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NOTES

RESTATEMENT OF CONTRACTS (SECOND)—A REJECTION OF NOMINAL CONSIDERATION?

INTRODUCTION

Restatement of Contracts § 84, illustration 1 (1932) :

A wishes to make a binding promise to his son B to convey to B Blackacre, which is worth \$5000. Being advised that a gratuitous promise is not binding, A writes to B an offer to sell Blackacre for \$1. B accepts. B's promise to pay \$1 is sufficient consideration.

Restatement of Contracts (Second) § 75, illustration 5 (Tent. Draft No. 2, 1965) :

A desires to make a binding promise to give \$1000 to his son B. Being advised that a gratuitous promise is not binding, A offers to buy from B for \$1000 a book worth less than \$1. B accepts the offer knowing that the purchase of the book is a mere pretense. There is no consideration for A's promise to pay \$1000.

A generation of lawyers has been told that Blackacre may be "sold" for one dollar. Perhaps on the theory that one generation of misinformed lawyers is enough, the authors of the tentative draft of the *Restatement of Contracts (Second)* propose a reversal of the venerable Blackacre-for-a-dollar hypothetical. Although the factual contexts of the two above quoted illustrations vary, the Reporter has made his Committee's intention clear by stating that the "only difference" is that "instead of the promise being binding, the promise is said now to be not binding."¹ The proposed change may not be criticized on the ground that it violates *Restatement* objectives by departing from rules based on existing precedents. To the contrary, the Reporter's position is that precedents are lacking to support the Blackacre illustration.² Since one of the functions of a "Tentative Draft" is to invite criticism and suggestion by bar associations and the profession generally, it is appropriate to examine the academic commentary and the case law background of the doctrine of nominal consideration.

1. ALI PROCEEDINGS 251 (1965).

2. *Ibid.*

Two preliminary comments regarding other statements on consideration in the tentative draft may be helpful in understanding the context of the proposed change.

The first comment is that the *Restatement (Second)* does not use the phrase "sufficient consideration."³ In the first *Restatement* "consideration" was used to refer to the element of exchange without regard to any legal consequences. The adjective "sufficient" was used to express the conclusion that the consideration requirement for an enforceable bargain was satisfied.⁴ The *Restatement (Second)* proposes to use the word "consideration" to refer to an element of exchange sufficient to satisfy the legal requirement.⁵ "Sufficient" would therefore be redundant.⁶

The second comment concerns the change in the organization of the sections defining and qualifying the doctrine of consideration. In the first *Restatement*, section 84 qualified the doctrine as defined in section 75. The *Restatement (Second)*, however, places the qualifying materials in the same section as the definition.⁷ Consequently, illustration 1 to old section 84 is now illustration 5 to new section 75.⁸ Remnants of nominal consideration are dealt with by the *Restatement (Second)* in section 89. These remnants are the option and guaranty contracts which are not, in reality, the nominal consideration of illustration 5 to section 75.⁹

THE ACADEMIC CONTROVERSY

The academic world remains divided on the question whether nominal consideration *should* be sufficient to enforce a promise. Professor Fuller describes two main classes of objections to enforcing all promises. The first class contains objections of "substance" which relate to the nature of the promise and to its effects.¹⁰ The second class contains objections of "form" which relate to the manner in which the promise was made without referring to the content of the promise itself.¹¹ According to Professor Fuller, the requirements of form serve three functions. These are: (1) evidentiary, (2) cautionary, and (3) channeling.¹² Ap-

3. RESTATEMENT (SECOND), CONTRACTS § 75, comment a (Tent. Draft No. 2, 1965) [hereinafter cited as RESTATEMENT (SECOND)].

4. *Ibid.*

5. *Id.* §§ 19, 75, comment a.

6. *Id.* § 75, comment a.

7. ALI PROCEEDINGS 250 (1965).

8. *Id.* at 250-51.

9. *Id.* at 251 and see text accompanying notes 43-52 *infra*.

10. FULLER & BRAUCHER, BASIC CONTRACT LAW 148 (1964) [hereinafter cited as FULLER & BRAUCHER].

11. *Ibid.*

12. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806 (1941).

plying this analysis to the doctrine of nominal consideration, Professor Fuller writes :

The proper ground for upholding these decisions [enforcing a promise given for nominal consideration] would seem to be that the desiderata underlying the use of formalities are here satisfied by the fact that the parties have taken the trouble to cast their transaction in the form of an exchange.¹³

According to Professor Fuller, form provides a means for a party to give a "legally effective expression of intention."¹⁴

The theory that there is a close resemblance between the policies underlying form and those underlying consideration is a "misconception" according to Professor Havighurst.¹⁵ After stating that the courts usually do not enforce a contract for nominal consideration, he argues :

[H]owever informal the expressions and however unconscious the parties may be of their legal significance, if consideration is present as a natural element in the transaction, it suffices. Certainly this does not suggest that the reasons for the requirements of consideration and of form are similar.¹⁶

It would seem that form, of any type in any situation, does emphasize to some extent the seriousness of an act to the party doing the act. But then a question which goes beyond "form" is asked by Professor Patterson :

Even if such a red-light formality were found or invented, would we not have to ask the promisee to show some additional reason, other than his mere expectation, why the promisor's default and unwillingness to pay damages should entitle the promisee to recover damages?¹⁷

The above question posed by Professor Patterson brings forth the substantive issues involved in the nominal consideration question. Professor Fuller writes with regard to these issues :

The attitude which our courts take toward private agreements rests upon a kind of tacitly accepted constitution, which has as one of its basic articles the principle of *private autonomy*. This constitution, like that which regulates the relation of the

13. *Id.* at 820.

14. *Id.* at 801.

15. Havighurst, *Consideration, Ethics and Administration*, 42 COLUM. L. REV. 1, 6 (1942).

16. *Ibid.*

17. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 943 (1958).

courts to statutes, is, however, a complex document, the provisions of which do not promote a single policy, but a congeries of policies.¹⁸ (Emphasis added.)

This principle of private autonomy views private individuals as having the power to bring about changes in their legal relations, and views the court which enforces the promise, as simply giving legal sanction to rights and duties already established by the parties.¹⁹

The principle of private autonomy which allows a party to make a binding expression of his intention is rejected by Professor Patterson who states :

To say . . . that a contract is binding upon a party because it expressed his will, is wholly inadequate because it does not explain why he may not will today the exact opposite of what he willed yesterday.²⁰

As is shown by the above statement, nominal consideration has been attacked because intent alone is believed not to be a sufficient reason to enforce a contract and that, therefore, the courts should look for something more. Professor Corbin states :

Serious intent is not a very definite concept ; and it is not identical with intention to be legally bound. . . .

The chief purpose underlying the law of contract is not to carry out the will of the promisor, although that may be one of many purposes. It is believed that the chief purpose of enforcement is the avoidance of disappointment and loss to the promisee. It is the reasonable expectation of the promisee (or beneficiary) that the law chiefly takes into account²¹

One wonders what the reasonable expectation of the promisee of a nominal consideration contract, which basically is a gratuitous promise decorated by form, really is. When it seems that we are getting something for nothing, we ask "what's the catch?" It is arguable that if this skepticism is commonly experienced under circumstances similar to those above described, we really have no reasonable expectation of receiving anything of value.

Professor Cohen speaks on the root problem of the relationship between the courts and the enforcement of promises as follows :

18. FULLER & BRAUCHER 150.

19. Fuller, *supra* note 12, at 806.

20. PATTERSON, JURISPRUDENCE, MEN AND IDEAS OF THE LAW 461 (1st ed. 1953).

21. 1 CORBIN, CONTRACTS § 112, at 497 (1963) [hereinafter cited as CORBIN].

Contract law is commonly supposed to enforce promises. Why should promises be enforced?

The simplest answer is that of the intuitionists, namely, that promises are sacred *per se*, that there is something inherently despicable about not keeping a promise, and that a properly organized society should not tolerate this. . . . But while this intuitionist theory contains an element of truth, it is clearly inadequate. No legal system does or can attempt to enforce all promises. Not even the canon law held all promises to be sacred and when we come to draw a distinction between those promises which should be and those which should not be enforced, the intuitionist theory, that all promises should be kept, gives us no light or guiding principle.

. . . It is indeed very doubtful whether there are many who would prefer to live in an entirely rigid world in which one would be obliged to keep *all* one's promises instead of the present viable system, in which a vaguely fair proportion is sufficient.²²

Provisions in the Uniform Written Obligations Act²³ would authorize the enforcement of all writings containing a statement to the effect that the signer intends to be legally bound. With regard to this form and the enforcement of all promises, it has been said:

What the Uniform Written Obligations Act proposes . . . is very close to the proposition that all promises should be enforced unless there is some reason for not doing so. The requirement of formality is a little more than mere evidence that words were uttered, for it goes beyond the writing alone. But it is hardly more than evidence that the words were intended to be a promise. . . .

There is no sound *a priori* reason for assuming that all assurances intended to be promises should be enforced.²⁴

Without this sound *a priori* reason, a court, in rendering a decision on the enforceability of a promise, should advance some social interest²⁵ which

22. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 572-74 (1933).

23. The Uniform Written Obligations Act was adopted in Pennsylvania in 1927 [Pa. Stat. Ann. tit. 33, §§ 6-8 (1949)] and in Utah from 1929 to 1933. Keyes, *Cause and Consideration in California—A Re-Appraisal*, 47 CALIF. L. REV. 74, 86 (1959).

24. Hays, *Consideration: A Legislative Program*, 41 COLUM. L. REV. 849, 852 (1941).

25. *Ibid.*

conforms to ethical standards of that society.²⁶ Professor Havighurst answers the question "what are these standards" by saying:

Subsequent occurrences affecting the question are the change of position by the promisee in reliance on the promise, events which affect the ability of the promisor to perform, changes in the situation which induced the promise, circumstances defeating the promisor's expectations, and the promisee's part in bringing about the circumstances.

Ethical judgments with respect to the duty of performance will be the resultant of all these factors, and only in extreme instances will the presence of one of them in any specified degree be determinative. Thus an intervening event making the promisor less able to carry out the promise might be adjudged as relieving him from the moral duty to perform if little or nothing had been received in exchange for the promise, whereas the same event would not be regarded as so relieving him if he had received something of value. A man who suffers a severe financial reverse may still be regarded as morally bound to pay his grocer, but under no duty, ethically speaking, to fulfill a pledge to his alma mater.²⁷

Judicial recognition of ethical norms thus weakens, if not destroys, the desirability of nominal consideration.²⁸

As evidenced by the Blackacre illustration, the doctrine of nominal consideration is used to avoid the delivery requirement of gift law. Proponents of nominal consideration may argue, however, that the purpose of the delivery requirement is to satisfy cautionary, channeling, and evidentiary interests. Since casting a gift into the form of a bargain serves these particular interests, such formalization should be accepted as a satisfactory substitute for delivery. This argument, however, does not persuade those who contend that the gift is a sterile transaction:

When one receives a naked promise and such promise is broken, he is no worse off than he was. He gave nothing for it, he has lost nothing by it, and on its breach he has suffered no damage cognizable by courts. No benefit accrued to him who made the promise, nor did any injury flow to him who received it. Such promises are not within the scope of transactions intended to confer rights enforceable at law.²⁹

26. Havighurst, *supra* note 15, at 11.

27. *Id.* at 12.

28. Note, 35 COLUM. L. REV. 1090, 1097 (1935).

29. Davis & Co. v. Morgan, 117 Ga. 504, 507, 43 S.E. 732, 733 (1903).

Another argument presented in support of nominal consideration states that nominal consideration is desirable since the doctrine overcomes an unintended consequence which resulted from the abolishment of the legal effect of the seal.³⁰ That unintended result was the disappearance of a way to make a gratuitous promise binding.³¹ The seal was formally abolished after it had become a meaningless act due to the liberalization of the requisites of the seal from wax impressions to mere printed words.³² It has been also suggested that legislatures in deciding to abolish the seal requirement, may have desired to move away from medieval formalism or may have concluded that the character of the seal was inappropriate as a formality.³³

Professor Simpson in speaking of the Uniform Written Obligations Act³⁴ states :

Legislative refusal to adopt this Act is based fundamentally upon approval of consideration as the test of an enforceable promise, a reluctance to extend the field of substitutes therefor, and disagreement with the assumption that a gift promise where made deliberately and with intent to be bound should be legally enforceable.³⁵

There is an analogy between the "seal" and the Uniform Written Obligations Act, at least to the extent that legislatures control the effect of their respective uses. The common problem concerns whether the intent of the parties is a sufficient reason for enforcement of the promise by the state.

Professor Patterson's statement that "consideration . . . includes not only a *thing* (promise or performance) that the promisor bargains for, but also the *process* of bargaining for it"³⁶ would receive added support if the *Restatement (Second)* is adopted with the proposed revisions. Professor Patterson viewed the bargaining "process" as defined in section 75 of the *Restatement*.³⁷ However, the "bargained-for process" is not defined in the *Restatement* and is weakened by section 84 which sanctions nominal consideration.³⁸ With the elimination of nominal consideration from section 84, and the inclusion of a definition of "bar-

30. VON MEHREN, *THE CIVIL LAW SYSTEM* 500 n.25 (1957) ; Hays, *supra* note 24 at 850.

31. *Ibid.*

32. SIMPSON, *CONTRACTS* 123 (2d ed. 1965) [hereinafter cited as SIMPSON].

33. Hays, *supra* note 24, at 849.

34. Note 23 *supra*.

35. SIMPSON 126.

36. Patterson, *supra* note 17, at 932.

37. *Ibid.*

38. See FULLER & BRAUCHER 194, wherein the editors pose a problem suggesting the inconsistency between the illustrations of section 84a and section 75.

gained for," section 75 and the "process" have become the dominant doctrine. When the process is applied to a promise to convey Blackacre for one dollar, there is no consideration.³⁹ The nominal consideration of one dollar, whether delivered or not, is a pretense rather than a reality.⁴⁰

An inquiry into the bargaining process is not an inquiry into the adequacy of consideration. Professor Corbin states: "The smallness of the consideration may not make it insufficient to support the promise if it was in fact bargained for and given in exchange."⁴¹ Determining the existence of a bargain is precedent to any ruling on consideration as noted by Professor Corbin: "Courts must first determine the fact of bargain and agreed exchange before they can properly apply the rules of consideration as a bargained exchange."⁴²

CASE LAW SUPPORTS PROPOSED REVISIONS

Cases exist which enforce promises given for nominal consideration. However, these decisions most often occur when other elements justifying enforceability are present. The court in *Lawrence v. McCalmont*,⁴³ a case involving a guaranty promise,⁴⁴ stated:

A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guaranty as to other contracts. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid.⁴⁵

However, it seems to be assumed by courts in deciding guaranty cases that the promisees have relied on the promises by advancing credit.⁴⁶

Another promise for nominal consideration often enforced is that

39. RESTATEMENT (SECOND) § 75, comment b.

40. See 1 CORBIN § 130, at 557.

41. *Ibid.*

42. *Id.* § 127, at 546.

43. 2 How. 426 (U.S.), 11 L. Ed. 326 (1844).

44. The promise in *Lawrence v. McCalmont* read:

In consideration of Messrs. J. & A. Lawrence having a credit with your house, and in further consideration of one dollar paid me by yourselves, receipt of which I hereby acknowledge, I engage to you that they shall fulfill the engagements they have made and shall make with you. . . .

Id. at 445-46, 11 L. Ed. at 333.

45. *Id.* at 452, 11 L. Ed. at 336.

46. See, e.g., *Robertson v. Garvan*, 270 Fed. 643 (D.C.N.Y. 1920); *Bond v. John V. Farwell Co.*, 172 Fed. 58 (6th Cir. 1909); *Stone-Ordean-Wells Co. v. Helmer*, 142 Minn. 263, 171 N.W. 924 (1919).

which grants an option of lease or purchase.⁴⁷ The court may sustain such a promise since it is difficult to value a given option.⁴⁸ What seems to be a reason worthy of more credence is that an option is simply a device for making a business offer irrevocable. Thus, the apparent disparity in the grant of a valuable option for one dollar lessens when the whole transaction is considered.⁴⁹ Although a lease option often recites nominal consideration in return for the lease itself,⁵⁰ more substantial benefits are usually present in the form of royalties or rentals going to the lessor.⁵¹ If the consideration is nominal in fact—that is, not bargained for—then no consideration has been given and the option giver has the power to revoke.⁵²

Deeds often are executed for a consideration of one dollar. The nominal consideration of one dollar results in a problem when a claimant to land under a deed received for nominal consideration seeks to prevail as a bona fide purchaser, under a local recording act, over the holder of a prior unrecorded conveyance received for a substantial consideration.⁵³ The recording act usually will require a "valuable consideration" if a claimant is to prevail.⁵⁴ In this connection, a Wisconsin court has said:

47. An example of a lease option is:

For and in consideration of one dollar (1.00) cash in hand paid the Superior Oil Company agrees to rent or lease. . . . The consideration for this option is that Lessee, W. F. Meder, agrees to pay to Superior Oil Company a monthly rental. . . .

Meder v. Superior Oil Co., 1 Miss. 814, 119 So. 318 (1928).

Purchase option:

For and in consideration of the sum of \$1.00 to me in hand paid, the receipt whereof is hereby acknowledged. I hereby grant an option . . . to purchase for the sum of fourteen thousand and forty dollars the following described land. . . .

Morrison v. Johnson, 148 Minn. 343, 344, 181 N.W. 945 (1921).

48. *Marsh v. Lott*, 8 Cal. App. 384, 97 Pac. 163 (1908).

49. See *Axe v. Tolbert*, 179 Mich. 556, 146 N.W. 418 (1914); *SIMPSON* 85; Note, 35 COLUM. L. REV. 1090 (1935).

50. *E.g.*, *Guffey v. Smith*, 237 U.S. 101 (1914); *Lindlay v. Roydure*, 239 Fed. 928 (E.D. Ky. 1917), *aff'd*, 249 Fed. 675 (6th Cir. 1918).

51. *Ibid.*

52. 2 CORBIN § 263, at 501. See *Murphy, Thompson & Co. v. Reid*, 125 Ky. 585, 101 S.W. 964 (1907) (dictum); *Bailey v. Grover*, 237 Mich. 548, 213 N.W. 137 (1927); text accompanying notes 5-10 *supra*.

53. *E.g.*, *Davis v. Kleindienst*, 64 Ariz. 251, 169 P.2d 78 (1946); *Smith County Oil Co. v. Jefcoat*, 203 Miss. 404, 33 So. 2d 629 (1948).

54. *E.g.*, N.Y. Real Property Law § 291:

A conveyance of real property within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his said office. Every such conveyance not so recorded is void as against any person who subsequently purchases or acquires by exchange or contracts to purchase or acquire by exchange, the same real property or any portion thereof, or acquires by assignment

[N]or does a mere nominal consideration satisfy the requirement that a valuable consideration must be paid. Its [the statute] purpose is to protect the man who honestly believes he is acquiring a good title and who invests some substantial sum in reliance on that belief.

The fact that the supposed title could be and was purchased for a mere nominal consideration is certainly constructive notice of the invalidity of the title, and sufficient of itself to put the purchaser upon inquiry.⁵⁵

Deeds have been executed for a dollar when the earlier deed was void for some reason.⁵⁶ Later deeds have been held valid, but they can be distinguished as ratifications of earlier deeds issued for consideration.⁵⁷ Some cases upholding the validity of those later deeds have not considered the sufficiency of consideration.⁵⁸

Promissory estoppel is often a factor in cases where deeds have been conveyed for one dollar, just as in the analogous cases of credit advanced on a guaranty. In situations where promissory estoppel principles have been applied courts use language such as: "After the city had expended its money on the faith of Mrs. Segar's consent she was estopped. . . ."⁵⁹ or, "Moreover, the plaintiffs had erected a house on the lot at an expenditure of several thousands of dollars."⁶⁰

Nominal consideration has been used in fact situations other than property conveyance. Examples of such use include a release from tort liability⁶¹ and an agreement to refrain from competing.⁶² There also is a dictum to the effect that one dollar would support a separation agreement.⁶³ However, these cases were all decided on grounds other than nominal consideration.⁶⁴

the rent to accrue therefrom . . . in good faith and for a *valuable consideration*, from the same vendor or assignor, his distributees or devisees, and whose conveyance, contract or assignment is first duly recorded. (Emphasis added.)

55. Wisconsin River Land Co. v. Selover, 135 Wis. 594, 597, 116 N.W. 265, 267 (1908).

56. Ehrig v. Adams, 67 Okl. 157, 169 Pac. 645 (1918); Henley v. Davis, 57 Okl. 45, 156 Pac. 337 (1916).

57. See Henley v. Davis, *supra* note 56.

58. See Ehrig v. Adams, 67 Okl. 157, 169 Pac. 645 (1918).

59. Segars v. City of Cornelia, 60 Ga. App. 457, 4 S.E.2d 60, 63 (1939).

60. Appeal of Ferguson, 117 Pa. 426, 451, 11 Atl. 885, 887 (1888).

61. Killean v. Beaupre, 187 Ill. App. 407 (1914).

62. Nelson v. Woods, 205 Ga. 295, 53 S.E.2d 227 (1949).

63. Sloan v. Sloan, 66 A.2d 799 (Mun. Ct. App. D.C., 1949).

64. In *Killean v. Beaupre*, 187 Ill. App. 407 (1914), the release was under seal, and the case was decided on that point.

A promisor did not contend that the nominal consideration of ten dollars was not consideration in *Nelson v. Woods*, 205 Ga. 295, 53 S.E.2d 227 (1949). She contended that she had never been paid the ten dollars.

A case which possibly can be said⁶⁵ to support the *Restatement* in its illustration of conveying Blackacre for one dollar is *Thomas v. Thomas*.⁶⁶ The promisee received a life estate in a dwelling house in return for 11 yearly rent and keeping the premises in good repair.⁶⁷ But even here Lord Denman, C.J., stated that "the obligation to repair is one which might impose charges heavier than the value of the life estate,"⁶⁸ while Justice Patterson said that "the liability to repair is first created by this instrument."⁶⁹

RESTATEMENT (SECOND) AND THE BARGAIN-GIFT PROMISE

Although the *Restatement (Second)* appears to adopt the "bargained for" test for consideration, a remnant of nominal consideration still seems to remain. The remnant is found in the proposed comment *c* and illustration 6 to section 75 which would enforce a promise involving a mixture of bargain and gift even when both parties know that it is in part a bargain and in part a gift. The reason given is the time-honored rule that the court will not inquire into the adequacy of consideration.⁷⁰ The element of bargain may furnish the consideration for the entire transaction.⁷¹ But when both parties know it is only in part a bargain, can it be said that the other part was bargained for? If A gives B ten dollars for a book worth only five dollars and both parties know that the extra five dollars is a gift,⁷² that five dollars is not bargained for and seemingly would not be enforced by the other requirements of the *Restatement (Second)*. If A offered to give 5,000 dollars for the five-dollar book and there was a partial bargain shown, would there be sufficient reason to enforce the promise as to the 4,995 dollar gift?

CONCLUSION

The tentative draft of the *Restatement (Second)* in refusing to enforce a promise for nominal consideration receives at least partial support from the academic world and strong support from case law. The promise for one dollar finds case law support in a business transaction.

In *Sloan v. Sloan*, *supra* note 63, the dollar was exchanged for \$2,250 and hence was not enforced as the court could inquire into the adequacy of consideration in a money for money exchange.

65. SIMPSON 85.

66. 2 Q.B. Rep. 851, 114 Eng. Rep. 330 (1842).

67. "Eleanor Thomas . . . shall . . . pay . . . 11. yearly . . . rent . . . and shall keep the said dwelling house and premises in good and tenantable repair." *Id.* at 854, 114 Eng. Rep. at 332.

68. *Id.* at 859, 114 Eng. Rep. at 333.

69. *Id.* at 860, 114 Eng. Rep. at 334.

70. RESTATEMENT (SECOND) § 75, comment *c*.

71. *Ibid.*

72. RESTATEMENT (SECOND) § 75, illustration 6.

But the business transaction involves a "bargain," other consideration than the dollar, and a necessary reliance on the promise in a fast-moving commercial world. Thus the business transaction is very easily distinguished from the conveyance of Blackacre for one dollar, which is merely a formal expression for an essentially gratuitous transfer.

It should be noted that the authors of the tentative draft have not seen fit to abolish all the legally operative effects of nominal consideration since a mixture of bargain and gift remains enforceable under provisions of the draft. However, if the *Restatement (Second)* is to be internally consistent, a mixture of bargain and gift should be enforced only to the extent of the bargain.

Since nominal consideration lacks case law support, the *Restatement (Second)* is on firm ground in omitting the Blackacre-for-a-dollar illustration. If nominal consideration is to become recognized as a desirable technique for supporting the principle of private autonomy, achieving this recognition must be the task of those who would change rather than those who restate the law.⁷³

73. The current status of the *Restatement (Second)* is shown by the following excerpt:

Contracts. While there will be no draft this year on Contracts, the Reporter has been making solid progress. The material approved by the Advisers now extends through Section 174 of Chapter 7 and a further draft will be considered in the fall. We shall make up next year for the absence of a submission now.

ALI ANNUAL REPORT 10 (1966).