

First Class Assignment

PLEASE NOTE: You should plan to be logged onto ZOOM, with your live image and name visible on screen at all times, even if you are attending the class in the classroom. (See the ZOOM rules previously provided by the administration.) I want everyone (including me) to be able to see the entire class if they select "gallery" view, and to have some sense of who their classmates are. It's much less isolating and easier to participate if people have some sense of being in the group. Microphones should be turned off unless you are speaking. This will help prevent background noise, echoes, and feedback.

We will take a 15-minute break each evening at 8:00 p.m., (occasionally a minute or two later), and during that time **I will use the ZOOM screen to take attendance**. If you are present in the classroom and you happen to lose your ZOOM connection, please mention it to me at the beginning of the break to make sure I don't mark you absent. Everyone should stay logged on during the break, cameras and microphones off, with full name visible onscreen.

Also, I will not be writing anything on the whiteboard in the classroom. Instead, information will be presented through ZOOM, so it will appear on your computer screen and also on the large video screen in the classroom. With this method, many students find it easier to see the information whether attending remotely or in person. In some instances, you might find it easier to take notes by simply taking a screen shot as the information is shown. (If you don't know how to take a screen shot on your device, just Google "screen shot" and the maker and model of your computer, and you should find that information.)

ASSIGNMENT

1. Please read the following in the hardbound text (Dawson, Harvey, Henderson & Baird) (Twelfth Edition):

a. Beginning on page 21, "Comment: Cost or Value in General Contract Law." Read only the first four paragraphs. The references to *Groves* and *Peevyhouse* concern cases we will read and discuss in the future. (The full names of these cases are *Groves v. John Wunder Co.* and *Peevyhouse v. Garland Coal Co.*) You should focus on the discussion that introduces Article 2 of the Uniform Commercial Code ("UCC") and the second Restatement of Contracts. These two sources play a major role in the law of contracts, and we will spend a good deal of time this year learning and discussing important provisions in each of them. Most of UCC Article 2 and the basic provisions of the second Restatement are included in *Selected Source Materials*, the Burton & Eisenberg paperback volume you were asked to obtain along with the hardbound casebook.

b. Pages 163-174 and 180-183. Brief all cases found within the assigned pages, whether or not designated as "principal cases." (Principal cases are those with headings in bold print.)

2. Read my handout, "The Basis for Legal Enforcement of Promises."
3. In *Selected Source Materials* (Burton & Eisenberg), read the following:
 - a. On page 2, Introductory note, "Uniform Commercial Code." Our focus in Contracts will be on UCC Articles 1 and 2 of the Uniform Commercial Code, which is often abbreviated to "UCC."
 - b. On page 130, Introductory note, "Restatement (Second) of Contracts."

Based on the introductory passages in this assignment, try to formulate an explanation of the differences between the UCC and the Restatement of Contracts.

- c. In UCC Article I (beginning on p. 3), read the following sections: 1-101; 1-102; 1-103; 1-106; 1-201(3), (12), (20), (26), (27), (37) and (43); 1-205; 1-302; 1-303; 1-304.
 - d. In UCC Article II (beginning around p.15), read the following sections: 2-101 and Official Comment; 2-102; 2-103 (1) (a) through (d); 2-104 (1) and (3); 2-105; 2-106 (2); 2-107 (1) and (2); 2-203.

4. After you read *Hamer v. Sidway* (p. 170 in the case book) carefully read my brief of that case (see below). (You don't have to brief this one yourself.) This is provided (a) to help you understand the case and the assigned handout (above); and (b) to give you an example of an effective briefing method. The part at the end called "Notes" includes things about or related to the case that I intend to mention or discuss in class. The "Notes" section of your own briefs can include anything you think is important to learn from the case, including information you obtain from discussion of the case in class.

I chose *Hamer v. Sidway* for this illustration because it introduces the concept of "consideration." The various definitions of "consideration" are central to the workings of contract law, and we will spend a great deal of time examining the complexity and nuances of that concept.

If you need to send me an email, you can use this address or my faculty email address. I receive lots of email every day, including lots of lawyer junk mail, so please be sure to put the word "CONTRACTS" in the subject line to make it more noticeable. If you send an email and I don't reply within a couple of days, please don't be shy about sending a follow up to remind me in case I missed the first one.

I'll send a syllabus soon, but the above will keep us busy.

CONSIDERATION

- Bargain aspect controls
- Meaning of “Legal Detriment”
- Meaning of “Benefit” to promisee

p. 170

Hamer v. Sidway
124 N.Y. 538 (1891)
Court of Appeals of New York

FACTS

1. Plaintiff is the assignee of William E. Story, 2d (nephew of decedent, William E. Story, Sr.) (The note in the case book following the case indicates that Plaintiff is Wm. Story Jr.’s mother-in-law. The younger Story and other family members assigned (transferred) all their claims against the estate to a single plaintiff so all claims could be consolidated and managed in a single suit. An “assignee” is someone to whom a party has transferred his contract rights. We will study this process at the end of the second semester.)
2. Defendant Sidway is the executor of the estate of Wm. E. Story, Sr.
3. Story, Sr. promised his nephew he would pay him \$5,000 if he would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until his 21st birthday.
4. It is undisputed that Story, Jr. abided by these terms, and after his 21st birthday communicated that fact to his uncle. The uncle wrote back, advising his nephew that the money was his, but that he would hold it for him, with interest, until he thought the nephew was able to manage it.
5. The nephew consented to this arrangement.
6. Upon the death of the uncle, the executor of his estate refused to pay the \$5,000 with accrued interest to the nephew, taking the position that the deceased uncle’s promise was not made as part of a legally binding contract.
7. The nephew’s assignee filed suit against the estate, alleging the estate’s breach of a contract made between the uncle and nephew.
8. The trial court held in favor of the plaintiff, but the appellate court reversed, holding that the nephew had not furnished any consideration for the uncle’s promise.
9. Here, the Court of Appeals reviews and reverses the holding of the lower appellate court, reinstating the judgment in favor of the plaintiff.

ISSUE

Was Story, Jr.'s forbearance from drinking, gambling, smoking, and swearing sufficient consideration to support the contract, even though these things conferred no actual benefit on the uncle and constituted no actual detriment to the nephew? (Yes.)

HOLDING, RULE, & RATIONALE

Yes. It is not necessary that the act of the promisee confer a benefit on the promisor, as long as it is the thing the promisor *bargained for*. The waiver of any legal right, or forbearance from anything the promisee otherwise had a right to do, is sufficient consideration to support the other party's promise.

Here, the promisee had a legal right to drink, smoke, swear, and gamble, so his forbearance constituted relinquishment of a legal right. Defendant argued incorrectly that there was insufficient detriment to the nephew to constitute consideration because the nephew was actually *improved* by refraining from unhealthy conduct. But "legal detriment," as a definition of consideration, does not mean actual harm. The necessary "detriment" is in the relinquishment of a legal right to do something or *not* to do something.

Similarly, defendant argued incorrectly that there was no consideration because the promisor (the uncle) was not benefitted by the supposed bargain. But the court says the only necessary benefit to the promisor is to receive whatever he bargained for. In this case, the uncle bargained for his nephew to refrain from certain conduct until he reached the age of 21. The law has no interest in why he wanted this result, or how it may or may not have been beneficial to the uncle for it to occur. It is sufficient that the uncle bargained for the nephew to refrain from certain conduct, and he got what he bargained for.

The lower court is reversed and the original trial court judgment in favor of the plaintiff is affirmed.

NOTES

1. From a modern perspective, it's important to see that a bargain occurred in this case, even though the court's discussion focuses more on the nature of "benefit" and "detriment" in the definition of consideration. The uncle didn't simply make a gratuitous promise, such as, "On your 21st birthday I will give you \$25,000." Rather, the uncle made a *deal* with his nephew. "I will promise to pay you \$5,000 if, in return, you promise to refrain from drinking, smoking, gambling, and swearing until you reach the age of 21, *and* if you actually keep your promise by performing your end of the deal." The facts tell us "the nephew assented thereto" and then performed as agreed. Thus, a contract was made in 1869 at the anniversary party of the uncle's parents, when the uncle and the nephew each promised to do something that would constitute consideration.

2. Putting all the components of this case together, we can conclude that consideration can be provided by doing something one is not otherwise legally obligated to do, or by *refraining* from doing something one otherwise has a legal right to do. Here, the uncle was not otherwise obligated to pay \$5,000, so his promise to do so constituted consideration. And it's important to note that the nephew, who was only about 15 years old at the time the agreement was made, was legally allowed to drink, smoke, swear, and gamble, at least in the State of New York in 1869, so the nephew also agreed to refrain from doing things he otherwise had a legal right to do. (The nephew was born January 31, 1854, and the agreement was made on March 20, 1869.)

3. Note that to make a binding contract the parties do not actually have to *deliver* consideration or perform their promises immediately. Contracts can be made by promising to do things in the future. Here, the uncle promised to pay money in the future, and the nephew promised to conduct himself in a certain way in the future. Thus, the sufficiency of consideration is evaluated under the assumption that these promises will be performed exactly as made. This means that the uncle and nephew actually made their contract in 1869 and it was legally binding at that time. It just happened that the agreement, as contemplated, would take nearly six years to perform.

4. Sometimes *Hamer v. Sidway* is viewed as reflecting a view of consideration that is not fully in line with the modern emphasis on the bargaining relationship between the parties. The modern view (First and Second Restatement) is that it isn't enough for each party to promise to do something that amounts to consideration. The nature of a bargain (*a deal*) is that each party promises something specifically to obtain the promise of the other party. This reciprocal relationship between the promised consideration is essential to the definition of a bargain. The "Introductory comment" in the case book section on "The Bargained-For Exchange" (pages 166-170) includes a famous quotation from *The Common Law* (1891) by Oliver Wendell Holmes:

[I]t is the essence of a consideration that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of *reciprocal conventional inducement, each for the other, between consideration and promise*. (Case book, p. 170, Emphasis added.)

Justice Holmes taught at Harvard Law School, was Chief Justice of the Supreme Judicial Court of Massachusetts. He also served as a Justice of the U.S. Supreme Court from 1902 to 1932.

5. The use of "promisor" and "promisee" can be confusing. Actually, this case describes a standard, "bilateral" contract, meaning that both parties made promises to give consideration, and both parties had consideration promised to them. Therefore, each party is the "promisor" of his own promise, and the "promisee" of the other party's promise. For purposes of *Hamer v. Sidway*, the uncle is referred to as the promisor because there is no question that his promise to pay constituted consideration. He was not legally obligated to pay \$5,000 to his nephew, so he undoubtedly was promising to do something he otherwise had a right not to do.

Thus, it was the nephew, in his role of promisee, who was in doubt. This case asks if the promisee gave something in return for the promise that was sufficient to satisfy the definition of consideration.

6. The structure of court system in the State of New York is complicated, and it is made more confusing by the unorthodox names given to those courts. The “Supreme Court” is actually the name given to general trial courts. This is the kind of court California refers to as the “Superior Court.” Appeals from decisions of the Supreme Court go to the “Appellate Division.” The highest court in New York is called the “Court of Appeals,” a name most states give to their intermediate-level appellate courts.

The New York Court of Appeals produced many cases in the early 20th century that are still influential today. Many of them appear in law school case books, particularly in torts and contracts. To a large extent, the legal transition from the pre-industrial revolution period into the modern world occurred in this court, as New York became more firmly established as the center of the business and commercial world. Prominent justices included Benjamin Cardozo (later appointed to the U.S. Supreme Court), William Andrews, Irving Lehman, Cuthbert Pound, Henry Kellogg, and others. You’ll see their names on many opinions from this era. The majority and dissenting opinions of this court in *Palsgraf v. Long Island Railroad Company* is a legal classic, and is included in every major torts case book. (Hint: When the time comes, there’s an excellent Wikipedia article about *Palsgraf*.)