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### Contracts--Past Consideration--Assignments Without Consideration--Irrevocability of Offers

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tible Instruments Law) nevertheless decided that such a signer is one of the "general class, kind, or nature known as sureties or guarantors" specifically enumerated in the Act and is therefore included in the "others subject to the obligation or liability" mentioned therein. The position taken in the *Akron* and *Zaentz* cases is a sound one. Even if we assume that co-makers are excluded from the immunities of "sureties, guarantors and endorsers", they would still be among "the others subject to the obligation or liability" entitled to the protection of a stay.

Perhaps the only failing in the Act itself lies in its maximum time limit of three months after termination of military service for suspension of liabilities. It is highly unrealistic to assume that a man just released from the army, who has been receiving about \$30 a month while in service, will be able to earn sufficient money in three months to discharge an indebtedness which has accumulated over a period of years. No other similar statute gives such inadequate protection.<sup>35</sup>

Amendment of the Act in this regard, accompanied by a more liberal interpretation of its provisions in the courts, would more closely achieve the avowed purposes of its drafters.

ROSE GRESS.

#### CONTRACTS—PAST CONSIDERATION—ASSIGNMENTS WITHOUT CONSIDERATION—IRREVOCABILITY OF OFFERS

##### *A. Introduction*

A promise made upon a past or executed consideration, if the promise is in writing and signed by the promisor, and if the writing expresses the consideration and if the consideration was actually given or performed and would be a valid consideration if it were not for the time when it was given or performed, shall not be denied effect as a valid contractual obligation.<sup>1</sup>

An assignment for which there was not any consideration shall not be denied the effect of irrevocably transferring the assignor's interests if in writing and signed by the assignor.<sup>2</sup>

An offer of contract, which states that it is irrevocable and which is made in a writing signed by the offeror, has been made irrevocable

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<sup>35</sup> Australia allows six months, Alberta and Saskatchewan two years. Great Britain and Manitoba set no limit, leaving the matter to judicial discretion in each case.

<sup>1</sup> N. Y. PERS. PROP. LAW § 33(3) and N. Y. REAL PROP. LAW § 279(2) (both eff. Sept. 1, 1941).

<sup>2</sup> N. Y. PERS. PROP. LAW § 33(4) and N. Y. REAL PROP. LAW § 279(3) (both eff. Sept. 1, 1941).

even though there was not any consideration, and the irrevocability will continue during the time stated in the offer, although, if no time is stated, the irrevocability will endure for a reasonable time.<sup>3</sup>

These three items of legislation were proposed by the Law Revision Commission.<sup>4</sup> It appears from the Report of the Commission that the three enactments are a part of what resulted from the Commission's study since 1934 of the law concerning the seal, and that they are intended to cause a writing, bearing no seal, to accomplish what a sealed writing in each case would have accomplished formerly.<sup>5</sup>

### B. The Provision Relating to Past Consideration

The provision relating to past consideration is said to be in derogation of the common law in many respects.<sup>6</sup> The Studies of the Law Revision Commission<sup>7</sup> trace the history of consideration from the common law of debt, through *assumpsit*, to the present day, and not only in the common law, but in equity and law merchant (value) as well. Note is taken of *Slade's case*,<sup>8</sup> whereafter debts could be recovered in *assumpsit* whether there had been a promise or not, and of the great work of Ames,<sup>9</sup> who demonstrated that at a time about sixty years before *Slade's case* in 1603, subsequent promises to pay precedent debts began to be enforceable at common law, originally in *indebitatus assumpsit*, in order to permit *assumpsit* to lie so that wager of law (were the plaintiff limited to the writ of debt) might be obviated.<sup>10</sup>

Even the scholarship which the Commission put into its Studies can hardly change the fact that "past consideration" is involved either in a promise to pay a precedent debt, or in a promise to pay when there was not a precedent debt. If the provision relates only to the former, it is at least generally not in derogation of the common law.<sup>11</sup> If it relates to the latter, there are many respects in which again it

<sup>3</sup> N. Y. PERS. PROP. LAW § 33(5) and N. Y. REAL PROP. LAW § 279(4) (both eff. Sept. 1, 1941).

<sup>4</sup> N. Y. LAW REVISION COMMISSION, Leg. Doc. (1941) No. 65(M) pp. 10-20.

<sup>5</sup> N. Y. LAW REVISION COMMISSION, Leg. Doc. (1941) No. 65(M) pp. 1-70; Leg. Doc. (1936) No. 65(C) and 65(D) pp. 1-293.

<sup>6</sup> N. Y. LAW REVISION COMMISSION, Leg. Doc. (1941) No. 65(M) pp. 1-70, partic. pp. 51, 52, 54, 55; Leg. Doc. (1936) Nos. 65(C) and 65(D) pp. 1-293, partic. pp. 27-92 and pp. 192-206.

<sup>7</sup> *Ibid.*

<sup>8</sup> 4 Coke 92b, 76 Eng. Rep. 1074 (1603).

<sup>9</sup> Ames, *History of Assumpsit* (1888) 2 HARV. L. REV. 1-19, 53-69.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* See also notes 6 and 9, *supra*; WILLISTON, CONTRACTS § 143, wherein, while contending that the subsequent promise adds nothing, Mr. Williston concedes that in the United States the declaration could be upon the subsequent promise at least as long as the writs lasted. See also §§ 144 and 146; WHITNEY, CONTRACTS § 53(h).

is not in derogation,<sup>12</sup> so that it is doubtful if we need the enactment, except to accomplish a clarification which has perhaps not been accomplished at all, as will be shown. For example, it is difficult to see desirability in the rendering enforceable of subsequent written promises to pay for what were gratuities such as gifts and acts of kindness when given or done. Yet this has indeed been accomplished unless the words "would be a valid consideration but for the time when it was given or performed" are construed to have some other meaning. Of course, nothing in the Studies of the Commission indicates an intention or expectation that the construction will include any such giving of force to promises to make some payment or performance in exchange for executed gratuities. On the contrary, the Commission says: "Without undertaking to enforce all promises and agreements, the common law might conceivably establish a more comprehensive basis or theory for the enforcement of deliberate promises intentionally made where they are of a character ordinarily relied upon by men in their economic or business dealings. The necessary deliberation, certainty and security could be insured by evidentiary and formal requirements."<sup>13</sup>

What, then, will the provision be held to cover? We do not need it when the subsequent promise merely recreates a remedial right, barred by the Statute of Limitations<sup>14</sup> or by discharge in bankruptcy<sup>15</sup> or by infancy,<sup>16</sup> upon a primary obligation or debt (miscalled by Mansfield a "moral" obligation)<sup>17</sup> which had never been discharged. We do not seem to need it if there was precedent debt even though the remedy is not barred,<sup>18</sup> and in many cases based upon principles of the common law as distinguished from equity (or

<sup>12</sup> See notes 6 and 9, *supra*.

<sup>13</sup> N. Y. LAW REVISION COMMISSION, Leg. Doc. (1936) No. 65(D) p. 92 (part of an article by Mr. Horace E. Whiteside, of the Cornell Law Faculty).

<sup>14</sup> *Serrell v. Forbes*, 106 App. Div. 482, 94 N. Y. Supp. 805 (1905), *aff'd*, 185 N. Y. 572, 78 N. E. 112 (1906); *Fletcher v. Daniels*, 52 App. Div. 482, 94 N. Y. Supp. 805 (1905); see also N. Y. LAW REVISION COMMISSION, Leg. Doc. (1936) No. 65(D) pp. 35, 36, 64.

<sup>15</sup> N. Y. PERS. PROP. LAW § 31; *Herrington v. Davitt*, 220 N. Y. 162, 115 N. E. 476 (1917); see also N. Y. LAW REVISION COMMISSION, Leg. Doc. (1936) No. 65(D) pp. 35, 36, 64.

<sup>16</sup> *Casey v. Kastel*, 237 N. Y. 305, 142 N. E. 671 (1924); *Halsey v. Reed*, 4 Hun 777 (N. Y. 1875) *Henry v. Root*, 33 N. Y. 526 (1865); see also N. Y. LAW REVISION COMMISSION, Leg. Doc. (1936) No. 65(D) pp. 35, 36, 64.

<sup>17</sup> N. Y. LAW REVISION COMMISSION, Leg. Doc. (1936) No. 65(D) pp. 35-37, 64, citing Holdsworth, *The Modern History of Consideration* (1922) 2 B. U. L. REV. 87, 174 and other works of Holdsworth. They might also have cited extensively from HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923).

<sup>18</sup> *Matter of Bradbury*, 105 App. Div. 250, 93 N. Y. Supp. 418 (1905); *Matter of Todd's Estate*, 47 Misc. 35, 95 N. Y. Supp. 211 (1905); *Yarwood v. Trusts & Guarantee Co.*, 94 App. Div. 47, 87 N. Y. Supp. 947; *Hicks v. Burhans*, 10 Johns. 243 (N. Y. 1813); WHITNEY, CONTRACTS § 49; WILLISTON, CONTRACTS §§ 143, 144; Ames, *History of Assumpsit* (1888) 2 HARV. L. REV. 1-19, 53-69.

upon the common law with merely some influence from equity or law merchant or both), we do not need the provision even though there was not a precedent obligation,<sup>19</sup> if the special nature of the promises makes their enforceability desirable nevertheless. These include promises to waive conditions such as those relating to architects' certificates, the liability of endorsers and drawers of negotiable paper and of guarantors, letters of credit, stipulations of counsel, a promise by a parent that his child shall have his earnings free from interference by the parent, promises undertaken in connection with bailments,<sup>20</sup> and

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<sup>19</sup> *Drake v. Bell*, 26 Misc. 945, 55 N. Y. Supp. 945 (1899); *Willets v. The Sun Mutual Ins. Co.*, 45 N. Y. 45, 6 Am. Rep. 31 (1871); *Hicks v. Burhans*, 10 Johns. 243 (N. Y. 1813).

<sup>20</sup> N. Y. LAW REVISION COMMISSION, Leg. Doc. (1936) No. 65(D) pp. 68-70. Gratuitous undertakings in connection with a bailment deserve special note, because they require reminder of a component of consideration theory not mentioned in the extended discussion of the various theories in either the 1936 or the 1941 Studies of the Commission, and also because after the mention of *Siegel v. Spear*, 234 N. Y. 479, 138 N. E. 414 (1923) in the 1936 Study (p. 70), *Comfort v. McCorkle*, 149 Misc. 826, 268 N. Y. Supp. 192 (1933), was brought to the Commission's attention by Mr. Hays of the Columbia Law School Faculty, who prepared the Commission's Study for 1941 (Leg. Doc. [1941] No. 65[M] pp. 23-58).

Can it not be, as suggested by Messrs. Edgar, Sr. and Jr., in their *WORK-BOOK IN BAILMENTS, INNKEEPERS AND CARRIERS* (1941) p. 51, that, among other things, consideration for an executory promise made at arms' length is a substitute for the element of trust exemplified by that transfer of possession which is the operative fact creating the jural relationship of bailment as distinguished from contract? And which is further exemplified by the power in trust which is the essence of the jural relationship of principal and agent as distinguished from contract? Bailment and agency would seem properly called "trusts cognizable at law." The persons who have status in them are not at arms' length. When, between persons dealing at arms' length a promise is passed, perhaps it is the consideration for that promise which takes away the arms' length quality in the transaction and brings breach of the promise nearer to being the breach of a trust. The trust element in special relationships has been recognized as the basis for their enforcement. It was said to be so expressly in *Rutgers v. Lucet*, 2 Johns. Cas. 92 (N. Y. 1800), and in the *Siegel* case itself. The opinion in the *Siegel* case pointed to the fact that in *Thorne v. Deas*, 4 Johns. 84 (N. Y. 1809), possession had not passed, so that no trust was constituted, and this was given as the reason for the judicial refusal in that case to recognize obligation as existing therein.

As for *Comfort v. McCorkle*, it does nothing except follow the historic common sense which underlies *Thorne v. Deas*. In both cases there was nothing to constitute a trust, and the "promissory estoppel" which Mr. Hays suggests in the 1942 Study of the Commission (p. 50) as a reason for a contrary result should depend for its justification upon something more reasonable than that the promisee, trusting the promisor in fact, relied upon the promise. There is always the question of his being entitled so to rely in a world of careless promising and casual forgetting. This seems also to be a satisfactory justification for the other cases deprecated by Mr. Hays in the 1941 Study at pages 51, 52, 54 and 55, and some of them (*e.g.*, *Pershall v. Elliott*, 249 N. Y. 183, 163 N. E. 654 [1928] and *McDevitt v. Stokes*, 174 Ky. 515, 192 S. W. 681 [1917]) are probably not within the operative language of the statute in any event. In the *Pershall* case, the promisee was not the person who had extended the "past consideration." In the *McDevitt* case, the "past consideration" consisted of an obligation already owed to a third person.

probably charitable subscriptions, and the Commission says that this list is probably not exhaustive.<sup>21</sup>

The Commission credits additional items to equity,<sup>22</sup> and notes that they are declarations of trust by a chattel owner, undertakings to hold real property in trust, and promises (for viewed realistically that is all they are) to make gifts when the form the promise takes is other than mere promise, and to make gifts of land by deed though no deed has been given (if the donee is in possession and has acted on the gift as by the making of improvements), undertakings imperfectly executed particularly when they are to a creditor for security or to a wife by way of settlement or to a child by way of advancement.

What then is left?

The marriage settlement? These have been well handled by the decisional law.<sup>23</sup>

Promises not to exercise a power of avoidance based on other grounds than infancy? These, like promises not to avoid the power based on infancy, are a present consideration.<sup>24</sup>

Promises by *A* and *B* to *C* that *A* and *B* will not mutually give up a contract between them? These, too, are a present consideration.<sup>25</sup>

Promises to do for one person what one is already bound to do for another? Let us pass the question of whether or not these are commonly enough thought of as invalid because of some connection with "past consideration" or for some other reason not so much related to *time*. Let us, in other words, except to express a doubt, pass the question of whether or not the words "would be a valid consideration but for the time when it was given or performed" will be construed to include "would be a valid consideration but for the fact that it had previously been promised to a different promisee." Is the matter important enough to have a whole new enactment about? Particularly one which is not phrased broadly enough to cover the strong doubt as to its inclusion? Assume that the enactment is construed so as to include these cases: What more will be proved to have been accomplished by the enactment than to repeat what was decided by the Court of Appeals in *De Cicco v. Schweitzer*?<sup>26</sup> The same comment can be made upon *Arend v. Smith*.<sup>27</sup> In that case,

<sup>21</sup> N. Y. LAW REVISION COMMISSION, Leg. Doc. (1936) No. 65(D) p. 70.

<sup>22</sup> N. Y. LAW REVISION COMMISSION, Leg. Doc. (1936) No. 65(D) pp. 69-71, 73.

<sup>23</sup> *De Cicco v. Schweitzer*, 221 N. Y. 431, 117 N. E. 807 (1917); *Phalen v. U. S. Trust Co.*, 186 N. Y. 178, 78 N. E. 943 (1906).

<sup>24</sup> WILLISTON, CONTRACTS §§ 151-154.

<sup>25</sup> *De Cicco v. Schweitzer*, 221 N. Y. 431, 117 N. E. 807 (1917); see Williston, *Successive Promises of the Same Performance* (1894) 8 HARV. L. REV. 27.

<sup>26</sup> 221 N. Y. 431, 117 N. E. 807 (1917).

<sup>27</sup> 151 N. Y. 502, 45 N. E. 872 (1897).

*A* was indebted to *B* Corporation, and *C*, the president of *B* Corporation, procured *A* to pay his debt by giving a note to *B* Corporation on *C*'s endorsement of it and *C*'s promise to renew or procure its renewal at maturity. When, at maturity, *C* having paid the note to *B* Corporation sued *A*, the promise respecting the renewal was held not to be a defense (to an action on the note) for want of consideration for the promise. However, considering *arguendo* that fairness and our economic society would both have been better served by a contrary result, it must again be asked, on the same basis as it was asked earlier in this paragraph, "Does the enactment under discussion provide for that result?" Moreover, the Commission itself hints that the *De Cicco* case overrules the *Arend* case,<sup>28</sup> and if, as the Commission continues,<sup>29</sup> there is still doubt nevertheless, the Commission ought to have framed a recommended enactment which would not have left the matter in doubt.

The Commission admits that the courts have been astute enough to find consideration in meritorious cases of promises by third persons to induce one already under contract with another to perform his contract "despite the applicability of the general rule that a pre-existing duty defeats consideration".<sup>30</sup> The very objections to the *De Cicco* opinion of which the Commission complains<sup>31</sup> evidence the astuteness of which the Commission writes.

The past consideration enactment does not seem to have been necessary in respect to consideration for the promises of notes, as will be shown. Special factors require separate treatment of this problem, one of them being the considerable discussion by Mr. Whiteside in the Studies of the Commission.<sup>32</sup>

The need for consideration was unknown at law merchant.<sup>33</sup> This is not contradicted in any subsequent case, according to Judge Cranch.<sup>34</sup> Professor Ames thought that the whole doctrine of consideration in the law of commercial paper was a modern innovation.<sup>35</sup>

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<sup>28</sup> N. Y. LAW REVISION COMMISSION, Leg. Doc. (1936) No. 65(D) pp. 45, 46.

<sup>29</sup> *Id.* at p. 46.

<sup>30</sup> *Id.* at p. 206.

<sup>31</sup> *Id.* at p. 46.

<sup>32</sup> *Id.* at pp. 74-79, with their extensive documentation.

<sup>33</sup> *Pillans v. Van Mierop*, 3 Burr. 166, 97 Eng. Rep. 1035 (1765).

<sup>34</sup> Cranch, *Promissory Notes* (1801). This article by Judge Cranch was originally an opinion by him in *Dunlop v. Silver*, 1 Cr. C. C. 27, Fed. Cas. 4169 (1801), *contra* to *Mandeville v. Riddle*, 1 Cranch (5 U. S.) 290, 2 L. ed. 112 (1803). When, as reporter of 1 Cranch, he compiled the volume containing the *Mandeville* case, he rearranged his opinion into an article (it is the most thorough consideration ever given to the cases in the English reports during the absorption of law merchant, and covers all of them), and inserted it as an appendix to the volume, where it appears at page 368 (2 L. ed. 139). In part it has been duplicated in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1909) 72. Blackstone agreed that consideration was not required at law merchant (2 BL. COMM. 446), although his choice of documentation is unfortunate.

<sup>35</sup> AMES, CASES ON BILLS AND NOTES (1881) 872-876. Here Professor

If, however, notes were not negotiable at law merchant, these views did not include notes. Thus the question of whether or not collateral security for an antecedent debt is sufficient "consideration" for the promise of a note very largely depends on whether or not they were negotiable instruments at law merchant. Lord Holt held that they were not, in *Buller v. Crips*.<sup>36</sup> As a result it has been said that they were not negotiable until the statute of Anne,<sup>37</sup> which is an error<sup>38</sup> early made,<sup>39</sup> and found repeated in modern writings,<sup>40</sup> as Judge Cranch has shown.<sup>41</sup>

At any rate, *Buller v. Crips* did lead to the statute of Anne, which had the result of restoring the law as it existed before *Buller v. Crips*.<sup>42</sup>

There has not been any doubt of the negotiability of promissory notes, and of the appurtenance to them of all the incidents of negotiable instruments, if they are in proper form, since that enactment.

In New York we followed England's course and by statute<sup>43</sup> accomplished for ourselves what the statute of Anne had brought about over there.<sup>44</sup>

Ames makes the point which was the basis of Lord Holt's objections to these instruments, that notes are specialties and are effective by the mere fact of their formal execution; in other words, that they symbolize property and not contract, having transformed into the former the promise of the latter. *See also* *Carnright v. Gray*, 127 N. Y. 92, 27 N. E. 835 (1891).

<sup>36</sup> 1 Salk. 130, 91 Eng. Rep. 123 (1704). This most important case, under the name *Buller v. Crips*, first appears in the law reports at an earlier term of King's Bench in the same year in 6 Mod. 29, 87 Eng. Rep. 793. "And the court at last took the vacation to consider of it." It never appears again under the same name, and this led even such a thorough scholar as Judge Cranch (1 Cranch 416, 417, 2 L. ed. 158, 159), to say that no case was ever decided which held that a promissory note was not a negotiable instrument. It did, however, appear in the Trinity Term, at the citations first given above, under the name *Butler v. Crips*, where the decision against negotiability is to be found, as Messrs. Edgar, Sr. and Jr. have shown in their *CASES ON BILLS AND NOTES* (1939) 10.

<sup>37</sup> 3 & 4 Anne, c. 9, 1704-5.

<sup>38</sup> *See* note 41, *infra*.

<sup>39</sup> It is first found in the headnote of the second report of the *Buller* case, under the name of *Butler v. Crips*.

<sup>40</sup> 7 AM. JUR. 795, 796.

<sup>41</sup> This is the burden of Judge Cranch's work (*supra*, note 34). He cites many cases before the statute of Anne in which notes were held negotiable under the customs of merchants, in some of which Lord Holt himself had sat, and reminds us that Malynes in his *LEX MERCATORIA* wrote on the use of notes in England, and that the work of Malynes was published in 1622. Judge Cranch points to a note case of 1586, and continues by showing that only four cases prior to *Buller v. Crips* doubted the negotiability of notes, that Lord Holt was responsible for all of the doubts, and that his dislike of notes was based on their being specialties without seals. Thus the discovery that *Buller v. Crips* was in the end actually decided against negotiability can be seen for its importance, in that it did make necessary the statute of Anne.

<sup>42</sup> 1 Cranch (5 U. S.) 418-459, 2 L. ed. 159-177.

<sup>43</sup> N. Y. 1 REV. STAT. 768 (1788); *Carnright v. Gray*, 127 N. Y. 92, 27 N. E. 835 (1891); 1 Cranch (5 U. S.) 460, 2 L. ed. 177.

<sup>44</sup> *Carnright v. Gray*, 127 N. Y. 92, 27 N. E. 835 (1891); 1 Cranch (5 U. S.) 460, 2 L. ed. 177.



How, then, does it happen that there is *any* requirement for anything even resembling consideration to be the basis for the enforceability of the promise of a note?<sup>45</sup>

In *Pillans v. Van Mierop*,<sup>46</sup> some of the judges said that consideration was necessary only in the case of "parol" obligations. The truth of this was later denied by the House of Lords in *Rann v. Hughes*.<sup>47</sup> If the statements in the *Pillans* case had been confined to the law merchant instrument involved in the case, the House of Lords would not have mistaken the reference to "parol" as having been intended to be synonymous with "oral", and probably would never have uttered the merely seeming repudiation of the *Pillans* case in *Rann v. Hughes*, which did not involve a note or other law merchant instrument.

In spite of this mischance, it is nevertheless certain in England that collateral security for a precedent debt furnishes sufficient "consideration" for the promise in a note, in an action between maker and payee,<sup>48</sup> in spite of *Rann v. Hughes*.

It is clear, therefore, that the absence of need for consideration, which was the state of the law before *Buller v. Crips*, the statute of Anne and *Rann v. Hughes*, has not been changed to such a degree as to make collateral security for a pre-existing debt insufficient "consideration" for the promise in a note.<sup>49</sup>

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<sup>45</sup> That there is a requirement for consideration or something very like it is undoubted. N. Y. LAW REVISION COMMISSION, Leg. Doc. (1936) No. 65 (D) pp. 72-79 (Mr. Whiteside); WILLISTON, CONTRACTS §§ 108, 1146.

<sup>46</sup> 3 Burr. 166, 97 Eng. Rep. 1035 (1765). In this case it was held that there was no need for consideration in law merchant transactions.

<sup>47</sup> 7 T. R. 350a, 101 Eng. Rep. 1014a (1764).

<sup>48</sup> After some vacillation (*cf.* *Sison v. Kidman*, 11 L. J. C. P. 100, 133 Eng. Rep. 1365 [1842], *pro*, and *Crofts v. Beale*, 20 L. J. C. P. 186, 133 Eng. Rep. 436 [1851], *contra*), the English courts settled down to the doctrine in a case involving a bill of exchange in 1876. *Currie v. Misa*, L. R. 10 Ex. 151, 44 L. J. Ex. 94, *aff'd on another ground in the House of Lords*, 1 App. Cas. 554, 45 L. J. Q. B. 852, and the rule of that case was followed in an action between payee and maker of a note in 1883. *Stott v. Fairlamb*, 53 L. J. Q. B. 47, 49 L. T. 525 C. A.

<sup>49</sup> *In re Ranlett's Estate*, 118 Misc. 528, 193 N. Y. Supp. 639 (1922); *Bigelow Co. v. Automatic Gas Producer Co.*, 56 Misc. 389, 107 N. Y. Supp. 894 (1907); *Lake v. Tysen*, 6 N. Y. 461 (1852). *In re Ranlett's Estate* involved a claim upon a note given for a past indebtedness upon the clearest possible facts. The defendant was the maker-debtor. The plaintiff was the creditor-payee. The plaintiff succeeded. The note was obviously given as mere security though the account was marked "discharged." In the *Bigelow* case, services had already been rendered by the plaintiff-payee to the defendant-maker when the note was made. The plaintiff recovered. The court said, in passing, that the notes were in "payment," but no particular significance was attached to the word, which was used off-handedly and not in contradistinction to the security notion or function. In the *Lake* case, a note was given upon the "settlement" of something very like an account of past due items owed between the parties. The plaintiff payee-creditor succeeded in his action against the defendant maker-debtor. No facts showed discharge of the precedent indebtedness. The circumstances of these cases do not constitute discharge, but security merely, for the payee may recover upon the original indebtedness by

In the light of the foregoing, it is difficult to imagine the defeat of a plaintiff in an action upon a negotiable note which he received from a maker already obligated to him upon an indebtedness, when the motive and purpose of the transaction were to secure the creditor's debt, as by making proof less difficult and risky, or to enable the creditor to have a symbol by which to raise cash by discount, particularly if he did discount the note and, upon the maker's dishonor, has had to take it up for honor. When one considers the conjunction of five facts, the need for the past consideration statute under discussion seems to disappear: (a) New York was, after all, a state whose decisional law<sup>50</sup> reached the conclusion that security for a precedent debt was value in a transfer; that such security is sufficient "consideration" follows as a probability; (b) there is a dearth of cases holding that security for a precedent debt is not "consideration" enough to support an action upon the promise of a note; (c) at one time there was no requirement at all for consideration for the promises of notes, and a mere accident led to the partial institution of the requirement as a very modern innovation; (d) New York's statute<sup>51</sup> is the equivalent of the statute of Anne after which it became settled in the English law that security for a precedent debt validates the promise of a note; and (e) New York's existing decisional law points all but conclusively to the same result.

### C. *The Provision Relating to Gratuitous Assignments*

The provision declaring the validity of an unsealed but written and signed assignment without consideration is generally declaratory of the decisional law and equity,<sup>52</sup> although before the enactment a gratuitous assignment was subject to revocation,<sup>53</sup> whose legal consequence, when the fact of the revocation had been communicated to

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offering up the note. *Hilderbrandt v. Fallot*, 46 Misc. 615, 92 N. Y. Supp. 804 (1905); *Hughes v. Wheeler*, 8 Cow. 77 (N. Y. 1827); *Pintard v. Tackington*, 10 Johns. 103 (N. Y. 1813); *Holmes and Drake v. De Camp*, 1 Johns. 33 (N. Y. 1806); *see also Webster v. Laurence*, 13 Hun 180 (N. Y. 1878). Statements expressed or implied in cases such as these that the note is only evidence are, of course, belied by those cases in which the plaintiffs succeed in actions on the notes themselves.

<sup>50</sup> *Continental Nat. Bank v. Townsend*, 87 N. Y. 8 (1881); *Grocers Bank v. Penfield*, 69 N. Y. 502 (1877). The Court of Appeals, which said in *Kelso v. Ellis*, 224 N. Y. 528, 121 N. E. 364 (1918), that the uniform act had brought to New York the recognition of antecedent debt as value, seems to have overlooked these two cases, as pointed out by the Messrs. Edgar, Sr. and Jr., in their *BILLS AND NOTES* (1935) at page 73. The Law Revision Commission apparently agrees (Leg. Doc. [1936] No. 65[D] p. 75), for they, too, refer to these two cases as reflecting the New York law. Mr. Williston, also, seems to have overlooked them. *WILLISTON, CONTRACTS* §§ 108, 1146, nn. 65 and 69.

<sup>51</sup> N. Y. 1 REV. STAT. 768 (1788).

<sup>52</sup> N. Y. LAW REVISION COMMISSION, Leg. Doc. (1941) No. 65(M) p. 55; Leg. Doc. (1936) No. 65(D) pp. 272-274.

<sup>53</sup> *WILLISTON, CONTRACTS* § 438; *Alger v. Scott*, 54 N. Y. 14 (1873).

the assignor, was to redirect the obligation to the assignor to the extent that the obligor had not already acted upon the assignment by performing to and for the assignee.<sup>54</sup> Hence the chief consequence of this enactment in the future will be to dissolve the subjection to revocation under which a gratuitous assignment labored.<sup>55</sup> Thus a gratuitous assignment, when in writing and signed, becomes as irrevocable as does a written and signed offer which purports to be irrevocable. We are tending to make the law of property complete, in this case by perfecting the power of disposition.

#### D. The Provision Relating to the Irrevocability of Offers

As to the provision which creates the irrevocability of offers in certain cases: It is in derogation of the common law.<sup>56</sup>

Much has been written in the periodicals of the past year concerning the provision noted herein,<sup>57</sup> but the Commission's Reports for 1936 and 1941 are more significant, both generally and in particular connection with the enactment concerning irrevocability and its relation to the seal.

The Commission in its 1941 report and the law review commentators are nearly unanimous in their references to *Cochran v. Taylor*<sup>58</sup> (decided a year after the Commission's original report of its study) and in their quotation of a remark from the court's opinion by Judge Rippey that modern business necessitates more forcefully than ever that a seal create an estoppel to deny consideration.<sup>59</sup> The commentators, Mr. Hays and Mr. Glendening, are critical of the statement. The latter goes so far as to call it "astonishing". In support of himself, however, Judge Rippey cited Mr. Williston.<sup>60</sup> History seems to support Judge Rippey, as Mr. Hays himself, writing for the Commission, has noted,<sup>61</sup> and its report shows clearly that it is indebted to the court for pointing out the historical error<sup>62</sup> in which the Commission itself once participated,<sup>63</sup> and which led to the

<sup>54</sup> See note 53, *supra*.

<sup>55</sup> Here we have gone further than does law merchant, for negotiation requires value to support it, while this enactment is satisfied by an informal signed document of transfer without more.

<sup>56</sup> *Minneapolis & St. Louis R. R. v. Columbus Rolling Mill*, 119 U. S. 149, 30 L. ed. 376 (1886); WHITNEY, CONTRACTS § 34.

<sup>57</sup> Glendening, Jr., *Developments in the Law of Seal and Consideration in New York* (1941) 26 CORN. L. Q. 692; Hays, *Formal Contracts and Consideration: A Legislative Program* (1941) 41 COL. L. REV. 849.

<sup>58</sup> 273 N. Y. 172, 7 N. E. (2d) 89 (1937).

<sup>59</sup> 273 N. Y. 172, 179, 7 N. E. (2d) 89, 91 (1937).

<sup>60</sup> WILLISTON, CONTRACTS § 219.

<sup>61</sup> N. Y. LAW REVISION COMMISSION, Leg. Doc. (1941) No. 65(M) pp. 27, 28.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Id.* at pp. 23-28; Leg. Doc. (1936) No. 65(D) pp. 5-13.

phrasing of former Section 342 of the Civil Practice Act,<sup>64</sup> so that, in the light of the *Cochran* case, the former section was seen to accomplish nothing. Consequently, as part of its work in 1941, the Commission was able to recommend the present wording of that section.<sup>65</sup>

Furthermore, because what the Court of Appeals held in the *Cochran* case was that a sealed option reciting a consideration is irrevocable during the period stated in the option, Judge Rippey's observation can be seen to be neither untrue nor "astonishing", for, though he wrote in terms of a sealed offer of option, he was merely stating the very basis of the Commission's 1941 recommendation, namely, that there is need for the device of an enforceable option without a requirement for consideration. The fact that the enactment extends this quality of enforceability to an unsealed but signed writing indicates how strongly the Commission and the legislature agree with Judge Rippey's actual meaning.

Indeed, the extension of potential irrevocability to unsealed writings is, in the light of the *Cochran* case, the entire accomplishment of the statute, which can thus be seen to have done no more than cancel out the necessity for the letters "L.S." or a piece of red paper, as the red paper once cancelled out the need for a drop of molten wax.

### E. Conclusion

In conclusion, it should be pointed out that the second and third of the provisions under discussion, like the enactment validating deeds to lands adversely possessed against the grantor<sup>66</sup> and the statute taking away the power of avoidance in certain cases of business contracts of minors<sup>67</sup> adopted at the same legislative session which enacted the provisions noted here, constitute necessary recognition of the fact that great need exists for bringing the law of property and of trade more into line with behavior in trade and about property.

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<sup>64</sup> Formerly read: "1. A seal upon a written instrument hereafter executed shall not be received as conclusive or presumptive evidence of consideration. A written instrument, hereafter executed, which changes or modifies or which discharges in whole or in part a sealed instrument shall not be deemed invalid or ineffectual because of the absence of a seal thereon. A sealed instrument may not be changed, modified or discharged by an exculatory agreement unless such agreement is in writing and signed by the party against whom it is sought to enforce the change, modification or discharge. A sealed instrument so changed or modified shall continue to be construed as an instrument under seal."

<sup>65</sup> N. Y. LAW REVISION COMMISSION, Leg. Doc. (1941) No. 65(M) pp. 3, 23-28. So that the Act now reads: "Except as otherwise expressly provided by statute, the presence or absence of a seal upon a written instrument hereafter executed shall be without legal effect."

<sup>66</sup> N. Y. REAL PROP. LAW § 260, noted in (1941) 16 ST. JOHN'S L. REV. 150.

<sup>67</sup> N. Y. DEBTOR AND CREDITOR LAW § 260, noted in (1941) 16 ST. JOHN'S L. REV. 154.

However, since it seems that without the enactment relating to past consideration our law already contains all that is necessary to the world of trade and property of what the Commission says is desirable,<sup>68</sup> and, since its wording creates doubt that it can be held to accomplish more than to fix in our law some of the necessary expedients already there (unless it be construed to include others not desirable), its virtue must lie in that it gives to hand the means of dealing with some unknown problem of the future. This seems hardly a sufficient basis for running the risk of the drawbacks which inhere in the enactment, in the light of the general flexibility, and hence, efficiency, of the common law.

L. DEL VECCHIO.

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<sup>68</sup> N. Y. LAW REVISION COMMISSION, Leg. Doc. (1936) No. 65(D) p. 92.