THE CONSIDERATION OF FORBEARANCE

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Although the doctrine of consideration has been much investigated and discussed, there remain (such are the curious oversights of scholarship) several problems of which our knowledge is still surprisingly perfunctory. These problems, it is true, cannot be described as exactly modern, but they are important nonetheless: important because of their intrinsic complexity, important also because of the light they eventually may throw on consideration as a whole. One such problem, for example, has to do with the nature of a request for service;[1] another with the question when, in a tacit arrangement, consideration can be implied; yet another problem concerns the notion of forbearance. It is with this last that this paper will deal.

I

To understand the origins of forbearance, consider first some features of sixteenth century contract law. Where D (defendant) owed P (plaintiff) money for goods sold or money lent or services rendered, P had, of course, an action of debt against D, provided the sum P demanded was liquidated or fixed. But suppose that, instead of debt, P wished to sue D in case or *assumpsit,* an action which owing to several advantages was fast becoming a major contractual remedy. To bring *assumpsit,* however, involved the difficulty that this action had been applied in cases of misfeasance, but so far not in all situations more specifically contractual. Indeed, to apply to other cases, *assumpsit* had first to broaden its scope. This soon occurred in two developments. One development, relatively well-known and culminating in *Slade's Case,*[2] was to extend *assumpsit* to cases of debt and to other executed transactions as well. A second development, which will concern us now, was still far more obscure and extended *assumpsit* to the enforcement of certain purely executory agreements. To be sure, not agreements constituting the usual bargain or exchange (which had already become enforceable by way of mutual promises), but agreements often involving a purely unilateral concession by P to D. And it is for the purposes of this extension that the notion of forbearance became so essential a vehicle.

But forbearance of what kind? Obviously there could be several sorts. The first and simplest would consist of some concession (in-

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1 An article on 'The Consideration of Request' will be published in the November 1965 issue of *M.U.L.R.*

2 (1602) 4 Co. Rep. 91a.

variably, a delay) in enforcing an existing legal right such as a debt that D owed to P. Of such forbearance the effect, as one can see, was not to create an entirely new liability, for D already was and remained liable on the debt. Rather, the effect was to prepare an additional basis of liability so as to let in *assumpsit* as an alternative remedy. As to this, however, the complication was that *assumpsit* could not be brought on any undertaking or promise by D, even a promise (as here) to pay an existing debt at a later date. To bring *assumpsit,* P had to show some 'consideration' on his own side; which meant that his forbearance to sue for a while had to be a discernible detrimental act, not just a polite omission of no further consequence. Hence arose the requirement that P's forbearance could not last merely 'an hour or less', which indeed was an understandable condition seeing that a delay for (say) a minute or two could hardly be said to make enough of a difference to constitute a new liability alternative to debt. Unfortunately, the time requirement was given a wider interpretation in *Lutwich v. Hussey,*[3] apparently the first case on this. Here D promised to pay both his and his father's debts if P would suspend his demands for a little time *(paululum cesarret).* D objected, successfully, that this promise lacked consideration, since P had not said how long he would forbear, 'for, if he did forbear for a quarter of an hour or less, he hath performed the word, *quod paululum cesarret;* and although the plaintiff doth allege he did forbear for half-a-year, this will not help the case.' What mattered, in short, was not how long P *had* forborne, but whether he *might* have forborne for too short a time.

This interpretation, it is easily seen, completely overlooked the realities of the case. In circumstances of this kind, P's delay would more often than not be both informal and unspecified. Furthermore, although as a matter of practical necessity the delay would always be longer than 'an hour or less', it would usually still be relatively short. It would be short because a debtor would only ask for a little time, as usually he would not be allowed more, to pay his original debt. And these points were soon recognized. Thus in *Whorwood v. Gybbons*[4] D promised to pay his debt at a later day, 'in consideration that [P] would defer payment *per parvum tempus*'. The Court now dismissed the objection that *parvum tempus* was not enough, as P had in fact forborne for the full period that D had requested of him. Similarly, in *May v. Alvares*[5] D had promised to return some goods belonging to P within six months if P would forbear the goods. D then argued that this promise was without consideration, since P had not actually promised to forbear for a certain time, 'for so he might forbear but

[3] (1583) Cro. Eliz. 19.
[4] (1587) Gouldsb. 48.
[5] (1594) Cro. Eliz. 387.

for a quarter of an hour'. Again it was held to be sufficient consideration if P did forbear for six months, which in any case was the period 'implied' by D's own promise of delivery. These as well as some later cases,[6] coupled with the circumstance that a debtor would usually ask for more time than just 'an hour or less', were very soon to deprive the time requirement of any real significance. It is true that the cases continue to pay lip-service to it,[7] and this because P had to justify his allegation of forbearance, as it was upon this forbearance that his action in *assumpsit* was based.

II

Forbearance, moreover, was to continue to be of direct importance in two situations closely related to the above. Firstly, the parties could go a step beyond the simple modification of an existing liability; that is, they could agree not merely to postpone payment of the debt, but could agree that D should pay a special price, or give special security, for the delay, especially where this was to be for a substantial period of time. Here, of course, P had two actions: one on the old debt when the modified day for payment would accrue; and one on the new agreement for the additional liability. This latter agreement, moreover, had to be enforceable in its own right. If, for example, D was to make an additional payment, P had to take care not to infringe the laws against usury.[8] And if D was to provide a separate security, P had to show that he too was giving something in exchange. This point is well illustrated in *Alliance Bank v. Broom*.[9] A customer having agreed to give a bank security for an overdraft, the bank then sought specific enforcement of this agreement, upon which the customer *demurred* that it was *nudum pactum*, there being no consideration as the bank had not actually promised to forbear. The Court was not impressed: in their view the bank had in fact forborne, which was clearly of benefit to the customer. Or, as was pointed out in another case, where at D's request, the creditor does in fact forbear, this is a sufficient consideration binding D, even if the creditor does not expressly undertake to forbear.[10]

6 *Infra*. Section III.

7 E.g. *Tolson v. Clerk* (1636) Cro. Car. 438. For some recent interest in all this, see G. D. G. Hall, 'An Assize Book of the Seventeenth Century' (1963) 7 *American Journal of Legal History* 228, 239.

8 As in *Pollard v. Scholy* (1595) Cro. Eliz. 20 where D agreed to pay P for his forbearance for some time a special sum which was, however, above the legal interest chargeable. The decision was that the subsequent agreement was void for usury, though the old contract stood.

9 (1864) 2 Dr. & Sm. 289.

10 *Crears v. Hunter* (1887) 19 Q.B.D. 341. This agreement for security was given a wider effect in *Fullerton v. Provincial Bank of Ireland* [1903] A.C. 309 and *Glegg v. Bromley* [1912] 3 K.B. 474.

Where, on the other hand, a debtor or his solicitor manages to procure a delay for payment without disclosing that he has prepared a security for his creditor, the latter will not be able to enforce this security. Not because there is here no forbearance in fact on the creditor's part (for well there might be), but because the forbearance does not connect the creditor with the debtor so as to allow one to imply an agreement for security as between P and D.[11] But, in any case, even where such an agreement is held to exist, this will not extinguish the debt, but will only suspend it for the currency of the security.[12]

Secondly, the parties, instead of merely modifying, or adding to, an existing liability, could agree to completely abandon or relinquish it, with or without substituted rights. They could agree, in short, to something amounting to a settlement or compromise. In early law, this sort of agreement would take many forms. So P might agree to cancel a bond if D would submit to arbitration,[13] or P might agree to 'surcease' a suit in connection with a will,[14] or agree to desist from suit in Chancery,[15] or consent to forbear to execute an order for the debtor's outlawry,[16] or agree to stop further prosecution,[17] or to forbear from requiring sureties of the peace,[18] or agree to stay all proceedings forever,[19] in which instance the Court indeed said that it 'is a very clear case: here the promise is mutual, the plaintiff promised to stay and surcease his suit, and the defendant promised to pay the £100'.[20] This kind of agreement, therefore, was meant to have a twofold effect. It was a compromise to bar all further action by P against D on the settled liability, in which respect it had the effect of an executory accord.[21] Secondly, the agreement was to operate like

11 'The mere existence of a debt from A. to B. is not sufficient valuable consideration for the giving of a security from A. to B. to secure that debt . . . . [So] where there is no communication of the security, where there is no express agreement, and there are no circumstances from which the Courts can imply any agreement, then there is no possibility of its being said with any justice that any consideration has been given at all': *Wigan v. English & Scottish Law Life Association* [1909] 9 Ch. 291, 297-298 *per* Parker J. *Cf. Oliver v. Davis* [1949] 2 All E.R. 353, 360 *per* Evershed M.R.

12 *Baker v. Walker* (1845) 14 M. & W. 465; *Re A Debtor* [1908] 1 K.B. 344; and see also *Nash v. Armstrong* (1861) 10 C.B.N.S. 259, 267 *per* Williams J.

13 *Brett & Peagrim's* case (1584) 3 Leon. 105, Owen 7.

14 *Rivett & Rivett's* case (1588) 1 Leon. 118.

15 *Dowdenay v. Oland* (1600) Cro. Eliz. 768.

16 *Jennings v. Harley* (1602) Cro. Eliz. 909.

17 *Dell v. Fereby* (1602) Cro. Eliz. 868.

18 *Rippon v. John Norton* (1601) Cro. Eliz. 849, 881 where P, having been beaten up by D's son, had complained to a Justice of the Peace. So that P would desist from proceeding with this complaint, D assumed that his son would keep the peace against P. The latter now brought action, having again been beaten and wounded.

19 *Pooly v. Gilberd* (1612) 2 Bulst. 41. 20 *Ibid.*

21 *Crowther v. Farrer* (1850) 15 Q.B. 677. But observe that this compromise would not have the same effect as regards a judgment debt: *Anon.* (1774) 1 Cowp. 128.

any other bargain in which one party buys something from another, in this instance D buying P's forbearance, or rather P's total or partial abandonment of a right.

Thus the question arose as to whether P indeed had anything to forbear. Surely D could not be said to have bought or procured an abandonment, when in truth P had no right that he could properly abandon or modify. In *Stone v. Wythipol*,[22] where this question was first raised, a promise to pay an infant's debt, if the creditor were to give more time, was held a bad promise, since the infant's debt was void. Similarly was it held to be insufficient consideration where the promise related to a liability that had died with the tortfeasor.[23] Nor was it a good promise where P agreed to forbear distraining corn which, in fact, was not distrainable.[24] 'If there be no consideration at the time, or no cause of action, the forbearance afterwards will not make it actionable.'[25] But there were these qualifications. The agreement would be actionable if the liability that P relinquished had a stronger foundation, that is, if it was not void but merely voidable,[26] or (a problem known much better today) where the forborne liability was not void but was genuinely doubtful, *i.e.*, if it was 'a serious claim honestly made'.[27]

III

We turn to another aspect of forbearance which has to do with the surety or guarantor. The latter's position was peculiar indeed. Suppose that a person (D) asked another person (P) to forbear, for a long or a little while, a debt owed by a third person (X). Suppose that P so did, relying on D's personal promise to pay X's debt. Suppose then that X himself made default, could P sue D on this promise of guarantee? An early case admitted that *assumpsit* might lie,[28] though it was not at all clear how this would meet the difficulty about consideration, the difficulty being that since the surety here received no personal or material advantage, was he not really just a well-meaning stranger *vis-a-vis* P? Presently this difficulty was over-

22 (1593) Cro. Eliz. 126, Latch 21.
23 *Tooley v. Windham* (1590) Cro. Eliz. 206.
24 *Morgan's* case (1630) Styles 304, 305.
25 *Beven v. Cowling* (1626) Poph. 183.
26 This qualification was early recognized: *Morning v. Knop* (1599) Cro. Eliz. 700; and see also *Loyd v. Lee* (1718) 1 Stra. 94, 95.
27 *Miles v. New Zealand Alford Estate Co.* (1886) 32 Ch. D. 266, 283 *per* Cotton L.J. This rule, which had started with *Longridge v. Dorville* (1821) 5 B. & Ald. 117, was however not accepted without difficulty: see, in particular, *Callisher v. Bischoffsheim* (1870) L.R. 5 Q.B. 449.
28 *Jordan's case* (1528) Y.B. 19 Hen. 8, 24, 3 where Brook J. reminded the Court of earlier cases where D asked P to supply bread to X, promising to pay in case of X's default, and D was held liable in *assumpsit*. It was strongly argued that the proper action was debt, but the Court had no doubt that case would lie either because debt would not, the defendant not having a *quid pro quo*, or because *assumpsit* could be regarded as an alternative to debt.

come by shifting the emphasis from D's own advantage or benefit to P's forbearance or detriment, it being said that there was sufficient consideration if P's forbearance was not merely 'for a quarter of an hour, or other small time'.[29] The justification for requiring a longer forbearance was to ensure that X, the true debtor, would receive a real benefit, that there would be 'an ease to the vendee'.[30] But, strictly speaking, it was of course irrelevant whether or not X did receive such a benefit, as this could not affect the consideration, if any, as between P and D. The truer reason for requiring a longer forbearance was the same as before: that in its first phase the availability of *assumpsit* still entirely depended on identifying some new element in the situation, such as a particular detriment (forbearance) suffered by P.[31]

Nevertheless, once the availability of *assumpsit* had become assured, the older objections about short forbearance again lost their earlier strength. Thus in *Cooks v. Douze*[32] a forbearance *per paululum tempus* was held good, despite the objection that such a promise lacked consideration for lack of certainty. While agreeing that various precedents had adjudged a short forbearance to be bad, the Court thought that what really mattered was that the creditor had promised to forbear and had in fact forborne. Similar objections, however, continued to be urged, sometimes with considerable success. In one decision a forbearance for an *indefinite* time was held not to suffice, for indefinite time is 'no more than *per paululum tempus*',[33] while in another it was emphasized once more that forbearance for a short time would *not* amount to sufficient consideration,[34] a point that had also been made in *Tricket v. Mandlee*[35] where *Cooks v. Douze* was disapproved. However, *Tricket v. Mandlee* did uphold a forbearance for a *reasonable* or *convenient* time, just as other cases decided that an undertaking to forbear *generally*, without mention of time, would be construed as an absolute forbearance, not just a short one.[36] Perhaps the most important step was to hold that forbearance for a *time certain* would be enough, since a defendant cannot complain of time being too short if he himself specified the period of time extended to him.[37]

29 *Philips v. Sackford* (1595) Cro. Eliz. 455.
30 *Sherwood v. Woodward* (1599) Cro. Eliz. 700.
31 Accordingly *assumpsit* was refused where a defendant had promised to hand over money received from a third party; though (as the Court added) the result would have been different had P given D an extra day: *Howlet v. Osbourn* (1594) Cro. Eliz. 380.
32 (1632) Cro. Car. 241. Here P had lent money to X at D's request. P had already long forborne and upon D's request forbore for a longer time.
33 *Tolson v. Clerk* (1636) Cro. Car. 438 (D indebted to P).
34 *Russel v. Haddock* (1666) 1 Sid. 294.
35 (1661) 1 Sid. 45; and see also *Bracham's* case (*circa* 1625) cited Latch, 151.
36 *Cowlin v. Cook* (1625) Latch 151; *Anon.* (1672) 1 Freem. K.B. 66.
37 *Best & Jolly's* case (1661) 1 Sid. 38; *Quick v. Coppleton* (1665) 1 Lev. 161; *Yard v. Ellard* (1695) Carth 462.

After this, any forbearance would be good unless the parties had expressly mentioned that the forbearance was to be for an 'indefinite' period, and where furthermore 'indefinite' would have to be construed as something less generous than (say) a reasonable time. Not only was this extremely unlikely, but (what is now still more important) it entirely ceased to matter of what duration the forbearance was. This is shown by *Harris v. Richards*[38] where in consideration that P would forbear to sue another for £20 for some time, and would also pay off a debt owed by D to another person, D promised to pay P the above mentioned £20 plus the money advanced by P. This was really an elaborate way of obtaining money (£55) at £20 interest, but an arrangement still advantageous to D who would otherwise have become liable on a much larger bond. Yet D then argued that his promise lacked consideration not having had any 'benefit thereby'. This argument the Court dismissed: 'it is a sufficient consideration that the plaintiff at his request would forbear it.'[39] Indeed, this not only settled any doubt as to whether a guarantee could be regarded as a 'benefit' to the guarantor,[40] but with forbearance now considered as an act of service given on request, it followed that any forbearance would furnish sufficient consideration provided the defendant had actually requested it, as invariably he did and as, indeed, he had to do if P's forbearance could at all be attributed to D.[41]

The result is that in these cases, too, forbearance was to lose its special significance. Not, it should be noted, because it ceased to be a necessary condition for bringing *assumpsit,* for a forbearance for 'an hour or less' would still not suffice. But, rather, because a forbearance was anyhow admitted wherever there was a relation of suretyship. Thus to say that P had forborne to sue X at D's request was another way of saying that P and D had entered upon a contract of guarantee. This, to be sure, did not conclude the role of forbearance even in guarantee, for that role now shifted to another sphere. For even granting that *assumpsit* would lie to enforce a guarantee, this did not mean that *every* guarantee would be enforceable. Consider the situation where a person was induced to give a guarantee

38 (1632) Cro. Car. 272.

39 *Ibid.* 273.

40 For these questionings see *Bidwell v. Catton* (1617) Hob. 216; *Rolte v. Sharp* (1628) Cro. Car. 77; *Best & Jolly's* case (1661) 1 Sid. 38.

41 See *supra* Section III on this point. In *Harris v. Venables* (1872) 7 L.R. Ex. 235, 240 Bramwell B. observed that 'if a man expressly contracts that on a particular petition being withdrawn he will pay a sum of money, that is good contract'. This is in reply to *Ross v. Moss* (1597) Cro. Eliz. 560 where it was held that the mere relinquishing of a suit was not enough, for P 'might relinquish it today, and afterwards begin it again'. Baron Bramwell was not worried by this possibility. For one thing because it is the defendant's own folly not to provide against another petition being filed. For another, because the plaintiff's forbearance still provides a real benefit to the defendant, especially when remembering the former's disinclination to commence new proceedings after labour and expense have been incurred.

by some feeling of fear, or by the desire simply to avoid trouble or embarrassment. 'If I say to one, do not trouble me and I will give you so much, this is not actionable, for there ought to be a lawful ground.'[42] Initially, great uncertainty existed as to what such a good ground would be. In *Hume v. Hinton*,[43] for example, a mother promised to pay a debt owed by her dead son, provided the creditor would forbear for a certain time. Her promise, it was said, was based merely on 'the piety of the mother',[44] but it was, nevertheless, held good. Later decisions saw such situations in a different light. So where a deceased debtor's wife, who was afraid of the creditor, made a promise to pay within a certain time, her promise was regarded as bad, since she had promised out of fear.[45] Nor, and still more obviously, was it a valid promise that was inspired by 'unlawful terror', or based on the 'threatening of an unlawful suit', not on the abandoning of a 'concrete right'.[46] In particular, there was no forbearance of a concrete right where P merely agreed not to join with his uncle in defending a suit brought by D;[47] or where (as in an even more well-known case) a son promised to forbear making further complaints.[48] Can an agreement, asked the Court, by a son not to bore his father constitute a binding contract? If such a promise could be good, there could never be such a thing as *nudum pactum*.

Still, if effective, how effective was such an agreement to be? This question arose in *Harris v. Venables*.[49] The plaintiff, having petitioned for the compulsory winding-up of a company, the defendants signed a guarantee to the effect that they personally would pay the plaintiff his debts within 18 months as well as indemnify him against all other costs if he withdrew the petition against the company. The question was whether the plaintiff's forbearance was intended to be for some time only or was to be for the full 18 months. It was held that the plaintiff could recommence his petition within the 18 months, it being shown that the company had filed a petition for voluntary

42 *Goodwin v. Willoughby* (1625) Poph. 177, 178.
43 (1651) Style 304.
44 *Ibid.* 305.
45 *Quick v. Coppleton* (1665) 1 Lev. 161; *Hunt v. Swain* (1665) 1 Lev. 165. It was admitted, however, that if the creditor's forbearance had been general and not confined to the woman alone, her promise would have been for a sufficient consideration.
46 *Jones v. Ashburnham* (1804) 4 East 455, 465. As Lord Ellenborough rightly pointed out, forbearance must mean the giving up of a concrete right: 'No right can exist in this vague, abstract, and indefinite way. Right is a correlative term: there must be some object of right; some object of suit; some party who, in respect of some fund or some character known in the law, is liable; otherwise there cannot be said to be any right': *ibid.* 463. And as Grose J. added: 'It is a perversion of terms to call that a forbearance to sue if there were no person capable of being sued: and here none is shown': *ibid.* 466.
47 *Rutter's* case (1671) 1 Freem. K.B. 21.
48 *White v. Bluett* (1854) 23 L.J. Ex. 36.
49 (1872) 7 L.R. Ex. 235.

liquidation. Such special facts apart, the rule would, nevertheless, seem to be that P would have to maintain his promised forbearance for the full period of D's guarantee.[50]

IV

So far the major contribution of forbearance had been to extend assumpsit to agreements which, far from creating original bargains, were rather designed to take effect upon some debt or liability already existing. In the situations we first considered, the action of *assumpsit*, as grounded on forbearance, helped to enforce an agreement modifying or relinquishing an earlier contract. In the other cases, concerned with principal and surety, the notion of forbearance helped to establish a new relationship between a creditor and a guarantor, though this agreement too depended on another contract, that between the creditor and X, the true debtor. In other words, what forbearance had done was to extend *assumpsit* to what we might well call auxiliary contracts, indeed, contracts that but for the present development would have remained unenforceable except by formal, sealed covenant. That these contracts had this *auxiliary* character was, however, not fully recognized. Certain cases, it is true, began to mention a 'collateral' function, but they were more directly concerned with a pleading point. An example is *Therne v. Fuller*,[51] where P was on the verge of procuring the arrest of X, his debtor, when X's brother (D) assumed to pay both debt and costs in consideration of P desisting from further suit. It was clear that D was liable in *assumpsit*, but D nevertheless objected to P's failure to declare 'how and in what manner he [D] became indebted'. The Court dismissed this objection: 'for although it be [as all the justices here agreed] that an *assumpsit* lies not upon a general allegation against the party, *quod indebitatus assumpsit*, without showing how he was indebted, *viz*, for ware sold or money lent, or such good cause; yet forasmuch as the debt is here *collaterally* due by another and the consideration is the staying the suit after the arrest, it is good enough.'[52]

We now turn to an entirely different type of forbearance that is connected with the executor. This raises some very special problems which are in urgent need of unravelling. To begin with it should be remembered that an executor may be liable in two different ways:

[50] *Cf. Rolt v. Cozens* (1856) 18 C.B. 673 where an agreement to forbear was held to run for the full period.

[51] (1616) Cro. Jac. 396.

[52] *Ibid.* 397. The writer's italics. The same point is made in *Austin v. Bewley* (1619) Cro. Jac. 548 where the relationship was directly between debtor and creditor, not involving a guarantee. These procedural developments had been originated by *Davies v. Warner* (1613) Cro. Jac. 593 and *Papworth v. Johnson* (1614) 2 Bulst. 91, both concerned with the executor's personal liability, as to which see *infra*.

in his representative and in his personal capacity. An executor was held personally liable where, for example, he had incurred further debts on his own account. In *Hatch & Capel's* case[53] where D's husband being indebted to P for beer, and the husband having died, his widow asked for more beer, promising that she would pay P both for her own and her husband's beer at a day certain, the Court was unanimous that *assumpsit* would lie, 'for they said that the forbearance of the money is a good consideration of itself; and they said, in every *assumpsit,* he who makes the promise ought to have benefit thereby, and the other is to sustain some losse'.[54] The widow thus became liable *de bonis propriis,* simply because (as an earlier case had put it) it was 'her own proper debt, as if she had entered into an obligation'.[55]

Take next the more normal case of the executor being sued in his representative capacity, that is, sued not for his own debts but for those of the testator. Here the executor would only be liable *de bonis testatoris,* to the extent of the assets actually left to him. Here, again, the appropriate action was debt, so that the question arose whether, and how, *assumpsit* could be made available against him. The great difficulty came from the well-known rule that personal actions did not survive the debtor; nor, in spite of intimations to the contrary, including *Pinchon's* case,[56] was it yet very certain that contractual actions would survive. For, though it was generally granted that an action like debt would survive, *assumpsit* seemed rather more of a personal undertaking.[57] Could this difficulty be turned? Would it be enough if the executor separately promised to pay the testator's debts? An early case thought it would, provided the executor had been left with sufficient assets out of which to pay.[58] Other decisions took a similar view, though they insisted that this, like any other promise, had to be supported by sufficient consideration, such as a creditor's forbearance in giving the executor more time to pay until probate was granted to him.[59] This approach, though of obvious help in letting in *assumpsit,* converted the executor's liability into an entirely personal one. How personal it was can be seen in *Davies v. Warner.*[60]

53 (1613) Godb. 202.
54 *Ibid.* 203.
55 *Wheeler v. Collier* (1595) Cro. Eliz. 406, 407.
56 (1612) 9 Co. Rep. 86b.
57 This doubt appears clearly in *Sanders v. Esterby* (1616) Cro. Jac. 417; *Bidwell v. Catton* (1617) Hob. 216; *Clark v. Thomson* (1621) Cro. Jac. 571; *Fawcet v. Charter* (1623) Cro. Jac. 662.
58 *Trewinian v. Howell* (1588) Cro. Eliz. 91.
59 See *Escrigs Case* (1589) 4 Leon. 3 and *Filcocks and Holts Case* (1590) 1 Leon. 240. Thus in *Smith v. Jones* (1610) Yelv. 184, or *Rosyer v. Langdale* (1650) Sty. 248, the executor was held not chargeable where no such extra element of consideration could be found.
60 (1613) Cro. Jac. 593.

Here P declared generally against an executor, a general declaration that was upheld: it was upheld because the action, said the Court, was not founded on the testator's debt, but was grounded on the executor's own promise, a promise now regarded as entirely personal or collateral to him.[61]

This approach also had a more unfortunate effect. The emphasis on personal liability rather suggested that the executor's liability was in every sense genuine, rather than just being a way out of the non-survival rule. Regarded as a strictly personal promise, moreover, awkward questions could soon be asked. Why should an executor actually be taken to have promised to pay? Why should he make any such personal promise at all, having regard to the fact that he might have had no ambition to be a benefactor, or having regard to the fact that at that time (and, indeed, until the Wills Act of 1837) the executor was also a residuary legatee who took what was left over or undistributed? More briefly, how could one say that the executor had promised when that promise was of no benefit to him? To all this the various replies were profoundly inadequate. One was that the promise was good, 'though he hath no benefit at all thereby; as if one saith to such a school-master, teach such a one, and I will give you so much for your pains; this is a good promise, and shall bind him, though he hath no benefit at all by it'.[62] Another was that creditor's forbearance was given at the executor's request, so that the former rendered a service to the executor.[63] Other objections were still more practical. How could one be sure that the executor had, in fact, promised to pay, if it was not shown whether the testator was really indebted, or whether the executor had been left sufficient assets in his hands? Again the replies were peculiar. Briefly these were that one simply had to assume that the testator was indebted or that he had left sufficient assets: 'it shall be intended he had, otherwise he [the executor] would not have made such a promise',[64] and in any case, 'suits shall not be presumed causeless'.[65] Be this as it may, this is the basis upon which it became established that an executor's promise, if supported by the creditor's forbearance, would be enforce-

61 To the same effect: *Papworth v. Johnson* (1614) 2 Bulst. 91, 92 where the Court remarked that unless the executor could be held personally liable, *assumpsit* would not lie: 'for it might grow upon a simple contract, and so the executor not to be charged with the same'. Or, as it was pointed out elsewhere: 'The plaintiff hath here laid in facto, that he had forborne her long; this is personal actionable, and by this her assumpsit, she has made herself liable to be charged': *Chapman v. Barnaby* (1614) 2 Bulst. 278.

62 *Chapman v. Barnaby* (1614) 2 Bulst. 278, 279.

63 *Townsend v. Hunt* (1635) Cro. Car. 408; and see *Smith v. Smith* (1670) 1 Mod. 235.

64 *Bothe v. Crampton* (1615) Cro. Jac. 613; *Davies v. Warner* (1613) Cro. Jac. 593; *Banes'* case (1612) 9 Co. Rep. 93.

65 *Bidwell v. Catton* (1617) Hob. 216.

able, and enforceable whether or not the executor had sufficient assets.[66] In this way also began a line of cases that were to cause a great deal of trouble; so much so that the Statute of Frauds legislated a requirement that such promises had to be in writing.[67] But this is another tale.

V

To conclude this study of forbearance, let us then summarize, in a brief and general way, the main points emerging from a mass of often very complicated law. In the first place, and as our first cases have shown, the notion of forbearance was of vital help in extending the action of *assumpsit* to the enforcement of certain agreements, the purpose of which was not to create original exchanges,[68] but was rather to create agreements of an auxiliary kind, such as agreements to modify or relinquish existing liabilities or to reinforce these liabilities through a guarantee. These auxiliary agreements, as well as being bilateral (typically, P abandoning a right against D for D's promise of a new price), could also be unilateral (such as P postponing the date of a debt or D offering to become a surety). Unfortunately, this unilateral feature was greatly obscured by the invariable mention of forbearance, as though this were a separate 'consideration', when, in fact, it was merely a way of saying that some concession had been made.

A second contribution of forbearance was to help in the enforcement of promises of a peculiar kind: peculiar because they were promises not designed to create original transactions, nor even to introduce auxiliary agreements, but were promises whose point was simply to avoid or circumvent certain impediments barring otherwise quite ordinary contractual claims. The chief instance of this was the executor's promise which, supported by the creditor's forbearance, could be regarded as a separate liability so as to avoid the principle that personal actions would not survive. There were other examples: one, in which forbearance helped to overcome the rule that *assumpsit* could not lie for rent, as it could not be brought on a contract real;[69] another, where forbearance was used to escape certain disabilities hindering recovery under the gaming laws.[70]

Thirdly, forbearance was used in quite another context that had to

[66] *Porter v. Bille* (1673) 1 Freem. K.B. 125; *Scot v. Stephenson* (1662) 1 Lev. 71; *Davis v. Rayner* (1671) 2 Keb. 744, 758; *Hawes v. Smith* (1675) 2 Lev. 122.

[67] *Rann v. Hughes* (1764) 7 T.R. 350n.; *Atkins v. Hill* (1775) 1 Cowp. 284; *Hawkes v. Saunders* (1782) 1 Cowp. 289.

[68] As regards original exchanges, forbearance was indeed a superfluous notion: see, for example, the case of *Nyulasy v. Rowan* (1891) 17 V.L.R. 663.

[69] *Green v. Harrington* (1619) 1 Br. & G. 14; *Brett v. Read* (1634) W. Jones 329.

[70] See on this Cheshire and Fifoot, *The Law of Contract* (5th ed. 1960) 256 ff.

do with the question whether certain agreements relating to compromises or guarantees should or should not be enforced on other grounds: such as compromises turning out to be illusory, P having no concrete right to give up, or guarantees proving to be inspired by fear. These grounds, of course, were raising rather different matters, matters far more akin to things like failure of consideration, or duress, or public policy. In these cases, therefore, forbearance did not represent a separate or essential notion, but, in fact, rather duplicated questions more properly belonging elsewhere. Yet it is in connection with these cases that the notion of forbearance has survived, while the situations in which forbearance did make a distinctive contribution belong to the formative stages of *assumpsit*, and thus also belong to past history.