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THE EFFECT OF OPTIONS ON CONSIDERATION

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The principal feature of contract law is that by a voluntary expression of assent to-day one can deprive himself of his freedom to-morrow. This does not mean that he does not have as free a will to-morrow as to-day. At least, experience proves that most promises can be broken. It means only that organized society—the fellow men of our political or social group—afford as against a promisor and in favor of a promisee a certain stimulus to action that tends to induce performance in accordance with a promise. This stimulus consists of the various sorts of societal remedies and penalties available to prevent or to compensate for or to penalize the breach of a contract. It is a stimulus that would not exist in the absence of an organized society—in the absence of *law*. Without law and organization, other stimuli toward the keeping of promises might exist. Some of them still exist along with but outside of law. The legal and societal system is merely an addition thereto, or a substitute therefor, brought about by reason of its survival value in the evolutionary development of men living in groups.

The end and purpose for which contracts are enforced by society is security in the fulfilment of expectations brought about by the promises of others. Society does not guarantee the fulfilment of all expectations in general. It does not even attempt to enforce all promises. It therefore becomes necessary for the lawyer to determine the criteria by which enforceable promises are distinguished from those not enforceable. The chief of these criteria is that amorphous and almost indefinable something called "consideration." This is not the place to attempt a definition of consideration; but it will be necessary to point out that its limits are very broad, that very little in the shape of value is required by the law, and that one promise may be sufficient as a consideration for another promise. If a contract is held to be invalid because of an "option to cancel," it will be found to be because it is supposed that this

causes an entire absence of the element called "consideration." The investigation of such "optional" contracts is, therefore, essentially an investigation in the field of "consideration."

It is human nature to try to get something for nothing. Everyone is striving for the greatest sum-total of satisfactions at the least possible expense. For the promises of others, therefore, we offer in return as small a consideration as will in fact induce them to make such promises. The law is not opposed to this. For centuries it has declared that values are to be determined by the parties themselves, that a thing is worth what the appetite of the promisor declares it to be worth, and that "adequacy" of return as measured by general market values is not required to make a promise binding.

It is equally true that "options" are not in the least regarded as objectionable by the law. An "optional" element will never invalidate a contract merely because it is an "option." It will do so only in case it defeats the requirement of a consideration. One who has an "option" has a *choice* between alternatives. There must always be at least two of these, although there may be many more than two. Thus where A has made an offer to B, the latter has a choice to make between accepting and not accepting. On its face this looks like a choice between *two* alternatives; but inasmuch as his choice, so far as the offer itself affects it, is between accepting and any other course of action known to man, there are innumerable alternatives and his option is unlimited.

When we say that B has such a "choice," we further mean that he is legally privileged to adopt either alternative. Even in cases where B has made a binding contract, he usually can in fact choose between performing and breaking the contract. It is not usual to say, however, that he has an option between these two alternatives. Society approves one of them and may even reward it. Society disapproves the other and penalizes it in various ways. So we say that B is not legally privileged to adopt the latter alternative. He is bound by legal duty. He has no option.

The offeror, A, usually also has an option between revoking his offer and not revoking it. He is equally privileged by the law to adopt either alternative, just as is the offeree to accept or not to accept. This is not true in the case of "binding options" and "irrevocable" offers, to be mentioned later.

The foregoing is true whether the offer is one that is to be accepted by making a return promise or by doing some non-promissory act. Thus A promises B a reward for certain information. B has an option between giving the information and not giving it. The same would be true if A had promised B a salary and had asked B to make a promise of service in return. If B accepts either offer, his option is gone. He has made his choice, and there is no further choice to be made. Likewise A's option between revoking and not revoking is gone. In the one case there is a unilateral contract, binding A by a legal duty to pay

the reward promised. In the other, there is a bilateral contract, with a legal duty on A to pay and another legal duty on B to serve. In the one case, the consideration for A's promise is B's completed performance—the giving of the information. In the second case, the consideration for A's promise is the return promise of B to serve.

It has been said thousands of times that both parties to a contract must be bound or neither is bound. This is never true in the case of unilateral contracts, and it is subject to certain marked limitations even in the case of bilateral contracts. One of two mutually exchanged promises may be aleatory, conditional, dependent upon an uncertain event.¹ Thus, A gives a promise to pay \$100 premium and B promises to pay \$5,000 if A's house burns down. No one doubts that B's conditional promise is sufficient as a consideration for A's promise. A must pay \$100 even though B never has to pay anything at all. If we adhere to the statement that unless both are bound neither is bound, we must so construe the term "bound" as to include a case where legal enforcement against B will never take place except in a very uncertain and improbable event. The law is not concerned with the amount that A pays as a premium or with the aleatory character of B's promise in return—with the element of uncertainty in the eventual performance by B. It appears that the contract is not invalidated by the smallness of the amount that induces B to make his large conditional promise or by the large element of uncertainty in the promise that B has given to induce A to promise his definite premium.

UNLIMITED OPTIONS

(a) *Illusory Promises.* The statement that in the case of a bilateral contract both parties must be bound or neither is bound is not altogether untrue. Where a conditional and aleatory promise is given for an unconditional one, it may be supposed that the former makes up for its uncertainty by a proportionate increase in the amount promised. The parties weigh certainty against amount as a business matter, each getting the benefit that he desires. The promisee in the aleatory promise gets what insurance companies call "protection," he gets the assurance of a large return in case the condition happens. In the market, this constitutes value. This assurance and this value lie in the fact that the law will enforce the promise if the condition happens to be fulfilled. So we say that the promisor is "bound," although the condition may never be fulfilled and he may never have to perform or be subject in any form to legal compulsion. He is *conditionally* bound. The requirement that both parties must be bound is satisfied, even though one or both are only conditionally bound, whether the conditions prece-

¹ *Martindale v. Fisher* (1745, K. B.) 1 Wils. 88; *Christie v. Borelly* (1860) 29 L. J. C. P. 153; *Seward v. Mitchell* (1860, Tenn.) 1 Cold. 87; *Losecco v. Gregory* (1902) 108 La. 648, 32 So. 985.

dent to the two enforceable duties are the same event or are different events.

This brings us to what has been described as the "illusory promise"—the promise that is not a promise, the promise that is an illusion. As was said in the beginning, the chief feature of contract law is that by an expression of his will to-day the promisor limits his freedom of voluntary choice in the future. Society controls his future action by affording the stimulus described as *compulsion*. With this element absent, we are no longer dealing with what is called contract or with contract law. To fall within this field, therefore, a promise must in its terms express a willingness to effect this limitation on freedom of choice. Thus, if A asks B to promise some future performance and B makes no answer, B has made no promise. This is true, even though when the future time arrives B may then be willing to perform as requested and may actually so perform. If, under these circumstances, A thinks that B has made a promise, he is under an illusion. The same is true if instead of making no answer B had replied, "I predict that when the time comes I shall be willing to do what you ask." A prediction of future willingness is not an expression of present willingness and is not a promise. To see a promise in it is to be under an illusion. We reach the same result if B's reply to A is, "I promise to do as you ask if I please to do so when the time arrives." In form this is a conditional promise; but the condition is the pleasure or future will of the promisor himself. The words used do not purport to effect any limitation upon the promisor's future freedom of choice. They do not lead the promisee to have an expectation of performance because of a present expression of will. He may hope that a future willingness will exist; but he has no more reasonable basis for such a hope than if B had merely made a prediction or had said nothing at all. As a promise, B's words are mere illusion. Such an illusory promise is neither enforceable against the one making it, nor is it operative as a consideration for a return promise.²

² *Thayer v. Burchard* (1868) 99 Mass. 508 (a carrier offered to transfer grain at \$4 per ton, and plaintiff accepted; no account was specified, and the plaintiff was "at liberty to buy grain or not, as they pleased, and if bought to ship it by the defendant's railroad or any other lines"); *Bernstein v. W. B. Mfg. Co.* (1921) 238 Mass. 589, 131 N. E. 200 (seller accepted an order for goods "subject to determination at any time by us"; nothing was said about the necessity of a notice of cancellation, and the court assumed that the seller's acceptance was illusory); *Burton v. Great No. Ry.* (1854) 9 Exch. 507 (agreement to transport all grain that defendant might present, for 12 months); *Willard, Sutherland & Co. v. United States* (1923) 262 U. S. 489, 43 Sup. Ct. 592 (in this case, there was an order of 1,000 tons by the United States, although it had not previously promised to order any; this made a valid bilateral contract for that amount, since the plaintiff's original promise operated at least as a standing offer so long as not revoked); In *Rehm-Zeiher Co. v. Walker Co.* (1913) 156 Ky. 6, 160 S. W. 777, it was agreed, "If for any unforeseen reason the party of the second part find that they cannot use the full amount, the party of the first part agrees

Such illusory promises have become the subject of actual litigation. In *Great Northern Ry. v. Witham*,³ the defendant wrote offering to supply the plaintiff with such goods as the latter might choose to order for one year at certain rates. The plaintiff replied that it accepted his offer and would be bound by its terms. No contract was made, because the Railway promised only to buy such goods as it might later choose to order. In *Strong v. Sheffield*,⁴ a woman guaranteed her husband's note, the creditor promising in return to forbear to sue her husband as long as he did not wish for the money. An action on the guaranty failed because the creditor's promise was illusory and not operative as a consideration.

It will be observed that in these illusory promises the promisor reserves an *option*. It is a choice between performing and not performing, just as in the case of an offer the offeree has a choice between accepting and not accepting. And inasmuch as the phrase "not performing" includes every possible course of conduct other than performing, it is obvious that the promisor's choice of conduct is absolutely unlimited. Hence, an option of this kind makes a promise illusory and legally inoperative.

There is one kind of conditional promise that seems to be illusory in character and yet is held to be operative as a consideration. This is a promise conditional upon a past event or upon an existing state of affairs.⁵ A's ship has not been heard from for some months. In return for A's promise of \$1,000, B promises to pay A \$2,000 in case the ship has already been sunk. The next day it is discovered that the ship has not been sunk. A must pay the premium promised. B's promise was operative as a consideration, in spite of the fact that the ship still existed and that therefore B would never be under any duty to pay. B's promise was not *in form* conditioned upon his own subsequent will, wish, or desire; but it would seem to be so conditioned *in fact*, since the

to release them from the contract for the amount desired by the party of the second part." This was held to make the buyer's promise conditional upon its own will and therefore illusory. "The contract places no limitation whatever upon the meaning of the words 'unforeseen reason' It was not necessary that the reason should be a good reason or a reasonable reason." *Fowler Utilities Co. v. Gray* (1907) 168 Ind. 1, 79 N. E. 897 (agreement to supply and to buy heat as long as the buyer desired); *Interstate Iron and Steel Co. v. Northwestern B. & I. Co.* (1922, C. C. A. 7th) 278 Fed. 50 (to sell and to buy 200 tons of iron bars, in monthly instalments upon specifications to be furnished to buyer 30 days before shipment, all amounts not so specified by the buyer to be "automatically canceled").

³ (1873) L. R. 9 C. P. 16. In cases like this it may be reasonably argued that there was no contract because of lack of acceptance in accordance with the offer rather than for lack of consideration; *orders* were asked of the offeree and not illusory promises. Often, however, the offeror does not so understand his own offer and makes no such contention; lack of consideration is a good defense. If an order is given before the offer is withdrawn, a contract is made.

⁴ (1895) 144 N. Y. 392, 39 N. E. 330.

⁵ *Seward v. Mitchell*, *loc. cit. supra* note 1.

expressed condition precedent to his legal duty to pay—the previous sinking of the ship—can never be fulfilled. As the case subsequently appears, the promise looks like an illusory promise.

Two reasons may be suggested for holding that such a promise is operative as a consideration. The first is that, however it may appear in the light of subsequent knowledge, the promise does not appear to the parties to be illusory at the time it is made. Among the many such promises made by a marine insurer, some of them will prove not to be illusory at all. For each such promise, therefore, he must set aside some of his resources to meet the expected percentage of losses. The making of such a promise affects his business transactions just as much as if it were a promise conditional upon an equally uncertain *future* event. The same is true even though only one such promise is made. Secondly, our fact-finding machinery is not infallible. The actual enforcement of B's promise depends not upon the actual previous sinking of the boat, but upon A's convincing a jury that it had previously sunk. This is a future event that may possibly take place, irrespective of the physical facts of the past.

(b) *Binding Options to Buy or Sell.* The reason why an illusory promise, one reserving in the promisor an unlimited option, is not enforceable against the promisor is that it is not a sound and reasonable basis of expectation on the part of the promisee. The reason that a *return* promise is not enforceable is that the illusory promise is not operative as a consideration. It is not a good social reason for bringing societal compulsion to the aid of the party making such a promise that is not a promise.

On the other hand, the fact that he has an unlimited option, entire freedom of choice as to the course of action he will adopt is not regarded as in itself injurious to society. It is not *illegal* in any sense, and it does not invalidate a contract where the other existing facts are sufficient to make it valid and enforceable. Therefore, one who has given a consideration for a real promise can enforce that promise, even though he may himself have an unlimited option. His legal right is not affected by the fact that he has made no promise at all or has made some illusory promise. Thus, where A promises to convey land to B for \$5,000 at any time within 30 days, and in return B pays A \$100, A's promise to B is binding even though B has made no promise at all. This is because B has actually paid \$100, amply sufficient as a consideration. There is nothing illusory about A's promise, although it is conditional on payment of \$5,000 within 30 days. A's legal duty is not made dependent on his own will, wish or desire, but upon the act of payment by B. A has no option whatever. B, on the other hand, has an unlimited freedom of choice, the option between paying \$5,000 and not paying it. B's unlimited option does not invalidate A's promise to B. This is true of every unilateral contract, whether the promise of which it consists is conditional or unconditional.

(c) *Binding employment options.* There are many valid employment contracts by which the employer is bound to give paid employment for life or as long as the employee may desire or for some definite period, and the employee is privileged to quit at any time. These are practically always unilateral contracts. Since the employee has made no promise to serve, or if any, an illusory promise to serve as long as he desires, there must be some other consideration to make the employer's promise binding. One of the commonest of these cases is that of an employee injured in service who releases his claim for damages in return for a promise of permanent employment.⁶ The release is ample consideration for the return promise even though the employee has an unlimited option between serving and not serving. In other cases the consideration has been the relinquishment of a business⁷ or a forbearance to strike when other employees are striking.⁸

LIMITED OPTIONS

We have seen above that a promise so worded as to leave the promisor an unlimited option as to his course of conduct creates no legal duty on him and is inoperative as a consideration for a return promise. We have seen also that conditional, aleatory promises are operative as a consideration for a return promise, however improbable may be the fulfillment of the condition, provided the condition is not a mere expression of the will, wish, or desire of the person who himself made the conditional promise. There are now to be considered the cases where a promisor reserves to himself a limited option, a choice among a limited number of alternatives.

The simplest case of this sort is the alternative promise.⁹ In return for A's promise B promises to do either one of two things, the choice between the two to be made by B. This is not a case where B promises a certain performance, with a collateral provision for a penalty or liquidated damages in case of breach. In such case B does not have the power by tendering the penalty or the liquidated sum to extinguish his duty to perform. The provisions for a penalty or liquidated damages are put in as an additional security for performance, not as a means of escaping performance. In the case of a true alternative promise,

⁶ *Pennsylvania Co. v. Dolan* (1892) 6 Ind. App. 109, 32 N. E. 802 (promise to employ as long as works are kept running, in consideration of release of a claim for damages); *Stearns v. Lake Shore & M. S. Ry.* (1897) 112 Mich. 651, 71 N. W. 148 (same).

⁷ *Carnig v. Carr* (1897) 167 Mass. 544, 46 N. E. 117 (defendant agreed to employ plaintiff permanently in consideration of plaintiff's discontinuing his own business and selling his stock in trade to defendant; plaintiff had the option to quit, but the defendant was held bound to employ); *Rague v. N. Y. Evening Journal Pub. Co.* (1914, 2d Dept.) 164 App. Div. 126, 149 N. Y. Supp. 668.

⁸ *Bridgeford & Co. v. Meagher* (1911) 144 Ky. 479, 139 S. W. 750.

⁹ *Riley v. Union Sawmill Co.* (1909) 122 La. 863, 48 So. 304 (promise to cut timber or to pay 10 cents per acre per year).

B's duty is equally well performed, no matter which of the two alternatives he chooses. He has, therefore, a true option, a privilege of choice; but it is a limited option between two specific alternatives, not an unlimited option to act as he may please. Such a promise, therefore, creates an enforceable duty, and an action will lie in case B fails to perform either alternative. Such a promise, also, is operative as a consideration for a return promise. The option element is not such as to invalidate it for either purpose.

Another case of the limited option is one where B's promise is expressly conditional upon some future voluntary action of his own. Such a promise will generally be found not to be an illusory promise. It is enforceable and it is operative as a consideration for a return promise. Thus, in *Scott v. Moragues Lumber Co.*,¹⁰ Scott was considering the purchase of a ship. The Lumber Company wished to charter such a ship. A bilateral agreement was thereupon made, the Lumber Company promising to charter the ship at a named rental and Scott promising to let the ship by charter to the Lumber Company at the named rate in case he should buy the ship. Scott bought the ship, and then refused to charter it to the Lumber Company. A judgment for damages was rendered against Scott. The mutual promises were consideration for each other, even though Scott's duty to deliver the ship to the Lumber Company was conditional on his own voluntary action in buying the ship. He made no promise to buy the ship, and he had an unlimited option between buying and not buying it; but he had promised to charter the ship subject to a condition precedent, and he did not have an unlimited option between chartering and not chartering. The only choice left to him was between chartering and *not buying*.¹¹ This has much in common with an alternative promise. If Scott had

¹⁰ (1918) 202 Ala. 312, 80 So. 394.

¹¹ *McMullan v. Dickinson Co.* (1896) 63 Minn. 405, 65 N. W. 661 (employment as long as the corporation should continue in business and as long as the employee should continue to hold 50 shares of stock. "The consideration for the agreement was ample and mutual, although the term of service might be terminated by defendant's cessation of business or plaintiff's selling his stock in the corporation. The expressions of a contingency whereby the contract might be terminated by the act of either party, expressly excluded the idea that each was at liberty to terminate it at any time without regard to the happening of either contingency.")

In *Blair Eng. Co. v. Page Steel & Wire Co.* (1923, C. C. A. 3d) 288 Fed. 662, the plaintiff agreed to furnish "all the necessary plans and specifications for such alterations and additions as the Page Co. may desire to make in its plant," at specified compensation promised in return by the defendant. It was held that the contract was void because the defendant's promise was "conditioned by its *desire*, present and future." In this case it might well be held that the defendant promised to put all alterations it might make into the plaintiff's hands. If so, the contract was valid, being like a contract to supply all one's requirements. The defendant's option was between paying the plaintiff and not making alterations, and not between paying and not paying. See also *McCaffrey v. Knight* (1922, D. C. R. I.) 282 Fed. 334 (agreement to buy and to sell 30 bbl. per week so long as the plaintiff should continue to make the article; erroneously held invalid).

promised to charter the ship to the Lumber Company or not to buy it, he would have had the option of either chartering or not buying. This is exactly the option that he had in the case litigated. There is at least one important difference, however, because of the difference in the form of the promise. In both cases alike there will be no breach if Scott performs either alternative, chartering or not buying; but if he performs *neither* alternative the damages collectible in the two cases would be different. If Scott's promise were an alternative promise, the Lumber Company's damages would be measured by the value of the less expensive alternative, on the theory that this is the one he would have actually got had Scott chosen to perform either. In the case as it actually was, the damages collectible were the value of the promised charter. Although Scott had an alternative, it was not a *promised* alternative. The Lumber Company made no promise to pay for Scott's forbearance to buy the ship, such forbearance being of no value to them. They promised only to pay for delivery of the ship to them, their duty to pay as well as their right to delivery being conditional upon Scott's voluntary purchase of the ship.

It should be observed that although the Lumber Company's duty to pay was subject to the same condition precedent as was Scott's duty to deliver the ship, Scott was the only one who had an option; the Lumber Company had no option or choice whatever.

Contracts involving this sort of a limited option are not at all uncommon. The following are illustrations:

(a) *Contract to Sell Entire Output.* There are many cases where a producer promises to sell and a buyer promises to buy, at named rates, the producer's entire output. In some of these cases, at least, the producer makes no promise to produce anything whatever. He merely promises that if he does produce he will deliver the entire output to the buyer. Such a promise creates a conditional duty and is operative as a consideration for the buyer's promise, even though it leaves in the seller an option between delivering the output and not producing any output. He has the legal privilege of not producing; but he does not have the legal privilege of producing and keeping the output himself or of producing and selling to a third person. He has a choice as to his conduct, but not an unlimited choice. He has a limited option.

Thus where a gardener promised to sell "all the pineapples that he may grow,"¹² the contract was valid, even though "nowhere in the con-

¹² *Hawaiian Pineapple Co. v. Saito* (1921, C. C. A. 9th) 270 Fed. 749. See also *Burgess Fibre Co. v. Broomfield* (1902) 180 Mass. 283, 62 N. E. 367. The defendant offered to buy at \$12 per ton all the old iron on the plaintiff's premises "which you may desire to sell"—"you to have the privilege of indicating what you desire to have us take and of reserving what you wish." The plaintiff accepted this offer. It was held to be a valid contract, the plaintiff's option being the limited one between selling to the defendant and not selling at all. The court said "it is like a contract for the purchase and sale of all the output of a mill for a

tract did Saito obligate himself to grow any pineapples on his holdings or elsewhere." In cases like this the contract is not aleatory, because the promise of each is conditional upon the same event. The condition is uncertain; but the performances promised are equally uncertain. No pineapples, no pay. Some pineapples, some pay. Many pineapples, much pay. A uniform ratio is maintained between goods delivered and amount to be paid. The fulfilment of the condition is at the option of the seller, and the buyer has no option whatever; but this fact does not make the contract aleatory.

In contracts for the delivery of total output the courts will frequently find, either by implication or in express words, a promise by the seller to operate his plant in good faith in the usual way.¹³ If such a promise is made, there is no option left to the seller. Such a promise is not at all necessary to the validity of the contract; but it very considerably increases the size and content of the duty assumed by the seller. Such a promise is almost certain to be implied if the contract is aleatory. Where a producer promised to sell all the oranges that he might produce during certain years and the buyer promised to pay \$8,000, and it was further provided that "purchaser assumes all risks," it was held that the buyer must pay the full \$8,000 even though an unprecedented freeze killed all the trees and not an orange was produced.¹⁴ It is clear, however, that the buyer would not have had to pay if the seller had cut down his own trees to avoid production; and it is probable that for such an act the buyer could have got a judgment for damages. A court might hold that the buyer's duty to pay was conditional on there being no intentional interference with production by the seller, and at the same time hold that there was no promise by the buyer not to interfere with production. In such case, we should have an aleatory contract in which the seller would have a limited option between delivering the crop and preventing the trees from bearing. Such a contract, if made, would be perfectly valid.

(b) *Contract to Supply Buyer's "Needs" or "Requirements."* There are many bilateral contracts where the seller promises to supply and the buyer promises to buy, at certain rates, all of a certain commodity that the buyer may need (or may require) in his business during a named period.

In a well-known case, A promised to supply and B promised to buy at a certain price all the coal B's three vessels might need during a certain season. It was held that an action would lie for breach of promise

season; such a contract is a valid one, although the amount bought and sold is not ascertained, and although there is no obligation to operate the mill."

¹³ See *Fayette-Kanawha Coal Co. v. Lake & E. Coal Corp.* (1922) 91 W. Va. 132, 112 S. E. 222.

¹⁴ *Losecco v. Gregory*, *loc. cit. supra* note 1.

by A.¹⁵ B's promise was operative as a consideration in spite of the fact that B had a limited option. B did not promise to use coal or to keep his vessels in commission. He was privileged to convert his vessels into oil burners, or to put them out of commission, thus preventing the need for coal. He had an option between buying coal of A and not using coal on his vessels. A had no option of any kind.

The words of the contract may provide for a purchase and sale of all that the buyer may "require." If the entire contract shows that this means "all that the buyer may choose to order," the buyer's promise is illusory, and there is no contract unless the buyer gives some consideration other than this promise. If, however, the context shows that the buyer is promising to buy of the seller all of the specified commodity that he may buy of any one, his promise is not illusory and the contract is valid. The buyer's option in such case is a limited one, between buying of this seller and not buying at all.¹⁶

The limited option of a buyer who promises to take all that he may "need," or "use," or "require" in his business is very considerably affected if the contract provides for the purchase and delivery of a maximum or a minimum amount or both.¹⁷ Thus the seller may promise to supply all that the buyer may need, not exceeding a certain maximum

¹⁵ *Wells v. Alexandre* (1891) 130 N. Y. 642, 29 N. E. 142. (The court seems to have thought that the boat owner promised to take as much coal as "the ordinary and accustomed use of the steamers required." If this was true, the buyer had no option whatever; but the written contract did not so provide.)

¹⁶ In *Schlegel Mfg. Co. v. Cooper's Glue Factory* (1921) 231 N. Y. 459, 132 N. E. 148, there was a written agreement for purchase and sale of "your requirements of special BB glue for the year 1916." The court held that the agreement was void because the buyer made no promise of any kind, either to order any glue or not to buy of others. The court seemed to think that such an agreement could not be operative unless the buyer promises to take some amount ascertainable with reasonable certainty. This is not necessary if the buyer does or promises anything else; a promise to buy of this seller exclusively would be sufficient. *Edison Elec. Ill. Co. v. Thacher* (1920) 229 N. Y. 172, 128 N. E. 124 (all manhole covers required in buyer's business).

¹⁷ *Wood County Grocer Co. v. Frazer* (1922, C. C. A. 8th) 284 Fed. 691 (agreement for purchase and sale of 2,000 bags of beet sugar, at not less than \$16.12 nor more than \$22.12 per bag, the buyer promising to accept the sugar in any event at the minimum price and the seller to deliver in any event at the maximum price; this was held valid, although the buyer had an option not to take the sugar at any price above \$16.12 and the seller had an option to charge as much as \$22.12 and an option not to deliver if buyer refused to pay that price); *Southern Pub. Assoc. v. Clements Paper Co.* (1918) 139 Tenn. 429, 201 S. W. 745 (plaintiff made an offer for print paper, minimum 120 tons, maximum 145 tons, accepted by defendant; this was held valid, and the limited option between 120 and 145 was held to be with the buyer); *Wheeler v. New Brunswick & C. R. R.* (1885) 115 U. S. 29, 5 Sup. Ct. 1061, 1160 (the Railroad was taking up worn rails and agreed to sell to Wheeler from 200 to 600 tons between certain dates; the limited option was held to be with the seller); see note L. R. A. 1918 D, 583.

amount. If in return the buyer promises to take all that he may need, not mentioning any maximum, his option is that described above—between buying of this seller and not buying of anybody. His *right*, however, and the correlative duty of the seller are limited. Beyond the maximum promised by the seller, there is no duty on the seller to supply, beyond that maximum the seller has an option of supplying or not supplying. If the buyer needs more than that maximum, he will not be privileged to buy of others until after this seller has refused to fill his orders.

The seller may promise to supply all the buyer may need, and the buyer may promise to buy all that he may need not exceeding a certain maximum. This enlarges the buyer's option, for beyond the specified maximum his choice is unlimited; up to that maximum he has the same limited option before described, between buying of this seller and not buying at all. In this case the seller has no option of any sort.

Again, the seller may promise to supply all that the buyer may need, not exceeding a certain maximum; and the buyer may promise to take all that he may need, not to be less than a certain minimum. This lessens the buyer's right by giving the seller an option above the maximum, but it enlarges the buyer's duty by depriving him of any option below the minimum.

Another common illustration of a limited option in the buyer is the bilateral agreement to buy and to deliver all of a commodity that the buyer may need for certain limited purposes or in a certain territory. Thus a manufacturer and a retailer agreed to sell and to buy all bread of a certain kind that the retailer should sell along a certain route.¹⁸ Here the option was all in the buyer. Off the specified route his option was unlimited; on that route, however, he must choose between selling this one brand of bread and selling none at all. In another case, there was a bilateral contract for the purchase and sale of "all the bunker oil sold by the purchaser to vessels in the port of Pensacola" during a named period.¹⁹

Contracts giving to one party, or to both, a limited option are enforceable. Such promises are not illusory, because they purport in terms to limit the promisor's field of choice. The law, carrying out the expressed intent of the promisor, puts its sanction on the promise and thus deprives him of legal privileges that he would otherwise have had. For similar reasons the law declares such a promise to be operative as a consideration for a return promise. Having determined as above that it is binding, and that it deprives the promisor of certain legal privileges, such a promise is ordinarily regarded as a detriment to the one who makes it. This renders no service, however, in determining the validity

¹⁸ *Ehrenworth v. Stuhmer & Co.* (1920) 229 N. Y. 210, 128 N. E. 108.

¹⁹ *Texas Co. v. Pensacola Mar. Corp.* (1922, C. C. A. 5th) 279 Fed. 19, 24 A. L. R. 1336.

of the contract, for we have to determine the enforceability of the promise before we know that it is substantially detrimental.

OPTION TO CANCEL

The one remaining type of option that will be considered is the option to cancel. In all business transactions the effort of each party is to get the most he can at the lowest expense to himself. In bilateral contracts, each promisor will so limit his own promise as to make the performance promised as little as possible; he will so hedge it with aleatory conditions as to reduce to the utmost the chance of his having to perform at all; and he will limit his own freedom of choice as little as possible. Every promise would thus be reduced to an absurdity but for the fact that the other contracting party would give nothing in return. Each must give enough to induce the other to give the desired exchange. Thus, each promise tends to be the general market equivalent of the return promise. In certain cases, however, eager contractors will promise much to gain a little. In many cases workers have done expensive and difficult work, receiving in return a promise of compensation to be paid only in case the other party is entirely satisfied with the result. Such promises are not illusory, although approaching it so closely that the point has been debated. Nor does the promisor in such a case reserve any true option. He does not promise to pay if he wishes to pay—a promise that would be illusory because it leaves him an unlimited option. He promises to pay *if he is satisfied with the result*. This requires him to consider the result judicially and in good faith, and in case of dispute it will be for the jury to say whether or not he has done so. Such a promise is not unenforceable, nor is it inoperative as a consideration.²⁰

The "option to cancel" is another method of producing a very similar result that has become increasingly common. One contractor attempts by this means to retain in as large a degree as possible his own economic freedom of choice, observing results as performance of the contract proceeds and cancelling the contract if these results are not satisfactory to him. The legal power created by this "option to cancel" is not generally made conditional upon dissatisfaction with the results; it is a power to cancel if the contractor so wills and desires. His option between cancelling and not cancelling is unlimited. The retention of such a power is not in itself illegal; but in some cases it has been held to

²⁰ *Hollingsworth v. Colthurst* (1908) 78 Kan. 455, 96 Pac. 851 (contract for sale of land, conditioned on title being satisfactory to buyer: held valid, the buyer being required to exercise honest judgment); *Livesley v. Johnston* (1904) 45 Or. 30, 76 Pac. 946 ("the clause leaving the quality and condition of the hops at the time of delivery to the judgment of the buyer does not render it void of mutuality").

²¹ *American Agric. Chem. Co. v. Kennedy* (1904) 103 Va. 171, 48 S. E. 868 (a written contract provided that the seller should have "the right to cancel this contract at any time"; the court held that this invalidated the contract *ab initio*,

invalidate the contract on the ground that it defeated the element of consideration.²¹ Different cases of this type will now be considered.

(a) *Revocable offers.* When A makes an offer to B, the latter gets a power of acceptance with an unlimited option between using it and not using it. Also A, the offeror, has a power; it is usually called the power to revoke, but it might as well be called a power to "cancel." There is no contract as yet, no contractual rights and duties; so this power is not a power to cancel a contract. It is like such a power, however, in this—that its exercise results in the extinguishment of legal relations then existing. The "cancellation" of a contract extinguishes rights and duties; the "cancellation" (or revocation) of an offer extinguishes the power of acceptance. Some offers are entirely irrevocable; but in the case of ordinary offers the offeror has an unlimited option between revoking and not revoking. The question of whether or not this unlimited option invalidates a contract does not arise, because there is as yet no contract for another reason—lack of acceptance by the other party.

That the existence of an unlimited option to revoke or cancel, as described in the preceding paragraph, does not necessarily invalidate a contract is indicated in the following case: B offers \$200 for a binding option for 30 days on land owned by A. A refuses such an option, believing that he may find a desirable purchaser himself. Thereupon B says, "Make me a written thirty-day offer, revocable at your pleasure, at the price of \$5,000, and tomorrow I will pay you \$100 for so doing." A assents to this, and delivers to B the written offer, "For thirty days I offer Blackacre to B for \$5,000, this offer to be revocable at my pleasure at any time before acceptance." B's return promise to pay \$100 to-morrow is thereby made binding. There is a valid contract, A's act being operative as a consideration in spite of his retaining an unlimited "option to cancel." The written document is beneficial to B in that it gives him a power of acceptance; it would have been worth more had it also given him an immunity from revocation, but B thought the revocable power itself worth \$100. Neither A's power to "cancel" in

saying, "As that proposition did not bind the plaintiff to sell, there was no consideration for the defendant's promise to purchase"; nothing was said about notice, and there was no analysis); *Miami Bottling Co. v. Orange Crush Co.* (1924, C. C. A. 5th) 296 Fed. 693 (defendant gave to plaintiff the exclusive privilege of bottling and selling "orange crush," plaintiff promising various things in return, with a provision that plaintiff might cancel at any time; specific performance was refused, the court saying that "the contract was void for lack of mutuality," and conceding that the defendant "is liable for damages for the period during which the contract was performed"): In *Nicholls v. Wetmore* (1916) 174 Iowa, 132, the seller reserved an option to cancel if at any time, in their judgment, plaintiff was not properly promoting the sale of their cars; further, his promise to deliver was subject to various contingencies, especially "to the prior orders of the other dealers and as the business of the manufacturers will permit." The court held the agreement void because it lacked "mutuality," resting the decision partly on other grounds. It is believed that those other grounds must be looked to for any satisfactory basis for the decision.

this case, nor his exercise thereof, is intended to affect B's duty to pay \$100. Its exercise will in no way benefit B; instead it will deprive him of the benefit of a thirty-day power. But it does not wholly destroy all the value of A's act, since that act created in B, for one moment at least, a power of accepting and binding A to convey Blackacre. The conclusion should be drawn that an unlimited option to cancel does not invalidate a contract where it can be shown that it does not wholly defeat consideration.

The case of *Gurfein v. Werbelovsky*²² was substantially the foregoing case. The documentary contract was as follows: "We have this day accepted your order for 5 cases plate glass (in named sizes) at \$1 per square foot, f. o. b. New York City. The above cases are to be shipped within three months from date. You have the option to cancel the above order before shipment." The buyer never cancelled, because prices rose materially; but the seller refused to ship the glass. The court held that the seller was bound by a valid contract. The buyer's promise to pay was operative as a consideration in spite of the option to cancel. The correctness of this decision follows *a fortiori*, if the decision in the paragraph preceding this one is correct. In each case the option was unlimited; but in the present case the exercise of the option would extinguish the seller's duty to deliver as well as the buyer's duty to pay, whereas in the former case it would extinguish the power for which the buyer promised his money without extinguishing his duty to pay the money. There are other differences between the two cases, but they seem immaterial. In the one case the defendant's promise was to pay \$100, not to buy the land; in the other, the defendant's promise was to ship glass. These promises were binding. In each case alike, the consideration given by the plaintiff was a promise—in the one case to convey, in the other to pay money—accompanied in each case by a power to cancel. In each case the defendant had a power to extinguish the plaintiff's power to cancel—in the one case by tendering \$5,000 and asking for a conveyance, in the other by shipping the glass.

(b) *Agency and Service Contracts.* Except in the case of an agency "coupled with an interest," the principal always has the power to terminate the agent's power to bind him in dealings with third parties. He exercises this power by giving notice to the proper persons. This does not mean necessarily, however, that the principal is legally privileged to do this. He does not have such a privilege if he has made a valid contract with the agent to employ him as agent for some period of time. In such cases, the principal has no "option to cancel"; for the term "option" connotes both legal power and legal privilege. The agency contract, however, may and often does create an option to terminate the relation, such option generally being in the principal, but sometimes in the agent and sometimes in both. There is nothing illegal or contrary to public welfare in this; and the option to cancel will not invalidate

²² (1922) 97 Conn. 703, 118 Atl. 32; (1923) 32 YALE LAW JOURNAL, 496.

the agency contract unless it utterly defeats the requirement of consideration. Sometimes it has been wrongly held to do this.

The recent enormous expansion of the automobile business has caused the creation of innumerable sales agencies. Agents have clamored for exclusive territory and for enormous credits. The risks involved are great. The manufacturer cannot be sure of the agent's business skill or business honor. Long and complex written contracts have been drafted, by men none too expert in contract law, for the purpose of meeting the economic needs of the parties. Many of these have already been tested in the courts, particularly the lower federal courts, and in some instances the parties have been disappointed in the result. Frequently the manufacturer has reserved to himself an "option to cancel." No doubt this is always effective to give to him both the power and the privilege of terminating the agency; but sometimes at the cost of invalidating all the contractual promises, thus depriving him of rights against the agent that both he and the agent had supposed were properly created.

A case of this sort, very frequently cited as holding that an "option to cancel" invalidates the contract, is *Velie Motor Car Co. v. Kopmeier Motor Car Co.*²³ By a bilateral contract the plaintiff gave to the defendant "the exclusive right of sale" in certain territory, guaranteed its machines to be free from defect, and promised to replace defective parts; in return the defendant promised to deposit \$1000, to order a certain minimum number of machines, and to do certain other things. This was without question a valid contract but for the following provision: "the party of the first part having the right to return deposits and cancel this contract, and a letter written by them to the party of the second part shall have been sufficient notice." The plaintiff did not exercise its power to cancel, and brought suit for a breach by the defendant. The court held the contract invalid for lack of "mutuality."

This decision is believed to be erroneous. "Mutuality" is a term that has made trouble in numberless cases, being used to express different concepts or shifting combinations of concepts.²⁴ "Mutuality of remedy" has made trouble in equity. "Mutuality of obligation", "mutuality of consideration", and "mutuality of assent" have made trouble throughout contract law in general. The continued use of any of these terms is sure to lead to error and confusion. The enforceability of the defendant's promises depends wholly upon whether the plaintiff gave a consideration for them. The plaintiff's return promises were ample as consideration unless the "option to cancel" made them illusory in character. An attempt will now be made to show that they were not illusory.

(1) A promises to pay \$100 a week for service and B promises to

²³ (1912, C. C. A. 7th) 194 Fed. 324.

²⁴ "The term mutuality, or lack of mutuality, does not always convey a clear and definite meaning." *Phila. Ball Club Ltd. v. Lajoie* (1902) 202 Pa. 210, 51 Atl. 973.

serve for one year beginning June 1 if he then so pleases. There is no contract; B's promise is no promise. The same is true if B promises, "I promise to serve for one year beginning June 1, but I reserve the privilege of not serving".

(2) Is the case materially different if B's promise is, "I promise to serve for one year beginning June 1, but I reserve the option to cancel by giving notice before that date"? Both technically and practically there is a difference, because the terms of B's promise no longer leave his option unlimited. His option is between serving and giving notice, and not as in the first case above between serving and not serving. The cost to B of one of these alternatives—the giving of notice—may be slight. Nevertheless, it is sufficient to satisfy the requirement of a consideration if agreed upon as such. The writing and mailing of a letter is more than a peppercorn. Promises to pay large sums of money for a consideration no greater than this have been enforced.²⁵ The fact that in those cases the letter or document was the agreed consideration and in the present case it is not is an important difference; but it is one that bears in favor of the validity of the present supposed contract. If the promise of the letter is the agreed consideration, the damages recoverable for breach would be merely the value of the letter, frequently a very slight sum. In the present case the consideration is B's promise to serve for a year conditional on his not giving notice before June 1. For breach of this promise A's damages would be the value of the promised service, a substantial amount. It is true that if B exercises his option to cancel, A will be deprived of his expected beneficial service; at the same time he will be relieved of his duty to pay, so that he will not be giving something for nothing. In the cases cited, the promisor was compelled to pay a large sum for next to nothing. The present case is, therefore, much like the case of *Scott v. Moragues Lumber Co.*, discussed *ante*,²⁶ where Scott promised to charter a vessel to the Lumber Co. if he should buy it, and the latter promised to pay rental therefor, if he should buy and deliver it. All that Scott needed to do to escape liability in that case was to forbear to buy, a forbearance that would cost him not even the trouble and expense of mailing a notice and would benefit the Lumber Co. not at all. Such a forbearance might, however, prevent Scott from making a large anticipated gain. In the present hypothetical case, B's promise is so worded as to assume a risk that Scott did not run, the risk of inability to give the notice of cancellation before June 1. There is no risk that Scott will be unable to forbear to buy the ship.

By giving the notice of cancellation, B not only goes to some trouble

²⁵ *Haigh v. Brooks* (1839, Q. B.) 10 Adol. & El. 309, D. C. (1840, Exch.) 10 *ibid.* 323; *Wilkinson v. Oliveira* (1835, C. P.) 1 Bing. N. C. 490.

²⁶ *Supra* note 10.

and expense; he also loses his right to payment by A. We must not, however, attempt to use this as a consideration on which to base the validity of the contract; because, until we can determine that the contract is in fact valid, we cannot know that B has a right to be lost by cancellation. We can prove nothing by begging the question. If in the *Velie Motor* case, the defendant had in fact deposited \$1,000 with the plaintiff, its power to cancel was dependent upon its returning the money. Even though the executory promises be regarded as not binding, the Velie Co. would be privileged to retain the deposit voluntarily made. Its surrender of the deposit would be a substantial loss. Its option was therefore between performing as it promised on the one hand and writing a letter of cancellation and surrendering possession of \$1,000 on the other.

It should be observed further in the *Velie Motor* Case that not only was the plaintiff's option a limited one—a choice between alternatives each of which would cost him something to perform, but also that the defendant received privileges and powers of great value to him. The defendant wished the privilege of holding himself out as plaintiff's agent; he wished also the power to sell a machine "guaranteed" by the plaintiff. It seems clear that he got this privilege and this power; the "option to cancel" would not prevent this, although they would last only so long as the power to cancel was not exercised. There was something to cancel, as the parties correctly understood. A sale of a machine by the defendant, as the plaintiff's agent and with the plaintiff's guarantee, would not be a wrongful act. This assumption is not at all based upon the question-begging assumption that there was a valid "contract"; but if it is a correct assumption in fact it leads directly to the conclusion that there was a valid "contract." It shows that the plaintiff's written expressions were actually beneficial to the defendant, even though the "option to cancel" created also a liability that the privilege and power might be extinguished. The plaintiff's promises, which were the bargained-for equivalent of the defendant's promises, are thus shown not to be illusory but to be beneficial to the defendant and detrimental to the plaintiff. They had some definite legal operation. There is no social or logical reason for holding them inoperative as a consideration.

(3) If A promises to pay \$100 a week for service and B promises to serve for one year beginning June 1, with an option to cancel in either A or B after two weeks trial, or by giving thirty days notice after June 1, the contract is certainly valid. According to the terms of the agreement, the party having the option to cancel will be under a duty to perform for at least two weeks or thirty days. His option is so limited thereby that his promise is clearly operative as a consideration.²⁷

²⁷ *Pilkington v. Scott* (1846, Exch.) 15 M. & W. 655 (contract of employment for seven years, with option to discharge on giving a month's notice or paying a month's wages, held valid); *Merchants' Life Ins. Co. v. Griswold* (1919, Tex.

(4) If one of the parties reserves an "option to cancel" in the event of certain named contingencies beyond his own control, the validity of the contract is not made doubtful thereby. Thus, B may promise to serve A for a year from June 1, and reserve the power to cancel in case of serious illness in his family prior to June 1. The power reserved is a future, conditional power. B will have an option if the condition occurs, not otherwise.²⁸

BILATERAL OPTIONS

There is no objection to giving an option to each of the parties to a contract at the same time, and it is not infrequently done. The validity of the contract is to be determined in exactly the same way as in the case of an option in one party only. Each promise, and its attendant option, must be considered separately and its sufficiency as a consideration must be determined. That each party has an option merely requires going over the ground twice. In *McIntire Export and Lumber Co. v. Jackson Lumber Co.*²⁹ there were mutual promises to buy and sell "all the ties you manufacture at your mill until notified to discontinue cutting." This was an "entire output" contract, the seller having a limited option between selling to this buyer and manufactur-

Civ. App.) 212 S. W. 807 (employee had power to terminate five year contract on giving 90 days notice; held valid); *Thomas v. Anthony* (1916) 30 Calif. App. 217) 157 Pac. 823 (motor car company reserved option to cancel agency contract on 15 days notice and returning unused deposits; valid); *Cincinnati Exhibition Co. v. Marsans* (1914, D. C. E. D. Mo.) 216 Fed. 269 (option to discharge ball player on 10 days notice); *Phila. Ball Club Ltd. v. Lajoie, loc. cit. supra* note 24 (contract terminable on ten days notice by the employer, and yet it was granted an injunction against breach by the defendant); *Franklin Tel. Co. v. Harrison* (1892) 145 U. S. 459, 12 Sup. Ct. 900 (employer had option to cancel at end of any one year); *McCall Co. v. Wright* (1910) 198 N. Y. 143, 91 N. E. 516 (employer had option to cancel by giving thirty days' notice of its intention to exercise such right and option; enforced in equity); *Orbach v. Paramount Pictures Corp.* (1919) 233 Mass. 281, 123 N. E. 669 (option to limit and terminate moving picture contract by written notice after a part performance).

²⁸ *New Eng. Oil Corp. v. Island Oil Mktg. Corp.* (1923, C. C. A. 4th) 288 Fed. 961 (contract for sale of 2,700,000 barrels of oil, seller to be privileged not to deliver so much if its wells did not produce so much, with the option, however, of delivering oil purchased elsewhere. Here the seller had a conditional option between delivering and not delivering any amount beyond the actual production of its own wells). *Peck v. Stafford Flour Co.* (1923, C. C. A. 8th) 289 Fed. 43 (option to cancel in case of non-payment of any instalment or in case of certain emergencies); *Semon, Bache & Co. v. Coppes Z. & M. Co.* (1905) 35 Ind. App. 351, 74 N. E. 41 (option to cancel in case of market decline or "in event of an emergency"); *Lilienthal Bros. v. Stearns* (1903, C. C. D. Ore.) 121 Fed. 197 (option to cancel if on examination buyer should determine the hops not to be in a specified condition); *Mayo v. American Malting Co.* (1914, C. C. A. 4th) 211 Fed. 945 (seller's option to cancel on default of the buyer to order as agreed); *Vitagraph v. Park Theatre Co.* (1924, Mass.) 144 N. E. 85; *Alcazar Amusement Co. v. Mudd & C. A. Co.* (1920) 204 Ala. 509, 86 So. 209.

²⁹ (1910) 165 Ala. 268, 51 So. 767.

ing no ties at the mill. The buyer had an "option to cancel" by giving notice to discontinue cutting, such cancellation to be effective as to all ties not yet cut. No time was specified as to this notice, and apparently the buyer could have cancelled before cutting was even begun by the seller. The seller cut 7,000 ties, and the buyer then cancelled and refused to take the ties already cut. The seller was given judgment for damages. There can be no doubt that this decision was correct. If the seller had repudiated, had cut ties at his mill and refused to sell them to this buyer, it is not so certain that the buyer would win; this is because the buyer's option has caused some courts to regard his promise as illusory. The buyer would win, however, if *Gurfein v. Werbelowsky* should be followed.

How, then, should an option contract be drawn so as to be sure to be enforceable in court? There is no absolutely sure way that would be effective in all courts. The best advice is to make sure that the contract expresses a clear and undoubted consideration for the promise or promises of each party. If the consideration is a return promise that provides for an option, make sure that the option is not unlimited—that the promise is not illusory, but promises something substantial in any event. Let there be some executed payment or other executed performance in fact made and not merely recited. If there is an "option to cancel", draw the provision so that the exercise of the option will not affect the option holder's executed performance and will not result in his getting something for nothing or in the other party's losing everything that he expected to gain by the transaction. In brief, consider carefully the consideration.