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THE PHILOSOPHY OF CONTRACTUAL OBLIGATION

ROBERT J. BUEY

THE HISTORY OF CONSIDERATION

The doctrine of consideration has stood for several centuries as a pillar in the law of contracts, an essential to their enforcement. Students of the law have, from the first instance of their contacts with the great body of jurisprudence, regarded consideration as one of the rudimentary principles upon which future knowledge of the refinements and technicalities of the law must be based. However, in recent years, chiefly because of the exceptions to and inconsistencies of the fundamental rule that every contract to be enforceable must be supported by a sufficient consideration, liberal students of the law have advocated the alteration or abolition of the rule. These advocates of change in the doctrine are not without sound historical authority as a basis for their demands. In the eighteenth century Lord Mansfield developed the theory of moral consideration as the basis for an enforceable contract; as a next step, he suggested that consideration should be only of evidentiary value as indicating a serious intention to become legally bound; and further, that in a business transaction *nudum pact

turn could not exist if the agreement were in writing. However, the conservatism of the English bar in the late eighteenth and early nineteenth centuries resulted in two decisions which stopped the liberalizing influence of Lord Mansfield.

The practical result of the activities of the present day liberals in the field of consideration and of the attempts of Lord Mansfield along the same line has been the position taken by the Wisconsin Supreme Court in two recent cases, wherein the court puts its stamp of approval on the moral obligation doctrine, quoting liberally from Lord Mansfield. The Wisconsin Supreme Court has taken a radical step in these two decisions, it has departed from precedent, and what the ramifications of these decisions will be is a matter of conjecture.

And so it is with the practical object in mind of being able to better understand the changes that are taking place in the doctrine of consideration in Wisconsin and to draw some conclusions therefrom that this paper is undertaken. This paper is divided into four major sections dealing with (1) the history of consideration; (2) the philosophical bases of contractual obligation; (3) the doctrine of moral consideration in Wisconsin; and (4) a comment upon the future of the doctrine.

The term consideration and the beginnings of the doctrine have caused considerable difficulty to the law student. The doctrine of consideration in the common law, even in the present day, is referable to no particular theory of liability. “It presents a composite picture including elements of reliance, bargain and equivalents, as well as a large admixture of formality, based upon differing and to some extent inconsistent theories.” And so in order to understand the modern trends of change in the rule of consideration, it is necessary to trace the development of the doctrine in the common law.

Prior to the fifteenth century there were only two forms of common law actions which recognized in any manner the enforceability of contractual obligations, and these did so only in a very limited degree;

3 Rann v. Hughes, 7 T.R. 350n(a), 101 Eng. Rep. 1014n(a) (1778) which overruled the theory that nullum pactum could not exist if the agreement were in writing; Eastwood v. Kenyon, 11 Ad. & E. 438, 450, 113 Eng. Rep. 482, 486 (1840) rejected the rule of moral consideration saying: “Indeed the doctrine (moral consideration) would annihilate the necessity for any consideration at all, insomuch as the mere fact of giving a promise creates a moral obligation to perform it.”
4 Park Falls State Bank v. Fordyce, 206 Wis. 628, 238 N.W. 516 (1932); Elbinger v. Capitol & Teutonia Co., 208 Wis. 163, 242 N.W. 568 (1932).
the two actions were debt and covenant. If the attorney could not fit his case under either of these two writs, the promise upon which his action rested was 'nudum pactum'. Because there were so many of these unenforceable contracts based on promises which were not under seal and which could not qualify as being the technical *quid pro quo*, some new term had to be devised "to express the act or other circumstances which had led up to or was the motive or reason for a given transaction. It is clear from the Year Books of the fifteenth and early sixteenth century that the word 'consideration' was used for this purpose." A new action evolved through which some of these parol promises became enforceable; it was known as assumpsit. The rules of consideration were developed from the procedural requirements of the action of assumpsit, and so it is readily seen that by following the development of assumpsit one is able to trace the early history of consideration.

6 (a) *Debt*. The action of debt could only be brought for a fixed sum in money or for a fixed quantity of chattels due to the plaintiff, either under a real contract, a statute, a record, judgment or specialty. Ames points out the theory behind the action: "The judgment for the plaintiff is that he recover his debt. In other words, as in the case of real actions, the defendant was conceived as having in his possession something belonging to the plaintiff which he might not rightfully keep, but ought to surrender. This doubtless explains why the duty of the debtor was always for the payment of a definite amount of money or a fixed quantity of chattels." Ames, *Parol Contracts Prior to Assumpsit* (1894) 8 Harv. L. Rev. 252, 260, Selected Readings on the Law of Contracts (1931) 23, 29. In view of this theory it is easily seen why the action of debt was never broadened to include the enforcement of executory promises. The *quid pro quo* was an essential to a successful action of debt, and that was always something which was executed or delivered. Some courts have treated the modern doctrine of consideration as being synonymous with the term *quid pro quo*. Justice v. Lang, 42 N.Y. 493, 1 Am. Rep. 576 (1870). This is an erroneous idea. 6 R.C.L. 649

(b.) *Covenant*. The writ first appeared in the twelfth century. 2 Pollock & Maitland, History of English Law (2d ed. 1899) 216. It was a formal contract action which would lie only upon a sealed instrument, although early in the history of covenant there were some cases where written covenants not under seal were enforced. State of New York, op. cit. supra note 5, at 95, 96. "It is curious and perhaps in a measure profitable to speculate for a moment on the course of future development in English contract law, if the parol covenant had been recognized. In that event our courts would certainly have adopted substantially the whole Roman law of obligation. The need for such a doctrine as that of consideration would not have been felt." 2 Street, The Foundations of Legal Liability (1905) 18. There does not seem to have been any reason why the action of covenant should not have been broadened to include suit upon a parol covenant, and it seems purely accidental that a seal was required; that is to say, practically all the early covenant actions dealt with land and that was probably the only reason why the seal was soon registered as being essential to all covenants in order to come within the scope of the writ. Pollock, Contracts in Early English Law (1893) 6 Harv. L. Rev. 389, 400, Selected Readings on the Law of Contracts (1931) 10, 19.

7 Holdsworth, History of English Law (1926), 4.

8 Holdsworth, The Modern History of the Doctrine of Consideration (1922) 2 B. U. L. Rev. 87. Holdsworth says that "though the chief and most permanent elements in the modern doctrine of consideration have sprung from the procedural requirements of the action of assumpsit, many difficulties have
As has previously been said, it is impossible to refer the doctrine of consideration to any set theory. However, to quote Ames, "At the present day it is doubtless just and expedient to resolve every consideration into a detriment to the promisee incurred at the request of the promisor." But, Ames goes on to say, such an easy definition was not possible in the sixteenth century because at that time consideration was divided into two classes: (1) detriment; (2) precedent debt. These two types of consideration were developed separately: consideration based upon detriment developed with special assumpsit; consideration based upon precedent debt developed with indebitatus assumpsit.

Ames in his article on the history of assumpsit has made the most thorough search in this field. Other noted authors have found the early history of assumpsit too complicated to deal with and have passed over it with but slight reference. Ames divides his discussion of special assumpsit into a discussion of four types of cases. "The earliest cases in which an assumpsit was laid in the declaration were cases against a ferryman who undertook to carry a plaintiff's horse over the river, but who overloaded the boat, whereby the horse was drowned; against surgeons who undertook to cure the plaintiff or his animals, but who administered contrary medicines or otherwise unskilfully treated their patient; against a smith for laming a horse while shoeing it; against a barber who undertook to shave the beard of the plaintiff with a clean and wholesome razor, but who performed his work negligently and unskilfully to the great injury of the plaintiff's face; against a carpenter who undertook to build well and faithfully, but who built unskilfully." These cases, as may be readily seen, are not in any sense actions on contract, but because of the peculiar conception of legal liability which then existed, the statement of an assumpsit was considered essential. It was believed that a tort to be actionable must be done by a stranger to the plaintiff and that the plaintiff must in no way participate therein; that if the plaintiff authorized another to come in contact with his person or property, that then,

arisen in the process of translating these procedural rules into the rules of the modern doctrine. These difficulties have arisen partly from the fact that the action of assumpsit was constantly expanding all through the period; but chiefly from the fact that other elements derived from other sources made their influences felt. * * * We must reckon with the influences derived from the action of debt, with the influence of the idea of consideration which was being developed by the Court of Chancery, and, later, with the influence of the Continental systems of law which came through the law merchant."

8 Holdsworth, op. cit. supra note 7, at 8, 9; Plucknett, A Concise History of the Common Law (1929) 412, 413.

10 Ames, History of Assumpsit, 3 Selected Essays 260.
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if any damage was done, there was no tort, because the plaintiff, by his authorization, assumed the risk. Therefore, a promise by the defendant to do the work skilfully in the above cases was believed to be necessary in order to shift the risk to the defendant. This peculiar notion of legal liability having passed from the law, the allegation of an *assumpsit* is no longer necessary in these tort actions, and hence there is little in common between these actions and actions of contract. The second class of cases are actions against bailees for negligence in the custody of things entrusted to them. These actions also sound in tort, and, in early times, it was also thought necessary to plead an *assumpsit*, a promise on the part of the bailee to care for the goods in a reasonable manner, before such bailee could be made to account for his negligence; "all agreed that without such an *assumpsit* the action would not lie." Today, the very fact of acceptance of the goods by the bailee raises an implied promise upon his part to treat the goods entrusted to him with care. Consideration played no important part in these cases because liability was imposed regardless of whether the bailee had or had not received a fee. The third class of actions in which an *assumpsit* had to be pleaded was the action of deceit against a vendor of a chattel upon a false warranty. This early deceit action sounded primarily in tort; today, of course, a vendor may be held upon a false warranty in contract, but such was not the character of the earlier actions as may be seen when it is noted that in them there was no reference to consideration; "if, by chance, alleged, it counted for nothing." The necessity of alleging an *assumpsit*, however, is seen in the leading case of *Chandelor v. Lopus* (1606-1607) wherein it was held that the declaration was bad because the defendant vendor merely "affirmed" instead of "warranted" a particular stone to be a bezoar stone, when in fact it was not.

The fourth class of cases discussed by Ames, actions on the case for deceit, is the most important to the modern history of consideration. The count in the first of these cases read something like this: "The defendant was to answer for that he, for a certain sum to be paid to him by the plaintiff, undertook to buy a manor of one J. B. for the plaintiff; but that he, by collusion between himself and one M. N., contrived cunningly to defraud the plaintiff, disclose the latter's evidence, and falsely and fraudulently became of counsel with M. N., and bought the manor of M. N., to the damage of the plaintiff." It was agreed that this action would lie. Here was finally a type of action in which the defendant's acts did not affect the plaintiff's person or his

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34 Ames, *supra* note 12 at 262-266.
35 Reported in Woodward, *Cases on Sales* (1933) 472.
36 Ames, *supra* note 12 at 266-269.
property, and yet recovery was given. The principle involved was, in due time, applied to the case where the plaintiff had paid a sum for lands which the defendant owned and the defendant had promised to convey, but the defendant conveyed to another thus deceiving the plaintiff. Still later, if the defendant, owning the lands, failed to convey, and the plaintiff had already paid the sum agreed, an action on the case for deceit arose for such nonfeasance.27

So, finally, the action amounted to this: if there was a promise, on the faith of which the plaintiff had parted with his money or property or gave his labor, and the defendant broke that promise, relief was given.28 It made no difference that the plaintiff's property or money or labor accrued to the benefit of some third party, the defendant was still liable. So, from this is seen, that from the sixteenth century on to the present day "a detriment has always been deemed a valid consideration for a promise, if incurred at the promisor's request."29 Prior to 1500, the court of equity had given relief to the plaintiff who had suffered a detriment because of the defendant promisor. Ames seems to think that this was a patent influence in bringing the common law judges to the point of allowing the action of assumpsit.21

By the end of the fifteenth century it had become clearly established that nonfeasance was actionable where the plaintiff had parted with his money, goods, or services in reliance upon the defendant's promise. The plaintiff, in these actions, had parted with his money relying upon the defendant's promise, or he had "suffered some charge," that is, he had given his goods or labor. Such conditions were easily reconcilable

77 Ames, supra note 12 at 269-276.
28 Plucknett, A CONCISE HISTORY OF THE COMMON LAW 408.
29 Ames, supra note 12 at 273-274.
21 There are, however, other theories of the origin of consideration. Justice Holmes seems to think that "the requirement of consideration in all parol contracts is simply a modified generalization of quid pro quo to raise a debt by parol." Holmes, Early English Equity, 2 SELECTED ESSAYS 705, 717. He makes one exception—that is, a surety may bind himself, even though he receives no quid pro quo. Ames makes slight comment upon this theory, but it seems patent that the very exception noted admits of the detriment idea as propounded by Ames.

Salmond expounds the theory that "consideration is a modification of the Roman principle of causa, adopted by equity, and transferred thence into the common law." Salmond, The History of Contract, 2 SELECTED ESSAYS 320, 336. Plucknett, however, points out that although there still is evidence of the effect of chancery's adoption of the Roman principle of causa in the common law cases that such "refuse to fit in the with any general theory of consideration." Plucknett, A CONCISE HISTORY OF THE COMMON LAW (1929) 414. Jenks, in refutation of Salmond's theory, says: "There was at one time a theory that valuable consideration owed its origin to the influence of Equity. Anything more unlike an equitable doctrine it would be impossible to conceive; although ** Equity did not refuse to adopt it in cases to which it had already been applied by the courts of Common Law. To have done otherwise would have been to open a feud between the two jurisdictions upon a fundamental principle of wide application." Jenks, A SHORT HISTORY OF ENGLISH LAW (1913) 298.
with the formula of *quid pro quo* used in the action of debt. "It is of course true that *quid pro quo* in the action of debt was regarded from the point of view of a benefit received by the promisor, while in assumpsit the *quid pro quo* is rather a 'charge,' that is to say, a detriment, to the promisee. *This distinction was too slight to overcome the convenience of having one formula which would fit both actions.*" (It. sup.)

It must be remembered that up to this time debts created by simple contract were not easily enforced. The action of debt was unsatisfactory for this purpose for many reasons, and so a new form of action had to be devised: this new action was later known as *indebitatus assumpsit*. The situation was something like this: suppose a man already owed a simple contract debt and he subsequently promises his creditor that he will pay it, which promise he breaks. In this situation is seen the elements which might make it possible to fit a creditor's action under either of two writs; that is, the debtor might be liable to an action of debt; but he has also made a promise which he has breached, a deceit upon the plaintiff creditor, which might give rise to an action of assumpsit. "Consequently, we find a new variety of assumpsit appearing in the middle of the sixteenth century called *indebitatus assumpsit* in which the plaintiff declares that the defendant being already indebted (*indebitatus*) undertook (*assumpsit*) to pay a particular sum." However, the defendant's express promise, if denied, had to be proved, and if it was not, the plaintiff lost his case. The Court of Queen's Bench during this period (from 1589 to *Slade's Case* in 1603) applied a more liberal rule: if the plaintiff proved the simple contract debt, a subsequent promise or assumpsit was implied. This implied assumpsit rule was not followed by other courts, however, until *Slade's Case* was decided.

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22 Plucknett, *A CONCISE HISTORY OF THE COMMON LAW* 408. This quotation demonstrates the looseness with which the phrase *quid pro quo* is used by writers.

23 The pleadings in debt had to be extremely accurate, giving every small detail, while in *indebitatus assumpsit*, as it later developed, all that was necessary was to allege the general nature of the indebtedness, and that the defendant being so indebted promised to pay. Here is found the origin of the common counts. Ames, *supra* note 12 at 284, 285. A further reason why debt was an unsuitable action for simple contract debt was the fact that it could only be brought in Common Pleas where the expensive fees of a serjeant would have to be secured. Plucknett, *op. cit. supra* note 22 at 410. The most important reason why the action of debt was not satisfactory for the enforcement of simple contract debts was that the defendant could fall back upon the wager of law. State of New York, *op. cit. supra* note 5 at 103. That is, the defendant and eleven of his neighbors could take an oath that the defendant did not owe the debt and that decided the case. 67 C. J. 284. This, however, could not be done in debt on a sealed obligation. Ames, *supra* at 284. Nor could the wager of law be used in assumpsit where the creditor had a right to trial by jury.

24 Plucknett, *op. cit. supra* note 22 at 409.
Slade's Case,\textsuperscript{25} decided in 1603, is commonly believed to be the origin of the action of \textit{indebitatus assumpsit}, but Ames points out that the case was merely an affirmation of the rule which had existed in the Court of Queen's Bench for over sixty years prior thereto.\textsuperscript{26} The jury found in \textit{Slade's Case} that there was no promise whatsoever, but that there was an indebtedness. The court held that "every contract executory imports in itself an assumpsit."\textsuperscript{27} The decision in \textit{Slade's Case} definitely set the rule that a precedent debt was a valid consideration to support an actionable contract. From this time on \textit{indebitatus assumpsit} was a concurrent action with debt; it was "based on a supposed implied promise to pay the debt, in form a kind of implied assumpsit, but in fact based on the express promise by which the debt was created, and supported by the same consideration; viz., the \textit{quid pro quo} or benefit to the promisor."\textsuperscript{28} Although concurrent with debt, the action was favored by the creditor because it gave him the right to trial by jury, and did not allow the defendant the wager of the law.\textsuperscript{29}

The implied assumpsit was brought into use after \textit{Slade's Case} to give a remedy in another class of previously unenforceable simple contract cases. These are the cases in which the plaintiff has supplied goods or rendered services to the defendant but where no agreement existed as to how much the defendant should pay. It is clearly seen that there was no other common law action that would have given the plaintiff relief.\textsuperscript{30} In 1609 the case of \textit{Warbrook v. Griffin}\textsuperscript{31} was decided; a promise to pay reasonable value was implied in fact, and the innkeeper therein was permitted to recover in assumpsit against his guest. Other cases followed, and soon the cases lined up in two distinct categories in which the courts permitted the plaintiff to recover in \textit{indebitatus assumpsit}: (1) recovery in that form of action upon proof of facts from which a promise could be implied in fact; (2) recovery in \textit{indebitatus assumpsit} upon the basis of duties imposed by law, where there was no express nor implied in fact contract.\textsuperscript{32} This latter exten-
sion of the action of *indebitatus assumpsit* into the field of quasi contract is beyond the scope of this paper. In the first category of cases, however, may be seen the source of the *quantum meruit*, *quantum valebat* actions of today.

Assumpsit, finally developed, was a flexible action sounding neither in contract nor in tort; it became an independent form of action, although at first it was merely "a special manifestation of the action on the case." The development of *indebitatus assumpsit* that took place because of the decision in *Slade's Case* definitely changed the emphasis in the action of assumpsit. "In the older cases the assumpsit merely served to prevent the defendant from saying that he acted solely at the plaintiff's invitation and therefore at the plaintiff's risk, where the case involved malfeasance; later when cases of nonfeasance became actionable, the assumpsit served to show that the defendant committed a wrong in undertaking to do a thing and failing to perform it; but when we come to *indebitatus assumpsit* the promissory character of the assumpsit is undeniable."3

Mutually concurrent executory promises are undeniably sufficient consideration to support a bilateral contract except in certain instances where public policy declares such promises or one of them void or unenforceable on extraneous grounds, as, for example, where the mutual promises contemplate the commission of a crime. Naturally, the lawyer wishes to apply the same detriment-benefit test to mutual promises as he does to unilateral agreements. The detriment or benefit is sought then in either (1) the making of the promise in fact, or (2) the legal obligation, the nature of the act promised. Ames chooses the former. Other authorities choose the latter. Whatever the theory, it seems definite that a promise to do or to forbear to do an act is just as sufficient a consideration for a promise as the act or forbearance itself would be. This rule, although the most important from the view of modern commercial transactions, has no definite historical origin, nor is it much disputed.35 Holdsworth shows that the earliest recognition of the rule came in 1555.36

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33 Ames, *supra* note 26 at 298.
35 State of New York, *op. cit. supra* note 5 at 109; Williston, *Contracts* (1936) §§ 103, 103A-103G; for general qualifications upon the mutual promise rule see 13 C. J. 327-341.
36 Holdsworth, *History of English Law* 444, 445: "The case of *Pecke v. Redman* [2 Dyer 113a, 73 Eng. Rep. 248 (1555)] was treated by Coke (in *Slade's Case*) as a case which decided that a wholly executory contract was enforceable by assumpsit; and, if the case is an authority for this proposition, it is the earliest case in which this principle was admitted. The remark in argument in the case of *Norwood v. Reed* [1 Plowden 182, 75 Eng. Rep. 278 (1558)] that 'every contract executory is an assumpsit in itself' shows that the lawyers were beginning to realize that mutual undertakings—the mutual assumpsits—of the two parties to an executory contract would give rise to
A review of the doctrine of moral obligation as a sufficient consideration to support a contract will be made elsewhere in this paper. At present it is sufficient to say that the doctrine of consideration involves three important elements: (1) a detriment to the promisee incurred because of the defendant promisor (origin—special assumpsit); (2) a benefit to the promisor (origin—indebitatus assumpsit); (3) mutual promises (origin—unknown). These are the elements of consideration. It is impossible to go further in an attempt to formulate a complete definition of consideration, for any definition, no matter how painstakingly it would be formulated, would be bound to admit of some exception. To quote from Rice v. Almy, an early Connecticut case: "Probably no rule of law has given rise to a greater multitude of cases and to a greater diversity of decisions than that which requires that a simple contract cannot be supported without a sufficient consideration. Many judges in giving opinions, and many authors of text-books, have endeavored to give a correct definition of such a consideration; but it is believed that it would be in vain to search in the most complete law library for one that would prove to be complete and logically accurate."

**The Philosophical Bases of Contractual Obligation**

It is an elemental concept that the importance of the promise of one man to another and the necessity of its enforcement grew as society itself evolved and became complex. In primitive time man sought his preservation by his own hands. His food, his clothing, his shelter, all these elemental things, were produced by his own deeds; he protected himself from the attacks of beast and man by virtue of his own strength and skill in combat; in a word, he lived in a state of anarchy, independent of the help of others. As the social system evolved, man was gradually separated from the personal necessity of seeking his material preservation; other men intervened to lighten his task, and soon all work was done on a cooperative or barter basis. This process has developed, sometimes rapidly, other times slowly, until today the vast field of commercial enterprise, as man knows it, the intricate, complex and involved social and economic system in which man lives

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mutual actions of assumpsit; and the principle was recognized in 1589 in *Strangborough and Warner's Case* [4 Leonard 7, 74 Eng. Rep. 685 (1589)].

'Note,' it was said, 'that a promise against a promisee will maintain an action upon the case, as in consideration that you do give me 10£ on such a day, I do promise to give you 10£ such a day after'.

37 Mutual promises as a consideration may be considered merely as a refinement of number (2) above. Ames defines consideration as any act or forbearance given in exchange for a promise. Then upon the premise that a promise is an act, it is possible to find consideration in every case of mutual promises. Ames, *Lectures on Legal History* 340.

38 32 Conn. 297, 303 (1864).
makes him utterly dependent upon the promises and undertakings of his fellowmen.

As society grew and man became dependent upon the promises and undertakings of others, he naturally sought security of such promises; he demanded that they be enforced, and such demand had to be heeded for upon the keeping of such promises and undertakings now depended his material preservation. At first, in order to prevent a breach of promise, the promisee resorted to self-help. But as law developed self-help was prohibited. And so some means of enforcing a promise had to be adopted by the law as a substitute for the primitive method of self-help. Such means took the form of a judgment or decree—a statement of a tribunal of organized society, made after due presentment and consideration of facts, that a promise should be enforced or that the breaker of such promise should make some sort of reparation to the promisee for his failure to perform, the reparation usually made by the payment of a sum of money. The judgment or decree was and is now carried out by the very force and impetus always inherent in organized society.

But the evolution from the period of self-help to that of the peaceful declaration and enforcement of promises did not occur without the development of concurrent problems. Chief among these was the problem which confronted every system of jurisprudence from the outset; namely, what promises should be enforced? To the reasonable mind conversant in some small way with the various systems of jurisprudence existing in organized society there seems to be three possible answers to this problem: (1) Enforce all promises regardless of character; (2) Enforce only those promises deliberately and fairly made by the promisor with the intention that he should be bound thereby; (3) Enforce only those promises supported by the illusive concept, consideration. It is submitted that no system of jurisprudence has yet considered the first answer practicable. Some of the continental systems adopted the second possibility, demanding as proof of such promises the same proof as the common law demands by the Statute of Frauds. The third answer was a development peculiar to the common law. Such answer created an arbitrary division of deliberate promises which were made by the promisor with the intention to be bound; that is, deliberate promises which were unenforceable because of lack of con-


40 As had previously been indicated, the common law came close to adopting the second answer in the eighteenth century when Lord Mansfield suggested that in *business transactions* the presence of consideration should only be of evidentiary value as showing deliberation and intention to be bound and that the promise should be enforceable if in writing whether it was supported by a consideration or not.
sideration and deliberate promises which were enforceable because of
the presence of consideration.41

So it is found that by viewing the law in its international aspect
two concepts of contractual enforcement have evolved which were and
still are at loggerheads with each other. One system gave wide and
efficient enforcement to promises; the other, narrower and less effec-
tive enforcement; and the student of the law "comes in both cases
upon a mixture of historical background and philosophical reasoning,
each influencing the other and neither governing the subject com-
pletely."42 Philosophical theories were formed to explain old rules,
to make new rules, and to revise both old and new rules of the law.
"Nowhere is the reciprocal action of legal rules and philosophical the-
ories more strikingly manifest than in our law of contractual liabil-
ity."43 Some of these theories of contractual obligation will now be
considered.

It was sometimes proposed that all promises were morally bind-
ing:44 This theory bound a man in law to perform his promises because
he was so bound by the natural law; that is, all promises because they
were morally binding should be legally binding.45 The influence of this
theory was very much felt in the law. Pound explains its potency in the
following way: in early times the law did nothing to enforce promises;
that there were only three grounds for legal action—insult, injury and
homicide; the neglect of the law was the gain of the church; promises
began to be enforced under the authority of religion. However, after
the church lost its influence in these matters, the theory dwindled in
importance in its play upon the common law rules of enforcement;
this theory in modified form is, however, the basis for the modern doc-
trine of moral consideration as will be shown later.

The will theory of contractual obligation takes on two forms. One
is the subjective theory, an outcropping of the Romanizing tendencies
of the metaphysical jurists of the nineteenth century. Pound explains
this theory as follows: "Later metaphysical jurists rely upon the idea

41 The writer acknowledges the aid of Dean Pound's invaluable book, An Intro-
duction to the Philosophy of Law (1925), in the preparation of the above
statement of the problem.
42 Pound, op. cit. supra note 41 at 241.
43 Pound, loc. cit. supra note 42.
44 The following paragraphs were prepared with the aid of the following
authorities: Pound, An Introduction to the Philosophy of Law (1925) 236-
284; State of New York, Legislative Document no. 65 (1936); Second Annual
Report of the Law Revision Commission, 167-172; Williston, Contracts
(1936) §§ 99-204.
45 This theory should be distinguished from the modern doctrine of moral obli-
gation; no modern court, with possibly but one exception, recognizes the rule
that a mere moral obligation is sufficient to support any express promise. The
theory is only important as being a possible basis for Mansfield's decisions in
the eighteenth century. This angle of the theory will be discussed elsewhere
in this paper.
of personality. The Romanist thinks of a legal transaction as a willing of some change in a person’s sphere of rights to which the law, carrying out his will, gives the intended effect. If the transaction is executed, revocation would involve aggression upon the substance of another. If it is executory, however, why should the declared intent that the change take place in the future be executed by the law despite the altered will of the promisor? Some say that this should be done where there is a joint will from which only joint action may recede. Where the parties have come to an agreement, where their wills have been at one, the law is to give effect to this joint will as a sort of vindication of personality.46 The other, and by far the most important “will theory” is the so-called “legal transactions” theory.

The latter theory is at the root of the whole controversy over consideration. In effect, the theory transcends and goes beyond the doctrine of consideration. It is closely allied to the theory that all promises are morally binding. It is the basis for the continental answer to the question, what promises should be enforced.47 To state the test which modern proponents of the theory propose: “Subject to certain qualifications relating to form, it should suffice for the formation of a contract that there exists: (1) capacity; (2) an intention to contract; (3) and a possible and lawful object.”48

46 Pound, op. cit. supra note 44 at 263-264. The author goes on to show that such a subjective theory may easily fail to explain a transaction such as the following: a case where an offer is made which a reasonable man would understand in a certain way and the offeree accepts it with that understanding, but where the offeror intended some other meaning. There is no “community of will” in such a case and yet the law, from the objective viewpoint, would hold that a contract existed.

47 The requirement of the existence of a sufficient causa to make a contract enforceable in the law of such countries as Argentina, Belgium, Bolivia, Chile, Columbia, France, Guatemala, Holland, Italy and Spain is in reality a nonexistent doctrine. Lorenzen, Causa and Consideration in the Law of Contracts (1919) 18 YALE L. J. 621. Countries which wholeheartedly adopt the modern will theory, omitting any consideration of the technical requirement of causa, are: Austria, Brazil, Germany, Japan, Mexico, and Switzerland. Ibid., 682, n. 10.

48 Lorenzen, op. cit. supra note 47 at 646. In all of the period of English legal history, Lord Mansfield came closer to putting this theory into practice than any other English jurist. State of New York, op. cit. supra note 5 at 169. The “will theory,” as distinguished from other theories herein outlined, lends no support to the doctrine of consideration as it now exists in the English law. On the contrary, Lorenzen believes that the doctrine of consideration cannot be justified on any theory. He says, in outlining his conclusions upon the subject: “The Anglo-American doctrine that an agreement, in order to be enforceable, must be clothed in a solemn form or be supported by a consideration, cannot, at least as regards the element of consideration, be justified on theory. Agreements which are physically possible and legally permissible should, on principle, be enforceable, although there is no valuable consideration, if it was the intention of the parties to assume legal relations. But the Anglo-American doctrine limits the test of validity to either of two forms of evidence only, out of a greater number of possible and rational forms of evidence of true intent to assume an obligation— with results which have been found to be unsatisfactory.” Lorenzen, loc. cit. supra. By causa is meant cause,
Lord Wright in his recent article believes the test of contractual intention should be the answer to the following question: “whether there was a deliberate and serious intention, free from illegality, immorality, mistake, fraud or duress, to make a binding contract.” A restatement of the same test is proposed by Pound in possibly a slightly variant form. His test of enforcement, although based upon the will theory, does not completely, so he claims, adopt it. He would “enforce those promises which a reasonable man in the position of the promisee would believe to have been made deliberately with intent to assume a binding relation.” To insure security against fraud he suggests the adoption of requirements of proof similar to those of the Statute of Frauds.

Holdsworth, while probably not adverse to any of the above proposals, makes one of his own which results in sort of a compromise between Lord Wright’s position and the position of the conservative jurists who defend the doctrine of consideration as it stands. Holdsworth proposes that a promise should be enforced if made by the party with the intention of affecting his legal relations: that admissible proof of such intention is a writing or that the promise is supported by a consideration. Holdsworth’s ideas are admittedly derivable from Lord Mansfield’s proposals in Pillans v. Mierop, namely, that the presence of consideration be of only evidentiary value. Holdsworth’s test allows the enforcement of a gratuitous promise if evidenced in writing; on the other end of the scale he permits the enforcement of an oral promise if supported by consideration in the technical sense of the word. To analyze the proposed test leads the student to the conclusion that the existence of serious intention of the promisor to bind himself is the mainstay of the proposal, writing or consideration being the only acceptable indicia of the presence of such intention.

reason, or motive in making a promise. It is submitted that the doctrine of causa, like the doctrine of consideration, is merely another form of evidence to ascertain intention to assume binding obligations; and that such doctrine as it is applied in some civil law countries (see note 47, supra) is subject to the same criticism that Lorenzen makes of consideration.

Lord Wright, Ought the Doctrine of Consideration be Abolished from the Common Law? (1936) 49 Harv. L. Rev. 1225, 1231.

Pound, op. cit. supra note 44 at 281-282. Pound’s theory includes in it some of the elements of the “reliance theory” discussed below. But the intention angle predominates.

Pound’s criticism of the present system is that security against fraud is guarded against only by the requirement of the presence of consideration “which is easy to establish by doubtful evidence as the pro-itself.”


8 Holdsworth, HISTORY OF ENGLISH LAW (1926) 47. Mansfield’s proposal was limited, however, to business transactions; Holdsworth goes beyond this. Wright, Ought the Doctrine of Consideration to be Abolished from the Common Law (1936) 49 Harv. L. Rev. 1225.
Perhaps it is an injustice to the learned modern authors who have made the proposals above discussed to classify them as being of the "will" variety. Possibly a new name should be devised for these proposals in order that they might be distinguished from the subjective will theory against which much criticism has been leveled. For the purposes of future distinctions in this paper the modern theories will be designated "serious-intention" theories.

It is not the writer's purpose at this time to attempt any evaluation of these proposals of modern jurists to broaden the bases of enforcement of promises; that will be done in the fourth section of this paper. The only object in setting them out at this time is to acquaint the reader with them so that he may keep them in mind when the doctrine of moral consideration is discussed in section three of this paper.

The bargain theory is probably the most popular common law theory. This theory of enforcement of promises amounts to this: if the promise does not find its origin in a bargain or exchange then it is unenforceable as being without consideration. The bargain theory is a test of consideration. Possibly this is best seen when Ballentine's definition of consideration is considered: "Consideration is primarily the test of bargain, and may be defined as the thing which the promisee gives or promises to give in exchange for the thing promised; not for

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64 One writer lists the objections to the will theory of contract as follows: "In the first place, it is the hand-maiden, if not the offspring, of that metaphysical philosophy of life which led men to deal in vacuous concepts rather than realities. In the second place, the 'will' theory was found to be unadaptable to the needs of modern commercial society; its logical application wrought havoc with reasonable understandings of business men. Again, the 'will' theory was individualistic to the core, and hence out of step with the movement for the socialization of law which has taken place in the last generation. Law is no longer looked upon as a means of securing the freedom of the individual will, but as an instrument of social control which must be adjusted with an eye to the social consequences. Finally, the adherents of the 'will' theory made many exceptions and distinctions in order to escape the rule of nullity." Patterson, Illusory Promises and Promisor's Options (1921) 6 Iowa L. Bull. 129, 133. This criticism is clearly not directed at the modern manifestations of the will theory as expounded by Pound, Lorenzen, Wright, et al. Patterson takes his example of the will theory from the French Civil Code. Lorenzen shows that that Code makes the presence of a sufficient causa the test of a valid contract. "Article 1131. An obligation without 'cause' or founded on a wrong 'cause' or an illicit 'cause' can have no effect." He later refutes the idea that any such test as sufficient causa exists and then lays down what he believes to be the true test. See, supra, pp. 17-18. Such true test as is proposed by Lorenzen corresponds to the test adopted by the Codes of Austria, Brazil, Germany, Japan, Mexico, and Switzerland; none of the theories proposed by any of the modern writers correspond to the test of causa demanded by the French Civil Code or any of the codes patterned therefrom. The distinction may be difficult to see, but it submitted that the causa test of enforcement is as much of a technicality in the civil law as the consideration test is in the common law. Neither test represents fully the modern theories of Pound, et al.

55 State of New York, op. cit. supra note 5 at 169.
the promise as it is usually expressed.\textsuperscript{56} From the historical viewpoint the bargain theory had its origin in the exchange of property which was the fiction upon which the action of debt was based.\textsuperscript{67} By a process of expansion the courts soon came to recognize contracts based on an exchange of promises, then the exchange of a promise for a forbearance, or goods, or services, or affirmative acts.\textsuperscript{68} But Pound claims that the bargain theory is now a restraint upon the courts and that they are seeking to get away from it.\textsuperscript{59} Courts are now enforcing subscription contracts, gratuitous promises where the promisee has relied thereon, promises based on moral obligations, promises to pay a debt after it has been barred by the statute of limitations, bankruptcy, etc.\textsuperscript{60} Clearly no bargain is present in these cases.

The greatest influence of the bargain theory on the law of contracts was to lessen the enforcement of contracts under seal. The specialty at common law was enforceable because it was under seal; the influence of this theory together with the fact that equity did not recognize the conclusiveness of the seal was to bring about such various limitations upon the effect of the seal as the rule that the seal is only presumptive of consideration.\textsuperscript{61}

The bargain theory is still the prevalent theory of the common law despite its many shortcomings. Some text writers have thought to get away from its rigid test by combining it with the theory of equivalents or by adopting an arbitrary classification of promises enforceable because supported by a consideration, the presence of which is tested by the bargain theory, and informal promises enforceable without the

\textsuperscript{56} Quoted in Ashley, \textit{The Doctrine of Consideration} (1913) 26 Harw. L. Rev. 429, 430. Another quoted section from Ballentine presents his idea further: "If we rationalize the doctrine of consideration, we shall find that the apparent arbitrary and technical rules of consideration furnish a touchstone or test of two substantive qualities in the transaction, viz.: (1) Is the engagement of the parties put on the basis of bargain, or is the real basis gratuitous? (2) If a bargain is found, does the subject matter given in exchange have sufficient possibility of value to be the foundation of a legitimate claim, or is it obviously insufficient?" \textit{Ibid.}, 431. Ashley, in the article, criticizes Ballentine's test. He says: "Consideration is not for the purpose of showing an intended business arrangement. In fact the transaction is sometimes meant to be gratuitous, and the requested consideration desired purely to meet the technicality." \textit{Ibid.}, 431-432. Ballentine replies: "Dean Ashley asserts that this (the bargain test) is not the reason for the rule, and seems to believe that consideration exists for its own sake. But nothing operates as a consideration which is not regarded or treated as an item of exchange by the parties." Ballentine, \textit{Is the Doctrine of Consideration Senseless and Illogical?} (1913), \textit{Selected Readings on the Law of Contracts} (1931) 588, 589. It is submitted that this last reply of Ballentine's admits of a subjective angle to the bargain theory which, by its most ardent proponents, is claimed to be an objective theory.

\textsuperscript{57} State of New York, \textit{op. cit. supra} note 5 at 170. See \textit{supra} note 6 (a).

\textsuperscript{58} State of New York, \textit{loc. cit. supra} note 57.

\textsuperscript{59} Pound, \textit{An Introduction to the Philosophy of Law} (1925) 272.

\textsuperscript{60} Pound, \textit{loc. cit. supra} note 59.

\textsuperscript{61} State of New York, \textit{op. cit. supra} note 5 at 170.
contractual obligation to support them. It is submitted that the admitted necessity of making such a classification confesses the inadequacy of the bargain theory and confesses further the necessity of formulating some new test to determine what promises should be enforceable.

Another theory is the theory of equivalents. This theory of contractual enforcement arose in the seventeenth century. "Under this theory an abstract promise unsupported by an equivalent is not enforceable. One should not rely upon such a promise. Voluntary promises without equivalents are mere ostentation and do not show deliberation and have no binding moral force. But when the promisee has parted with an equivalent in exchange for a promise, or is injured relying upon a promise, that promise should be morally and legally enforceable."

Proponents of the serious-intention theory find this theory of equivalents easily adjusted to their theory. The equivalents theory goes upon the premise that voluntary promises are merely made for "show," and that it is the presence of an equivalent which proves that the promises

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62 Restatement, Contracts (1932) § 19 states first the requirements of the law for formation of an informal contract: "(a) A promisor and a promisee each of whom has legal capacity to act as such in the proposed contract; (b) A manifestation of assent by the parties who form the contract to the terms thereof, and by promisor to the consideration for his promise, except as otherwise stated in sections 85-94; (c) A sufficient consideration except as otherwise stated in sections 85-94, and 535; (d) The transaction, though satisfying the foregoing requirements, must be one that is not void by statute or by special rules of the common law." (It. sup.) Section 75 defines consideration: "(1) Consideration for a promise is (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation, or (d) a return promise. (2) Consideration may be given to the promisor or to some other person. It may be given by the promisee or by some other person." Comment (b) on the above definition reads in part as follows: "The section defines consideration in effect as the price bargained for and paid for a promise, and in connection with section 19 states the principle that, subject to certain exceptions, an informal promise is not binding unless an agreed price has been paid for it. Consideration must actually be bargained for as the exchange for the promise." Then follows "Topic 4. Informal contracts without assent or consideration." Section 85: "When assent or consideration unnecessary. Neither a manifestation of assent, unless the promise is in terms conditional upon such a manifestation, nor consideration is requisite for the formation of an informal contract in the cases enumerated in sections 86-90." (It. sup.) Then follows the enumeration of the contracts which are enforceable without consideration. To quote merely the headings: "Section 86. Promise to Pay a Debt Barred by the Statute of Limitations. *** Section 87. Promise to Pay a Debt Discharged in Bankruptcy. *** Section 88. Promise to Perform a Duty in Spite of Non-Performance of a Condition. *** Section 89. Promise to Perform a Voidable Duty. *** Section 90. Promise Reasonably Inducing Definite and Substantial Action." This last recognizes in some manner the reliance theory which will be discussed later. Williston likewise adopts the bargain theory, but makes this qualification: "Where informal promises are binding without such a price they will be classified as promises which are binding without consideration." Williston, Contracts (1936) § 100 (2). For further comment upon this arbitrary classification see: Whittier, Restatement of Contracts and Consideration (1930) 18 Calif. L. Rev. 611.

63 State of New York, op. cit. supra note 5 at 171.
were made with deliberation and with intention to be bound. If that is the premise, then why argue "equivalents" when the presence of serious intention in making the promise is more in point?  

The theory of equivalents is another theory which is only able to partially explain the practical results reached in the courts under the consideration test. The theory explains the enforcement of real contracts of debt; that is, an equivalent is present in the technical *quid pro quo* which supports the enforcement of the debtor's duty to pay. It explains the enforcement of contracts containing mutual promises; the theory of exchange of promises is not inconsistent with the presence of an equivalent. It explains the enforcement of a specialty on the theory that the presence of a seal acknowledges an equivalent. But the theory fails to explain the enforcement of releases, waivers, and options. It cannot explain why past consideration will not support a promise when such past consideration is clearly an equivalent.

The reliance theory, sometimes called the injurious-reliance theory, was the product of the metaphysical jurists' attempts in the nineteenth century to establish a new foundation of promise enforcement. The late eighteenth century had seen the breakdown of the attempt to place contract enforcement on a moral law basis. The most notable attempt in this field at that time was Lord Mansfield's. The new foundation emphasized the philosophy of property. A promise was looked upon as a conveyance of one's substance, and one might alienate his services as well as his property. The earliest exposition of the reliance theory was this: "the duty of performing an agreement arises when one party thereto begins to act under it." The present statement of the theory is that the promisor should be held to performance of his promise because there has been a reliance thereon by the promisee, such reliance resulting either in a change of the promisee's position because of the promise (so-called promissory estoppel) or in an arousing of a "reasonable expectation" in the promisee's mind.

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64 See Pound, *An Introduction to the Philosophy of Law* (1925) 256.
65 State of New York, *op. cit. supra* note 5 at 171. Pound further points out that if the equivalents theory were sound, then it would make no difference whether the equivalent was rendered before or after the promise was given or simultaneously with it. Pound, *An Introduction to the Philosophy of Law* (1925) 258. Further: "The equivalent theory must wrestle at the outset with the doctrine that inadequacy of consideration is immaterial so that the equivalency is almost Pickwickian." *Ibid.*, 273-274. The most serious proponents of the equivalent theory is Langdell. *Ibid.*, 259.
66 The will theory, it might be mentioned, was also built upon this new idea. The idea being that one *must will* the alienation.
67 Pound, *op. cit. supra* note 65 at 261: Tracing the origin, the writer says of this theory: "Juristically this seems to be a rationalization of the Roman innominate contract. There, in case a pact was performed on one side, he who performed might claim restitution *quasi ex contractu* or claim counter-performance *ex contractu.*"
This theory has been criticized on many grounds. Probably the most potent argument advanced against the theory is that it does not even go as far as the practical application of the test of consideration as it is known today. English and American courts have long considered many promises enforceable and binding whether there has been reliance thereon by the promisee or not.

Many modern jurists have deplored the present state of the doctrine of consideration. Some attack it as being too narrow a concept upon which to base the enforcement of promises. Others, more conservative, while supporting the consideration test, deplore the exposition and application of the doctrine as being far from clear. The various theories of contractual enforcement as outlined in this section are, in final analysis, merely attempts of jurists throughout the centuries to clarify the law of contractual enforcement. These theories have been more or less successful in their influence upon the common law, but not one has achieved its object, namely, that that theory should become the prime test of enforcement; that is testified to by the variety of decisions upon the subject. If these theories have had any effect upon the common law, it has been in a sort of practical way. Ashley criticizes judicial modification of the common law doctrine of consideration as tending toward abolishing that doctrine entirely. Whether his prediction will in time become a verity rests solely with the courts themselves. After all, it is the practical results reached in a series of given cases which determine the state of the law.

69 Ashley, The Doctrine of Consideration (1913) 26 Harv. L. Rev. 429. Ashley criticizes the application of the estoppel doctrine as a substitute for the consideration test as "an unwarrantable usurpation of legislative powers by the court." The case of Rickett's v. Scothorn, 57 Neb. 51, 77 N.W. 365 (1898), is a good example of an application of the promissory estoppel doctrine. See, also, Person, The Formation of Simple Contracts (1924) 9 Cornell L. Q. 402, 419-420, as criticizing the "reasonable-expectation" phase of this theory: "Some leading authorities have accounted for contract obligations on the ground that they are the enforcement of promisors to fulfill expectations their promises have aroused. This explanation seems to base obligations on the subjective state of the promisee and is therefore open to the same practical objections that have been urged against basing them on the subjective state of the promisor. (Ed.—will theory) A large percent of contract obligations, moreover, come to exist at a moment before the obligee can possibly have such expectations."

70 State of New York, op. cit. supra note 5 at 171-172.

72 Ashley writes: "In spite of all that has been written and said in explanation of the doctrine of consideration, the law is still far from clear upon the subject. The courts are not consistent in their application of the rule, partly because they are unwilling to enforce it strictly in all cases, and partly because they are often hazy in their understanding and knowledge of the topic. All this leads to present uncertainty and doubt. It is further true that consciously or not the law of consideration is being modified gradually, until the present technical requirement is likely to be entirely abolished." Ashley, loc. cit. supra note 69.

73 See supra note 72.
That being an undeniable conclusion, then what is the object of considering and evaluating the philosophical theories advanced as proposed bases for the enforcement of promises? The answer seems to be this: the courts have found that the present state of the law of contracts in regard to consideration has been a restraining force upon the modern field of commercial enterprise; they have attempted to broaden the field of enforceable promises, and in so doing they have created so many exceptions to the accepted test of consideration that they now find that the exceptions have become the rule. It is submitted that a rule of exceptions in time becomes no rule at all; the result, confusion. And so many jurists today are looking for a new test based upon a new theory which will not only explain the exceptions to the present rule but will also create a foundation upon which to base future determinations as to whether a given promise is enforceable. The result is clearly predicted by Pound: “Given an attractive philosophical theory of enforcement of promises, our courts in a new period of growth will begin to shape the law thereby and judicial empiricism and legal reason will bring about a workable system along new lines.”

The Doctrine of Moral Consideration in Wisconsin

Wisconsin, like most states, has made little advancement in the field of promise enforcement until recently. Of course, it adopts the common law test of consideration. The Wisconsin Supreme Court has defined consideration, saying that “may consist of a benefit to the promisor or a detriment to the promisee.” As a corollary to that definition the court, of course, has recognized that mutual promises of the parties to the contract constitute a sufficient consideration. It is not the object of this paper to review in detail the whole application of the doctrine of consideration by the Wisconsin court, nor to determine what the court deems to be a “legal” detriment or benefit sufficient to support the enforcement of a promise; that is the function of a digest.

Possibly the most forceful example of this tendency to broaden the field of enforceable promises to meet with commercial necessity is seen in the rule which denies to the maker of a note the defense of lack of consideration against a holder in due course. Other examples of this tendency are too numerous to mention.

75 Pound, An Introduction to the Philosophy of Law (1925) 283.
76 Messenger v. Miller, 2 Pin. 60 (1847); Eyclzheimer v. Van Antwerp, 13 Wis. 546 (1861); Gegare v. Fox River Land & Loan Co., 152 Wis. 548, 140 N.W. 305 (1913); Drover’s Deposit Nat. Bank v. Tichener, 156 Wis. 251, 145 N.W. 777 (1914); Briggs v. Miller, 176 Wis. 321, 186 N.W. 163 (1922); Onsrud v. Paulsen, 219 Wis. 1, 261 N.W. 541 (1935).
77 Lyman v. Babcock, 40 Wis. 503 (1876); Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 N.W. 853 (1908); Sixta v. Ontonagon Valley Land Co., 148 Wis. 186, 134 N.W. 341 (1912); Alexander Hamilton Institute v. Hart, 180 Wis. 90, 192 N.W. 481 (1923); Thomsen v. Olson, 219 Wis. 143, 262 N.W. 601 (1935).
This section is concerned chiefly with a development in the decisions of the court which has taken place since 1932, a development which has widened the field of enforceable promises, and which has opened the doors of the court to promisees who had previously been excluded. The development referred to is the recognition by the court of the doctrine of moral consideration.

Historically the doctrine of moral obligation first gained prominence in the eighteenth century. As has been previously noted, the whole basis of philosophical thought of the late seventeenth and early eighteenth centuries was one of natural law. Jurists of the period could make no distinction between a natural and a civil obligation; they regarded natural obligations as legal because of the very fact that they were natural. The result of such a trend of thought as a matter of course was the formation by continental jurists of the contractual enforcement theory of the inherent moral force of a promise made as such. Such theory, originating with Grotius, was generally adopted by continental jurists of the eighteenth century and led, in time, to the civil law rule that a promise made with the intention to be legally bound created a legal obligation. The first important recognition of this theory of enforcement in the common law was by Lord Mansfield, who was well versed in the civil law, in the celebrated case of Hawkes v. Saunders. There is a lot of loose language in this decision, and it by no means represents the modern state of the doctrine of moral obligation, but its importance to the profession lies in the fact that it is the beginning of a trend of thought in the common law away from the technical doctrine of consideration as a test for the enforcement of promises; just how far that trend has gone will be seen later.

Hawkes v. Saunders was a case of a legatee under a will suing the executrix, but in her personal capacity, upon her express promise to pay the legacy, there being sufficient assets of the estate in her hands so to do; the defense was no consideration for the promise. Lord Mansfield admitted the lack of any detriment to the promisee or benefit to the promisor; that the case did not fit under any test of consideration then formulated. But he said: "I cannot agree to that (the necessity of a detriment or a benefit) being the only ground of consideration sufficient to raise an assumpsit." Then follows the widely

78 Pound, An Introduction to the Philosophy of Law (1925) 252-253.
79 See pp. 16-17, supra; also, Pound, op. cit. supra note 78 at 259-260.
80 Grotius, 1583-1645, Dutch scholar, statesman and jurist; student of natural law; one-time minister to England.
81 Pound, op. cit. supra note 78 at 260.
82 1 Cowp. 289, 98 Eng. Rep. 1091 (K.B. 1782). There was an earlier case in which the doctrine was expounded, but Hawkes v. Sounders is the first extensive treatment. The earlier case was Atkins v. Hill, 1 Cowp. 234, 98 Eng. Rep. 1038 (1775), a Mansfield decision.
quoted statement setting forth in sweeping phrases the first tenets of
the moral consideration doctrine to be recognized by the common law:
"Where a man is under a legal or equitable obligation to pay, the
law implies a promise, though none were ever actually made. A fortiori,
a legal or equitable duty is a sufficient consideration for an actual
promise. Where a man is under a moral obligation, which no court of
Law or Equity can enforce, and promises, the honesty and rectitude of
the thing is consideration. As if a man promised to pay a just debt,
the recovery of which is barred by the statute of limitations: or if a
man, after he becomes of age, promises to pay a meritorious debt con-
tracted during his minority, but not for necessaries; or if a bankrupt,
in affluent circumstances after his certificate, promises to pay the whole
of his debts; or if a man promise to perform a secret trust, or a trust
void for want of writing, by the Statute of Frauds. In such and many
other instances, though the promise give a compulsory remedy, where
there was none before either in law or in equity; yet as the promise is
only to do what an honest man ought to do, the ties of conscience upon
an upright mind are a sufficient consideration." (It. sup.)

The broad doctrine of moral consideration was recognized in Eng-
land for about forty years after the decision of Hawkes v. Saunders in
1782. Whether it was Mansfield's idea that a mere moral obligation
not based on a pre-existing legal obligation barred by operation of law
would support an express promise later made is to this writer a matter
of conjecture. However, the language used by Mansfield in Hawkes v.
Saunders led the courts in several contemporaneous decisions to the
idea that an express promise founded on a purely moral antecedent
obligation was sufficient to support an assumpsit. As early as 1802,
twenty years after Mansfield's decision, there is found in a reporter's
note to the case of Wennall v. Adney a protest to this trend of the
courts. The note submits that the correct rule should be as follows:
"An express promise, therefore, as it should seem, can only revive a

83 1 Cowp. 289, 290, 98 Eng. Rep. 1091 (1782). Justice Buller, who writes a con-
curring opinion in the same case, said: "The true rule is, that wherever a
defendant is under a moral obligation, or is liable in conscience or equity to
pay, that is a sufficient consideration." The case held the executrix to her
promise.

84 Note (1926) Corn. L. Q. 357, 358.

85 Watson v. Turner, Bull N. P. 129, 147, 281 (1767); Lee v. Muggeridge, 5
Taunt. 36, 128 Eng. Rep. 599 (1813); Note (1932) 16 MINN. L. REv. 808.


87 The reporter begins: "An idea has prevailed of late years that an express
promise, founded simply on an antecedent moral obligation, is sufficient to
support an assumpsit. It may be worth consideration, however, whether this
proposition be not rather inaccurate, and whether that inaccuracy has not
in a great measure arisen from some expressions of Lord Mansfield and Mr.
Justice Buller, which, if construed with the qualifications fairly belonging to
them, do not warrant the conclusion, which appears to have been rather hastily
drawn from thence."
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precedent good consideration which might have been enforced at law through the medium of an implied promise had it not been suspended by some positive rule of law; but can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."

The rule as submitted was adopted by the case of Eastwood v. Kenyon in 1840. The effect of Eastwood v. Kenyon was to repudiate the doctrine of moral consideration entirely insofar as it permitted the enforcement of an express promise which was not based on a pre-existing barred legal obligation; the case is still good law in England as it is in many American jurisdictions. The exceptions allowed by the rule as laid down in Eastwood v. Kenyon are no longer regarded as a part of the moral obligation doctrine. Practically all jurisdictions as a matter of course allow the enforcement of a new promise to make good a claim barred by the statute of limitations or discharged by bankruptcy without mentioning moral obligation. These promises are now regarded as exceptions to the general doctrine of consideration and are enforceable without reference to the doctrine.

89 11 Ad. & E. 438, 447, 113 Eng. Rep. 482, 485 (1840) wherein the above rule is quoted verbatim and adopted.
90 Note (1926) 11 Corn. L. Q. 357, 358.
91 8 Halsbury's Laws of England §§ 202, 204. But see Dunlop Pneumatic Tyre Co. v. Selfridge & Co., Ltd., [1915] A.C. 847. In that case the plaintiff fire manufacturer sold tires to D & Co. and exacted from them a price-fixing agreement to the effect that D & Co. should not sell below plaintiff's list price except in certain circumstances, and, in those circumstances, D & Co. agreed to obtain from such sub-vendee an agreement that he would not sell below stated list price. Defendant was such a sub-vendee, and had breached its contract. P sued defendant. Held, assuming that plaintiff was an undisclosed principal, no consideration moved from it to the defendant, and plaintiff could not therefore enforce the promise. Lord Dunedin begins his opinion: "My Lords, I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce. Notwithstanding these considerations I cannot say that I have ever had any doubt that the judgment of the Court of Appeal was correct." [1915] A.C. 847, 855.
92 The majority of American jurisdictions have adopted the limitation of Eastwood v. Kenyon to the effect that in order for the subsequent express promise to be enforceable it must be based on a pre-existing legal obligation. Union Nat. Bank v. Hartwell, 84 Ala. 379, 4 So. 156, 158 (1888); Dodge v. Adams, 19 Pick. (Mass.) 429 (1837); Terry v. Terry, 217 S.W. 842, 845 (Kan. City Ct. of App. 1919); Heckmann v. Van Graafeiland, 291 S.W. 191 (St. Louis Ct. of App. 1926); McGuire v. Hughes, 207 N.Y. 516, 101 N.E. 460 (1913); Pershall v. Elliott, 249 N.Y. 183, 163 N.E. 554 (1928); Shear Co. v. Harrington, 266 S.W. 554 (Tex. Civ. App. 1924). For a complete list of these jurisdictions see: Notes (1922) 17 A.L.R. 1289, 1318, 1333; (1932) 79 A.L.R. 1346, 1349-1352; Williston, Contracts (1936) § 148 n. 1.
93 Williston states the general rule: "The law in most of the United States, as in England, has rejected the principle of moral consideration, even though some exceptional cases of liability on promises made without present consid-
But some American jurisdictions still recognize the efficacy of moral consideration to support the enforcement of a subsequent promise, and it is this trend which will now be considered.

The modern doctrine of moral consideration goes beyond the enforcement of promises based upon a pre-existing legal obligation into the field of promises where no such obligation exists. This field may be readily divisible into three classes: (1) cases in which the moral obligation arises from ethical considerations alone, where there never existed any legal obligation to keep the promise and where the promisor never received a pecuniary benefit at any time; (2) cases in which the moral obligation arises collaterally to a fully performed or still existing legal liability; (3) cases in which the moral obligation arises out of and is connected with the previous receipt by the promisor of an actual material or pecuniary benefit, but where there has been no pre-existing legal obligation whatsoever.94

Mere Moral Obligation. Where there is no pre-existing legal obligation or any pre-existing benefit accruing to the promisor, it may be generally stated and taken as a rule of thumb that a mere moral obligation will not support an express promise. The cases have consistently held, for example, that an executory promise to support a relative,95 or to pay a weekly sum to a father,96 or to pay support expenses of a parent previously incurred by a stranger,97 is not enforceable when the only reason for enforcement is the fact that the promisor is under a moral obligation to perform. Likewise, where there is no antecedent statutory liability, the father of a bastard child cannot be held to a subsequent promise to pay for the child’s support when such promise is based merely on ethical considerations alone.98 In another class of cases arising in this category are suits on promises to pay based on a moral obligation arising from past illicit cohabitation. Generally, such promises, while not unenforceable because of illegality, are unenforceable as being without consideration, any moral consideration being insufficient.99 Promises made by widows or children of a deceased
person to pay the decedent’s debts, where the deceased leaves no estate and no other consideration exists except ethical considerations are unenforceable.\textsuperscript{100} Promises made in consideration of a sense of duty to pay for the promisee’s losses which were incurred on the basis of the promisor’s good-faith, but bad advice, are not enforceable.\textsuperscript{101}

There are very few jurisdictions in the United States which in any manner recognize the efficacy of mere moral consideration arising from ethical motives alone. Two states have attempted recognition by statute,\textsuperscript{102} and only one state adopts the doctrine in its broadest sense.\textsuperscript{103} Wisconsin has clearly indicated that there must necessarily

\textsuperscript{100} Shraeder v. Fink, 60 Md. 436 (1883); Williams v. Nichols, 10 Gray (Mass.) 83 (1857); Bank of Commerce v. McCarty, 119 Neb. 795, 231 N.W. 34 (1930).
\textsuperscript{101} Morris v. Norton, 75 Fed. 912 (1896); but compare the result in cases where the promisor might have been legally liable to the promisee if he had not made the promise to pay. Hyman v. Succession of Parkerson, 140 La. 249, 72 So. 953 (1916).
\textsuperscript{102} The Georgia Code (Sec. 4243) states that a strong moral obligation is sufficient consideration to effect the enforcement of a promise. Early Georgia cases followed this provision strictly. Gay v. Hamil, 82 Ga. 375, 10 S.E. 205 (1889) (wherein one partner of a firm did most of the work because the other had disabled himself by the use of “excessive stimulants;” after the work was done and the partnership about to be wound up, the partner who did the least work agreed that a division of partnership assets the other partner should get $80.00 per month for the past work as added compensation. Held, under the statutory provision the existing strong moral obligation was sufficient consideration for the promise); Lingo v. White, 29 Ga. App. 470, 106 S.E. 312 (1921) (wherein a husband who had given his wife a check for the purpose of paying the wife’s father’s hospital expenses stops the payment of the check, Held, husband liable on check). But other Georgia cases seem to limit the operation of the statute. David v. Morgan, 117 Ga. 504, 43 S.E. 732 (1903); Helmer v. Helmer, 159 Ga. 376, 125 S.E. 849, 852 (1924). In David v. Morgan, supra, the statute was construed as not relating “to the moral obligation which inheres in every promise;” that such moral obligation refers to one supported by “an antecedent legal obligation, though unenforceable at the time, or by some present equitable duty.”

The Louisiana Code provides that a “natural obligation” is sufficient to enforce a promise. Williston, CONTRACTS (1936) § 149. The case of Hyman v. Succession of Parkerson is a good illustration of the Louisiana law. Therein an attorney, acting in utmost good faith, purchased a forged mortgage for the plaintiff, his client. The attorney, feeling that such bad investment was his fault, gave the plaintiff his promissory notes as a substitute for the forged notes. The suit was by the plaintiff on the notes. The attorney’s defense was want of consideration. Held, attorney is liable on the notes. Hyman v. Succession of Parkerson, 140 La. 249, 72 So. 953 (1916). It is to be noted that Louisiana is a civil law state.

\textsuperscript{103} Pennsylvania is probably the only common law state in which the moral obligation doctrine exists in its broadest sense. As an illustration of just how far Pennsylvania courts have gone in this field, the following quotation is revealing: “The duty to perform a positive promise which is not contrary to law or to public policy, or obtained by fraud, imposition, undue influence or mistake, is certainly an obligation in morals, and, if so, is sufficient consideration for an express promise.” Bentley v. Lamb, 112 Pa. 480, 4 Atl. 200 (1886). The rule expounded, however, seems to be dicta because there were past services in the case which might easily serve as consideration under the true rule of moral consideration which shall be discussed later in this paper. A later Pennsylvania case holds that a transfer of property in consideration of love and affection or any other moral obligation is not good as against creditors. Swartz v. Backmen, 267 Pa. 185, 110 Atl. 260 (1920).
be a benefit to the promisor before his promise will be enforced.\footnote{104}

Perhaps the most potent argument against allowing mere moral obligation to support a promise is the fact that such a test "must vary with the opinion of every individual."\footnote{105} It is submitted that the test, if allowed to stand, would in time degenerate into a philosophical debate concerning the questions: what obligations are moral? what are immoral? what obligations are neutral, having no moral or immoral characteristic? Any conclusions drawn would not establish any wider or sounder basis for the enforcement of promises than now exists.

**Collateral Moral Obligation.** While the rule may be stated, as will be shown below, that moral obligation arising from the previous receipt by the promisor of a pecuniary or material benefit is sufficient to support the promise even though there existed no previous legal liability, such receipt, if it was given for contractual obligations performed by the promisor at the time, generally will not support the enforcement of his supplemental or collateral promise made after the contract is fully performed or still enforceable. To state the rule more definitely, promises made collateral to a validly existing or fully performed contract are not generally enforceable.\footnote{106} It is difficult for this writer to see the connection of these promises with the doctrine of moral consideration in any manner. Is there any moral obligation which arises from the making of a collateral promise such as this, except the inherent moral force of that promise, if such be admitted? Even where moral obligation arising from partly ethical motives is attempted to be used as a basis for enforcing a promise, proponents of the test place very little significance on the inherent moral force of the promise, except possibly in Pennsylvania.\footnote{107} They place more emphasis on the nature and the cause of the promise, as, for example, motives of love and affection, the obligation to make good another man's losses because incurred on the promisor's advice, the obligation to provide for a past mistress. So it would seem that where there was a legal duty to perform or which has been fully performed by the promisor who subsequently makes a collateral promise, that any moral obligation which might arise because of a receipt of a pecuniary benefit by the promisor

\footnote{104}Park Falls State Bank v. Fordyce, 206 Wis. 628, 635, 238 N.W. 516 (1932). "It is true that there are numerous cases holding that a mere moral obligation will not support a promise to pay. But it is equally true that there are numerous cases holding a moral consideration sufficient where the promisor originally received from the promisee something of value sufficient to arouse a moral as distinguished from a legal obligation." The court adopts the latter view as will be shown later.


\footnote{106}See collection of authorities: Notes (1902) 53 L.R.A. 353, 358; (1922) 17 A.L.R. 1299, 1333; (1932) 79 A.L.R. 1346, 1350.

\footnote{107}See supra note 103; also Bentley v. Lamb, 112 Pa. 480, 4 Atl. 200 (1886).
would only be co-extensive with his legal obligation then existing or fully discharged, and would, in no event, be sufficient to support the collateral promise. The conclusion which naturally follows is that this second division of "moral obligations" is not moral at all, and, in final analysis, does not extend as far as the first division of "moral obligations."

Moral Obligation Connected with the Promisor's Previous Receipt of a Pecuniary Benefit, but Unconnected with a Pre-existing Legal Obligation. This is the most important phase of the doctrine of moral obligation. The general proposition involved herein has its origin in the decision of Eastwood v. Kenyon. That decision settled the law in England upon the enforceability of promises based upon moral obligation. It decided that promises based upon moral obligation were only enforceable if, at sometime prior to the making of such promise, the promisor had been legally bound to perform, but where his liability has since been abated by statute or by some positive rule of law. The majority of American jurisdictions adopted this general proposition. Notable exceptions to the rule have been evolved by all jurisdictions; for example, it is generally recognized that a new promise by an adult to fulfill a contract made during his infancy is binding without new consideration; a promise by a sane person to fulfill a contract made while he was insane is likewise binding; yet in neither of these cases is there any pre-existing legal duty on the part of the promisor.

A minority of American jurisdictions have refused to follow the Eastwood v. Kenyon rule as a limitation. They adopt that rule as far as it goes, but they go further. It is at this point where the crux of the moral consideration discussion is reached.

The minority jurisdictions recognize moral obligation as a sufficient consideration to enforce a promise where the promisor, without his request, has received a pecuniary or material benefit at some time in the past, even though at that time he was not legally bound to any performance. The rule, it has been said, amounts to a recognition of a past consideration as being legally sufficient where such past con-

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108 It occurs to the writer that a good example of this conclusion would be as follows: (1) A promises to pay B, a poor relative to whom he owes no legal obligation to support, the sum of $500.00 per year. Going upon the assumed premise that a mere moral obligation will support a promise, there is certainly such a moral obligation in the case. (2) But supposing B confesses a benefit upon A in the form of services for which A has promised to pay B $500.00 per year. A is legally bound. Then subsequently A makes a collateral promise to pay B $200.00 more each year. Disregarding any ideas about the inherent moral force of every promise, is A's moral obligation any greater in situation (2) than in situation (1)? Doesn't it seem logical that A's moral obligation in situation (2) is only co-extensive with his legal obligation?


110 6 R.C.L. 667.

111 Williston, Contracts (1936) §§ 151, 155.
sideration consisted of a benefit to the promisor and not merely a detriment to the promisee. Five elements appear to be essential in order to enforce an express promise under this doctrine: (1) that the past consideration inure directly to the promisor’s benefit; (2) that the consideration is a benefit to the promisor and not merely a detriment to the promisee; (3) that the benefit conferred by the promisee is not intended as a mere gratuity; (4) that the subsequent express promise is not of a collateral nature; (5) that the promisor is subject to a real moral obligation under the facts of a given case.\(^1\)

It has been held that where a new promise not within the Statute of Frauds is based upon a previous agreement from which the promisor has received a pecuniary benefit but which is *unenforceable* by the promisee because of the Statute of Frauds, that the moral obligation resting upon the promisor to make a return for the benefit received is sufficient consideration to support such new promise.\(^2\) Such a holding might readily be made under the rule in *Eastwood v. Kenyon* on the reasoning that a pre-existing legal obligation would have existed had it not been for the positive rule of the statute. It is in the cases in which the subsequent express promise connected with a past benefit to the promisor is enforceable even though the statute declares the original agreement *void* where the truly liberal view is adopted.\(^3\) In those cases there can be no pre-existing legal obligation whatsoever. It is always to be kept in mind that the cases here discussed are against the weight of authority.

Cases, under this doctrine, have also held that where the promisee voluntarily discharges the promisor’s legal obligations to other persons for him, not, however, intending such as a gift, that a subsequent promise to repay the promisee will be enforced.\(^4\) Also, where the promisee has voluntarily and without request beneficially improved the promisor’s land, a subsequent promise to pay the promisee has been

\(^{1}\) Note (1932) 16 *Minn. L. Rev.* 808, 814-815.

\(^{2}\) Rankin v. Matthiesen, 10 S.D. 628, 75 N.W. 196 (1898).

\(^{3}\) Bagaeff v. Prokopik, 212 Mich. 265, 180 N.W. 427 (1920); Palmer v. Stanwood Land Co., 158 Wash. 487, 291 Pac. 342 (1930). It is to be noted that in Wisconsin agreements within the statute of frauds are *void*. Wisconsin, as will be shown later, ties up with the liberal view on this matter. Elbinger v. Capitol & Teutonia Co., 208 Wis. 163, 242 N.W. 568 (1932). Two earlier Wisconsin cases refusing to enforce a subsequent promise connected with a void contract under the statute may be distinguished on the ground that the promisor received no pecuniary benefit from the void contract. The cases are: Hooker v. Knab, 26 Wis. 511 (1870); Nichols v. Mitchell, 30 Wis. 329 (1872).

enforced.\textsuperscript{136} Where the promisee has voluntarily rendered past services for the promisor and the promisor has benefitted thereby, the services not intended to be a gratuity although the promisor may have at the time thought so, a subsequent promise to pay for such services is binding.\textsuperscript{137}

The cases here reviewed are but a few examples of the wide application of the liberal doctrine of moral consideration, but they are sufficient to present a general view of the doctrine, which is all this writer can hope to accomplish. The controversy among the jurisdictions in this country stated in its widest scope is just this: the strict view recognizes the enforcement of only those promises connected with a pre-existing legal obligation, with but several exceptions previously noted; the liberal view disregards the test of pre-existing legal liability and seeks only the determination of the question whether the promisor has received an actual material or pecuniary benefit.

Possibly the first Wisconsin case to mention moral obligation as a sufficient consideration was \textit{Messenger v. Miller},\textsuperscript{138} decided as early as 1847. But it is submitted that the reference was of purely accidental character, the facts of the case failing to bear out the rule of law.

The first case to give any serious consideration to the moral obligation doctrine was \textit{Frey v. City of Fond du Lac}.\textsuperscript{139} In that case the city council voted to pay two hundred dollars to every person who had

\textsuperscript{136} The leading case on this angle is \textit{Drake v. Bell}, 26 Misc. 237, 55 N.Y. Supp. 945 (1899), aff'd on other grounds 46 App. Div. 275, 61 N.Y. Supp. 657 (1899)

\textsuperscript{137} Holland v. Martinson, 119 Kan. 43, 237 Pac. 902 (1925)


\textsuperscript{139} Frey v. City of Fond du Lac, decided as early as 1847
enlisted or who should thereafter enlist under certain calls in the United State military service and be credited to the defendant city. The plaintiff enlisted before the ordinance was voted upon. He received one hundred dollars, and he sued for the remainder. The plaintiff recovered in the lower court. The supreme court reversed the holding on the ground that the defendant city's promise was to pay for something in the past and for which the city was never legally bound to pay. The court laid down this rule: "It is a general rule that a promise to pay for a past consideration, for which there is not and never has been any legal liability on the part of the party promising, does not make a contract binding in law. It is placed on the same footing with a promise which does not purport to be made for any consideration at all." The court then proceeds to give approval to the rule of *Eastwood v. Kenyon* as taken from a reporter's note to the case of *Wennall v. Adney.* The case also suggests the exception in regard to an adult's promise to pay for an obligation incurred during infancy. The present status of this decision will be commented upon in connection with the *Park Falls State Bank v. Fordyce* case discussed later.

The rule as adopted in the *Frey* case is followed in *Hooker v. Knab* which was a suit upon the defendant's note given to the plaintiff for a part of the amount claimed by the plaintiff as damages for defendant's failure to deliver wheat under an oral purchase agreement which was void as within the Statute of Frauds. The *Frey* case rule is also followed in *Melchoir v. McCarty,* wherein plaintiff sued on a subsequent promise by the defendant to pay for liquor delivered by the plaintiff to the defendant under a contract void because the plaintiff sold the liquor on Sunday without a license. It was held that the promise was not binding since there existed no past legal obligation.

Possibly the first relaxation of the strict English rule is found in the case of *Silverthorn v. Wylie* dealing with a subsequent promise to pay for past services. The case, while it fails to discuss the moral obligation angle, holds the promise binding even though the past services were not rendered on request; the case was decided under a rule adopted from an earlier case to the effect that "A promise to pay for past services implies that they were rendered upon previous request, and such services are good consideration for the promise." The implication of the case is, however, that if the record showed affirma-

120 24 Wis. 204, 206-207 (1869).
121 See supra, p. 32.
122 26 Wis. 511, 514 (1870). See also Nichols v. Mitchell, 30 Wis. 329 (1872) as a case identical in facts and principle.
123 31 Wis. 252, 256 (1872)
124 96 Wis. 69, 71 N.W. 107 (1897).
125 Jilson v. Gilbert, 26 Wis. 637 (1870).
tively that there was no previous request the decision would be otherwise.

In Briggs v. Miller, decided by the Wisconsin court in 1922, is found the most peculiar case in the field of consideration. The defendant in that case was a public lecturer in the field of applied psychology. In order to create the impression that he was honest, fair and sincere in his teachings and in order to create public confidence in himself, the defendant advertised that if anyone had at any time lost any money in any of the defendant's business transactions and would come forward and prove the same, he would immediately pay such loss. The plaintiff presented to the defendant an unpaid note which defendant had endorsed, which note had been given by one of the defendant's companies and was barred by the statute of limitations. The defendant refused to pay, and the plaintiff sued on the new promise. The trial court had overruled a demurrer to the complaint, but, on appeal, the supreme court reversed such order, holding that on the facts stated the plaintiff could not recover. The court refused to find any benefit accruing to the defendant from the promise and refused to find any detriment to the plaintiff in the mere act of accepting the defendant's offer. The court rejected the plaintiff's claim that the opportunity offered to the defendant to prove his sincerity and honesty and thereby improve his financial standing was such a benefit to the promisor as would amount to a sufficient consideration. The case has been criticized as restricting the doctrine of consideration to a very narrow field; that the true rule should be that "Anything which a promisor requests is prima facie a benefit to him or he would otherwise not request it."

The effect of the case so far as the law of moral consideration is concerned is of no consequence; that is to say, the case sub silento recognizes the Eastwood v. Kenyon rule, but goes off on the proposition of just what constitutes a benefit. Its significance, however, is that it shows just how far the court had gone up to 1922 in restricting the doctrine of consideration. There is little doubt in this writer's mind but that the case would be decided differently if it came before the court today. Perhaps it was this decision that influenced the court in deciding the later cases which will now be discussed.

In recent years the Wisconsin court has joined the liberal minority in the controversy over the sufficiency of moral consideration to support a subsequent express promise. The position now taken by the court is well defined. It has not by any means adopted the Pennsylvania view that mere moral consideration is sufficient to support a

226 176 Wis. 321, 186 N.W. 163 (1922).
227 Note (1922) 7 Corn. L. Q. 365, 366.
promise. On the other hand it has gone beyond the *Eastwood v. Kenny* rule and has recognized the efficacy of moral consideration to support a subsequent express promise where the promisor has previously received a pecuniary benefit even though there existed no former legal obligation.

The first case to recognize the liberal rule was *Park Falls State Bank v. Fordyce*, decided in 1932. In that case Van Ostrand owed the plaintiff bank $5,000 and had given his notes to the plaintiff for that sum. Later he sought an additional loan of $1,000 and offered additional security worth at face value $5,800. The bank wanted the security but did not want to increase the loan, and so the bank's president asked the defendant, one of the bank's directors, to take over the Van Ostrand loan, lend the debtor the additional $1,000, and take the new collateral. The defendant refused to do this because the collateral was insufficient, but he did take over the collateral and a new $5,000 note from Van Ostrand, paid the bank $4,000 in cash and placed $1,000 to Van Ostrand's credit in the bank, whereupon the debtor executed a new $1,000 note to the bank, receiving back his original $5,000 note. All this was done for the accommodation of the bank. Subsequently, Van Ostrand became insolvent and failed to pay the defendant's note. Pursuant to an agreement with other creditors of Van Ostrand the defendant surrendered his collateral. When it began to look as though the defendant were going to lose on the note, the plaintiff bank passed a resolution which provided for the taking up of the Van Ostrand note held by the defendant, and paid the defendant in full. The resolution referred to was passed by the board of directors and affirmed by blanket resolution of the stockholders who were practically all ignorant of the real transaction at the time. Subsequently, upon discovering the facts, the stockholders passed a resolution directing the officers of the plaintiff bank to bring suit against the defendant to rescind the former transaction and recover back the money paid. The trial court judgment was adverse to the plaintiff and it appealed. The supreme court affirmed the judgment, and, contrary to the plaintiff's contention that the moral obligation here involved was insufficient to support the bank's subsequent payment, laid down the following rule: A moral consideration will support an executory promise, notwithstanding the fact that there is no pre-existing legal obligation, where the promisor has received an actual benefit in the past.

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128 See note 104.
129 206 Wis. 628, 238 N.W. 516 (1932).
130 The court cited with approval the following cases: Drake v. Bell, 26 Misc. 237, 55 N.Y. Supp. 943 (1899); Farnham v. O'Brien, 22 Me. 475 (1843); Stebbins v. Crawford County, 92 Pa. 289 (1879); Edson v. Poppe, 24 S.D. 466, 124 N.W. 441 (1910); Bagaeff v. Prokopik, 212 Mich. 265, 180 N.W. 427 (1920);
The defendant contended in the instant case that the rule of moral consideration has no application at all to executed promises, and that such was the nature of the promise involved in the case. The court answered this contention by admitting that such rule was applicable as between natural persons, but that officers of a bank, being similar to trustees, may not make a gift of bank funds, and if they do, an action for rescission may be had; therefore, the rule as to executory promises is applicable in such a case.

The court, in the instant case, in reviewing past decisions does not directly overrule the case of Frey v. City of Fond du Lac but limits its application to cases where the original transaction which benefitted the promisor was against public policy; in such cases, any subsequent promise is unenforceable. The philosopher would probably make the distinction by saying that because the original transaction was invalid as against public policy, no moral obligation could ever arise sufficient to enforce a subsequent promise. As to the Frey case itself and the case of Hooker v. Knab, the principal case indicates that in neither one did the promisor receive an actual pecuniary benefit.

The principal case was followed in the same term by Elbinger v. Capitol & Teutonia Co., which affirmed the rule there laid down and applied the same to an executory promise made after the original transaction was void as within the Statute of Frauds. The plaintiff, in the last case, rendered services to the defendant under an oral brokerage contract which was void because not in writing as required by statute. Subsequently the defendant settled with the plaintiff by paying him $200 in cash and giving him a note for $146. The defendant failed to pay the notes, and the plaintiff sued. The defense was want of consideration. The court found for the plaintiff under the doc-


The court has reference to the case of Melchoir v. McCarty, 31 Wis. 252 (1872) where the defendant promisor received a benefit (the liquor) but where the original transaction was illegal (sale of liquor on Sunday without a license). Defendant's subsequent promise to pay for the liquor was not enforced.

Consider the facts of these cases, supra, pp. 42-43, what benefit did the city of Fond du Lac receive for its promise to pay those who enlisted in the military service $200.00 apiece? (Frey Case). What benefit did the defendant receive in Hooker v. Knab for his note? The writer is inclined to find a benefit in the latter case; the defendant in that case gave plaintiff his note after he had breached his contract to deliver wheat. The contract was oral and unenforceable, but certainly if the defendant had kept his contract, he would not have been able to sell the wheat at a higher price to others. The facts of the case do not state that defendant did get a higher price, but the implication seems to be in the record.

208 Wis. 163, 242 N.W. 568 (1932).

trine of the *Park Falls State Bank* case.\textsuperscript{337} Later cases in the reports have recognized the view taken in these two decisions, but to date there has been no further application of the moral consideration doctrine as there expounded.\textsuperscript{338}

**A Comment Upon the Future of the Doctrine**

The pivotal point in moral consideration, as has been repeatedly shown, is the presence of or the lack of a pre-existing legal obligation. The strict rule, demanding the presence of such obligation, grew out of the moral obligation idea, but has since, in most cases, disregarded the morality of a given situation and is applicable merely as an arbitrary rule, which is presumably without reason. On the other hand, the liberal view disregards pre-existing legal obligation, demands as a test a benefit to the promisor, and has for its acknowledged basis the moral obligation of a man "to make return for things of value not intended as a gift that he has accepted" and his moral obligation "to do what he knowingly and advisedly gave one acting for his benefit and to his own hurt to understand he would do."

But construing the narrow view in relation to its historical origin of moral obligation, the student is in a quandary to find any greater

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\textsuperscript{337} The court said: "We there (referring to the *Park Falls State Bank* case) repudiated, as too narrow, the principle obtaining in some jurisdictions that in order for a moral consideration to be sufficient to support an executory promise there must have been a pre-existing legal obligation to do the thing promised, which for some reason, as the statute of limitations, discharge in bankruptcy, or the like, is unenforceable. We there said that 'one ought, in morals, to make return for things of value not intended as a gift that he has accepted, and he ought in morals to do what he knowingly and advisedly gave one acting for his benefit and to his own hurt to understand he would do.' We there held that whenever the promisor has originally received value, material pecuniary benefit, under circumstances giving rise to a moral obligation on his part to pay for that which he has received, it is a sufficient consideration to support a promise on his part to pay therefor. The mere fact that a statute enacted for the benefit of the promisor prevents legal liability on his part does not deprive him of the power by a subsequent promise to assume a legal obligation to do that which an honest man should do where no moral turpitude is involved in the transaction." Elbinger v. Capitol & Teutonia Co., 208 Wis. 163, 165, 242 N.W. 568, 569 (1932).

\textsuperscript{338} See Goldman v. Schmid, 209 Wis. 71, 244 N.W. 586 (1932) which recognized the rule in the Elbinger case but refused recovery to the plaintiff real estate broker who sued on a subsequent promise (a note) to pay commissions due under a void contract on the ground that the plaintiff broker had been faithless to the interests of his principal. In Johnson v. Crook, 216 Wis. 534, 257 N.W. 453 (1934) the rule in the *Park Falls State Bank* case was held inapplicable, the court failing to find any moral obligation on the part of the promisor at all. In Onsrud v. Paulsen, 219 Wis. 1, 261 N.W. 541 (1935) the court quoted extensively from the *Park Falls State Bank* case on the subject of consideration, but other consideration was found in the facts to support the enforcement of the note there involved.

An interesting sidelight is the case of Webb v. McGowin, 168 So. 196 (Ala. App. 1935), aff'd 232 Ala. 374, 168 So. 199 (1936) which holds that a subsequent promise to pay a promisee who had saved the promisor from injury by a falling block of wood and who was himself injured by the act was binding. The *Park Falls State Bank* case is cited as authority therein.
degree of moral obligation behind the promises enforced under that rule because they are supported by a pre-existing legal duty on the part of the promisor than behind the promises enforced under the liberal rule as adopted in Wisconsin. To the practical mind the moral obligation in both cases is of the same force. The only distinction that one may readily draw from the two rules is that in one, the strict rule, there was at one time the element of bargain, while in the other, the liberal view, there was never any bargain existing at any time. But the absence of the bargain element in a test of promise enforcement is not by any means an innovation when one considers the recognition by the courts of the doctrine of promissory estoppel as a test of enforcement.139

And so it is submitted as an irresistible conclusion that either view of the moral consideration doctrine is as much beyond the scope of the technical rule of consideration as the other. Viewed from the standpoint of the philosophical theories of contractual obligation heretofore reviewed, the doctrine of moral consideration seems to be based upon two of these theories. One finds primarily the theory of equivalents in the requirement of a benefit to the promisor; historically, of course, one finds the theory that all promises are morally binding as the beginning of the natural-law foundation of the doctrine.

The equivalent theory of enforcement, as has been shown, goes upon the premise that voluntary promises are merely made for ostentation, and that the presence of an equivalent is merely a test of serious intention. So what the doctrine of moral consideration really amounts to is nothing more than a single phase of the serious-intention proposal. What then is the practical effect of the recognition by minority jurisdictions of the liberal view?

The student has but to review the history of consideration as heretofore outlined to realize that the development in the common law of the technical test of consideration was purely accidental. If the action of covenant had not been so bound up with actions concerning land, the requirement of the seal might well have become obsolete, and the courts would not have felt the necessity for the test and would have recognized the enforcement of the parol or unsealed covenant without regard to consideration.140 But the fact is that the doctrine did develop and has been carried on by the very force that keeps other obsolete rules alive in the law, namely, precedent.

The rule of necessity of consideration is beset with many evils. Man's existence depends upon the enforcement of contractual obligations, yet the technical test of consideration is today being used by the

139 See discussion of the reliance theory, supra, pp. 25-26.
140 See supra note 6 (b).
legal profession to allow a man to escape from his contractual obligations just as it sometimes uses the due-process clause of the Constitution to allow a man to escape his social obligations. Wisconsin, by adopting the liberal doctrine of moral consideration, is merely attempting to establish a broader basis of contractual enforcement. A conservative jurist might well complain of this as judicial legislation. But the fact remains that the necessity of enlargement is present, and whether the solution is to come from the bench or from legislative halls seems immaterial in this case.

SOLUTIONS OFFERED

The extension of the moral consideration test is the easiest solution to put into effect for all it amounts to is continued recognition of the present test of consideration together with the universal recognition of the liberal doctrine of moral consideration. This writer submits that to allow the extension of the doctrine of moral consideration is to admit into the law a "subjective cloudland" of argument over what constitutes a past benefit to the promisor sufficient to arouse a moral obligation on his part. Proponents of the solution may say: why not let the courts decide what benefits are sufficient to arouse a moral obligation for that is what the courts have been doing to date, anyhow? The answer seems apparent from the very question propounded; differing ideas of morality are as prevalent on one side of the bar as on the other. Further, the solution fails to answer the problem of what should be done about promises made with the serious intention of being legally bound where no question of moral obligation is involved. Should the solution go a step further and recognize the inherent moral force of all promises? One would hardly recommend such a procedure.

As a solution, several states have enacted statutes declaring written contracts to be presumptive of consideration. Lord Mansfield was the first to suggest this solution in the case of Pillans v. Mierop. However, Mansfield's idea went far beyond most present day statutes because he proposed that no agreement could fail if it were in writing. The statutes have added the word "presumptive" and therein lies the fallacy of this proposal. This solution is open primarily to two objections: (1) the statute usually fails to state the nature of the presumption, that is, whether the presumption is rebuttable or conclusive; (2) the statute usually fails to state the essentials of a written contract, that is, is a note or memorandum sufficient, must it be subscribed

141 Williston, CONTRACTS (1936) § 218.
or signed by the party to be charged, or will proof of oral assent to a written contract suffice?

The Written Obligations Act is an act approved by the National Conference of Commissioners on Uniform State Laws in 1925. The Act, drafted by Williston, is in effect a practical application of the serious-intention theories of Lorenzen, Pound, and Wright. The reasons for the adoption of the Act are stated as follows: the common law provided for the enforcement of releases and promises even though gratuitous if made under seal. The technical rules of the common law concerning the seal, such as what constituted a seal, soon became obnoxious and frequently worked injustice. The American jurisdictions, as a result, either abolished the seal entirely, modified its efficacy, or left the law as it was. This split in authority led to confusion in an important field of commercial law. The purpose of the Act is not to re-adopt the common law seal, but to reach a similar result and at the same time avoid the technical common law rules concerning the seal.

The text of the Act as proposed is as follows: *An Act to Validate Certain Written Transactions Without Consideration, and to Make Uniform the Law Relating Thereto.*

Section 1. 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 of language, that the signer intends to be legally bound. * * *

Section 4. All acts or parts of acts inconsistent with this act are hereby repealed. * * *

To date the Act has been adopted in only two states, Pennsylvania and Utah.

When one attempts to draw any conclusions in this field or to make any substantial proposals of a test for promise enforcement, he is confronted at the outset with Dean Pound's prediction: "Given an attractive philosophical theory of enforcement of promises, our courts in a new period of growth will begin to shape the law thereby and judicial empiricism and legal reason will bring about a workable system along new lines."

Likewise, he is confronted with the realization that the greatest liberal minds of the century have pondered the problem and have utterly failed to accomplish any practical results; there has been uni-

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343 See supra pp. 17-20.
344 Handbook of the National Conference of Commissioners on Uniform State Laws, 1925, 584-585; for an interesting discussion concerning the adoption of the Act, see the minutes of the 1925 conference, pp. 193-215, 303, 308; also, see Williston, CONTRACTS (1936) § 219A.
345 Handbook, etc. (1925) 584.
346 Handbook, etc. (1935) 333.
formity of thought of course, but one finds nothing but utter chaos in
the practical application of any uniform test of promise enforcement;
the law and the justice it metes out is ponderous and slow-moving;
new ideas and proposals find a practically insurmountable obstacle in
the doctrine of *stare decisis*; the law, and it is not for this writer to
say that it is not a good thing, is not subject to every wind that blows
or to every foolish whim that might obsess the mind of an overzealous
jurist. But, nevertheless, it is only through these new proposals, new
winds, so to speak, that any changes, any progress is made in juris-
prudence. New proposals, even though they border upon sheer
idiocracy, keep the active legal mind at work; and when the chaff is
separated and thrown on the scrap heap, the kernels that come out
add to the law and make for progress.

And it is with this idea always foremost that the following con-
clusion is drawn: this writer, after much serious consideration, is
inclined to adopt that manifestation of the serious-intention theory
previously discussed known as the Uniform Written Obligations Act;
that such rule be superimposed upon the present doctrine of considera-
tion with this result: on one end of the scale, no promise will be unen-
forceable if reduced to writing, the safeguard being the necessity of the
promisor to make the *additional* written statement that he intends to
be legally bound; that will make him pause and think, thus preventing
any rash promises. At the other end of the scale, as Mr. Holdsworth
suggests, oral promises will be enforced only if supported by the
technical concept of consideration. In a word, only two indicia of seri-
ous intention to be legally bound should be acceptable to the courts;
namely, a writing or consideration,