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DOCTRINE OF CONSIDERATION AND THE CIVIL LAW PRINCIPLE OF CAUSE

ABRAM GLASER*

Aside from its academic interest, three practical reasons may be given for the choice of this subject: (1) the growing importance of our trade with Spanish-American countries demands a knowledge of the principle of Roman *cause*, which determined the validity of contracts made in most civil law jurisdictions; (2) the validity of contracts made in parts of the United States and its possessions,¹ where the common law is blended with principles of the civil law, may depend upon the same principle; (3) the common law doctrine of consideration in recent years has been under increasing attack and has had to submit to piecemeal statutory changes. In order that these changes may be made wisely it is important to trace the history, and examine the bases, of its subtleties and evasions, and, among other things, to inquire whether in the differing principle of Roman *cause* there is some ultimate juristic reason toward which we are unconsciously tending or consciously ought to tend.

It is generally admitted that the application of the strange and artificial doctrine of consideration results in inconsistencies and anomalies which at times defeat the legitimate intentions of contracting parties and tend to undermine confidence in the integrity of our system of jurisprudence.

The case of *Jaffray v. Davis*² is one of many illustrations in point. In that case the defendants, owing the plaintiffs \$7714.37 for goods sold and delivered, gave to the plaintiffs their three promissory notes, amounting to \$3462.24, secured by a chattel mortgage on the stock, fixtures, and other property of the defendant, which the plaintiffs agreed to accept in full satisfaction and discharge of the indebtedness. After the notes were paid, and the mortgages were discharged of record, the plaintiffs sued for the balance of the indebtedness, alleging lack of consideration for their agreement to release the defendants from its payment. The court held that the agreement was supported by sufficient consideration. It cited the case of *Foakes v. Beer*^{2a} where it was said "that a lesser sum cannot be a satisfaction of a greater sum, but the gift of a horse, hawk, or robe, etc. in satisfaction, is good," quite regardless of the amount of the debt.

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¹Louisiana, Puerto Rico, the Canal Zone and the Philippine Islands.

²124 N. Y. 164 (1891).

^{2a}L. R. 9 App. cases 605.

At page 167 the court added:

"This single question was presented to the English Court in 1602, when it was resolved, if not decided, in Pinnel's Case, 5 Coke 117, 'that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole,' and that this is so although it was agreed that such payment should satisfy the whole. This simple question has since arisen in the English courts, and in the courts of this country, in numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed upon any recurrence of the question to criticize and condemn its reasonableness, justice, fairness, or honesty. The steadfast adhesion to this doctrine by the courts, in spite of the current of condemnation by the individual judges of the court and in the face of demands and conveniences of a much greater business, and more extensive mercantile dealings and operations, demonstrate the force of the doctrine of stare decisis."

The incongruous implications of this decision are apparent. If the defendants, though with greater difficulty, had immediately paid the plaintiffs the same sum in cash, which, it must be inferred, the plaintiffs would have preferred to the secured promissory notes, the plaintiff would have recovered the balance of \$4252.13, since their release in that case would have been without consideration.

It was even suggested in the case that if the defendants had merely given unsecured promissory notes, i.e. only written promises to pay, the court, on the authority of *Sibree v. Tripp*,³ which it cites, might have held that the discharge of the debt was based on sufficient consideration, on the ground stated in that case, "the circumstance of negotiability making it in fact a different thing, and more advantageous, than the original debt, which was not negotiable."

In *Fitch v. Sutton*⁴ a composition agreement was held inoperative and *nudum pactum*, but subsequently, in *Couldery v. Bartrum*,⁵ the collateral agreement of creditors to be satisfied with the part payment was held to satisfy the technical requirement of consideration. Sir George Jessel, Master of the Rolls, ironically said:

"According to English common law a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or canary, or a tomtit, if he chose but, by a most extraordinary peculiarity of the English Common Law, he could not take 19s. 6d. in the pound; that was *nudum pactum* That was one of the mysteries of the English common law."

³15 Mees & W. 26.

⁴5 East 230 (K. B. 1804).

⁵19 Ch. D. 394, 399 (1881).

He added that, because of the obvious advantage of composition agreements to creditors in cases of insolvency, and because "every debtor has not a stock of canary birds or tomtits, or rubbish of that kind, to add to his dividend, it was felt desirable to bind the creditors in a sensible way by saying that, if they all agreed, there should be a consideration imported from the agreement constituting an addition to the dividend, so as to make the agreement no longer nudum pactum".

As Dean Roscoe Pound observes in his INTRODUCTION TO PHILOSOPHY OF LAW:⁶

"The doctrine of consideration with its uncertain lines stood in the way of many things which the exigencies of business called for and business men found themselves doing in reliance on each other's business honor and the banker's jealousy of his business credit, with or without assistance from the law."

ROMAN PRINCIPLE OF CAUSA

According to our school of jurists, in practically all classes of Roman legal transactions, both where there was no element of consideration⁷ and where consideration, or something like it, was inherent,⁸ there was an ultimate juristic reason or *causa*, which made any declaration of will enforceable if the presupposition under which it was apparently made existed and, in transactions *inter vivos*, was recognizable by the other party.⁹ This view is now generally regarded as fallacious, for though the Romans had the sense that a declaration of the will, and particularly a *formal* declaration of the will, (as was thought at common law in the case of a sealed promise), had special significance and ought to create a legal duty, much of this significance was lost in the later Empire in the efforts of courts to meet the requirements of justice.¹⁰

Under the Emperor Justinian any agreement was actionable when clothed in the form of a stipulation or if it belonged to one of certain recognized kinds of contracts, known as *consensual*, *nominate real*, or *innominate contracts*, or was one of the "vested" pacts known as *pacta adiecta*, *pacta praetoria*, or *pacta legitima*. All other agreements were regarded as nude pacts. The actionability of a stipulation, for example, depended on a formal answer to a formal question, such as *spondesne?*, i.e. do you promise?, or *dabis?*, i.e. will you give? It had its origin in

⁶(1922) 277-278.

⁷E. g., in sale by copper and scales (*per aes et libram*), *mandatum* or agency, and unilateral stipulations.

⁸E. g., in so-called *innominate* real contracts (I give in order that you may give, etc.), in certain kinds of servitudes, mutual stipulations, and three of the four consensual contracts (bargain and sale, letting and hiring, and partnership).

⁹Windschied, DIE LEHRE VON DER VORAUSSETZUNG, 1850; PANDEKTEN (7th ed.), sec. 98; see E. G. Lorentzen, "Causa and consideration in the law of contracts", 28 YALE L. J. 621 (1919).

¹⁰Planiol, TRAITE ELEMENTAIRE DE DROIT CIVIL (6th ed.) No. 1038; Lorentzen, *op. cit.* p. 626. For an exhaustive discussion of the subject see the opinions in the case of *Conradie v. Russouw*, South African Reports, 1919 Appellate Division 279, to which reference is made later.

very early Roman history in an oath to the gods, accompanied by a libation, and thus had religious sanction or *causa*. However, in the time of Justinian it was considered merely as an observance of a prescribed legal formality, and the formal declaration as such created the legal duty. The stipulation was generally accompanied by a written memorandum known as a *cautio*, and, practically, any written agreement that was legally permissible and physically possible was enforceable,¹¹ though it could be set aside if, because of mistake or illegality, it proved to be contrary to the actual, as distinguished from the declared, will of the promisor and thus had no true cause or *causa*.

Promises of gifts, though gratuitous, were enforceable if not beyond fixed amounts. For gifts above 500 *solidi*, Justinian required registration in court.¹²

F. P. Walton, declaring that the word *causa* in the Roman Corpus Juris was used in a bewildering number of senses, cites, with sources, nine of its different uses, among which were "motive", "end" or "purpose" of an agreement, and the "legal ground" for its enforcement, all of which were sufficient to give validity to agreements.¹³ In any event, the Romans had no conception of the common law doctrine of consideration as such.

MODERN CIVIL LAW

Modern orthodox views of *causa*, especially in France, are derived from principles enunciated by Domat and Pothier, civil law commentators who lived in the 17th and 18th centuries respectively. These principles were stated as follows:

"The cause of an obligation is the immediate end (*le but immediat*) which the party has in view. In bilateral contracts the cause of the obligation of one party is the obligation of the other party—in real contracts, such as loan and pledge, the cause of the obligation of the borrower and pledgee is the delivery of the thing. In the contract of donation the cause is *animus donandi* of the donor."¹⁴

Typical of modern civil law on the subject is article 1131 of the French Civil Code, which provides:

"An obligation without cause, or on a false cause, or on an illegal cause, can have no effect."

In interpreting the meaning of "cause", the modern French jurist, M. Henri Capitant, following Domat and Pothier, distinguishes motive or efficient cause from desire or immediate cause. He said, "If I make a gift to A, my desire to

¹¹A few American states dispense, at least presumptively, with the need of consideration in any written contract (see *infra*).

¹²Code XLII, 53, 34, 1; Sohm, *INSTITUTES OF ROMAN LAW* (Leslie's translation, 3d. ed.) 202, where it is stated that 500 *solidi* are equivalent to 234 pounds; Lorentzen, *op. cit.* p. 624.

¹³"*Causa and consideration in contracts*" (1925), 41 L. Q. Rev. 306, 311.

¹⁴Baudry, *Lancantinerie et Barde*, *OBLIGATIONS*, 1, Nos. 298-99; Pothier, *TRAITE DES OBLIGATIONS* (1761).

benefit A is the immediate cause (*le but immediat*). My reason for desiring to benefit him is the efficient cause or motive. If I convey property my desire to convey title and to obtain payment is the immediate cause. My reason, such as the wish to leave the locality in which the property is situated or to make a more profitable investment, is the efficient cause or motive. The only cause that enters into the union of wills (*accord des volontes*) and that should be recognized as creating a legal obligation is the immediate cause or end in view, and the law should have nothing to do with the motivating cause, which is subjective and varies with individuals and circumstances, so that a mistake in motive alone should not annul an obligation."¹⁵

French theorists have long been divided into causalists and anti-causalists.¹⁶ The anti-causalists point out that in bilateral contracts each party binds himself conditionally on the other party becoming bound and thus the mutual promises are correlative, and neither can logically be the cause of the other; in real contracts, if delivery of the thing is the cause, it is the efficient cause and not the end in view; and in donations it is difficult to distinguish motive from desire.

Although variously interpreted, the theory that cause or will, including the desire, born of goodwill, to benefit another or to render an equivalent for an already completed performance, and not consideration, is the essential thing in the creation of a binding obligation prevails not only in France but in Holland, Italy, Belgium, Spain, and other countries of continental Europe and in countries deriving their basic law from them, including the nations of Central and South America, and in Puerto Rico, the Canal Zone, and the Philippine Islands, the basic law of which is the Civil Code of Spain,¹⁷ and in certain parts of the British Empire, including Ceylon¹⁸ and Scotland.¹⁹

In Quebec²⁰ and Louisiana cause and consideration are used interchangeably.

The Louisiana Civil Code²¹ provides:

¹⁵DE LA CAUSE DES OBLIGATIONS (Contrats, engagements unilatereaux legs.) 2nd ed., Paris Librairie Dalloz, (1924) p. 23, 87; Colin et Capitant, COURS ELEMENTAIRE 2, p. 313.

¹⁶Planiol, COURS ELEMENTAIRE (6th ed.) 2, n. 1039.

¹⁷Civil Code, (1889), Article 1274. For further references see Joseph H. Drake, "Consideration vs. Cause in Roman-American Law, 4 MICH. LAW REV. 19 (1905); Lorentzen, *op. cit.*

¹⁸Lipton v. Buchanan, (1904) 8 Ceylon N. L. R. 49; Jayawickreme v. Amarasuriya (1918) A. C. 869; (1918 P. C.) 119 L. T. R. 499, where a promise motivated by family duty or generosity was held to be a "*justa causa debendi*" sufficient to make it enforceable.

¹⁹Lord Mackenzie, ROMAN LAW, (6th ed. 1886) 3, 3, 2; Bell, PRINCIPLES OF THE LAW OF SCOTLAND (4th ed. 1839) sec. 10; Lord Stair, INSTITUTIONS OF LAW OF SCOTLAND 1, 7, 7 (first ed. 1681). The House of Lords, in an appeal from a Scottish court, applied an undiluted Roman principle of *causa* in Cantiere San Rocco v. Clyde Shipbuilding Company, A. C. 103 (1922) S. C. 723. Compare Chandler v. Webster (1904) 1 K. B. 493, 499, one of the celebrated English coronation cases, where the common law was applied, with a different result, both cases involving the right of restitution where from causes outside the volition of the parties fulfillment of the contract had become impossible.

²⁰Civil Code Art. 984, which speaks of a "lawful cause or consideration" as one of the four requisites of a valid contract, without apparently making any distinction between cause and consideration.

²¹Article 1896 (1890), (Saunders 2d. ed. 1920). For the origin of Louisiana Law see "The Laws of Louisiana" by Hon. E. T. Merreick, AM. LAW REG. 22, p. 6.

"Cause is consideration or motive. By the cause of the contract in this section is meant the consideration or motive for making it; and a contract is said to be without a cause, whenever the party was in error, supposing that which was his inducement for contracting to exist, when in fact it had never existed, or had ceased to exist before the contract was made."

In *New Orleans and Carrollton R. Co. v. Chapman*,²² the promise to the creditor of another to pay the debt was held binding because of the existence of the debt.

In *Marx & Sons v. Leichner*,²³ the plaintiff sold and delivered certain merchandise to the defendant. Subsequently, the plaintiff said he would accede to defendant's request to accept a return of the goods, although they were in all respects as ordered. The plaintiff, however, retracted his promise and sued for the purchase price. The defendant interposed plaintiff's promise as a defense. The plaintiff contended, and, it would seem from the facts of the case, correctly, that, according to the principles of common law, the contract of sale having been already executed, his promise to release the defendant from his obligation to pay for the goods, in order to be binding, had to be based on new consideration, which was lacking in the case. The Louisiana court, however, decided in favor of the buyer on the ground that the hope of retaining the good will of his customer was sufficient to support the promise to accept the return of the merchandise.

Neither consideration nor *causa* is mentioned as essential to the validity of a contract in the Civil Code of Japan, in the German Code,²⁴ in the Swiss Code of Obligations of 1911, in the Portuguese Code of 1867, in Brazil or, formerly, in Austria. In these countries all that is required is capacity, intention to contract, an object that is physically possible and legally permissible, and some special forms in certain cases.²⁵

In 1919 both the doctrine of consideration and the theory of *causa* were dispelled from the judicial system of South Africa after a controversy which had lasted many years. The courts of Cape Colony²⁶ had adopted the doctrine of consideration and the courts of the Transvaal had rejected it,²⁷ when the question was presented squarely for decision to the Supreme Court of South Africa in 1919 in *Conradie v. Russouw*.²⁸

²²8 La. An. 97 (1853).

²³(La. 1928) 121 So. 685.

²⁴"It is satisfactory to note that the German Code (Bürgerliches Gesetzbuch für das Deutsche Reich, secs. 134, 138) has returned to the pristine simplicity of the law as it obtained among the foremost nations of the continent of Europe until the Code Napoleon, under the influence of Domat and of Pothier, who unfortunately was himself influenced by Domat, led them astray", De Villiers, A. J. A., in *Conradie v. Russouw*, South African Law Reports, cited *infra*.

²⁵For a fuller discussion, see Lorentzen, *op. cit.*

²⁶*Mtembu v. Webster* (21 S. C. 323).

²⁷*Rood v. Wallach* (1904, T. S. 187).

²⁸South African Law Reports, 1919 Appellate Division, 279.

The Russouws, man and wife, had given plaintiff a written option to buy their farm but subsequently cancelled the option. The Cape Provincial Division allowed an exception to the declaration as bad in law in that no consideration was alleged to have been given for the option, which, it held, could accordingly be revoked at any time. The Supreme Court of South Africa, reversing this ruling, with all five judges concurring, stated that a good cause of action can be founded on a promise made seriously and deliberately and with the intention that a lawful obligation should be established.

The opinions of three of the judges, covering forty pages, are replete with citations from the works of commentators on Roman and modern civil law bearing upon the principle of *causa* and other elements determining the validity of contracts, and no study of this subject can be complete without a careful reading of these opinions.

After pointing out that *nudum pactum* in Roman law did not mean a *pactum* or agreement which lacked consideration but meant one which had not been taken up into one of the recognized classes of contracts or vested pacts, and that *nuda pacta* could, by formal question and answer, readily be converted into enforceable unilateral or bilateral stipulations, Judge de Villiers said:

"The way the matter is looked at from the modern point of view is this. Donation itself within the restrictions imposed by law is a *justa causa, justum negotium*, a contract or transaction approved of by law. And the same may be said of every lawful contract—if two or more persons, of sound mind and capable of contracting, enter into a lawful agreement, a valid contract arises between them enforceable by action. The agreement may be for the benefit of one of them or of both—the promise must have been made with the intention that it should be accepted—the agreement must have been entered into *serio ac deliberato animo*. And this is what is meant by saying that the only element that our law requires for a valid contract is *consensus*, naturally within proper limits. It was a serious mistake in English law when what was merely required as proof of a serious mind was converted into an essential of every contract. It would be equally a mistake with us to introduce for a valid contract the necessity for a *causa*, whether in the shape of valuable consideration or any other ground of obligation."²⁹

THE DOCTRINE OF CONSIDERATION

How the requirement of consideration became part of the common law is not easy to explain. Some writers contend that courts of equity adopted, and the common law courts borrowed, the idea of Roman *causa* and evolved the doctrine of

²⁹*Ibid*, at pages 321-23.

consideration from it.³⁰ As proof they point to the fact that for a considerable time in English law both terms were used interchangeably.³¹

According to the weight of authority, however, the doctrine is of common law growth and remains uninfluenced by the principles of Roman or Continental law.³²

The most ancient of common law actions arising out of contract were the actions of debt and covenant. The actionability of both depended on the observance of certain formalities. The action of debt was to recover a certain sum which was conceived to be the lender's money in the possession of the debtor. The action was brought not to enforce an agreement but to effect the restoration of the lender's money.³³

The action in covenant, which was recognized as early as the twelfth century, was an action to enforce an agreement, but it was maintainable only upon an instrument under seal, which was the sole evidence of liability recognized by the court, and if this instrument were destroyed or lost the remedy was also lost.³⁴

No means were found to enforce promises not under seal for several centuries.³⁵ The word "consideration" first began to appear about the year 1557.³⁶ Since a *res* or thing had to be delivered in order to maintain an action of debt, and a seal was essential as the foundation of an action in covenant, the courts naturally felt that something objective and external beyond the intention to contract was essential to a simple contract to give it substance and meaning. They were made to feel so also because a simple promise otherwise would have the same importance as a sealed promise or specialty, and its enforcement might not have been within the purview of the Statute of Westminster ("the statute in *consimili casu*"), which allowed the issuance of new writs only in similar cases.

In 1602 came Coke's celebrated dictum in *Pinnel's case*:³⁷

"Resolved by the whole Court that payment of a lesser sum on the

³⁰Salmond (1887) 3 L. Quart. Rev. 166, 178; ESSAYS ON JURISPRUDENCE AND LEGAL HISTORY, No. 4.

³¹2 Street, FOUNDATIONS OF LEGAL LIABILITY (1906) note 2, at 39, n. 1; Calthorpe's Case (1574, K. B.) 3 Dyer 336b.

³²Ames, *The History of Assumpsit* (1888), 2 HARV. L. REV. 1, 53; Ames, LECTURES ON LEGAL HISTORY, 129, 147; Wald's Pollock, CONTRACTS (ed. Williston) 191. See also Hare, CONTRACTS, chs. 7 and 8; Holmes, COMMON LAW, 253, 254; 3 Holdsworth, HISTORY OF ENGLISH LAW, 319.

³³Ames, LECTURES ON LEGAL HISTORY (1913) 71; Jenks, DOCTRINE OF CONSIDERATION (1892) 114-16.

³⁴3 Holdsworth, HISTORY OF ENGLISH LAW (3d ed. 1923) 417-19; Holmes, THE COMMON LAW (1881) 272-3; 2 Pollack and Maitland, HISTORY OF ENGLISH LAW (2d ed. 1923) 192-3; 220-225; 3 Street, FOUNDATIONS OF LEGAL LIABILITY (1906) 115.

³⁵About the year 1400 an action brought against a carpenter for breach of his promise to construct a house was dismissed, because the promise was not contained in an instrument under seal, Y. B. 2 Hen. IV, f. 3, pl. 9; Y. B. 11 Henry IV, f. 53, pl. 60. Ames, *The History of Assumpsit* (1888), 2 HARVARD L. REV. 1, 53.

³⁶Joscelin and Shelton's Case, 3 Leon. 4 (C. P.).

³⁷5 Co. Rep. 177, a; Moo. 677, pl. 923; s. c.; Litt. 212b; quoted in the case of *Jaffray v. Davis*, *supra*. *Slade's Case*, decided in 1603, 4 Co. Rep. 92b, also indicates the painful transition of judicial thought from real to consensual contracts in this period.

day in satisfaction of a greater cannot be any satisfaction for the whole because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum, but the gift of a horse, hawk, or robe, etc., in satisfaction is good. For it shall be intended that a horse, hawk, or robe might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of a parcel can be a satisfaction to the plaintiff."

The courts had borrowed from the Roman law the phrase *ex nudo pacto non oritur actio*, i.e. "no action arises from a nude contract," and began to apply it to designate agreements which were unenforceable because they lacked consideration. Thus the phrase came to denote something which it did not mean in Rome.³⁸

EVOLUTION OF CONSIDERATION

At the beginning of the 17th century the judges of England were evenly divided upon the enforceability of a subsequent promise to pay a precedent debt,³⁹ and finally a promise made by one after attaining majority to pay a debt incurred during infancy was enforced.⁴⁰ Similarly, a promise to pay a debt barred by the Statute of Limitations was held binding.⁴¹

In the eighteenth century Lord Mansfield, a Scotchman and hence a student of the Civil Law, which did not recognize the English doctrine of consideration, believed that the obligation of a contract should be deduced from the lawful intention of the party without something external or objective to give it substance and meaning. He did much to crystallize the principles of the law merchant, where the doctrine of consideration is less rigid, and tried to write the theory of moral consideration into the common law, as courts of equity had done in drawing upon ideas of natural justice to give effect to the declared will.⁴²

He upheld the binding force of a promise to pay a debt discharged in bankruptcy in the words:

"The debts of a bankrupt are due in conscience, notwithstanding he has obtained his certificate; and there is no honest man who does not discharge them, if he afterward has it in his power to do so. Though all legal remedy may be gone the debts are clearly not extinguished in conscience."⁴³

³⁸See *supra*.

³⁹See *Wheatley v. Low* (1623), Cro. Jac. 668 (K. B.), where a bailee was charged in *assumpsit* though the undertaking was gratuitous. *Cp. Siegel v. Spear*, 234 N. Y. 479. See also *Lampleigh v. Brathwaite*, Hob. 105 (1615); *Smith's Leading Cases* (1st ed.) vol. 1, (1837) 67.

⁴⁰*Ball v. Kesketh*, Comb. 381 (K. B. 1697).

⁴¹*Hyleing v. Hastings*, 1 Ld. Raym. 389 (K. B. 1699).

⁴²1 Holdsworth, *op. cit.*, note 2, at pages 455-7; 5 *id.* at 294 *et seq.*; Roscoe Pound, *Consideration in Equity*, (1919) 13 ILL. L. REV. 667.

⁴³*Trueman v. Fenton*, 2 Cowp. 544, 548 (K. B. 1777).

His language in *Pillans and Rose v. Van Mierop and Hopkins*⁴⁴ has often been quoted:

"I take it that the ancient notion about the want of consideration was for the sake of *evidence* only: for when it is reduced into *writing*, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration, and the statute of frauds proceeded upon the same principle."

But in *Rann v. Hughes*, a case involving the statute of frauds, decided soon afterwards,⁴⁵ the House of Lords did not accept this view. It said:

"It is undoubtedly true that every man is by the law of nature bound to fulfill his engagements. It is equally true that the laws of this country supply no means, nor afford any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is *nudum pactum ex quo non oritur actio*, and whatsoever may be the sense of this maxim in the civil law, it is in the last mentioned sense only that it is to be understood in our law. . . . All contracts are by the law of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavored to maintain as contracts in writing. If they are merely written and not specialties, they are parol, and a consideration must be proved."

Though there was a period after the decision in *Rann v. Hughes* in which Lord Mansfield and other judges persisted in the attempt to reform the doctrine of consideration,⁴⁶ the view of the House of Lords was finally reaffirmed in *Eastwood v. Kenyon*,⁴⁷ in which it was denied that all promises deliberately made should be held binding. Lord Denman, C.J., said:

"The doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it . . . the enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society."

Thus there was established the narrow materialistic view that the consideration must be external or extrinsic; it need not be adequate, so long as it is not merely a lesser quantity of an identical quality; there must be something of value in the eyes of the law, but the law cannot inquire into adequacy. Therefore, as

⁴⁴(1765, K. B.) 3 Burr. 1663.

⁴⁵(1778, K. B.) 7 T. R. 350 note; 4 Bro. P. C. 27. According to the theory of the early French law a writing dispensed with the need of *causa*, Brissaud, HISTORY OF FRENCH PRIVATE LAW, 516 note.

⁴⁶(1782) *Hawkes v. Saunders*, 1 Cowp. 289; (1813) *Lee v. Muggeridge*, 5 Taunt. 36.

⁴⁷11 Ad. and E. 438 (Q. B.).

has been well said, we see the solemn pretence of the tomtit or peppercorn or seal, instead of a simpler and juster doctrine designed to give effect to a deliberate bargain which the parties intended to be binding.

NEW BASES

Lord Wright, distinguished English jurist, after reviewing the requirements for valid contracts in other legal systems, says:

"I have referred at length to these other legal systems in order to show that the common law doctrine of consideration is one which other legal systems successfully dispense with, and that the doctrine is no natural or essential part of a theory of contractual liability."⁴⁸

Some leading authorities here and abroad share this view. The English Law Revision Committee in its report of May 1937 stated that if a lawyer were to draw up a code of the law of contracts today, starting with a clean slate, it would be most unlikely that he would adopt the doctrine of consideration. The Committee saw little danger in making a written contract deliberately entered into binding because it would still be necessary for the court to find that the parties intended to create a binding obligation.⁴⁹

Professor Lorentzen of Yale University states that, subject to certain qualifications relating to form, it should suffice for the formation of a contract that there exist: (1) capacity, (2) an intention to contract, and (3) a possible and lawful object; and that whether the parties actually contemplated a juristic act or dealt with each other on a non-judicial basis be determined not from any doctrine of consideration or of a *causa*, but from the facts of each particular case.⁵⁰

Case law in many American jurisdictions has mitigated the strictness of the doctrine by applying the theory of promissory estoppel or by pretending through strained construction to find consideration in certain classes of cases, such as charitable subscriptions, composition agreements, gratuitous undertakings of bailees and other persons, waivers of conditions, and in other types of cases, some of which are referred to in the Restatement of the Law of Contracts, in which reliance on a promise, attended by hardship, though not regarded by the promisor as consideration for his promise, has been held to be sufficient for enforcement.

Some states make any written instrument presumptive of consideration, and in at least one state a written instrument imports a consideration in the same manner and as fully as a sealed instrument at common law.⁵¹

For many years the doctrine of *Lawrence v. Fox* relating to contracts for the

⁴⁸"Ought the Doctrine of Consideration to be Abolished From the Common Law?", 49 HARV. L. REV. 1225, 1253 (June 1936).

⁴⁹R. E. Ireton, *Consideration—What Is It?*, 8 BKLYN. LAW REV. 303-19 (March 1939).

⁵⁰"*Causa and Consideration in the Law of Contracts*", 28 YALE L. J. 621 (1919).

⁵¹New Mexico Statutes Ann. (1929) 45-608; Idaho Code (1932) sec. 28-103; Wyo. Comp. Stat. (1910) 3641-2.

benefit of third parties was an outstanding, and almost sole, anomaly in New York in respect to the doctrine of consideration. Since 1935, however, there have been drastic statutory changes signifying dissatisfaction with certain aspects of the doctrine. First, in 1935, the New York legislature, abolishing the common law rule, made a gratuitous promise contained in a sealed instrument no more enforceable than any other gratuitous promise.⁵² In 1936 it partially abolished the troublesome rule that a lesser sum cannot be a satisfaction of a greater sum by providing that:

"A written instrument . . . which purports to be a total or a partial release of all claims, debts, demands or obligations, or a total or partial release of any particular claim, debt, demand or obligation, or a release or discharge in whole or part of a mortgage, lien or charge upon personal or real property, shall not be invalid because of the absence of consideration or of a seal."⁵³

and that:

"An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation or lease or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration, provided that the agreement . . . shall be in writing and signed by the party against whom it is sought to enforce the change, modification or discharge."⁵⁴

In 1937 the legislature made an accord prior to satisfaction binding, provided that it is in writing and signed by the person making the promise.⁵⁵

At its last session, in the Spring of 1941, it enacted:

"When hereafter an offer to enter into a contract is made in writing signed by the offeror, which states that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability. When such a writing states that the offer is irrevocable but does not state any period of time of irrevocability, it shall be construed to state that the offer is irrevocable for a reasonable time."⁵⁶

It made past consideration sufficient consideration under the following circumstances:

"A promise hereafter made in writing and signed by the promisor

⁵²Civil Practice Act, sec. 342. It is interesting to note that such a promise was originally the only kind of enforceable promise. *Supra*.

⁵³Debtor and Creditor Law, sec. 243.

⁵⁴Personal Property Law, sec. 33, subdiv. 2; Real Property Law, sec. 279.

⁵⁵Personal Property Law, sec. 33a; Real Property Law, sec. 280.

⁵⁶Personal Property Law, sec. 279, subd. 4, and Real Property Law 33, subd. 5 (both subdivisions identical) as added by Laws of 1941, Chapter 328, effective September 1, 1941.

shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed."⁵⁷

It also made assignments irrevocable as follows:

"An assignment hereafter made shall not be denied the right of irrevocably transferring the assignor's rights because of the absence of consideration, if such assignment is in writing and signed by the assignor."⁵⁸

It removed the last vestige of difference, in the matter of consideration, between sealed and unsealed instruments by providing that:

"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."⁵⁹

DANGER OF OVERSIMPLIFICATION

It is unfortunate that progress in the formulation of more rational rules has had to be made empirically in more or less unrelated classes of cases and by statutory enactments without any apparent binding thread of principle. Yet there would be the danger of oversimplification in the *formulae* so far advanced by such authorities as Lord Wright and Professor Lorentzen, who advocate the enforceability of every serious, deliberate engagement relating to a possible and lawful object subject to qualification as to form.

The danger would not exist because of the practical difficulty of determining contractual intent, since judges and juries constantly have to determine such intent in cases of fraud, undue influence, duress, mistake and failure of condition, and Continental courts seem to have no difficulty in finding *causa*. It would exist because enforcement of every such promise, especially when the promisee suffers no detriment in reliance on it, might sometimes result in injustice and hardship to promisors, who, from motives of pure benevolence, or through error, promise more than, from both a personal and social viewpoint, they ought to promise. Of course, the same might happen when there is a slight, but technical, consideration, but if we are to revise our system we should try to avoid present evils.

The Romans realized this evil and limited the amount of gifts unless regis-

⁵⁷Personal Property Law Section 33, subd. 3, and Real Property Section 279, subd. 2 (both subdivisions being identical) added by Laws of 1941, Chapter 331, effective Sept. 1, 1941.

⁵⁸Personal Property Law Sec. 33, subd. 4, and Real Property Law, Sec. 279, subd. 21, both subdivisions being identical, added by Laws of 1941, Chapter 330, effective September 1, 1941.

⁵⁹Laws of 1941, Chapter 329, effective September 1, 1941, Section 342 of the Civil Practice Act.

tered in court and sometimes granted relief to one who discovered that he had made a very bad bargain, and who duly acted on his discovery.⁶⁰

The danger is not wholly obviated by requiring enforceable promises to be written, although there is some safeguard against it in the Uniform Written Obligations Act. This act, adopted in Pennsylvania and elsewhere,⁶¹ provides that a written release or promise, although without consideration, is binding if it contains an additional express statement that the signer intends to be legally bound, thus making the promisor more conscious of the consequences of his engagement than if the statement were not there or if the instrument were merely under seal.⁶²

CONCLUSION

So far as those cases are concerned in which there is justifiable reliance by a promisee, attended by hardship, Section 90 of the Restatement of the Law of Contracts proposes the wholesome rule that:

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Even beyond such a rule, and the reforms already established in case and statutory law, judges should be given discretion, on equitable principles, to enforce, or refuse to enforce, gratuitous promises (and promises supported by mere technical consideration as well), according to the requirements of justice. By such a judicial process of inclusion and exclusion the law, at first indefinite, would gradually become more certain as rules and principles crystallized in special classes of cases, as was the case in judicial recognition of the validity of a promise made by one after attaining majority to pay a debt incurred during infancy, of a written promise to pay a debt barred by the statute of limitations or after a discharge in bankruptcy, of composition agreements, waivers of conditions, charitable subscriptions, gratuitous undertakings of bailees and other persons, and in the development of the doctrine of *Lawrence v. Fox*.

To do more is hazardous. To do less is to apply medieval rules that are often inconsistent, unjust and unnecessary.

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ABRAM GLASER

⁶⁰In such a case, called *laesio enormis*, if the price were less than one half the real value, the seller could rescind if he acted promptly. See L. B. Donahue, "ELEMENTS OF ROMAN LAW", (1930) p. 83.

⁶¹1927 P. L. 985; 33 PS secs. 6-8; note (1928) 76 U. OF PA. L. REV. 580.

⁶²Similarly the Roman Law made a written agreement irrevocable if the *causa* on account of which the stipulation was made, was stated, Code IV, 30, 13.