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SOME CURRENT ECONOMIC AND POLITICAL IMPACTS IN THE LAW OF CONTRACT¹

GEORGE JARVIS THOMPSON

The economic debacle of the past decade has made the man in the street skeptical of the practical value of contract; he has been impressed by his failure to get the promised advantage. To refer to the law of contract is to invite a barrage of witticisms: "Isn't that a disappearing subject? Nobody takes contracts seriously any more; a contract nowadays is good only as long as both parties like it. Even the government has broken its promise on the gold certificate, and look at what it has done to the gold clause bonds!"²

Naturally, this situation is disturbing to the thoughtful citizen, and he begins to wonder if we are not really facing a disintegration of the very fundamentals of contract—the morally binding force of one's promise. A young law teacher recently remarked with misgiving that his first-year law students reflected this attitude after nearly a year's study of contract. "I asked them," said he, "how they could contemplate living in a world where there was not even a moral sanction behind another's promise—no will to keep one's word to the point of sacrifice." Nor were these same students inclined to apply legal sanctions where in the turn of Fortune's wheel it struck them as hard for the promisor to make good his promise in damages, though the other party had completely and trustfully performed on his part.

Some may see reflected here three apparently unsettling influences: (1) the breakdown of international law and respect for the validity of treaties between nations so common in our day; (2) the effect of the economic depression of the past decade; and (3) the lack of discipline, especially self-discipline, regarded by not a few as one of the first fruits of the so-called "progressive" education with its accentuation upon the child's having what he wants when he wants it, unhampered by the old repressions of hard work and sacrifice to make good his promise.³ Of course, these students exhibit

¹The substance of this paper was embodied in an address by the author at the CORNELL LAW QUARTERLY annual banquet, Ithaca, New York, April 13, 1940.

²See discussion of the gold clause cases, 6 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1938) §§ 1813, 1938; and Guaranty Trust Co. v. Henwood, 307 U. S. 247, 59 Sup. Ct. 847 (1939), approved (1939) 8 GEO. WASH. L. REV. 232, extending the prohibition even to payment on a gold basis in alternative foreign currencies as provided in the bond. And see *infra* note 33.

³See Reeder, *What Is Wrong with American Education Today?* (1940) 51 SCHOOL & SOCIETY 65; Small, *In Defense of Progressivism: A Reply to Mr. Reeder* (1940) 51 SCHOOL & SOCIETY 733; Counts, *Dare Progressive Education Be Progressive?* in KILPATRICK, SOURCE BOOK IN THE PHILOSOPHY OF EDUCATION (Rev. ed. 1934) 343; COBB, ONE FOOT ON THE GROUND—A PLEA FOR COMMON SENSE IN EDUCATION (1932). And see Elias, *Liberalistic Education as the Cause of Fascism* (1940) 51 SCHOOL & SOCIETY 593; KILPATRICK, *op. cit. supra*, c. XVIII, *Education and Life*.

the emotional reaction of the inexperienced. Making one's living soon awakens an appreciation of both the individual and social interest in the timely and full performance of promises, now frequently termed the "credit interest." But even in the market place one finds articulate the demand for new determinatives of what promises should be legally enforceable and the nature and extent of the relief to be granted. To many, it seems that chaos lies ahead. Does the situation justify such apprehension?

Just as nature meets the destructive challenge of disease by building up within us the necessary antidote, so our Anglo-American law is already providing needed correctives to buttress our economic and social foundations. This takes the form of a broad jural paradox⁴—on the one hand, not merely does it forecast protection in general of the kinds of promises now enforced but it is extending the number and flexibility of enforceable promises, while, on the other hand, it turns to the opposite field of thrust law in order to diminish both the need for and the number of enforceable promises.

I

Let us consider the first phase of this corrective paradox. Recent years have witnessed renewed legislative attacks upon the creative function of the seal in the making of contracts.⁵ For example, New York in a series of amendments to Section 342 of the Civil Practice Act beginning in 1935 did away with the operative effect of the seal in raising a presumption of consideration which had been introduced by the Laws of 1828,⁶ and provided that no longer should the seal have any effect upon the requirement of consideration. Though this has been thought to have eliminated the sufficiency of the seal as a substitute for consideration in creating enforceable contracts in New York,⁷ and to that extent to have restricted the ease of contracting, other provisions of this section as amended, doing away with the necessity of a seal upon an agreement seeking to modify or vary a writing under seal,

⁴CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928) 62 *et seq.*

⁵See Comment, *The Present Status of the Sealed Obligation* (1939) 34 ILL. L. REV. 457; 1 WILLISTON, *CONTRACTS* (Rev. ed. Williston and Thompson 1936) §§ 218, 219; and Mr. Justice Goddard's special memorandum in the English Law Revision Committee's Sixth Interim Report, May 1937, p. 35, (1937) 15 CAN. B. REV. 618.

⁶2 Rev. Stat. (1830) 406, § 77, amended by L. 1876, c. 448, L. 1877, c. 416, and L. 1920, c. 925. See Whiteside, *Section 342 of the Civil Practice Act as Amended by Chapter 708 of the Laws of 1935*, REPORT, RECOMMENDATIONS AND STUDIES OF THE LAW REVISION COMMISSION (1936) 350; and additional amendments to this section, L. 1935, c. 353, L. 1936, c. 685, L. 1937, c. 80.

⁷The late cases of *Cochran v. Taylor*, 273 N. Y. 172, 7 N. E. (2d) 89 (1937), and *Transbel Investment Co. v. Venetos*, 279 N. Y. 207, 18 N. E. (2d) 129 (1938), recognizing the ancient magic of the common-law seal in creating an enforceable obligation without regard to consideration, have raised the question, may not this still be the law of New York in spite of the recent amendments of Civil Practice Act § 342? A study is now being made on this point by the New York State Law Revision Commission.

and extending the doctrine of undisclosed principal to sealed instruments, operated in just the opposite direction to increase the number and scope of enforceable contracts. Some recent writers have regretted the passing of the sealed contract and favor as a substitute the Uniform Written Obligations Act recommended by the Commissioners on Uniform State Laws in 1925. This Act provides that a written release or promise signed by the person releasing or promising shall be enforceable without regard to consideration if it also contains an additional express statement in any form of language that the signer intends to be legally bound.⁸ On the other hand, a new tendency to restrict the Statute of Limitations on sealed instruments to the same period as on simple written contracts,⁹ and elimination of specially burdensome consequences, such as the equal formality rule for modification or discharge, the special rules of evidence¹⁰ and the rule against application of the undisclosed principal doctrine, may well lead to statutory revival of the common-law function of the seal to create enforceable obligations without consideration.¹¹ In support of this suggestion it may be observed that the Uniform Act in its fifteen years of life has been adopted in but two states, neither of which needed it since both had and still retain the common-law seal.¹²

A more disturbing factor has been the recent hue and cry against the orthodox common-law requisite of consideration in the formation of contracts.

⁸Reeve, *The Uniform Written Obligations Act* (1928) 76 U. OF PA. L. REV. 580 [SELECTED READINGS ON THE LAW OF CONTRACTS (1931) 614]; Sharp, *Promissory Liability* (1939-40) 7 U. OF CHI. L. REV. 1, 250, 251; note, *Contracts without Consideration: The Seal and the Uniform Written Obligations Act* (1936) 3 U. OF CHI. L. REV. 312; 1 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1936) § 219A; 6 *id.* at § 1822.

⁹*E.g.*, ILL. ANN. STAT. (Smith-Hurd, 1934) c. 83, § 17, making the period ten years on all such written instruments; N. Y. CIV. PRAC. ACT § 47a (added by L. 1938, c. 499), limiting actions on bonds and/or mortgages secured by real property to six years, the same as on simple contracts, whether oral or written.

¹⁰*E.g.*, the rule prohibiting denial of a recital of consideration in a sealed instrument. It is not clear that this effect has been achieved by the amendments of 1935-37 to the N. Y. Civil Practice Act § 342, especially as to sealed options. See note (1939) 8 FORD. L. REV. 414.

¹¹It was these unusual and burdensome consequences attached to the seal as compared with ordinary written contractual obligations which led to the widespread revolt against the common-law seal. See Steele, *The Uniform Written Obligations Act—A Criticism* (1926) 21 ILL. L. REV. 185 [SELECTED READINGS ON THE LAW OF CONTRACTS (1931) 608]. The writer has been fortified in this suggestion by the fact that since it was penned, his colleague, Professor John W. MacDonald, Executive Secretary and Director of Research of the New York State Law Revision Commission, announced in addressing the Lawyers' Institute held at Cornell Law School, August 1940, that his research staff in making a study of the effect of the decision in *Transbel Investment Co. v. Venetos*, *supra* note 7, had come to a similar conclusion because of the simplicity and convenience of the seal. See 1 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1936) § 219; Sharp, *supra* note 8, at 251.

¹²PA. STAT. ANN. (Purdon, 1930) tit. 33, § 6 (P. L. 1927, 958); Burns' Contested Election, 315 Pa. 23, 171 Atl. 888 (1934); Utah Laws 1929, c. 62, omitted from Utah Stat. 1933, though apparently still law. And see note (1936) 3 U. OF CHI. L. REV. 312.

No less an authority than Lord Wright,¹³ President of the Judicial Committee of the Privy Council of the British Empire, influenced by his experience there in administering world-wide law, advocates the abandonment of our concept of a bargained-for consideration for the most advanced of Civilian views, the Roman-Dutch Law of South Africa, to wit, that every promise deliberately made and indicating an intention to enter into a lawful agreement be enforced. Indeed, it may be news to many that in 1937 a statute forthwith abolishing the doctrine of consideration passed the New York legislature. This drastic legislation was vetoed by Governor Lehman only upon urgent representations from bench, bar, and business organizations that the great commercial fabric of the Empire State was unprepared for so radical a change without opportunity for study and discussion.¹⁴ Needless to add, the New York State Law Revision Commission was no party to this premature move, for it functions to provide just such preliminary investigation. But suppose this extreme suggestion does become law. What will it mean? Simply an extension of legal enforcement to more promises, that is, making more contracts rather than less—it is to be hoped to the consequent strengthening of the credit interest.

Mention of the New York State Law Revision Commission reminds that it, too, by its recommended legislation has been whittling down the requirement of consideration.¹⁵ With what result? Again increasing the number and types of enforceable promises. These are limited chiefly to those promises modifying or discharging existing contracts. Substituted for consideration is

¹³Wright, *Ought the Doctrine of Consideration to Be Abolished from the Common Law?* (1936) 49 HARV. L. REV. 1225, 1234, 1252. Similar suggestions had already been made in America. See Ballentine, *Is the Doctrine of Consideration Senseless and Illogical?* (1913) 11 MICH. L. REV. 423 [SELECTED READINGS ON THE LAW OF CONTRACTS (1931) 588]; and Llewellyn, *Contract*, 4 ENCYC. SOC. SCI. (1931) 337.

¹⁴1937 Senate Introd., No. 2089, Print No. S. 2623, Senator Kleinfeld. Passed May 7; vetoed without memorandum May 26, 1937. The English Law Revision Committee, Sixth Interim Report, May 1937, p. 17, par. 27, (1937) 15 CAN. B. REV. 600, rejected the suggested summary abolition of the requirement of consideration for similar reasons, but proceeded to recommend a radical pruning of the doctrine. The various recommendations contained in this report of the English Law Revision Committee, though submitted to Parliament, have not yet been adopted.

¹⁵See N. Y. CIV. PRAC. ACT § 342, as amended 1935, 1936; N. Y. PERS. PROP. LAW § 33 (2), N. Y. REAL PROP. LAW § 279, as amended 1934, 1936, 1937; N. Y. DEBTOR AND CREDITOR LAW § 243, added 1936. This legislative program was based on studies prepared for the Commission by Professor H. E. Whiteside, *The Development of the Doctrine of Consideration*, REPORT, RECOMMENDATIONS AND STUDIES OF THE LAW REVISION COMMISSION (1936) 81 *et seq.*, and Professor A. Arthur Schiller, *The Counterpart of Consideration in Foreign Legal Systems*, *id.* at 183 *et seq.*, and related studies on Doctrines Relating to the Seal and a Promise to Perform or the Performance of a Pre-existing Duty as Consideration, made by research staff members of the Commission under the direction of Professor John W. MacDonald. Compare the English Law Revision Committee's Sixth Interim Report, May 1937, (1937) 15 CAN. B. REV. 585, recommending even more drastic inroads upon the doctrine of consideration.

the safeguard that the new promise be in writing¹⁶ and signed by the party against whom it is sought to be enforced. This development is in direct answer to the impact of the continuing business depression of the past decade and is to be applauded for giving legal flexibility to economic adjustments of contracts which both parties recognize as having become a harsh burden to the obligor through no fault of his own.¹⁷ Indeed, the moral and practical appeal of this situation had earlier led several courts, without the aid of statute, to qualify the orthodox common-law rule denying enforcement of such promises for want of consideration in certain cases and to give effect to the promise so far as it had been performed, particularly with respect to agreements for reduction of rent below that called for in a lease.¹⁸ Note,

¹⁶Llewellyn, *Contract*, 4 ENCYC. SOC. SCI. (1931) 337, suggests such writing as a practicable substitute for the consideration requisite in general. *Accord*, English Law Revision Committee's second recommendation [Sixth Interim Report, May 1937, p. 31, (1937) 15 CAN. B. REV. 615]: "That an agreement shall be enforceable if the promise or offer has been made in writing by the promisor or his agent, or if it be supported by valuable consideration past or present."

For other statutes giving effect to written receipt or agreement to accept part payment in full, see 1 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1936) § 120, note 9.

¹⁷This objective has been aided by the 1937 amendments, recommended by the New York State Law Revision Commission, adding to N. Y. Personal Property Law §§ 33-a and 33-b, and N. Y. Real Property Law §§ 280 and 281, which give effect to an executory accord provided it is in writing and signed by the party against whom it is sought to be enforced, and also make operative tender of the performance requested by a written and signed offer of accord though the tender is rejected by the offeror.

Similar revision has been recommended by the English Law Revision Committee [Sixth Interim Report, May 1937, p. 31, (1937) 15 CAN. B. REV. 615]:

"(3) That an agreement to accept a lesser sum in discharge of an enforceable obligation to pay a larger sum shall be deemed to have been made for valuable consideration, but if the new agreement is not performed then the original obligation shall revive.

"(4) That an agreement in which one party makes a promise in consideration of the other party doing or promising to do something which he is already bound to do by law, or by a contract made either with the other party or with a third party, shall be deemed to have been made for valuable consideration."

Cf. Heilman, *The Correlation between the Sciences of Law and Economics* (1932) 20 CALIF. L. REV. 379.

¹⁸*Schuessler v. Lundstrom*, 246 Fed. 439, 158 C. C. A. 503 (1917); *McKenzie v. Harrison*, 120 N. Y. 260, 24 N. E. 458 (1890). See Whiteside, *Study in Relation to the Seal and Consideration*, REPORT, RECOMMENDATIONS AND STUDIES OF THE LAW REVISION COMMISSION (1936) 259; 1 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1936) § 120, note 4. *Quaere*, would these courts enforce a tenant's promise, made in course of the term, to pay an increased rent thereafter though no new consideration was given him therefor? Denied in *Torrey v. Adams*, 254 Mass. 22, 149 N. E. 618 (1925), 43 A. L. R. 1447, 1451 (1926). An analogous qualification was also applied in some states to parol modification of a sealed contract, *e.g.*, *Cammack v. J. B. Slattery & Bro., Inc.*, 241 N. Y. 39, 148 N. E. 781 (1925), while recent years have witnessed judicial enforcement of *ultra vires* contracts of corporations to the extent performed if not repugnant to public policy. See 1 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1936) § 271. Some courts went farther and enforced the promised reduction even as to future rent due under the lease. *Lindeke Land Co. v. Kalman*, 190 Minn. 601, 252 N. W. 650, 93 A. L. R. 1393, 1404 (1934) (purporting to find consideration in the tenant continuing in possession of the leased premises in the absence of such a

however, that these modifying promises are still in harmony with the volitional background of our contract law, merely requiring that the creditor make good his voluntary promise in keeping with his moral duty. No Hamlet's choice is afforded the debtor—to keep or not to keep his original contract;¹⁹ only the creditor's promise of relief can aid him.

And what of the current insistence upon recognition of the "reliance interest" in the law of contract? Its advocates sometimes concede need of safeguards and tend to present their suggestions in the guise of simple steps—either speaking to the reliance interest in contract damages as a special measure of liability,²⁰ or, going further, presenting it as a principle of promissory liability though still usually carrying its special measure of damages.²¹ The Contracts Restatement of the American Law Institute is condemned for not recognizing the reliance interest either in contract damages or, more broadly, as equivalent to consideration.²² It should not be overlooked, however, that the Restatement does give much effect to the reliance *theory* in famous Section 90, restating promissory estoppel.²³ This section would make enforceable a promise where the promisor should have expected that the promisee would rely on the promise in a definite and substantial manner and he has so relied to his damage, but then only if there is no other way to do justice. The trouble with that, say these critics, is twofold: first, it operates chiefly outside the bilateral contract field in which lies our socially essential credit interest and, therefore, will enforce some non-essential promises; and, second, it applies in all cases the ordinary contractual measure of damages, that is, the value of the promised performance, frequently termed "the expectancy interest."²⁴

requirement in the lease), approved (1934) 32 MICH. L. REV. 1001, as peculiarly a depression problem. But the orthodox view was adhered to in *Levine v. Blumenthal*, 117 N. J. L. 23, 186 Atl. 457 (Sup. Ct. 1936), *aff'd* 117 N. J. L. 426, 189 Atl. 54 (1937), both as to past and as to future rent.

¹⁹Mr. Justice Holmes' view [*The Path of the Law* (1897) 10 HARV. L. REV. 457, 462] that there is such a legal choice as distinguished from the *de facto* power to break a contract has been repudiated in a recent English case, *Ahmed Angullia v. Estate & Trust Agencies, Ltd.*, [1938] A. C. 624, approved (1939) 55 L. Q. REV. 1. See to the same effect, Barbour, *The "Right" to Break a Contract* (1917) 16 MICH. L. REV. 106 [SELECTED READINGS ON THE LAW OF CONTRACTS (1931) 500]; Sharp, *supra* note 8, at 252; 1 STORY, EQUITY JURISPRUDENCE (1836) 25.

²⁰Fuller and Perdue, *The Reliance Interest in Contract Damages* (1936-37) 46 YALE L. J. 52, 373. Cf. Cohen, *The Basis of Contract* (1933) 46 HARV. L. REV. 553, 578-580.

²¹Sharp, *loc. cit. supra* note 8; Mason, *A Theory of Contract Sanctions* (1938) 38 COL. L. REV. 775, 777, 784, note 22; Shattuck, *Gratuitous Promises—A New Writ?* (1937) 35 MICH. L. REV. 908.

²²Fuller and Perdue, *supra* note 20, at 89; Shattuck, *supra* note 21, at 941, 944n.

²³1 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson, 1936) § 139.

²⁴Fuller and Perdue, *supra* note 20, at 64-65, 80, 88 *et seq.*; Shattuck, *supra* note 21, at 909, 941 *et seq.*; Gardner, *An Inquiry into the Principles of the Law of Contracts* (1932) 46 HARV. L. REV. 1, 23; and POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1925) 236.

This criticism is at least equally apt with respect to the eighth recommendation of

They want the "reliance interest" recognized as at least supplemental to the "bargain interest" of present-day consideration for the purpose of creating promissory liability. Then, particularly if the case falls outside the general "credit interest" field, damages are to be measured, subject to the court's discretion, not, as normally, by the value of the promised performance, but by the extent to which the promisee has been damaged in his reliance on the promise.

There is much to be said for this view as a supplemental basis²⁵ for expansion of the contract concept, since it has both historic support and intrinsic merit. It harks back to the very beginnings of the action of *case sur assumpsit* as an *ex delicto* remedy for deceit, practically coincident with the discovery of America, as Dean Ames has shown in his classic articles on the history of assumpsit.²⁶ This *ex delicto* writ of case lay, it will be remembered, only where there was damage, which here consisted of a detriment suffered by the promisee in justifiable reliance on the promise. The transition of assumpsit from a tort action to a contract action may be compared to the marriage of the little red-trousered Chinese bride of old, her identity becoming merged into the new family, which youthful Assumpsit experienced when the measure of damages for the broken promise changed from the value of what the promisee had parted with or the damage he had suffered in reliance on the promise²⁷ to the value of the promised or return performance, *i.e.*, the measure of recovery applied in the other *ex contractu* actions of covenant and debt. This became settled shortly after famous *Slade's Case*, 1602,²⁸ which introduced *indebitatus assumpsit*, based upon the

the English Law Revision Committee, Sixth Interim Report, May 1937, p. 31, (1937) 15 CAN. B. REV. 616: "That a promise which the promisor knows, or reasonably should know, will be relied on by the promisee shall be enforceable if the promisee has altered his position to his detriment in reliance on the promise."

²⁵That it should but serve to supplement other accepted bases for enforcement of promises, see Cohen, *supra*, note 20, at 578, 585; Sharp, *supra* note 8, at 19 *et seq.*; POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1925) 261, 275, 276.

²⁶Ames, *History of Assumpsit* (1888) 2 HARV. L. REV. 1, 53; AMES, LECTURES ON LEGAL HISTORY (1913) Lectures XIII, XIV. [SELECTED READINGS ON THE LAW OF CONTRACTS (1931) 33; 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1909) 259]; and see Gardner, *supra* note 19, at 22. Cf. Washington, *Damages in Contract at Common Law* (1931) 47 L. Q. REV. 345, 372.

²⁷That the measure of damages in the early *ex delicto* phase of assumpsit was not limited to the value of the consideration given for the promise but, as generally in the action on the case, included consequential damages, see Washington, *supra* note 26, at 372-376; Shattuck, *supra* note 21, at 908-912. Cf. Mason, *supra* note 21, at 777.

²⁸4 Coke, 92b (K. B. 1603).

Ames and Holdsworth agree that the transition was effected as a logical consequence of *Slade's Case* as expressly stated in *Pinchon's Case*, 9 Coke, 86b, 88b-89a (1612), recognizing that assumpsit lay against executors to enforce debts of their testator and that in spite of the *ex delicto* origin of that writ the maxim *actio personalis moritur cum persona* did not apply because ". . . an action sur Assumpsit upon good consideration, without specialty, to do a thing is no more personal, *i.e.* annexed to the person,

implied-in-fact promise arising from the creation of a debt situation, and it has remained the common-law measure of damages in contract to this day.²⁹ Though, of course, aware of this, the reliance advocates object to the realistic description, "the revival of the tort theory of recovery in contract." They would ignore the ancient procedural distinctions and argue now that the old forms of action have been abolished and a single, simple statement of the cause of action substituted, not only in most of our states but even in the homeland of our law, the question should be considered on the merits of its moral and practical desirability. In short, should these promises be enforced? Would it be advantageous to introduce this intermediate measure of relief—injurious reliance damages? If so, say they, let the innovation be accepted as a normal evolution of the law of contract into the broader concept of the law of obligations.³⁰

In spite of the plausible appeal of the reliance interest argument, we should not be stampeded by the idea that we must rush in to fill an aching void in our law of contract. Obviously, many promises now refused recognition as contracts are already indirectly enforced by the quasi-contractual doctrine of restitution to the same extent that they would be under the reliance interest theory.³¹ To appreciate that this is no mean portion of our law, one needs but look at the American Law Institute's Restatement of the Law of Restitution. Recognition of the reliance interest may point the way of progress, however, in meeting the present-day challenge. If adopted, it will broaden direct liability on promises.

Concurrently with this expansion of the contract concept has come an expanding of the remedy of specific performance for breach of contract, thus further enhancing the practical utility of contract by assuring the promisee that he will get the performance promised. This but repeats the experience of the older Civil Law of Europe: an extraordinary remedy becomes the

than a covenant by specialty to do the same thing." This was extended to simple contracts of a testator in *Sanders v. Esterby*, Cro. Jac. 417 (1616). See Ames, *supra* note 26, at 15 [SELECTED READINGS ON THE LAW OF CONTRACTS (1931) 45; and 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1909) at 276]; 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (2d ed. 1923) 451, 452. But a later writer has found several cases recognizing the value of the promise as the measure of damages in assumption in the last two decades of the sixteenth century and culminating in *Slade's Case*. Washington, *supra* note 26, at 373 *et seq.*

²⁹See Holmes, J., in *Chicago, M. & St. P. Ry. v. McCaull-Dinsmore Co.*, 253 U. S. 97, 100, 40 Sup. Ct. 504 (1920); Shattuck, *supra* note 21, at 908-912; McCORMICK, DAMAGES (1935) 561; POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1925) 236; 5 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1937) §§ 1338-1339A.

³⁰Cohen, *supra* note 20, at 578; Fuller and Perdue, *supra* note 20, at 405; Mason, *supra* note 21, at 776; Shattuck, *supra* note 21, at 941 *et seq.*; McCORMICK, DAMAGES (1935) 454. *And see* Washington, *supra* note 26, at 366. *Cf.* Gardner, *supra* note 24, at 22.

³¹See Fuller and Perdue, *supra* note 20, at 374; Sharp, *supra* note 8, at 17 *et seq.*

usual remedy. Of course, there is still far to go in this direction, but definite progress is being made toward that desirable goal.³²

II

Now to turn to the reverse of the corrective paradox—the diminution of the promissory element in contrast with its extension. A recent best-seller³³ magnifies the golden thread of credit—the honorable record of performance of business promises—to the point where it obscures the related economic and legal aspects of the social fabric. It is well to emphasize in the interest of social stabilization the enduring values of promises habitually honored, but these commentators completely overlook another and increasingly important source of legally enforceable obligation—the relational or thrust-law obligation.³⁴ Historically, this thrust type of obligation far antedates the evolution of the action of *assumpsit*, for it represents the characteristic pre-Columbian obligation of ancient England.³⁵ Product of the static society of that day, it applied to those who became parties to the routine domestic and business relations of the community life and is readily recognized by the dual title indicating the respective parties to the particular relation, as, for example, husband and wife, master and servant, principal and agent, and shipper and common carrier.³⁶ These relations may be created without benefit of promise,

³²Sharp, *supra* note 8, at 22 *et seq.*; Walsh, *The Growing Function of Equity in the Development of the Law* in 3 LAW—A CENTURY OF PROGRESS (1937) 139, 174; WALSH, EQUITY (1930) 300. An impetus has also been given this movement by legislation, *viz.*, Uniform Sales Act § 68 [see 5 WILLISTON, CONTRACTS (REV. ED. WILLISTON AND THOMPSON 1937) § 1419A]; and modern procedural codes, practice acts and rules of court (*e.g.*, Federal Rules of Practice, Rule 2) are gradually making equitable relief available under one general type of procedure whenever appropriate.

In some degree this seems to be a retracing of our legal history, for Professor Barbour, *The History of Contract in Early English Equity* in 4 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY (1914), points out that in the fifteenth century the chancellor exercised a wide discretion in enforcing agreements not under seal, that is, simple promises before they were recognized and enforced at law. See COOK, CASES ON EQUITY (2d ed. 1932) 509.

³³SCHERMAN, THE PROMISES MEN LIVE BY (1938). In spite of extravagant praise from the prominent persons featured on the dust jacket, including Bernard M. Baruch and William Allen White, the book tells at most but half the story. This book contains a scathing historical resumé of government promises.

³⁴POUND, THE SPIRIT OF THE COMMON LAW (1921) 20 *et seq.* MAINE, ANCIENT LAW (Pollock ed. 1906) 320, calls this "Imperative Law."

³⁵"The law of contract holds anything but a conspicuous place among the institutions of English law before the Norman conquest. In fact it is rudimentary. Many centuries must pass away before it wins that dominance which we at the present day concede to it. Even in the schemes of Hale and Blackstone it appears as a mere supplement to the law of property." 2 POLLOCK AND MATTLAND, HISTORY OF THE ENGLISH LAW (2d ed. 1899) 184. See *infra* note 40.

³⁶Cohen, *supra* note 20, at 554; Thompson, *The Relation of Common Carrier of Goods and Shipper, and Its Incidents of Liability* (1924) 38 HARV. L. REV. 28; POUND, THE SPIRIT OF THE COMMON LAW (1921) 20 *et seq.*; POUND, INTERPRETATIONS OF LEGAL HISTORY (1923) 57.

the law thrusting the reciprocal rights and duties upon the parties irrespective of their knowledge of or assent to the specific terms, for this is the non-volitional obligation of status.

A century ago the foregoing view emphasizing the paramount significance of the promise would have been correct, for that was the heyday of the volitional contract as the primary source of legal obligations. An ever-expanding frontier providing new lands and new opportunities in the New World economically unshackled the millions of Western Europe, and engendered in our own land the spirit of free enterprise and rugged individualism. The free-will philosophy of Kant and Rousseau dominated both the law and the dynamic society of that day.³⁷ Well-founded seemed to be Sir Henry Maine's famous epigram of the mid-century—that the movement of progressive societies had been from status to contract.³⁸ Implied contract carried a heavy load in the nineteenth-century attempt to compress most legal obligations into the contract mould.³⁹ The survival of the common-law relational obligations was obscured by the historical accident that the plaintiff suing for breach of a relational duty had the alternative of resorting to the *ex contractu* action of assumpsit or to an *ex delicto* action on the case, and, of course, in this period the *ex contractu* remedy had an overshadowing supremacy.

With the disappearance of our public lands about 1910, the Westward-Ho movement of three centuries abruptly ended; then began an almost geometrically accelerated return to the static society of the pre-Columbian period which gave a new emphasis and significance to the relational thrust-law obligation springing from that earlier day.⁴⁰ Even before the turn of the century

³⁷ROUSSEAU, SOCIAL CONTRACT (Tozer transl. 3d ed. 1905) c. VI. See Cohen, *supra* note 20, at 575; POUND, INTERPRETATIONS OF LEGAL HISTORY (1923) 54 *et seq.*; POUND, CONTEMPORARY JURISTIC THEORY—I. THE REVIVAL OF ABSOLUTISM (1940) 4.

³⁸MAINE, ANCIENT LAW (Pollock ed. 1906) 174. See POUND, THE SPIRIT OF THE COMMON LAW (1921) 34; POUND, INTERPRETATIONS OF LEGAL HISTORY (1923) 53.

³⁹PARSONS ON CONTRACTS (1st ed. 1853) 3 *et seq.*, quoting 2 BLACKSTONE, COMMENTARIES 443; POUND, *The Economic Interpretation and the Law of Torts* (1940) 53 HARV. L. REV. 365, 382. The ancient origin of the social contract theory and its practical value in rationalizing a legal responsibility of the sovereign toward his subject is discussed by Cohen, *supra* note 20, at 591. See also Laski, *The Social Contract*, 14 ENCYC. SOC. SCI. (1934) 127; Cohen, *A Critical Sketch of Legal Philosophy in America* in 2 LAW—A CENTURY OF PROGRESS (1937) 266, 275 *et seq.*; 3 BLACKSTONE, COMMENTARIES 160.

⁴⁰Cheadle, *Government Control of Business, II* (1920) 20 COL. L. REV. 550, 554; Pound, *The New Feudalism* (1930) 16 A. B. A. J. 553, 557. Cf. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1899) 233, which, relying on MAINE, ANCIENT LAW (6th ed.) 170, 305, [(Pollock ed. 1906) 173, 373] points out that though the law of contract was a comparatively late growth, the really feudal centuries were "the golden days of 'free,' if 'formal,' contract." A reading of the passages referred to in Maine discloses a rationalization of the relation of lord and man analogous to Rousseau's social compact theory of the relation of sovereign and subject, or state and citizen, which, by the way, Maine severely criticizes [ANCIENT LAW (Pollock ed. 1906) 323]. The freedom of contract mentioned was the freedom of a man to contract away not only his own

this change was foreshadowed by the movement for statutory or administrative standardization of the terms of certain types of contracts,⁴¹ such as insurance policies, public building contracts and surety bonds, employment contracts, *et cetera*. In the law of public utilities, too, appeared early manifestations of the coming era. The epidemic of comprehensive public utility statutes beginning about 1905, and creating public service commissions with state-wide powers to regulate the reciprocal rights and duties in the generic relation of public utility proprietor and patron, speeded the diminishing importance of the promise in this field. Even before the advent of the New Deal, federal bureaucracy was well on its all-absorbing way from the Interstate Commerce Commission of 1887 through the Federal Trade Commission, the Federal Power Commission, the Federal Radio Commission on down to the Home Owners Loan Corporation, to mention but a few. The New Deal, though coming to power on an anti-bureaucracy platform,⁴² quickly turned and capitalized upon this trend, as witness not only the abortive National Industrial Recovery Act but also the Federal Securities and Exchange Commission, the Federal Communications Commission, the Bituminous Coal Commission, the Civil Aeronautics Authority, and both federal and state regulation by big and little labor relations boards, wage standards boards, social security administrations and other alphabetical administrative bodies too numerous to mention.⁴³ Only the relational approach will adequately explain and support this general system of imposed obligations—"there," says the law to the employer, "swallow that and like it, any contracts you may have made or may make to the contrary notwithstanding." *Quaere*, will it come to speak as peremptorily to labor? Taxation, too, takes its fling at the hapless promise, for,

freedom but that of his descendants. This would be more accurately described as the power to enter into the relation of lord and man.

⁴¹Cohen, *supra* note 20, at 588; Isaacs, *The Standardizing of Contracts* (1917) 27 YALE L. J. 34; and particularly Professor K. N. Llewellyn's constructive critique of this development in his review [(1939) 52 HARV. L. REV. 700] of PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937).

⁴²Campaign address on the Federal Budget at Pittsburgh, Pa., Oct. 19, 1932, I PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT (1938) Item 144, pp. 808 *et seq.*, in support of the Democratic platform of 1932 calling for "an immediate and drastic reduction of governmental expenditures by abolishing useless commissions and offices, consolidating departments and bureaus, and eliminating extravagance, to accomplish a saving of not less than 25 per cent in the cost of Federal Government." See President Roosevelt's explanatory note to said address, *id.* at 811. Pursuant to power conferred by the Federal Reorganization Act of 1939 (53 STAT. 561, 5 U. S. C. A. §§ 133b *et seq.*), the Bituminous Coal Commission was abolished and its functions were transferred to the Department of the Interior, and the Civil Aeronautics Authority was transferred to the Department of Commerce.

⁴³LINDLEY, *HALF WAY WITH ROOSEVELT* (1936) 151 *et seq.*; HACKER, *A SHORT HISTORY OF THE NEW DEAL* (1935). And see in general, LYON AND ABRAMSON, *GOVERNMENT AND ECONOMIC LIFE*, 2 vols., Brookings Institute Publications No. 79 (1939) and No. 83 (1940).

as a recent discerning writer has pointed out, "Men now do things by virtue of their status as citizens and taxpayers which formerly they did by voluntary agreement. One only needs to mention the fields of charity and education to make this obvious."⁴⁴

Backgrounded against the vista of our common-law history, this administrative evolution appears in broad outlines as a logical resultant of the economic and social forces which dominate this first half of the twentieth century. The World War of 1914-18 brought on the world-wide economic depression which overwhelmed the United States a decade ago. Big men as well as little men everywhere turned to their governments for relief⁴⁵—that spelled government-imposed adjustments: thrust rights to one, thrust obligations upon another—a dangerous power easily translated into "might makes right" and the absolute regimentation of dictatorship. What more natural than that we should find paralleled in our law of contract those elemental forces of freedom and regulation which contend so mightily for supremacy in the political world around us!⁴⁶ Today the broad jural paradox described serves to harness these divergent forces so that they unite to undergird our delicately balanced social order. But what of tomorrow? The experience of the centuries bids us have faith in our common-law heritage.⁴⁷

⁴⁴Cohen, *supra* note 20, at 554; 1 LYON AND ABRAMSON, *GOVERNMENT AND ECONOMIC LIFE* (1939) 486 *et seq.*

⁴⁵Cohen, *supra* note 20, at 565; Dickinson, *Political Aspects of the New Deal* (1934) 28 *AM. POL. SCI. REV.* 197, 200.

⁴⁶POUND, *CONTEMPORARY JURISTIC THEORY—I. THE REVIVAL OF ABSOLUTISM* (1940).

⁴⁷Faith in the resiliency and enduring vitality of our common law to meet successfully today's world crisis is voiced in Aronson, *Mr. Justice Stone and the Spirit of the Common Law* (1940) 25 *CORNELL L. Q.* 489.