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CONTRACTS-PROPOSALS FOR LEGISLATION ABROGATING THE REQUIREMENT OF CONSIDERATION IN WHOLE OR IN PART

Charles B. Blackmar S.Ed.
University of Michigan Law School

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CONTRACTS—PROPOSALS FOR LEGISLATION ABROGATING THE REQUIREMENT OF CONSIDERATION IN WHOLE OR IN PART*—Consideration is the test evolved by our law for separating enforceable informal promises from those that are unenforceable. The doctrine of consideration has frequently been criticized,¹ but it is so firmly established that most of the recent proposals for change have been addressed to the legislatures. The purpose of this discussion is to consider proposed legislation both as to its possible operation and as to the future effect of the proposals on the basic doctrine of consideration.

1. *Proposals to do away with consideration in certain cases*

A critical observer could produce much authority for the proposition that consideration is not necessarily required in order that an informal promise may have legal consequences. Both Professor Williston and the *Restatement* set forth many situations in which promises

* This is the first in a series of related comments in the law of Contracts and Restitution, to be published from time to time throughout volume 46 of the REVIEW.

¹ For theoretical discussion see SELECTED READINGS ON THE LAW OF CONTRACTS 320-618 (1931); Whittier, "The Restatement of Contracts and Consideration," 18 CAL. L. REV. 611 (1930); Wright, "Ought the Doctrine of Consideration to be Abolished," 49 HARV. L. REV. 1225 (1936); Corbin, "Recent Developments in Contracts," 50 HARV. L. REV. 449 (1937); Sharp, "Promissory Liability," 7 UNIV. CHI. L. REV. 250 (1940); and the series of articles in 41 COL. L. REV. 777-876 (1941).

are enforced without consideration.² If a convincing case is presented it is quite probable that a court will not require consideration or will apply the test in a manner not supported by prior decisions. The New York Law Revision Commission³ and the English Law Revision Committee⁴ have presented certain fact situations in which the present law is highly uncertain, and have recommended that the requirement of consideration be abolished in these situations. As to what the situations are the two bodies substantially agree. New York has adopted a comprehensive legislative program pursuant to the recommendations of the commission,⁵ but the English parliament has not taken any action on the recommendations presented to it. The correlation of findings in the two investigations suggests that future legislative programs may develop along the lines there suggested, and a discussion of the proposals and of the practical effects thereof that can be observed should be of value.

a. *Irrevocable offers.* Both the English⁶ and the New York⁷ commissioners agreed that the needs of business require a simple method for making offers irrevocable. As the common law now stands an offer may be revoked prior to acceptance unless it is made for consideration or, in some jurisdictions, under seal.⁸ The New York statute on offers reads as follows:

"When hereafter an offer to enter into a contract is made in writing signed by the offeror, or by his agent, which states that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability. When such writing states that the offer is irrevocable but does not state any period or time of irrevocability, it

² I. WILLISTON, *CONTRACTS*, §§ 138-204 (1936); I *CONTRACTS RESTATEMENT*, §§ 85-94 (1932). See also New York Law Rev. Com., Leg. Doc. 65D, pp. 62-70 (1936); Shattuck, "Gratuitous Promises—A New Writ?" 35 *MICH. L. REV.* 908 (1937).

³ New York Law Rev. Comm., Leg. Doc. 65C, 65D (1936); *id.*, Leg. Doc. 65M (1941).

⁴ Great Britain, Law Rev. Comm., 6th Int. Rep. (1937).

⁵ N.Y. Debtor and Creditor Law (McKinney, 1945) § 243, N.Y. Personal Property Law (McKinney, 1945) § 33; N.Y. Real Property Law (McKinney, 1945) § 279. For comment on the program see Hays, "Formal Contracts and Consideration—A Legislative Program," 41 *COL. L. REV.* 849 (1941); Lloyd, "Consideration and the Seal in New York—An Unsatisfactory Legislative Program," 46 *COL. L. REV.* 1 (1946).

⁶ Great Britain Law Rev. Comm., 6th Int. Rep., ¶ 50 (6) (1937).

⁷ New York Law Rev. Comm., Leg. Doc. 65M, pp. 11-33, 529 (1941).

⁸ I WILLISTON, *CONTRACTS*, § 50 (1936); I *CONTRACTS RESTATEMENT*, §§ 35, 46, 47 (1932); 17 *C.J.S.*, *Contracts*, § 55.

shall be construed to state that the offer is irrevocable for a reasonable time."⁹

Under this statute a serious problem of construction is apparent. Is an offer irrevocable which reads, "I offer to sell you Blackacre for \$10,000. This offer is to remain open thirty days"? It is doubtful that this offer contains an assurance of irrevocability. Perhaps the courts will require a statement in so many words that an offer is irrevocable. The New York statute contains a manifest ambiguity which should be avoided by other jurisdictions contemplating similar legislation.

A different problem regarding offers is that of an offer for a unilateral contract which is revoked before full performance, but after the offeree has completed part of the performance required. The New York Commission recognized this problem but made no specific recommendation.¹⁰ The English committee followed the doctrine of the *Restatement* and recommended that a binding contract be deemed to have been made after the offeree has partially performed, the contract being conditional on completion of the performance.¹¹ This solution of the problem has been criticized because it leaves one party to a transaction free while the other is bound even though the transaction was at all times intended to be an exchange.¹²

b. *Past consideration.* The two reports also agree that promises should be enforceable if supported by past consideration.¹³ Generally such promises are not enforceable,¹⁴ but there are numerous exceptions.¹⁵ Two criticisms of the common law rule are that a promise given in return for past benefits is more likely to be relied on than is a purely gratuitous promise, and that often a promisor may have every intention of going through with a promise but may die before completing per-

⁹ N.Y. Personal Property Law (McKinney, 1945) § 33 (5); N.Y. Real Property Law (McKinney, 1945) § 279 (4).

¹⁰ New York Law Rev. Comm., Leg. Doc. 65D, pp. 58-59 (1936).

¹¹ Great Britain Law Rev. Comm., 6th Int. Rep., ¶ 50 (7) (1937); 1 *CONTRACTS RESTATEMENT*, § 45 (1932).

¹² Shattuck, "Gratuitous Promises—A New Writ?" 35 *MICH. L. REV.* 908 at 935-40 (1937).

¹³ Great Britain Law Rev. Comm., 6th Int. Rep., ¶ 50 (2) (1937); New York Law Rev. Comm., Lge. Doc. 65M, pp. 51-52 (1941). The most desirable effect foreseen by the English Committee was that of making enforceable a promise of guaranty of a pre-existing debt.

¹⁴ 1 *WILLISTON, CONTRACTS*, § 142 (1936); 17 *C.J.S., Contracts*, § 116.

¹⁵ 1 *WILLISTON, CONTRACTS*, §§ 142-150 (1936); 17 *C.J.S., Contracts*, §§ 117-125. Most of the situations listed in the references in note 2, *supra*, involve promises based on past consideration. In *Webb v. McGowan*, 27 Ala. App. 82, 168 S. 196 (1936), 232 Ala. 347, 168 S. 199 (1936), valuable benefit actually received would be enforced. See also 53 *L.R.A.* 353 (1901); 26 *L.R.A. (n.s.)* 520 (1910); 5 *CORN. L. Q.* 450 (1920); 21 *NOTRE DAME LAWYER* 341 (1946).

formance, leaving the promisee with no possible recourse against a personal representative. The New York statute reads:

“A promise hereafter made in writing and signed by the promisor or his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.”¹⁶

Under the statute a test of consideration must be applied as of a past time. Not everything which a promisor considered valuable can support a subsequent promise. For example, a promise to pay an annuity to one's parents in return for support furnished during minority would appear to be unenforceable under the statute,¹⁷ but an identical promise made to an aunt or to a stranger would probably be binding. It is pertinent to inquire whether there is any reason to retain a vestige of the doctrine of consideration when so great a change is made. If the promisor mentions something in the writing as consideration should that not be enough?

What is the effect of a promise given for a completed performance under a prior contract with the promisor, if the consideration for the original promise has already been received by the promisee? Suppose, for example, that after a surgeon has been fully paid such miraculous results follow from an operation that extra compensation is promised. The performance rendered could have been sufficient consideration at a time in the past. A similar fact situation was presented in one case and the court declared that a contract could not be modified after full performance so as to fall within another section of the New York statute but made no mention of the section on past consideration. The promise was held to be unenforceable.¹⁸

c. *Modification of a contract.* By the weight of authority a promise to perform an existing legal duty, or the actual performance of such a duty, cannot serve as consideration to support a promise.¹⁹ A promise to pay additional compensation for the completion of a contract is usually not enforceable, nor is a promise to extend the time for pay-

¹⁶ N.Y. Personal Property Law (McKinney, 1945) § 33 (3); N.Y. Real Property Law (McKinney, 1945) § 279 (2).

¹⁷ The parent is under a legal duty to support the child. See note 18, *infra*.

¹⁸ *Aldine Metal Products Co. v. Bogert and Carlough Co.*, 270 App. Div. 897, 61 N.Y.S. (2d) 71 (1946).

¹⁹ 1 WILLISTON, CONTRACTS, § 130 (contractual duty), §§ 131-132 (1936) (duties imposed by law); 1 CONTRACTS RESTATEMENT, § 76a (1932); 17 C.J.S., Contracts, §§ 110-113.

ment of a debt given in return for the debtor's agreement to pay. It is true that the rule is easy to circumvent either by a slight alteration of the duty to be performed or by the rescission of a prior agreement and substitution of a new contract imposing added burdens on only one party.²⁰ A related rule is that which has been called the Rule in *Pinnel's Case*²¹ or the Rule of *Foakes v. Beer*,²² to the effect that a liquidated debt cannot be discharged by the payment of less than is due.²³ This latter rule also can be avoided by a modification of the terms of payment,²⁴ and has been repudiated by decision or by statute in many jurisdictions.²⁵

The argument in favor of the rules mentioned above is that they serve to protect against extortion.²⁶ A contractor who is building a building for a man who needs it badly for business purposes might refuse to proceed unless promised more money. A debtor might present his creditor with the alternatives of taking part of the debt or of prosecuting a suit for the whole amount and probably failing to collect. The problem of extortion, however, is one of economic duress rather than of consideration. Duress remedies should be available even though the requirement of consideration has been satisfied by one of the expedients suggested above. The consideration rules do not provide an adequate protection, and the problem should be met by extension of relief for economic duress.²⁷

Each of the rules mentioned here has been criticized on a theoretic-

²⁰ 1 WILLISTON, CONTRACTS, §§121, 130A (1936); 29 GEO. L. J. 510 (1941); 41 MICH. L. REV. 327 (1942). Williston states that the rescission of the prior contract must precede the formation of the new one, but courts will not often scrutinize the time element too closely. See *Sasso v. K. and G. Realty Co.*, 98 Conn. 571, 120 A. 158 (1923); 33 YALE L. J. 78 (1923).

²¹ 5 Co. Rep. 117a, 77 Eng. Rep. 237 (1602).

²² L.R. 9 A.C. 605 (1884).

²³ 1 WILLISTON, CONTRACTS, § 120 (1936); 17 C.J.S., Contracts, §§ 112, 127; 1 CONTRACTS RESTATEMENT, § 76 a, c (1932).

²⁴ 1 WILLISTON, CONTRACTS, § 121 (1936) and cases cited.

²⁵ *Id.*, § 120, note 8 (decisions), note 9 (statutes). In *Central London Property Trust v. High Trees House, Ltd.*, [1947] 1 K.B. 130, the court held that such an agreement when acted upon was conclusive and discharged the debt. See Gold, "The Present Status of the Rule in *Pinnel's Case*," 30 Ky. L. J. 72 (1941), *id.* 187 (1942); 14 IND. L. J. 260 (1939); 16 WASH. L. REV. 42 (1941).

²⁶ See discussion in *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578, 15 S.W. 844 (1890).

²⁷ See *Jaeger v. Canter*, (N.Y. 1939) 13 N.Y.S. (2d) 414, and *Pozar v. Daum*, 259 App. Div. 455, 19 N.Y.S. (2d) 634 (1940), to the effect that duress is available as a defense to a modification agreement under the statute. The problem of duress was discussed by the Law Revision Commission, New York Law Rev. Comm., Leg. Doc. 65D pp. 199-205 (1936). For a discussion of extension of remedies for economic duress see Dawson, "Economic Duress—An Essay in Perspective," 45 MICH. L. REV. 253 (1947).

cal basis,²⁸ but the most telling criticism is that they operate to invalidate genuine bargains. A promisee might well prefer performance at a higher price to a judgment for damages. A creditor might recover more, if he accepts a part payment or grants additional time, than he could get by suing the debtor. The English committee recommended the abrogation of both rules.²⁹ The New York commission submitted a recommendation which was adopted by the legislature in the following language:

“An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration, provided that the agreement changing, modifying, or discharging such contract, obligation, lease, mortgage, or security interest shall be in writing and signed by the party against whom it is sought to enforce the charge, modification, or discharge, or by his agent.”³⁰

The statute puts an end to the Rule in *Pinnel's Case* if the subsequent agreement is reduced to writing.³¹ It does not operate as a complete abrogation of the rule relating to performance of existing legal duties. A modification of an existing contract which is burdensome to only one of the parties will be enforced without consideration, but the law is not changed as to performance of a duty imposed by law as consideration nor as to the enforceability of a promise by a stranger to a contract in return for one party's performance of the contract.

This section of the statute has been construed in several decisions. In *Mermelstein v. Realty Associates Securities Corp.*³² a letter signed by the party against whom a modification was sought to be enforced was not given effect because the court found no agreement between the parties. This decision appears unsound because acceptance is usually

²⁸ See discussion New York Law Rev. Comm., Leg. Doc. 65D pp. 163-206 (1936); opinion of Lord Blackburn in *Foakes v. Beer*, L.R. 9 A.C. 605 at 614 (1884); criticisms cited 1 WILLISTON, CONTRACTS, § 120, note 7, § 130A (1936).

²⁹ Great Britain Law Rev. Comm., 6th Int. Rep., ¶ 50 (3), (4) (1937). The committee made clear that it might be held to be against public policy to allow additional compensation for legal duties such as those of the police.

³⁰ N.Y. Personal Property Law (McKinney, 1945) § 33 (2), N.Y. Real Property Law (McKinney, 1945) § 279 (1). This identical section has been adopted in Michigan, Mich. Stat. Ann. (1937 and Supp.) § 26.978(1).

³¹ *Detroit Trust Co. v. Mason*, 309 Mich. 281, 15 N.W. (2d) 475 (1944).

³² 272 App. Div. 205, 69 N.Y.S. (2d) 763 (1947). No such requirement was mentioned in *Thompson v. Willson*, 183 Misc. 949, 51 N.Y.S. (2d) 665 (1944), and *New York City Housing Authority v. Philmo Garage Corp.*, 187 Misc. 413, 63 N.Y.S. (2d) 236 (1946).

not necessary to complete a gratuitous transaction.³³ In another case³⁴ a party was allowed to enforce a prior contract even though a subsequent contract had been entered into covering the same subject matter and imposing additional restrictions on him. The court declared that there was no indication of intention to abandon rights under the first contract. These two decisions indicate that the application of the statute may easily be restricted if the court is so inclined.

One problem is that of distinguishing between a modification and an independent gratuitous promise. A promise by a husband that he would not change the status of his wife as beneficiary of insurance policies, made after a separation agreement had been entered into, was held to be a modification.³⁵ On the other hand, a promise to reimburse one party for tools used in completing a contract, made after full performance, was held to be a purely gratuitous promise which was not covered by the statute.³⁶

In *Spector v. National Cellulose Corp.*³⁷ it was held that an enforceable modification can be made for the benefit of third parties. The case involved an agreement by a mortgagee with the mortgagor that he would subordinate his mortgage to certain junior liens.

d. *Assignments and releases.* The problem of gratuitous assignments and releases is essentially one of property law.³⁸ The question is not one of the enforcement of promises. The difficulty is that unless the strict requirements of property law are complied with, gratuitous assignments are revocable and gratuitous releases ineffective.³⁹ The formalities of the law of gifts sometimes are not suitable for the trans-

³³ Informal contracts which require no consideration require no showing of mutual assent. 1 WILLISTON, CONTRACTS, c. 7 (1936); 1 CONTRACTS RESTATEMENT, § 85 (1932). Sealed instruments and deeds require no acceptance. 1 WILLISTON, CONTRACTS, § 213 (1936); 1 CONTRACTS RESTATEMENT, § 105-6 (1932).

³⁴ *United States Navigation Co. v. Black Diamond Lines*, (C.C.A. 2d, 1942) 124 F. (2d) 508; reversing (D.C. N.Y. 1941) 37 F. Supp. 1005.

³⁵ *Salinas v. Salinas*, 187 Misc. 509; 62 N.Y.S. (2d) 385 (1946).

³⁶ *Aldine Metal Products Co. v. Bogert and Carlough Co.*, 270 App. Div. 897, 61 N.Y.S. (2d) 71 (1946).

³⁷ 181 Misc. 465, 48 N.Y.S. (2d) 234 (1943). If no acceptance is required a communication to a third party might well be held to satisfy the statute.

³⁸ BROWN, PERSONAL PROPERTY, § 58 (1936).

³⁹ Assignment, 2 WILLISTON, CONTRACTS, § 438 A (1936); 1 CONTRACTS RESTATEMENT, § 158 (1932). Releases, 6 WILLISTON, CONTRACTS, § 1820 (1938); 2 CONTRACTS RESTATEMENT, § 402 (1) (1932). Many states have passed statutes authorizing the discharge of contracts by a simple writing. See citations, 1 WILLISTON, CONTRACTS, § 120, note 9 (1936). A statute to the effect that an unsealed writing is to have the same effect as though it were sealed would apparently make written releases and assignments effective without consideration even though absence of consideration could be shown as a defense to a written contract. Such statutes are found Miss. Code Ann. (1942) § 261; Ind. Stat. Ann. (Burns, 1933) §2-1601 [492]; Wyo. Comp. Stat. (1945) § 66-215.

fer of contract claims. In order to provide a simple procedure the New York Legislature adopted the following statute:

"A written instrument, hereafter executed, which purports to be a total or partial release of all claims, debts, demands or obligations, or a total or partial release of any particular claim, debt, demand or obligation, or a release or discharge in whole or in part of a mortgage, lien or charge on personal or real property, shall not be invalid because of the absence of consideration of a seal."⁴⁰

"An assignment hereafter made shall not be denied the effect of irrevocably transferring the assignor's rights because of the absence of consideration, if such assignment is in writing and signed by the assignor, or by his agent."⁴¹

The section on releases calls for a writing but makes no mention of a signature. Certainly the instrument of release would have to come from the releasor. A "paid" stamp on an invoice would probably be a binding release. If the writing is retained by the releasor, as if an entry is made in books of account, the effect of the writing as a release is problematical.

The statute also provides a method by which an enforceable gratuitous promise may be made.⁴² If a transaction were made in the form of a bargain with one party subsequently executing a release of the consideration due him, the party in whose favor the release runs could set it up if sued, but could apparently demand that the other party perform his part of the transaction.

e. *Conclusion on specific proposals.* In most of the situations discussed above the courts proceeding under the common law have not applied the doctrine of consideration consistently, with the result that reasonable expectations are often defeated. Statutory modification is a sensible solution. The New York experience, however, shows that even a statute drafted after the most careful deliberation will leave uncertainties when an attempt is made to change basic doctrines of the law. But there is no certainty in the existing law, and if the statutes give a desirable impetus to the course of the law, then complete certainty should not be demanded.

Problems considered by the New York commission but on which no specific recommendations were made are those of charitable subscriptions⁴³ gratuitous business promises,⁴⁴ and promises inducing substantial

⁴⁰ N.Y. Debtor and Creditor Law (McKinney, 1945) § 243.

⁴¹ N.Y. Personal Property Law (McKinney, 1945) § 33(4), N.Y. Real Property Law (McKinney, 1945) § 279(3).

⁴² Suggested by Lloyd, "Consideration and the Seal—An Inadequate Legislative Program," 46 *COL. L. REV.* 1 at 26 (1946).

⁴³ New York Law Rev. Comm., Leg. Doc. 65M, p. 41 (1941).

⁴⁴ *Id.* at pp. 49-51.

reliance.⁴⁵ The English committee considered the last of these and approved the position taken by the *Restatement*.⁴⁶ The courts have gone far toward making promises to charities enforceable without consideration.⁴⁷ The other two situations probably should not be dealt with through legislation because the law has not yet developed sufficiently and the possible difficulties cannot be easily foreseen. The danger in passing a statute prematurely is that the terms of the statute may be held to be exclusive and that the growth of the law will thereby be stunted.⁴⁸

A serious question about the New York reforms is the requirement that promises enforceable without consideration be in writing. This requirement creates a new series of Statute of Frauds cases and borrows the unfortunate history of the construction of that statute. The parts of the New York statute dealing with assignments, releases, and past consideration involve gratuities for the most part, and the requirement of writing may be justifiable on the ground that it provides for greater deliberation and furnishes convincing evidence. On the other hand, the sections relating to offers and to modification of contracts will undoubtedly become important in commercial transactions. Does not the requirement of writing in such cases interfere with customary business procedures? Suppose *A* writes *B* making an offer irrevocable under the terms of the statute, and later receives assurance over the telephone that the offer is to be considered as withdrawn. *B* might still be able to accept the offer because his assent to its withdrawal was neither in writing nor for consideration. That the courts may be lenient in construing the requirement of writing is indicated by a decision holding that the actual performance of duties of which one party had been relieved by a modification operated to rescind the modification and reinstate the original agreement.⁴⁹ In contrast to New York the English Committee recommended that the Statute of Frauds be repealed al-

⁴⁵ New York Law Rev. Comm., Leg. Doc. 65 D, pp. 67-68 (1936).

⁴⁶ Great Britain Law Rev. Comm., 6th Int. Rep., ¶ 50 (8) (1937); 1 *CONTRACTS RESTATEMENT*, § 90 (1932).

⁴⁷ See opinion in *I and I Holding Company v. Gainsburg*, 276 N.Y. 427, 12 N.E. (2d) 532 (1938); 29 *GEO. L. J.* 245 (1940); Billig, "The Problem of Consideration in Charitable Subscriptions," 12 *CORN. L. Q.* 467 (1927), reprinted in *SELECTED READINGS ON THE LAW OF CONTRACT* 542 (1931).

⁴⁸ On reliance by the promisee as a basis for enforcement see Shattuck, "Gratuitous Promises—A New Writ?" 35 *MICH. L. REV.* 908 (1937); cases cited in *RESTATEMENT IN THE COURTS* 367-371 (1944).

⁴⁹ *Kane Realty Co. v. National Childrens' Stores*, 169 Misc. 699, 8 N.Y.S. (2d) 505 (1938). In contrast, the endorsement of a check containing a statement on the back that it was given in full payment of rent was held not sufficient to modify the rent reserved in the lease. *Pape v. Rudolph Brothers*, 257 App. Div. 1032, 13 N.Y.S. (2d) 781 (1939), affirmed without opinion, 282 N.Y. 692, 26 N.E. (2d) 817 (1940).

most in its entirety and specifically recommended that all of the promises made enforceable in New York if in writing be enforced without a writing.⁵⁰ Past experience with the Statute of Frauds raises serious doubts about the wisdom of extending it.

A final inquiry should be made as to what remains of the doctrine of consideration if such sweeping exceptions are established. Does the conclusion of the studies suggest that the whole doctrine is faulty? In the following section proposals for the abrogation of consideration in its entirety in certain forms of contract will be considered.

2. *Proposals for enforcement of promises in particular forms without consideration*

Should not the promisor's intent to be legally bound be sufficient of itself to make a promise enforceable? If so, the problem to be solved is that of providing a formality which will show an unmistakable intent to be bound. Nobody has yet suggested that every promise be made legally enforceable.

A promise under seal was enforceable without consideration at common law, but usually absence of consideration can now be set up as a defense to an action on a sealed instrument.⁵¹ The importance of the seal has declined because the seal is not adapted to customs of the present day, not because of a conviction that all legally enforceable promises should be for consideration. Without the seal, however, the fictitious bargain is the only method for making an enforceable gratuitous promise, and this method is not at all dependable.⁵² Consequently, several proposals have been made for new types of formal contracts.

a. *The Model Written Obligations Act.* Professor Williston drafted the Model Written Obligations Act, which was approved by the Commissioners on Uniform State Laws in 1925.⁵³ The express purpose was to provide a simple formality by which enforceable

⁵⁰ Great Britain Law Rev. Comm., 6th Int. Rep., ¶¶ 1-16, 50 (1) (1937).

⁵¹ WILLISTON, CONTRACTS, §§ 217-218 (1936).

⁵² Lloyd, "Consideration and the Seal—An Unsatisfactory Legislative Program," 46 COL. L. REV. 1 at 25 (1946); Mason, "Consideration—A Comparative View," 41 COL. L. REV. 825 at 836 (1941); 1 CONTRACTS RESTATEMENT, § 75, comment b (1932); 27 MICH. L. REV. 314 (1929); 24 COL. L. REV. 896 (1924); GRISMORE, CONTRACTS, § 60 (1947).

⁵³ HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 215 (1925). Because of the unenthusiastic reception of the act it was re-designated a Model Act in 1943. HANDBOOK 153 (1943). Favorable comments are found 76 UNIV. PA. L. REV. 580 (1928); 21 IOWA L. REV. 621 (1936); 3 UNIV. CHI. L. REV. 312 (1936). Unfavorable comments are found, Steele, "The Uniform Written Obligations Act—A Criticism," 21 ILL. L. REV. 185 (1926); 14 A.B.A.J. 348 (1928); New York Law Rev. Comm., Leg. Doc., 65M, pp. 36-39 (1941). Only Steele disputes the proposition that parties should be capable of making legally binding gratuitous promises if they so intend.

gratuitous promises could be made. The act has been adopted only by Utah and Pennsylvania,⁵⁴ and reads as follows:

"A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration if the writing also contains an additional express statement, in any form or language, that the signer intends to be legally bound."

What constitutes an express statement of intent to be legally bound cannot be determined with certainty. That the statement must be an additional statement indicates that a mere promise is not enough, but in one decision it was suggested that the repetition of a promise might satisfy the statute.⁵⁵ If a promissory note contains provisions for security⁵⁶ or for the confession of judgment⁵⁷ the test of the law is apparently met.

One decision shows that a promisor might include a statement of intent to be bound quite accidentally.⁵⁸ Defendant wrote to a firm of attorneys requesting information about the debts of his father, and included in the letter a statement which the court found to indicate an intent to be legally bound. Yet it is apparent that defendant followed the form of the statute quite accidentally, and his intent to be legally bound is doubtful since he did not even know the amount of the debts. A dilemma appears—either the defendant may be held to a gratuitous promise made by accident, or else there will be no certainty under the statute because the question of actual intent may always be litigated. The purpose of the act is to establish a form, but the form set up is one which might be complied with unintentionally. Because of this striking defect the reception of the act has been unenthusiastic.

b. *The English proposal.* The English Law Revision Committee proposed that all promises be enforced which are in writing, the requirement of consideration being limited to oral promises.⁵⁹

By the terms of this recommendation every promise which is expressed in writing would constitute a formal contract. The proposal is not solely for the purpose of providing a form which may be used deliberately by those who wish to make gratuitous obligations which are

⁵⁴ Utah Laws (1929) c. 62; Pa. Stat. Ann. (Purdon, 1936) 33,6. The act is to a certain extent superfluous in Pennsylvania because there the seal retains much of its original force. *Central-Penn National Bank v. Tinkler*, 351 Pa. 123, 40 A (2d) 389 (1945).

⁵⁵ *Gilmore v. Kessler*, (Northumberland Co., Pa. 1934) 22 D. & C. 274.

⁵⁶ *Ibid.*

⁵⁷ *United Plate Glass Co. v. Burg*, 22 Wash. Co. (Pa.) Rep. 155 (1941).

⁵⁸ *Galvanori & Nevy Bros. v. Acquadro*, (Lackawanna Co., Pa. 1942) 46 D. & C.

358.

⁵⁹ *Great Britain Law Rev. Comm.*, 6th Int. Rep., ¶ 50 (2) (1937).

legally binding. If the form is complied with then the promise is apparently enforceable whether intended to be so or not.

Several devices would be available to the courts if hardship resulted from a gratuitous promise. A statement might be found to be a declaration of intention rather than a promise. If circumstances change, a promisor might be excused on the ground that he would not have intended to be bound if he had foreseen what actually happened.⁶⁰ The courts will undoubtedly find a way to mitigate hardships if all written promises are made enforceable, but this can only be at the expense of certainty.

If the English proposals become law it is certain that promises will be enforceable which were not made with any intent to assume legal obligations. Is there any showing of advantage sufficient to offset this difficulty? A study of the committee's report leads one to believe that the proposal was the result of dissatisfaction with the illogical and inconsistent aspects of the law of consideration, and that no showing was made of a need indicated by experience to enforce all written promises. Without a showing of practical advantage the recommendation appears to be a dubious expedient.

c. *Other proposals.* The New York commission considered the need for a new formal contract but came to the conclusion that the preferable course was to correct only specific deficiencies and that no general form for the making of enforceable gratuitous promises was necessary.⁶¹ The sections of the New York statute on releases and modifications may permit the making of an enforceable gratuitous promise by a procedure akin to the feigned bargain.

Unless we are willing to go to the extent proposed by the English Committee, the search should be for a form of contract which will indicate clearly the intent to assume a legal obligation but which is not likely to be used without such intent. This purpose can best be achieved by requiring formalities such as are now in use for other formal instruments, such as acknowledgment or attestation.⁶²

3. *Conclusions*

The conclusions expressed in the two comprehensive studies discussed above indicate that future changes may be expected. The doctrine of consideration is the product of experience, and there is no

⁶⁰ See discussion by Hamson, "The Reform of Consideration" 54 L. Q. REV. 233 (1938).

⁶¹ New York Law Rev. Comm., Leg. Doc. 65M, p. 39 (1941). This solution is severely criticized by Lloyd, "Consideration and the Seal in New York—An Inadequate Legislative Program," 46 COL. L. REV. 1 (1946).

⁶² This was the conclusion reached by Decker, "The Case of the Sealed Instrument in Illinois," 1 ILL. L. BUL. 65 (1917); id. 138 at 171 (1918).

doubt that it will remain the primary standard of promissory enforceability. Specific injustices and uncertainties may be relieved by legislation, but problems which cannot be narrowly channeled must be subjected to further judicial development. Perhaps recent criticisms will cause the courts to realize the truth of the proposition that consideration is not the only criterion for the enforcement of informal promises, but the doctrine cannot be summarily abolished. The consequences of basic changes in the law are too unpredictable. Unless a need for legislation is shown by experience there is no assurance that legislative action will bring about gains sufficient to offset the difficulties and uncertainties which are sure to result.

Charles B. Blackmar, S.Ed.
