

man, but I don't think you can count on that \$5,000 from me. I'm devoting my energy and my finances to some new business ventures of my own." At that point, would the uncle have had any legal obligation to his nephew? What legal remedies—if any—might have been available to young Will?

(c) It's 2015, and young Will Story, aged 21, has a serious drug problem. His loving Uncle Bill promises to pay Will \$5,000 on his 25th birthday if Will abstains from using cocaine for the next four years. Will spends four years clean and sober, with no use of drugs or alcohol, and asks Uncle Bill for the money. Perhaps Uncle Bill will pay gladly, but if he doesn't, should Will be able to sue him for the money?

2. *Historical background.* As we noted in the introduction to this section, the test for consideration employed by the court in *Hamer* is not the only one a court might use; the Restatement uses a "bargained-for exchange" analysis, which we will address below. The "benefit/detriment" test used in *Hamer* has deep roots in Anglo-American contract law, however, as the following Comment attests.

Comment: History of the Consideration Doctrine

The origins of the modern consideration doctrine can be traced back at least to thirteenth-century English law. At that time, the English courts did not yet recognize our modern concept of breach of contract. They did, however, enforce legal rights that were similar to those arising under contracts today. In particular, the English courts allowed two causes of action of a contractual nature: *covenant* and *debt*. Each of these had its own particular limitations.

The action of covenant was available only to enforce a promise that was made in writing and under seal. The "seal" at this stage of legal development was exceedingly formal: Typically, wax was melted onto a document and, before it cooled, was impressed with a signet ring or other device. The sealed document was often referred to as a "deed," or "specialty." Such documents were seldom employed in informal, day-to-day business affairs, so the action of covenant had limited utility for enforcing promises made in such transactions. (The term "deed" is used today to refer to a document that conveys an interest in realty, typically a formal, "legalistic" document.)

The action of debt had more practical importance, because it was available to enforce both formal promises (through the action of debt "sur obligation") and informal ones (debt "sur contract"). The debt action had another limitation of its own, however: It was not available unless the plaintiff claimed that the defendant owed him a definite or certain sum of money. This limitation did not prevent the action of debt from being used to enforce informal promises, such as loans, purchases of goods, and agreements to pay for services rendered, so long as the plaintiff could claim a definite sum and could establish that the defendant had received a quid pro quo for the asserted debt.

Both covenant and debt were effective remedies for the cases in which they were available, but neither provided a useful remedy for the improper performance of an informal promise. For instance, suppose a nobleman took a piece of heirloom silver to a silversmith for repair, and the smith did the work improperly, damaging it further. The customer could not seek a remedy in the

action of covenant, because the parties would not have used a sealed instrument for such a routine transaction. On the other hand, the action of debt would not lie either, because the damage caused by the defective performance was not a definite sum.

In addition, the action of debt suffered from two other limitations. First, it was not available if the debtor had died in the meantime. (Unlike today, when ordinary money debts customarily survive as obligations enforceable against a decedent's estate.) More importantly, the court rules of the time permitted the defendant in a debt action to have the benefit of a process known as "wager of law." Under this procedure, the defendant could appear in court with "oath-helpers" (usually eleven in number), each of whom would swear that the defendant was not indebted to the plaintiff. If the defendant successfully performed this ceremony, he won his case. Obviously, the less scrupulous the debtor (and his friends), the greater the likelihood that the debt would go uncollected.

Because of these shortcomings, the actions of covenant and debt were gradually replaced during the fifteenth and sixteenth centuries by a new form of action, called "assumpsit." Assumpsit eventually became the general remedy for breach of promise. Like most changes in the common law system, this one came incrementally. In the fourteenth century, the English courts recognized the action for damages resulting from a wrongful act (what today we would call a "tort"). This action, known as "trespass," originally applied to public wrongs, such as breach of the peace. Later, in the form of "trespass on the case," it was extended to apply to private wrongs as well. Thus, an action in trespass on the case would lie for the nonperformance of an obligation voluntarily undertaken (such as the silversmith's promise of repair). The action in such cases came to be known as assumpsit, because the pleading alleged that the defendant had "assumed"—that is, voluntarily undertaken—the obligation of performance.

By the year 1400, it was well established that an action of assumpsit could be used to recover damages for improper performance of a voluntary obligation. The English courts, however, distinguished between "misfeasance" (improper performance) and "nonfeasance" (failure to render any performance at all). Assumpsit was only available to remedy the former. For nonfeasance, the plaintiff was remitted to an action of covenant, where he could recover only if he could produce a specialty. Throughout the fifteenth century, a number of exceptions to this rule accumulated, permitting assumpsit to be used for various types of mere nonfeasance. By the first quarter of the sixteenth century, the rule disappeared entirely, and the plaintiff generally was permitted to recover for either misfeasance or nonfeasance without producing a sealed document. Assumpsit had completely superseded covenant.

The use of assumpsit instead of an action for debt had obvious attraction for the unpaid creditor, because of the procedural advantage enjoyed by the defendant in a debt action. Defendants' attorneys therefore objected strenuously when plaintiffs attempted to bring an assumpsit in any case where an action of debt would be available. This heated dispute was ultimately resolved by the Exchequer Chamber in *Slade's Case*, 76 Eng. Rep. 1074 (1602), which held that a plaintiff might elect between assumpsit and debt in any case where both would lie. The natural consequence was that assumpsit effectively replaced debt as well.

Once assumpsit had taken over the field of contractual obligation, the English courts faced another question: What should be its scope? As we saw above, both covenant and debt had been limited by specific requirements—the production of a sealed instrument, and the obligation to pay a sum certain, incurred in exchange for a quid pro quo. Assumpsit did not have these limitations, but it did develop limitations of its own. These came to be expressed in the doctrine of consideration, which—like the action of assumpsit itself—developed incrementally. As assumpsit evolved, it became customary to plead the factors that the defendant had considered in making his promise. Over time the process of pleading such “considerations” grew into a formal requirement. Case decisions gradually outlined the kinds of consideration for which an action in assumpsit would lie. The concepts of detriment to the promisee and benefit to the promisor, which were used quite early, came to represent the paradigms of consideration. The historical link is not clear, but at least it can be said that the “detriment” suffered by the promisee has a resemblance to the harm suffered by the plaintiff in the early trespass action, while the “benefit” to the promisor is akin to the quid pro quo received by the defendant in a debt action. Even today, courts will use these concepts to describe the factors in a case that justify the finding of sufficient consideration to support liability for breach of a promise. Accounts of the development of the consideration doctrine can be found in the writings of many legal historians. One in-depth exploration is contained in Alfred W. B. Simpson, *A History of the Common Law of Contract* (1987).

Pennsy Supply, Inc. v. American Ash Recycling Corp. of Pennsylvania

Pennsylvania Superior Court
895 A.2d 595 (2006)

Before: Joyce, Orié Melvin and Tamilia, JJ.

Opinion by Orié Melvin, J.:

1. Appellant, Pennsy Supply, Inc. (“Pennsy”), appeals from the grant of preliminary objections in the nature of a demurrer in favor of Appellee, American Ash Recycling Corp. of Pennsylvania (“American Ash”). We reverse and remand for further proceedings.

2. The trial court summarized the allegations of the complaint as follows:

The instant case arises out of a construction project for Northern York High School (Project) owned by Northern York County School District (District) in York County, Pennsylvania. The District entered into a construction contract for the Project with a general contractor, Lobar, Inc. (Lobar). Lobar, in turn, subcontracted the paving of driveways and a parking lot to [Pennsy].

The contract between Lobar and the District included Project Specifications for paving work which required Lobar, through its subcontractor Pennsy, to use certain base aggregates. The Project Specifications permitted substitution of the aggregates with an alternate material known as Treated Ash Aggregate (TAA) or AggRite.