PROMISSORY LIABILITY. II*

MALCOLM P. SHARP†

II. THE LIMITS OF LIABILITY

THE making and breaking of promises may cause readily discernible economic harm, as to which provision must normally be made by courts. Contractual responsibility is moreover the most important of the ideas used in the organization of enterprise in the nineteenth and early twentieth centuries. The controlling idea of freedom of choice in the conduct of practical affairs has, as a corollary, the security of expectations created by the exercise of free choice.

Not every undertaking that has been defined as a promise is, however, "enforceable"; and some undertakings which are normally enforceable by means of familiar remedies, may, under other circumstances be either entirely unenforceable or enforceable to only a limited extent.

Difficulties which have appeared in the evolution of contractual responsibility have left their vestigial traces in the modern law. The danger of fabricated claims is guarded against, though only more or less systematically, by Statutes of Frauds and Statutes of Limitations. Certain notions of fairness have doubtless contributed to the persistence of old limits on the enforceability of promises, as well as to the familiar statutory safeguards.

For contemporary purposes, a more instructive set of limitations appears to result from the recognition that knowledge and foresight must, to a certain extent, control the making of promises, if they are to have rational and healthy effects. Adjustments between the criminal law and the rules of civil liability apart from contract, on the one side, and contract law, on the other, must be made under the head of public policy. Moreover, certain more general notions, for example those notions about equality of bargaining position which appear to be expressed in our rules about forfeitures, influence decisions on public policy. Finally, the general scheme of free contract is to some degree threatened by the economic stress of the great depression; and, as in the medieval world, efforts to combine freedom with control in the interests of security, appear in our legislation.

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† Associate Professor of Law, University of Chicago Law School.

I. LACK OF SEAL AND CONSIDERATION

Either a writing sealed and delivered or "consideration" is said to be necessary if a promise is to be enforced by a court. The seal belongs to the most primitive group of phenomena associated with the most elementary steps in the evolution of contract; though the action of debt made its appearance in the King's courts before the action of covenant. The formal contract enforced in covenant, and the "real" contracts enforced in debt and its related forms, proved inadequate to business needs in England, as comparable classifications have proved inadequate elsewhere. Generalized notions of responsibility known today as "tort" liability were extended to protect promissory expectations, and added to form and quid pro quo the force of the "detriment" characteristic of consideration.

While the seal as a physical object is very ancient, the Normans were apparently responsible for the English notion that a writing carrying a sealed impression in wax and delivered to a promisee might express a promise which by reason of the form would be given effect by courts. Any stamped impression came to serve as well as an impression in wax; and the requisites for effective "delivery," as we have seen,⁶⁹ have become relatively informal. Legislation and, in some jurisdictions, judicial decisions have permitted the substitution of a scroll or any arbitrary mark for the marked impression associated with the seal. It is still possible for a court to hold, however, that such an impression is essential at common law; and the absence of a seal, even if there is consideration, may still have practical effects with respect to proof.⁷⁰ Moreover, while a seal may be as effective as consideration for most purposes, its effect may be limited, for example, by equity rules about specific performance.⁷¹ The primitive character of the sealed writing, and the vogue of consideration, have led to statutes abolishing or limiting the effect of the seal.

It seems doubtful whether these statutes by themselves have a good effect. On the contrary, it seems that the extension of power to make effective promises without consideration, subject perhaps to certain safeguards, is desirable. Thus, the extension of the effect of the scroll by either statute or decision seems desirable. Even the anomalous notion that a recital of consideration is as effective as consideration has useful practical effects.⁷² The Uniform Written Obligations Act is desirable legislation.

⁶⁹ Note 24 *supra*.

⁷⁰ *Woodbury v. United States Casualty Co.*, 284 Ill. 227, 120 N.E. 8 (1918).

⁷¹ *Corbett v. Cronkhite*, 239 Ill. 9, 87 N.E. 874 (1909).

⁷² *Schneider v. Turner*, 130 Ill. 28, 22 N.E. 497 (1889).

It may even be suggested that the following argument has some force. The characteristic of the common law seal is an impression on wax on paper, generally extended to any marked impression on paper. A scroll or any arbitrary mark is similarly an impression on paper which by a slight extension should be equally effective. The words "I intend to be legally bound," or even any words having a like interpretation,⁷³ may be embodied in an impression on paper which should be equally effective at common law.

The recognition of the seal marks a forward step in the enforcement of promises. The seal also serves to distinguish the mere statement of intention sharply from the promise. It has evidentiary value. Form serves further as some safeguard against hasty, improvident, and one-sided undertakings.

A combination of *quid pro quo* and consideration has served somewhat similar functions. Historically older, the benefit idea characteristic of *quid pro quo* has combined with the detriment idea characteristic of consideration, to form our modern doctrine of consideration. Like the seal, consideration marked originally a step forward in the enforcement of promises; and its persistence as a test seems due to a combination of the hardening process which leaves so many vestigial survivals in the law, and certain rough practical ideas. Again, the mere statement of intention may sometimes be distinguished from the promise by the test of consideration. The more the circumstances that must be proved, the less is the danger of fabricated claims. Again, the combined doctrines of seal and consideration furnish some protection against one-sided bargains.

Modern consideration can hardly be defined by one systematic statement. The requirement of consideration is in fact a number of alternative requirements, and may under various circumstances be satisfied by a variety of rather different events.

Consideration is, most simply, detriment to the promisee or benefit to the promisor. Detriment is conduct or the promise of conduct which might properly, in relation to the promisor, be different; benefit is an advantage or the promise of an advantage which the promisor could not otherwise properly claim.

It may be observed as to the word "properly" that there is no more "right" to recover or defend on an invalid claim or defense asserted in good faith and with some basis of reason, than there is deliberately to break a contract, as by declining to pay all or part of an admittedly due debt.

⁷³ Cf. *Gilmore v. Kessler*, 22 Pa. Dist. & Co. 274 (1934) on interpretation of the Uniform Written Obligations Act.

If words are used in their ordinary sense, there is no such right;⁷⁴ and our familiar rules as to consideration depend on views of what parties may or may not properly do in taking advantage of strategic positions resulting from the inevitable limitations of judicial procedure. One may properly test an honest and not absurd, though invalid, claim or defense, and different conduct or the promise of different conduct may be consideration.⁷⁵ But a debtor, even in real difficulties, may not properly, even on his creditor's suggestion, so the courts seem to think, decline to pay any part of his due debt; and so paying any part is not consideration for a release of the balance.⁷⁶ The decisions do not depend on inevitable deductions from the working notion of a right; but on views, which are not beyond question, about the policy applicable to settlements. The debtor who uses the strategic advantage of a defendant's position to get a benefit might indeed be regarded as a party to duress; but other situations may be distinguished in the interests of security of settlements and promises generally.⁷⁷

⁷⁴ As an effort to conform precisely to examined usage, the following definition of right may be suggested. A right is a relation between persons such that the person said to have the right may in the event of threatened or actual specified action or inaction on the part of the person said to have a correlative duty successfully ask for a court order prohibiting or compelling action in the case of threats, or giving damages or imposing a penalty in the case of actual action or inaction. A privilege is an expression for a complex of rights, or is without legal significance. A power expresses a relationship in which a person can create primary, non-substitutional rights, whether or not in violation of duty. An immunity is an expression for an exception. A right in personam is paucital, other rights multital; and they commonly appear in combination.

⁷⁵ Cf. *Montgomery v. Grenier*, 117 Minn. 416, 136 N.W. 9 (1912); *Woodbury v. U.S. Casualty Co.*, 284 Ill. 227, 120 N.E. 8 (1918), holding the surrender of an honest but colorless claim or defense not consideration. The mere assertion of even such a claim or defense at the same time violates no right. Mere reliance on an invalid defense in court commonly is combined with an actual or threatened violation of a right. Compare the factors determining whether the assertion of a colorless claim may be "duress" for other purposes. See 5 Williston, *Contracts* §§ 1606, 1607 (rev. ed. 1937). As to breach of contract and duress, see note 77 *infra*. As to "tort" liability, see *Harper, The Law of Torts* §§ 268-73 (1933). The description of the legal relationships raising these problems is an interesting problem of terminology. It may be suggested that a rather simple and traditional set of terms, if clearly defined, will furnish satisfactory solutions. As a practical matter, it is not easy to see why the circumstances creating lack of consideration should not be the same as those creating duress. Cf. note 77 *infra*.

⁷⁶ *Foakes v. Beer*, L.R. 9 App. Cas. 605 (1884); cf. *Pinnel's Case*, 5 Co. *117 (1602); *Couldery v. Bartrum*, L.R. 19 Ch. D. 394 (1881); *Jaffray v. Davis*, 124 N.Y. 164, 26 N.E. 351 (1891); *Rye v. Phillips*, 203 Minn. 567, 282 N.W. 459 (1938). A comparable rule applies to any attempted compromise occasioned by a threatened breach of contract, without colorable legal justification, unless at least there is colorable moral justification for the breach. *King v. Duluth, M. & N.R.*, 61 Minn. 482, 63 N.W. 1105 (1895).

⁷⁷ Cf. *Astley v. Reynolds*, 2 Str. 915 (1732); *Hartsville Oil Mill v. United States*, 271 U.S. 43 (1926); *Pittsburgh Steel Co. v. Hollingshead & Blei*, 202 Ill. App. 177 (1916); see 2 Patter-

So far as we have gone, detriment may have been suffered or benefit conferred before the promise which is the subject of examination. Historically, from the sixteenth century through the eighteenth, any past detriment or benefit with peculiar consequences for the promisor might, indeed, have emerged as a ground for holding the promisor bound. Thus, if a surety requested an advance to a principal, and subsequently to the advance made his surety's promise, he was bound;⁷⁸ and similarly, if one requested a benefit for himself, and subsequently promised a return, he was bound.⁷⁹ This is, perhaps, the explanation of the effect of a promise on the defense of limitations or bankruptcy.⁸⁰ Moreover, the principle might easily have been extended beyond the cases involving prior request. Thus, it is somewhat curious that recovery against one who promises to pay another already crippled in saving the promisor's life, is given only by a minority view.⁸¹ In fact, however, the principle is closely limited and confined to cases of prior request and cases involving the defenses of limitations, bankruptcy and infancy.

It will be observed that the words used in the definition, "in relation to the promisor," make performance or promise of performance of what one is already under obligation to someone to perform, consideration for another's promise,⁸² where the promisee owed no duty—in a sense including the duty of a public officer to people generally—to the other, apart from the promise; and the description of benefit is meant to include the same situation. There seems to be no more circularity in treating the promisee's

son, *Cases on Contract* 86-97 (1935); 5 *Williston, Contracts* § 1618 (rev. ed. 1937). It will be seen that while the rule refusing effect to settlements occasioned by wholly unjustified breaches of contract, or prospects of breach, may be an overgeneralization from rough notions of duress, it cannot either on authority or practically well be rested on duress; as is apparent when one considers the effect on a sealed instrument or money paid, of identical circumstances. On the other hand, there appears in some cases excessive reluctance to treat breach of contract, or threatened breach, with circumstances of peculiar hardship, as duress. A recognition that, for example, there is not likely to be duress when a creditor is, without peculiar economic pressure, quite willing to settle, might be accompanied with a consistent recognition that the needs of obligees and the strategic positions of obligors rather frequently give an opportunity for duress in the traditional sense of the word.

⁷⁸ *Sidenham v. Worlington*, 2 Leon. 224 (1585); *Laingor v. Lowenthal*, 151 Ill. App. 599 (1909); see *Arant, Suretyship* § 27 (1931).

⁷⁹ *Lampleigh v. Brathwait*, Hobart 105 (1615); cf. *Moore v. Elmer*, 180 Mass. 15, 61 N.E. 259 (1901).

⁸⁰ *Dickson v. Thomson*, 2 Shower 126 (1681); *Trueman v. Fenton*, 2 Cowp. 544 (1777).

⁸¹ *Webb v. McGowin*, 168 So. 196 (Ala. App. 1935), cert. den. (with opinion) 168 So. 199 (Ala. S. Ct. 1936).

⁸² Cf. *McDevitt v. Stokes*, 174 Ky. 515, 192 S.W. 681 (1917); *DeCicco v. Schweizer*, 221 N.Y. 431 (1917); see note 4 *supra*.

new promise to this particular promisor as involving detriment, than there is in any case where a promise is "consideration" for a promise. In fact, there seems to be in every such case, a practical detriment, in view of the extent to which one risks his standing by the mere making of a serious promise. He must either keep the promise or risk a loss of credit.

Illusory promises are of course not promises at all; though they may be mistaken for promises. The mistake in such cases seems a sufficient reason usually for holding the other party free. In some cases of one-sided output or requirement contracts, the reasons for denying recovery, for "want of mutuality," seem to be like the reasons for denying recovery on other oppressive promises, like promises of forfeitures, or too broad (but not monopolistic) agreements not to compete; but here denial of enforceability on one side may threaten total "failure of consideration" on the other.⁸³

To be consideration, detriment or benefit, except in cases of "past consideration," must, finally, be given in exchange for—or in limited old, modern, and perhaps expanding classes of cases, simply in reasonable reliance on—the promise which is the subject of examination. The cases which throw most doubt on the general validity of so-called promissory estoppel are the cases dealing with mere preparations to "accept" offers.⁸⁴ Here it may be that reflection on the first recognitions of firm offers in cases of auctions without reserve and offers for protracted unilateral acceptance, and in case of offers by mail, will suggest the development of general enforcement of offers expressly or impliedly firm, at least in cases of reasonable reliance in conduct, in the common law.⁸⁵ Moreover, the early cases of a creditor's oath or other proof as consideration,⁸⁶ and the

⁸³ Cf. *T. W. Jenkins & Co. v. Anaheim Sugar Co.*, 247 Fed. 958 (C.C.A. 9th 1918); *Nassau Supply Co. v. Ice Service Co.*, 252 N.Y. 277, 169 N.E. 383 (1929). See Havighurst and Ber-
man, *Requirement and Output Contracts*, 27 Ill. L. Rev. 1 (1932).

⁸⁴ *Corbett v. Cronkhite*, 239 Ill. 9, 87 N.E. 874 (1909); cf. *Richelieu Hotel Co. v. Int'l Military Encampment Co.*, 140 Ill. 248, 29 N.E. 1044 (1892); *Threlkeld v. Inglett*, 289 Ill. 90, 124 N.E. 368 (1918); *Plumb v. Campbell*, 129 Ill. 101, 18 N.E. 790 (1888); *Estate of Mary Beatty v. Western College*, 177 Ill. 280, 52 N.E. 432 (1898), for example, in indicating a disposition to give effect to reasonable reliance. But cf. *Dunshee v. Dunshee*, 255 Ill. 296, 99 N.E. 593 (1912), applying the rule of *Kirksey v. Kirksey*, 8 Ala. 131 (1845).

⁸⁵ See Part I, Section 3, *supra*. Notice again the treatment of the cases in notes 25 and 26, as a reminder that an offer may, on any view, be so conditional that what at first looks like reasonable reliance will turn out on examination to be unreasonable. It is not decisions on properly conditional offers, but decisions on firm offers, which raise the difficulty about the effect of reasonable reliance. On the other hand, the other lines of "offer" cases here referred to indicate a recognition of the business significance of the firm offer, which may well increasingly be given effect, and particularly in cases of reasonable reliance in deciding on and carrying into effect a course of business conduct.

⁸⁶ *Sturlyn v. Albany, Cro. Eliz.* 67 (1587).

steady course of decisions against parties in the nature of benevolent bailees in *assumpsit*,⁸⁷ indicate a sound historical basis for giving reasonable detrimental reliance in conduct, quite apart from "bargain" or "exchange," the effect of consideration. *Thorne v. Deas*⁸⁸ seems to mark a backward step. Since then the effect given reliance in certain cases of mere gift,⁸⁹ charitable subscriptions⁹⁰ and promissory gifts of land later improved⁹¹ in particular, as well as the liability of benevolent bailees for "nonfeasance"⁹² and parties with partial properties for "misfeasance" toward the other partial interests⁹³—these phenomena in particular suggest, though they do not assure, the systematic development of the old notion that reasonable detrimental reliance in conduct is consideration.⁹⁴

A noteworthy limit on the doctrine of consideration is brought out by contrasting the more or less related notion of value. One might suppose that a surety's promise made after an advance would be binding because of the risk which it creates, if for no other reason.⁹⁵ The promisee may,

⁸⁷ *Coggs v. Bernard*, 2 Ld. Raym. 909 (1703). See Langdell, *Cases on Contracts*, Summary §§ 66-8 (2d ed. 1879).

⁸⁸ 4 Johns. (N.Y.) 84 (1809). The old cases there relied on were hardly understood until Ames wrote, and in any event did not on the reported facts involve any reliance in conduct. *Kirksey v. Kirksey*, 8 Ala. 131 (1845), is a familiar application of the supposed rule that consideration must be "bargained for," somewhat—though, as the surety's obligation shows, not precisely—like *quid pro quo* in debt; cf. *Bigelow v. Bigelow*, 95 Me. 17, 49 Atl. 49 (1901). *Quid pro quo* in a progressive system may properly supplement detriment, for example in some cases of promises to or for "third parties"; but it is hard to see why it should limit the effect of the detriment which was characteristic of *assumpsit*, and which seems historically and practically to include reasonable reliance in conduct. See notes 1-5 *supra*.

⁸⁹ *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898). For a life of Mr. Justice Sullivan, who wrote the opinion, see Lightner, John J. Sullivan, 10 Neb. L. Bull. 198 (1931). He was evidently an able and practical lawyer.

⁹⁰ Cf. *Allegheny College v. Nat'l Chautauqua County Bank*, 246 N.Y. 369, 159 N.E. 173 (1927) (in fact an extension of responsibility beyond the limits of the older subscription cases, and to a case where no reliance in conduct was shown).

⁹¹ *Seavey v. Drake*, 62 N.H. 393 (1882).

⁹² *Siegel v. Spear & Co.*, 234 N.Y. 479, 138 N.E. 414 (1923).

⁹³ *Barile v. Wright*, 256 N.Y. 1, 175 N.E. 351 (1931); cf. *Kirby v. Brown*, *Wheelock, Harris, Vought & Co.*, 229 App. Div. 155, 241 N.Y. Supp. 255 (1930), *rev'd* on the facts but not the law 255 N.Y. 274, 174 N.E. 652 (1931); cf. *Beck v. Sheldon*, 259 N.Y. 208, 181 N.E. 360 (1932); *Hammond Co. v. Standard Oil Co.*, 259 N.Y. 312, 323, 181 N.E. 583, 587 (1932). But cf. *Holden v. Efficient Craftsman Co.*, 234 N.Y. 437, 138 N.E. 85 (1923).

⁹⁴ With the enactment of the Uniform Written Obligations Act and the unqualified recognition of the principle expressed in Section 90 of the *Restatement of Contracts*, Pennsylvania has made a notable advance; *Fried v. Fisher*, 328 Pa. 497, 196 Atl. 39 (1938).

⁹⁵ *Pillans v. Van Mierop*, 3 Burr. 1663 (1765); cf. *American Multigraph Sales Co. v. Grant*, 135 Minn. 208, 160 N.W. 676 (1916), representing the modern authorities *contra*. See note 78 *supra*.

for example, make further advances to the principal or forego opportunities to get "real" security, without being able to prove, or even say, clearly, that he has acted in reliance on the surety's undertaking. It seems that business promises, that is, promises connected with ordinary commercial transactions, should generally be enforced, at least where there is a written memorandum. The argument applies to commercial offers, even apart from reliance in conduct.

Along with the language in some of the letter of credit cases,⁹⁶ an interesting group of decisions suggests that the line between consideration and value may become blurred and finally eliminated, to the extent that a promise merely to secure an existing debt will be treated as though given for consideration, in the same way that a transfer merely to secure an existing debt is treated as though given for value.⁹⁷ Rules limiting the power of promisor and promisee to agree to a discharge, where a "creditor beneficiary" has heard of their arrangement may illustrate a comparable development, and must depend on comparable reasons.⁹⁸ The similar rules protecting a "donee beneficiary" against common action by promisee and promisor are more exceptional and striking.

It will be observed that the familiar classifications of promises enforceable in court have considerable capacity for expansion. The notion of form may be expanded to include more or less systematic writing. It may be increasingly thought that an undisputed due debt may be released on payment of a smaller sum as properly as a promise may be made in return for the surrender of a groundless but colorable and honest claim or defense; in the absence at least of circumstances showing that the debtor is taking undue advantage of the creditor's urgent needs and his own strategic advantages as a defendant in litigation. The release, that is, may be given increasing effect, subject to safeguards resulting from a sensible development of the significance of economic duress in law. The notion of past consideration may well be extended, particularly in cases where

⁹⁶ *American Steel Co. v. Irving Nat'l Bank*, 266 Fed. 41 (C.C.A. 2d 1920).

⁹⁷ *Elgin Nat'l Bank v. Goecke*, 295 Ill. 403, 129 N.E. 149 (1920); *Thompson v. Franklin Nat'l Bank*, 45 App. D. C. 218 (1916); *West Rutland Co. v. Houston*, 104 Vt. 204, 158 Atl. 69 (1932); cf. *American Nat'l Bank v. Kerley*, 109 Ore. 155, 199, 220 Pac. 116, 130 (1923); see *Sturges, Cases on Credit Transactions* 202, note 72 (2d ed. 1936).

⁹⁸ *Bay v. Williams*, 112 Ill. 91 (1884). A case in which the facts illustrate both the reason for the general rule and the reason for an exception when the contract between promisor and promisee is still executory on both sides is *Hartman v. Pistorius*, 248 Ill. 568, 94 N.E. 131 (1911). The general rule seems hardly consistent with, and at the same time preferable to, a rule permitting a promisee in a creditor-beneficiary situation to recover the entire amount of an obligation before he was himself paid. *Meyer v. Hartman*, 72 Ill. 442 (1874). See the author's review, *Williston on Contracts*, 4 Univ. Chi. L. Rev. 30, 41-2 (1936).

quasi-contractual relief is prevented only by a presumption in favor of neighborly action without expectation of pay.

Ordinary notions of detriment and benefit can be applied in such a way as to make effective the promise made in exchange for the performance or promise of performance of a duty owed to a third person. Detriment and benefit similarly give a roughly businesslike solution of the problem of mutual promises; while difficulties resulting from illusory or harsh requirement and output contracts can be dealt with sometimes by the application of mistake doctrines, sometimes, perhaps, frankly by the application of something like forfeiture rules.

The increasing disposition to treat preparation for something like acceptance as the equivalent of acceptance, for example, in cases of auctions without reserve and the commencement of protracted unilateral acceptance, may lead to an extension of notions of promissory estoppel to cases of preparation to accept generally. The cases enforcing promises to make gifts to charities, and to make gifts of land, as well as the promises of mandatories, because of reasonable reliance, may well be increasingly generalized to cover all cases of reasonable reliance. Finally, the risk of reliance, even where it cannot be proved, may be seen as a sufficient reason for enforcing promises generally, and more particularly for enforcing promises given to secure existing business obligations.

Legislation might well accelerate the process of development here suggested. In particular, the legislation proposed by the English Law Revision Committee is framed with a view simply to expanding the common law classifications.⁹⁹

A more simple legislative solution seems, however, preferable. It would seem desirable to provide that promises shall no longer be unenforceable because of lack of seal or consideration or both. The purely benevolent promise ought, perhaps, to be subject to safeguards; and such a promise

⁹⁹ See Report of the English Law Revision Committee, *The Statute of Frauds and the Doctrine of Consideration*, 15 Can. Bar Rev. 585 (1937); see also State of New York Law Revision Commission, *Report, Recommendations and Studies*, 1936, 65-374 (1936). The situation in Illinois is the center of attention in a series of notes. See *Contracts without Consideration; The Seal and the Uniform Written Obligations Act*, 3 Univ. Chi. L. Rev. 312 (1936); *Some Aspects of Delivery: Specialties and the Uniform Written Obligations Act*, 3 Univ. Chi. L. Rev. 488 (1936); *Some Aspects of the Law of Release of Claims in Illinois*, 5 Univ. Chi. L. Rev. 455 (1938); *Some Aspects of the Law of Gratuitous Promises in Illinois*, 5 Univ. Chi. L. Rev. 446 (1938); *Promissory Obligations Based on Past Benefits or Other Moral Considerations*, 7 Univ. Chi. L. Rev. 124 (1939). A note on reasonable reliance in commercial matters will appear in a following number of this volume of the University of Chicago Law Review. See also *The Present Status of the Sealed Obligation*, 34 Ill. L. Rev. 457 (1939). For translated material on somewhat comparable matters in Continental European law, see Rheinstein, *Materials on Comparative Law of Contracts*, c. 2, pt. I (mimeo. ed. 1939).

described as one not made in payment for prior conduct on the part of the promisee, nor occasioning reasonable alterations of conduct, nor made as a step in the formation of a business contract, nor made to secure the performance of a business contract, nor made by way of settlement or made by way of modification of claims. A peculiarly benevolent promise of this sort, including the much debated but actually unimportant social engagement, might be made enforceable only if it contained some affirmative indication, besides the words construed as a promise, that the promisor recognized their practical effect in creating dependable expectations. Further formal safeguards for this situation might be developed, drawing on suggestions from such sources as the Roman *stipulatio* and the comparable insistence on words of promise in the Uniform Written Obligations Act.

It may be that a reasonably systematic treatment of the social engagement, eliminating it entirely from the class of enforceable promises, would best satisfy our notions of social fairness; and avoid debate about what appears, even in Continental Europe, a relatively unimportant matter. A general definition could easily be developed, which the good sense of judges could apply.

The statute in question might in general terms encourage the extension of concepts of economic duress occasioned by threats of breach of contract. It might also require not a formal writing, but a Statute of Frauds memorandum, in some cases of suretyship for business promises where the surety receives no business benefit on his own account; and extend Lord Mansfield's treatment of a business surety¹⁰⁰ by making such a memorandum sufficient, as well as necessary, to make the benevolent, friendly or familial surety's promise to back a business principal binding. It is worth while noting that while a majority of the English Law Revision Committee thought the Statute of Frauds, except in land cases, should be abolished entirely, a minority dissented solely on the point that benevolent sureties should receive some such protection as that given by the Statute of Frauds.

2. THE STATUTE OF FRAUDS

Caution and uneasiness about treating promises as generally enforceable appears not only in consideration doctrine but also in the Statute of Frauds itself. The statute requires that specified promises must be recorded in a signed writing. The contracts which must be in writing are contracts in consideration of marriage, held not to include simple contracts to marry, contracts not to be performed within a year, contracts "to answer for the debt, default or miscarriages of another person," cer-

¹⁰⁰ *Pillans v. Van Mierop*, 3 Burr. 1663 (1765).

tain personal undertakings of executors or administrators, contracts and a variety of other transactions affecting interests in land, and certain executory contracts for the sale of chattels for more than a minimum stated amount. The original statute, passed in 1677, has been copied with variations and sometimes additions in common law jurisdictions.

The English Law Revision Committee, as has been observed, recently criticized the statute. The Committee, with a dissent only about sureties' contracts, recommended the abolition of the statute, except with respect to land matters which were not within the scope of the Committee's report. Its report referred to judicial praise, but more particularly to judicial criticism of the statute, and recalled the familiar disposition of judges to limit its operation in every possible way.

More important, anomalies in the statutory scheme and objections to its entire policy were pointed out. Thus, the Committee failed to find any plausible reason for the requirement that contracts not to be performed within a year must be in writing.¹⁰¹ The policy supposed to be behind the requirement appears to be something like the policy of the Statute of Limitations; but the real difficulties of the sort contemplated arise not because performance is to extend over a long period, but because of the lapse of a long period between grounds of action and proof. Again, the Committee pointed out that if any purpose is served by a requirement that sales contracts involving more than a minimum sum must be in writing, the same purpose presumably requires that all contracts involving more than the same sum must be in writing. In the judgment of the Committee, the real difficulty with the statute is that it imposes an unnecessary, and, therefore, undesirable limit on the enforcement of promises and contracts; and it should, therefore, be repealed.

The most interesting of the problems arising under the statute are the suretyship problems. Here, a majority of the Committee thought the statute unnecessary; and the limitations on the operation of the statute developed by the courts suggest, at least, the need of amendment in the interests of certainty and fairness.

Two groups of cases indicate the factors which have influenced qualification or limitation of the words of the statute by judicial decision. In one group of cases, the most that can be said for the decisions is that situations of such complexity as to require unusual particularity of proof, are felt to be so safeguarded by ordinary requirements of proof as not to re-

¹⁰¹ The questionable policy of this provision, along with general hostility to the statute on the part of judges, may be reflected in the construction of "not to be performed within the space of one year from the making thereof"; cf. *Boydell v. Drummond*, 11 East 141 (K.B. 1809); *McDonald v. Fitch*, 281 Mass. 528, 183 N.E. 348 (1933).

quire the additional safeguard of writing. An example is the contract to indemnify a surety.¹⁰²

A more interesting group of cases, now producing more uncertainty and suggesting interesting possibilities of amendment, are the cases involving the surety who has received some readily discernible personal benefit from the transaction in which he is surety. Not every such surety is excluded from the protection of the statute. For example, the more or less conditional surety's promise, the guaranty, and the non-conditional promise made after the principal's promise, though made for consideration or even compensation, must each be in writing, unless they fall within limited exceptions.

On the other hand, puzzling and suggestive exceptions from the statute appear to depend on the feeling that a surety who has received a discernible personal benefit in the transaction should be bound by his contract whether or not it is in writing. Thus, the surety who is a joint obligor is bound whether or not the contract is in writing.¹⁰³ The rule is said to depend on the notions that there is only one debt, that the benefit accruing to one joint debtor necessarily accrues to the other, and that hence the surety's promise must be regarded as made for a *quid pro quo* as well as consideration. The *quid pro quo* principle is not, however, carried out consistently, as is seen in the case of compensated sureties whose promises may fall within the statute.

A related group of cases has developed the so-called "main purpose" rule. If a surety has made his promise in assigning a claim for whose payment he thus becomes surety, or if he becomes surety for a claim secured by "real" security which he thus releases in his own interest, he is within rather well recognized limits of the "main purpose" exception to the statute. As soon as his promise is outside these somewhat arbitrary classes, his position is uncertain, and the more so because the supposed reason for the exception, if consistently applied, would apparently greatly extend the main purpose exception. It may be suggested, indeed, that the policy of the statute requires its application only to the surety who is "benevolent" in a very limited sense, who acts from motives of friendly or familial good will, and not from motives ultimately affected by ordinary business gain. Thus, the "main purpose" exception suggests that a large group of suretyship contracts, including, for example, the case where a surety backs a customer's account, might well be excluded from the operation of the statute.¹⁰⁴

¹⁰² *Resseter v. Waterman*, 151 Ill. 169, 37 N.E. 875 (1894).

¹⁰³ *Gibbs v. Blanchard*, 15 Mich. 292 (1867).

¹⁰⁴ Cf. *Witschard v. Brody & Sons*, 257 N.Y. 97, 177 N.E. 385 (1931).

In any event, it appears that the statute requires reconsideration and improvement. It is familiar that the writing required by the statute is not in the ordinary sense a form, for it may consist of notations of various sorts made after the communications which are depended on to create significant relations between the parties.¹⁰⁵ It would not be difficult to clarify some of the uncertainty about what is a memorandum sufficient to satisfy the statute. It is, for example, not perfectly obvious that a real admission made in the course of litigation should not satisfy the statute. It may be useful to recall, further, that the peculiar suretyship promises, highly conditional and thus a kind of "guaranty," made by commercial endorsements, are not within the statute. This observation suggests the utility of simplifying the requirements for a suitable memorandum. For example, a writing on a commercial instrument, as by words of "guaranty," which may be neither an endorsement nor a sufficiently full record to satisfy the statute, might well be made a sufficient "memorandum."

That a contract unenforceable because it lacks either seal or consideration is different from a contract made unenforceable by the statute, is indicated further by the rule that a contract of the latter sort is effective except for purposes of action between the "parties" to it.¹⁰⁶ The statutory requirement is thus not strictly a requirement of form; and its source and history are different from the source and history of those arbitrary symbols which are given the effect of form. The Statute of Frauds belongs for many purposes with the Statute of Limitations. It is designed to prevent the fabrication of claims and the misuse of judicial processes.

Nevertheless, the requirements of the statute do serve most of the practical purposes of form, in distinguishing casual statements of intention from promises, facilitating proof, and serving as something of a safeguard against hasty, improvident, and one-sided undertakings.

We thus return to the suggestion made at the end of the last section. In making promises more and more enforceable, regardless of older rules about form and consideration, legislatures and courts should doubtless consider the desirability of giving some protection to the properly benevolent surety. Any simple notation intelligibly indicating the existence or general terms of a promise, including notations with intelligible conventional commercial significance, might be treated as necessary and sufficient to make his promise enforceable, subject only to limits to be mentioned or discussed in the following sections.

¹⁰⁵ *Dunlap v. Hopkins*, 95 Fed. 231 (C.C.A. 7th 1899); *Schmoll Fils & Co. v. Wheeler*, 242 Mass. 464, 136 N.E. 164 (1922).

¹⁰⁶ *Chicago Dock Co. v. Kinzie*, 49 Ill. 289 (1868); *Amsinck v. American Ins. Co.*, 129 Mass. 185 (1880).

If some modern form is required for the simply benevolent promise in the sense described in the last section, a similar form may be required for the extraordinary case where a benevolent promisor is backed by a benevolent surety. But where a business promisor is backed by a benevolent surety, in the sense here described, the simplest intelligible notation of the surety's promise should be sufficient.

3. MISTAKE

In extending promises which are enforceable, by the modification or elimination of requirements of form, consideration and writing it will at once be observed that the assumptions of our system of free contract require the recognition and perhaps, at points, the extension of other limits on the enforcement of what have been defined as promises.

Thus, it has been observed that promises which would otherwise be enforced cannot be enforced if made under duress. Promise might, indeed, originally have been defined in such a way as to exclude words spoken under the influence of duress, fraud or mistake. It seems, however, that the original definition at once conforms to normal usage, and requires us systematically to consider the practical reasons for our rules limiting the enforceability of promises as originally defined.

A number of reasons will naturally occur to anyone for our rules about the simpler forms of duress, including reasons about the policy behind criminal and tort rules. It has already been suggested that the extension of promissory responsibility should be accompanied by a qualifying extension of recognition that reliance on groundless contract defenses may make a resulting contract unenforceable for the reasons summed up in the phrase "economic duress." The distinguishing feature of economic duress seems to be the use of pressure, "illegal" on independent grounds, to secure the kind of transaction which the assumptions of our economic system require us to recognize as unhealthy. The test can be readily determined from the test developed to deal with the related but subtler problems of mistake.¹⁰⁷

Similarly, fraud, deliberate, negligent, or faultless nondisclosure, and negligent or innocent misrepresentation, create a variety of situations in which promises are unenforceable. In this discussion, the principles applicable to these situations may, again, be indicated by an examination of the principles applicable to mistake. Nondisclosure in fiduciary relations, for example, gives various rights or remedies to persons who take only limited risks in dealing with their fiduciary associates, relying confidently

¹⁰⁷ For a study of the influence of general ideas and economic forces on the law in such matters, see Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 *Tulane L. Rev.* 345, 12 *ibid.* 42 (1937).

on full disclosure of all relevant circumstances.¹⁰⁸ Again, even the most innocent misrepresentation may limit the hearer's sense of the scope of the risks he takes in a transaction, and so increase the number of impressions on which he may confidently rely.¹⁰⁹

Some problems of mistake, as the word is popularly used, have already been discussed. Thus the existence of a promise for any purpose may be prevented by mutual misunderstanding, equally reasonable on the part of each party, of what is in the other's mind when he uses symbols which are thus misunderstood. A number of other kinds of mistake, rather unsystematically grouped together, similarly prevent the existence of a contract or transaction for any purpose. Mistake about the nature of a transaction, like "fraud in the factum," is generally said to prevent the existence of the transaction for any purpose, though troublesome questions about bona fide purchasers may be imagined. Again in England, where rescission for breach of warranty has been limited, errors as to subject matter have been held to prevent the existence of transactions of sale; and an occasional similar decision may be found in this country. Finally, errors as to the person with whom one is dealing may, in case the dealing is not face to face, so invalidate the transaction that even a bona fide purchaser from the supposed buyer in possession may be denied protection. In these cases we say that the transaction is not even effective "at law"; and there need be no resort for relief from the business consequences of words used, "to equity." More curiously, one-sided unreasonable misunderstanding, "unilateral misunderstanding," is thought not to affect the force of a transaction either at law or in equity, though the situation, both psychologically and commercially, is close to unilateral mistake about the legal effect of words.

On the other hand, in another group of cases, the simple results which a consistent application of objective theory would require, are complicated by the peculiar effect attributed to writing. Where there is mutual mistake of expression in an agreement recorded in writing, the parties have understood each other perfectly, and expressed to each other their correct understanding in other ways, apart from the writing. In opposition to perfectly adequate evidence of other sorts, the writing by itself indicates an interpretation of the transaction inconsistent with its proper objective interpretation. Because of the weight attached to writing, however, the

¹⁰⁸ Cf. *Bank of Monroe v. Anderson Bros. Mining Co.*, 65 Iowa 692, 22 N.W. 929 (1885); see *Arant, Suretyship* 77-81 (1931).

¹⁰⁹ *St. Louis-San Francisco R. Co. v. Cauthen*, 112 Okla. 256, 241 Pac. 188 (1925); *Bloomquist v. Farson*, 222 N.Y. 375, 118 N.E. 855 (1918).

transaction has been treated as correctly recorded in writing "at law," and relief for mutual mistake of expression has traditionally been given only "in equity." We have already seen how the consequences of this distinction, as they appear, for example, in rules about issues for judge or jury, may be expected to disappear.

The definition and treatment of the notion of a promise cover misunderstanding and mutual mistake of expression. It is possible that the kinds of misunderstanding and mistake which may or may not affect the existence of a transaction at law should be treated like those errors about the outside world, mistakes of law, and unilateral mistakes to which we are now turning. In these latter cases there is a promise, as promise has been defined, and its objective meaning is clear. There is a transaction at law, with practical consequences for example as to bona fide purchasers and answers to claims for rescission, while relief, if it is available at all, is given on "equitable" principles or in equity, subject to traditional equitable limitations.

Mutual errors as to the external world may deprive a transaction of its normal consequences or some of them. A serious error as to the nature or fact of a personal injury may invalidate the settlement of a claim for the injury.¹¹⁰ Errors as to the characteristics of animals¹¹¹ or jewels¹¹² have provided material for theoretical discussion and occasionally for litigation. Errors as to the area and boundaries of land have created some difficult questions for courts.¹¹³ Finally errors, unaccompanied by fraud, significant nondisclosure, or any misrepresentation, about the assets behind obligations, present similar problems in special but significant form.¹¹⁴

In cases where a promise or set of promises is made under the influence of error about the external world in the minds of both parties, there are strong reasons for giving full effect to the promises as made. The making

¹¹⁰ *St. Louis-San Francisco R. Co. v. Cauthen*, 112 Okla. 256, 241 Pac. 188 (1925) (alternative ground of decision); *Grand Trunk Western R. Co. v. Lahiff*, 218 Wis. 457, 261 N.W. 11 (1935) (useful test; questionable application); cf. *Bell v. Lever Bros.*, [1932] A.C. 161 (settlement upheld; classical but not very helpful tests; defensible result).

¹¹¹ *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887).

¹¹² *Wood v. Boynton*, 64 Wis. 265, 25 N.W. 42 (1885).

¹¹³ *McGinnis v. Boyd*, 279 Ill. 283, 116 N.E. 672 (1917); *New Jersey Power & Light Co. v. Buck*, 117 N.J. Eq. 10, 174 Atl. 570 (1934); *Paine v. Upton*, 87 N.Y. 327 (1882) (mistake as to area; reformation against grantor by deduction from price; anomalous, but well settled).

¹¹⁴ *Lindeberg v. Murray*, 117 Wash. 483, 201 Pac. 759 (1921) (reconstruction of corporation; large transaction); *Costello v. Sykes*, 143 Minn. 109, 172 N.W. 907 (1919) (ordinary sale; smaller transaction). As a precaution against too great readiness to approve relief, consider *Price v. Neal*, 3 Burr. 1355 (1762); *Fidelity & Casualty Co. v. Planenscheck*, 200 Wis. 304, 227 N.W. 387 (1930).

and breaking of promises, particularly contractual promises, has serious practical consequences which have already been observed. Any disposition to limit promissory responsibility must be considered and limited carefully, in order to avoid interference with the security of promissory expectations. Business men recognize and generally approve the risk taking functions of contract; they are more or less clearly aware of the uncertainty about both present and future which surrounds the making of most promises. But if the parties to a contract confidently count on the existence of a state of facts about which they turn out to be mistaken, and the mistake is prejudicial, the resulting transaction is seen not to conform to our notions of healthy bargaining and trade. Such a transaction is apt to be less serviceable than a reasonably well informed transaction; and it does not conform to the classical economic standards for a healthy system of free trade. The informed and equal dealers who are relied on for the intelligent allocation of community resources are absent from such a transaction.

Accordingly in cases of mutual mistake, where the mistake is about a "basic assumption," relief against the normal effects of the transaction is given in equity, subject to equitable limitations. The exception which brings out the significance of the rule is mistake of law, though it has been suggested that relief for mistake of law has been limited only so far as people generally are more or less aware of their uncertainty about law, and so take the risk of mistakes of law in entering into bargains.¹¹⁵ This generalization may be a clue to the future development of the law; and it is suggested by the disposition to make exceptions to the exception and allow relief for some mistakes of law, for example mistakes where parties have concentrated on specific rights¹¹⁶ in some jurisdictions, and mistakes about the legal effect of language¹¹⁷ generally.

There is considerable disposition, though some of the studies seem to overstate it, to limit relief for mistake to cases of mutual mistake, and deny relief in cases of so-called unilateral mistake. It has been suggested on the other hand that the strongest line of authority opposed to relief for unilateral mistake depends on the view that a builder warrants the accuracy of his figures in submitting bids to persons not engaged professionally in building.¹¹⁸

¹¹⁵ *Doll v. Earle*, 59 N.Y. 638 (1874). See Rest., Restitution c. 2, topic 3 (1937); *Mistake of Law: A Suggested Rationale*, 45 Harv. L. Rev. 336 (1931).

¹¹⁶ Cf. *Holt v. Markham*, [1923] 1 K.B. 504.

¹¹⁷ *Snell v. Ins. Co.*, 98 U.S. 85 (1878).

¹¹⁸ *Steinmeyer v. Schroepel*, 226 Ill. 9, 80 N.E. 564 (1907). Contra: *St. Nicholas Church v. Kropp*, 135 Minn. 115, 160 N.W. 500 (1916).

It is difficult to see why relief should be confined to cases of mutual mistake. There seems to be some impression that mutual assent is impaired by the kind of mutual error we have been discussing, whereas it is clearly not impaired by unilateral error or unilateral mistake of expression. A moment's reflection will indicate, however, that mutual assent is not in any way impaired by mutual error, in the traditional sense in which the words "mutual assent" have been used. There may be a promise, in the traditional sense in which we have used the word, even though both parties have made an error about a basic assumption; just as there may be a promise when one party has made a slip of the pen, a unilateral mistake of expression.

The extreme and simple case of unilateral mistake is indeed the case where one signs the wrong paper and sends it off to his correspondent by way of the acceptance of an offer already made; discovering the mistake at once, and notifying the correspondent before the communication has in any way affected his conduct.¹¹⁹ Here it appears persuasively that the same reasons which require relief in cases of mutual error may also require relief in any case of unilateral mistake.

The objective theory of contracts is not really threatened by such a suggestion, for relief from the consequences of the transaction will be allowed subject only to equitable limitations. Thus it is commonly said that change of position on the part of the person relying on the transaction will defeat relief for mistake. The mistaken person has perhaps merely by making a promise assumed some risk. He seems, however, in no worse a position than one who negligently misstates a fact. Apart from odd decisions about the measure of damages for deceit, a consistent treatment of liability would, it seems, require the mistaken party at most to make good the loss of the other party from the transaction as a whole, as a condition of relief against other consequences of the transaction. The mistaken party would thus of course make restitution and compensate the other party normally for expenses incurred in reliance on the promise as made; but the mistaken person would be relieved from liability for expectation damages.¹²⁰

Similarly in cases of mutual mistake, it may well be that change of position of the person relying on the transaction, should not be treated as a

¹¹⁹ *Miller v. Stanich*, 202 Wis. 539, 230 N.W. 47 (1930).

¹²⁰ *Page v. Higgins*, 150 Mass. 27, 22 N.E. 63 (1889); *R. E. Jones Ltd. v. Waring & Gillow Ltd.*, [1926] A.C. 670 (a case, it seems, of unilateral error; with a statement of a principal of relief like that here suggested; but a curious application). See *Some Aspects of the Law of Mistake in Illinois*, 5 *Univ. Chi. L. Rev.* 446 (1938). For material on duress, fraud, and mistake in Continental European law, see *Rheinstein*, *op. cit. supra* note 99, at c. 2, pt. II.

sufficient objection to relief from some of the consequences of the transaction. Restitution of benefits received on both sides will of course be required if the transaction is not given full effect. Each party would otherwise receive an unpaid-for windfall, not the result of a sufficiently informed bargain or gift, at the expense of the other. Moreover the party seeking relief for mutual mistake may in some cases properly be required to pay reliance damages to the other party, as a condition of relief, though where neither is in any way more at fault than the other, the equal treatment of equals would seem to require the equal sharing of simple reliance elements of damage.¹²¹

4. BASIC EXPECTATION AND IMPOSSIBILITY

A close relationship between mistake and impossibility has been commonly observed. Again, all the practical reasons for enforcing promises need to be remembered, and appropriate caution used in relieving parties to contracts from the normal consequences of their words, on the grounds of supervening impossibility. It is, of course, never impossible to render a judgment binding a party to a contract, or his estate, regardless of the events which followed formation of the contract. At the same time, like mistake about present facts about which the parties are confident, lack of foresight about future events as to which the parties are confident, results in a transaction whose practical consequences are apt not to be desirable, and which must be regarded as unfair when tested by the economist's ideal of an informed and equal bargain.

Accordingly, as in cases of mistake, caution in granting relief for impossibility appears along with rules or a principle recognizing relief in certain cases. Here, it may be expected that the influence of the relatively flexible rules governing mistake will gradually modify the rather rigid limits set upon relief for impossibility. The explanation for the difference may be that relief for mistake was worked out largely in equity or under the influence of equity, while the defense of impossibility has been developed by the law courts; or it may be that the difference is due to the more or less accidental influence of strong language in early cases, strictly limiting the effect of impossibility.

In any event, there has been a disposition to say that the defense is

¹²¹ Note 17 *supra*. At this point consider again the situations in which mistake is said to render a transaction wholly ineffective, that is "void," that is no transaction even "at law"; and the treatment of such situations. Consider also the situations of simple unreasonable "misunderstanding" on one side, where there is said to be in all cases "a contract," even "in equity." See 1 Williston, *Contracts* §§ 94-95A (rev. ed. 1936); 5 *ibid.* §§ 1538-9, 1558 (rev. ed. 1937); 1 Williston, *Sales* §§ 224, 225, 250 (2d ed. 1924); cf. Whittier, *The Restatement of Contracts and Mutual Assent*, 17 *Calif. L. Rev.* 441, 442 (1929).

limited to cases of death or illness of a party to a personal service contract, destruction of clearly specified "means" or "subject matter,"¹²² or supervening law.¹²³ There are, of course, indications of a sensible broadening of the rules; and the cases involving the risks of war indicate how sufficient pressure, at any time, is likely to liberalize the rules. Experience with extreme inflation abroad, at its worst, of course, in Germany, is another illustration of circumstances which may result in the modification of old views, like the development of the law of supervening difficulty or impossibility abroad, particularly again in Germany.

Where performance is frustrated by difficulty or impossibility which is recognized as an excuse, restitution for benefits already conferred on either side is, of course, in order.¹²⁴ The plain fairness of restitution in such cases is indeed strikingly illustrated by the cases, for example the *Coronation* cases,¹²⁵ which have caused unnecessary difficulty in the English courts.

An interesting difference between some forms of mistake and impossibility appears in connection with simple reliance damages, occasioned, for example, by expenses of preparation for performance. Generally, if not always, the principle that equals should be treated as equals will require the equal sharing of reliance damages by the parties to a transaction which has been frustrated by impossibility. There is confusion in the cases on this point; but the difficulty seems to result from all or nothing notions of responsibility, which may perhaps be explained historically by the influence of theology or puritan morality, or simply the drive for simplification, on all branches of the law except admiralty.

5. CONDITIONS; BASIC EXPECTATION AND DEFAULT; SURETIES' DEFENSES

The most interesting group of problems resulting from lack of foresight in transactions, was first treated under the head of conditions. As more complicated contracts, at various stages of performance, came before the courts, it became increasingly apparent that it is the absence of conditions¹²⁶ which creates the troublesome problems of adjustment when one

¹²² *Howell v. Coupland*, 1 Q.B.D. 258 (1876); *Butterfield v. Byron*, 153 Mass. 517, 27 N.E. 667 (1891); cf. *Anderson v. May*, 50 Minn. 280, 52 N.W. 530 (1892).

¹²³ *Baily v. DeCrespigny*, L.R. 4 Q.B. 180 (1869). For indications of what may be future developments in the treatment of impossibility, see 6 Williston, *Contracts* §§ 1938, 1951, 1963 (rev. ed. 1938). For material on impossibility and related matters in Continental European law, see *Rheinstein*, op. cit. supra note 99, at c. 3.

¹²⁴ *Butterfield v. Byron*, 153 Mass. 517, 27 N.E. 667 (1891).

¹²⁵ *Chandler v. Webster*, [1904] 1 K.B. 493. As to reliance damages, see notes 17, 56, 121, supra.

¹²⁶ Compare the problems of interpretation, and occasionally the policy against forfeiture or other policies, involved under "express" or actually "implied" conditions, with those raised

party to a bilateral contract has not performed, or is likely not to perform, part of his undertakings, and the other party relies on this circumstance, not simply for a cause of action but for an excuse for discontinuing performance on his part. Again, the extent of the risks which parties must be regarded as taking and the unfairness of contracts infected with serious lack of foresight, are the factors to be considered. On examination, the problem turns out to be closely related to the curious problems resulting from the increase of the surety's normal risks by the act of another party to the transaction.

Two extreme and simple treatments of the effect of one party's default on the other's obligations are thinkable. Each might simply have a cross action against the other.¹²⁷ It is possible that this solution would have been regarded as more normal, if the law on the subject had started its development when cross actions were a more familiar procedural device; and the solution is doubtless more likely to be fair, the more familiar and convenient are the facilities for cross actions.

At the opposite extreme, every default might be treated as an excuse for the other party, and the defaulting party protected against unfairness resulting from his part performance, by quasi-contractual relief to prevent unjust enrichment or forfeiture or both. The right of the defaulting party to restitution for benefits conferred, where his default excuses the other party from his contractual obligations, is generally if unevenly recognized by the courts.¹²⁸ The deliberate defaulter under a personal service or construction contract, is commonly denied relief on account of unjust enrichment,¹²⁹ though it may be suggested that most of the leading cases on the subject do not as a matter of accounting involve extreme forfeitures,

in the following discussion. *Nolan v. Whitney*, 88 N.Y. 648 (1882); *Hebert v. Dewey*, 191 Mass. 403, 77 N.E. 822 (1906); *Globe Mutual Life Ins. Ass'n v. Wagner*, 188 Ill. 133, 58 N.E. 970 (1900); *Norwich Union Indemnity Co. v. Kobacker & Sons Co.*, 31 F. (2d) 411 (C.C.A. 6th 1929).

¹²⁷ *Christie v. Borelly*, 29 L.J.C.P. (N.S.) 153 (1860); cf. *Maurice O'Meara Co. v. Nat'l Park Bank*, 239 N.Y. 386, 146 N.E. 636 (1925). On the relation between this subject and the evolution of cross actions, see 3 Williston, *Contracts* § 887 E, note 7 (rev. ed. 1936); 2 Williston, *Sales* §§ 605-6 (2d ed. 1924). Professor Page in conversation has made some stimulating observations on the subject. The familiar view that independence of obligations was the universal rule before the latter Eighteenth Century has received some qualification, and needs reconsideration. See Page, *Cases on Contracts*, 588-92 (1935).

¹²⁸ See the discussion in the cases in the next two notes.

¹²⁹ *Hansell v. Erickson*, 28 Ill. 257 (1862). An even stricter rule has been expressed as to construction contracts, in *New York, Nieman-Irving & Co. v. Lazenby*, 263 N.Y. 91, 188 N.E. 265 (1933). Contra: *Britton v. Turner*, 6 N.H. 481 (1934) (a persuasive opinion), cf. *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183, 10 Atl. 264 (1887).

and the rule may well be limited to cases where unjust enrichment seems to appear, but not forfeiture. The other striking limit on comparable relief is the disposition to deny to buyers of chattels in default the various types of protection given to mortgagors and land contract purchasers.¹³⁰ The necessity for these protections is not, however, always as clear as is apt to be supposed, for the buyer who has valuable rights can often dispose of them by sale or assignment. Again in extreme cases of actual forfeiture, relief may be expected to be recognized more and more as normal.

Neither of these simple solutions has, of course, been adopted by the courts. After struggling, somewhat as in cases of impossibility, to discover some indication of the parties' expectations about the variety of contingencies which may occur in the course of performance,¹³¹ the courts recognized that they were dealing with a problem which could not be solved by interpretation. As in cases of mistake and impossibility, some attempt was made to distinguish between "substantial" and other differences.¹³² The suggestion that such a word could be used to describe a systematic, metaphysical or scientific test, while comforting, is, of course, illusory. The word may be used to describe the results of a practical judgment; but the difficult necessity of making the practical judgment remains. The phrase "failure of consideration" has also been used,¹³³ to suggest a relation between the necessity for consideration and the effect of default. The two sets of rules have, however, little connection; and default may excuse a party to a sealed instrument, as it may excuse in European law, or as it may be appealed to for excuse by parties to international treaties.

One reminder of the impossibility of solving these questions by resort either to interpretation or to such clear-cut rules as are suggested by the effect of a specified order of performance, appears in the cases dealing with the effect of default on a party who was to perform first. If a party has let the time for the first performance pass, and is then not in a position to perform himself when he calls for performance on the other side, it appears that some principle not dependent on interpretation requires that the other party be excused.¹³⁴

¹³⁰ Cf. *Richards v. Shaw*, 67 Ill. 222 (1873) (an introduction to the seller's rights).

¹³¹ *Preston's Case*, Lofft 194 (1773); *Boone v. Eyre*, 1 H. Bl. 273, note a (1777). See note 127 *supra*.

¹³² *Bettini v. Gye*, 1 Q.B.D. 183 (1876) (Blackburn, J.).

¹³³ *Poussard v. Spiers and Pond*, 1 Q.B.D. 410 (1876) (Blackburn, J.).

¹³⁴ *Beecher v. Conradt*, 13 N.Y. 108 (1855); *Standard Oil Co. v. Koch*, 260 N.Y. 150, 183 N.E. 278 (1932).

This principle, on examination, seems closely related to the principles applicable to mistake and impossibility. A party to a contract which is at all elaborate, can hardly expect perfect performance on the other side, or even performance so nearly perfect that defects are covered by the maxim *de minimis*. He takes the risks of human failings; and if he were allowed an excuse for every default for which damages might be collected, it would tend to interfere with the security of promissory expectations. On the other hand security may be promoted and defaults discouraged by excusing for serious defaults. And lack of foresight about possible defaults may lead to a transaction which by the omission of conditions proves unfair, much as in the case of a promise which fails to guard against impossibility, or a promise affected by mistake. It may indeed be suggested that in all three situations one might expect in our society a disposition in case of doubt to enforce promises as communicated, and so, in cases of default, a disposition to leave the parties to settle their accounts by cross actions.

This disposition does not appear in clearly discernible form in the cases. It may even be doubted whether the limited classes of contracts described as containing "independent" promises, are clear-cut examples of a special rule. Doubt has been thrown on the standard history of independence and dependence and the old cases are too few and too inconclusive to indicate that an old rule about independence may have survived in case of "aleatory" contracts. It seems, rather, that these contracts commonly present a situation in which, according to ordinary tests, the remedy by way of cross actions is appropriate.¹³⁵

The best statement of these ordinary tests, and perhaps the best portion of the work, is Section 275 of the *Restatement of Contracts*. Here the results of considerations in favor of enforcing promises as communicated, and considerations in favor of relief for lack of foresight, are stated in a comprehensive general principle. If the party seeking an excuse has received practically all that he expected,¹³⁶ or can be fairly compensated in damages,¹³⁷ a default is not likely to excuse him. If a defaulting party has gone far in performance¹³⁸ or even in expensive preparation,¹³⁹ this too must have been more or less foreseen, and the default is less likely to be an

¹³⁵ Note 127 *supra*. The results of the independence of promises in leases indicate the objections to independence, in some situations, even where a contract is also a grant for some purposes.

¹³⁶ *Jacob & Youngs Co. v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921); *Kauffman v. Raeder*, 108 Fed. 171 (C.C.A. 8th 1901). With the cases cited in this and the following six notes, compare *Clarke Contracting Co. v. City of New York*, 229 N.Y. 413, 128 N.E. 241 (1920).

¹³⁷ Note 136 *supra*.

¹³⁸ Note 136 *supra*.

¹³⁹ *Harrild v. Spokane School District*, 112 Wash. 266, 192 Pac. 1 (1920).

excuse. Deliberate¹⁴⁰ or even seriously negligent default, which should and may be particularly discouraged, is not one of the risks assumed, and such a default is likely to excuse.

After a long history of attempts to state clear-cut rules on the subject, this general statement is a great help. Many such cases are adequately comprehended in its scope. A slight default at the outset, even as to time, in a mercantile contract, will excuse. On the other hand, such words as divisible or indivisible, applied particularly to contracts of sale,¹⁴¹ indicate situations where parties may be left to their cross actions or where, on the other hand, a default as to particular items may operate as an excuse.

The restatement adds, as a further criterion, a reference to the effect of a default in creating uncertainty about the future. If, in fact, a present default creates serious uncertainty about future performance, this too is a risk which the other party is likely not to have assumed; and this circumstance makes the default more likely to operate as an excuse.¹⁴²

In the absence of present default, anticipatory conduct may create such uncertainty as to excuse a party to a contract. We have already seen that anticipatory conduct may give a present cause of action. Anticipatory conduct which creates a present cause of action will now normally operate also as an excuse,¹⁴³ subject to the same limitations about correction before change of position that apply to causes of action.¹⁴⁴ Some anticipatory conduct which does not give a present cause of action, may, further, operate as an excuse. The vendor's or seller's lack of title, unknown to purchaser or buyer at the time of contract, unlike the deliberate sale of the subject matter of an executory contract, gives no present cause of action; but it is commonly an excuse.¹⁴⁵ So bankruptcy, in spite of language to the contrary, does not operate simply to give a cause of action as for breach of an executory contract; but it may, in the absence of a prompt election by the representative of the bankrupt estate, give the other party an excuse.

The relation between this treatment of default as an excuse and the treatment of suretyship defenses is apparent. It is rather extraordinary

¹⁴⁰ *Glazer v. Schwartz*, 276 Mass. 54, 176 N.E. 613 (1931). Had there been a large "forfeiture" here the result would be more questionable.

¹⁴¹ *Baker v. Higgins*, 21 N.Y. 397 (1860); *Frankel v. Foreman and Clark*, 33 F. (2d) 83 (C.C.A. 2d 1929).

¹⁴² Cf. *Helgar Co. v. Warner's Features*, 222 N.Y. 449, 119 N.E. 113 (1918).

¹⁴³ *James v. Burchell*, 82 N.Y. 108 (1880).

¹⁴⁴ *In re Vaughan's Estate*, 156 Misc. 577, 282 N.Y. Supp. 214 (1935), aff'd 248 App. Div. 730 (1936).

¹⁴⁵ See Rest., Contracts §§ 275 (f), 283-4, 316, 318-20 (1932). See Part I, Section 6, *supra*.

that in certain lines of cases, the surety's defenses have been limited as much as they have.¹⁴⁶ Difficulties about allowing the surety to take advantage of duress or fraud practiced on the principal seem largely illusory. When a supposed principal turns out to have no enforceable obligation, the surety and obligee have commonly made their arrangement under the influence of a mistake about a basic assumption; and it should take strong language to show that the surety has assumed this particular risk. So, in case of recoupment, setoff, or counterclaim, the surety's use of the principal's rights results in no more risk of double recovery against the obligee, than inhere generally in the danger of imperfect proof; and the use of these rights creates no peculiar danger of double vexation if the rules about *res judicata* properly applicable between assignee, assignor and obligor are applied by proper analogy between surety, principal, and obligee.¹⁴⁷ The surety's use of the claims of the bankrupt or insolvent principal, while it shows in a strong light the utter unfairness of rules about cross claims in bankruptcy, works out, given those rules, in most cases which can be imagined, in the interests of all parties affected by the transaction, except the obligee who is adequately protected anyway.

The effect of the obligee's default on the surety's obligations has not occasioned so much difficulty. The default may be an excuse; but commercial reasons may require that the parties be left to protect themselves by the recovery of damages. Thus, the importance of minimizing disputes, together with the availability of remedies by action in many cases, has been held to prevent a buyer's bankers from taking advantage of a seller's default with respect to the quality of the subject matter, as an excuse from liability under a letter of credit.¹⁴⁸

The surety's defenses which have occasioned most discussion depend on conduct of obligee and principal increasing the surety's risk beyond what is said to have been contemplated; or in one line of cases, failing to minimize his risk by retaining security for the principal's obligation. While in an extreme case, a change in the principal's undertaking or a contract to extend time, may conceivably result in a new transaction, to which the surety's promise does not apply, the troublesome cases appear not to be of this type. The surety's promise, may, as a matter of interpretation, be applicable to a slightly changed undertaking on the part of the principal, as we

¹⁴⁶ See *The Availability of a Principal's Defense to His Uncompensated Surety*, 46 *Yale L.J.* 833 (1937); Arant, *Suretyship* pt. 2, c. 1, and §§ 53-61 (1931).

¹⁴⁷ Cf. Levine, *The Principal's Warranty and Offset Claims against the Creditor as Defenses to the Surety*, 30 *Mich. L. Rev.* 197 (1931); Arant, *Suretyship* § 60 (1931).

¹⁴⁸ *Maurice O'Meara Co. v. Nat'l Park Bank*, 239 N.Y. 386, 146 N.E. 636 (1925).

see in the treatment of compensated sureties' promises where a slight change is made in the principal's contract or a contractual extension of time is made which the surety cannot show to be prejudicial. Short of the "new" transaction to which an ordinary surety's promise is not applicable, an increase in the surety's risk beyond what is regarded as normal, gives him a defense;¹⁴⁹ and the compensated surety is regarded as taking more risks than the simple surety. Apart from the peculiar variations of the case of *Pain v. Packard*,¹⁵⁰ the obligee need take no steps actively to protect the mere surety. But the extent to which the surety is protected reaches an extreme in some applications of the rule that surrender of security by the obligee releases the surety to the extent of the value of the security.¹⁵¹ It is somewhat doubtful, indeed, whether extreme applications of this rule can be explained on the basis of the surety's normal expectations at all. They suggest the possibility that the surety, like the mortgagor, is protected in many cases really by rules of policy designed to protect a party who is apt to be thoughtless and at a bargaining disadvantage in making his promise.

6. POLICY AND LEGISLATION

Criminal and civil responsibility apart from contract are governed by rules with which contract law must be consistent. Thus, contracts to commit crimes or torts, or to break contracts, are said to be against public policy.

The same principle may be put in another way by saying that our basic institutions, protected by law, cannot be interfered with by contract. So our concern with freedom of contract may yield to other principles; and a contract for a companionate marriage in Colorado may be held unenforceable.¹⁵² The caution which must be observed in judicial determination that a contract is against public policy, has recently been emphasized by the House of Lords in deciding that a contract of a man whose previous marriage had been conditionally dissolved by a preliminary divorce decree, to marry a second wife, is actionable.¹⁵³

¹⁴⁹ *Plunkett v. Davis Sewing Machine Co.*, 84 Md. 529, 36 Atl. 115 (1897); *Fond du Lac Harrow Co. v. Bowles*, 54 Wis. 425, 11 N.W. 795 (1882); *Kazunas v. Wright*, 286 Ill. App. 554, 4 N.E. (2d) 118 (1936). See *Suretyship Releases in the Law of Mortgages*, 4 Univ. Chi. L. Rev. 469 (1937); *Arant, Suretyship* §§ 49-52, 67, 68 (1931).

¹⁵⁰ 13 Johns. (N.Y.) 174 (1816). See *Arant, Suretyship* § 71 (1931); cf. *ibid.*, at §§ 69, 70.

¹⁵¹ *Dunn v. Parsons*, 40 Hun (N.Y.) 77 (1886). See *Arant, Suretyship* §§ 62-6, especially 62 (1931). The student should be reminded of the discussion of suretyship problems in 2 *Williston, Contracts* c. xvi (rev. ed. 1936); and 4 *ibid.*, at c. xxxviii and xxxix (rev. ed. 1936).

¹⁵² *In re Duncan's Estate*, 87 Colo. 149, 285 Pac. 757 (1930).

¹⁵³ *Fender v. St. John-Mildmay*, [1938] A.C. 1.

Moreover, the consequences of contracts which are in any sense opposed to public policy, vary greatly, and have not as yet been treated as systematically as they might be.

Thus, a contract to which there are some policy objections may, nevertheless, be fully enforceable. Examples are the contracts made by corporate agents in violation of "doing business statutes," in some situations, and contracts to indemnify against a possible libel action, as distinct from contracts to libel. Again, contractual provisions may be simply "void" in the sense that they are unenforceable without affecting other provisions with which they may be associated. A familiar example is the ancillary contract not to compete, which is broader than normal commercial purposes require. Again, provisions against public policy may be separable on other grounds from associated provisions, as in the case of an illegal combination's sales contracts. Again, the familiar rule that a party less at fault may recover from the party more at fault on a contract opposed to public policy, leaves considerable scope for judicial discrimination.

A determination that a contract is against public policy may have interesting consequences in limiting quasi-contractual relief. Again, such a determination may have no effect on quasi-contractual relief, as a gambler may recover money deposited with a stakeholder though not money paid to another gambler, at common law. It is sometimes said also that in cases where the policy is not strong, the contract is merely "void," and restitution may be had for benefits conferred in the course of part performance.¹⁵⁴ Again, a "locus poenitentiae" may be allowed at the outset of a contract whose full performance would be distinctly against public policy, and restitution given for part performance at the stage before the more objectionable items of performance have taken place.¹⁵⁵ Again, as in the case of normal contractual relief, quasi-contractual relief may be given to the party less at fault against the party more at fault.¹⁵⁶ Finally, in recognition of the injustice and occasional absurdity caused by the common law rules, restitution for part performance under contracts opposed to public policy, has very generally been provided by statute.¹⁵⁷

These are substantial qualifications of the rule as generally stated, that in case of contracts opposed to public policy, neither restitution nor any other form of relief will be given to either party for nonperformance of the contract. It seems, indeed, that the qualifications are quite as important as the general rule. While there must be consistency in dealing with different kinds of responsibility, one would expect to find in a system like

¹⁵⁴ See Page, Contracts § 1071 (1920).

¹⁵⁶ See Page, Contracts §§ 1090-9 (1920).

¹⁵⁵ See Page, Contracts §§ 1100-2 (1920).

¹⁵⁷ See Page, Contracts §§ 1072-89 (1920).

ours a strong disposition not only to limit the class of contracts opposed to public policy, but in cases where contracts are opposed to public policy, to limit as well the resulting disabilities. It should be carefully considered in each case whether the criminal or tort remedy is not quite sufficient, without imposing an additional loss by a modification of the ordinary rules of contractual or quasi-contractual relief.

The most interesting questions of public policy have been reserved for separate comment. Quite apart from crime or tort, some contracts have been thought so opposed to sound economic or governmental policy as to be unenforceable, and this without statutory authority, and as a result solely of judicial opinion and decision.

The most interesting cases of this sort are those in which elements of economic inequality appear to have led judges to find contracts unenforceable. There is no independent wrong, as commonly in cases of duress, and no mistake or lack of foresight. It is simply that some groups are recognized as being in so disadvantageous a position that bargains whose terms may result from their inferior position are thought likely to be unfair. We do not insist on a fair price in contract; but we do insist on a minimum of knowledge, foresight, and equality between bargaining parties. It is only informed and equal parties who can make healthy and useful bargains and the kind of bargains which characterize a healthy and useful economic system.

The groups whose protection is perhaps most familiar comprise minors¹⁵⁸ and others whose position is analogous to that of minors. We are all familiar with the striking protections thrown around the efforts of persons of this sort to make contracts.

More significant in some ways are the cases in which persons of full age and competence, engaged in ordinary economic activities, are protected against the consequences of their own economic weakness. Frequently provisions in employment contracts, or in contracts for the sale of a business, may expressly bind a party not to compete. Provisions of this sort are unenforceable unless they are so limited as to give only the kind of protection which is appropriate to make the transaction a success. Promises not to compete which cover an unnecessarily broad territory or long time are unenforceable; and it is sometimes supposed that this has something to do with our modern policy as to monopoly. This appears to be an error; and it is characteristic that reasonable promises not to compete were apparently becoming enforceable in the seventeenth century, just when the policy against monopolies was beginning to develop its sup-

¹⁵⁸ *Bliss, Williams & Co. v. Perryman*, 2 Ill. 484 (1838).

port. More important, unnecessarily expansive promises not to compete are unenforceable even though the parties are in a trade so competitive that no true monopoly is to be feared, and for the same reason in a situation not likely to be affected by American anti-trust acts. The original and still the important objection to such undertakings is that they are oppressive, apt to result from unequal bargaining, and that they give the winner in the bargaining process a gain for which he is likely to have no real use, at the expense of a serious burden imposed on the loser.¹⁵⁹

One-sided bargains of this sort, like one-sided requirement or output contracts, thus belong in some respects with contracts imposing forfeitures. From an early time, it has been held that provisions, sometimes verbally in the language of liquidated damages, which impose a loss on a defaulting party out of all proportion to the damages which his breach may cause, are unenforceable.¹⁶⁰ So, the mortgagor's agreement that the mortgagee may take the land as his own on the date when the debt is due, has been denied its full effect in various systems of law. This is partly on the theory that the purpose of the mortgage is to secure the debt, and partly to prevent forfeiture. The equity of redemption developed by the chancellors in the seventeenth century is carefully guarded even in cases of sale by mortgagor to mortgagee;¹⁶¹ and it has been supplemented by the largely statutory foreclosure by sale as well as by additional statutory redemption periods. It has already been observed that comparable protection to purchasers under land contracts has been developed, but that buyers of chattels have not been given comparable protection by the common law. It is also worth noting that protection to mortgagors may have gone further than is necessary in normal times and, in fact, reached a point where the inconvenience of foreclosure may somewhat hinder the free flow of mortgage funds, and thus somewhat prejudice the interests of borrowers and lenders alike. With other lenders, the federal government itself has taken something of a lead in efforts to simplify the machinery of foreclosure. Such a development is, of course, consistent with efforts to

¹⁵⁹ *Mitchel v. Reynolds*, 1 P. Wms. 181 (1711).

¹⁶⁰ *Kothe v. Taylor Trust*, 280 U.S. 224 (1930); cf. *Remington Arms Union Metallic Cartridge Co. v. Gaynor Mfg. Co.*, 98 Conn. 721, 120 Atl. 572 (1923). See notes 126, 129, 130, 140, *supra*. See Rest., Contracts, §§ 302, 357 (1932).

¹⁶¹ *Peugh v. Davis*, 96 U.S. 332 (1877); cf. *West v. Reed*, 55 Ill. 242 (1870). See Turner, *The Equity of Redemption* (1931). Comparable policies may be seen in the protection of sureties; and in the treatment of parties to transactions with insurance companies, both at common law and under statutes. See Patterson, *Essentials of Insurance Law* c. VII-IX (1935). Compare the problems resulting from the extensive use of various standard forms. See Prausnitz, *The Standardization of Commercial Contracts in English and Continental Law* (1937).

protect mortgagors, as by moratorium legislation, against temporary and severe difficulties.

The history of foreclosures thus suggests also the parallel history of usury laws. While one may think that limits on interest rates are not as futile as some have supposed, nevertheless, one must recognize that there are limits on the effectiveness of usury laws. Small loan legislation has thus been designed to check abuses of bargaining position, while recognizing that too drastic rules may drive abuses underground or decrease the funds which borrowers should be able to obtain.

The limits of effective regulation appear also in the gaming and insurance cases. The requirement of an insurable interest may discourage crime and in some classes of insurance determine losses to be paid; but it has also been supported on the ground that an agreement to take a chance on an event in which one has no interest apart from the agreement is gambling. Usury and gambling are classed together as serious defects in a contract, as one sees by noting their persistence as "real defenses" in the law of negotiable instruments. And one may think that the courts have been disposed to go too far in holding insurance contracts unenforceable for lack of an insurable interest.¹⁶²

Perhaps, however, the most striking example of the danger of judicial determinations of policy appears in the contracts which are said to obstruct the administration of justice. While maintenance and champerty were once abuses practiced by the great, changing circumstances have resulted in limits on earlier rules. Much more strikingly, contracts to arbitrate, after occasioning unnecessary difficulties both at law and in equity, have been increasingly recognized by businessmen and legislators as useful and workable devices to supplement the work of busy courts.¹⁶³ Where there is room for doubt, it is to be remembered that in our system the policy in favor of freedom and security of contract has won acceptance; and that large modifications of policy are for legislatures rather than courts.¹⁶⁴

In a system where uninformed and unequal bargains have been to such an extent condemned by the courts, and where usury and small loan legislation is familiar, it is curious to observe the history of labor legislation. Where legislators determined that an economic class, because of its weak

¹⁶² *Grigsby v. Russell*, 222 U.S. 149 (1911); *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 45 N.E. 1078 (1897) (recognizing arguable insurable interests).

¹⁶³ *Miles v. Schmidt*, 168 Mass. 339, 47 N.E. 115 (1897); *Hopkins v. Gilman*, 22 Wis. 454 (1868); *Ezell v. Rocky Mountain Bean and Elevator Co.*, 76 Colo. 409, 232 Pac. 680 (1925).

¹⁶⁴ *Steele v. Drummond*, 275 U.S. 199 (1927); *Berman v. Coakley*, 243 Mass. 348, 137 N.E. 667 (1923).

bargaining position, required legal protection, their views often clashed with the views of courts. Since legislation under our system must be consistent with constitutions, the courts have used general words about fairness in our constitutions, to embody their views this time about the fairness of legislation, in constitutional decisions. The history is familiar; and we are familiar also with recent changes in constitutional doctrine, and the recognition that legislative protection to bankrupts, farmers and wage earners may be as legitimate as traditional judicial safeguards for mortgagors.¹⁶⁵ We observe, too, that the elementary needs of large portions of our population may lead to striking changes in the whole scheme of free contract and private property, under the influence of economic instability and stress. We observe at the same time, a certain vitality in enterprise; and recognize that there is likely to be a place for free undertakings in any imaginable organization of the community.

¹⁶⁵ *Ogden v. Saunders*, 12 Wheat. (U.S.) 212 (1827); *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).