

binding by the courts of Henry VI, must have been based upon a benefit to the debtor; now a promise might be enforced in consideration of a detriment to the promise. But in the true archaic spirit the doctrine was not separated or distinguished from the remedy which introduced it, and thus debt in modern times has presented the altered appearance of a duty limited to cases where the consideration was of a special sort.

The later fortunes of *assumpsit* can be briefly told. It introduced bilateral contracts, because a promise was a detriment, and therefore a sufficient consideration for another promise. It supplanted debt, because the existence of the duty to pay was sufficient consideration for a promise to pay, or rather because, before a consideration was required, and as soon as *assumpsit* would lie for a non-feasance, this action was used to avoid the defendant's wager of law. It vastly extended the number of actionable contracts, which had formerly been confined to debts and covenants, whereas nearly any promise could be sued in *assumpsit*; and it introduced a theory which has had great influence on modern law, that all the liabilities of a bailee are founded on contract.<sup>114</sup> Whether the prominence which was thus given to contract as the foundation of legal rights and duties had anything to do with the similar prominence which it soon acquired in political speculation, it is beyond my province to inquire.

## CONTRACT—II. ELEMENTS

THE GENERAL METHOD TO BE PURSUED IN THE ANALYSIS OF CONTRACT is the same as that already explained with regard to possession. Whenever the law gives special rights to one, or imposes special burdens on another, it does so on the ground that certain special facts are true of those individuals. In all such cases, therefore, there is a twofold task. First, to determine what are the facts to which the special consequences are attached; second, to ascertain the consequences. The first is the main field of legal argument. With regard to contracts the facts are not always the same. They may be that a certain person has signed, sealed, and delivered a writing of a certain purport. They may be that he has made an oral promise, and that the promise has furnished him a consideration.

The common element of all contracts might be said to be a promise, although even a promise was not necessary to a liability in debt as formerly understood. But as it will not be possible to discuss covenants further, and as consideration formed the main topic of the last lecture, I will take up that first. Furthermore, as there is an historical difference between consideration in debt and in *assumpsit*, I shall confine myself to the latter, which is the later and more philosophical form.

It is said that any benefit conferred by the promise on the promisor, or any detriment incurred by the promise, may be a consideration. It is also thought that every consideration may be reduced to a case of the latter sort, using the word "detriment" in a somewhat broad sense.

To illustrate the general doctrine, suppose that a man is desirous of having a cask of brandy carried from Boston to Cambridge, and that a truckman, either out of kindness or from some other motive, says that he

will carry it, and it is delivered to him accordingly. If he carelessly staves in the cask, there would perhaps be no need to allege that he undertook to carry it, and on principle, and according to the older cases, if an undertaking was alleged, no consideration for the assumpsit need be stated.<sup>1</sup> The ground of complaint in that case would be a wrong, irrespective of contract. But if the complaint was that he did not carry it as agreed, the plaintiff's difficulty would be that the truckman was not bound to do so unless there was a consideration for his promise. Suppose, therefore, that it was alleged that he promised to do so in consideration of the delivery to him. Would this be a sufficient consideration? The oldest cases, going on the notion of benefit to the promisor, said that it could not be, for it was a trouble, not a benefit.<sup>2</sup> Then take it from the side of detriment. The delivery is a necessary condition to the promisor's doing the kindness, and if he does it, the delivery, so far from being a detriment to the promise, is a clear benefit to him.

But this argument is a fallacy. Clearly the delivery would be sufficient consideration to enable the owner to declare in assumpsit for the breach of those duties which arose, irrespective of contract, from the defendant's having undertaken to deal with the thing.<sup>3</sup> It would be a sufficient consideration for any promise not involving a dealing with the thing for its performance, for instance, to pay a thousand dollars.<sup>4</sup> And the law has not pronounced the consideration good or bad according to the nature of the promise founded upon it. The delivery is a sufficient consideration for any promise.<sup>5</sup>

The argument on the other side leaves out of sight the point of time at which the sufficiency of the consideration is to be determined. This is the moment when the consideration is furnished. At that moment the delivery of the cask is a detriment in the strictest sense. The owner of the cask has given up a present control over it, which he has a right to keep, and he has got in return, not a performance for which a delivery was necessary, but a mere promise of performance. The performance is still future.<sup>6</sup>

But it will be seen that, although the delivery may be a consideration, it will not necessarily be one. A promise to carry might be made and accepted on the understanding that it was mere matter of favor, without consideration, and not legally binding. In that case the detriment of delivery would be incurred by the promise as before, but obviously it would be incurred for the sole purpose of enabling the promisor to carry as agreed.

It appears to me that it has not always been sufficiently borne in mind that the same thing may be a consideration or not, as it is dealt with by the parties. The popular explanation of *Coggs v. Bernard* is, that the delivery was a consideration for a promise to carry the casks safely. I have given what I believe to be the true explanation, and that which I think Lord Holt had in view, in the fifth lecture.<sup>7</sup> But whether that which I have offered be true or not, a serious objection to the one which is commonly accepted is that the declaration does not allege that the delivery was the consideration.

The same caution should be observed in construing the terms of an agreement. It is hard to see the propriety of erecting any detriment which an instrument may disclose or provide for, into a consideration, unless the parties have dealt with it on that footing. In many cases a promise may incur a detriment without thereby furnishing a consideration. The detriment may be nothing but a condition precedent to performance of the promise, as where a man promises another to pay him five hundred dollars if he breaks his leg.<sup>8</sup>

The courts, however, have gone far towards obliterating this distinction. Acts which by a fair interpretation of language would seem to have been contemplated as only the compliance with a condition, have been treated as the consideration of the promise.<sup>9</sup> And so have counter promises in an agreement which expressly stated other matters as the consideration.<sup>10</sup> So it should be mentioned, subject to the question whether there may not be a special explanation for the doctrine, that it is said that an assignment of a leasehold cannot be voluntary under the statute of 27 Elizabeth, c. 4, because the assignee comes into the obligations of the tenant.<sup>11</sup> Yet the assignee's incurring this detriment may not be contemplated as the inducement of the assignment, and in many cases only amounts to a deduction from the benefit conferred, as a right of way would be, especially if the only obligation is to pay rent, which issues out of the land in theory of law.

But although the courts may have sometimes gone a little far in their anxiety to sustain agreements, there can be no doubt of the principle which I have laid down, that the same thing may be a consideration or not, as it is dealt with by the parties. This raises the question how a thing must be dealt with, in order to make it a consideration.

It is said that consideration must not be confounded with motive. It is true that it must not be confounded with what may be the prevailing or chief motive in actual fact. A man may promise to paint a picture for

five hundred dollars, while his chief motive may be a desire for fame. A consideration may be given and accepted, in fact, solely for the purpose of making a promise binding. But, nevertheless, it 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.

A good example of the former branch of the proposition is to be found in a Massachusetts case. The plaintiff refused to let certain wood be removed from his land by one who had made an oral bargain and given his note for it, unless he received additional security. The purchaser and the plaintiff accordingly went to the defendant, and the defendant put his name upon the note. The plaintiff thereupon let the purchaser carry off the wood. But, according to the testimony, the defendant signed without knowing that the plaintiff was to alter his position in anyway on the faith of the signature, and it was held that, if that story was believed, there was no consideration.<sup>12</sup>

An illustration of the other half of the rule is to be found in those cases where a reward is offered for doing something, which is afterwards done by a person acting in ignorance of the offer. In such a case the reward cannot be claimed, because the alleged consideration has not been furnished on the faith of the offer. The tendered promise has not induced the furnishing of the consideration. The promise cannot be set up as a conventional motive when it was not known until after the alleged consideration was performed.<sup>13</sup>

Both sides of the relation between consideration and promise, and the conventional nature of that relation, may be illustrated by the case of the cask. Suppose that the truckman is willing to carry the cask, and the owner to let him carry it, without any bargain, and that each knows the other's state of mind; but that the truckman, seeing his own advantage in the matter, says to the owner, "In consideration of your delivering me the cask, and letting me carry it, I promise to carry it," and that the owner thereupon delivers it. I suppose that the promise would be binding. The promise is offered in terms as the inducement for the delivery, and the delivery is made in terms as the inducement for the promise. It may be very probable that the delivery would have been made without a promise, and that the promise would have been made in

gratuitous form if it had not been accepted upon consideration; but this is only a guess after all. The delivery need not have been made unless the owner chose, and having been made as the term of a bargain, the promisor cannot set up what might have happened to destroy the effect of what did happen. It would seem therefore that the same transaction in substance and spirit might be voluntary or obligatory, according to the form of words which the parties chose to employ for the purpose of affecting the legal consequences.

If the foregoing principles be accepted, they will be seen to explain a doctrine which has given the courts some trouble to establish. I mean the doctrine that an executed consideration will not sustain a subsequent promise. It has been said, to be sure, that such a consideration was sufficient if preceded by a request. But the objections to the view are plain. If the request was of such a nature, and so put, as reasonably to imply that the other person was to have a reward, there was an express promise, although not put in words, and that promise was made at the same time the consideration was given, and not afterwards. If, on the other hand, the words did not warrant the understanding that the service was to be paid for, the service was a gift, and a past gift can no more be a consideration than any other act of the promise not induced by the promise.

The source of the error can be traced partially, at least, in history. Some suggestions touching the matter were made in the last lecture. A few words should be added here. In the old cases of debt, where there was some question whether the plaintiff had showed enough to maintain his action, a "contract precedent" as spoken of several times as raising the duty. Thus, where a man had granted that he would be bound in one hundred shillings to pay his servant on a certain day for his services, and for payments made by the servant on his account, it was argued that there was no contract precedent, and that by parol the party is not obliged; and, further, that, so far as appeared, the payments were made by the servant out of his own head and at no request, from which no duty could commence.<sup>14</sup>

So when debt was brought on a deed to pay the plaintiff ten marks, if he would take the defendant's daughter to wife, and it was objected that the action should have been covenant, it was answered that the plaintiff had a contract precedent which gave him debt.<sup>15</sup>

The first case in *assumpsit*<sup>16</sup> only meant to adopt this long familiar thought. A man went bail for his friend's servant, who had been arrested. Afterwards the master promised to indemnify the bail, and on his failure

to do so was sued by him in *assumpsit*. It was held that there was no consideration wherefore the defendant should be charged unless the master had first promised to indemnify the plaintiff before the servant was bailed; "for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head." This is perfectly plain sailing, and means no more than the case in the Year Books. The report, however, also states a case in which it was held that a subsequent promise, in consideration that the plaintiff at the special instance of the defendant had married the defendant's cousin, was binding, and that the marriage was "good cause . . . because [it] ensued the request of the defendant." Whether this was intended to establish a general principle, or was decided with reference to the peculiar consideration of marriage,<sup>17</sup> it was soon interpreted in the broader sense, as was shown in the last lecture. It was several times adjudged that a past and executed matter was a sufficient consideration for a promise at a later day, if only the matter relied on had been done or furnished at the request of the promisor.<sup>18</sup>

It is now time to analyze the nature of a promise, which is the second and most conspicuous element in a simple contract. The Indian Contract Act, 1872, § 2,<sup>19</sup> says:

- (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal:
- (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise.

According to this definition the scope of promises is confined to conduct on the part of the promisor. If this only meant that the promisor alone must bear the legal burden which his promise may create, it would be true. But this is not the meaning. For the definition is of a promise, not of a legally binding promise. We are not seeking for the legal effects of a contract, but for the possible contents of a promise which the law may or may not enforce. We must therefore only consider the question what can possibly be promised in a legal sense, not what will be the secondary consequence of a promise binding, but not performed.

An assurance that it shall rain tomorrow,<sup>20</sup> or that a third person shall paint a picture, may as well be a promise as one that the promise

shall receive from some source one hundred bales of cotton, or that the promisor will pay the promisee one hundred dollars. What is the difference in the cases? It is only in the degree of power possessed by the promisor over the event. He has none in the first case. He has equally little legal authority to make a man paint a picture, although he may have larger means of persuasion. He probably will be able to make sure that the promisee has the cotton. Being a rich man, he is certain to be able to pay the one hundred dollars, except in the event of some most improbable accident.

But the law does not inquire, as a general thing, how far the accomplishment of an assurance touching the future is within the power of the promisor. In the moral world it may be that the obligation of a promise is confined to what lies within reach of the will of the promisor (except so far as the limit is unknown on one side, and misrepresented on the other). But unless some consideration of public policy intervenes, I take it that a man may bind himself at law that any future event shall happen. He can therefore promise it in a legal sense. It may be said that when a man covenants that it shall rain tomorrow, or that A shall paint a picture, he only says, in a short form, I will pay if it does not rain, or if A does not paint a picture. But that is not necessarily so. A promise could easily be framed which would be broken by the happening of fair weather, or by A not painting. A promise, then, is simply an accepted assurance that a certain event or state of things shall come to pass.

But if this be true, it has more important bearings than simply to enlarge the definition of the word *promise*. It concerns the theory of contract. The consequences of a binding promise at common law are not affected by the degree of power which the promisor possesses over the promised event. If the promised event does not come to pass, the plaintiff's property is sold to satisfy the damages, within certain limits, which the promisee has suffered by the failure. The consequences are the same in kind whether the promise is that it shall rain, or that another man shall paint a picture, or that the promisor will deliver a bale of cotton.

If the legal consequence is the same in all cases, it seems proper that all contracts should be considered from the same legal point of view. In the case of a binding promise that it shall rain tomorrow, the immediate legal effect of what the promisor does is, that he takes the risk of the event, within certain defined limits, as between himself and the promisee. He does no more when he promises to deliver a bale of cotton.

If it be proper to state the common-law meaning of promise and contract in this way, it has the advantage of freeing the subject from the superfluous theory that contract is a qualified subjection of one will to another, a kind of limited slavery. It might be so regarded if the law compelled men to perform their contracts, or if it allowed promises to exercise such compulsion. If, when a man promised to labor for another, the law made him do it, his relation to his promise might be called a servitude *ad hoc* with some truth. But that is what the law never does. It never interferes until a promise has been broken, and therefore cannot possibly be performed according to its tenor. It is true that in some instances equity does what is called compelling specific performance. But, in the first place, I am speaking of the common law, and, in the next, this only means that equity compels the performance of certain elements of the total promise which are still capable of performance. For instance, take a promise to convey land within a certain time, a court of equity is not in the habit of interfering until the time has gone by, so that the promise cannot be performed as made. But if the conveyance is more important than the time, and the promise prefers to have it late rather than never, the law may compel the performance of that. Not literally compel even in that case, however, but put the promisor in prison unless he will convey. This remedy is an exceptional one. The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses.

A more practical advantage in looking at a contract as the taking of a risk is to be found in the light which it throws upon the measure of damages. If a breach of contract were regarded in the same light as a tort, it would seem that if, in the course of performance of the contract the promisor should be notified of any particular consequence which would result from its not being performed, he should be held liable for that consequence in the event of non-performance. Such a suggestion has been made.<sup>21</sup> But it has not been accepted as the law. On the contrary, according to the opinion of a very able judge, which seems to be generally followed, notice, even at the time of making the contract, of special circumstances out of which special damages would arise in case of breach, is not sufficient unless the assumption of that risk is to be taken as having fairly entered into the contract.<sup>22</sup> If a carrier should undertake to carry the machinery of a sawmill from Liverpool to Vancouver's

Island, and should fail to do so, he probably would not be held liable for the rate of hire of such machinery during the necessary delay, although he might know that it could not be replaced without sending to England, unless he was fairly understood to accept "the contract with the special condition attached to it."<sup>23</sup>

It is true that, when people make contracts, they usually contemplate the performance rather than the breach. The express language used does not generally go further than to define what will happen if the contract is fulfilled. A statutory requirement of a memorandum in writing would be satisfied by a written statement of the promise as made, because to require more would be to run counter to the ordinary habits of mankind, as well as because the statement that the effect of a contract is the assumption of the risk of a future event does not mean that there is a second subsidiary promise to assume that risk, but that the assumption follows as a consequence directly enforced by the law, without the promisor's cooperation. So parol evidence would be admissible, no doubt, to enlarge or diminish the extent of the liability assumed for non-performance, where it would be inadmissible to affect the scope of the promise.

But these concessions do not affect the view here taken. As the relation of contractor and contractee is voluntary, the consequences attaching to the relation must be voluntary. What the event contemplated by the promise is, or in other words what will amount to a breach of contract, is a matter of interpretation and construction. What consequences of the breach are assumed is more remotely, in like manner, a matter of construction, having regard to the circumstances under which the contract is made. Knowledge of what is dependent upon performance is one of those circumstances. It is not necessarily conclusive, but it may have the effect of enlarging the risk assumed.

The very office of construction is to work out, from what is expressly said and done, what would have been said with regard to events not definitely before the minds of the parties, if those events had been considered. The price paid in mercantile contracts generally excludes the construction that exceptional risks were intended to be assumed. The foregoing analysis is believed to show that the result which has been reached by the courts on grounds of practical good sense, falls in with the true theory of contract under the common law.

The discussion of the nature of a promise has led me to analyze contract and the consequences of contract somewhat in advance of their

place. I must say a word more concerning the facts which constitute a promise. It is laid down, with theoretical truth, that, besides the assurance or offer on the one side, there must be an acceptance on the other. But I find it hard to think of a case where a simple contract fails to be made, which could not be accounted for on other grounds, generally by the want of relation between assurance or offer and consideration as reciprocal inducements each of the other. Acceptance of an offer usually follows by mere implication from the furnishing of the consideration; and inasmuch as by our law an accepted offer, or promise, until the consideration is furnished, stands on no different footing from an offer not yet accepted, each being subject to revocation until that time, and each continuing until then unless it has expired or has been revoked, the question of acceptance is rarely of practical importance.

Assuming that the general nature of consideration and promise is understood, some questions peculiar to bilateral contracts remain to be considered. These concern the sufficiency of the consideration and the moment when the contract is made.

A promise may be a consideration for a promise, although not every promise for every other. It may be doubted whether a promise to make a gift of one hundred dollars would be supported by a promise to accept it. But in a case of mutual promises respectively to transfer and to accept unpaid shares in a railway company, it has been held that a binding contract was made. Here one party agrees to part with something which may prove valuable, and the other to assume a liability which may prove onerous.<sup>24</sup>

But now suppose that there is no element of uncertainty except in the minds of the parties. Take, for instance, a wager on a past horserace. It has been thought that this would amount to an absolute promise on one side, and no promise at all on the other.<sup>25</sup> But this does not seem to me sound. Contracts are dealings between men, by which they make arrangements for the future. In making such arrangements the important thing is, not what is objectively true, but what the parties know. Any present fact which is unknown to the parties is just as uncertain for the purposes of making an arrangement at this moment, as any future fact. It is therefore a detriment to undertake to be ready to pay if the event turns out not to have been as expected. This seems to be the true explanation why forbearance to sue upon a claim believed by the plaintiff to be good is a sufficient consideration, although the claim was bad in fact, and known by the defendant to be bad.<sup>26</sup> Were this view unsound, it is

hard to see how wagers on any future event, except a miracle, could be sustained. For if the happening or not happening of the event is subject to the law of causation, the only uncertainty about it is in our foresight, not in its happening.

The question when a contract is made arises for the most part with regard to bilateral contracts by letter, the doubt being whether the contract is complete at the moment when the return promise is put into the post, or at the moment when it is received. If convenience preponderates in favor of either view, that is a sufficient reason for its adoption. So far as merely logical grounds go, the most ingenious argument in favor of the later moment is Professor Langdell's. According to him the conclusion follows from the fact that the consideration which makes the offer binding is itself a promise. Every promise, he says, is an offer before it is a promise, and the essence of an offer is that it should be communicated.<sup>27</sup> But this reasoning seems unsound. When, as in the case supposed, the consideration for the return promise has been put into the power of the offeree and the return promise has been accepted in advance, there is not an instant, either in time or logic, when the return promise is an offer. It is a promise and a term of a binding contract as soon as it is anything. An offer is a revocable and unaccepted communication of willingness to promise. When an offer of a certain bilateral contract has been made, the same contract cannot be offered by the other side. The so-called offer would neither be revocable nor unaccepted. It would complete the contract as soon as made.

If it be said that it is of the essence of a promise to be communicated, whether it goes through the stage of offer or not, meaning by *communicated* brought to the actual knowledge of the promise, the law is believed to be otherwise. A covenant is binding when it is delivered and accepted, whether it is read or not. On the same principle, it is believed that, whenever the obligation is to be entered into by a tangible sign, as, in the case supposed, by letter containing the return promise, and the consideration for and assent to the promise are already given, the only question is when the tangible sign is sufficiently put into the power of the promise. I cannot believe that, if the letter had been delivered to the promisee and was then snatched from his hands before he had read it, there would be no contract.<sup>28</sup> If I am right, it appears of little importance whether the post office be regarded as agent or bailee for the offerer, or as a mere box to which he has access. The offeree, when he drops the letter containing the counter-promise into the letterbox, does an overt

act, which by general understanding renounces control over the letter, and puts it into a third hand for the benefit of the offerer, with liberty to the latter at any moment thereafter to take it.

The principles governing revocation are wholly different. One to whom an offer is made has a right to assume that it remains open according to its terms until he has actual notice to the contrary. The effect of the communication must be destroyed by a counter communication. But the making of a contract does not depend on the state of the parties' minds, it depends on their overt acts. When the sign of the counter promise is a tangible object, the contract is completed when the dominion over that object changes.

## CONTRACT—III. VOID AND VOIDABLE

THE ELEMENTS OF FACT NECESSARY TO CALL A CONTRACT INTO EXISTENCE, and the legal consequences of a contract when formed, have been discussed. It remains to consider successively the cases in which a contract is said to be void, and those in which it is said to be voidable, in which, that is, a contract fails to be made when it seems to have been, or, having been made, can be rescinded by one side or the other, and treated as if it had never been. I take up the former class of cases first.

When a contract fails to be made, although the usual forms have been gone through with, the ground of failure is commonly said to be mistake, misrepresentation, or fraud. But I shall try to show that these are merely dramatic circumstances, and that the true ground is the absence of one or more of the primary elements, which have been shown, or are seen at once, to be necessary to the existence of a contract.

If a man goes through the form of making a contract with A through B as A's agent, and B is not in fact the agent of A, there is no contract, because there is only one party. The promise offered to A has not been accepted by him, and no consideration has moved from him. In such a case, although there is generally mistake on one side and fraud on the other, it is very clear that no special doctrine need be resorted to, because the primary elements of a contract explained in the last lecture are not yet present.

Take next a different case. The defendant agreed to buy, and the plaintiff agreed to sell, a cargo of cotton, "to arrive ex Peerless from Bombay." There were two such vessels sailing from Bombay, one in October, the other in December. The plaintiff meant the latter, the