WILLISTON ON CONTRACTS

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THE NEW edition of Williston on Contracts, the Restatement with its annotations (now including the Illinois annotations), and the study of the seal and consideration recently published by the New York Law Revision Commission are three indications of the stage which the comprehensive and critical study of contracts has reached. One need only mention the work of Llewellyn, Patterson, Corbin, Gardner, Page, Whittier, and Havighurst, among others, to be reminded of the talent and industry which are at work in this field.

The new edition follows the old closely. There are interesting new observations on the Restatement and such new uniform laws as the Written Obligations Act and the Joint Obligations Act. The collection of authorities is of course brought down to date, and references to law reviews added. Professor Rheinstein has furnished valuable new contributions on the continental European law. The general theory of the work is, however, as is natural, similar to the theory of the first edition; and elements of this theory are the subject of the present observations.

It would be impertinent for a student of Mr. Williston, in the position of the writer, to praise his work. As one of a limited number of American classics, it is of course superior to ordinary praise. At the same time, as Samuel Butler has observed, the true Christian must be ready to leave everything for Christ's sake, even Christ himself; and it is the mark of a great teacher to stimulate his students' efforts to find new points of departure from his own teaching. Moreover, it may be useful for many of us to remind ourselves that the work of Mr. Williston is rich in suggestions for future work on the part of those who come after him.

A continuous recognition that the events from offer to breach of contract constitute a kind of commercial tort would, it seems to the writer, help to clarify the discussion of contract problems. Deliberation (including assumption of risk), negligence and faultlessness, their accompanying conduct, and its consequent temporal harm, would thus naturally be compared with similar phenomena elsewhere. The practical tests of judicial treatment of contract problems would need to be reexamined. New light would be thrown on such matters as mistake, promissory

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estoppel, the disappearance of consideration, bona fide purchase, third party contracts, and the effect which one party's default has on the other's obligations, to mention only a few topics as a reminder of the many in whose treatment some sound comprehensive generalization would be useful. Something more than an observation on the historical relationship between case and assumpsit is intended. The suggestion is that the notion of wrong is the elementary substantive legal notion from which other more complicated notions are derived; and that it is frequently useful to remind ourselves of it in our treatment of breach of contract and its commercial consequences.

I

In the new edition, Mr. Williston quite naturally continues his support for his interpretation of the "objective" theory of contracts. No one is likely to deny a large measure of truth in the theory. Insistence on this element of truth may, however, obscure the existence of significant qualifications of the theory in the decisions of the courts.

In a portion of the first edition of his treatise, to which no corresponding portion of the revised edition has yet appeared, Mr. Williston deals with unilateral mistake.[1] He recognizes the division of authority with respect to relief for unilateral mistake, and takes the view that the better supported and sounder doctrine denies relief. He expresses the opinion that relief for unilateral mistake in contract cases is inconsistent with an objective theory of contracts, whether the relief is given "at law" or "in equity." He observes, moreover, that the rules of law and equity are not likely to keep separate indefinitely and that equitable doctrines on this subject must be developed consistently with the ordinary rules of mutual assent.

The connection between the treatment of unilateral mistake (indeed, of mistake generally) and the general theory of mutual assent is thus recognized. Inasmuch as the general theory of objective mutual assent is developed in the first portions of his treatise, and thus in the first portions of the revised edition, it is interesting at this time to consider Mr. Williston's position on unilateral mistake.[2] While it seems misleading to

[1] See 3 Williston, Contracts §§ 1577–79 (1st ed. 1920). And see Rest., Contracts § 503 (1932).

[2] See, for example, in the revised edition, sections 20, 21, 35, 94, 95, 139. Mr. Page has taken a somewhat different position from Mr. Williston's with respect to unilateral mistake. See 1 Page, Contracts § 256 (2d ed. 1920). Mr. Thayer has recently advocated relief for unilateral mistake. See Thayer, Unilateral Mistake and Unjust Enrichment as a Ground for the Avoidance of Legal Transactions, Harvard Legal Essays 466 (1934). A somewhat argumentative note in favor of relief for unilateral mistake appears in 59 A.L.R. 809 (1929). Mr. Patterson has written a classic article opposing relief for unilateral mistake, but his recent

give an account of mutual assent without at once indicating the significance of mistake, it must be remembered that the appearance of a "subjective" test in cases of mistake, does not require the abandonment of "objective" tests in deciding other questions, such as those about the duration of offers. Unilateral mistake is selected for observation here as a controversial and instructive phenomenon which seems to require a sigificant qualification of the objective theory.

The English cases are suggestive. A brief examination of some of them may serve at once to define the problem of unilateral mistake, illustrate it in its various forms, and suggest a sound approach to its solution. Mistake in reading or writing, and error as to the external world present comparable problems when the significant mistake is on one side. Mistake as a defense to an action on a contract and as a basis for quasi-contractual relief after performance of a contract present, for present purposes, the same question. The distinctions must appear with the cases.

In a recent case the evidence tended to show that an oral agreement on the dissolution of a partnership was followed by a written agreement which went beyond the oral agreement, or contrary to it, in providing for the payment of certain rent by one of the partners. The partner charged with the rent testified that he signed the written agreement without reading it with any care, or understanding what it contained. He was held liable for the rent. In affirming the judgment two of the three justices of the Court of Appeal indicated, as alternative grounds for their decision, the view that relief for simple impalpable unilateral mistake could not be given.[3] It is to be observed, however, that cases of this sort involve a deliberate assumption of risk on the part of the person who fails to read or attempt to understand a writing which he signs. The responsibility of one who deliberately undertakes a risk should, it seems, be increased at a number of points in our law (for example, in the case of promises without consideration) and not diminished at any point.

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case book may perhaps be regarded as an indication that his present position is more doubtful. See Patterson, Equitable Relief for Unilateral Mistake, 28 Col. L. Rev. 859 (1928). *Cf.* 2 Patterson, Cases on Contracts II, especially pp. 476–78, 483–92, 544–49; 312–20, and 570 as to reformation. The writers recognize the conflict in the decisions, and seem perhaps increasingly inclined to favor relief; though everyone recognizes that any relief should be by way of rescission and not reformation. For a brief argument in favor of a position much like that here advocated, see Whittier, The Restatement of Contracts and Mutual Assent, 17 Calif. L. Rev. 441, 442 (1929). See the writer's Notes on Contract Problems and Comparative Law, 3 Univ. Chi. L. Rev. 277 (1936). The first instalment of Fuller and Perdue, The Reliance Element in Contract Damages, 46 Yale L.J. 52 (1936), which has just appeared, indicates that the article as a whole will suggest comparable considerations.

[3] Blay v. Pollard, [1930] 1 K.B. 628.

The question raised by these comments is whether one who does not deliberately assume risks, but who is faultlessly or negligently mistaken, should be held liable for more than the expenses occasioned by his conduct, including, for example, the expenses occasioned in the procuring of necessary supplies on a rising market. It is generally recognized that innocent misrepresentation on the part of the person resisting relief, or his conduct in taking advantage of a known or "palpable" mistake, may justify relief for the mistaken party. One of the English cases of mistake in expression is an interesting reminder, however, that what in the reports may appear to an acute commentator to be cases of palpable mistake, have sometimes been decided by courts, reluctant to determine finally the nice issues of fact involved, as simple cases of unilateral mistake and relief granted on a general theory applicable to all cases of unilateral mistake.[4]

A decision the significance of which Mr. Williston minimized in his first edition, comes closer to the precise question under discussion. By a slip the plaintiff's solicitors, in drafting an agreement for the compromise of agency accounts, included accounts which the plaintiff did not consider in dispute, though there was no evidence that the defendants were or should have been aware of the slip. In the plaintiff's proceedings for relief from the compromise, relief was first denied in an opinion stressing the extent to which parties to a compromise must normally be regarded as taking risks. On appeal, however, the Court of Appeal unanimously reversed the decision and granted relief. The justices used various expressions in dealing with the mistake problem. The parties' counsel, it was said, "did not understand or agree to the same thing," "had different views," "were not agreed."[5] The court also made observations perhaps indicating that the opinions were confined to a case in which counsel are mistaken, and it is to this narrow point that Mr. Williston limits the effect of the decision in his first edition.[6] It is difficult to see, however, any satisfactory grounds for distinguishing the mistakes of business men, including commercial agents, from the mistakes of counsel. All that can be said is that vivid imagination and professional sympathy may lead a judge to appreciate more readily the argument for relief when a member of his own profession has made a mistake.

An American case in which a lessor who had signed a lease form containing a privilege of renewal, instead of a form without the privilege

[4] Paget v. Marshall, 28 Ch.D. 255 (1884).

[5] Hickman v. Berens, [1895] 2 Ch. 638, followed in Shepherd v. Robinson, [1919] 1 K.B. 474. *Cf Re* Walton's Settlement, [1922] 2 Ch. 509.

[6] 3 Williston, Contracts § 1578, n. 96 (1920).

which was also before him, partly, it seems, as the result of his lawyer's mechanical slip, illustrates the propriety of relief in such a case, at least where there has been no change of position on the other side. The lessor was relieved of the new lease.[7]

In cases involving mistakes other than mistakes in reading or writing, relief for unilateral mistake may also be proper. Of course, if an error is such that it would not afford a ground for relief for mutual mistake, it will not afford a ground for relief where the mistake is unilateral.[8] On the other hand, one of the most interesting and puzzling of the recent English mistake cases indicates that relief may in some cases be proper on the ground of unilateral error. Here the plaintiff was induced by the false representations of Bodenham to enter into a contract with him whereby the plaintiff became the agent of a supposed automobile manufacturer and agreed to purchase five hundred cars and pay £5000 as a deposit. At Bodenham's request, the plaintiff first sent two checks by him to the defendant for a total of £5000 and then, in place thereof, sent the defendant directly a £5000 check marked "not negotiable" and payable to the defendant. The defendant thereupon cashed the £5000 check in satisfaction of Bodenham's debt of this amount to the defendant, returned to Bodenham goods which the defendant held as security for Bodenham's debt, and let him have other goods by a conditional sale. On the discovery of Bodenham's fraud, the defendant subsequently regained these goods but in a deteriorated condition. On the plaintiff's action for the amount of the check, as for money paid under a mistake, a judgment for the plaintiff was reversed unanimously by the Court of Appeal; but the decision of the Court of Appeal was in turn reversed and judgment given for the plaintiff by the House of Lords, two judges dissenting.

We are not here interested in the opinion that the defendant, because of its position as a payee under these circumstances, could not be a holder in due course. For our purpose, it is significant to observe that all the judges in the House of Lords appear to have agreed that the plaintiff was entitled to recover for money paid under mistake, somewhat as the true owner is entitled to recover against a finder who is not entitled to keep his windfall. The dissenting judges, Lord Chancellor Cave and Lord Atkinson, thought that the plaintiff's recovery should be limited to the difference between the amount which it had paid and the amount by which the defendant had been prejudiced as a result of delivering the goods to

[7] Miller v. Stanich, 202 Wis. 539, 230 N.W. 47 (1930).

[8] Smith v. Hughes, L.R. 6 Q.B. 597 (1871), cited in 3 Williston, Contracts § 94, nn. 5, 13 (2d ed. 1936).

Bodenham. The majority appear to have thought that the plaintiff by entrusting the check to Bodenham did not create an appearance on which the defendant could properly rely in his dealing with Bodenham; but they did not deny the proposition, asserted by the dissenting judges that if such an appearance had been created, the defendant would have been entitled to compensation at least to the extent of any loss suffered by the defendant as a result of the plaintiff's conduct.[9]

The significant mistake in this case appears to have been on the plaintiff's part although, in one sense, the defendant was indeed mistaken in that it was unaware of the circumstances which led the plaintiff to send the check. A comparable "mistake" can be found on the part of the person resisting relief in every case of unilateral mistake. The significant mistake in the present case appears to have been the plaintiff's error about the position of Bodenham. Moreover, though the judges of the Court of Appeal though that there was no contract at any time in the case at bar, the House of Lords avoided deciding this question and rested its decision on a ground which would have been applicable to a case where there was originally a contract affected only by simple mistake. Such a case would have arisen, for example, if there had been an innocent mistake all around by the plaintiff, Bodenham, and the defendant; or in the case of a promise to the plaintiff made by the defendant to release Bodenham's security in consideration of the plaintiff's check.

The theory of relief for unilateral mistake, and indeed of relief for mistake in general, was stated in interesting form by Lord Sumner:

> If a tradesman misdelivers goods, so that the wrong person gets them, many laymen and all lawyers recognize at once that they do not thereby become the property of the receiver, for passing of property is a question of intention, and obviously the tradesman never meant in such circumstances to make his goods the property of the wrong man. When goods are found, the maxim that finding is keeping attracts many people, but not without a strong subconsciousness of guilt. In the case of payments of money, however, the notion is common that, if some one pays me money when he need not do so, it is my windfall, for I am not bound to keep his accounts for him. This is where the fallacy comes in.[10]

The type of unilateral mistake that has occasioned most discussion in this country is mistake, whether in listing items or in arithmetic, in determining the amount of builders' bids. A leading case in Illinois denied relief in such a situation, where there was a negligent mistake in arithmetic.[11] There are suggestions in the opinion that the bidder assumes the risk of errors in his bid, that in effect he may be said to warrant the cor-

[9] Jones v. Waring and Gillow, [1926] A.C. 670.

[10] *Id.* at 696. [11] Steinmeyer v. Schroeppel, 226 Ill. 9, 80 N.E. 564 (1907).

rectness of his bid. The opinion expressly recognizes the possibility of relief in other cases of unilateral mistake.

While it is doubtful whether the mere presence of negligence is a sufficient ground for denying relief, it is of course true that the law of mistake must be integrated with the law of warranty. A seller of chattels is not excused from liability on a warranty on the ground of mistake, and presumably the situations in which warranties will be found have not been exhausted by the cases. It is perhaps not imposing too great a burden on a man whose business requires him to make estimates and submit bids, to insist that he take the risk of any errors in his figures, particularly when he is not dealing with experts, to whom mistakes are more likely to be "palpable."

On the other hand, relief has been given the mistaken contractor in a number of cases. Where the mistake is "palpable," relief is commonly held proper; but opinions in cases of palpable mistake have frequently rested decisions on more general grounds.[12] In a leading case, among the cases allowing relief for simple impalpable mistakes of this type, the court may possibly have been influenced by the circumstance that the party resisting relief was a church.[13] Whatever the psychological effects of the circumstance may have been, it is difficult to find a theoretical justification for imposing a higher standard of fair dealing on a church than that which governs business men.

It has just been suggested that in spite of much language to this effect in the cases, negligence of itself should not bar relief. No one doubts that relief in any case of unilateral mistake must be granted only on conditions which adequately protect the party resisting relief. In *Jones v. Waring*,[14] none of the judges in the House of Lords challenged the principle stated by Lord Chancellor Cave. Lord Chancellor Cave insisted that since the plaintiff's conduct had led the defendant to change its position by surrendering security which deteriorated before it was retaken, the plaintiff's recovery should be reduced by the amount of the defendant's loss. The view of the other judges that the plaintiff's conduct was not responsible for the defendant's action in surrendering the security seems difficult to justify as one reads the somewhat inadequate and confusing reports of the case. The other judges were, however, careful not to question the Lord Chancellor's view of the law. It was taken for granted in *Paget v. Marshall*,[15] the case of arguably palpable mistake already referred to,

[12] Bromagin v. Bloomington, 234 Ill. 114, 84 N.E. 700 (1908); Moffet H. & C. Co. v. Rochester, 178 U.S. 373 (1900).

[13] St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N.W. 500 (1916).

[14] [1926] A.C. 670.

[15] 28 Ch.D. 255, 267 (1884).

that the mistaken party must compensate the opposing party for "any reasonable expenses to which he may have been put by reason of the plaintiff's mistake." Similarly in an early case which seems to depend primarily on unilateral mistake of expression, the Massachusetts court, while reversing a judgment granting relief on the ground that issues had been improperly submitted to a jury, framed a careful *dictum*, evidently with reference to subsequent negotiations or trial, approving relief and in effect directing an accounting between the parties in such a way as to prevent loss to the other party if the party claiming to be mistaken should subsequently be able to establish his case.[16] Somewhat similarly a defrauded party who is unable to return the consideration which he has received, has been allowed relief on paying the fraudulent party the value of any benefits which the defrauded party had received; and Mr. Williston has approved the flexible development of conditions of this sort in decrees dealing with the rescission of fraudulent transactions.[17]

The innocent or negligently mistaken party must thus in any case compensate the other party for any material loss which the mistake has occasioned; and the concept of "loss" is as yet so undefined that it can be developed in such a way as to meet practical requirements. If this is so, it is difficult to see why negligence, of which there is very commonly an element in cases of mistake, should defeat any relief whatever.

The whole body of law may be thought of as consisting of classifications of wrongs and remedies. From this point of view, a "right," like a "privilege," "power," or "immunity," is a means of classifying wrongs. The breaking of a contract has only a remote resemblance to the breaking of a dish. Rather, the defendant has been responsible for a sequence of events which has hurt the plaintiff. The defendant at some point in the sequence of events may have foreseen and desired or accepted some or all of the consequences of his conduct, that is, he may have acted intentionally; at other points he may have acted unintentionally. In either case his conduct may have been faultless or faulty; it may have been active or inactive.

The mistaken maker of a promise, like the mistaken but honest maker of misrepresentations of fact, would at that stage of events be commonly described as, at worst, negligent. Later, indeed like the author of an honest misrepresentation, he may deliberately refuse to make good any loss which he has caused. It would thus be consistent with the treatment of such wrongs as misrepresentation to limit the responsibility of one who

[16] Page v. Higgins, 150 Mass. 27, 22 N.E. 63 (1889).

[17] Basye v. Paola Refining Company, 79 Kans. 755, 101 Pac. 658 (1909). See 3 Williston, Contracts § 1530 (1st ed. 1920).

has made a promise under the influence of a mistake to the expense occasioned by his conduct, while holding a promisor who has deliberately assumed the risk of mistakes, as most promisors do with respect to some mistakes, liable for the loss of the benefit of the bargain which he has deliberately made with his promisee.

The relation, both historical and analytical, between misrepresentation and breach of promise suggests that they might properly be treated somewhat more alike. Whether it is in fact desirable to limit liability for breach of promise, as many of the cases seem to do, ultimately depends on other considerations. Contract is the foundation of much of our enterprise, domestic, commercial and public; and no one needs to be reminded of the importance of security of contract. It is some check on the success of merely colorable claims of mistake, to require that mistake be mutual if it is to be a ground of relief. The requirement doubtless operates, somewhat like the requirement of consideration, to reenforce common sense insistence on particularity of proof in doubtful cases.

On the other hand, too great attention to the security of contractual obligations may occasion a neglect of other considerations. Is not Lord Sumner right in suggesting that we condemn "unjust enrichment" resulting from mistake for much the same reasons that we refuse to permit a finder to withhold property from the true owner? The justification commonly urged for protecting a man's property in a settled community is that he, or someone under whom he claims, has earned it and that to protect earning encourages industry, thrift, skill and enterprise. But the windfall is not earned. Similarly, it is commonly said that the meeting of informed buyers and sellers and their willing bargaining is the only means of determining a "fair" return by way of earning. Mistakes, for the same reasons, are likely to result in "unfair" gains. It must be remembered again that business men take many chances which do not properly come under the head of mistake; and the law of mutual mistake fully recognizes that fact. But where there is a unilateral mistake of expression or error as to a fundamental assumption, there seems to be much the same reason as in cases of mutual mistake for preventing unjust enrichment at the expense of the mistaken party while compensating the other party for any expenses which the mistake may have occasioned.

The significance of the treatment of unilateral mistake appears elsewhere than in those relatively few cases in which, in its simple form, it is involved. A recognition that relief for mistake is normal, within proper limits, would perhaps help to strengthen the tendency to insist strictly on fiduciary obligations of disclosure in many cases, particularly those involving corporate relationships, where persons in positions analogous to

those of agents and partners, insist nevertheless that they have no duty to make full disclosure in transactions with their principals. There are important distinctions between mistake and non-disclosure in fiduciary relations, but it should be unnecessary to point out the relations of similarity between the two sets of phenomena.

Moreover it may be useful at this stage of history to relate the simple, every-day events of contract to familiar assumptions about the operation of our economic system. It would perhaps be found that these assumptions contemplate not only informed and willing buyers and sellers, but buyers and sellers with some degree of equality in bargaining position, whether they are mortgagors and mortgagees or workmen and employers. It has been thought indeed that informed and willing, and perhaps to some extent equal, buyers and sellers will in consulting their own informed sense of their own interests best promote the common interests. If experience with building booms as well as security speculation tends to throw some doubt on the validity of this view, it may of course in time have some effect on the institution of contract, along with other capitalist institutions. Reflection on the significance of information or mistake in commercial transactions may lead to observations which will help to clarify the relation of current economic developments to contract law.

II

While deliberate assumption of risk and innocent or negligent mistake are thus more sharply distinguished in the treatment of mutual assent, the distinction relates as well to other aspects of the treatment of contracts. Mr. Williston repeats in his revised edition his old doubts about promissory estoppel as a substitute for consideration, while at the same time he adds a new defense of the doctrine of promissory estoppel as set forth in the Restatement. Some questions may be raised both about the old doubts and the new defense.

First, as to the old doubts, the question may be raised with all deference whether there is not better historical support for the doctrine of promissory estoppel than has commonly been supposed. A serious objection to promissory estoppel has been the requirement that consideration must be "bargained for." Of course, if a promise is conditioned on a specified return, the promise will not be enforceable unless the condition occurs. Thus, a promise in exchange for an agreement to forbear bringing an action will of course not be enforceable if the promisee forbears without giving his agreement. It is, however, quite another thing to insist that consideration must not only be a detriment to the person furnishing or suffering it, or a benefit to the other party, but that it must be in some sense a

price, or something comparable, as well. Benefit or price may be a sufficient substitute for detriment, as the American courts have been disposed to hold, but again, it is quite another thing to insist that price, or something of the sort, is a necessary element of consideration. Our law of simple contracts developed of course primarily in the action on the case, originally a tort action in the limited sense. The requirement of consideration is a vestigial survival of the stage of history when the plaintiff in an action on the case had to show that he had suffered in somewhat the same way as the victim of a trespass. The requirement that his suffering must be "bargained for" is an importation of an idea very loosely resembling "quid pro quo," from the distinct action of debt. It has no place as a necessary element in the law of simple contracts.

Moreover there is some indication that the appearance of the requirement is very late. Those who insist upon the requirement have been driven to argue as Mr. Williston does, that *Coggs v. Bernard*[18] is wrong.[19] There a bailor recovered for negligence against a bailee who was moving brandy casks as a favor, in what is assumed to be an action of assumpsit, although in view of the circumstances, nothing can have been given as the price for the bailee's undertaking to use reasonable care. Somewhat similarly it appears to have been the rule since the Sixteenth Century that an alleged debtor's promise to pay a debt in return for the creditor's oath that the debt is due, is binding, although it is difficult to regard the oath as a price for the undertaking to pay. Dean Langdell in his famous Summary was forced to criticize not only these cases but all his other English cases which bore on the point.[20] It may be suggested that the first good authority for the requirement that detriment be also price was *Thorne v. Deas*,[21] and that it was given its present currency by Dean Langdell and his successors at the Harvard Law School. It is to be observed that even the recent English cases cited by Mr. Williston are difficult to reconcile with the requirement that consideration shall not only be a detriment (or a benefit), but must be as well in some sense a price.[22]

If these suggestions about the nature and history of the requirement that consideration be bargained for are correct, it follows that the Restatement in recognizing the enforceability of deliberate promises in cases of promissory estoppel, is supported by the essential elements of the historic law of simple contracts as well as by the group of modern cases which recognize the justice of the position taken in the Restatement.[23] Just as

[18] 2 Ld. Raym. 909 (1703). [19] 1 Williston, Contracts § 138 (2d ed. 1936).

[20] 1 Langdell, Cases on Contracts §§ 66–68 (2d ed. 1879).

[21] 4 Johns. (N.Y.) 84 (1809). [22] 1 Williston, Contracts § 112 (2d ed. 1936).

[23] 1 Williston, Contracts §§ 139–40 (2d ed. 1936).

the old law of sealed obligations suggests the desirability of providing for the enforcement of promises made with formal deliberation, and perhaps the enforcement of some business promises simply evidenced by writing, though without consideration, so the old law of simple contracts suggests that a deliberate promise, which should be expected to influence conduct and which does influence conduct, should commonly be enforced as made.

On the other hand, if what has been said about unilateral mistake is sound, it may be that the Restatement goes too far. In case of mistake on the part of a promisor under the circumstances described, it would seem that the measure of damages should not be determined by the value of the bargain, as the Restatement suggests, but by the expense occasioned the promisee by the promisor's conduct. The general principle of the Restatement indeed reenforces a suggestion which has been made elsewhere that the general theory of estoppel requires a thorough-going reconsideration of the position of the bona fide purchaser in our law.[24]

III

Mr. Williston in his revised edition maintains his old position with respect to the rights of one whose debtor has obtained a promise of payment from someone else. The rights of such a person have been the subject of much discussion; and to the writer it seems that the simple, forthright explanation suggested by the leading case of *Lawrence v. Fox*[25] is still the best. At various points the opinion indicates that the reason for permitting the creditor an action against the promisor is that to do so prevents the promisor from taking advantage of technical defenses to defeat the rough practical business expectations of the parties. The promisee's motive indeed is not to benefit his creditor, but his intention seems to be to confer on his creditor an advantage which is not payment but a step in payment, or provision for payment. If this is so, the expectations of the parties are best given effect by recognizing a right in the creditor, which it seems unnecessary to compare to the right of a judgment creditor with equitable execution on his debtor's asset.

There seems to be much the same reason for regarding the promisee's arrangement as designed to give the creditor beneficiary an interest which should be protected by a "right," as there is for regarding a promisee's arrangement as designed to give a donee beneficiary such an interest. It does not follow necessarily that the creditor beneficiary should be given an irrevocable right, though the recognition of a right in the donee beneficiary has been regarded by Mr. Williston as leading to the protection of the donee's right against revocation by the promisee. It seems, however,

[24] Harvey, The Victims of Fraud (1932). [25] 20 N.Y. 268 (1859).

that there will sometimes at least be good business reasons for protecting the creditor beneficiary's interests against the consequences of voluntary rescission by the promisee and the promisor. A creditor who is advised that he has a right of action against both his old debtor and a new debtor, may reasonably regard himself as more secure than formerly. The transaction should tend to improve the debtor's credit standing in the community; and it may encourage the creditor himself to take steps, for example, extend additional credit, which will neither be consideration from the creditor nor even in some cases readily traceable as a consequence of the arrangement between the promisee and promisor. There may thus be reasons for protecting the creditor comparable to the reasons which have been advanced in favor of treating one who merely receives security for an antecedent debt as though he had given value.

The cases which throw most doubt on the recognition of some such right in the creditor are the cases which permit the promisee to recover damages from the promisor. The arguments just suggested seem to question the soundness of these decisions. Moreover it seems that in most situations the promisee will receive sufficient protection if he is given the ordinary familiar rights of the ordinary surety. He will thus be entitled to reimbursement after he has been required to pay the creditor; and there will be no reason to question his right to exoneration, as in *Woodruff v. Germansky*.[26] The promisor has indeed in terms undertaken an obligation to the promisee whose breach might be expected at least to entitle the promisee to nominal damages. It seems, however, that a closely comparable obligation must be implied in every case in which a principal prevails on a surety to back him; and the obligation is ordinarily thought to be sufficiently protected by the surety's rights of subrogation, indemnity and, particularly, exoneration.

The promisor in cases of this type can doubtless be adequately protected, on any view, against the dangers of double liability by a practical if somewhat inartistic treatment of the effect of the promisee's recovery, and by the development of equitable protection, particularly against the danger of foreclosure by a mortgagee creditor. Indeed the cases dealing with the promisee's action do not seem on the whole to result in any very substantial injustice. The confusion which they have created must, however, in some cases, provoke wasteful controversy and litigation. It would perhaps be useful, particularly in such a state as Illinois where there is some confusion about the relations of creditor, promisee, and promisor, to enact a statute which would state clearly any one of the intelligible theories of their relationship.

[26] 233 N.Y. 365, 135 N.E. 601 (1922).

IV

The most interesting of the topics discussed in the third volume of the revised edition, the last volume now available, is the effect of one party's failure to perform on the obligations of the other party to a contract. Here, as formerly, Mr. Williston defends the use of the phrase "failure of consideration" to designate the situation in which one party's default excuses the other.

While the importance of words is not to be exaggerated, the use of this phrase raises several questions. There seems to be some danger that it will help keep alive the notion that the old Anglo-American doctrine of consideration has a kind of general validity which it does not possess. Where consideration is not required, as in our law of formal obligations and in the Continental European Law, one party's default may nevertheless excuse the other; and the principle on which the excuse is recognized seems to have much more general validity than does our peculiar doctrine of consideration.

Moreover it would seem desirable to develop more clearly the relations between the rules governing mistake, the relations of promises, and impossibility. In cases in which these rules are invoked, the parties have failed to appreciate or foresee circumstances for which they have made no provision. Business men must ordinarily anticipate a certain number of unexpected developments, and can fairly be required to take the risk of many such developments. It seems indeed that there should be somewhat the same reluctance to permit one party to excuse himself because of the other's default, that exists when mistake or impossibility is urged as a defense. A certain amount of departure from the terms of contracts is not unusual, and to permit parties too freely to take advantage of defaults tends of course to interfere with the security of obligations. Particularly with the development of recoupment, set-off and counterclaim, the fair solution will frequently be to allow the parties cross actions in case of defaults on both sides.

It may be said that quasi-contractual relief will, when fairness requires it, protect the defaulting person who is refused an action on his contract; but the somewhat uneven development of quasi-contractual relief in these cases is itself a reminder that the person who defaults on his contract is not necessarily an outlaw. While the negligent person or the person contemplating deliberate default may be checked or guided by rules limiting his recovery, the purpose of rules of commercial law is of course normally not punishment but the settlement of accounts.

If relations such as have been suggested are carefully considered, it may appear that there is a body of principles common to the law of mistake, the

relations of promises, and impossibility, which recognize the importance of the risk-taking element in the formation of contracts, and at the same time protect parties against liability and loss when the circumstances under which they are called on to act turn out to be substantially different from those whose existence they had assumed.

V

One cannot leave the reflections suggested by the appearance of the first three volumes of the revised edition of Mr. Williston's treatise without looking forward to the appearance of its later volumes.

Each student doubtless is curious about the treatment of subjects which interest him particularly. To the writer two or three additional topics are of particular interest.

Will the authors add anything to Mr. Williston's treatment of the defenses of the surety? If there is anything in the suggestions which have just been made about the possibility of distinguishing more sharply between the risks which business men do or should take and changes in circumstances which should excuse them, it may be that the development of such distinctions in other fields will clarify the roughly comparable distinctions in the law of suretyship.

If, as some observers think, the land contract is in some jurisdictions developing into an informal means for the sale of rights in land, comparable to the sale of chattels, it would be helpful to have Mr. Williston's observations on the comparison. May not circumstances other than possession, for example, prove to be relevant in some circumstances in determining when risks pass under a contract for the sale of land?

In particular, the writer hopes that Mr. Williston will be led to develop the reflections on freedom of contract which he has already published elsewhere. In a system in which, for example, some kinds of insurance have been severely treated and efforts to provide for commercial arbitration discouraged by the courts, and in which protections have been thrown around mortgagors, perhaps unnecessarily elaborate in prosperous times, the current controversy about freedom of contract reminds us of the relation between the old institution of private contract and the modern organization of industry and government. While the pressure of business needs operates in its familiar way to change familiar rules, historical forces may be at work either—as at present—to strengthen the institution and make it more serviceable, or—as in some renewed depression—to change it to serve different needs.