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NOTES

PROMISSORY OBLIGATIONS BASED ON PAST BENEFITS OR OTHER MORAL CONSIDERATION

I

The currently popular criticism¹ of the doctrine of consideration can find few more vulnerable points than that rule which holds that past benefit² or the

¹ Lord Wright, *Ought the Doctrine of Consideration To Be Abolished from the Common Law*, 49 Harv. L. Rev. 1225 (1936); Report of the English Law Revision Committee, *The Statute of Frauds and the Doctrine of Consideration*, 15 Canadian Bar Rev. 585 (1937) (Sixth Interim Report of the Committee); M. P. Sharp, *Notes on Contract Problems and Comparative Law*, 3 Univ. Chi. L. Rev. 277 (1936); Shattuck, *Gratuitous Promises—A New Writ?*, 35 Mich. L. Rev. 908 (1937); *Some Aspects of the Law of Gratuitous Promises in Illinois*, 5 Univ. Chi. L. Rev. 464 (1938).

² Benefit will be used in this discussion in the sense given it in the Restatement of Restitution. "A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. . . . The word 'benefit,' therefore, denotes any form of advantage," Rest., Restitution § 1, comment b (1937).

moral obligation arising from its receipt is insufficient consideration to support a promise. This aspect of the consideration doctrine works a great hardship in the cases where one, not intending it as a gratuity, confers a benefit on another without the previous request necessary to make it a valid consideration³ or without satisfying the exacting conditions precedent to recovery in quasi-contract.⁴ The impossibility of creating an enforceable legal obligation in this situation,⁵ even though the person benefited manifests by a subsequent promise his intention to be legally obligated to pay for the benefits,⁶ is in striking contrast to the treatment accorded similar cases in the civil law. There a promise may be supported by a "natural obligation" arising from the past receipt of a benefit.⁷ Moreover a person who performs a service by managing the business of another,⁸ even without any authorization, may recover the value of his services under the doctrine of *negotiorum gestio*.⁹

The refusal of most American courts to enforce the subsequent promise of the person benefited necessarily leads to a lowering of standards of responsibility. It is contrary to a layman's notions of good morals.¹⁰ It impairs the freedom of contract. Criticism of this refusal finds support in history, for prior

³ *Lampleigh v. Brathwaite*, Hob. 105 (K.B. 1616). The readiness of the courts to make an exception to the past consideration rule whenever there has been a previous request, without insisting, as did Justice Holmes in *Moore v. Elmer*, 180 Mass. 15, 61 N.E. 259 (1901), that there be a clear understanding that the benefit was to be paid for, indicates the disfavor with which the courts have regarded the past consideration rule.

⁴ These conditions are so numerous that relief is afforded in only a few cases. Cf. Woodward, *Quasi-Contracts* 308-14 (1913).

⁵ Generally legal sanctions would be unnecessary to compel performance of a promise which the promisor made solely because he felt himself morally obliged to do so. But where, as in *Webb v. McGowin*, 27 Ala. App. 82, 168 So. 196 (1936), noted in 31 Ill. L. Rev. 390 (1936), the promisor has died, only a legally enforceable obligation could help the promisee. The same necessity exists where bankruptcy or legal incapacity of the promisor intervenes.

⁶ It is an anomaly that the courts will even violate the express intent of the parties in order to prevent unjust enrichment resulting from the enforcement of forfeiture provisions in a contract, yet in the aforementioned cases they refuse to give effect to the express intent of the parties which would prevent unjust enrichment.

⁷ 7 Planiol et Ripert, *Traité pratique de droit civil français*, pt. II—Obligations § 992 (1931) (part II, avec le concours de Esmein, Radouant, et Gabolde), translated in Rheinstein, *Cases and Other Materials on the Comparative Law of Contracts* 19 (mimeo. ed. 1939) (contains a valuable collection of continental cases on this problem).

⁸ "The affair carried on might be of any sort, the act being either material, as the procurement of medical and hospital treatment, or juristic, as the paying of a debt," *Negotiorum Gestio* in Louisiana, 7 Tulane L. Rev. 253, 255 (1933).

⁹ Lorenzen, *Negotiorum Gestio* in the Civil Law, 13 Cornell L. Q. 190 (1928); Tulane L. Rev., op. cit. supra note 8.

¹⁰ See F. C. Sharp, *Ethics of Breach of Contract*, 45 Int'l J. of Ethics 27 (1934) (indicates what an important role our notions of good morals play in the law of contracts).

to *Slade's Case*¹¹ there did not have to be a present consideration, a past debt being sufficient to support a subsequent express promise to pay.¹²

Statutory reform to remedy this defect has been suggested by the English Law Revision Committee,¹³ which advocated the complete abolition of the rule that past consideration is no consideration.¹⁴ An analysis of the theories of contract and quasi-contract, suggests, however, that the consequences of this defect may be avoided without statutory revision. Recovery in quasi-contract for a benefit conferred with a non-gratuitous intent could be granted with a minimum of judicial extension of currently accepted legal principles, for these principles afford an ample basis for meeting the objections on which the courts at present base their refusal to allow quasi-contractual recovery. A further alternative to statutory reform in those cases where there has been a subsequent promise to pay for the benefit is recovery in contract, on the basis that such promise is supported by the moral obligation arising from the receipt of a past benefit. In Illinois there already exists authority for this position. Added support for the contention that a subsequent promise to pay for material benefits should be enforced is to be found in the commercial cases where the courts have greatly liberalized the requirements of the doctrine of consideration in order to make a promisor bear the risk of reliance on the promise.

II

The objections to allowing quasi-contractual recovery for benefits conferred non-gratuitously are, first, the officious nature of the act of conferring a benefit and, second, in the emergency cases, where the objection of officiousness fails, the conclusive presumption of the gratuitous nature of the service.¹⁵ The basis of the objection of officiousness is the undesirability of allowing one to force himself on another as his creditor.¹⁶ As Bowen, L.J., said in *Falcke v. Scottish Imperial Ins. Co.*, "liabilities are not to be forced upon people behind their backs. . . ." ¹⁷ It would seem, then, that if the person benefited manifested his consent to become an obligor, such action should be treated as removing this objection as a bar to recovery in quasi-contract. A subsequent promise to pay the person who has conferred a benefit is clearly sufficient evidence of such consent. Hence, the

¹¹ 4 Coke *92b (K.B. 1602).

¹² *Sidenham v. Worlington*, 2 Leon. 224 (C.P. 1585); 1 Williston, Contracts § 143 (rev. ed. 1936).

¹³ Report of the English Law Revision Committee, op. cit. supra note 1.

¹⁴ Report of the English Law Revision Committee, op. cit. supra note 1, at ¶ 32.

¹⁵ Hope, Officiousness, 15 Cornell L.Q. 25, 205 (1929); Woodward, Quasi-Contracts 314 (1913).

¹⁶ ". . . A person should not be required to become an obligor unless he so desires," Rest., Restitution § 2 (1937). Hope, op. cit. supra note 15, suggests that originally the objection of officiousness was based partially on the notions of the service being non-beneficial and unnecessary, but concludes that these elements have been forgotten.

¹⁷ 34 Ch. D. 234, 248 (C.A. 1886).

making of a subsequent promise should result in the imposition of quasi-contractual liability, provided that the receipt of the benefit constitutes enrichment, and its retention is unjust because it was not conferred gratuitously.¹⁸

The most common instances of past benefit are the improvement of another's land, the rendering of some service, or the payment of another's debt. Where the benefit rendered consists of improvements upon land the Illinois courts refuse to allow recovery in quasi-contract whether the improvement was made as a result of mistake or with full knowledge of all the facts.¹⁹ In denying restitution to one who has improved land by mistake the courts rely, not on the doctrine of officiousness, but on the closely analogous "policy which protects the owner of land against paying for improvements which he does not want or for which he cannot pay."²⁰ This policy, however, hardly seems to justify the denial of relief when the owner has indicated by a subsequent promise of compensation that he wants the improvements and that he has the ability to pay for them. Rather a subsequent promise should remove the bar to recovery both when the improvements were made by mistake and when made voluntarily with the expectation of being paid. The case for relief is particularly strong when the improvements were made as a result of a mistake. At present the courts grant restitution where an owner has remained silent knowing that the improvements were being made.²¹ His silence serves as consent. Since there is just as clear a case of unjust enrichment when he fails to learn of the improvements until after their completion, restitution should be granted, if he gives his consent when he discovers that they have already been made.

Furthermore, the courts have recognized the equitable duty of an *owner* seeking relief in equity to compensate one who improved his land as the result of an honest mistake.²² The Illinois Supreme Court has stated that quasi-contractual relief should be granted "where one received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it."²³ It follows then that when the reason for the denial of restitution has been removed by a subsequent promise, restitution should be granted in an independent action to the person who made the improvements in all those cases where the courts have recognized the equitable duty of reimbursement.²⁴

¹⁸ Cf. 14 Canadian Bar Rev. 758 (1936).

¹⁹ *Dart v. Hercules*, 57 Ill. 446 (1870); *Maynard v. Stevens*, 370 Ill. 594, 19 N.E. (2d) 575 (1939) (unless there has been compliance with the Ejectment Act, Ill. Rev. Stat. (1939) c. 45, §§ 53-59); cf. *Williams v. Vanderbilt*, 145 Ill. 238, 34 N.E. 476 (1893); see *Wakefield v. Van Tassel*, 218 Ill. 572, 75 N.E. 1058 (1905).

²⁰ Rest., Restitution § 2, comment a (1937).

²¹ *Olin v. Reinecke*, 336 Ill. 530, 168 N.E. 676 (1929).

²² *Lagger v. Mutual Union Loan Ass'n*, 146 Ill. 283, 33 N.E. 946 (1893); *Ebelmesser v. Ebelmesser*, 99 Ill. 541 (1881); see *Wakefield v. Van Tassel*, 218 Ill. 572, 75 N.E. 1058 (1905).

²³ *Highway Com'rs v. Bloomington*, 253 Ill. 164, 174, 97 N.E. 280, 284 (1912).

²⁴ The right to maintain an independent action for restitution for improvements made by mistake has been upheld in *Bright v. Boyd*, Fed. Cas. No. 1875 (C.C. Me. 1841), and in *Hardy*

In the cases where one renders some unrequested service to another, recovery in quasi-contract is again conditioned upon the removal of the objection of officiousness. The view, here contended for, that a subsequent promise will be sufficient to overcome this objection has been expressly approved by a dictum in an Illinois appellate court decision. The court, although denying recovery because of the usual objection of officiousness, stated that quasi-contractual relief would have been allowed, if there had been a subsequent promise to pay that which "in equity and good conscience ought to be paid."²⁵

Adoption of the proposed principles should meet with little opposition where the benefit consists of payment of the debt of another. At present "a person who officiously pays the debt of another may be entitled to recover the amount of such payment if the other affirms the payment."²⁶ The reason for allowing recovery is, of course, the fact that the subsequent affirmation removes the objection of officiousness. The recognition in these cases of the right to recovery when the bar to liability has been removed is a very persuasive precedent for similar treatment of the cases where the benefit takes some other form.

When a person confers a benefit on another by saving his life or property in an emergency, the courts cannot rely on officiousness as an objection to granting quasi-contractual relief, but they will refuse recovery on the ground that there was no unjust enrichment because the benefit was gratuitously conferred.²⁷ The gratuitous nature of the act is, it is said, conclusively presumed when not done by one in his professional capacity.²⁸ It is submitted that this presumption is undesirable, and that it is inconsistent with general legal principles.

In the usual emergency case the service is rendered under circumstances which demand immediate action. The impossibility of deliberation prevents the formation of an intention either to render the service gratuitously or for com-

v. Burroughs, 251 Mich. 578, 580, 232 N.W. 200, 201 (1930). In the latter case the court pointed out that "the fact that the defendants need no relief, and therefore seek none, ought not to bar the plaintiffs right to relief in equity."

²⁵ See *Illinois T. R. v. Cleveland, C., C. & St. L. R.*, 157 Ill. App. 102 (1920).

²⁶ Rest., Restitution § 112, comment c (1937); *Graves v. Harwood*, 9 Barb. Ch. (N.Y.) 477 (1850); *Maryland Casualty Co. v. Givens*, 177 Ky. 131, 197 S.W. 497 (1917); see *Neely v. Jones*, 16 W. Va. 625 (1880); *Kenan v. Holloway*, 16 Ala. 53 (1849). Cf. 3 Page, Contracts § 1520 (1920).

For an interesting discussion of this problem arising when a bank pays a check after receiving a stop payment order see *Recovery by Drawer against Bank for Payment of Check in Violation of Stop Payment Order*, 45 Yale L. J. 1134 (1936); *Recovery by Bank Paying Instrument after Stop Notice*, 40 Harv. L. Rev. 110 (1926).

²⁷ Hope, *op. cit. supra* note 15. It is interesting to contrast the state of the law in Germany. There even though one renders services gratuitously, if there is a change in circumstances removing the reason for the gratuitous intention, the courts will enforce a promise to pay for the services made after the change in circumstances, *Reichsgericht (VI) 1909, S. v. W.*, 72 RGZ 188, reprinted in *Rheinstein, op. cit. supra* note 7, at 26.

²⁸ Hope, *op. cit. supra* note 15; *Woodward, Quasi-Contracts §§ 199, 201 (1913)*.

pensation.²⁹ Since no real intention exists, in establishing the presumption of intention the courts should be guided by the same principles that govern similar situations in other branches of the law. The application of the principal rule relied on by the courts in the construction of wills, when confronted with the analogous problem of ascribing to a testator an intention relating to a contingency which it is clear the testator never considered, would preclude a presumption of a gratuitous intent. This rule is to ascribe to the testator an intention which a reasonable man would have formed had he been faced with the necessity of making a choice.³⁰ Inasmuch as it is more normal, human nature being what it is, to want to receive value for value given than it is to expect no return for benefits conferred,³¹ it seems probable that in the majority of cases, a reasonable man would intend to receive compensation for his services.³² This is particularly true when the person undergoes financial loss or physical injury in rendering the service.

If the courts did adopt this rule of law regarding intention, it would be expedient to limit relief to the cases where the person rescued subsequently promised to reimburse his rescuer. The acceptance of the promise would serve to corroborate the presumption of non-gratuitous intention. It would furnish some evidence of the reasonable value of the services. Finally, the requirement of a subsequent promise would provide a method by which one could limit his quasi-contractual liability to those cases where there was a real emergency.

No one can gainsay the justice of allowing quasi-contractual recovery to one who has suffered physical injury or financial loss in saving another from danger. Such a policy would place the loss on the one who caused it. It would reward meritorious acts of intervention. Furthermore, it would be consistent with the decisions in the "rescue" cases allowing the rescuer to recover (on the theory that "danger invites rescue") from the party who created the emergency.³³ Inasmuch as the courts will compel a third person who has created a danger inviting rescue to reimburse the rescuer, they should give legal effect to the attempts of a person rescued from a danger he himself created³⁴ to place himself under a legal obligation to compensate his rescuer.³⁵ Furthermore, the theory

²⁹ Of course, the circumstances also prevent the making of a contract. In view of the fact that the impossibility of making a contract regarding special services in non-emergency cases has moved the courts to grant quasi-contractual recovery for the value of the services (*Craven-Ellis v. Canons Ltd.*, [1936] 2 K.B. 403, discussed in 14 *Canadian Bar Rev.* 758 (1936)), the impossibility here should serve as an additional reason for granting restitution.

³⁰ *Rheinstein*, *Law of Inheritance* 147 (1938); *Rest.*, *Property* § 243 (Tent. Draft 1937).

³¹ Cf. *Hope*, *op. cit.* *supra* note 15 at 37, n. 35.

³² We do not, of course, suggest that the reasonable man would require a promise of compensation as a condition precedent to his rescue attempt.

³³ *Eckert v. Long Island R.*, 43 N.Y. 502 (1871); *Wagner v. Int'l R.*, 232 N.Y. 176, 133 N.E. 437 (1921); *Laufer v. Shapiro*, 210 App. Div. 436, 206 N.Y. Supp. 189 (1924).

³⁴ Cf. *Webb v. McGowin*, 27 Ala. App. 82, 168 So. 196 (1936).

³⁵ It might be contended that the logical extension of these rescue cases would justify the imposition of tort liability on one who negligently created his own danger when that danger leads to the injury of a rescuer.

that "danger invites rescue" would justify the implication of a request for assistance, thereby bringing these cases within the rule that a requested benefit is good consideration for a subsequent promise.

The principles proposed would make possible the granting of quasi-contractual relief, both in the emergency and non-emergency cases. The requirement of a subsequent promise would be in itself an efficient protection against their abuse. Such a requirement would prevent anyone from forcing himself on another as his creditor and would allow one to avoid paying for an unwanted benefit. Furthermore, it would be an adequate safeguard to subject to careful scrutiny the circumstances under which the subsequent promise is made and to deny restitution when there is any suspicion that the promise was a product of duress or mistake. What dangers of abuse remain are clearly outweighed by the justice and social desirability of allowing one to place himself under a legal obligation to make reimbursement for benefits received.

III

A

" As an alternative to quasi-contractual relief, the courts of Illinois could grant relief in contract. No Illinois decision exists which would preclude the enforcement of a subsequent promise supported by the moral obligation arising from the previous receipt of a benefit. There are a number of Illinois cases stating, sometimes strongly, the widely accepted rule that moral obligation is good consideration only when it arises from a previously existing legal obligation barred by operation of a rule of law. None of these cases, however, is conclusive on the sufficiency of moral obligation arising from a past benefit because they are merely dicta on the point. In none of the cases was there a moral obligation arising from the receipt of a past benefit, either because there was no past benefit,³⁶ or because the benefit was conferred gratuitously,³⁷ or because the benefit had already been paid for,³⁸ or because the benefit did not move from the promisee and, thus, no moral obligation was owed to the promisee.³⁹ Of course, it might be contended that even though the statements of the limited rule of moral consideration are dicta, they would prevent the Illinois Supreme Court from recognizing a more liberal doctrine. It was, however, in the face of equally strong dicta stating the narrow rule that Wisconsin⁴⁰ recently recog-

³⁶ Kirkpatrick v. Taylor, 43 Ill. 207 (1867); Hart v. Strong, 183 Ill. 349, 55 N.E. 629 (1899); Schwerdt v. Schwerdt, 235 Ill. 386, 85 N.E. 613 (1908).

³⁷ Williams v. Forbes, 114 Ill. 167, 28 N.E. 463 (1885); Strayer v. Dickerson, 205 Ill. 257, 68 N.E. 767 (1903); French v. Green, 225 Ill. 304, 80 N.E. 318 (1907); People v. Porter, 287 Ill. 401, 123 N.E. 59 (1919).

³⁸ Plowman v. Indian Refining Co., 20 F. Supp. 1 (Ill. 1937).

³⁹ Hobbs v. Griefenhagen, 91 Ill. App. 400 (1899), aff'd 194 Ill. 73, 62 N.E. 308 (1901).

⁴⁰ Park Falls State Bank v. Fordyce, 206 Wis. 628, 238 N.W. 516 (1931).

nized the sufficiency of the moral obligation arising from any past receipt of benefit.

To counteract the persuasiveness of these dicta, there are two cases, neither of which has been overruled, in which the Illinois Supreme Court unequivocally declared its adherence to a less limited rule of moral obligation as sufficient consideration to support a promise. In *Spear v. Griffith*,⁴¹ A conveyed land to his son for a consideration based on an estimate of the quantity of land. In fact there was less land than estimated. The court said A's subsequent promise to pay for any deficiency in the land was supported by the moral obligation to do so. In *Lawrence v. Oglesby*,⁴² a son, the chief beneficiary under his father's will, promised the latter on his deathbed that he would pay his sister \$1500 that the father had promised to pay her. The court enforced the promise on the ground it was supported by consideration in the form of the very broad moral obligation of the father to provide for the daughter. The force of the court's recognition of this broad moral obligation as good consideration is weakened by its alternative holding that the father's leaving his will unchanged was a "full and sufficient consideration for the promise."⁴³ The court so held although it was clearly not a bargained-for consideration. The explanation of the court's willingness to rely on these alternative grounds, both of which lack general recognition, is the fact that the action was framed in assumpsit, thereby precluding the enforcement of a constructive trust, the normal theory of relief in this situation.⁴⁴

In view of the agreement of the authorities on the validity of the doctrine of moral consideration when limited to the cases where it arises from a former legal obligation subsequently barred,⁴⁵ or when there was an unsuccessful attempt to create a legal obligation,⁴⁶ the slight further step to its recognition in all cases where there has been a past benefit could be negotiated without difficulty. The reason compelling such a step is the fact that in every case where one receives a material benefit which was not gratuitously conferred, the moral obligation to pay for it is the same whether there was once a legal obligation subsequently barred, or an unsuccessful attempt to create a legal obligation, or no previous legal obligation at all.⁴⁷ Since the moral obligation is sufficient consideration in

⁴¹ 86 Ill. 552 (1877).

⁴² 178 Ill. 122, 52 N.W. 945 (1899).

⁴³ *Ibid.* at 129.

⁴⁴ 3 Bogert, Trusts and Trustees § 499 and cases cited in § 499, n. 20 (1935); *People v. Schaefer*, 266 Ill. 334, 107 N.E. 617 (1914).

⁴⁵ See cases cited in notes 33-6 *supra*. *Contra*: *Bank of New Boston v. Livingston*, 182 Ill. App. 529 (1913). This decision, in which the court refused to enforce a promise by the heirs to pay a claim against an estate which had been barred by operation of law, appears to be the only Illinois case which has departed from the general rule.

⁴⁶ See *Morse v. Crate*, 43 Ill. App. 513 (1892); *Barnes v. Hedley*, 2 Taunt. 183 (C.P. 1809).

⁴⁷ *Ferguson v. Harris*, 39 S.C. 323, 17 S.E. 782 (1893); *Comstock v. Smith*, 7 Johns. (N.Y.) 87, at 88, n. (c) (1810).

the first two situations, it should be similarly regarded where there was no previous legal obligation at all. It was this observation that recently moved the Supreme Court of Wisconsin, in a decision approving corporate directors' performance of a moral obligation, to extend the doctrine of moral consideration to every moral obligation arising from the past receipt of a benefit.⁴⁸ Illinois should have even less difficulty in extending the doctrine than did Wisconsin, because, although like Wisconsin it must disregard some dicta limiting the doctrine, it has, unlike Wisconsin, the persuasive precedents of the *Oglesby* and *Griffith* cases upon which to rely. Precedents from nine other states⁴⁹ should give added sanction to the adoption of the Wisconsin view of the doctrine of moral consideration.

Enforcement of these promises would instance the increasing tendency to enforce promises seriously made.⁵⁰ The past benefit, in providing a reason for the promise,⁵¹ would serve to corroborate the existence of a contractual intent. In so serving it would perform what Lord Wright regards as the primary function of consideration; namely, to provide a test of contractual intention.⁵² If protection of those in an unfavorable bargaining position is also a function of consideration,⁵³ a past benefit will perform this function more effectively than present consideration, for the reason that a past benefit sufficient to create a moral obligation must be a substantial one, whereas equivalency is not required of a

⁴⁸ *Park Falls State Bank v. Fordyce*, 206 Wis. 628, 238 N.W. 516 (1931).

⁴⁹ *Baker v. Gregory*, 28 Ala. 544 (1856); *Webb v. McGowin*, 27 Ala. App. 82, 168 So. 196 (1936); *Gray v. Hamil*, 82 Ga. 375, 10 S.E. 205 (1889) (decided under Georgia Code); *Drake v. Bell*, 26 N.Y. Misc. 237, 55 N.Y. Supp. 945 (1899); *Doty v. Wilson*, 14 Johns. (N.Y.) 378 (1811); *Bentley v. Lamb*, 112 Pa. 480, 4 Atl. 200 (1886) (this was an extreme extension of the doctrine of moral consideration, the court holding that the moral obligation arising from a gratuitous promise was sufficient consideration to support a subsequent express promise); *In re Sutch's Estate*, 201 Pa. 305, 50 Atl. 943 (1902); *In re Phol's Estate*, 7 A. (2d) 14 (Pa. Super. Ct. 1939); *Ferguson v. Harris*, 39 S.C. 323, 17 S.E. 782 (1893); *Edson v. Poppe*, 24 S.D. 466, 124 N.W. 441 (1910); *Boothe v. Fitzpatrick*, 36 Vt. 681 (1864); *Olsen v. Hagen*, 102 Wash. 321, 172 Pac. 1173 (1918); *Park Falls State Bank v. Fordyce*, 206 Wis. 628, 238 N.W. 516 (1932).

⁵⁰ Sharp, *op. cit. supra* note 1; *Some Aspects of the Law of Release of Claims in Illinois*, 5 Univ. Chi. L. Rev. 455, 462 (1938); *Ashley, Doctrine of Consideration*, 26 Harv. L. Rev. 429 (1913); *Uniform Written Obligations Act*, 9 Uniform L. Ann. 431 (1932); *Uniform Written Obligations Act*, 9 Uniform L. Ann. 245 (Supp. 1939). This act is discussed in *Contracts without Consideration*; *The Seal and the Uniform Written Obligations Act*, 3 Univ. Chi. L. Rev. 312 (1936).

⁵¹ "The fact that the promisor has already received consideration for his promise before he makes it, so far from enabling him to break his promise seems to us to form an additional reason for making him keep it," Report of the English Law Revision Committee, *op. cit. supra* note 1, at 603.

⁵² Wright, *op. cit. supra* note 1. This view was held by Lord Mansfield, *Pillans v. Van Mierop*, 3 Burr. 1664 (K.B. 1765).

⁵³ *Oliphant, Mutuality of Obligation in Bilateral Contracts at Law*, 28 Col. L. Rev. 997 (1928); *Univ. Chi. L. Rev.*, *op. cit. supra* note 50; *Col. L. Rev.*, *op. cit. infra* note 54.

present consideration.⁵⁴ Finally, enforcement of these promises would mitigate the hardship resulting from the abolition in many states of the common law effect of the seal.⁵⁵

B

An additional reason for enforcing these promises exists in cases in which there is a risk of reliance by the promisee on the promise. Such a case is *Lawrence v. Oglesby*,⁵⁶ where a son promised his father to pay a share of his legacy over to his sister. Thereafter, the father left his will unchanged. It is probable that his failure to insert a provision for the sister was a consequence of his reliance on his son's promise. In cases where the conduct is unequivocal reliance, some courts in recognition of the "idea implicit in assumpsit that a recovery should be available to anyone who has, in a selected sense, been hurt by the promise of another and his failure to fulfil it,"⁵⁷ have placed the risk of this reliance on the promisor.⁵⁸ But in cases like *Lawrence v. Oglesby* the conduct, mere failure to act, is equivocal, because of the apparent impossibility of ascertaining whether it was by reason of reliance on the promise or because of some other reason that the person refrained from certain conduct. As a result, the courts here, unable to find actual reliance, refuse to place the risk of equivocal reliance on the promisor. This refusal, it is submitted, overlooks the fact that the inaction, although not unequivocal reliance, is in many cases of such nature that "it cannot be supposed that the connection between that inaction and the promise is wholly unconscious."⁵⁹ The protection of the promisee by placing the risk of this equivocal reliance on the promisor in such cases would find adequate support in the field of commercial law.

Examination of the commercial cases involving situations creating a risk of reliance indicates the lengths to which the courts have gone to allocate the burden of this risk to the promisor. The fact that the commercial law has advanced further in allocating the burden of this risk to the promisor is readily explained. This field of law developed from the law merchant, the growth of which was shaped almost entirely by considerations of business convenience.

Furthermore, it was the common man rather than the trained jurist who guided the development of the law merchant. Morris Cohen contends that it is the belief of common men that promises possess a sanctity which makes their

⁵⁴ 1 Williston, Contracts § 115 (rev. ed. 1936); Rest., Contracts § 81 (1932). This doctrine is questioned in *The Peppercorn Theory of Consideration and the Doctrine of Fair Exchange in Contract Law*, 35 Col. L. Rev. 1090 (1935).

⁵⁵ ". . . Certainly the abolition of the common law effect of the seal seems to leave defective the law of many American jurisdictions," Sharp, *op. cit. supra* note 1, at 278.

⁵⁶ 178 Ill. 122, 52 N.E. 945 (1899).

⁵⁷ Sharp, *op. cit. supra* note 1, at 279.

⁵⁸ Sharp, *op. cit. supra* note 1, at 279; cf. Shattuck, *Gratuitous Promises—A New Writ?*, 35 Mich. L. Rev. 908 (1937).

⁵⁹ *In re All Star Feature Co.*, 232 Fed. 1004 (D.C. N.Y. 1916).

breach unbearable.⁶⁰ This belief would naturally lead them to enforce promises on a broader scale than did the casuists who developed the common law.

An instance of the risk of equivocal reliance is found in the cases in which a debtor, pressed by his uneasy creditor for collateral security for a pre-existing debt, negotiates a third person's demand note, or time note maturing before the due date of the original debt,⁶¹ to the creditor without any new consideration. It is evident that the creditor, "being lulled into quiet,"⁶² will often rely on the third person's note. He may delay suit against the debtor, during which time the debtor might become insolvent; or he may neglect an opportunity to get a mortgage or chattel pledge; or his feeling of security resulting from the acquisition of the new collateral may induce him to extend credit to the debtor or others. In most cases, however, it would be impossible to prove that the creditor would have acted differently had no collateral been furnished. The awareness of the judges of the risk of this reliance was largely responsible for some of the early decisions allocating the burden to the promisor by making the creditor a holder for value,⁶³ even though it was difficult to find "value" in the traditional meaning.⁶⁴

Difficulties arise, however, when a third person, rather than the debtor himself, furnishes collateral after the debt has been contracted by executing a demand note or a time note, maturing before the maturity date of the debt, directly to the creditor without new consideration. The necessity of finding consideration to support the obligation of the third person as the immediate party to the security transaction has rendered protection of the creditor difficult,⁶⁵ even though he is just as likely to be lulled into a false security, and to fail to pursue his rights as in the case where he is the endorsee of the note of the third person.⁶⁶

⁶⁰ Cohen, *The Basis of Contract*, 46 *Harv. L. Rev.* 553 (1933).

⁶¹ When a time note, maturing after the maturity date of the debt, rather than a demand note is given as collateral, the courts find consideration in an implied agreement to forbear until the maturity date of the collateral.

⁶² *Manning v. McClure*, 36 *Ill.* 490, 498 (1865); *Swift v. Tyson*, 16 *Pet. (U.S.)* 1 (1842). The collateral "stays the hand of the creditor," *Leask v. Scott Bros.*, 2 *Q.B.D.* 376 (1877).

The collateral will have this effect whether it is a promise or a deed to land. A realization of this has led the Uniform Laws Commission to suggest that a creditor who takes land or a chattel as security for a precedent debt be protected as a holder for value, *Commissioner's Note*, 1 *Uniform L. Ann.* 448, 449 (1931), discussed in Kennedy, "Value"—a Plea for Uniformity in New York Commercial Law, 8 *St. John's L. Rev.* 1 (1933).

⁶³ *Swift v. Tyson*, 16 *Pet. (U.S.)* 1 (1842); *Manning v. McClure*, 36 *Ill.* 490 (1865).

⁶⁴ Wickhem, *Consideration and Value in Negotiable Instruments*, 3 *Wis. L. Rev.* 321 (1926).

⁶⁵ 1, 4 *Williston, Contracts* §§ 108, 1146 (rev. ed. 1936); *Story, Promissory Notes* 218, n. 4 (5th ed. 1859); *First Nat'l Bank of Poteau v. Allen*, 88 *Okl.* 162, 212 *Pac.* 597 (1923); *Daniels & Fisher Stores Co. v. Allen*, 66 *Colo.* 83, 179 *Pac.* 152 (1919); *Gilbert v. Wilbur*, 105 *Me.* 74, 72 *Atl.* 868 (1908).

⁶⁶ Wickhem, *op. cit. supra* note 64.

The recognition that there is the same need for protection in these cases as in those where the collateral is negotiated to the creditor has led the courts to create various devices to afford the creditor protection in spite of the lack of consideration. This explains the readiness of some courts to dispense with the necessity of consideration by finding a conditional delivery and an implied agreement to furnish a surety,⁶⁷ or to find consideration in an implied agreement to forbear,⁶⁸ when the facts scarcely seem to justify such findings. One court has gone so far as to hold, in a case of an unrequested but reasonable forbearance, that "forbearance, even without an agreement to forbear, if it be completed," is sufficient consideration.⁶⁹ As early as 1568 it was said that where a person requested the extension of credit, his subsequent suretyship promise was enforceable without any new consideration.⁷⁰

Some courts have avoided the necessity of finding consideration by relying on technicalities to bring the creditor within the class of holders in due course. Thus, in *American National Bank v. Kerley*,⁷¹ the court held that a payee, who had received the instrument as collateral security through an intermediary who was his own agent, was a holder in due course. The Illinois Supreme Court adopted the same view with regard to a creditor to whom a "pay me" note had been transferred by its maker.⁷² The courts, in each of these cases, managed to overcome the difficulty of calling an immediate party, as such, a holder in due course. However, in the *Kerley* case the court failed to consider the more troublesome question of whether the holder, knowing the operative facts which, if pleaded, would constitute the defence of lack of consideration, can be a holder in due course. Other courts, apparently without being aware of what they were doing, have held the creditor to be a holder in due course without even a technicality to justify their holding.⁷³ Another method of giving a creditor the protection that business needs require is accomplished by treating the delivery of

⁶⁷ *Steers v. Holmes*, 79 Mich. 430, 44 N.W. 922 (1890); *Samson v. Thornton*, 3 Met. (Mass.) 275 (1841); *Arant, Suretyship* § 27, n. 17 (1931).

⁶⁸ *Mohn v. Mohn*, 181 Iowa 119, 164 N.W. 341 (1917); *Johnson & Higgins v. Harper Transportation Co.*, 228 Fed. 730 (D.C. Mass. 1915); *McDonald Bros. v. Koltcs*, 155 Minn. 24, 192 N.W. 109 (1923).

⁶⁹ *In re All Star Feature Co.*, 232 Fed. 1004 (D.C. N.Y. 1916). *Contra*: *Strong v. Sheffield*, 144 N.Y. 392, 39 N.E. 330 (1895).

⁷⁰ See *Hunt v. Bate*, 3 Dyer 272 (K.B. 1568); *Sidenham v. Worlington*, 2 Leon. 224 (C.P. 1585); *Laingor v. Lowenthal*, 151 Ill. App. 599 (1909). *Cf.* *Arant, Suretyship* § 27 (1931).

⁷¹ 109 Ore. 155, 199-203, 220 Pac. 116, 130, 131 (1923).

⁷² *Elgin Nat'l Bank v. Goecke*, 295 Ill. 403, 129 N.E. 149 (1920). This holding makes it possible for two parties to avoid the necessity of furnishing consideration by merely having the obligor make the note payable to himself and then endorse it to the other party.

⁷³ *Many, Blanc and Co. v. Krueger*, 153 Ill. App. 327 (1910); *Thompson v. Franklin Nat'l Bank*, 45 App. D.C. 219 (1916); *West Rutland Trust Co. v. Houston*, 104 Vt. 204, 158 Atl. 69 (1931) (in this case there was an alternative ground for holding the person who furnished the collateral).

the note as a pledge.⁷⁴ The pledge of one's paper, like the pledge of a chattel, is an executed transaction rather than executory, so that consideration is not required. The simplest way to protect the creditor is to say, as did Lord Mansfield, that when the promise of the surety is reduced to writing there is no objection to the want of consideration because "a *nudum pactum* does not exist in the law of merchants."⁷⁵ This rule would obviate the necessity of relying on fictions to enforce the promise of the surety, yet would not leave the surety unprotected, for the rules regarding mistake would give him the same protection that the doctrine of consideration now affords him.

Another illustration of the risk of reliance problem is suggested by practices connected with irrevocable letters of credit.⁷⁶ In pursuance of a contract of sale, the buyer arranges with a bank to issue an irrevocable letter of credit whereby the bank agrees to honor all drafts of the seller up to a fixed amount. This assures the seller of the performance of the contract, and is a convenient credit arrangement for the buyer. It is possible to find consideration in each situation thus far appearing in the reports, in which the bank was or should have been held liable upon the letter of credit. A sense of the limitations of consideration doctrines, and of the danger that these doctrines will not give legitimate protection in every case of reliance or risk of reliance has, however, induced writers and courts to suggest a general principle making letters of credit irrevocable from the outset. Such a principle would, for example, protect the seller who has simply made preparations to accept a buyer's offer against revocation of a promised credit secured by the buyer. It would indeed go further and protect the seller from the time the promise in the letter is properly communicated to him, without requiring him to prove that it has influenced his conduct. Such a principle would doubtless lead to a reconsideration of the buyer's power to revoke his offer.

The commercial cases provide sufficient authority to warrant enforcement of promises in the non-commercial cases where such enforcement is similarly necessary to afford protection against the risk of reliance. Where there is no risk of reliance the desirability of allowing one to place himself under a legal obligation to reimburse another for benefits conferred should be equally persuasive in leading the courts to adhere to the suggested liberal view of consideration.

⁷⁴ Steffen explains the holding in *West Rutland Trust Co. v. Houston*, 104 Vt. 205, 158 Atl. 69 (1931) (cited note 73 *supra*) on this ground, even though the court does not speak of the security transaction as a pledge, Steffen, *Cases on Commercial and Investment Paper* 654 (1939).

⁷⁵ *Pillans v. Van Mierop*, 3 Burr. 1664 (K.B. 1765).

⁷⁶ See Gutteridge, *Bankers' Commercial Credits* (1932); Thayer, *Irrevocable Credits in International Commerce: Their Legal Nature*, 36 Col. L. Rev. 1031 (1936); McCurdy, *Commercial Letters of Credit*, 35 Harv. L. Rev. 539 (1922); Davis, *The Relationship between Banker and Seller under a Confirmed Credit*, 52 L. Q. Rev. 225 (1936); *Letters of Credit—Negotiable Instruments*, 36 Yale L. J. 245 (1926).