responsibility implies that one is bound to do something, even in the absence of a specific promise.

The purpose of the founder would be unfairly thwarted or at least inadequately served if the college failed to communicate to the world, or in any event to applicants for the scholarship, the title of the memorial. By implication, because, of course, nothing specifically was ever said, it undertook, when it accepted a portion of the "gift", that in its circulars of information and in other customary ways, when making announcement of this scholarship, it would couple with the announcement the name of the donor. What is the duty? Or perhaps the detriment? That the college has to assume the responsibility for communicating to the world that Mary Yates Johnston has given money to fund this scholarship, when and if the college announces its availability? Cardozo conveniently assumes the money brought with it some implied duties and responsibilities, almost sounding in promise. Of course, "implication" is the linchpin of the analysis, pushing it toward some identifiable legal doctrine. Why? Because the parties apparently never actually said anything to each other on the subject, and so Cardozo is free to say for them whatever will help establish his point.

Now Cardozo begins to deal with the responsibilities of the donor—for two reasons I think. First, to establish that this transaction might look like a mutual exchange leading towards promises and consideration, and second, to suggest that the transaction was of some benefit to the promisor and, as such, might be an independent source of consideration. **The donor was not at liberty to gain the benefit of such an undertaking upon the payment of a part and disappoint the expectation that there would be payment of the residue.** Why is that important? Because it is more evidence of Cardozo's insistent use of the bilateral battering ram. If the donor cannot withdraw the "residue" of the offer after the college has started the "undertaking," it must be because they both are obligated to each other. As a result, the "expectation" would be violated if the promise to pay the money were unfulfilled, particularly since we imply that the college assumed the duty. Perhaps the point is that the donor is bound by the promise to give *all* the money (particularly if the college carries out its "duty"), and a failure to do so, assuming consideration is present, would be a violation of the promise, and a breach of contract.<sup>56</sup>

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56. Of course, it is possible that Cardozo has something else in mind here—his own unique form of unilateral contract analysis. If the college is assuming an implied duty of some sort to perform, and by implication is engaging in part performance, then Cardozo might be arguing that the donor/

If the college had stated after receiving \$1,000 upon account of the subscription that it would apply the money to the prescribed use, but that in its circulars of information and when responding to prospective applicants it would deal with the fund as an anonymous donation, there is little doubt that the subscriber would have been at liberty to treat this statement as a repudiation of the duty impliedly assumed,—we have now gone from condition to duty to impliedly assumed duty—a repudiation justifying a refusal to make payments in the future. That is, the donor of that money would be free to say “I will make no more payments.”

*Obligation in such circumstances is correlative and mutual. A case much in point is N. J. Hospital v. Wright (95 N. J. L. 462, 464), where a subscription for the maintenance of a bed in a hospital was held to be enforceable by virtue of an implied promise by the hospital that the bed should be maintained in the name of the subscriber. A parallel situation might arise upon the endowment of a chair or a fellowship in a university by the aid of annual payments with the condition that it should commemorate the name of the founder or that of a member of his family. The university would fail to live up to the fair meaning of its promise if it were to publish in its circulars of information and elsewhere the existence of a chair or a fellowship in the prescribed subject, and omit the benefactor's name. A duty to act in ways beneficial to the promisor and beyond the application of the fund to the mere uses of the trust would be cast upon the promisee by the acceptance of the money. We do not need to measure the extent either of benefit to the promisor or of detriment to the promisee implicit in this duty. “If a person chooses to make an extravagant promise for an inadequate consideration it is his own affair” (8 Holdsworth, History of English Law, p. 17). It was long ago said that “when a thing is to be*

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promisor is now obligated to carry out her portion of the bargain by handing over the full payment. Once you start performance in some form of reliance on the offer (i.e. by announcing the scholarship or agreeing to circulate information about it), you are guaranteed that if you complete performance, thereby accepting the offer, then the other party is required to carry out its obligations. This may be vaguely akin to what used to be known in the language of Section 45 of the first Restatement as the “offer for a unilateral contract” situation. If you begin performance looking toward acceptance of an offer for a unilateral contract, the promisor cannot revoke the offer before the full consideration is tendered. Acceptance can therefore be accomplished by completed performance. See RESTATEMENT (FIRST) OF CONTRACTS § 45 (1932); see also RESTATEMENT (SECOND) OF CONTRACTS § 45 comment a (1979).

For further elaboration of the complexity, if not chaos, inherent in various unilateral contract scenarios, see Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136 (1916). Wormser later modified his views. See Wormser, *Book Review*, 3 J. LEGAL ED. 145 (1950). Knapp and Crystal do an excellent job of tracing the doctrinal evolution of unilateral contract offers, especially the impact of Section 45 of the Restatement. See C. KNAPP & N. CRYSTAL, *supra* note 8, at 184-97. See generally Pettit, *Modern Unilateral Contracts*, 63 B.U.L. REV. 551 (1983).

done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action" (*Sturlyn v. Albany*, 1587, *Cro. Eliz.* 67, quoted by *Holdsworth, supra*). The longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good.

**Obligation in such circumstances is correlative and mutual.** What does that mean? It means we have returned to the secure and relatively unproblematical world of bilateral contracts. It looks like Cardozo is saying, I have found it, I have found mutuality. I have found correlative duty.<sup>57</sup> I may still be having trouble finding consideration, but something impliedly mutual is occurring. Both parties must be bound or neither is bound,<sup>58</sup> and Cardozo is asserting that in this case, in this situation, both parties are bound. One party is bound to conform to the promise to give the amount, the other party is bound under its assumption of implied duty to conform to the terms running with the condition. If one party breaches, the other party could sue, and it does not matter which party breaches. He seems to be arguing that if mutuality is present, then consideration must also be present, because mutuality is evidence of the exchange of promises. A case much in point, *N.J. Hospital v. Wright*,<sup>59</sup> illustrates his mutuality point, as well as does his reference to the "parallel situation" of the endowed chair or fellowship in the university. The "condition" is that the benefactor's name be commemorated, or "the fair meaning of its "promise" would be violated, if the name were not mentioned when information was circulated. The promises, actual or implied, set up a mutuality, almost an intended exchange. But we are about to accelerate at a dizzying speed.

**A duty to act in ways beneficial to the promisor and beyond the**

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57. Mutuality was an issue in the New York courts of the time. See *Oscar Schlegel Mfg. Co. v. Peter Cooper's Glue Factory*, 231 N.Y. 459, 132 N.E. 148 (1921) ("requirement" contract consisting solely of letter written by sales manager of the defendant company to the plaintiff company lacked mutuality where obligation assumed by defendant was to pay a certain price per pound for glue if any should be ordered).

58. See, e.g., *id.*

The RESTATEMENT (SECOND) OF CONTRACTS § 79(c) (1979) reflects a different approach today: "If the requirement of consideration is met, there is no additional requirement of . . . (c) 'mutuality of obligation.'" Comment f states that "[t]he word 'mutuality' though often used in connection with the law of Contracts, has no definite meaning," and the statement "[b]oth parties must be bound or neither is bound," "is obviously erroneous as applied to an exchange of promise for performance," as well as the class of contracts without consideration.

59. 95 N.J.L. 462, 113 A. 144 (1921) (where defendant stipulated that her charitable contribution be applied to building an operating room, and the plaintiff hospital sought and obtained a waiver of a similar privilege held by another contributor, there was sufficient evidence for the jury to find consideration for defendant's promise to contribute to plaintiff's building fund).



application of the fund to the mere uses of the trust would be cast upon the promisee by the acceptance of the money. Cardozo has done two things there. He has transformed the duty to act, which might be a detriment to the promisee, into a benefit to the promisor, and normally, under cases like *Hamer*, we need only one of those elements, detriment to the promisee or benefit to the promisor. But he has also turned the inquiry around. It looked at first like Cardozo would be satisfied with merely implying a duty, because that might mean detriment, but apparently he is not willing to settle for just duty or implied duty.

We do not need to measure, he says, the extent either of benefit to the promisor or of detriment to the promisee implicit in this duty. That is, we do not want to inquire as to how much benefit or detriment there is. I am having enough trouble, he seems to be saying, trying to make the argument that there is any at all. In *Hamer v. Sidway*, if Cardozo had wished to recall, the court had said that it did not have to get involved in whether or not there was any benefit to the promisor, Uncle Willie. All the *Hamer* court was concerned about was whether or not Willie's nephew suffered a detriment. But the *Hamer* court also said that perhaps it could find some sort of benefit to the promisor in that case: "[W]ere it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense."<sup>60</sup> Precisely what would the benefit to the promisor have been? Probably not an economic benefit; but perhaps it was psychological (Uncle Willie's motivation for the promise to reward his nephew for refraining from bad habits). Uncle Willie felt good at accomplishing the goal—pointing the way toward an upstanding life. Whatever the benefit was, there may not have been much that was measurable or identifiable in the benefit, but even an ephemeral benefit appeared to satisfy the requirements of consideration in New York.

Let us see what Cardozo has to say about the extent of the benefit to the promisor or the detriment to the promisee. First he justifies his refusal to measure the amount of benefit or detriment by his assertion that "[i]f a person chooses to make an extravagant promise for an inadequate consideration it is his own affair." This is standard hornbook learning: we do not generally inquire into the adequacy of consideration. Once we establish that there is an implied duty or a benefit, we are not required to measure either, nor to make sure that they are adequate in the balance—any amount will do.

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60. *Hamer v. Sidway*, 124 N.Y. at 546, 27 N.E. at 257.

Cardozo then cites a case from 1587, a chestnut having survived almost three hundred and fifty years: It was long ago said that "when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action." What is the principle here? The principle, and the irony, is that the standard doctrine that we will not inquire into adequacy of consideration is one of the cornerstones of the noninterventionist tendency in consideration doctrine. We will not investigate or supervise individual bargains in most circumstances. Cardozo is using the principle of nonintervention now in a totally disingenuous (dare I use that word again?) way. He is applying formal doctrine to relax the concept of consideration. In effect, he is saying that even when we alter the contours of consideration doctrine by implying duties and promises, we still follow the old rules that do not permit an inquiry into the adequacy of consideration. Thus, almost anything will stand for consideration—even the most limited and attenuated duties and promises, shielded from scrutiny, will become enforceable. It was an instrumental use of formal doctrine—maybe Cardozo was capable of cynicism.

Then we come to a quintessential Cardozo sentence. (It is hard to read this one without weakening; in the constellation of Cardozo sentences this is right up there with the "willful transgressor" who "may hope for mercy if he will offer atonement for his wrong.")<sup>61</sup> **The longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good.** What does Cardozo mean? He means that in searching for the benefit to the promisor he is perfectly willing to consider totally subjective elements like whether Uncle Willie, in *Hamer*, felt better from seeing his nephew not drink. Cardozo is now willing to consider whether there are noneconomic elements, subjective elements, sufficient to constitute a benefit to the promisor—for instance, whether Mary Yates Johnston felt good knowing that there would be a fund in her name at Allegheny College.<sup>62</sup> In other words, says Cardozo, if we are really serious about defining consideration, I will show you consideration where you never saw it before, where you never imagined it could exist. That is the whole purpose of the exercise. I will fill it out just the way you want it, and I will cite Williston and Langdell, and Holmes as justification. I will even wrap this subjective benefit the-

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61. *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. at 244, 129 N.E. at 891.

62. See J. DAWSON, *GIFTS AND PROMISES* 206 (1980) ("[I]f the performance promised will promote some commendable cause, this may inspire an intensive search for some hidden, self-serving motive that will make a gift look like an exchange."). Dawson states it is "compulsory" to cite *Allegheny College* in support of this proposition. *Id.* at n.22

ory under the protective cloak of objective "adequacy" theory, thus insuring that it is protected from scrutiny by the anti-monitoring mechanisms approved by Holmes. Now what have we got? What does this entire paragraph mean? Does it mean that we have consideration? That we have a detriment to the promisee and/or a benefit to the promisor? We have condition turned into duty, we have benefits to promisors, we have mutuality. Is he suggesting here that there is a bargain? Is that what this is all about? Who knows? Let us read on.

*We think the duty assumed by the plaintiff to perpetuate the name of the founder of the memorial is sufficient in itself to give validity to the subscription within the rules that define consideration for a promise of that order. When the promisee subjected itself to such a duty at the implied request of the promisor, the result was the creation of a bilateral agreement (Williston, Contracts, §§ 60-a, 68, 90, 370). There was a promise on the one side and on the other a return promise, made, it is true, by implication, but expressing an obligation that had been exacted as a condition of the payment. A bilateral agreement may exist though one of the mutual promises be a promise "implied in fact," an inference from conduct as opposed to an inference from words (Williston, Contracts, §§ 90, 22-a). We think the fair inference to be drawn from the acceptance of a payment on account of the subscription is a promise by the college to do what may be necessary on its part to make the scholarship effective. The plan conceived by the subscriber will be mutilated and distorted unless the sum to be accepted is adequate to the end in view. Moreover, the time to affix her name to the memorial will not arrive until the entire fund has been collected. The college may thus thwart the purpose of the payment on account if at liberty to reject a tender of the residue. It is no answer to say that a duty would then arise to make restitution of the money. If such a duty may be imposed, the only reason for its existence must be that there is then a failure of "consideration." To say that there is a failure of consideration is to concede that a consideration has been promised since otherwise it could not fail. No doubt there are times and situations in which limitations laid upon a promisee in connection with the use of what is paid by a subscriber lack the quality of a consideration, and are to be classed merely as conditions (Williston, Contracts, § 112).*

We think the duty assumed by the plaintiff to perpetuate the name of the founder of the memorial is sufficient in itself to give validity to the subscription within the rules that define consideration for a promise of that order. Now we return to duty, the implied duty to abide by the implied additional terms that flow from the condition; the assumption of

that responsibility is sufficient as a legal duty to provide consideration. Now why does Cardozo return to the duty of the college? Because he has a problem here, as earlier, in the dissent. The dissent is proclaiming that, at the very most, there is a unilateral contract.<sup>63</sup> What does Cardozo have to show in order to rebut that argument? He has to show that there is a bilateral agreement—promises supported by consideration. How does he show that?

When the promisee subjected itself to such a duty at the implied request of the promisor, the result was the creation of a bilateral agreement. Then Cardozo cites Williston again. There was a promise on the one side and on the other a return promise, made, it is true, by implication, then Cardozo picks up momentum, but expressing an obligation that had been exacted as a condition of the payment. Now, let us read on for a second.

A bilateral agreement may exist though one of the mutual promises be a promise "implied in fact," an inference from conduct as opposed to an inference from words. Williston once again.<sup>64</sup> We think the fair inference to be drawn from the acceptance of a payment on account of the subscription is a promise by the college to do what may be necessary on its part to make the scholarship effective. The plan conceived by the subscriber will be mutilated and distorted unless the sum to be accepted is adequate to the end in view. All right, pretty strong words, "mutilated and distorted" for such a simple duty. Moreover, the time to affix her name to the memorial will not arrive until the entire fund has been collected. The college may thus thwart the purpose of the payment on account if at liberty to reject a tender of the residue. He has turned the world upside down, has he not? Now all the burden is on the college. It is no answer to say that a duty would then arise to make restitution of the money. In other words, what would happen if the college breached? If

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63. In his dissent, Kellogg is very careful to point out that even if an offer to enter into a unilateral contract was present, the college never accepted the offer and, therefore, there was no contract. 246 N.Y. at 380, 159 N.E. at 177.

64. The ideas and language here may also have been drawn in part from the Keuka College case:

[The question of enforceability in charitable subscription cases may be reduced to] whether the agreement which is sought to be enforced, and which is a voluntary promise on the part of the defendant, expressly or impliedly, either imposes upon the promisee some obligation, which is assumed, or requests of the promisee the performance of services, which are to be performed upon the strength of the promise . . . . Nor need a request to the promisee to perform the services be expressed in the instrument; it may be implied.

Keuka College v. Ray, 167 N.Y. 96, 99-100 (1901).

the college has an implied duty, and if it can violate it, then there must be a detriment to the promisee. The reason there must be detriment is because there must be consideration, because if there is consideration, you can sue the other party. If you can sue the other party, then there must be a contract. That is why we are being led down the path.

In effect, Cardozo is trying to buttress his bilateral contract argument by demonstrating that both parties have obligations to each other which may be frustrated in their own way by each. A duty "to make restitution" is no answer, because there must be some reason for that "duty." The "duty" must be grounded in the relationship between the parties. A gift, condition to a gift, or a unilateral contract does not impose a "duty." What does? Cardozo's bilateral contract is found in the exchange of promises, even if implied, between the parties.

If such a duty may be imposed, he says, the only reason for its existence must be that there is then a failure of "consideration." To say that there is a failure of consideration is to concede that a consideration has been promised since otherwise it could not fail. No doubt there are times and situations in which limitations laid upon a promisee in connection with the use of what is paid by a subscriber lack the quality of a consideration, and are to be classed merely as conditions. Now, at this late hour, we return to Williston for justification and for insight into the particularly difficult problem of distinguishing between a mere condition to a gift and consideration. Having established the parameters of a bargained for exchange supported by consideration, Cardozo now fends off the original problem with which he began—is this consideration or a condition to a gift? Cardozo invokes Williston's tramp case to get him out of the bind.

*"It is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which construction of the promise is more reasonable is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration" (Williston, supra, § 112). Such must be the meaning of this transaction unless we are prepared to hold that the college may keep the payment on account, and thereafter nullify the scholarship which is to preserve the memory of the subscriber. The fair implication to be gathered from the whole transaction is assent to the condition and the assumption of a duty to go forward with performance. The subscriber does not say: I hand you \$1,000, and you may make up your mind later, after my death, whether you will un-*

*dertake to commemorate my name. What she says in effect is this: I hand you \$1,000, and if you are unwilling to commemorate me, the time to speak is now.*

**"It is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which construction of the promise is more reasonable is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration."<sup>65</sup>** The condition is consideration if it was a benefit to the promisor. Do not forget that in the preceding paragraph Cardozo has attempted to demonstrate how the promise to fund a memorial scholarship could be of benefit to Mary Johnston. She received subjective benefit out of it. She felt good. It was important to her. Thus, even if we do not believe that there is an implied duty on the part of the college, it could be that the condition is converted into consideration because it is of some benefit to the promisor.

**Such must be the meaning of this transaction unless we are prepared to hold that the college may keep the payment on account, and thereafter nullify the scholarship which is to preserve the memory of the subscriber. That would be unfair, or at least not nice behavior, and one-sided. Certainly the interaction is susceptible to analysis more consistent with understandings in the real world. The fair implication to be gathered from the whole transaction is assent to the condition and the as-**

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65. Williston's example is as follows:

If a benevolent man says to a tramp,—“if you go around the corner to the clothing shop there, you may purchase an overcoat on my credit,” no reasonable person would understand that the short walk was requested as the consideration for the promise, but that in the event of the tramp going to the shop the promisor would make him a gift. Yet the walk to the shop is in its nature capable of being consideration. It is a legal detriment to the tramp to take the walk, and the only reason why the walk is not consideration is because on a reasonable interpretation, it must be held that the walk was not requested as the price of the promise, but was merely a condition of a gratuitous promise.

It is often difficult to decide whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which interpretation of the promise is more reasonable, is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration. On the other hand, if, as in the case of the tramp stated above, the happening of the condition will be not only of no benefit to the promisor but is obviously merely for the purpose of enabling the promisee to receive a gift, the happening of the event on which the promise is conditional, though brought about by the promisee in reliance on the promise, will not be interpreted as consideration.

WILLISTON, CONTRACTS § 112 (3d ed. 1957).

sumption of a duty to go forward with performance. Finally, desperate Cardozo cites, among others, Corbin. The subscriber does not say: (and here is the real offer and acceptance problem) I hand you \$1,000, and you may make up your mind later, after my death, whether you will undertake to commemorate my name. What she says in effect is this: I hand you \$1,000, and if you are unwilling to commemorate me, the time to speak is now. In other words, Cardozo is saying that the acceptance must have been made at the moment the offer, if it was an offer, was tendered. The acceptance consisted of an implied promise manifested by the act of taking the money, which was a portion of the total promised amount. The acceptance was made with an implied promise that is just like an implied duty.<sup>66</sup> Therefore, offer and acceptance transpired during the subscriber's lifetime, and we are not faced with the problem of an unaccepted offer lapsing with the death of the subscriber. The implied promise is the promise to conform to the terms of the condition, or to accept the terms of the implied duty. That is the best Cardozo could do because, needless to say, the parties never engaged in any actual give and take. They never engaged in a formal bargain, an exchange of offer and acceptance, such as theoretically transpires in a commercial bargaining or exchange situation. As Cardozo said in another context, though, there is "an air of unreality"<sup>67</sup> about his reconstruction of the legal consequences of the minimal interaction between the parties.<sup>68</sup>

*The conclusion thus reached makes it needless to consider whether, aside from the feature of a memorial, a promissory estoppel may result from the assumption of a duty to apply the fund, so far as already paid, to special purposes not mandatory under the provisions of the college charter (the support and education of students preparing for the ministry), an assumption induced by the belief that other payments sufficient in amount to make the scholarship effective would be added to the fund thereafter upon the death of the subscriber (Barnes v. Perine, 12 N. Y. 18, and cases there cited).*

This is not a promissory estoppel case or problem, Cardozo says.

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66. Cardozo was no stranger to implying promises. In fact, he seemed to like doing it. For example, "it is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied." *Wood v. Lucy, Lady-Duff Gordon*, 222 N.Y. at 90-91, 118 N.E. at 214.

67. *Kerr Steamship Co. v. Radio Corp. of Am.*, 245 N.Y. 284, 291, 157 N.E. 140, 142 (1927).

68. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 4 n.8 (1979) ("while enforcement in [cases involving donative promises to charitable institutions] is usually rationalized on either a bargain or reliance theory, often these theories are made to apply only by straining or distorting the transaction at hand.")

Why? Because the duty of the promisee became at least part of the consideration, particularly if the college assumed a duty over and above its mandatory duties under its charter. We do not need to get involved in the types of questions that typically are asked in a promissory estoppel situation. All we have to do is pursue consideration. Why not raise the types of questions that we normally ask in promissory estoppel situations—such as, in the language of the old Restatement—was there a promise reasonably inducing definite and substantial action?<sup>69</sup> Because we do not have any answers, and if we look closely at the conduct of the parties, we have promissory estoppel problems. It would be hard to find detrimental reliance on the part of the college. Detrimental reliance does not necessarily follow in this case from the assumption of a duty because it is difficult to isolate exactly what the college did in reliance on Mary Yates Johnston's promise, except perhaps to open a bank account to deposit her money—hardly a substantial change in position. Consideration might not follow either because we have had to struggle to find the elements of what looks like a bargained for exchange, by implying circumstances all over the place. Even if we were looking just for detriment or benefit, we would have had to reach. The fit in either instance is not comfortable. But at least there is more play in the consideration formula than in the relatively undeveloped terrain of promissory estoppel, even applied to charitable subscription cases, circa 1927. What emerges, believe it or not, is an exchange, a bargain—validated by the expanded “moulds” of standard consideration doctrine.

*The judgment of the Appellate Division and that of the Trial Term should be reversed, and judgment ordered for the plaintiff as prayed for in the complaint, with costs in all courts.*

### III. CONCLUSION

Exactly what was the problem that Cardozo faced in this case? Litigation is easiest when strong facts mesh with firm law, but a good lawyer can make do with either strong facts or firm law. At first blush, Cardozo had neither. It would have been very easy to turn the facts into a tawdry headline—“Grasping College Decimates Old Woman's Estate”—especially if Danzig's facts<sup>70</sup> had been in any way inferable from the record. And if anything was clear about classical contract law, it was that dona-

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69. See RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932).

70. See *supra* text accompanying notes 29-32.



tive promises were unenforceable. Some lawyers would have thrown in the towel at that point.

The questions posed on appeal by both parties focused on whether the pledge was supported by consideration and was therefore enforceable. There is no mention of *Hamer v. Sidway*, or *Holmes* for that matter, in either brief. Promissory estoppel is not mentioned at all in the college's brief; it is barely mentioned in the respondent's brief or the college's reply brief. Rather, the college's brief often stressed notions of reliance, or its "responsibility" to do certain vaguely defined things (like administering a fund).<sup>71</sup> This may have been so for a couple of reasons. The trial judge concluded that the college had acted in reliance only by "setting aside the \$1,000.00 towards the memorial fund."<sup>72</sup> The judge also found that, although the Johnston subscription was used to induce other subscriptions to the endowment fund, such use was not "done with knowledge of Mary Yates Johnston."<sup>73</sup> Thus, the trial judge cut the heart out of the factual basis of the substantial reliance arguments. Faced with these factual findings, the college chose to divide its consideration argument into two parts: first, that "the procurement of other subscriptions constituted a valid consideration . . ."<sup>74</sup> and second, that "the establishment of the Mary Yates Johnston Memorial Fund was a consideration . . ."<sup>75</sup> The "procurement of other subscriptions" argument was fraught with danger, not the least of which was that there seemed to be no evidence that the Johnston pledge was conditioned on other subscriptions to her specific fund, or for that matter, the college's general endowment fund. The college seemed to suggest that the Johnston pledge reduced the amount of money it would have to raise elsewhere, and that in reliance on her pledge, it had engaged in the forbearance of the opportunity to seek funds that she had already contributed to the general fund drive.<sup>76</sup>

How did Cardozo react to these arguments? In the briefs, the attorneys did not analyze the legal and factual issues as Cardozo eventually did. Although Cardozo used some of the legal sources found in the briefs, the legal argument in the opinion seems uniquely his. He ignored the college's argument for consideration based on procurement of other subscriptions, apparently finding it insufficient, and he went much further than the college did in elaborating its argument resting on the "establish-

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71. Appellant's Brief at 33.

72. Record at 44.

73. *Id.* at 38.

74. Appellant's Brief at 19.

75. *Id.* at 29.

76. *Id.* at 32-36.

ment of the Johnston fund as consideration.” The executor’s brief had quoted extensively from Williston’s incisive discussion of consideration and promissory estoppel in charitable subscription cases,<sup>77</sup> and concluded that “no element of estoppel here exists, no damage has been sustained or expense incurred or liability assumed on the strength of the promise in question.”<sup>78</sup> And again, *Hamer v. Sidway*, Holmes, and bargain theory as theory are not discussed by either party. But there may be a clue as to what motivated Cardozo to write as he did.

One of the lawyers for the bank, as executor of Mary Yates Johnston’s estate, was Robert H. Jackson, who within a decade or so was named Solicitor General of the United States, and then Associate Justice of the United States Supreme Court. Jackson represented the bank at trial and in oral argument before the Court of Appeals. The brief, though signed by all the attorneys for the respondent, is written in Jackson’s characteristic lively and assertive fashion. It is also witty, self-assured if not smug, and acerbic. Jackson’s tone conveyed agitated impatience with the college, casting college fund drives as oppressive, grasping, and intrusive devices; he referred somewhat contemptuously to “thrive by drive”<sup>79</sup> and “drivees.”<sup>80</sup> In part, Jackson may have been attempting to counter the college’s tone as it sought to characterize the repudiation of the pledge as some kind of moral failing.

In the end, Jackson may have been unduly provocative—suggesting for instance, that “[s]uch inventions as ‘implied requests’ and assumed compliance therewith, making a meritorious object itself supply the consideration, and other judicial dodges promises to keep the subject in confusion.”<sup>81</sup> Later, he ventured that “[t]he Court has not in the past, and probably will not now, invent fictitious considerations that invite the contempt of those who hope to see the law an honest, if not an exact science.”<sup>82</sup> In Appendix II, I have excerpted some of Jackson’s pithy statements, subdivided more or less by subject matter or theme. They deserve to see the light of day after all these years, but they also may help explain some of Cardozo’s opinion. There is a certain tension between Jackson’s pronouncements and Cardozo’s resolution of the doctrinal problems in the opinion. Jackson seems to be saying I dare you to justify the result in this case by engaging in the metaphysical mental gymnastics

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77. Respondent’s Brief at 19-22.

78. *Id.* at 23.

79. *Id.* at 24.

80. *Id.* at 28.

81. *Id.* at 16.

82. *Id.* at 24.

of consideration doctrine. It will be hypocritical and confusing to boot. There is no consideration here. Jackson may have overreached. Cardozo may simply have responded by saying, I will show you what I can do. And though he may have risen to the bait, Cardozo did so in his own reserved and hushed tones. I am not convinced this was the dynamic between them, but if you compare the excerpts from Jackson's brief and Cardozo's opinion, you might conclude something is percolating between them. Maybe it was not a good idea to suggest to Cardozo that "judicial dodges" or "fictitious considerations" were in the air. Maybe it was not a good idea to risk making Cardozo angry, if he could become angry. On the other hand, perhaps Cardozo thought Jackson's rhetoric was all within the accepted limits of lawyering.

At the same time, one should notice that as a judge with a mission—loosening up, maybe even disjuncting, the classical law of contracts, torts, etc.—Cardozo faced difficult conceptual problems and made substantial advances.<sup>83</sup> *Hamer* was hardly a secure precedent around which a great edifice had been erected. Indeed, it was more of a lighthouse than a castle. And promissory estoppel was hardly developed beyond the most classic of charitable subscription cases. With facts as weak as in *Allegheny College*, it would have been difficult for most judges to move the doctrine along in the direction that Cardozo wished. Normally, strong facts drag the doctrine with them. Yet, here again Cardozo's craft shows how much can be done with just a few raw materials, for he manages to push forward simultaneously on both doctrinal fronts. Simply by using *Hamer*, drawing a few inferences about the nature of reasonable conduct, and turning a piece of Holmes's objective theory on its head to create liability rather than limit it, Cardozo was able both to reinforce *Hamer* as a precedent and suggest a new and at the same time familiar way of thinking about what might be consideration. In so doing, Cardozo demonstrated that a formal exchange requirement might be "implied" or met in the most attenuated way.

By positioning, if only in dictum, promissory estoppel not as an ex-

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83. It is, of course, fair to ask—what was Cardozo's larger purpose in this and similar enterprises? As one of my colleagues, David Engel, observed of Cardozo's tort opinions, "What is all of this fancy dancing about?" Is Cardozo maintaining a pose of calculated uncertainty as a matter of personal or psychological style, instrumental strategy, or cosmic insight? Is he on a mission to alter the law of contracts in some particular direction? He is elusive. Why is an important question; an investigation of what he is trying to accomplish is significant. I leave that point to others, or other occasions. My aspiration in this essay was simply to unpack how he analyzed the legal problem, a subject of some dispute, and not to address why he did it the way he did in some fundamental epistemological sense.

ception to consideration doctrine, but squarely within it, Cardozo opened the possibility (though never realized by him or his court) that in the next case promissory estoppel could be found in a commercial circumstance. Bargain theory was used to make all doctrinal moves appear as mainstream as possible. To make such gains, in a two-front war with such poor troops on such unpromising terrain, bordered on the inspired.

What are we left with at the end of this opinion? The free-standing structure of the analysis looks something like this: After the statement of "facts," there is an opening foray of several paragraphs into the problem area of consideration doctrine in charitable subscription cases in New York, focusing on a definition of consideration. The conclusion is that whatever consideration is, it is, at the least, an expansive, flexible, and adaptable doctrine. Then, as evidence of that insight, the concept of promissory estoppel is introduced, not as an exception to consideration doctrine, but as a continuation of the process of enlarging it. In other words, promissory estoppel is used informatively, as an historical lesson, and instrumentally, as a means to expand consideration. The "background of precedent" allows Cardozo to fit charitable subscription cases into "the mould of consideration as established by tradition," but more particularly, by his understanding and reshaping of that tradition. The remainder of the opinion consists of a search for the factual components of consideration, not an easy search.

The result brings to mind again Professor Lipson's *Thaumatrope*, but this time after one more spin, it reveals Cardozo trapped by the facts of the case and the unsettled law, an image of a man in a cage.

## APPENDIX I

ALLEGHENY COLLEGE, Appellant, v. THE NATIONAL CHAUTAUQUA  
COUNTY BANK OF JAMESTOWN, as Executor of  
MARY Y. JOHNSTON,  
Deceased, Respondent.

246 N.Y. 369; 159 N.E. 173; 57 A.L.R. 980 (1927)

CARDOZO, Ch. J. The plaintiff, Allegheny College, is an institution of liberal learning at Meadville, Pennsylvania. In June 1921, a "drive" was in progress to secure for it an additional endowment of \$1,250,000. An appeal to contribute to this fund was made to Mary Yates Johnston of Jamestown, New York. In response thereto, she signed and delivered on June 15, 1921, the following writing:

"Estate Pledge,

"Allegheny College Second Century Endowment  
"JAMESTOWN, N. Y., *June 15, 1921.*

"In consideration of my interest in Christian Education, and in consideration of others subscribing, I hereby subscribe and will pay to the order of the Treasurer of Allegheny College, Meadville, Pennsylvania, the sum of Five Thousand Dollars; \$5,000.

"This obligation shall become due thirty days after my death, and I hereby instruct my Executor, or Administrator, to pay the same out of my estate. This pledge shall bear interest at the rate of . . . per cent per annum, payable annually, from . . . till paid. The proceeds of this obligation shall be added to the Endowment of said Institution, or expended in accordance with instructions on reverse side of this pledge.

"Name                   MARY YATES JOHNSTON,  
"Address                306 East 6th Street,  
  "Jamestown, N. Y.

"DAYTON E. McCLAIN   Witness

"T.R. COURTIS           Witness

"to authentic signature."

On the reverse side of the writing is the following indorsement: "In loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund, the proceeds from which shall be used to educate students preparing for the Ministry, either in the United States or in the Foreign Field.

"This pledge shall be valid only on the condition that the provisions of my Will, now extant, shall be first met.

"MARY YATES JOHNSTON."

The subscription was not payable by its terms until thirty days after the death of the promisor. The sum of \$1,000 was paid, however, upon account in December, 1923, while the promisor was alive. The college set the money aside to be held as a scholarship fund for the benefit of students preparing for the ministry. Later, in July, 1924, the promisor gave notice to the college that she repudiated the promise. Upon the expiration of thirty days following her death, this action was brought against the executor of her will to recover the unpaid balance.

The law of charitable subscriptions has been a prolific source of controversy in this State and elsewhere. We have held that a promise of that order is unenforceable like any other if made without consideration (*Hamilton College v. Stewart*, 1 N. Y. 581; *Presb. Church v. Cooper*, 112 N. Y. 517; *23rd St. Bap. Church v. Cornell*, 117 N. Y. 601). On the other hand, though professing to apply to such subscriptions the general law of contract, we have found consideration present where the general law of contract, at least as then declared, would have said that it was absent (*Barnes v. Perine*, 12 N. Y. 18; *Presb. Soc. v. Beach*, 74 N. Y. 72; *Keuka College v. Ray*, 167 N. Y. 96; cf. *Eastern States League v. Vail*, 97 Vt. 495, 508, and cases cited; *Y. M. C. A. v. Estill*, 140 Ga. 291; *Amherest Academy v. Cows*, 6 Pick. 427; *Ladies Collegiate Inst. v. French*, 16 Gray, 196; *Martin v. Meles*, 179 Mass. 114; *Robinson v. Nutt*, 185 Mass. 345; *U. of Pa. v. Coxe*, 277 Penn. St. 512; *Williston, Contracts*, § 116).

A classic form of statement identifies consideration with detriment to the promisee sustained by virtue of the promise (*Hamer v. Sidway*, 124 N. Y. 538; *Anson, Contracts* [Corbin's ed.], p. 116; 8 *Holdsworth, History of English Law*, 10). So compendious a formula is little more than a half truth. There is need of many a supplementary gloss before the outline can be so filled in as to depict the classic doctrine. "The promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting" (*Wisc. & Mich. Ry. Co. v. Powers*, 191 U. S. 379, 386; *McGovern v. City of N. Y.*, 234 N. Y. 377, 389; *Walton Water Co. v. Village of Walton*, 238 N. Y. 46, 51; 1 *Williston, Contracts*, § 139; *Langdell, Summary of the Law of Contracts*, pp. 82-88). If A promises B to make him a gift, consideration may be lacking, though B has renounced other opportunities for betterment in the faith that the promise will be kept.

The half truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disre-

garded or forgotten. The doctrine of consideration has not escaped the common lot. As far back as 1881, Judge HOLMES in his lectures on the Common Law (p. 292), separated the detriment which is merely a consequence of the promise from the detriment which is in truth the motive or inducement, and yet added that the courts "have gone far in obliterating this distinction." The tendency toward effacement has not lessened with the years. On the contrary, there has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in what is styled "a promissory estoppel" (Williston, *Contracts*, §§ 139, 116). Whether the exception has made its way in this State to such an extent as to permit us to say that the general law of consideration has been modified accordingly, we do not now attempt to say. Cases such as *Siegel v. Spear & Co.* (234 N. Y. 479) and *DeCicco v. Schweizer* (221 N. Y. 431) may be signposts on the road. Certain, at least, it is that we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions. So long as those decisions stand, the question is not merely whether the enforcement of a charitable subscription can be squared with the doctrine of consideration in all its ancient rigor. The question may also be whether it can be squared with the doctrine of consideration as qualified by the doctrine of promissory estoppel.

We have said that the cases in this State have recognized this exception, if exception it is thought to be. Thus, in *Barnes v. Perine* (12 N. Y. 18) the subscription was made without request, express or implied, that the church do anything on the faith of it. Later, the church did incur expense to the knowledge of the promisor, and in the reasonable belief that the promise would be kept. We held the promise binding, though consideration there was none except upon the theory of a promissory estoppel. In *Presbyterian Society v. Beach* (74 N. Y. 72) a situation substantially the same became the basis for a like ruling. So in *Roberts v. Cobb* (103 N. Y. 600) and *Keuka College v. Ray* (167 N. Y. 96) the moulds of consideration as fixed by the old doctrine were subjected to a like expansion. Very likely, conceptions of public policy have shaped, more or less subconsciously, the rulings thus made. Judges have been affected by the thought that "defences of that character" are "breaches of faith toward the public, and especially toward those engaged in the same enterprise, and an unwarrantable disappointment of the reasonable expectations of those interested" (W. F. ALLEN, J., in *Barnes v. Perine*, *supra*, page 24; and cf. *Eastern States League v. Vail*, 97 Vt. 495, 505, and cases there cited). The result speaks for itself irrespective of the motive.

Decisions which have stood so long, and which are supported by so many considerations of public policy and reason, will not be overruled to save the symmetry of a concept which itself came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure (8 Holdsworth, *History of English Law*, 7 *et seq.*). The concept survives as one of the distinctive features of our legal system. We have no thought to suggest that it is obsolete or on the way to be abandoned. As in the case of other concepts, however, the pressure of exceptions has led to irregularities of form.

It is in this background of precedent that we are to view the problem now before us. The background helps to an understanding of the implications inherent in subscription and acceptance. This is so though we may find in the end that without recourse to the innovation of promissory estoppel the transaction can be fitted within the mould of consideration as established by tradition.

The promisor wished to have a memorial to perpetuate her name. She imposed a condition that the "gift" should "be known as the Mary Yates Johnston Memorial Fund." The moment that the college accepted \$1,000 as a payment on account, there was an assumption of a duty to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly in the spirit of its creation. The college could not accept the money, and hold itself free thereafter from personal responsibility to give effect to the condition (*Dinan v. Coneys*, 143 N. Y. 544, 547; *Brown v. Knapp*, 79 N. Y. 136; *Gridley v. Gridley*, 24 N. Y. 130; *Grossman v. Schenker*, 206 N. Y. 466, 469; 1 Williston, *Contracts*, §§ 90, 370). More is involved in the receipt of such a fund than a mere acceptance of money to be held to a corporate use (cf. *Martin v. Meles*, 179 Mass. 114, citing *Johnson v. Otterbein University*, 41 Ohio St. 527, 531, and *Presb. Church v. Cooper*, 112 N. Y. 517). The purpose of the founder would be unfairly thwarted or at least inadequately served if the college failed to communicate to the world, or in any event to applicants for the scholarship, the title of the memorial. By implication it undertook, when it accepted a portion of the "gift," that in its circulars of information and in other customary ways, when making announcement of this scholarship, it would couple with the announcement the name of the donor. The donor was not at liberty to gain the benefit of such an undertaking upon the payment of a part and disappoint the expectation that there would be payment of the residue. If the college had stated after receiving \$1,000 upon account of the subscription that it would apply the money to the prescribed use, but that in its circulars of information and when respond-



ing to prospective applicants it would deal with the fund as an anonymous donation, there is little doubt that the subscriber would have been at liberty to treat this statement as the repudiation of a duty impliedly assumed, a repudiation justifying a refusal to make payments in the future. Obligation in such circumstances is correlative and mutual. A case much in point is *N. J. Hospital v. Wright* (95 N. J. L. 462, 464), where a subscription for the maintenance of a bed in a hospital was held to be enforceable by virtue of an implied promise by the hospital that the bed should be maintained in the name of the subscriber (cf. *Bd. of Foreign Missions v. Smith*, 209 Penn. St. 361). A parallel situation might arise upon the endowment of a chair or a fellowship in a university by the aid of annual payments with the condition that it should commemorate the name of the founder or that of a member of his family. The university would fail to live up to the fair meaning of its promise if it were to publish in its circulars of information and elsewhere the existence of a chair or a fellowship in the prescribed subject, and omit the benefactor's name. A duty to act in ways beneficial to the promisor and beyond the application of the fund to the mere uses of the trust would be cast upon the promisee by the acceptance of the money. We do not need to measure the extent either of benefit to the promisor or of detriment to the promisee implicit in this duty. "If a person chooses to make an extravagant promise for an inadequate consideration it is his own affair" (8 Holdsworth, *History of English Law*, p. 17). It was long ago said that "when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action" (*Sturlyn v. Albany*, 1587, Cro. Eliz. 67, quoted by Holdsworth, *supra*; cf. *Walton Water Co. v. Village of Walton*, 238 N. Y. 46, 51). The longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good.

We think the duty assumed by the plaintiff to perpetuate the name of the founder of the memorial is sufficient in itself to give validity to the subscription within the rules that define consideration for a promise of that order. When the promisee subjected himself to such a duty at the implied request of the promisor, the result was the creation of a bilateral agreement (Williston, *Contracts*, §§ 60-a, 68, 90, 370; *Brown v. Knapp*, *supra*; *Grossman v. Schenker*, *supra*; *Williams College v. Danforth*, 12 Pick. 541, 544; *Ladies Collegiate Inst. v. French*, 16 Gray, 196, 200). There was a promise on the one side and on the other a return promise, made, it is true, by implication, but expressing an obligation that had been exacted as a condition of the payment. A bilateral agreement may

exist though one of the mutual promises be a promise "implied in fact," an inference from conduct as opposed to an inference from words (Williston, Contracts, §§ 90, 22-a; *Pettibone v. Moore*, 75 Hun, 461, 464). We think the fair inference to be drawn from the acceptance of a payment on account of the subscription is a promise by the college to do what may be necessary on its part to make the scholarship effective. The plan conceived by the subscriber will be mutilated and distorted unless the sum to be accepted is adequate to the end in view. Moreover, the time to affix her name to the memorial will not arrive until the entire fund has been collected. The college may thus thwart the purpose of the payment on account if at liberty to reject a tender of the residue. It is no answer to say that a duty would then arise to make restitution of the money. If such a duty may be imposed, the only reason for its existence must be that there is then a failure of "consideration." To say that there is a failure of consideration is to concede that a consideration has been promised since otherwise it could not fail. No doubt there are times and situations in which limitations laid upon a promisee in connection with the use of what is paid by a subscriber lack the quality of a consideration, and are to be classed merely as conditions (Williston, Contracts, § 112; Page, Contracts, § 523). "It is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which construction of the promise is more reasonable is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration" (Williston, *supra*, § 112). Such must be the meaning of this transaction unless we are prepared to hold that the college may keep the payment on account, and thereafter nullify the scholarship which is to preserve the memory of the subscriber. The fair implication to be gathered from the whole transaction is assent to the condition and the assumption of a duty to go forward with performance (*DeWolf Co. v. Harvey*, 161 Wis. 535; *Pullman Co. v. Meyer*, 195 Ala. 397, 401; *Braniff v. Baier*, 101 Kan. 117; cf. Corbin, Offer & Acceptance, 26 Yale L. J. 169, 177, 193; McGovney, Irrevocable Offers, 27 Harv. L. R. 644; Sir Frederick Pollock, 28 L. Q. R. 100, 101). The subscriber does not say: I hand you \$1,000, and you may make up your mind later, after my death, whether you will undertake to commemorate my name. What she says in effect is this: I hand you \$1,000, and if you are unwilling to commemorate me, the time to speak is now.

The conclusion thus reached makes it needless to consider whether,

aside from the feature of a memorial, a promissory estoppel may result from the assumption of a duty to apply the fund, so far as already paid, to special purposes not mandatory under the provisions of the college charter (the support and education of students preparing for the ministry), an assumption induced by the belief that other payments sufficient in amount to make the scholarship effective would be added to the fund thereafter upon the death of the subscriber (*Ladies Collegiate Inst. v. French*, 16 Gray, 196; *Barnes v. Perine*, 12 N. Y. 18, and cases there cited).

The judgment of the Appellate Division and that of the Trial Term should be reversed, and judgment ordered for the plaintiff as prayed for in the complaint, with costs in all courts.

KELLOGG, J. (dissenting). The Chief Judge finds in the expression "In loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund" an offer on the part of Mary Yates Johnston to contract with Allegheny College. The expression makes no such appeal to me. Allegheny College was not requested to perform any act through which the sum offered might bear the title by which the offeror states that it shall be known. The sum offered was termed a "gift" by the offeror. Consequently, I can see no reason why we should strain ourselves to make it, not a gift, but a trade. Moreover, since the donor specified that the gift was made "In consideration of my interest in Christian education, and in consideration of others subscribing," considerations not adequate in law, I can see no excuse for asserting that it was otherwise made in consideration of an act or promise on the part of the donee, constituting a sufficient *quid quo pro* to convert the gift into a contract obligation. To me the words used merely expressed an expectation or wish on the part of the donor and failed to exact the return of an adequate consideration. But if an offer indeed was present, then clearly it was an offer to enter into a unilateral contract. The offeror was to be bound provided the offeree performed such acts as might be necessary to make the gift offered become known under the proposed name. This is evidently the thought of the Chief Judge, for he says: "She imposed a condition that the 'gift' should be known as the Mary Yates Johnston Memorial Fund." In other words, she proposed to exchange her offer of a donation in return for acts to be performed. Even so there was never any acceptance of the offer and, therefore, no contract, for the acts requested have never been performed. The gift has never been made known as demanded. Indeed, the requested acts, under the very terms of the assumed offer, could never have been performed at a time to convert the offer into a promise. This is so for the

reason that the donation was not to take effect until after the death of the donor, and by her death her offer was withdrawn. (Williston on Contracts, sec. 62.) Clearly, although a promise of the college to make the gift known, as requested, may be implied, that promise was not the acceptance of an offer which gave rise to a contract. The donor stipulated for acts, not promises. "In order to make a bargain it is necessary that the acceptor shall give in return for the offer or the promise exactly the consideration which the offeror requests. If an act is requested, that very act and no other must be given. If a promise is requested, that promise must be made absolutely and unqualifiedly." (Williston on Contracts, sec. 73.) "It does not follow that an offer becomes a promise because it is accepted; it may be, and frequently is, conditional, and then it does not become a promise until the conditions are satisfied; and in case of offers for a consideration, the performance of the consideration is always deemed a condition." (Langdell, Summary of the Law of Contracts, sec. 4.) It seems clear to me that there was here no offer, no acceptance of an offer, and no contract. Neither do I agree with the Chief Judge that this court "found consideration present where the general law of contract, at least as then declared, would have said that it was absent" in the cases of *Barnes v. Perine* (12 N. Y. 18), *Presbyterian Society v. Beach* (74 N. Y. 72) and *Keuka College v. Ray* (167 N. Y. 96). In the *Keuka College* case an offer to contract, in consideration of the performance of certain acts by the offeree, was converted into a promise by the actual performance of those acts. This form of contract has been known to the law from time immemorial (Langdell, sec. 46) and for at least a century longer than the other type, a bilateral contract. (Williston, sec. 13.) It may be that the basis of the decisions in *Barnes v. Perine* and *Presbyterian Society v. Beach* (*supra*) was the same as in the *Keuka College* case. (See *Presbyterian Church of Albany v. Cooper*, 112 N. Y. 517.) However, even if the basis of the decisions be a so-called "promissory estoppel," nevertheless they initiated no new doctrine. A so-called "promissory estoppel," although not so termed, was held sufficient by LORD MANSFIELD and his fellow judges as far back as the year 1765. (*Pillans v. Van Mierop*, 3 Burr. 1663.) Such a doctrine may be an anomaly; it is not a novelty. Therefore, I can see no ground for the suggestion that the ancient rule which makes consideration necessary to the formation of every contract is in danger of effacement through any decisions of this court. To me that is a cause for gratulation rather than regret. However, the discussion may be beside the mark, for I do not understand that the holding about to be made in this case is other than a holding that consideration was given to convert the

offer into a promise. With that result I cannot agree and, accordingly, must dissent.

POUND, CRANE, LEHMAN and O'BRIEN, JJ., concur with CARDOZO, Ch. J.; KELLOGG, J. dissents in opinion, in which ANDREWS, J., concurs. Judgment accordingly.

APPENDIX II  
EXCERPTS FROM ROBERT JACKSON'S BRIEF FOR THE  
RESPONDENT

A.

Efforts to classify this cross between evangelism and legalism fail.

.....

It is not a PLEDGE in the legal sense of a deposit or delivery of property as security. It is a pledge only in the evangelical sense of an unctuous and ceremonial, but unenforceable resolve in the present to do good in the future— and as usual the more unctious the less resolve.

B.

The picture drawn . . . of the College turning down the pious ambitions of youth who have come to it, relying on this gift, looks a little foolish in view of the frank and practical testimony of the Treasurer that the fund has never been established for—

“We could not establish the fund and have students coming expecting to receive from it until we had it.”

(Dr. Miles, Folio 251)

So the Court will be relieved to know that the grieving waiting line is simply the creation of imagination, and that the management of the College is treating the situation in an honest, practical and commendable manner that the [Appellant's] Brief would not indicate.

The law of New York condemns all mental flip flops by the Courts in the aid of charity. It is clear though inelastic; honest though rigid.

Counsel is, of course, able to cite foreign cases to sustain his argument. In fact, we have found some stronger for him than those he cites. On no subject do we find greater confusion and lack of intellectual integrity among our sister states.

C.

No Common Law Court, to our knowledge, has yet held the contract of Charitable Subscriptions *Sui Generis* and not requiring consideration.

Those states which depart from the law of England and New York and Massachusetts do so either by declaring an estoppel to question the subscription after expense has been incurred or buildings built or obligations incurred in reliance thereon or they have done lip service to the

doctrine of consideration and then invented fictitious, devious or technical considerations, only adding to the difficulty of the general doctrine. Such inventions as "implied requests" and assumed compliance therewith, making a meritorious object itself supply the consideration, and other judicial dodges, promise to keep the subject in confusion.

Massachusetts, like New York, makes no gestures for effect . . . .

Out where they dilute the common law with populism the Courts have often gone so far as to find mere taking a consideration for paying.—Logic that would sustain burglary as a common law contract.

#### D.

Certainly if this Court is to retain the doctrine of consideration as a test of contractual obligation, it should not invite contempt by asserting the premise and then resorting to an evasion of the conclusion. The trial court considered and rejected the argument to do so, saying it would be straining too hard to find a legal consideration for what was intended as a gift.

#### E.

If the doctrine is to be retained at all there is no reason why the clear and rugged path already marked out should not be followed even though it be a rough one for the coercive charities that thrive by drive. The Court has not in the past, and probably will not now, invent fictitious considerations that invite the contempt of those who hope to see the law an honest, if not an exact science.

The Appellant quotes Dean Pounds' version of the dialogue between the Doctor and Student. This is one of the many cases in which the Common Law, passing through the lens of Dean Pound acquires more of color than of light.

#### F.

The whole aspect of the transaction forbids any conclusion that tetratrix intended to assume a legal obligation by the agreement in suit.

The printed form was supplied by the plaintiff and must be interpreted against it. The document seems carefully devised to induce execution rather than to force collection.

It does not style itself "contract" or "promissory note". Many a

cautious widow would shy at that! "Estate Pledge", seductive creature of the lay mind—suggestive of futurity and moral duty—not a suggestion of establishing creditor and debtor relationship or an unalterable obligation. The only suggestion of contract about it is the effort to recite for her a consideration—In that they used recitals more persuasive to signing than collecting. "Interest in Christian Education"—To this recital could be urged all the good things in both the real and the hypothetical worlds. "Subscription of others"—Here the social pressure of not being outdone in virtue by others would impress any prospective drivee. Certainly it is not too much to expect that those who conduct "intensive drives" to convert the charitable tendencies and religious impulses of elderly women into bills receivable should do so by language plainly conveying to the driven one the effect of her act.

This instrument is not a bargain; it is a gift; not creating a creditor but a beneficiary. It is of testamentary character. It is gotten up to lead the testatrix to believe that she was giving the College participation in her estate as a legatee, to crystalize so far as possible the intention to make a gift and to interpose moral obstacles to reconsideration in the calm that follows drives.

It is an "Estate Pledge". The "obligation" is not due until thirty days after death. The Executor or Administrator is directed to pay it and it is subject to all provisions of her Will then extant. It is witnessed after the manner of a Will and creates an obligation of the character of a legacy, not a debt. She contemplated giving the College \$5,000 out of *her net estate*—not giving them a creditor's claim for \$5,000. Moreover their gift after death was not to supersede but to follow the gifts to her family.



